

OWNERLESS LAND IN SCOTS LAW

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ABSTRACT

It is said that, in Scotland, all land has an owner. The *bona vacantia* (vacant goods) doctrine operates to the effect that, if no other owner can be identified, property including land falls to the Crown under the maxim *quod nullius est fit domini regis* (that which belongs to no one belongs to our Lord King). Accordingly, it is claimed, there is no such thing as ownerless land.

This thesis seeks to disprove that claim. Adopting a primarily doctrinal methodology, with historical and comparative insights where appropriate, this thesis argues that a correct interpretation of the current rules of property law allows for land which has no owner.

The thesis is structured into three main parts. The first part examines the decision in *Joint Liquidators of Scottish Coal, Noters* [2013] CSIH 108 as the starting point for the questions addressed in the remainder of thesis. In this decision, for the first time, the Inner House recognised circumstances in which ownerless land may arise through termination or divestment of the real right of ownership, and considered the engagement of the Crown's rights to *bona vacantia*, alongside its limitations.

The second part of the thesis examines the death of natural persons and the operation of succession law, with a focus on the period between death and title subsequently being taken by the deceased's successors – a period known as a *haereditas jacens* (dormant estate). In this section, it is argued that the *haereditas jacens* is a period during which property is ownerless as a result of the deceased's patrimony having no holder.

The thesis then moves on to its third part and returns to consider *Scottish Coal* alongside the dissolution of juristic persons. Here the operation of the *bona vacantia* doctrine is examined in detail. Two further periods of ownerless property are identified during which property is ownerless. The first period arises after the owner ceases to exist, at which point the Crown may claim the ownerless property. The second period arises where the Crown declines to claim ownership, or disclaims, with the result that the property becomes truly ownerless and in fact can no longer be acquired by derivative acquisition.

The conclusion reached by this thesis is that ownerless land exists in Scotland, and could even be considered commonplace. With the Inner House of the Court of Session recognising this phenomenon, it is submitted that the wider legal system, both in practice and in academia, must also recognise the existence of ownerless land

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My late grandmother, Janet ‘Netta’ Mclean, and late uncle, Colin Mclean, are the dedicatees of this thesis, both of whom I miss very much - alongside Monty Bubbles the Shih Tzu who very nearly saw the completion of this thesis. This work is submitted in their honour.

Finally, Robert, my harvest moon, thank you for letting me spend all my waking hours at a laptop or “in that building with all the Stairs [sic]”.

Ne Obliviscaris

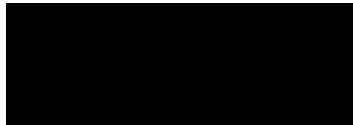
AUTHOR'S DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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Signature:



GLOSSARY OF COMMON TERMS

<i>Bona vacantia</i>	Translated as ‘vacant goods’, property (both heritable and moveable) with no owner that falls to the Crown.
<i>Bonis defuncti</i>	Translated as ‘goods of the deceased’, the property held within the deceased’s estate.
Confirmation	A constitutive process in which an executor’s appointment is confirmed by the local Sheriff Court. The Sheriff (in their role as commissary) will issue a decree of confirmation which authorises the executor to wind-up the estate.
Commissary	A special judge, historically from the church courts, who among other duties issued confirmation of the deceased’s estate. The sheriff in the deceased’s local sherrifdom now sits as a commissary in granting confirmation.
Defunct or deceased	A person who has died, sometimes also termed <i>de cuius</i> .
Executor	The person appointed to administer the distribution of the estate of a deceased in a fiduciary capacity. Executors can be nominated in the deceased’s will or testament, an ‘executor-nominate’, or (if no will or nomination) appointed by the Sheriff Court of the deceased’s domicile, an ‘executor-dative’.
<i>Haereditas</i> or <i>hereditas</i>	Translated as ‘inheritance’, the estate of the deceased, being the totality of all their assets and liabilities.
<i>Haereditas jacens</i> or <i>hereditas jacens</i>	Literally, a lying down, sleeping, or dormant, estate. The period between the death of the deceased and the grant of confirmation (or in older cases, the service of heir) where no successor is vested with the deceased’s estate.

<i>Jus ad rem</i>	A right to property, said to be held by an uninfert proprietor or others in possession of an unregistered disposition, other dispositive deed, or conveyance.
<i>Jus crediti</i>	Translated as ‘a right to credit’, the right of a beneficiary, grantee, or other to demand a conveyance or other payment, with the ability to commence a court action for enforcement of this right. Also known as a <i>jus actionis</i> , an actionable right.
King’s and Lord Treasurer’s Remembrancer (KLTR)	An official of the Scottish Government, tasked with the receiving, administering, and disposing of the hereditary revenues of the Crown.
<i>Quod nullius est fit domini regis</i>	Translated as ‘that which belongs to no one belongs to our Lord King’, a maxim of Scots law that describes the legal rule that all ownerless property belongs to the Crown and can be claimed by the KLTR as a hereditary revenue.
Treasure trove	A legal rule in which all treasure found in Scotland belongs to the Crown as ownerless property. The KLTR takes custody of all treasure.
<i>Ultimus haeres</i>	Literally ‘last heir’, an entitlement of the Crown to take property under the laws of succession where the deceased’s line of succession has been exhausted.
Uninfert proprietor or unregistered holder	The holder of an uncompleted title, meaning the holder of a conveyance of a title which has not been completed through registration or recording the conveyance in the property registers.

INTRODUCTION

The Scottish legal tradition seems to accept as fact that all of Scotland's land is owned. From tenement flats to mountains, lochs and glens, all of Scotland's land mass, every inch, is believed to have an owner. Yet there has been very little scrutiny of whether this belief is, in fact, accurate. The idea that some land in Scotland has no owner or, in other words, is ownerless,¹ is often dismissed as an impossibility. Gretton and Steven asserted:²

In the normal case at least, land cannot be ownerless. (Land, unless owned by someone else, belongs to the Crown.)

Similarly, Anderson commented that:³

Land can never be ownerless; land that is not otherwise owned belongs to the Crown.

What the learned authors allude to here are two old rules of Scots property law. The first is that the Crown, under the feudal system, was deemed owner of all land in Scotland. Any land which has never been disposed to a third party, or acquired by positive prescription, remains in Crown ownership today.⁴ The second rule is the *bona vacantia* doctrine, a set of rights held by the Crown by virtue of which the Crown becomes the owner of any property that subsequently comes to be without an owner. This is often expressed by the maxim *quod nullius est fit domini regis*, meaning “property which belongs to no one belongs to our Lord King”.⁵ Whilst the first rule is not disputed, an analysis of this second rule and its limits will form a central part of this thesis.

This introductory chapter will define in brief the basic concepts under discussion in this thesis, in particular the notion of ownerless property, the Crown's right to take said property under the *bona vacantia* doctrine, and the *haereditas jacens*. This introduction will also outline the methodology in the research of this thesis and provide an overview of the structure of the discussion in subsequent sections.

Terminology

A note on terminology must be discussed at the outset. It has always been accepted that property without an owner exists in Scotland. This is often defined to mean things which

¹ K Reid, “Property (Reissue)”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, para 76.

² G Gretton & A Steven, *Property, Trusts and Succession*, 5th edn (2024), para 9.1.

³ C Anderson, *Property: A Guide to Scots law* (2016), para 8-03.

⁴ K Reid, *The Law of Property in Scotland*, 1st edn (1996), para 48. See Craig, *Jus Feudale*, 1.16.47 [Dodd's translation (2017)].

⁵ Reid, *ibid*, para 547.

have never *previously* been owned.⁶ The textbook examples are moveable property such as shells, pearls, gems, and wild animals.⁷ This comes from Justinian:⁸

Wild animals, birds, fish, that is to say all creatures which the land, the sea, and the sky produce, as soon as they are caught by any one become at once the property of their captor by the law of nations; for natural law admits the title of the first occupant to that which previously had no owner.

There is a need for careful terminology here to avoid confusion. The term chosen in this thesis to refer to the species of property described above (shells, wild animals, etc.) is *unowned*. It is property in respect of which there has never been an owner. By contrast, the focus of enquiry in this thesis is property which was previously owned but now finds itself without an owner. The term *ownerless* is used to describe such property. As a general rule of Scots law, the doctrine of occupation (or *occupatio*), whereby ownership of property can be acquired by the first possessor, is excluded for ownerless property.⁹ In its place, the *bona vacantia* doctrine applies.

Bona vacantia

The *bona vacantia* doctrine applies to land that no longer has an owner, and also to ownerless moveable property such as treasure, abandoned goods, or incorporeal property. Under this doctrine, the Crown can claim any property that comes to have no owner as *bona vacantia*. There are three main circumstances in which this rule applies:

- 1) The Crown is entitled to take ownership of any lost or abandoned moveable property, including any treasure;
- 2) The Crown is entitled to take ownership of the estate of a deceased person who dies without heirs as *ultimus haeres* (last heir); and
- 3) The Crown is entitled to take ownership of any property formerly owned by a dissolved juristic person.

These assets historically provided the Crown with income as part of the Crown's "hereditary revenues". Today, any such revenue is made over to the Scottish Ministers as part of the devolution settlement.¹⁰ The official entrusted with collecting, administering and realising assets which fall to the Crown as *bona vacantia* is the King's and Lord Treasurer's

⁶ *Ibid*, para 540.

⁷ Gretton & Steven, *Property*, paras 9.1 to 9.2.

⁸ J, *Inst*, 2.1.11, quoted in F Ruddy, "Res nullius and occupation in Roman and international law" (1968) 36(2) *University of Missouri at Kansas City Law Review* 274, 277.

⁹ D Carey Miller, *Corporeal Moveables in Scots Law*, 1st edn (1991), para 2.02.

¹⁰ Scotland Act 1998, Sch 5(3)(3)(a).

Remembrancer (the KLTR), who pays the proceeds to the Scottish Consolidated Fund.¹¹ Whilst this doctrine appears profitable in theory, it may be somewhat less fruitful in practice given the range of property that may become *bona vacantia*, as the Scottish Law Commission has described:¹²

Each day [His] Majesty becomes the proprietor of countless cigarette ends, crisp packets, drinks cans, chewing gum blobs, and numerous sagging sofas, worn-out washing machines and defunct cars.

In the context of land, the KLTR has stated that *bona vacantia* land can include:¹³

Highly problematic sites such as opencast coal mines, shale bings, harbours and landfill sites but we also encounter land and buildings with greater potential for public interest or commercial use or redevelopment, such as industrial property, retail, woodland, listed buildings and undeveloped areas of land.

Whilst there is a broad understanding of the general principle of *bona vacantia*, the exact parameters and operation of the Crown's rights under this doctrine are somewhat unclear. In 1936, *bona vacantia* was said to be shrouded in 'great antiquity'¹⁴ and to some extent this remains the case today. In part, this may be explained by a lack of academic writing in the area, with Arthur McMillan's *The Law of Bona Vacantia in Scotland* (1936) the last discrete treatment of the topic. The paucity of critical study does not mean that primary sources are absent in this area of law. Modern statutes containing provisions relating to *bona vacantia* alongside common law authorities do exist. However, a comprehensive and critical review of the law in this area has been lacking for some time. As the Scottish Law Commission noted "a modern academic treatment of the law is needed".¹⁵

This thesis attempts to pick up the gauntlet that the Commission has thrown down, by providing a modern analysis of the law relating to ownerless land and the operation of the *bona vacantia* doctrine. Whilst *bona vacantia* applies to all property, this thesis confines its examination to land, arguably the most valuable asset in relation to which the Crown's right under this doctrine may be exercised.¹⁶ The operation of rules relating to treasure trove or abandoned moveable property will not be explored, except in so far as the operation of the

¹¹ Formerly an office part of the Exchequer Court, the KLTR became part of the Exchequer Office in 1856 with a range of duties that has diminished over time. Since 1981, the King's and Lord Treasurer's Remembrancer is *ex officio* the Crown Agent, Chief Executive of the Crown Office and Procurator Fiscal Service (COPFS). See further A Murray, "The post-Union Court of Exchequer", chapter in H Macqueen (ed), *Miscellany V* (Stair Society Vol 52, 2006), 103; and "Remembrancer", *Bell's Dictionary and Digest of the Law of Scotland*, 7th edn, edited by G Watson (1890) [reprinted 2012, Old Studies in Scots Law, Vol 2].

¹² Discussion Paper on *Prescription and Title to Moveable Property* (SLC DP No 144, 2010), para 9.2.

¹³ *Ownerless Property Transfer Scheme (OPTS)*, Consultation paper (September 2022), 1.

¹⁴ A McMillan, *The Law of Bona Vacantia in Scotland* (1936), 1.

¹⁵ Report on *Prescription and Title to Moveable Property* (SLC Report No 228, 2012), para 3.21.

¹⁶ Treasure can arguably be more valuable, but significant high value finds are uncommon (though not unheard of).

Crown's rights in respect of these types of property illuminates the application of the Crown's rights to land. Wherever possible, the focus remains on land alone.

The key proposition advanced in this thesis is that the Crown's right to *bona vacantia* does not bring about an immediate transfer of ownership. The nature and effect of the Crown's right in this respect has been confused by lax terminology and historical difficulties in classifying rights in private law, alongside muddled discussions about the vesting of such rights. In place of such confusion, it will be argued that ownerless land, in the true sense of the term, does exist in Scotland consistent with the present law.¹⁷

Haereditas jacens

In order to explore the law relating to ownerless land, two areas of Scots private law require to be examined: the law of property, and the law of persons. The law of property is to some extent enjoying a Civilian renaissance since the abolition of the feudal system and much has been written on the entire subject.¹⁸ The law of persons, on the other hand, is under-theorised. There is an absence of overriding principle and doctrine in relation to the law in this area. Much of the existing literature is practical in nature. It focuses on the technical details of laws relating to natural persons or to corporate persons. As a result, there is a near-total absence of unifying discussion of the fundamental concepts of personhood:¹⁹

It is a curious fact that the first pillar of the Gaian scheme [the law of persons] has, in Scotland, with the important exception of child and family law, been all but ignored. It is not taught at university. There is no book on the subject. And outside academia the law of persons is perhaps not even widely recognised as a subject. In daily practice, however, there are a myriad of problems. The law of persons might be broken down into various sub-categories: persons and non-persons; natural persons and legal persons; persons and patrimonies. It is in the law of persons that concepts on legal personality and legal capacity need to be studied. The law of persons, though core, is too often ignored.

In common with this, there is a total absence of scholarship examining the termination of personhood, whether in the case of natural persons or juristic persons.²⁰ The Crown's rights to *bona vacantia* only operate where property comes to be without an owner, but there is ambiguity about when exactly an owner's personhood ceases to exist.

¹⁷ Both Gretton & Steven, *Property*, para 3.7, and Reid, "Property (Reissue)", para 76, have recognised the possibility of ownerless land under a disclaimer issued by the Crown under the Companies Act 2006 but as will be argued further in this thesis this is not the only time that ownerless property can arise.

¹⁸ Principally K Reid, *The Law of Property in Scotland*, both the 1st edn (1996) and 2nd edn (2026), but also D Carey Miller & D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn, (2005); and W Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol 1, (2009) and vol 2 (2022).

¹⁹ R Anderson, "Unincorporated associations reform" (2009) 13(3) *ELR* 507, 507. See also G Cunningham, Book Review (2022) 26(1) *ELR* 143, 143.

²⁰ See *infra* at 4.3.

This opacity is most readily seen in the case of a death of a natural person. When a natural person dies, any property that they owned must be distributed by the law of succession. The person entrusted with this distribution is the executor, who must obtain a court decree known as confirmation to validly obtain title.²¹ However, there is a gap in time between death and confirmation of the executor (and their acquisition of ownership of the deceased's heritable property). This gap is a longstanding feature of Scots succession law and, to give it its old name, is known as a *haereditas jacens* (a dormant estate).

During the *haereditas jacens*, ownership of the deceased's property appears to be "vested in no one".²² It would seem to follow from that statement that the Crown's rights to *bona vacantia* should be engaged, as they are with all ownerless property. Ownership of the deceased's property should be vested in the Crown, even temporarily, until an executor is confirmed. However, there seems to be a widespread acceptance that this is not the case.²³ A contradiction emerges; if there is no ownerless property because the Crown is the owner of all ownerless property, then why does the Crown not own the property within a *haereditas jacens*?

As Gretton noted, "there exists virtually no discussion of the issue" of the status of the *haereditas jacens* in Scotland.²⁴ However, this question requires examination. If a *haereditas jacens* is a period of ownerless property in its own right, it is suggested that this must occur far more frequently than the other circumstances in which *bona vacantia* property arises. Death is an inevitable feature of all human life and each day in Scotland countless *haereditas jacens* estates arise. How the existence of the *haereditas jacens* interacts with the Crown's rights to *bona vacantia*, and whether the *haereditas jacens* is a period of ownerless property, poses a central problem for this thesis.

Structure

To address these issues this thesis has three main parts. The first part examines the decision in *Joint Liquidators of Scottish Coal, Noters*²⁵ as the starting point for the questions the thesis aims to answer. In this case, for the first time, the Inner House recognised circumstances in which ownerless land may arise through termination or divestment of the real right of

²¹ Succession (Scotland) Act 1964, s14.

²² D Walker, *Principles of Scottish Private Law*, Vol 1, 4th edn (1988), III, 207.

²³ G Gretton, "*Quaedam meditationes Caledoniae: The property/succession borderland*" (2014) 3(2) *EPLJ* 109, 116.

²⁴ G Gretton, "The Succession/Property Borderland: A View from Scotland", (18th Ius Commune Conference, Maastricht, 28-29 November 2013), 8, available via Internet Archive <http://www.iuscommune.eu/html/activities/2013/2013-11-28/workshop7a_Art.%20G.L.%20Gretton.pdf>.

²⁵ [2013] CSIH 108.

ownership, and considered the engagement of the Crown's rights to *bona vacantia*, alongside its limitations.

The second part of the thesis considers the termination of natural persons and the effect of death on property rights through an examination of the law of succession. In doing so the *haereditas jacens* is examined to establish whether this is a period of ownerless property distinct from the other forms of ownerless property which the Crown claims as *bona vacantia*. The third part of this thesis examines the termination of juristic persons and examines the historical development and modern operation of the *bona vacantia* doctrine in Scots law.

In exploring these areas, and by conducting an in-depth exploration of the gap that follows from natural death and corporate termination, the main argument of this research is that under the current law ownerless land is possible and is a relatively frequent occurrence despite a reluctance to acknowledge its existence.²⁶

Methodology

The methodology adopted in this thesis is primarily doctrinal. Doctrinal analysis is crucial to the coherence and functioning of the legal system by identifying the overall principles and rules in any given area of law.²⁷ Hutchinson and Duncan set out that research and funding trends have changed in academia such that there is now an increasing need to justify doctrinal research.²⁸ At a local level, in Scots law, TB Smith, albeit writing at a much earlier point in the 1960s, argued that that “Scots Law is threatened by decay is largely due to the fact that Scottish law faculties and indeed, the profession as a whole, have been unable to discharge adequately the duties of legal writing.”²⁹ Of course, many inroads have been made since Smith's statement but “our view of the past remains strikingly incomplete. Often it seems a matter of chance which areas of law have and which have not been investigated, and there are many gaps.”³⁰ Ownerless land is one such gap. Given the dearth of discussion in substantial areas of our law, there is still a need for doctrinal research in Scotland, and for

²⁶ As this thesis approached its submission, Reid published the second edition of his *Law of Property in Scotland*. The first edition of Reid's text has been hailed as a seminal moment in the development of Scots law, having taken a systematic and unitary approach to Scots property law that had not been attempted since the 18th century. Reid's second edition now explicitly recognises the existence of ownerless land in certain circumstances. In relevant places, these arguments have been acknowledged and there is some alignment of opinions, though the research for this thesis was conducted independently over a period of several years prior to publication of the second edition.

²⁷ N MacCormick, *Legal reasoning and Legal Theory* (1978), 153.

²⁸ T Hutchinson & N Duncan, “Defining and describing what we do: Doctrinal legal research” (2012) 17(1) *Deakin Law Review* 83, 84.

²⁹ T Smith, “The Scottish Universities Law Institute” 1960 *SLT* (News) 97.

³⁰ K Reid & R Zimmermann, “The development of legal doctrine in a mixed system”, chapter in K Reid & R Zimmermann (eds), *A History of Private Law in Scotland*, Vol 1 (2000), 8-9.

the “critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law”.³¹

In a mixed legal system, with common law jurisprudence, “an uncoded system makes no break with history, so that ancient history remains part of the living law”.³² Historical primary sources, unless repealed, overruled, or fallen into desuetude,³³ are still part of our legal system and require to be examined. Consequently, an element of historical research has been undertaken to identify what forms part of the current law. This is indeed more important given the scarcity of modern primary and secondary sources on both *bona vacantia* and the *haereditas jacens*.

Alongside the historical aspects, comparative research has also been undertaken. This methodology is frequently associated with German legal scholars such as Reinhard Zimmermann who examine their own legal system by reference to both its historical development and with regard to comparatively similar jurisdictions.³⁴ As a mixed legal system, Scotland benefits from the status of property law as a “resolutely civilian”³⁵ system in which Roman law, and later the civil law of the *ius commune*, is said to have a stronghold. Consequently, some legal concepts (and problems) such as the *haereditas jacens* are shared across civil law systems and comparative research is worthwhile in this area in attempting to rationalise the law in Scotland.³⁶ There are limitations to this method however, and care must be taken to avoid interpreting issues in foreign jurisdictions solely from a Scottish perspective merely because they employ similar Latin terminology. As Mousourakis observed:³⁷

A basic methodological principle of comparative law is that foreign legal rules, institutions and concepts must be approached or appraised from the viewpoint of the legal order to which they belong. In other words, the comparatist must be able to distance himself or herself from his or her own legal system and its way of thinking, placing himself or herself in the environment of the rules or institutions he or she is considering and using the legal concepts and methods of legal analysis and interpretation used by the lawyers and jurists of the foreign system or systems under consideration.

³¹ T Hutchinson, ‘Vale Bunny Watson: Law librarians, law libraries, and legal research in the post-internet era’ (2014) 106 *Law Library Journal* 579, 584.

³² K Reid & R Zimmermann, ‘The development of legal doctrine in a mixed system’, 11.

³³ A common law doctrine which invalidates legal rules through non-use or the passage of time.

³⁴ E.g.: R Zimmermann, ‘Das Ehegattenerbrecht in historisch-vergleichender Perspektive’ (2016) *Rabels Z* 80(1) 39; and R Zimmermann, ‘Pflichtteil und Noterbenrecht in historisch-vergleichender Perspektive’ (2020) 84(3) *Rabels Z* 465.

³⁵ K Reid, ‘Property law: Sources and doctrine’, chapter in Reid & Zimmermann, *A History of Private Law in Scotland*, 193.

³⁶ G Mousourakis, *Comparative Law and Legal Traditions* (2019), 214.

³⁷ *Ibid*, 108.

Where possible, this risk has been mitigated in this thesis through thorough examination of the general principles of the legal systems in relation to which comparative research has been undertaken, and identification of fundamental differences or similarities in these foreign legal traditions with that of Scotland.³⁸ Both the doctrinal and historical-comparative methodology are of value in stating and rationalising the law relating to ownerless land in Scotland.

³⁸ As part of this research, sources not in the English language have been examined and translated using Microsoft Word's document translation function or with Google translate, with legal terms in the relevant language further checked for accuracy of translation. As these were tools utilised by the author, all translation errors remain with the author.

PART ONE - TERMINATION OF OWNERSHIP OF LAND

Chapter 1: *Joint Liquidators of Scottish Coal, Noters*

1.1 Introduction

This thesis begins by considering the decision in *Joint Liquidators of Scottish Coal, Noters*.¹ It is a case of much interest given “it is rare to come across a court decision which has such significant impacts across a range of practice areas, including banking, insolvency, energy, waste, real estate and planning” law.² Leaving aside the range of wider public and environmental law issues at play, it is the Inner House’s treatment of property law that is of interest to this thesis. The judgment provides a clear structure for the various forms of divestment and termination of the right of ownership, and consequently how the Crown’s rights to *bona vacantia* may come to be engaged. This chapter explores the decision and the modern framework it provides for the ways in which a person may be divested of ownership.³ That framework is then employed as the structure underpinning the work of this thesis.

1.2 Background

The litigation concerned the administration of assets by the joint liquidators of the financially distressed Scottish Coal Company Limited (SCC). SCC was said to have been the last domestic Scottish coal company, operating six opencast mines in Scotland.⁴ Opencast coal mining is heavily regulated by legislation in Scotland.⁵ Significant environmental impacts can occur from coal mining operations, such as pollution of water courses and ground water.⁶ Certain obligations must be accepted as part of the grant of the necessary licences for coal mining under statute, such as undertaking to restore the site and make it safe following cessation of activities. These are obligations which come at significant cost to the licence holder.⁷

In 2013, SCC was placed into liquidation. The primary concern for the creditors of SCC was that compliance with the licences’ statutory obligations would incur significant costs, which would exhaust the assets of SCC and leave the creditors with little prospect of recovering their debts.⁸ This presented a problem for the liquidators of the company, tasked with distributing or realising assets to satisfy creditors’ debts alongside the winding down of the company’s affairs.

¹ [2013] CSIH 108.

² S Telfer, “Planning and environmental liabilities of liquidators” (2013) 159 *SPEL* 108-112, 108. See also S Hendry, “The Scottish Coal case” (2013) 23(1) *Water Law* 46-48, 47.

³ As recognised in Reid, “Property (Reissue)”, para 70.

⁴ E Askeland, “Last Scottish-owned coal-mining company folds”, *The Scotsman* (20 April 2013), available at <<https://www.scotsman.com/news/last-scottish-owned-coal-mining-company-folds-1578655>>.

⁵ *Joint Liquidators of Scottish Coal, Noters* [2013] CSOH 124, per Lord Hodge at para 4.

⁶ *Ibid*, at para 5.

⁷ *Ibid*, at para 4.

⁸ *Ibid*, at paras 6-7.

Liquidators are officers of the court, allowing them the right to apply to the Court of Session for directions in respect of their duties.⁹ Taking into account the creditors' concerns, the joint liquidators applied to the Outer House for directions on matters including whether it was possible to abandon ownership of the coal sites and the associated statutory licences, with the result that ownership would pass to the Crown as *bona vacantia*.¹⁰

Total liability for remediation to manage and make safe the sites concerned in the case was estimated at £72 million.¹¹ Given the potential for serious environmental damage and significant cost to the public purse, the application was intimated to a range of public bodies as interested parties, including the Scottish Environment Protection Agency (SEPA), Scottish Natural Heritage, the Lord Advocate (on behalf of the Scottish Ministers), the KLTR and relevant local authorities where the sites were situated.

1.2 Outer House

The liquidators of SCC invited the Lord Ordinary, Lord Hodge, to find that liquidators were able to abandon the real right of ownership. Lord Hodge noted that the Insolvency Act 1986 allows a liquidator winding up a company registered in England & Wales to abandon property.¹² However, no equivalent provision was enacted for Scottish-registered companies, and no authority or academic commentary existed on whether the abandonment of ownership of land was possible.¹³

The liquidator's argument was that the general powers provided for liquidators in Scotland under section 169 of the Insolvency Act 1986 permitted abandonment. Section 169 states a liquidator has the same powers as a trustee in sequestration under Scottish sequestration legislation.¹⁴ This legislative wording has been found in successive company law statutes affecting Scotland since the Companies Act 1862.¹⁵

At this stage it is important to highlight certain differences between corporate insolvency and sequestration in terms of the effect of these processes on the debtor's property. Corporate insolvency in Scotland operates differently to sequestration, in that when the relevant corporate person is placed into administration, receivership or liquidation, the property remains owned by the insolvent person itself, rather than ownership being transferred to its

⁹ *Ibid*, at para 12, citing *Liquidator of Upper Clyde Shipbuilders Ltd* 1975 SLT 39.

¹⁰ *Ibid*, at para 9.

¹¹ C Ingle, "Heritage disowned" (2013) 58(5) *JLSS* 32.

¹² Insolvency Act 1986, s178.

¹³ [2013] CSOH 124, at para 14.

¹⁴ Now largely repealed because of the consolidation efforts of the Scottish Law Commission in the Report on *Consolidation of Bankruptcy Legislation in Scotland* (SLC No 232, 2013). See now the Bankruptcy (Scotland) Act 2016 and, in particular, Part 8 of the 2016 Act.

¹⁵ Companies Act 1862, s171.

insolvency practitioner.¹⁶ In sequestration the trustee has the property of the debtor vested in them, or transferred, at the date of the award of sequestration. The debtor in most cases is divested of any property that they owned.¹⁷

Lord Hodge considered a trustee's powers in sequestration under the law force at the time, namely section 31 of the Bankruptcy (Scotland) Act 1985.¹⁸ The 1985 Act vested the trustee in sequestration with the property of the debtor at the date of sequestration.¹⁹ However, under the 1985 Act (and now the Bankruptcy (Scotland) Act 2016), the trustee in sequestration is not required by law to 'take up' all rights previously vested in the debtor for the purposes of sequestration – a disclaimer mechanism exists.²⁰ This mechanism allows a trustee in sequestration to abandon the right to administer any part of the debtor's estate.²¹ For example, a trustee could choose to reject contractual rights held by the debtor. The result of a trustee's abandonment is not that the property becomes *bona vacantia*, but rather that the property reverts in the debtor.²²

On the basis of the disclaimer mechanism available to a trustee in sequestration, the joint liquidators of SCC argued that a liquidator has power to disclaim ownership of land. This argument was made notwithstanding the fact that, in a liquidation, the land remains owned by the insolvent company. Disclaiming ownership would therefore appear to cause the right to be removed from the company's patrimony by abandonment and become ownerless. This approach would render both the land and the environmental licences as *bona vacantia*, thereby enabling the company to avoid the liabilities attached to the land and the licences, and improving the prospects of payment for the company's creditors.

The respondents challenged the joint liquidators' argument about the exercise of abandonment under section 169 of the 1986 Act on the grounds that: (i) there is no power for a landowner to abandon ownership of land generally in Scots law; and (ii) it is impossible to have ownerless land in Scotland.²³ Lord Hodge framed two key questions from these challenges by the respondents:²⁴

First, can someone abandon the ownership of land in Scotland? Secondly, can there be ownerless land in our legal system?

¹⁶ In limited circumstances, a liquidator can acquire ownership of the company's property upon court order. See the 1985 Act, s145.

¹⁷ 1985 Act, s31(1). See now the 2016 Act, s78(1).

¹⁸ The current statutory powers for vesting of a debtor's estate are now found in Part 5 of the 2016 Act.

¹⁹ 1985 Act, s31(1). See now the 2016 Act, s78(1).

²⁰ [2013] CSOH 124, at para 17.

²¹ 1985 Act, s32(9(a)). See now the 2016 Act, s87(8).

²² [2013] CSOH 124, at para 18.

²³ *Ibid*, at para 21.

²⁴ *Ibid*.

1.2.1 Can someone abandon the ownership of land in Scotland?

In the absence of Scottish authorities submitted to the court, Lord Hodge drew from other jurisdictions. Lord Hodge looked to South Africa and Germany and the systems available there which permitted abandonment of the ownership of heritable property. However, his lordship noted the risk that abandonment of land could be liable to abuse.²⁵ Lord Hodge also considered the statutory framework surrounding the registration of title to land but was unable to find any express provision for permitting or prohibiting land abandonment.²⁶ In consideration of these points, and in the absence of any specific authority, Lord Hodge came to the conclusion that the contemporary legislation governing the law of land registration, namely the Land Registration (Scotland) Act 1979, permitted the abandonment of ownership.²⁷

1.2.2 Can there be ownerless land under Scots law?

The respondents had argued that ownerless land was an “impossibility” in Scots law.²⁸ However, Lord Hodge rejected that submission. Lord Hodge drew from the institutional writers and the decision in *Lord Advocate v University of Aberdeen and Budge*.²⁹ His lordship noted that the maxim *quod nullius est fit domini regis* applies only insofar as the Crown does not disclaim its prerogative right to claim *bona vacantia*, with a disclaimer of the right by the Crown also possible at common law.³⁰ Additionally, the statutory regime of the Companies Act 2006 for property falling as *bona vacantia* by a dissolved company also provides for the Crown to issue a disclaimer.³¹ In the absence of a feudal system, whereby the vassal’s interest could revert to the superior following a Crown disclaimer, Lord Hodge ruled that ownerless land was possible.³² His lordship’s reasoning was that, as Parliament had provided a mechanism for disclaiming land falling to the Crown as *bona vacantia* under the Companies Act 2006, then ownerless land must exist in Scotland. Accordingly, Lord Hodge rejected the respondents’ submissions and proposed to make an order confirming, among other issues, that the liquidators could abandon ownership of SCC’s land.³³

1.3 Inner House

Given the potential ramifications for both property and environmental law, SEPA and the other public bodies appealed the Lord Ordinary’s decision to the Inner House. In respect of

²⁵ *Ibid*, at para 22.

²⁶ *Ibid*, at para 23.

²⁷ *Ibid*.

²⁸ *Ibid*, at para 24.

²⁹ *Lord Advocate v University of Aberdeen and Budge* 1963 SC 533.

³⁰ [2013] CSOH 124, at para 24.

³¹ Companies Act 2006, ss1012 – 1013. Discussed below at 8.2.4ff.

³² [2013] CSOH 124 at para 26.

³³ *Ibid*, at para 77.

the property law aspects, the Second Division of the Inner House framed their approach based on Lord Hodge's self-directed questions:

- 1) Can someone abandon the ownership of land in Scotland?
- 2) Can there be ownerless land in our legal system?

1.3.1 Abandonment

In respect of the first question, the Inner House, in Lord Carloway's lead judgment, gave more detailed consideration to the terminology regarding abandonment. A person may 'physically' abandon land, thereby having the intention to leave it permanently.³⁴ However, the issue for consideration was the abandonment of ownership of land instead.³⁵ The Inner House noted that ownership of corporeal moveables can be abandoned by physical disposal accompanied by intention, or similar conduct, implying the abandonment of ownership. However, the court focused on the fact that heritable property is subject to the need for written deeds and public records.³⁶ In this respect, the Inner House concluded:³⁷

With ownership of land, however, the existence of the written record is important since it renders the fact of ownership public and, subject to the operation of law, permanent. This has a number of significant consequences; notably, but by no means exclusively, in relation to diligence, inheritance and the performance of obligations which run with the land. As a generality, the world is entitled to look to, and rely upon, the Registers to establish who owns a piece of land, in the sense of having a real right in it, at any given moment... There is no legal process whereby a person can transfer land into oblivion. In short, then, the answer to the first question is that a person cannot abandon the ownership of land in the sense of casting away the real right.

As a result, it is now regarded as impossible to unilaterally abandon the real right of ownership of land.³⁸

1.3.2 Ownerless property

Turning to the second question, the Inner House agreed that there *can* be ownerless land.³⁹ This may come as a surprise given that, as noted in the introduction to this thesis, Scots law is "fundamentally hostile"⁴⁰ to the idea of property coming to be without an owner. However,

³⁴ [2013] CSIH 108, per Lord Justice Clerk (Carloway) at para 98.

³⁵ *Ibid*, per Lord Carloway at para 98.

³⁶ *Ibid*, per Lord Carloway at para 99.

³⁷ *Ibid*, per Lord Carloway at paras 100 and 103.

³⁸ See further K Reid & G Gretton, *Conveyancing 2013* (2014), 196; and M Combe & M Rudd, "Abandonment of land and the *Scottish Coal* case: was it unprecedented?" (2018) 22(2) *ELR* 301-306. Of worthwhile note is Paisley's discussion of abandonment of ownership of servient tenements under a servitude *oneris ferendi* in Roman Law, see R Paisley, *Rights Ancillary to Servitudes* (2022), para 6-021 (fn 125). Whether this rule has been accepted into Scots law, is doubtful.

³⁹ [2013] CSIH 108, per Lord Carloway at para 104.

⁴⁰ S Styles, "Vesting and the law of property" (1989) 34(9) *JLSS* 338, 340.

the Inner House was clear that ownerless property can arise when an owner “ceases to exist”, which was construed to include:⁴¹

The death of a person without heirs or upon the dissolution of a corporate body. In that situation, as is well known, the maxim *quod nullius est fit domini regis* (that which is the property of no-one belongs to the Crown) applies to land as it does to moveables.

As a result, in answering the second question, the court agreed with Lord Hodge, that “there must be land which can be described as ownerless, since it is only then that it will be classified as *bona vacantia*”.⁴²

1.4 Discussion

Whilst the Inner House made helpful *obiter* remarks in a number of areas when reaching their decision, particularly in respect of *bona vacantia* which will be explored in the third part of this thesis, it is helpful to begin this thesis with an examination of Lord Carloway’s attempt to summarise how the real right of ownership may be lost:⁴³

The law provides a number of methods by which a person's ownership of land can be terminated. It is conceivable that the land itself may be destroyed by coastal erosion or some other physical effect upon the *solum*... Equally, there are situations where the owner disappears; not in the sense of simply vanishing from view but actually ceasing to exist. Thus, a company may be dissolved or an individual may die leaving no heirs. In these situations it is established...that the land falls to be regarded as *bona vacantia* (property which has become empty) and may be disposed of by the Crown...There are only two other methods by which a person's ownership of land can be terminated. The first is where the law operates to divest him of it by means of a formal legal process...The second method of termination is by voluntary transfer to another person, by either *inter vivos* or *mortis causa* disposition.

Following the scheme that Lord Carloway developed in *Scottish Coal*, there are four situations in which an owner’s right of ownership of land is terminated:

- (i) The land (the thing, or *rem*) itself is destroyed;
- (ii) The owner ceases to exist, in that a natural person dies without heirs or a corporate person is dissolved;
- (iii) The owner is deprived of ownership by involuntary transfer (such as compulsory purchase, diligence or sequestration); and
- (iv) The owner voluntarily gives away ownership such as by sale or by testament.

⁴¹ [2013] CSIH 108, per Lord Carloway at para 104.

⁴² *Ibid*, at para 108.

⁴³ [2013] CSIH 108, per Lord Carloway at paras 101 to 102.

Category (i) requires little explanation. Categories (iii) and (iv) relate to familiar areas of property law, with the relevant rules covered extensively in existing literature.⁴⁴ It is category (ii), in which land becomes ownerless due to its owner ceasing to exist, that is the focus of this thesis.⁴⁵

The recognition by the Inner House that ownerless land can exist may seem immediately to resolve the key issue in this thesis. However, as the Inner House identified in *Scottish Coal*, where property becomes ownerless, the Crown's rights to *bona vacantia* become engaged.⁴⁶ That would mean, as some suggest, that when personhood terminates the Crown acquires ownership immediately "by force or law and without the need for any action on the part of the Crown".⁴⁷ The result would be that, as noted in the introduction to this thesis, the term 'ownerless' as used by Lord Carloway is oxymoronic. This author believes that this is not the correct interpretation of the law and that ownerless land, in the true sense of the word, does exist in Scotland. That is the central argument presented in this thesis.

To demonstrate the existence of ownerless land, this thesis will subsequently be structured into two parts, following Lord Carloway's analysis above. The thesis will firstly examine the cessation of natural persons, which requires an analysis of the law of succession, and then the cessation of juristic persons, examining the law of corporate dissolution and insolvency. Whilst it will not be possible to examine every single type of juristic person recognised in Scots law, the most common entities will be considered before moving on to examine the operation of the *bona vacantia* doctrine itself. By exploring both categories of person, it will be shown how ownerless land, in the true sense of the word, can arise. This thesis begins with the cessation of natural persons and the operation of the law of succession.

⁴⁴ For example, Gretton & Steven, *Property*; G Gretton & K Reid, *Conveyancing*, 5th edn (2018); Carey Miller, *Corporeal Moveables*; D Brand et al, *McDonald's Conveyancing Manual* 7th edn (2004); R Paisley, *Land Law* (2000); D Cusine & R Rennie, *Missives*, 2nd edn (1999); and J Rowan-Robinson & E Farquharson-Black, *Compulsory Purchase and Compensation: The Law in Scotland*, 3rd edn (2009).

⁴⁵ In the unlikely event that land ceases to form part of the sovereign territory of Scotland, Paisley argued that Scots law (and the law of ownership of Scotland), and thus the 'Scottish' right of ownership ceases to exist, Paisley, *Land law*, para 3.44. Reid, 'Property (Reissue)', para 74, also suggests another category of 'involuntary extinction' to Lord Carloway's taxonomy such as extinction of ownership through positive prescription extinguishing the former owner's right or the process of realignment under s86 of the Land Registration (Scotland) Act 2012. In any event these do not fall into the categories under examination by this thesis.

⁴⁶ [2013] CSIH 108, per Lord Carloway at para 104.

⁴⁷ Reid, "Property (Reissue)", para 76.

PART TWO - CESSATION OF NATURAL PERSONS

Chapter 2: General principles of succession law

“The law provides a number of methods by which a person's ownership of land can be terminated... there are situations where the owner disappears; not in the sense of simply vanishing from view but actually ceasing to exist. Thus, a company may be dissolved or an individual may die leaving no heirs.”

Scottish Coal, paras 101-102.

2.1 Introduction

In line with Lord Carloway's framework,¹ the second part of this thesis examines how ownerless land might arise from the cessation of natural persons. When a natural person ceases to exist,² the law of succession is immediately engaged to distribute their property. This involves distributing any rights of ownership held by the deceased. An examination of the general principles of the law of succession is therefore a necessary precursor to an exploration of whether the termination of a natural person can result in land becoming ownerless.

This chapter will consider some of the key aspects of Scots succession law as groundwork for the subsequent discussion in this thesis. In particular, it will be shown that the classification of private law rights in succession law historically masked the issue of the ownership of property after death. The difficulties in defining succession rights meant that it could be unclear as to whether successors obtained ownership, or some lesser form of right, after death. Further, a proper analysis of the transmission of property after death and the correct classification of rights in succession reveals the interim period known as a *haereditas jacens*. As will be discussed in this part of the thesis, a question arises as to whether the *haereditas jacens* should be understood as a period in which property is ownerless. If so, this challenges Lord Carloway's suggestion that ownerless property arises in succession only where an estate becomes heirless, and therefore open to a claim by the Crown as *ultimus haeres*.

2.2 Succession law in Scotland

Succession or inheritance law in any legal system deals with the transmission of property and rights upon the death of a natural person in whom they had existed.³ In other words, the law of succession is concerned with the distribution and exhaustion of the deceased's

¹ *Supra*, 15-16.

² Or is treated as having ceased to exist under the Presumption of Death (Scotland) Act 1977.

³ *Green's Encyclopaedia of the Law of Scotland*, 2nd edn (1909), Vol 11, 402.

patrimony. The patrimony of the deceased in Scotland is typically called the estate, or *haereditas*, in which the deceased's assets and liabilities are held after death.⁴

An estate can be classified as either testate (the deceased died having made a will) or intestate (the deceased left no will, or there are gaps in an existing will). The distribution of the estate can be under the terms of the will as testate succession. Alternatively, the distribution may be under the default rules of the Succession (Scotland) Act 1964 as intestate succession.⁵ The intricate rules of succession law will not be explored in this thesis, nor any policy aspects of succession law.⁶ Instead the focus is placed on the proprietary aspects involved in the law of succession and the administration and system of transfer of property from the dead to the living. For reasons to be explained, this may properly be called executry law.

Until the 1964 Act, Scots succession law had a division which moved the law in two "currents".⁷ Heritable property was distributed by feudal customs, one may term it as feudal succession, mainly involving primogeniture.⁸ Moveable succession is said to be derived from canon law, subject to Scottish customs and local ecclesiastical developments.⁹ The religious influence in moveable succession derives from the fact that it was regulated firstly by the church, and then later the secular commissary courts, before the total amalgamation of the commissary courts into the sheriff courts in 1876.¹⁰

The division of succession rules dependent on the species of the property was archaic,¹¹ and was reformed following the recommendations of the Mackintosh committee in 1950.¹² The resulting Succession (Scotland) Act 1964 provides the current framework for the administration of estates and the distribution of the deceased's property.

⁴ G Gretton, "Trust and patrimony" in H Macqueen (ed), *Scots law in the 21st Century; Essays in Honour of Bill Wilson* (1996), 189.

⁵ An intestate estate can be in whole or part, such as where a will does not cover the entire distribution (1964 Act, s36).

⁶ On the policy aspects, see D Reid, "From the cradle to the grave: politics, families and inheritance law" (2008) 12(3) *ELR* 391-417.

⁷ Stair, *Inst.*, 3.4.pr.

⁸ I Kotlyar, "Destinations in bonds in the 17th-Early 18th century Scots law: Between continental influences and national developments" (2020) 24(3) *ELR* 342, 358.

⁹ D Sellar, "Juridical acts made in contemplation of death in the law of Scotland", chapter in *Recueils de la Société Jean Bodin pour l'histoire comparative des institutions, Acts of Last Will*, (1993), Part 3. On the Roman influence to Canon law, see R Zimmermann, "Heres fiduciaries? Rise and fall of the testamentary executor", chapter in R Helmholz & R Zimmermann (eds), *Itinera Fiducia: Trust and Treuhand in Historical Perspective* (1998), 267.

¹⁰ Sheriff Courts (Scotland) Act 1876, ss35-40. See the history of the commissary courts in the *Third Report of the Commissioners of Parliament on the Courts of Justice in Scotland* (printed 11 February 1818), 57-72.

¹¹ D Sellar, "Succession law in Scotland – A historical perspective", chapter in K Reid et al, *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007), 49.

¹² *Report of the Committee of Inquiry on the Law of Succession in Scotland* (Cmd 8144, 1950).

Whilst this thesis principally concerns land, it is the historic law of moveable succession that forms the bedrock of succession law today in Scotland, particularly the administrative system by which the deceased's property is distributed. This is because the 1964 Act assimilated heritable property to the law of moveable succession.¹³ As a result, to understand the framework for the distribution of land after the death of an owner, unusually one must look at the historic law regarding the distribution of moveable property. Aspects of the historic rules of heritable succession will be considered in more detail in later chapters,¹⁴ but the following sections explore how the key features of modern Scots succession law originated into the system we have today.¹⁵

2.3 Executors

All property of the deceased requires to be distributed after death. However, there is no immediate transfer of ownership to successors in Scots law at death.¹⁶ Instead, there is an interim step by which the distribution must be carried out by an administrator called the executor.¹⁷ Historically, because of the division in succession law between heritable and moveable property, the executor only dealt with the distribution of moveable property, whilst heritable property passed directly to a family member known as the heir at law:¹⁸

The person to whom heritage descends is called the heir, whilst he who inherits the moveables is called the executor. Both characters may be united in the same individual, as in the case of a sole surviving child.

Following the 1964 Act, both heritable and moveable property are now distributed by the executor for deaths after 10 September 1964.¹⁹ In testate succession, an executor will normally²⁰ be chosen by the deceased, in which case the executor is called an 'executor-nominate'.²¹ In intestate succession, the executor is appointed, or decerned, by a court and is known as an 'executor-dative'.²² The term 'executor' arises, as Erskine and Mackenzie explain, because the officeholder executes the wishes of the deceased. Today, an executor is

¹³ 1964 Act, s14(1).

¹⁴ See Ch 7.

¹⁵ A mechanism does exist for deaths prior to 10 September 1964, which can be found in ss26A–26C of the Titles to Land Consolidation (Scotland) Act 1868.

¹⁶ G Gretton, "*Quaedam meditationes Caledoniae*", 115.

¹⁷ See W Wilson & A Duncan, *Trusts, Trustees, and Executors*, 2nd edn, (1995), paras 31-01 – 31-02 for a full list of the institutional writers discussing the role of the executor.

¹⁸ J Lorimer & R Bell, *A Hand-book of the Law of Scotland*, 6th edn (1894), paras 797 – 798.

¹⁹ Succession (Scotland) Act 1964, s14.

²⁰ Though an executor-nominate may decline office or have predeceased the testator, in which case an executor-dative will need appointed.

²¹ Dative is an old Scots law word which means a person appointed by a sovereign or court.

²² Confirmation of Executors (Scotland) Act 1858, s2. An order of priority exists for determining the appointment of executor-datives, which largely derives from an order by the archbishops and bishops of Scotland in 1666 (subject to some statutory modifications) See further E Scobbie, *Currie on Confirmation of Executors*, 9th edn (2011), paras 6-03ff.

regarded as a fiduciary office, in that they administer the estate on behalf of others.²³ However, this was not always the case. Historically, the executor enjoyed a financial benefit from appointment, which derives from the origin of the executor in the medieval period. In the medieval period, appointment as executor would pass all moveable property to the executor.²⁴ The only requirement incumbent on the executor was the payment of legacies in wills and the satisfaction of “legal rights”.²⁵

After these payments were satisfied, the ‘benefit’ of the office of executor becomes apparent, in that the executor appeared to be able to retain the residue of an estate.²⁶ However, the existence of this entitlement is by no means definitively settled in sources. Sellar outlined two approaches, either the remainder of the estate was made over to the church, or the executor simply retained this.²⁷ Anton described that medieval confirmation documents often used the term that the dead’s part or free estate was to be put to “pious use”.²⁸ A similar approach is found in early English law; “the cartularies of the convents are full of acts drawn up by executors for the good of the souls of the deceased”.²⁹ Zimmerman identified more comparative examples of such appropriations across the *ius commune*.³⁰ Over time this practice of “pious use” may have come to be regarded as making the dead’s part over to the next of kin as an act of Christian care.³¹ Yet a more self-serving role of the executor is noted in some sources. Currie noted that the appointment as executor gave the executor the right to “appropriate the whole of the dead’s part”.³² Likewise, McDonald described that “there was nothing but [the executor’s] own sense of right to compel him to distribute [the dead’s

²³ Thereby being considered a trustee by statute, Trusts and Succession (Scotland) Act 2024, s81(1).

²⁴ Erskine, *Institute*, III.9.18. A Anton, ‘Medieval Scottish executors and the courts spiritual’ (1955) 67 JR 129, 135. See also *Green’s Encyclopaedia of the Laws of Scotland*, Volume 6 (1928), 4981, and Wilson & Duncan, *Trusts*, para 31-03.

²⁵ Scots law has, from an indeterminate early period, provided ‘legal rights’ for the female spouse of the deceased, the *jus relictæ*, and to the deceased’s issue, the right to legitim, which gives these parties a right to a fixed share of the moveable property of the deceased. These are ancient rights, though modified by statute such as Section 8 of the Married Women’s Property (Scotland) Act 1881 which expanded the right of spouse to include the surviving male spouse or husband of the deceased under the *jus relictæ*. The spousal or relict’s right has been expanded for civil partners under the Civil Partnership (Scotland) Act 2004, s131. Despite statutory modification over time, the origins of which are obscure but see the exploration in K Reid, “Legal rights in Scotland”, chapter in K Reid et al, *Comparative Succession Law, Vol 3, Mandatory Family Protection* (2020)..

²⁶ Anton, “Medieval Scottish executors”, 147.

²⁷ Sellar, “Succession law in Scotland – A historical perspective”, 60.

²⁸ Anton, “Medieval Scottish executors”, 148.

²⁹ R Caillemer, “The executor in England and on the continent”, chapter in *Select Essays in Anglo-American Legal History*, vol 3 (1907), 747.

³⁰ Zimmermann, ‘*Heres fiduciaries?*’, 298ff.

³¹ Anton, ‘Medieval Scottish executors’, 147.

³² J Currie, *The Confirmation of Executors in Scotland* (3rd edn, 1902), 51.

part] amongst the children or next of kin of the testator”.³³ Anton also recognised this practice in the medieval sources:³⁴

Another customary rule developed: that the next of kin had right to the office of executor-dative. In this position their power of disposition was discretionary and they themselves were in the class which had customary right to benefit. Why should they not exercise their discretion in their own favour? From here it is short step to say that executors, as such, and not the next of kin, had a proprietary interest in the balance of the dead’s part. This was probably never admitted by the ecclesiastical lawyers.

It appears that the earlier ecclesiastical courts which regulated executors expected the dead’s part to be put to ‘pious use’ but the executor had discretion on what this effectively meant.³⁵ Erskine, recognising that the executor would appropriate the dead’s part, goes so far as to call an exhausted estate as a “*nudum officium*” (a naked, or unprofitable, office) for the executor.³⁶

Whilst it is unclear exactly the extent of appropriation by executors, legislation by the Parliament of the Kingdom of Scotland in the Reformation began to play a role in modifying executors’ entitlements to the dead’s part. The Estates of Deceased Minors Act 1526 narrates the problem that the bishops would typically appoint an executor-dative who could “intromit... and withdraw the goods from the kinfolk and friends”.³⁷ Under the 1526 Act, the next of kin were entitled to be nominated as executor-dative in the case of intestacy. As a result, the next of kin as executor-dative appeared to be able to retain the intestate moveable estate, after payment of legal rights, for themselves. However, this benefit gave rise to much confusion in respect of the vesting of succession rights, which will be discussed further in the next section.³⁸

Further legislation also sought to restrict executors-nominate being able to appropriate the estate. An Act of 1617³⁹ noted that “ignorant people” had appointed strangers outwith their next of kin to act as executor-nominate, with the consequence that those executors would be entitled to keep the dead’s part after deduction of legacies.⁴⁰ The 1617 Act provided that ‘stranger’ executors-nominate were liable in count, reckoning and payment of the deceased’s

³³ *Green’s Encyclopaedia of the Laws of Scotland*, Volume 6 (1928), 498.

³⁴ Anton, ‘Medieval Scottish executors’, 149.

³⁵ I Kotlyar, “The Evolution of the Scots Law and Practice of Succession: 1300–2000”, chapter in M Gigliola di Renzo Villata (ed), *Succession Law, Practice and Society in Europe Across The Centuries* (2018), 181.

³⁶ Erskine, *Inst.*, III.9.26; and P Halkerston, *A Translation of Technical Terms and Phrases used in Mr Erskine’s Institutes* 2nd edn (1829), 194.

³⁷ Estates of Minors Deceased Act 1526 (RPS ref: 1526/6/40). This was then later re-enacted by the Intestate Succession Act 1540 (RPS ref: 1540/12/95).

³⁸ *Infra*, section 2.4.

³⁹ Executors Act 1617 (RPS ref: 1617/5/28). See *Nasmyth v Hare*, 17 February 1819, FC.

⁴⁰ *Lowndes v Douglas* (1862) 24 D 1391, per Lord Neaves at 1402. See also Stair, *Inst.*, III.8.54.

whole estate to the wife, children and nearest of kin.⁴¹ Further, the entitlement of executors-nominate to any residue after payment of legacies was reduced to a third of this residue alone.

The result of this legislation appears to be a change in how the executor's role was regarded in law. Stair, writing in the 17th century, described the appointment of an executor as "not properly a succession, but rather an office" and that appointment of an executor is a "fideicommissary succession" which makes the executor a "*haeres fideicommissarius*" (or a fiduciary heir).⁴² Erskine, in the 18th century, also noted that "executry is truly an office; the executor is in judgment of the law a trustee."⁴³ Likewise, Lord Kames refers to an executor as a "trustee".⁴⁴ By the time of Bell in the 19th century, it appears settled that "every executor is a trustee".⁴⁵ The final entitlement of an executor-nominate to one third of the remaining residue of an estate was finally abolished in 1855.⁴⁶ Lord McLaren's treatise on succession law appears to record the change that the 1617 Act had intended, in that the statute had modified the executor to that of a mere trustee.⁴⁷ As a result of the restriction of the entitlement to the estate once held by an executor, it is often expressed that:⁴⁸

The office of executor has long ceased to be a beneficial one. It is an administrative one. Somebody must administer the estate, and acceptance of office does not disturb the distribution provided.

Generally, the role of the executor under modern Scots law is: (i) to ingather the estate of the deceased; (ii) to pay off the deceased's debts out of the deceased's assets;⁴⁹ and (iii) to distribute the estate in accordance with the terms of a will, the operation of legal rights, or

⁴¹ As to what constituted a "stranger", see Erskine, *Institutes*, 3.9.26.

⁴² Stair, *Institutions*, 3.8.30 and 3.8.51.

⁴³ Erskine, *Institute*, 3.9.41.

⁴⁴ Lord Kames, *Elucidations* (1777), 107.

⁴⁵ Bell, *Principles*, s1899.

⁴⁶ Confusingly, this was done by the Intestate Moveable Succession (Scotland) Act 1855, s8.

⁴⁷ Lord McLaren, *The Law of Wills and Succession*, vol II, 3rd edn (1894), 854.

⁴⁸ *Smart v Smart* 1926 SC 392, per Lord Sands at 402. See further Scobbie, *Currie on Confirmation*, para 1-13 and R Macleod, *Contentious executries: Commissary and Executry Litigation in Scotland* 2nd edn (2024), paras 1-007ff. There are still some conceptual debates about whether the executor is to be regarded as a trustee or akin to a judicial factor. This is an immaterial point for the purposes of this thesis but is noted for completeness. See further, G Gretton, "Trusts", chapter in Reid & Zimmermann, *A History of Private Law in Scotland*, Vol 1, 514-515; Wilson & Duncan, *Trusts*, paras 31-08 - 31-13; and A Menzies, *The Law of Scotland Affecting Trustees*, 2nd edn (1913), 849. The point becomes rather muddled due to litigation regarding whether an executor is a trustee for creditors, and what obligations an executor owes to creditors. It is settled following *Brown v Robertson* (1896) 23 R 739 that an executor is not a trustee for creditors.

⁴⁹ If this is not possible then the deceased's estate can be sequestrated under the Bankruptcy (Scotland) Act 2016.

the distribution of the free estate under the rules of intestacy.⁵⁰ Recently, the Inner House in *Pentland-Clark v Maclehose* provided the following definition:⁵¹

The duty of an executor is one of factory. He requires to ingather the deceased's estate, to pay the debts due by the deceased and thereafter to distribute the ingathered estate to the beneficiaries in accordance with the wishes of the deceased as disclosed by any will. He represents the deceased; that is to say, in questions with third parties, he is the same person as the deceased (*eadem persona cum defuncto*). The title which he holds is subject to all pleas that could have been taken against the deceased.

2.4 Confirmation

An executor is required to obtain a court decree authorising their distribution of the estate, known as 'confirmation'.⁵² As Currie described:⁵³

Confirmation is the ratification by a competent Court of an appointment of executors, made either by the deceased himself or by the Court, and constitutes a title to uplift, receive, administer, and dispose of the... estate of the deceased person contained in an inventory⁵⁴ given up by the executors, and upon which the confirmation proceeds.

As Erskine wrote, "an executor is not vested with the right of the...estate belonging to the deceased, without confirmation."⁵⁵ It is the process of confirmation that acts as a judicial conveyance to executors upon which they can then validly complete title and obtain ownership of the deceased's heritable property.⁵⁶ Confirmation is another longstanding tradition of Scots succession law. During the medieval period, the power to confirm an executor was held by the bishop of the diocese in which the deceased was domiciled.⁵⁷ Anton identified that confirmation was a serious requirement for the Church.⁵⁸

Many surviving documents point to the Church's anxiety that confirmation should be obtained as soon as possible after death. The protection of beneficiaries was doubtless the primary motive, but there was also the secondary and less altruistic object of securing payment of the quot.⁵⁹

⁵⁰ Macleod, *Contentious Executries*, para 1-010.

⁵¹ *Pentland-Clark v Maclehose* [2012] CSIH 29 per Lord Carloway at para 41. See also *Santander UK Plc v Roofi's Executor* [2024] SAC (Civ) 44, per Sheriff Principal Anwar at paras [17]-[26].

⁵² For a full account, see Scobbie, *Currie on Confirmation*. The Intestates Widows and Children (Scotland) Act 1875, s1, and Small Testate Estates (Scotland) Act 1876, s3, provides an expedited process for confirmation for small estates, currently those valued below £36,000 (Confirmation to Small Estates (Scotland) Order 2011, reg 2).

⁵³ Currie, *The Confirmation of Executors*, 1.

⁵⁴ An executor must prepare an inventory that is lodged as part of the petition for confirmation, Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Sch 8(19), and the Probate and Legacy Duties Act 1808, s38. For the specific drafting an inventory, see Scobbie, *Currie on Confirmation*, Ch 10.

⁵⁵ Erskine, *Inst*, III.9.27.

⁵⁶ Gretton & Reid, *Conveyancing*, para 26-05.

⁵⁷ Anton, 'Medieval Scottish executors', 140.

⁵⁸ *Ibid*, 137.

⁵⁹ The quot was an old form of tax payable by executors at confirmation to the bishops and, later, commissaries until its final abolition under the Discharge of Quots of Testaments Act 1700 (RPS ref: 1700/10/243).

Without confirmation, any person who intromitted with the goods of the deceased was liable to an action of vitious intromission.⁶⁰ The further value for the executor in obtaining confirmation, is that confirmation limits the executor's liability to the deceased's creditors to the extent of the property confirmed in the inventory.⁶¹ Bell described this as limited representation, and that an executor's confirmation does not "incur a responsibility beyond the estate, his title⁶² being strictly limited".⁶³ Erskine and Stair were of the similar view.⁶⁴

Obtaining confirmation is regarded as the first step for an executor to undertake in order to acquire ownership of the deceased's property.⁶⁵ However, in some situations, title can transfer to successors without an executor being confirmed. Three exceptions continue to have relevance today.

The first is that the deceased may have made a *de praesenti* conveyance of moveable property during their lifetime, such as a drafting and executing a deed of assignation or deed of gift, but did not deliver this to the grantee, which meant the title could not be completed by the grantee during the deceased's lifetime.⁶⁶ The Confirmation Act 1690, which remains a statute in force, permits that these conveyances can be effected without the need of confirmation.⁶⁷

The second exception is the use of what is known as a survivorship clause or survivorship destination. A survivorship clause is a "technical speciality"⁶⁸ of conveyancing of heritable property and is inserted into a conveyance to two or more grantees of a disposition of land.⁶⁹ The presence of a survivorship clause means that the deceased's share of ownership will automatically pass, or accresces, to the surviving co-owner(s) at death. Confirmation is not

⁶⁰ Anton, "Medieval Scottish executors", 137. This form of action persists to this day but is now only available as a remedy for creditors of the deceased, *Dobbie v Patten* 2015 SC GLA 34, per Sheriff Principal Scott at para [16]. For full account see Macleod, *Contentious Executries*, paras 2-123ff.

⁶¹ Bell, *Prin*, s1900.

⁶² Historically, there was active title and passive titles in succession. Active title relates to assets or property, i.e.: an executor obtains an active title to property by confirmation. Passive title relates to liability, responsibility for the deceased's debts. Bell speaks here of a passive title, that the responsibility of the executor for the deceased's debts following confirmation is limited. See Gretton & Steven, *Property*, paras 27.33–27.34.

⁶³ Bell, *Prin*, s1922.

⁶⁴ Erskine, *Inst*, III.9.41; and Stair, *Inst*, III.8.64.

⁶⁵ G Gretton, 'What is vesting?' (1986) 31 *JLSS* 148, 149.

⁶⁶ Erskine, *Inst*, III.9.30. See K Reid, "Testamentary formalities in Scotland", chapter in K Reid et al, *Comparative Succession Law, Vol 1: Testamentary formalities* (2011), 410. There would be a barrier to the use of a *de praesenti* conveyance in respect of transferring ownership of land under s47(2) of the Land Registration (Scotland) Act 2012 as delivery of the disposition must have taken place before the granter died in order for it to be registered in the Land Register.

⁶⁷ The Court of Session found that special legacies also fell under the rule of the 1690 Act in *Gordon v Campbell* (1729) Mor 14384. Whether this is still good law remains unclear. It appears at Lord McLaren's time, the rule had not been forgotten albeit he terms it the "old law" because of the 1823 Act, see McLaren, *Wills and Succession* 1st edn (1868), para 1689.

⁶⁸ Brand, *McDonald's Conveyancing Manual*, para 30.13.

⁶⁹ Gretton & Reid, *Conveyancing*, para 27-06.

required for a survivorship clause to take effect. The position is similar with other testamentary devices for moveable property such as nominations or life assurance policies.⁷⁰

The third exception to the requirement for confirmation is less discussed in modern times. Currie described that:⁷¹

In cases of intestate succession confirmation was formerly necessary, not only as an active title to recover the estate [for the executor], but to vest the succession in the next of kin. There was no representation in moveables, unless the succession was confirmed. If the next of kin died before confirmation, he lost his right to the estate **in so far as not actually reduced into possession**, and the whole went to those who were next of kin at the date of confirmation. [**Bold** added]

Currie's qualification regarding possession is important. The reason for this statement is because after the Reformation "the title of the next of kin, as the parties presumably entitled to succeed, was more liberally and tenderly dealt with".⁷² The Court of Session became more lenient in whether confirmation was necessary where the next of kin had already taken possession of the deceased's corporeal moveable property. In *McWhirter v Miller*,⁷³ Lord Kilkerran reported that the case proceeded on:⁷⁴

Whether confirmation was at all necessary to the transmission of moveables, whereof the nearest in kin had attained the possession, or if possession itself was not sufficient to transmit the right without confirmation.

The court found confirmation was not required if successors had already taken possession prior to confirmation. In itself, this decision relates to only one case or set of facts but Lord Kilkerran's report is notable for the court's apparent endorsement of a wider *ratio*:⁷⁵

This interlocutor, though expressed as to apply to the case in hand, was intended to establish the general point, that wherever a nearest in kin attains possession of moveables, the right thereto, *eo ipso*, transmits without confirmation; and on this the Court was unanimous.

Thus, in rather clear terms, the Court of Session appeared to state that possession by the next of kin was sufficient to transfer moveable property (with no confirmation needed). The issue was again revisited in *Spence v Wilson*,⁷⁶ this time examining the next of kin receiving payment of a debt before confirmation, and *McWhirter* was followed. However, in *Pringle*

⁷⁰ H Hiram, *The Scots Law of Succession*, 2nd edn (2007), paras 5.32-5.34. Another form existed known as a *donatio mortis causa* but this has been abolished by s25 of the Succession (Scotland) Act 2016.

⁷¹ Currie, *Confirmation of Executors*, 80.

⁷² *Bones v Morisson* (1866) 5 M 240, per Lord President at 243.

⁷³ (1744) Mor 14395. Texts refer to this case with variants to the pursuer's name as *McWhirter*, *MacWhirter*, or *M'Whirter*.

⁷⁴ (1744) Mor 14395, at 14397.

⁷⁵ (1744) Mor 14395, at 14398.

⁷⁶ (1751) Mor 14399. See also *Brodie v Stuart* (1757) 5 Bro Sup 861.

*v Veitch*⁷⁷ the court highlighted that intention to take possession (an *animus*) alone was insufficient for this exception to operate. In *Leslies v Abercrombie*⁷⁸ the court, with vocal debate on the bench, refused to extend the *McWhirter* rule to include a bond where the sum is not yet due.⁷⁹ Finally, in *Macdowall v Macdowall*,⁸⁰ the Court unanimously decided that possession cannot give an active title beyond the subjects actually possessed.⁸¹ These authorities are why More, in his notes of Stair's *Institutions*, commented that "possession of moveables by the next of kin vests the right with out confirmation."⁸² Likewise Erskine wrote "the next of kin, by the bare possession of the *ipsa corpora* of them, acquires the property, and transmits it to his own next of kin...but, without either the actual possession of the deceased's moveables by the next of kin, or his confirmation, no right is vested in him".⁸³

2.5 Nature of the rights in succession

McWhirter and the other cases illustrate an attempt to move away from the need for confirmation by the next of kin simply taking possession of corporeal moveable property. However, the nature of rights of succession was (and to some extent, is) undertheorised from a property law perspective. There is a question of whether *McWhirter* allowed (i) a succession right to be acquired by possession alone, or (ii) does the next of kin simply obtain ownership of this through possession alone?

On one view, when Erskine wrote that possession alone "acquires the property" without the need for confirmation, one would interpret this to mean that ownership having been obtained by possession alone.⁸⁴ From another viewpoint, only a personal right exigible against the executor has vested in the next of kin given it is said that there is no immediate transfer of ownership to successors in Scots law.⁸⁵ When sources speak of "the right of the next of kin", what exactly is this right that they are speaking of? Ownership, or some lesser right? If it is true, as some sources indicate, that ownership can be obtained by possession founded on a succession right alone, then confirmation would not be required for corporeal moveable property, nor would there be a need for an executor to transfer ownership. This point illustrates a wider problem, in that the manner in which succession rights are discussed in

⁷⁷ (1769) Mor 14401.

⁷⁸ (1776) Mor 14403.

⁷⁹ [1776] Hailes 727.

⁸⁰ (1784) Mor 14404.

⁸¹ (1784) Mor 14404, at 11407.

⁸² J More, *Notes to Stair's Institutions*, Vol II (1832), 257.

⁸³ Erskine, *Inst*, III.9.30. See also Erskine, *Prin*, III.9.18.

⁸⁴ This seems to be the approach of the court in *Macdowall* given the report speaks of an "active title" of the next-of-kin.

⁸⁵ G Gretton, "*Quaedam meditationes Caledoniae*", 115.

older legal sources often do not use terminology which readily fits into the framework of modern property law as we understand it today.

Succession rights are, of course, rights relating to property as they give the entitled party the right to succeed to the deceased's property. However, significant confusion arose as to whether succession rights are to be treated in themselves as ownership. Today, this would include the classification of rights arising from statutory prior rights, legal rights, legacies in a will and the rights to the free estate under the 1964 Act. This section attempts to provide a framework for the classification of these succession rights to assist the subsequent discussion of this thesis on the status of ownership of heritable property after an owner has died. In doing so, it is necessary to begin with the fundamental distinction of rights in Scots private law, that of personal rights and real rights.

2.5.1 Personal and real rights

In Scots law, there is a “clear distinction between personal and real rights comparable to the distinction between personal and real actions in Roman law”.⁸⁶ As Reid described:⁸⁷

Property law, therefore, is concerned with rights in things, otherwise known as real rights. Rights in things are contrasted with rights against persons, or personal rights, which are the province of the law of obligations. The distinction between real rights and personal rights is of the first importance in legal systems based upon Roman law. A real right or right in a thing (*jus in rem* or *jus in re*) is a right held directly in a thing.

The real right of ownership is regarded as the “sovereign or ultimate real right”.⁸⁸ Ownership is unititular, in that only one right of ownership can exist in property at any one time.⁸⁹ Subordinate real rights, such as real rights of lease or security, can be held in property alongside ownership but such rights are strictly limited in recognition.⁹⁰

On the other side of the distinction are personal rights. Personal rights are *jura in personam*, they are not held in property directly but against a person, such as the owner of the property.⁹¹ These rights typically arise in contract or delict, whereby a person has a right to enforce a correlative contractual or delictual obligation against another person. Where personal rights concern property (such as a right under missives of sale, or a right under a disposition) these personal rights can be further categorised. The classification examined here is the difference between a *jus crediti* and a *jus ad rem*.

⁸⁶ W Gordon, “The wrongs and rights of vesting” (1987) 32(6) *JLSS* 281, 219.

⁸⁷ Reid, *The Law of Property*, para 3. See the expanded discussion in the second edition at paras 17-20.

⁸⁸ Erskine, *Inst*, II.1.1.

⁸⁹ *Sharp v Thomson* 1995 SC 455, per Lord President Hope at 469.

⁹⁰ Reid, “*Property (Reissue)*”, paras 21 to 32.

⁹¹ R Paisley, *Rights Ancillary to Servitudes* (2022), para 19-142.

To begin with a *jus ad rem*, as Lord Mackenzie wrote:⁹²

The real right, which belong to a proprietor, or to the holder of a mortgage or pledge, is called a *jus in re*. When there is only a personal right to a thing to be enforced by an action, the legal ownership belonging to another, this personal claim is called a *jus ad rem*. A *jus in re* implies a complete acquisition – a *jus ad rem* is a mere right to acquire a thing. The difference is nearly the same as that between property and obligation. These terms are not Roman, having been borrowed from the Canonists. To the uninitiated this distinction may appear trivial; but it enters deeply into legal discussions, and sometimes helps the solution of difficult problems.

A *jus ad rem* is a right to acquire property.⁹³ It is a personal right and not some form of *sui generis* right or *quasi*-real right of ownership that straddles the distinction between personal rights and real rights.⁹⁴ It remains a personal right, though its exact definition can be troublesome. More often than not, a *jus ad rem* is defined by highlighting its differences to ownership (and vice versa) in older authorities.⁹⁵ Johnston described it thus:⁹⁶

Once a disposition has been delivered to the disponent—and, to use the old terminology, he or she has acquired a *jus ad rem*.

Further, in *Johnston v MacFarlane's Trustees*⁹⁷ Lord Dunpark described it as:⁹⁸

‘A personal right to land’. That is the right of the uninfert proprietor who may make up his title at any time.

In effect, the holder of a *jus ad rem* is the grantee of a conveyance of ownership. This, to use the feudal terminology for land, makes the holder of a *jus ad rem* an “uninfert proprietor”. The term uninfert proprietor is an oxymoron, and the term is reluctantly used here because without being clothed with the real right of ownership, the term ‘proprietor’ is inaccurate.⁹⁹ However, it is still a common phrase in Scottish legal parlance despite the modern term, an “unregistered holder”, being encouraged.¹⁰⁰ Lord Clyde noted this contradiction of the term “uninfert proprietor” but explained “while in terms of a strict legal analysis the holder of an unrecorded disposition still only has a personal right to the lands disposed, he has personally acquired such rights as make it reasonable to use the language of ownership in relation to him even although there has been no alteration to the quality of his right”.¹⁰¹ The unregistered

⁹² J Kirkpatrick (ed), *Lord Mackenzie's Studies in Roman law*, 5th ed (1880), 171–172.

⁹³ Lord Trayner, “*Jus ad rem*”, *Latin phrases and maxims* (1861).

⁹⁴ This matter has been thankfully settled by *Burnett's Trustee v Grainger* [2004] UKHL 8.

⁹⁵ Trayner, “*Jus in re*”, *Latin phrases and maxims*.

⁹⁶ D Johnston, *Prescription and limitation of actions*, 2nd ed (2012), para 3-51.

⁹⁷ 1986 SC 298.

⁹⁸ 1986 SC 298, per Lord Dunpark at 315.

⁹⁹ Reid, *The Law of Property*, 1st edn, para 645.

¹⁰⁰ Reid, “Property (Reissue)”, para 1162.

¹⁰¹ *Sharp v Thomson* 1997 SC (HL) 66, per Lord Clyde at 84.

holder, or uninfert proprietor, is given a personal right to complete title. As Gloag and Irvine observed:¹⁰²

A personal right to lands may be described as the status of one who is in a position to take infertment, but who has not done so. It is the right of a man who has a disposition in his favour which he has not recorded... The delivery of a disposition constitutes a *jus ad rem* and not a *jus in rem* and yet is more than a mere *jus actionis* it would be difficult to define it.

The last sentence in Gloag & Irvine here introduces the third right relating to property for the purposes of this thesis, the *jus crediti* or *jus actionis*. This is the right to demand a conveyance or to raise an action for delivery of property. This right can arise, for example, as a right under the terms of a contract such as missives of sale.¹⁰³ It allows the holder to demand a conveyance, or sue for a conveyance of property. In contrast, one may say that a *jus ad rem* is a “higher class” of personal right to that of a *jus crediti* as the holder of a *jus ad rem* can complete title unilaterally.¹⁰⁴ However, the borderland between *jus crediti* and *jus ad rem* is an area lacking in clear modern analysis and historically the two could be confused with one another. Lord President Hope in *Sharp v Thomson* considered *Edmond v Gordon*¹⁰⁵ as the definitive authority on this issue.¹⁰⁶ In *Edmond*, Lord Cranworth opined that:¹⁰⁷

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 by 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 persons to do something else in order to make the right perfect.** [Bold added]

Broadly these three categories of rights relating to property provide a useful framework for this thesis. Succession rights must fall into one of three categories:

- (i) A personal right to demand delivery of property (*jus crediti*);
- (ii) A personal right to complete title to property by external act (*jus ad rem*); or
- (iii) The right of ownership (*dominium*).

2.4.2 Classifying succession rights

¹⁰² W Gloag & J Irvine, *Law of Rights in Security* (1897), 33.

¹⁰³ *Sharp* (House of Lords), per Lord Jauncey at 70.

¹⁰⁴ *Sharp v Thomson* (Inner House), per Lord Hope at 463.

¹⁰⁵ (1857) 3 Macq 116.

¹⁰⁶ *Sharp v Thomson* 1995 SC 455, per Lord Hope at 463.

¹⁰⁷ (1857) 3 Macq 116, per Lord Cranworth at 122.

The question then becomes how succession rights fall into this framework and which category of right vests in a successor. Attempts have been made to classify succession rights by reference to the law of vesting. For example, the Stair Memorial Encyclopaedia states:¹⁰⁸

In the law of succession, vesting is concerned with the creation in a beneficiary of rights of ownership, or *dominium*, in property which formerly comprised part of the estate of a deceased person. Unless rights of ownership have been created in the beneficiary, the property is not vested him. It would be inaccurate, however, to say that vesting of property in a beneficiary is equivalent to the creation in him of all the rights of ownership in that property...

...On intestacy, and in cases of simple *mortia causa* gift, questions of vesting do not usually pose any difficulty. Provided that the beneficiary survives the donor of the gift, he receives both title to, and the right to demand possession of, the subject of the gift immediately on the donor's death.

The latter paragraph, with its use of "title", implies that intestate succession operates as a transfer of ownership to successors immediately at the previous owner's death. Similarly, Walker wrote:¹⁰⁹

An interest, whether on intestacy or under a will vests when the person entitled thereto acquires full legal right of property in the share of estate or subjects of bequest, so that they become part of his estate, disposable by him *inter vivos* or *mortis cause*, attachable by his creditors and passing on his death to his executor.

Again, the terminology of "full legal right of property" implies ownership arises in a right of succession, whether intestate or testate succession. If that were the case, it would obviate the office of executor in distributing the estate. From a wider property law aspect, it undermines the need for real rights to be transferred by conveyance or title completed by external act if ownership simply passed at death.¹¹⁰ Thus it cannot be the case that succession rights simply create ownership as some older sources suggested.¹¹¹ To follow this theory would be incoherent with the traditional principles for the transfer of ownership by derivative acquisition.

It follows from that conclusion that succession rights must be a personal right. In one sense, this conclusion is simple enough. However, difficulty arises as to whether succession rights are a *jus crediti* or a *jus ad rem*. If they are a *jus crediti*, then successors cannot complete title as they are not in receipt of a conveyance. Instead, they must rely on an executor to

¹⁰⁸ R Howie, "Vesting" in Stair Memorial Encyclopaedia, *Wills and Succession*, Vol 25, (1990), paras 903 and 905.

¹⁰⁹ D Walker, *Principles of Scottish Private Law*, Vol 4, 3rd edn, (1983), 217.

¹¹⁰ Two overarching principles are at play here. The first is the maxim *traditionibus, non nudis pactis, transferuntur rerum dominia* (ownership transfers by conveyance or delivery and not by mere agreement). The second is the publicity principle, in which a grantee must complete an external act to acquire ownership. See further K Reid, "Property (Reissue)", paras 1085-1086.

¹¹¹ For land in this case. On moveables, the position is less clear, *supra* section 2.4.

convey property to them. If succession rights operate to give the successor a *jus ad rem* then the successor can complete title unilaterally without the involvement of an executor.

If it is accepted that an executor is a special form of trustee as now seems to be accepted elsewhere,¹¹² then the approach of classifying the rights held by beneficiaries or successors of an estate in succession law must be similar, if not identical, to that of classifying a beneficiary's right under trust law.¹¹³ This would lead to the conclusion that succession rights are a form of *jus crediti*, though as Lord Justice-Clerk Ross described of a beneficiary's right in a trust in *Johnston*:¹¹⁴

Although the right of a beneficiary is frequently described as a *jus crediti*, it is more than that because in certain circumstances a beneficiary can follow the trust property against third parties. The suggestion that the right is in the nature of a *jus ad rem* does not mean very much... In *Inland Revenue v. Clark's Trs* 1939 SC 11, Lord President Normand there expressed the view that the true position is that **the beneficiary's right is nothing more than a personal right to sue the trustees and to compel them to administer the trust in accordance with the directions which it contains.**

[**Bold added**]

Gretton attempted to provide a framework for how succession rights can be classified.¹¹⁵ Similar to the conclusion reached here, Gretton rejected the notion that ownership of property simply transfers to a legatee or beneficiary to an estate upon death of the deceased:¹¹⁶

Ownership is a real right. What the beneficiary acquires, at the moment of vesting, is a personal right and not a real right. It thus follows, by a simple process of deduction, that what is acquired at vesting is not ownership itself. Rather, it is the right to be made owner (by the appropriate form of conveyance or transfer) by the executor or the trustee.

Gretton explained that the need for a conveyance or delivery from an executor is universal irrespective of the species of property:¹¹⁷

The principle holds good for other sorts of property as well, such as investments or corporeal moveables. Nor does anything turn on whether the case is one of testacy or intestacy. For instance, in intestacy the widow will normally have a claim to the family home under her prior rights, as provided by the Succession (Scotland) Act 1964. This right vests at the moment of death of her intestate husband. But ownership will not pass to her till the executor makes the necessary transfer.

¹¹² G Gretton, "Trusts", 515.

¹¹³ Gretton and Reid in formulating the dual patrimony provide a greater understanding of the beneficiary's rights in a trust relationship. On this, see the summary in Discussion Paper on *Liability of Trustees to Third Parties* (Scot Law Com No 138, 2008), paras 1.3 to 1.11.

¹¹⁴ 1986 SC 298, per Lord Justice Clerk Ross at 307-308.

¹¹⁵ G Gretton, 'What is vesting?' (1986) 31(6) *JLSS* 148.

¹¹⁶ *Ibid*, 148.

¹¹⁷ *Ibid*, 149.

It appears then, using the terminology from the preceding discussion, that Gretton believed that succession rights are broadly akin to a *jus crediti*. Succession rights vest at death but they are only a personal right to demand a conveyance from the executor in order to later obtain ownership of the deceased's property.¹¹⁸

When a conveyance takes place from the executor, for example, the delivery of a disposition, only then do successors hold a *jus ad rem* upon which to complete title. As noted in the above section on confirmation, confirmation is a judicial conveyance. An executor, after confirmation, holds a *jus ad rem* in respect of the deceased's property.¹¹⁹ Accordingly, the executor may perform the relevant external act to complete title to the deceased's estate, such as completion of a Notice of Title in the Land Register. Alternatively, as an unregistered holder, the executor may convey the estate validly to successors.¹²⁰ However, in strict theory, a successor should not be able to validly complete title without the conveyance or delivery from an executor.¹²¹

A series of cases in the 19th century demonstrate how the law seems to recognise the categorisation of rights argued for by Gretton argued and adopted here. Before examining the cases themselves, it is necessary to deal with an old rule in succession law. Historically, confirmation played a part in the vesting of rights of succession in intestacy, particularly the right of successors to receive the intestate dead's part or free estate. This tended to confuse the precise nature of different rights of succession, as family members could serve as executor, alongside obtaining succession rights to the estate as next of kin at confirmation. In contrast, the legal rights of the deceased's issue (legitim) and spouse (the *jus relictæ*) vested at the moment of death.¹²² However, any succession rights to the remaining part of

¹¹⁸ In later years, Gretton notes this system as a *legatum per damnationem*, or a legacy of compulsory effect, whereby an heir or executor is obliged to convey the property to the legatee or beneficiary. This is in contrast to a *legatum per vindicationem*, which is a legacy or other succession right with vindicatory effect with the legatee or beneficiary acquiring ownership immediately without the need for an heir's or executor's involvement. See further Gretton, "Quaedam meditationes Caledoniae", 117, and also the exploration of its Roman roots in L Salomon, "The acquisition of possession in legacies *per vindicationem* in classical Roman law and its influence in the modern civil codes" (2006) 3 *Roman Legal Tradition* 65.

¹¹⁹ There is a complex question of whether an executor or legatee can use the will to deduce title without confirmation. However, space does not permit a full discussion here but see the Professors of Conveyancing, 'Memorial and opinion on the completion of title after the Succession (Scotland) Act 1964', (1965) (6) *JLSS* 153; and the subsequent discussion in *Letters to the Editor*, (1965) *JLSS* 189; and Law Society of Scotland, "The Succession (Scotland) Act 1964" (1966) (3) *JLSS* 84-86;

¹²⁰ Succession (Scotland) Act 1964, s15, and Conveyancing (Scotland) Act 1924 s4A.

¹²¹ This would certainly be the case for heritable property, albeit there is a process for beneficiaries to deduce title by will, noted above at n119. Whether the *McWhirter* rule for moveable property is still valid rule for possession founded on a succession right remains unclear.

¹²² *Yeaman v Yeaman* (1686) Mor 8176. The Married Women's Property (Scotland) Act 1881, s6, introduced the *jus relict* for the husband of a deceased wife, with the statute providing that the *jus relict* was to be subject to the "same rules of law" in relation to the nature of the *jus relictæ*.

the moveable estate, namely the ‘dead’s part’¹²³ (or residue thereof), would not vest in a beneficiary until confirmation was obtained. The result was that the right to half, or a third, of the deceased’s net moveable estate would vest under legal rights at death but rights to the remaining dead’s part required confirmation for any right to vest in a beneficiary.

The injustice of requiring confirmation to vest succession rights to the intestate dead’s part was eventually removed by the Confirmation of Executors (Scotland) Act 1823 on the recommendation of parliamentary commissioners.¹²⁴ After several iterations during Bill stage,¹²⁵ the 1823 Act provides at Section 1:

In all cases of intestate succession, where **any person** or persons who, at the period of the death of the intestate, **being next of kin, shall die before confirmation be expedite, the right of such next of kin shall transmit to his or her representatives**, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next of kin immediately upon the death of such intestate.[**Bold added**]

On first reading of this section, it looks as though the 1823 Act is discussing the entitlement to confirm as executor-dative, and that the *power* to be appointed executor can pass to the next of kin of any entitled person who dies before confirmation is obtained. Whilst this is true, its real purpose (through muddled wording) is to allow rights of succession to the intestate free-estate to vest *ipso jure* on death and thereby to be transmissible to the kin’s own successors.¹²⁶ As Bell said “the language of the statute is not, perhaps, very happily conceived for bringing out the principle which it was intended to sanction”.¹²⁷

The 1823 Act was thus intended to provide that succession rights to an intestate moveable estate vested at death, rather than being dependent upon the grant of confirmation.¹²⁸ However, after the Act’s commencement it was unclear what was the nature of the right that actually “vested”. Several cases in the Court of Session tried to resolve this point. Unfortunately, the cases are rather complex due to multiple deaths relating to the succession of one estate, so more explanation of the facts is needed.

2.5.2 *Robertson v Gilchrist*

In *Robertson v Gilchrist*,¹²⁹ the deceased had held a bond. She left a will leaving her entire moveable property to her two sisters. The first sister was nominated executor, with a

¹²³ Today this is commonly called the ‘free estate’.

¹²⁴ The commissioners did not seem to have a solid understanding of the Scots law of succession, see their muddled summary in *Third Report of the Commissioners of Parliament on the Courts of Justice in Scotland* (1816), 65. The wording of the 1823 Act somewhat reflects the confusion.

¹²⁵ (1823) Bill Nos 215, 293, and 439.

¹²⁶ Wilson & Duncan, *Trusts*, paras 31-04.

¹²⁷ Bell, *Comm*, 5th edn (1826), 142.

¹²⁸ *Supra* at 2.4.1.

¹²⁹ (1828) 6 S 446.

conditional institute for the second sister to act as executor. The first sister, as executor-nominate, took possession of the deceased's moveables, including claiming the interest on the bond. However, she did not obtain confirmation. She then died, leaving a will passing her whole estate to her husband. The second sister was confirmed as executor to the deceased in place of the (now deceased) first sister and raised an action against the first sister's husband for delivery of the bond.

Since the first sister, as executor-nominate, had not confirmed to the estate, there was a question of whether she had validly acquired title to the bond that would allow her to leave it in her will to her husband. The second sister argued that the deceased's legacy of the bond created only a *jus ad rem* in the first sister. Confirmation would have been necessary to allow transmission of the bond by the first sister to her husband as a real right.¹³⁰ The husband argued that a *jus ad rem* is capable of transmission by will, in the same manner that legitim and *jus relictæ* vest without confirmation.¹³¹

The Inner House held that the bond had transmitted to the first sister's husband. In particular, Lord Glenlee held that the first sister had a *jus ad rem* in respect of the bond, which is sufficient for transmission even without confirmation.¹³² Lord Glenlee's opinion on the 1823 Act was that:¹³³

In regard to the [1823 Act], I cannot possibly see a reason why it omitted the case of a general disposition, unless it was held that the property transmitted in that case without confirmation; for there is no reason why intestate succession, where there is no expression of will, should be placed in a more favourable situation than testate.

Lord Alloway agreed with Lord Glenlee, holding that there is no distinction between testate and intestate succession, and that transmission takes place in testate succession without the need for confirmation.¹³⁴ Wilson & Duncan cite this case as authority, following Bell, for the proposition that:¹³⁵

In the case of testate succession, confirmation was not necessary at common law to take moveables out of the *haereditas jacens*.

Wilson & Duncan argue that testate succession provides that the property named in a legacy automatically transmits to the legatee without the need for an executor. In that sense ownership of legated property passes at death.¹³⁶ However, this view is not correct if viewed

¹³⁰ (1828) 6 S 446 at 447.

¹³¹ *Ibid.*, at 447.

¹³² *Ibid.*, per Lord Glenlee at 449.

¹³³ *Ibid.*, at 450.

¹³⁴ *Ibid.*, at 451.

¹³⁵ W Wilson & A Duncan, *Trusts*, para 31-04. See Bell, *Prin.*, s1891.

¹³⁶ Thereby contradicting the view expressed in the Stair Memorial Encyclopaedia, *supra*, n108.

under Gretton's framework. *Robertson* is really concerned with whether a right under a legacy is capable of later being the subject of a legacy made by the holder of that right. It is not ownership that is the focus here but personal rights. A right concerning the bond had vested in the first sister before she died. However, what had vested was not a real right but a personal right. To go further, it is arguable that it was not a *jus ad rem*. It is argued, following Gretton, that the legacy gave the first sister a *jus crediti* to obtain ownership of the bond by way of conveyance from the executor (albeit enforceable against herself as executor).¹³⁷ After her death, it was a *jus crediti* that transmitted to her husband by her own will. The decision remains correct but erroneous terminology in respect of a "*jus ad rem*" is employed. In place of Bell's opinion, *Robertson* is authority that in the case of testate succession, confirmation is not necessary for a *jus crediti* under a will to vest in the named legatee.

2.5.3 *Mann v Thomas*

Following *Roberston*, a similar case of *Mann v Thomas*¹³⁸ attempted to classify succession rights. Here, the next of kin to the deceased had died without obtaining confirmation, but before dying had executed an assignation of the rights to the deceased's moveable estate to her husband. Her husband then proceeded to obtain confirmation to the assigned estate under the 1823 Act, which was objected to.

The First Division held that the assignation was a competent transfer. In itself, this is an uncontroversial decision: the next of kin had held a *jus crediti* for her share of the moveable estate, which she validly assigned to her husband. However, the interpretation of *Mann* alongside the *obiter* remarks in *Robertson* then gave rise to a series of decisions which are irreconcilable with fundamental principles of property law.

2.5.4 *Frith v Buchanan, Hamilton & Co*

Substantial problems began to arise with the interpretation of succession rights in the 19th century, beginning with *Frith v Buchanan, Hamilton & Co*.¹³⁹ Here the deceased died intestate, survived by four siblings entitled to his moveable estate. The estate included funds held by Buchanan, Hamilton, and Co ("the firm"). One sibling of the deceased, a brother, was in financial difficulty with a creditor, Frith. Frith attempted to arrest the deceased's funds that were held by the firm.

¹³⁷ A *jus crediti* as an incorporeal right which is capable of assignation or transmission, W McBryde, *The law of contract in Scotland*, 3rd edn (2007), para 12-30.

¹³⁸ (1830) 8 S 468.

¹³⁹ (1837) 15 S 729.

No confirmation had been obtained by any of the parties at the time of the arrestment. When confirmation was later obtained, the firm paid over the funds to the executors, who passed this to the surviving brother's trustee in sequestration. Frith then sued the firm for passing over the arrested funds to the executor.¹⁴⁰ The focus of the argument came to be about the effect of the operation of the 1823 Act and whether the arrestment was competent. In reference to *Mann*, the firm claimed that no real right of ownership of the moveables was conveyed to the surviving brother by death alone, so the arrestment was incompetent. At first instance, the court found in favour of Frith, with the Lord Ordinary noting:¹⁴¹

The statute [the 1823 Act], as has often been remarked, is not distinctly or accurately expressed... But the question here is, what is the nature of the right which is so transmitted? Is it merely a *jus ad rem*, or does the property vest *pleno jure* in the representative, confirmation being still required in both cases?

The Lord Ordinary found that the 1823 Act vested the next of kin with ownership and noted that confirmation survives only for “fiscal purposes” and to give authority for an executor to sue the debtors of the deceased.¹⁴² The Inner House, with conflicting judgments, agreed with the Lord Ordinary. In particular, Lord Corehouse set out Lord Balgray's opinion:¹⁴³

I have before me the notes of the late Lord Balgray¹⁴⁴ upon this cause, when his Lordship had first considered the reclaiming note: and they are to the import that his Lordship understood **the statute to have the effect of causing moveables to vest *pleno jure*, as in England**, and that consequently an arrestment must be effectual in competition with a posterior confirmation. These were his Lordship's views. ... I think **the object of the statute was to vest a *jus in re*, in the next of kin...**

[**Bold** added]

Lord Corehouse agreed with the Lord Ordinary that a real right vests in the next of kin at the death. All moveable property held by the deceased vests *ipso jure* in the next of kin at death.¹⁴⁵ However, Lord Mackenzie's dissent in *Frith* merits some consideration. Lord Mackenzie takes what one may view as the modern interpretation of the vesting of succession rights:¹⁴⁶

I cannot find any thing in this enactment to imply that where the next of kin is still in life, his creditor may use arrestments of the goods or debts left by the defunct, as being *ipso jure* fully vested in the next of kin by his mere survivance...I am of opinion that the statute **was not meant to vest the real right in the next of kin without confirmation**, but intended that there should be confirmation in order to

¹⁴⁰ *Ibid.*, at 730.

¹⁴¹ (1837) 15 S 729.

¹⁴² *Ibid.*

¹⁴³ (1837) 15 S 729, per Lord Corehouse at 734-735.

¹⁴⁴ Lord Balgray had died before judgment was given.

¹⁴⁵ W Alexander, *The Practice of the Commissary Courts in Scotland* (1859), 45.

¹⁴⁶ (1837) 15 S 729, per Lord Mackenzie at 734.

vest such real right, and, for that purpose, gave certain facilities for expediting confirmation. [**Bold added**]

2.5.5 *Elder v Watson*

The majority's decision in *Frith* was applied in *Elder v Watson*.¹⁴⁷ In this case, two sisters and one brother were successors to their deceased brother. The sisters sued for their share of the estate against the surviving brother, who had intromitted with the estate without confirmation. The sisters both subsequently died intestate, with the brother confirming to their estates too. However, the sisters' estates were then sequestrated. The trustee executed diligence against the brother for the sisters' share of the intromitted estate. The brother objected arguing that the debt had been extinguished by confusion because he had become both creditor and debtor of their share.

The Inner House agreed with the brother and found the trustee's diligence unlawful. In particular, Lord Wood, delivering the judgment of the court commented:¹⁴⁸

[The earlier cases] we think, leave it no longer an open question, whether or not the moveable estate of a deceased party vests in the next of kin *ipso jure*, —a *jus in re* being at once transmitted without confirmation.

In particular, Lord Wood noted that the prior authorities “could only follow from a full *jus in re*, at once passing to the next of kin”¹⁴⁹ and further that the 1823 Act had conferred at death “an absolute *jus in re*, the same as would formerly have been done by confirmation.”¹⁵⁰ In their view, confirmation only remained necessary “as a formal title, to enforce recovery of the estate against unwilling debtors, or others retaining corporal possession of it”.¹⁵¹

These cases illustrate how the common law developed the rule that the next of kin automatically obtained a real right in the moveable property of the deceased. This view was not solely limited to intestacy, as cases such as *Robertson* demonstrate. However, the case of *Bones v Morrison*¹⁵² indicates a change in direction of the law into the understanding of succession rights as argued by Gretton.

2.5.6 *Bones v Morrison*

Martha and Alice Bone were the nieces of Arabella MacLaurin. Arabella had died intestate survived by her sister, the mother of the pursuers. Arabella's husband had predeceased her but had left a will leaving his estate to Arabella. Her nieces later obtained confirmation as Arabella's executors-dative and raised an action for payment of the husband's estate. The

¹⁴⁷ (1859) 21 D 1122.

¹⁴⁸ *Ibid*, per Lord Wood at 1128.

¹⁴⁹ *Ibid*.

¹⁵⁰ *Ibid*, per Lord Wood at 1127.

¹⁵¹ *Ibid*.

¹⁵² (1866) 5 M 240.

testamentary trustees of Arabella's husband objected to their title as they were not the next of kin at the time of Arabella's death. On appeal to the Inner House, Lord Cowan in his judgment noted:¹⁵³

It must be held, under repeated decisions of the Court, that the effect of [the 1823 Act] is to vest in the original next of kin a real right in the moveable estate of the defunct; so that, although confirmation has not been expedite, the estate must be dealt with, on the party's death, as vested and transmitted to her representatives.

Lord Cowan recognised the prior authorities that a real right had transmitted, but then goes on in his judgment to note:¹⁵⁴

Now, it may be true that the right of succession passed to Mrs Bone and her husband, but it is not correct to say that no right remained in *bonis defuncti*. The right still requires to be taken out of her *hereditas jacens*, and in that sense it is in *bonis defuncti*; and to her, in any view, confirmation must be expedite. There is a great difference between the right of succession which transmits without confirmation, and the right in the moveables which the executor obtains when confirmed. There is no *jus in re*, as regards the estate of a deceased, until confirmation. If that be so, there can be no necessity for confirmation at all.

Whilst confusing, what emerges from the latter half of Lord Cowan's judgment is a clarification on rights of succession. A personal right vests in the successors rather than any real right. A successor acquires a personal right to demand a conveyance of the deceased's property, but confirmation is still required, as Lord Cowan noted, for the executor to convey ownership of the property to the next of kin.

If the view in *Robertson*, *Mann*, and *Frith* had continued to shape the law, all ownership of moveable property would at once pass to the next of kin at death without the need for an executor's involvement. The *ratio* as applied in *Frith* and *Mann* seems to have been reinterpreted as the years progressed, as evidenced by the judgment given by Lord Cowan in *Bones*. Later, in 1878, in *Webster v Shiress*¹⁵⁵ the Lord Justice-Clerk described in *obiter*:¹⁵⁶

It was not without some demur and difficulty that in the cases of *Mann*... and *Frith* ... the Court arrived at the conclusion that the intention of the statute, although not expressed in its words, was to vest the beneficial interest by survivance of the intestate, and they sustained the right of an assignee and an arresting creditor during the lifetime of the unconfirmed next of kin. Thus, the whole question in this branch of the inquiry is whether the beneficial interest in the succession vested.

¹⁵³ (1866) 5 M 240, per Lord Cowan at 245.

¹⁵⁴ *Ibid.*

¹⁵⁵ (1878) 6 R 102.

¹⁵⁶ (1878) 6 R 102, per Lord Justice-Clerk at 105.

The term ‘beneficial interest’ is at odds with a modern understanding of succession rights, but in effect his lordship is expressing that a form of personal right had vested in the next of kin (one which can be arrested, left in a legacy, or be the subject of an assignation). The 1964 Act did not displace the established principle that rights of succession confer a personal right alone. However, the law developed in haphazard way due to confusion about the rights held by successors and the nature of the right vesting in a successor on death from a property law perspective. As Paisley noted “the study of the law of succession has for too long been divorced from the general law of property”.¹⁵⁷

Although it now seems accepted that a *jus crediti* vests at death under the 1964 Act, remnants of the line of authority first set out in *Robertson* may still be found in two areas. First, special legacies that contain “words of conveyance” may engage the Confirmation Act 1690.¹⁵⁸ In those cases, the legacy itself effects a special conveyance on death, providing the legatee with a *jus ad rem* upon which to complete title without the need for confirmation.¹⁵⁹ The second concerns the rule in *McWhirter*, which suggests that the next of kin acquire ownership of corporeal moveables through possession alone, without the need for confirmation.¹⁶⁰ If this remains good law, could it be said that the taking of possession is itself the conveyance (in the form of delivery) which converts the next of kin’s *jus crediti* into a real right? This issue requires further examination.

2.6 Conclusion

This chapter has sought to outline the basic principles and mechanism for the transfer of ownership after death. It has been argued that Gretton’s taxonomy is correct in its classification of succession rights. A successor holds only a *jus crediti* after death, regardless of whether the succession is testate or intestate.¹⁶¹ Whether this point applies to both heritable and moveable property is a point of debate. In any event, it is argued that for heritable property, beneficiaries must await an executor against whom to exercise this right to a conveyance of the property. However, an executor is not able to fulfil this right immediately on appointment. Instead, the executor must obtain confirmation. As noted, under the 1964 Act confirmation is a judicial conveyance of the deceased’s estate to the executor.¹⁶²

¹⁵⁷ R Paisley, “Forfeiture clauses and events in Scots law” chapter in K Reid et al (eds), *Exploring the Law of Succession* (2007), 115.

¹⁵⁸ *Supra*, 2.4.

¹⁵⁹ *Supra*, 2.4.

¹⁶⁰ *Supra*, 2.4.

¹⁶¹ G Gretton, ‘What is vesting?’, 481.

¹⁶² 1964 Act, s14. See K Reid, “Property (Reissue)”, para 1211.

On confirmation, the executor is vested with a *jus ad rem* in the deceased's heritable property. Only then may the executor either complete title in their own name, or else validly convey the property to successors as an unregistered holder. Without an executor, there is no person against whom a beneficiary's *jus crediti* can be exercised, and therefore no way in which the successor can acquire a real right of ownership in the heritable property of the deceased.¹⁶³

This system of transfer also derives from the fact that Scots law places an emphasis on the requirement for a conveyance and thereafter an external act to take place for ownership to be transferred under general property law. For land, this is delivery of a disposition and registration of same in the Land Register of Scotland.¹⁶⁴

These principles, deriving from both succession law and general property law, provide a framework that requires an executor, and confirmation, to validly transfer ownership of the deceased's property in most cases. It is the reason why Scotland largely could be said to have an indirect system of transfer for succession, in which an executor is required to effect the transfer of ownership from the dead to the living.¹⁶⁵ Yet, if obtaining ownership of the deceased's property requires an executor to obtain confirmation, a problem appears to arise. If there is no confirmation, or even no executor appointed, what is the status of ownership of the property that had been owned by the deceased? In the context of moveable property, Lord Cowan in *Bones* alluded to this fact:¹⁶⁶

The right still requires to be taken out of her *hereditas jacens*, and in that sense it is in *bonis defuncti*; and to her, in any view, confirmation must be expedite.

The first Latin phrase, the *hereditas jacens*, is a curious term – it means a dormant estate. In these cases, the estate of the deceased is 'dormant'. Lord Cowan refers to the property as *in bonis defuncti* ("within the goods of the deceased"). Consequently, the status of ownership during this dormancy seems "indeterminate".¹⁶⁷ One must necessarily ask whether this *haereditas jacens* is a period where property is ownerless?

¹⁶³ As discussed above, for corporeal moveable property, the *McWhirter* rule may still hold good to allow successors to utilise their succession right and take possession alone.

¹⁶⁴ Land Registration etc (Scotland) Act 2012, s50. See also G Gretton, "The integrity of property law and of the property registers" 2001 *SLT (News)* 135, 136.

¹⁶⁵ G Gretton, "*Quaedam meditationes Caledoniae*", 114.

¹⁶⁶ (1866) 5 M. 240, per Lord Cowan at 245.

¹⁶⁷ S Macdonald-Mulvihill, "Where there's a will, there's not always a way" (2024) 28(3) *ELR* 428 -433, 433.

Chapter 3: The *haereditas jacens*

3.1 Introduction

It has been argued in the previous chapter that, owing to the need for an executor to distribute the deceased's property, that there is a period between death and confirmation where ownership of the deceased's former property is uncertain. In practice, this may not be an issue, but difficult questions arise where an executor fails to confirm to the estate, or does so only belatedly. In this intervening period between death and confirmation, the rights of third parties such as creditors of the deceased and successors seem somewhat insecure, and the necessary question arises: who owns the deceased's assets during this gap?

In Scots law, until such time as confirmation is granted, the deceased's estate, or patrimony, is said to be a *haereditas jacens*. The term *jacens* derives from the Latin *jacere*, a sleeping or lying estate.¹ In this thesis, the term *haereditas jacens* refers to an estate to which no executor has (yet) confirmed. In other words, there is a 'dormant estate' from the perspective of its ownership. The *haereditas jacens* is one of the great conundrums of Scots property and succession law. The question of the person(s) to whom ownership is transferred upon the death of the previous owner is, by and large, unanswered.

As has been demonstrated,² succession to property does not operate in the same way as succession to the Crown on the death of a sovereign: one cannot declare, '*the proprietrix is dead, long live the proprietor!*' There is no instantaneous transfer of title onto successors. After death, the proprietorship section of a property title in the Land Register of Scotland³ shows the property to be owned by a dead proprietor. However, the register is inaccurate as the person no longer exists.⁴ Thus, there appears to be a period of ownerless property, in that no living person owns the land. Meston described the *haereditas jacens* as "a general problem of Scots law".⁵ The issues and complexity of ownership of property during this period do seem to arise often, much to the frustration of practitioners.⁶ Despite this, there is little substantive treatment of the issue in both primary and secondary sources in modern times.

¹ *Barachander Farm v The Scottish Ministers* [2008] CSIH 15, per Lord President Gill at para 44.

² See Ch 2.

³ For purposes of this thesis, it is assumed that the General Register of Sasines is fully closed and all land is registered in the Land Register of Scotland. That is, of course, a fiction but it is worthwhile to focus discussions on registered titles alone wherever possible.

⁴ That is provided one accepts that death terminates legal personality, see below at 3.2.4 and 3.2.5.

⁵ M Meston, *Succession (Scotland) Act 1964*, 5th edn (2002), 130.

⁶ Law Society of Scotland, *Submission to the Scottish Law Commission's eleventh programme of law reform consultation* (29 July 2022), s5.

The acceptance within Scots law of the existence of a period of a *haereditas jacens* appears to conflict with the law of *bona vacantia*. The logical application of the *quod nullius* maxim would appear to answer the question of who owns an estate before an executor is confirmed - in other words, the Crown. However, this does not seem to be accepted as the legal outcome. This was a point raised by Gretton:⁷

If Luke owns land and dies, if his right of ownership does not at once pass to someone else, is the land now ownerless? And if it is ownerless, does it not belong to the state? If not, why not?

This chapter will explore the various theories that have been put forward in academic literature over the years to explain the problem of the ‘gap’ between death and confirmation and the *haereditas jacens* in Scots law. As will be shown, there is no single accepted theory as to the status of ownership of property. It may be the case that the property is simply ownerless. To determine that point, or whether another theory is correct, the remaining chapters in Part 2 of this thesis will examine the theories to determine whether these theories are supported within the few primary sources that do exist in Scots law.

3.2 The literature

As an area largely under-researched, it is useful to recount what discussion does exist. The following is an account of the various theories put forward over recent years. These will be outline in a chronological manner. `

3.2.1 Gretton

In 1986, Gretton addressed the issue of vesting in the law of trusts and succession.⁸ As noted earlier,⁹ Gretton examined the nature of succession rights. Gretton then raised two unsolved issues:

- (1) What is the status of the beneficiaries’ rights between death and confirmation, when there is a *haereditas jacens*?; and
- (2) What is the status of the executor after confirmation, but before completion of title?

Gretton offered no conclusive view on these issues. However, his questions sparked a debate in the academic commentary on the concept of vesting in Scots law, in which the nature of the *haereditas jacens* was explored. The key contributions to that debate are summarised below.

⁷ Gretton, “*Quaedam meditationes Caledoniae*”, 115.

⁸ Gretton, “What is vesting?”.

⁹ *Supra* at 2.5.1.

3.2.2 Gordon

Both Gordon¹⁰ and Maher,¹¹ offered responses to Gretton. In respect of Gretton's question of the status of beneficiaries' rights between death and confirmation, Gordon offered two potential answers. On one approach, the beneficiary's right is against the executor of the deceased, who is still not identified or confirmed. The other approach is that the right is actually against the estate itself. Thus, until confirmation, the right is only enforceable against the *haereditas jacens*, which Gordon asserted in Roman law had legal personality:¹²

The answer to the first conundrum appears to be that the beneficiary's right against the executor of the deceased who has still to be confirmed is that the beneficiary's right is against the 'the executor of the deceased' who in these circumstances is a person still to be identified. In a sense the beneficiary's right is against the deceased and it is in fact against the executor only because the deceased is no longer available to be sued and the executor represents him once appointed. One might also say that the right lies against the personified estate of the deceased, using a concept similar to the *hereditas jacens* of Roman law.

With the second question, namely the status of a confirmed executor's right before completion of title, Gordon offered the view that the executor has a personal title, i.e.: a relationship to the thing, but not ownership. The executor may have a real right in the sense of a right in the thing, but it is only on completion of title that he obtains the real right of ownership itself.¹³

3.2.3 Styles

Styles saw another approach,¹⁴ noting how this important area of law is underdeveloped and academics have used "sloppy terminology".¹⁵ In respect of Gretton's conundrums, Styles termed the *haereditas jacens* as an "executorial interregnum"¹⁶ and highlighted that there has been no institutional authority on the issue. He offered a tentative analysis to the effect that the temporary owner of property formerly owned by the deceased is the Crown. The Crown holds the estate as a trustee, acting in a conservation of title role.¹⁷ Styles saw the transfer being threefold: (i) upon death, the property vests in the Crown; (ii) the Crown, through the grant of confirmation to the executor, confers a personal right to the *haereditas*; and (iii) the Crown (through the Keeper of the Registers of Scotland) conveys heritable title to the executor on the registration of title. Applying the 'Crown theory', Styles argued that the

¹⁰ W Gordon, "The wrongs and rights of vesting".

¹¹ G Maher, 'The rights and wrongs of vesting' (1986) 31(10) *JLSS* 396.

¹² W Gordon, 'The wrongs and rights of vesting', 219.

¹³ *Ibid*, 219.

¹⁴ It should be noted for completeness, that Patrick provided a response too. See H Patrick, "What is a real right in Scots law?" (1988) 33(3) *JLSS* 98.

¹⁵ S Styles, "Vesting and the law of property" (1989) 34(9) *JLSS* 338.

¹⁶ *Ibid*, 339.

¹⁷ *Ibid*, 340.

Crown still holds the real right of property after an executor is confirmed but before they complete title.¹⁸ The Crown need not complete title to make its right real because of its unique role as the creator and upholder of all property rights. However, the Crown is still under a duty to grant completion of title to the executor.

3.2.4 Gretton's subsequent contributions

Gretton returned to the issue of the *haereditas jacens* at different points. When devising the dual patrimony theory,¹⁹ the issues of patrimony and personality were considered:²⁰

One approach which has occasionally been mooted is that a trust should be regarded as a distinct juristic person... patrimony has historically shown a tendency to develop into personality. The *haereditas jacens* of Roman law began as patrimony and ended up something like an autonomous person. One sees the same development in the German *Zweckvermögen*. Indeed, it is arguable that the concept of juristic personality and the concept of autonomous patrimony are essentially identical. That is something which needs examination.

Later, Gretton addressed the issue further.²¹ He recognised that few modern systems allow the *haereditas jacens*.²² Gretton offered the view that:²³

Scots law must accept some sort of a *hereditas jacens* following the death. There exists virtually no discussion of the issue. My personal theory is that death does not end personality. It ends active capacity but not passive capacity.

The theory here is that a person may die as a matter of fact, but their legal personality continues as a matter of law (termed in this thesis as the Living Dead theory). The factually dead are not legally dead as they continue to exist as a matter of law. This theory is also one which Paisley and Brown (with some distinctions) argue.

3.2.5 Paisley

Paisley's theory developed along similar lines to that of Gretton.²⁴ In a lecture on the subject,²⁵ Paisley argued:²⁶

Albeit death does sometimes have the effect of terminating certain rights, there is no clear authority in Scots or South African law as to whether death itself effects a

¹⁸ *Ibid*, 340.

¹⁹ This is a theory developed by Gretton and Reid, separately, that a trustee enjoys two patrimonies, their own private patrimony, and the patrimony of the trust in which they serve as trustee. On the theory, see the summary in Discussion Paper on *Liability of Trustees to Third Parties* (SLC DP No 138, 2008), paras 1.3 to 1.11.

²⁰ G Gretton, "Trust and patrimony", 191.

²¹ G Gretton, "*Quaedam meditationes Caledoniae*".

²² *Ibid*, 115.

²³ G Gretton, "The Succession/Property Borderland".

²⁴ R Paisley, "Property deprivation of an absentee in emulation of the laws of succession: The laws of Scotland and South Africa compared" chapter in E Reid & D Visser (eds), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (2013), 106.

²⁵ No official transcript of the speech exists so transcription errors in terms of grammar and paragraph breaks are this writer's own error.

²⁶ R Paisley, "The effect of death in the context of the law of succession", speech, 1 March 2013, Queen's University Belfast.

general deprivation of the property rights of the [deceased]. In both legal systems it seems plausible to argue that it does not because there is a strong Civilian tradition, shared by both Scotland and South Africa, upon which to base the proposition that the personality of the deceased subsists after death (at least until his property is distributed): the property remains vested in the [deceased] albeit he is represented by the heir or executor as the case may be. At the heart of the law of succession, centred as it is on the fact of death, it is ironic that there is this legal fiction of the continued legal personality of a deceased. [Brackets added]

Paisley explained further:²⁷

The fiction of continued legal personality appears to the accepted approach of Scots law. In that the personality of the *de cuius*, that's the person whose estate is under consideration, the *de cuius*, continues after death. At least, that is, until the estate of the *de cuius* is distributed, his personality continues. Put it another way, Scots law operates as if the deceased is not dead and extends the endurance of his personality after death. At the very heart of Scots law of succession is the pretence that the deceased is not dead. It's just like the wake for the deceased in rural Ulster, where a drink is poured for the deceased and a seat at the table is set... The continuance of personality after death appears initially somewhat strange. However, it is not at all surprising. It is in some measure a mirror image of the position of the unborn child, who has legal personality to some extent and for some purposes, before being born.

[*Italics* and grammar added in transcription]

What originates from Paisley's and Gretton's theories is that a deceased is in an incapacitated state following death. There is no transactional, or active, capacity but a passive capacity to hold rights that remains with the deceased.²⁸ This becomes an uncomfortable legal fiction, in that the property registers are cluttered with "legal ghosts", which can only exercise active transactional capacity with the assistance of an executor.²⁹ As Paisley pointed out:³⁰

In such a case, the *de cuius* remains like a disabled person having no representative akin to a juristic body like an incorporated company without officers. No director. No secretaries. A company without directors or secretaries is utterly disabled. It cannot act and so too is the dead person. One further important consequence of this continued personality is that the property of the *de cuius* does not become ownerless on death. The beneficiaries just can't walk in and grab it because it is unowned. A dead person's property continues to belong to the dead person...

What's the active capacity of a deceased represented by an executor? When represented by an executor, the deceased retains his passive capacity and gains active capacity. Active capacity entitles the deceased represented by the executor not only to acquire and hold rights but to participate more fully in the acquisition, grant, assertion, and transfer of rights.

²⁷ R Paisley, "The effect of death in the context of the law of succession", speech.

²⁸ This is terminology borrowed from N MacCormick, "General legal concepts" in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001), Ch 5. See further analysis at 4.3.

²⁹ Gretton, "The Succession/Property Borderland".

³⁰ R Paisley, "The effect of death in the context of the law of succession", speech.

3.2.6 Brown

Brown has also contributed to the discussion but draws a distinction from Paisley and Gretton.³¹ Both Gretton and Paisley advocated the notion that the dead continue to exist. However, Brown appeared to suggest that the *haereditas jacens* is instead the surviving remnant of the deceased (their universal successor), which has legal personality. Perhaps an understandable comparison is that Brown's *haereditas jacens* is the "legal ghost" of the deceased, as distinct from (Gretton's & Paisley's view) that the deceased is still alive. However, what both theories agree on is that: (i) there remains an owner during the gap between death and confirmation; and (ii) either the deceased or the *haereditas jacens* lacks transactional (active) capacity.

3.2.7 Reid

Latterly Reid has engaged in the theories about the *haereditas jacens*.³² Reid suggested that the *haereditas jacens* is treated as if it did not exist following the grant of confirmation, given confirmation is retroactive to the date of death.³³ This is similar to an earlier argument by Bartos and Meston.³⁴ Reid suggested that: (i) during the *haereditas jacens*, the estate "is feigned to be still in the person of the deceased"; and (ii) the executor is treated, following confirmation, as if they have owned all property from the date of death.³⁵

3.3 The competing theories of ownership after death

The discussion above attempts to encapsulate the various approaches put forward in recent years. From these contributions, the following theories to explain the period of the *haereditas jacens* can be identified:

1. The deceased continues to have personality following death;
2. The estate, following Roman law, operates a self-constituted juristic person;
3. The executor is treated as if they are already confirmed;
4. The Crown acts as temporary custodian of any property owned by the deceased in the period before confirmation; or
5. The deceased's property is simply ownerless.

The theory offered by Styles, namely that the Crown temporarily owns the former property of the deceased, would be the most coherent theory in Scots law to explain the *haereditas jacens*. When there is ambiguity as to the ownership of any property it is often suggested

³¹ See J Brown, "On partnerships, promises and succession" 2023 *JR* 121.

³² K Reid, "Administration of estates in Scotland", chapter in K Reid et al, *Comparative Succession Law, Vol 4: Administration of Estates* (2025), 444-445.

³³ *Ibid*, 445.

³⁴ D Bartos (ed), *Bartos and Meston on the Succession (Scotland) Act 1964* 6th edn (2015), para S14-23.

³⁵ Reid, "Administration of estates in Scotland", 445.

that the Crown must be the owner, owing to the maxim *quod nullius est fit domini regis* discussed at the outset to this thesis. As the Scottish Law Commission noted “property for which no other owner can be ascertained belongs to the Crown.”³⁶ This is a point Gretton had raised:³⁷

If Luke owns land and dies, if his right of ownership does not at once pass to someone else, is the land now ownerless? And if it is ownerless, does it not belong to the state? If not, why not?

In respect of Gretton’s second question, the answer in Scots law is perhaps the fatal blow to Styles’s theory. Generally, it seems to be the widespread consensus in Scotland that the Crown is not the owner of property in a *haereditas jacens*. From the research undertaken for this thesis, there appear to be no primary or secondary sources (other than Styles) advocating that the Crown holds ownership temporarily pending the grant of confirmation. It is a theory which falls to be dismissed from any further consideration at the outset. However, if the Crown is not the owner of the deceased’s property during the *haereditas jacens*, then who is? To answer this question, this thesis now moves to consider the other theories put forward. It begins with the most common theory, that the deceased continues to have legal personality, and thus continues to be the owner of their property after death.

³⁶ Scottish Law Commission, *Report on land registration* (SLC Report No 222, Vol 1, 2020), para 33.54.

³⁷ G Gretton, “*Quaedam meditationes Caledoniae*”, 115.

Chapter 4: The Living Dead theory

4.1 Introduction

The previous chapter considered the problem of the *haereditas jacens* in Scots law and considered whether the *haereditas jacens* is a period of ownerless property in Scots law. To determine that point, it is necessary to evaluate the various theories put forward to explain the *haereditas jacens*. This chapter begins that evaluation with an examination of the most popular theory, namely that the deceased continues to exist following natural death. This theory, which posits that the personality of the deceased continues after death, is termed in this thesis as the ‘Living Dead theory’. Both Paisley and Gretton have offered the view that the Living Dead theory may explain the *haereditas jacens* in Scots law.¹ However, it will be argued in this chapter that this theory is not supported by substantive succession law.

4.2 The Living Dead theory

The Living Dead theory posits that the deceased continues to have legal personality after death. According to this theory, at death, the deceased loses their ability to perform juridical acts but retains personhood. This is said to be analogous to an adult losing capacity due to mental impairment, or the position of a child until they reach the age of majority. Property accordingly continues to be owned by the deceased during the *haereditas jacens*. If this theory is correct, then there is no ownerless period after death as the deceased remains the owner. In Paisley’s version of the theory,² a confirmed executor is placed in the position of performing juridical acts on behalf of the deceased in the same way that a parent, guardian or attorney acts as a representative for their respective ward. Thus, when an estate is distributed by an executor, the executor acts as a representative ‘agent’ of the deceased rather than as an independent trustee to whom the property has been conveyed. Some evidence can be found in sources for the Living Dead theory as a whole. In *Smith’s Trustees v Grant*,³ Lord Curriehill observed:⁴

On the death of a creditor, the debt owing to him is left with a debtor, but without a creditor,—i.e., without any person who can perform the active functions of a creditor; and the debt remains in that position until taken *ex bonis defuncti* [from the goods or property of the deceased], either by a confirmation, or by some of those proceedings which are equivalent to a confirmation.

¹ To some extent, Brown, too, see 3.2.6.

² See 3.2.5.

³ (1862) 24 D 1142.

⁴ (1862) 24 D 1142, per Lord Curriehill at 1166.

The phrase *in bonis defuncti* (the goods of the deceased) can be found throughout historic cases in succession law.⁵ It will be recalled in Chapter 2 that Lord Cowan in *Bones* employs the same term to describe the need for confirmation for the executor to obtain ownership.⁶ Bankton also wrote:⁷

We call the Inheritance before the heir's entry, *haereditas jacens*, viz., as lying over untaken up by the heir, till which it is feigned to be still in the person of the deceased.

In modern times, it is common to speak of an estate as the “deceased’s property”. Taken literally, such phraseology may imply that the property of the deceased is still owned by the deceased, as Bankton outlined.

However, these expressions may simply be a useful turn of phrase rather than setting out a legal principle applicable during the *haereditas jacens*. Such phraseology continues to be used even after an executor is confirmed to the estate. It is commonplace to speak of an executor “distributing the deceased’s property”. On a literal view, one could infer from the language used that the executor is acting on behalf of an extant person, the deceased, and their (continuing) ownership of property. On another view, it is figurative expression alone.

Terminology aside, the more fundamental issue with the Living Dead theory is that it challenges a basic and common presumption that a natural person’s legal personality ceases at death.⁸ Leaving aside whether ownership is held by the deceased after death, it is necessary to examine whether there is continued personhood after death.

4.3 Personhood of the dead

It is not unusual that personhood can exist in an entity without a link to a living physical being. Corporate bodies like companies or local authorities can exist without a physical *corpus*. However, to continue the legal personality of a natural person beyond death conflicts with the principle of finality - in other words, that there is a definite and fixed end to a person’s legal existence. As MacCormick noted:⁹

Legal rules and principles must exist to make some provision concerning the commencement of a person of any given type, concerning the duration and identity through time of any and every such person, and as to the final termination of the person, whether by natural or civil death, voluntary or involuntary liquidation, winding up or whatever.

⁵ The writer identifies at least 102 cases mentioning the term. The last Inner House decision to use the term appears to be *Waddell’s Judicial Factor v Waddell* 1924 SC 877, per Lord Sands at 671.

⁶ See above at 2.6.

⁷ Bankton, *Inst*, IV.45.163.

⁸ A Fell, “The rights of the dead”, chapter in K Falconer et al, *Life and Death in Private Law* (2023), 105.

⁹ MacCormick, “General legal concepts”, para 40.

It has been noted in the introduction to this thesis that Scots law suffers from an absence of overriding principles and doctrine concerning the law of persons.¹⁰ Walker had attempted a definition of personality in Scots law:¹¹

Legal personality is the quality, attributed to legal rules, of being a legal person, an entity to which **legal rights can attach** and on **which legal duties may be incumbent**. A legal person is a right and duty bearing unit for legal purposes, having *persona standi in judicio*,¹² and only a legal person has rights and duties under the legal system. **[Bold]**

There is no substantial treatment on the Scots law of persons in contemporary primary sources. However, MacCormick provided a theory that has gone on to widely influence conceptions of personhood in Scots law.¹³ In doing so, he wrote:¹⁴

Law regulates conduct, hence it has to have a concept of the person as one whose conduct is regulated... Fundamental grounds for recognising the existence of a person are capability for rational and intentional action and capability to have interests and to suffer harm.

Thus, two features of personhood are extracted from this statement. There is passive capacity (capability to have interests and suffer harm) and active capacity (capability to make rational and intentional actions with juridical effect). As a sub-category of passive capacity, MacCormick identified a “passive transactional capacity” that is found in private law:¹⁵

This is the capacity to be acted upon with legal effect through some form of legal transaction or act in the law, whether the effect be beneficial or detrimental. Those who doubt its significance may wish to reflect on the fact that a gift of property on trust for the benefit of a child is valid, whereas one for the benefit of a pet dog is not.

In respect of active capacity, MacCormick sets out that this is “some standing feature or feature of persons in virtue of which they are treated in law as able to act... or to transact and to have one's transactions of various sorts considered as valid”.¹⁶ Thus, under MacCormick's theory, there are two forms of capacity which taken together can be “fundamental grounds for recognising the existence of a person”.

MacCormick's theory has proved influential. For example, the Scottish Law Commission spoke of capacity in such a way:¹⁷

¹⁰ See Introduction, “*Haereditas jacens*”.

¹¹ D Walker, *Principles of Scottish private law*, Vol 1, 4th edn, (1988), Book III, 205.

¹² Personhood and standing in court.

¹³ MacCormick, “General legal concepts”, Chapter 5.

¹⁴ *Ibid*, para 35.

¹⁵ *Ibid*, para 49.

¹⁶ *Ibid*, para 53.

¹⁷ Consultative Memorandum on *Legal Capacity and Responsibility of Minors and Pupils* (SLC CM No 65, 1985), para 1.3.

At the outset, it is necessary to distinguish between what may be called “active” and “passive” capacity, that is, between a capacity to perform civil acts having legal effect and a capacity simply to hold rights.

Similarly, Gretton and Steven noted that:¹⁸

Everyone has rights capacity– the capacity to hold rights, including real rights. Thus, a baby could own land. But not all human beings have transactional capacity, such as the capacity to transfer or acquire ownership.

Whilst both active and passive capacity are viewed as constitutive factors for personhood, the above quote shows that it is possible to have passive capacity whilst, at the same time, not enjoy active capacity.¹⁹ This occurs with adults with incapacity or children below the age of legal capacity, two categories of person who are unable to validly carry out juridical acts. However, incapacitated adults or young children do not cease to be a person under the law. The reason for this, as MacCormick recognised, is that passive capacity alone could arguably form the sole basis for personhood:²⁰

We should note that passive capacity is fully conceivable as inhering in some being or entity wholly lacking in any active capacity; and that possession in some measure of some range of passive capacity is sufficient to existence as a legal person.

This point will be returned to in subsequent sections. However, it is proposed that to assess the extent to which the substantive law supports the Living Dead theory, consideration must be given to whether, in the primary sources, the dead are accorded both active and passive capacity after the end of their living being. Evidence of recognition of such capacity in the primary sources would support the notion that the deceased continues to have personhood as some commentators suggests. The sections which follow will offer an analysis of the primary sources in relation to both active and passive capacity. It may be useful to note from the outset the conclusion ultimately reached, which is that the primary sources reject the view that the dead continues to be a person in law.

4.4 Active capacity of the dead

This section examines whether the deceased enjoy active capacity after death. It is perhaps patently obvious that the dead cannot perform a juridical act such to demonstrate that they are independently capable of exercising active capacity. Instead, proponents of the Living Dead theory suggest that an executor exercises the deceased’s active capacity on behalf of the deceased. As Paisley argued:²¹

¹⁸ Gretton & Steven, *Property*, para 4.7.

¹⁹ MacCormick, “General legal concepts”, para 48.

²⁰ *Ibid*, para 50.

²¹ Paisley, “Property deprivation of an absentee in emulation of the laws of succession”, 106.

There is a strong Civilian tradition, shared by both Scotland and South Africa, upon which to base the proposition that the personality of the deceased subsists after death (at least until his property is distributed): the property remains vested in the [deceased] albeit he is represented by the heir or executor as the case may be.

Paisley's argument is that the executor represents the deceased, thereby exercising their active capacity. Paisley appears to utilise the maxim that an executor is *eadem persona cum defuncto* (the same person as the deceased)²² as illustrative of the exercise of active capacity of the deceased:²³

After the death of the *de cuius*, the executor represents the *de cuius*. Now that word is important, represents the *de cuius* in Scots law. Represents the deceased and by virtue of a legal fiction, albeit only partially, and not in full measure, is regarded as this phrase, *eadem persona cum defuncto*. In other words, the same person as the deceased. That is to say the executor is regarded as *being* the deceased... The legal position occupied by the *de cuius* is kept unaltered as much as possible by setting the executor in his place.

In other words, as the executor "stands simply in the deceased's shoes" ²⁴ in questions involving third parties to the estate, this is demonstrative of the executor continuing the deceased's personality. Historically, this point could be expressed by the Latin phrase *sustinet personam defuncti*. In *Globe Insurance v Scott's Trustees*, Lord Fullerton observed:²⁵

It is true that the confirmed executor is, in one sense, an officer, bound to administer the estate for the benefit of all concerned; and his liability cannot exceed the amount of the estate. But to that extent, *sustinet personam defuncti* [he sustains the personality of the deceased], he is the representative of the defunct, against whom actions and diligence operate as they would have done against the defunct when alive. [Translation added]

The phrase *sustinet personam defuncti* is similar to that of *eadem persona cum defuncto*, and may give credence to the notion that an executor is continuing the deceased's legal personality, exercising their active capacity thereby. However, it is argued that such phraseology cannot be viewed in a manner as to sustain the legal personality of the deceased as the proponents of the Living Dead theory suggest. For reasons to be outlined, construing the role of executor as akin to a parent or guardian appears to be misguided. To illustrate this point, the *eadem persona* maxim requires further consideration before moving on to consider how rights and obligations transmit to the executor via confirmation.

²² *Macdonald, Fraser & Co Ltd v Cairns's Exrx* 1932 SC 699 per Lord President Clyde at 704.

²³ R Paisley, "The effect of death in the context of the law of succession", speech.

²⁴ *Mitchell v Mackersy* (1905) 8 F 198, per Lord Kyllachy at 199-200.

²⁵ (1849) 11 D 618, per Lord Fullerton at 638.

4.4.1 *Eadem persona cum defuncto*

It is suggested that the reliance on the role of executor as *eadem persona* does not assist with demonstrating the continued personality of an owner after their death. The *eadem persona* maxim derives from Roman law,²⁶ wherein the *haeres* or Roman heir was considered to be the universal successor of the deceased. In effect, “the legal personality of the [deceased] is merged in that of the [heir]”.²⁷ In Roman law, there was no concept of separate or dual patrimonies of the heir or executor, in the way that Scots law now conceives the patrimonies of trustees and executors. Rather the personalities, and *universitas* or patrimonies, of the deceased and heir in Roman law merged.²⁸

As the early law regarding executors developed in Scotland, Scots law adopted Roman concepts, with the idea of the heir as *eadem persona cum defuncto* being one of them.²⁹ In one of the earliest decisions found for this thesis, in *Pringle v Pringle*³⁰ the report notes that the Court of Session found that:³¹

...quoad creditors of the defunct, both [the heir and the executor] are considered as but *eadem persona cum defuncto*...

This appears to be one of the earliest cases³² that attributes the maxim to an executor. The maxim is, of course, a legal fiction, as was explored in *obiter* by Lord Mackenzie in *Kerr v Martin*.³³

“Fiction of law,” says Stair...“is no presumption; for thereby the lawgiver makes that which he knows not to be true, to be esteemed and held as if it were true: so the heir is *eadem persona cum defuncto* .”

Now, that very fiction, it may be observed, is taken with much equitable exception. For instance, a man is put in jail for his ancestor's debt, because he is *eadem persona*; but he is not, as *eadem persona*, hanged for his ancestor's act of murder or treason. That would be carrying the joke too far; for fiction is little better, after all, than a play of fancy.

The reason for this fiction appears to be, as Erskine described (in the context of heirs), as consequence of the benefit of the office:³⁴

An heir is, in the judgment of the law, *eadem persona cum defuncto*; and therefore, after he has acknowledged the succession by service, he represents the deceased, not

²⁶ Wilson & Duncan, *Trusts*, para 31-03.

²⁷ B Nicholas, *An introduction to Roman Law*, 1st edn (1962), 235.

²⁸ Nicholas, *Roman Law*, 236-237; and Sellar, “Succession law in Scotland – A historical perspective”, 60.

²⁹ Anton, “Medieval Scottish executors”, 149; and *Mackenzie v Mackenzie* (1847) 9 D 836, per Lord Jeffrey at 843.

³⁰ (1740) Mor 11446.

³¹ (1740) Mor 11446.

³² Identified in this research.

³³ (1840) 2 D 752, per Lord Mackenzie at 787. Lord Macmillan later reaffirms this warning in *Selsdon v Selsdon* (1934) SC (HL) 24, at 42.

³⁴ Erskine, *Inst*, III.8.50.

only in his rights, but in his debts and burdens, agreeably to the rule *cujus est commodum, ejus debet esse incommodum*. [To whose advantage, it must be his disadvantage]

Similar observations could be made in relation to the role of the executor, appointment to which – as outlined in Chapter 2 – originally provided a financial benefit.³⁵ Therefore, to accept appointment (and therefore the benefit of any residue of the estate) was to carry with it any liabilities relating to the estate. It is here that the true nature of this maxim becomes apparent, namely that it is designed for the protection of creditors. As Lord Brougham described:³⁶

It is a man's duty to pay his debts during his lifetime. He does a wrong if he spends the money wherewith he should satisfy all, in paying one, and leaving the others unpaid,—no question of that. Comes his decease; comes his executor in his shoes to represent him after his decease; and the executor has that very duty which the testator in his lifetime had, and which every honest man ought to perform,—the duty of paying his creditors equally.

This statement by Lord Brougham emphasises the original concept of *eadem persona cum defuncto* – that the executor is liable to meet the deceased's debts as a protection for creditors. This representative fiction cannot, in itself, be determinative that the deceased continues to have legal personality after death. The maxim allows the creditor to treat the executor as one and the same as the deceased for the purpose of recovery of debts. Yet, it does not seem to support a wider conclusion that the personality of the deceased continues after death by virtue of the executor being *eadem persona cum defuncto*. Examining the underlying theory of this rule demonstrates this point further.

4.4.2 The executor as universal successor

The reason that the executor is *eadem persona* is because the executor is the universal successor of the deceased. All property, rights, and obligations of the deceased pass to the executor by a concept known as *transmission*, which shall be further explained in the next section. This is in contrast to singular succession, which concerns the transfer of a particular thing or property.³⁷ The operation of universal succession *transmits* the whole patrimony of the deceased to the executor.³⁸ Anderson offered a succinct explanation of universal succession:³⁹

That universal succession can render the successor actively liable for debts is a major difference from singular succession... 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

³⁵ *Supra*, 2.3.

³⁶ *Globe Insurance Company v Mackenzie* (1850) 7 *Bell's App's* 296, per Lord Brougham at 319-320.

³⁷ K Reid, "Property (Reissue)", para 1077.

³⁸ *Ibid*, para 1077.

³⁹ R Anderson, *Assignment* (2008), para 3-01.

the view that on death there is neither a 'succession' of assets nor a cessation of legal personality. But that point cannot be explored here.... In the Scottish sources, this conceptual distinction is sometimes expressed in a nomenclature which distinguishes transfer (singular succession) from transmission (universal succession)

As Anderson identified, universal succession operates as a *transmission* (not transfer) of both rights *and* obligations to the executor. Singular succession is limited to the *transfer* of rights alone (rather than of debts or obligations). The concept of universal succession is a long-established doctrine in Scots law as Lord Keith set out:⁴⁰

Used generally with reference to an heir who takes up a succession on death, it carries with it a liability on the heir to the deceased's creditors for the deceased's debts. From this aspect he represents the deceased. The *persona* of the deceased is regarded as continued in the heir, or, as it is otherwise expressed, he is *eadem persona cum defuncto*... The term "universal successor" may be foreign to English law but it cannot be regarded as strange in this House for the doctrine is part of the common law of Scotland, though now affected by statute, and till within the last hundred years had important consequences to the heir in a succession.

As was recounted in Chapter 2, the executor did not initially act in a fiduciary capacity.⁴¹ Early executors were entitled to retain the residue of an estate, hence providing an important incentive for seeking appointment and confirmation. The Living Dead theory attempts to place the executor on a form of representative or agency basis, in that the executor exercises active capacity of the deceased as supposedly evidenced by the fact that an executor is answerable for a deceased's debts or manages the deceased's property for distribution.

However, this feature arises due to universal succession, wherein the executor acquires a standalone or independent title to the deceased. Confirmation transmits the entire patrimony to the executor, with no residual rights left to the deceased. After this operates, the deceased no longer has a patrimony in which to hold rights, in respect of which the executor could exercise active capacity on the deceased's behalf after confirmation. Instead the executor holds the patrimony independently.

Equally, it is difficult to conceive the continuation of passive capacity, given that the transmission of patrimony removes the estate from the deceased entirely. Universal succession is, by its very nature, a rejection of the Living Dead theory because the executor does not deal with the patrimony of the deceased as a going concern – instead, it has been made over to the executor and becomes independent from the deceased. Thus, it is argued that the executor does not exercise active capacity on the deceased's behalf in distributing their estate. A series of decisions relating to the powers of an executor, examined below,

⁴⁰ *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 per Lord Keith at 530.

⁴¹ *Supra*, 2.3.

illustrate the limitations of the idea that the executor acts in a simple representative role. This tends to suggest that the common law has not developed in such a way as to demonstrate the existence of the Living Dead theory in Scots law.

4.4.3 Executors in litigation concerning the deceased

Before reviewing the sources, it is worthwhile to acknowledge one legal rule from the outset. Actions commenced by a pursuer before their death can be sisted pending the appointment of an executor. The executor can be substituted into court proceedings in place of the deceased, without the consent of their opponent.⁴² In some respects, this appears a representative function and the exercise of active capacity on behalf of the deceased. However, rather than this being an exercise of active capacity, it is a consequence of universal succession. Universal succession operates here to *transmit* patrimonial losses (in the sense that there is a right to restitution against a third party by damages) to the executor so any right to recover damages can pass to the executor as a patrimonial asset. There is a traditional limitation to the extent of the executor's powers in this respect, one which is fatal to the idea of active capacity representation – that at common law the executor could only recover patrimonial losses vested in the deceased up to the date of death.

A series of court actions regarding personality rights developed this rule, which is one that does not seem to support recognition within the common law of a continued passive capacity of the deceased, nor to support the idea of the executor acting in a representative capacity in relation to the deceased's active capacity.

4.4.4 Personality rights

Before reviewing the authorities, a matter of classification should be addressed. A person enjoys various forms of rights, some of which are hard to classify into Scots private law. The hardest of these, arguably, are personality rights given the absence of their development in Scots law.⁴³ Whitty attempts to classify these into two categories, primary rights and secondary rights.⁴⁴ In his view, there are primary rights, which are non-patrimonial rights. This includes the right to life, the right to privacy, and other personality rights in families relationships.⁴⁵ Whitty outlines his view that breach of a primary right typically gives rise to

⁴² *X v Y* 1945 SLT (Sh Ct) 2; *Fearn v Cowpar* (1899) 7 SLT 68; and *Martin's Executrix v McGhee* (1914) SC 628.

⁴³ N Whitty, "Overview of rights of personality in Scots law", chapter in N Whitty & R Zimmermann (eds), *Rights of personality in Scots law* (2009), section 3.3.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

a secondary obligation and a correlative secondary right.⁴⁶ Secondary personality rights are patrimonial rights as they carry economic value.⁴⁷

There is a lack of substantive legal authority in respect of this concept of personality rights,⁴⁸ but Whitty's attempt provides a useful framework for discussion. As noted, if the Living Dead theory accurately explains the position in Scots law, the continued passive capacity of the deceased should allow for patrimonial rights to accrue to the deceased on, and after, death. Such rights should be enforceable by the executor, as the deceased's agent, after confirmation. However, the common law does not appear to have developed in this way. Instead, there is a traditional restriction in the executor's ability to recover damages due to the deceased. This undermines the idea that there is a form of representation by the executor of the deceased's active capacity. These rules tend to suggest that death forms a demarcation point, in which personality is terminated altogether.

4.4.4 *Neilson v Rodger*

A useful starting point in illustrating the development of the common law is *Neilson v Rodger*.⁴⁹ It concerned a worker injured by employer's machinery. The worker commenced litigation but died of her injuries in the initial stages of the litigation. The defender subsequently sought to challenge her executor's title to sue for *solatium*. The Inner House held that the action had transmitted to her executor to continue. As Lord Murray noted:⁵⁰

This action was commenced by the deceased during her lifetime, and I think it may competently be carried on by her representatives. I do not, however, mean to lay it down that it could have been raised by them after her death.

Lord Wood also noted:⁵¹

Now, upon the authorities, I apprehend it cannot be denied that where a claim for damages and *solatium* arises on account of bodily injury, or from any other cause, the right vests *ipso jure* and *ipso facto* prior to any proceeding or decree for its constitution—that it is a moveable claim—is assignable either by positive conveyance or implied legal assignation—and that it passes to personal representatives. [**Bold added**]

The wording employed in the judgment demonstrates a tendency of the courts to outline that executors operate in a purely proprietary sense. The continuing of litigation (as Lord Wood suggested) is a simple realisation of assets, i.e.: to be awarded damages which can then be part of the distribution of the deceased's estate. The judgment implies that assets of the

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Albeit progress is being made academically, see Whitty & Zimmermann, *Rights of personality in Scots law*.

⁴⁹ (1853) 16 D. 325.

⁵⁰ (1853) 16 D. 325, at 328.

⁵¹ (1853) 16 D. 325, at 329.

deceased are transferred to the executor, through a form of “positive conveyance or implied legal assignation”, at confirmation.

That notion of a ‘conveyance’ to the executor arguably conflicts with a central tenet of the Living Dead theory, namely that the executor simply represents the active capacity of the deceased. The theory proposes that no rights need to be transmitted, the executor simply steps into the shoes of the deceased and engages in actions to vindicate the deceased’s passive capacity irrespective of the timing in which the right accrues.

The executor was successful in *Neilson*, as Lord Murray had noted, but it was only because the pursuer had raised an action prior to death. It is worthwhile to explore the Lord Justice-Clerk’s dissent. His lordship dissented on the basis that:⁵²

To me it appears plain, that the stern fact of death from the injuries cuts down all legal subtleties about the transmission of rights of actions to executors, and that we shall run counter to common sense, so it strikes my mind, if we entertain the right of the executors to carry on this action...it appears to me, that the death has terminated and trodden down as utterly inapplicable, and as unmeaning metaphysics, all the subtle questions which legal rules might raise as to the transmission of rights of actions, and at once, and of necessity, compels the law to take into account only the remedies and rights of action which the death necessarily creates.

The Lord Justice-Clerk’s criticisms in *Neilson* could be used to suggest a wider critique of the Living Dead theory, in that the theory obscures the notion of transmission of rights to executors. To some extent, the Lord Justice-Clerk was vindicated in these views through subsequent cases.

4.4.5 *Auld v Shairp*

*Auld v Shairp*⁵³ concerned the executor-dative of a defamed university lecturer. She commenced an action against Dr Shairp for defamation on her late husband’s behalf. The defender objected, arguing that an action for defamation did not transmit after death unless it had been commenced prior to death. Before the Inner House, the question was whether the right to initiate an action of defamation could transmit to an executor in Scots law. Following *Neilson*, Lord Neaves held that the right to damages can transmit to the executor.⁵⁴ On the other hand, Lord Ormidale found there was no title to sue. His lordship sets out his reasoning as follows:⁵⁵

⁵² (1853) 16 D 325, per Lord Justice Clerk at 328.

⁵³ (1874) 2 R 191.

⁵⁴ (1874) 2 R 191, per Lord Neaves at 202.

⁵⁵ (1874) 2 R 191, Per Lord Neaves at 204.

If the action had been purely one for loss and damage to property, either heritable or moveable, sustained by the late Dr Auld... I should have had no doubt of the pursuer's title to sue in her representative character of executrix...

That, however, not being the nature of the present action, but, on the contrary, it being essentially one for vindication of character, where the injured party himself died without raising action or complaining in any form, the maxim, I think, applies - *actio personalis moritur cum persona*.⁵⁶

The majority, in agreement with Lord Neaves, held that "a civil right is at once vested in the person who is the sufferer by the delict, and that that is part of his patrimony, and transmits just as any other part of his property transmits".⁵⁷ Thus, the executor-dative could initiate proceedings.

Later, in *Darling v William Gray & Sons*⁵⁸ the House of Lords upheld the judgment of Lord Neaves in *Auld*, with Lord Watson commenting that "The maxim *actio personalis moritur cum persona* has a very limited application in the law of Scotland".⁵⁹ This seems to be supportive of a more expansive interpretation of the executor as *eadem persona cum defuncto*, meaning that an executor can exercise active capacity to pursue a remedy for any loss or injury sustained by the deceased. However, the courts were quick to curtail this potentially more expansive understanding of the executor's role.

4.4.6 Bern's Executor v The Royal Lunatic Asylum of Montrose

The Inner House (of seven judges) revisited the issue of the maxim *actio personalis moritur cum persona* in *Bern's Executor v The Royal Lunatic Asylum of Montrose*⁶⁰. An incapacitated adult died whilst in the care of a mental institution (owing to mistreatment). The executor wished to sue the institution for damages, but his right to do so was challenged. In determining this issue, Lord McLaren sets forth the view that the decision in *Auld* placed Scots law on a tangent from other civil law jurisdictions:⁶¹

It is not a satisfactory answer to say that this right is covered by the general law which vests assets of a deceased person in the executor, if it be the case that in other legal systems the right to sue a personal action is denied to executors. If the right existed, it is not likely that executors would refrain from asserting it.

Lord McLaren remained unconvinced that Scots law has developed in the way that the majority in *Auld* had suggested. In respect of personal actions in which "the institution of

⁵⁶ Translated, personal actions die with the person.

⁵⁷ *Leigh's Executrix v Caledonian Railway Co* (1913) SC 838 per the Lord President at 844, summarising *Neilson*.

⁵⁸ (1892) 19 R (HL) 31.

⁵⁹ (1892) 19 R (HL) 31 per Lord Watson at 31.

⁶⁰ (1893) 20 R 859.

⁶¹ (1893) 20 R 859, per Lord McLaren at 862.

such an action always and necessarily puts the character of the pursuer in issue”,⁶² Lord McLaren rejected the notion that the executor should have the power to commence court proceedings.

Lord Young agreed with Lord McLaren, highlighting that “a right to sue such an action will not pass to a trustee in bankruptcy or, as I think, to executors or to the fisk, while a right to sue for a debt or money due would.”⁶³ Lord Trayner and the Lord Justice Clerk dissented, with Lord Trayner noting that Lord Neaves in *Auld* appeared to be conclusive on the point. Lord Trayner commented that:⁶⁴

The right of an executor is to the whole moveable estate of the deceased, whether that estate consists of money or other moveables in the possession of the deceased, or in rights which, when enforced, result in money or other moveable property being recovered. In other words, the executor takes up the whole “assets” of the deceased, and claims for money are among the assets of the deceased. It does not appear to me to be material to consider under what circumstances the deceased’s claim arises.

The majority’s decision in *Auld* was distinguished as a result. As summarised in a later case, *Riley v Ellis*:⁶⁵

It is recognised by the law of Scotland that an action for strictly personal wrong, whether to the person or to the reputation, dies with the person. Although to this rule an exception has been admitted in the case of *Neilson v. Rodger* to the effect that, **if the action has been raised in the lifetime of the party, it transmits...** But where the claim is for personal injury and at the same time for patrimonial loss resulting from that injury, **it has been held in *Auld v. Shairp* that the claim transmits, not by reason of the personal injury, but of the patrimonial loss.**⁶⁶ [Bold added]

The issue continued in flux, again revisited in *Leigh’s Extr v Caledonian Railway Co.*⁶⁷ The Lord President in that case attacked Lord Neaves’s approach in *Auld v Shairp* regarding transmissibility as “unsound law”.⁶⁸ However, the Lord President conceded that “there is a transmissible right when a claim is made or an action is raised.”⁶⁹ Therefore the Inner House allowed the executrix’s claim to proceed in *Leigh’s Extr* as the deceased had initiated pre-action discussions of liability in their lifetime.

⁶² *Ibid*, per Lord McLaren at 863.

⁶³ *Ibid*, per Lord McLaren at 870.

⁶⁴ *Ibid*, per Lord Trayner at 867.

⁶⁵ 1910 SC 934 per Lord Johnston at 937. The Lord President dissented and disagreed with Lord Johnston, see 943..

⁶⁶ *Ibid*, per Lord Johnston at 938.

⁶⁷ 1913 SC 838.

⁶⁸ 1913 SC 838 per Lord President at 844.

⁶⁹ 1913 SC 838 per Lord President at 844.

4.4.7 *Stewart v London, Midland and Scottish Railway Co*

One of the major final developments was *Stewart v London, Midland and Scottish Railway Co*.⁷⁰ In this case, the pursuer sought to overturn *Bern's Executor* to allow her to claim damages as executrix-nominate for her deceased sister. On appeal, the House of Lords held that *Bern's Executor* was still good law. *Bern's Executor* was thus the settled position that an executor cannot initiate a claim for *solatium* on the deceased's behalf.

The discussion of these cases illustrates the traditional approach of the common law. An executor can engage in court actions to recover any losses suffered up to the date of death, but only those vested in the deceased *prior* to death. Therefore, *solatium* was traditionally excluded by the courts. Much can be criticised in respect of the restrictive rule of the transmissibility of delictual claims to the executor.⁷¹ However, for present purposes, the traditional reluctance of the courts in cases such as *Bern's Executor* and that of the Lord Justice-Clerk's dissent in *Neilson* illustrates an intimate relationship between patrimonial assets and the task of the executor.

4.4.8 Statutory intervention

The Scottish Law Commission examined the law in this area in 1973, questioning the suitability of the rules relating to the executor recovering damages.⁷² They concluded that the rules were justifiable.⁷³ The common law rules were then reflected in Section 2 of the Damages (Scotland) Act 1976 by restricting the recovery of *solatium* for personal injury. However, these rules were later amended by the Damages (Scotland) Act 1993 due to controversy resulting from the ability of a defender to delay court proceedings until the injured party had died, and thereby to cut off their *solatium* claim.⁷⁴ The current position is found under the Damages (Scotland) Act 2011, whereby an executor can recover damages for patrimonial and non-patrimonial loss (including *solatium* arising from personal injury, reputational harm⁷⁵ or harassment) incurred until immediately before the deceased's death.⁷⁶ The executor cannot claim for wrongs causing death, or any such rights in delict arising after

⁷⁰ 1943 SC (HL) 19.

⁷¹ N Whitty, "Overview of rights of personality in Scots law", section 3.6.4(c).

⁷² Report on *Damages for Injuries Causing Death* (SLC Report No 31, 1973), paras 21-25.

⁷³ *Ibid*, 38.

⁷⁴ Damages (Scotland) Act 1993, s3. See *Report on The Effect of Death on Damages* (Scot Law Com No 134, 1992), paras 4.7 to 4.10, and 4.22 to 4.28. See also Discussion Paper on *Damages for Wrongful Death* (SLC DP No 135, 2007), para 2.30.

⁷⁵ Though claims under reputational harm alone have to be raised by the deceased before their death, 2011 Act, s2(3).

⁷⁶ 2011 Act, ss1-2.

death, under the current law.⁷⁷ Such claims must instead be raised by the relatives of the deceased.

4.4.9 Reconciling the law of delict with the Living Dead theory

Effectively the common law had developed conditional transmission to the executor, whereby only some rights could transmit. This still remains the case today in respect of matters which are *delectus personae*. Given this, the executor cannot be said to be an agent of the deceased given the overarching focus on the transmission of rights to them. The development of the law in this area does not seem to support the Living Dead theory and its reception in Scots law. If it were the case that the deceased continued to have personality, then an executor could recover damages for delictual wrongs sustained at, or after, death. The timing of such losses would be immaterial as the executor could exercise all rights held by the deceased in this representative capacity. It is clear that the law has not developed in this way. Instead, death seemingly marks a fixed point for recoverability of certain losses. This reflects the purely proprietary nature of the executor's role, arising through universal succession.

The discussion above suggests that the primary sources in the law of succession tend to contradict the Living Dead theory, at least insofar as it relates to the active capacity of the deceased. The thesis now turns to consider the treatment in the case law of the passive capacity of the deceased, an area in which the legal position is somewhat more complex.

4.5 Passive capacity of the dead

The preceding discussion has dismissed the idea of the executor exercising active capacity on behalf of the deceased. In some respects, this does not address the Living Dead theory during the *haereditas jacens* itself because it has focused on the position of the executor *after* confirmation.

It was touched upon above,⁷⁸ that recognition of passive capacity alone would seem sufficient for personhood if MacCormick's account is accepted. Aspects of the Living Dead theory incorporate this approach. If it is true that dead persons continue to enjoy personhood as the Living Dead theory contends, then the deceased must at least have passive capacity prior to the confirmation of an executor. There would then have to be evidence of this within legal sources. As Paisley argued:⁷⁹

A dead person unrepresented by an executor cannot carry out any legal acts which require a positive or active capacity, albeit that dead person has the passive capacity

⁷⁷ E Reid, *The Law of Delict in Scotland* (2022), paras 31.46-31.48.

⁷⁸ *Supra*, 4.3.

⁷⁹ R Paisley, "The effect of death in the context of the law of succession", speech.

of an adult who is free from disability. So, he has got passive capacity but not active capacity.

If it is correct to say that “passive capacity is sufficient to existence as a legal person”⁸⁰ as MacCormick argued, or that passive capacity can be treated as “the minimum legal recognition” of a person, then it is necessary to identify whether a person after death continues to enjoy passive capacity too. As Walker terms it,⁸¹ can rights continue to “attach” to the dead? If so, then it is arguable that the Living Dead theory is the correct understanding of the *haereditas jacens*.

To address this issue, it is necessary to examine the passive capacity of the deceased during the period of the *haereditas jacens*. Crucially, this examination begins with the question of whether rights can accrue to the deceased after death. Such accrual should, in principle, be possible if the deceased retains passive capacity, as posited by the Living Dead theory. This section demonstrates, however, that the dead do not enjoy passive capacity in this respect.

4.5.1 Real rights and the dead

If the deceased lacks active capacity, then this excludes several areas of law in which the existence of passive capacity might be detected. This is illustrated in this section.

Taking into account the fact that this thesis focuses on ownership, it shall initially be explored whether ownership can be transferred to the dead. Under the Living Dead theory, it should be possible for the deceased to acquire ownership since the theory posits that they have passive capacity. To acquire ownership of land, however, a deed must be registered in the Land Register by the acquirer (or the deed must be registered by their solicitor on the acquirer’s instructions). This would seem to require an exercise of active capacity by or on behalf of the deceased. The Keeper is prohibited from registering deeds where the grantee or applicant has died prior to the date of the application for registration.⁸² Thus, a real right to heritable property cannot be acquired by the deceased after death under the 2012 Act.

In the context of corporeal moveable property, the acquisition of a real right requires the grantee to take delivery and possession of the property in question.⁸³ With incorporeal moveables, the acquisition of a right requires the assignee to intimate the assignation to the

⁸⁰ MacCormick, “General legal concepts”, para 48.

⁸¹ Walker, *Principles*, 4th edn, Vol I, 205.

⁸² Land Registration etc. (Scotland) Act 2012 s47(1). The Scottish Law Commission in its report noted that “We think that the current law is clear: a person who is dead...cannot apply for registration.”, Scottish Law Commission, *Report on land registration* (SLC Report No. 222, Vol 1, 2010), para 12.79. No authority is given for this proposition in the report, however the provision attracted no negative comment during the Bill’s passage through Parliament. It might therefore be inferred that provision encapsulated what was generally understood to be the law prior to the 2012 Act.

⁸³ Generally, see Carey Miller & Irvine, *Corporeal moveables*, para 8-05; and *Burnett’s Trustee*, per Lord Rodger at para 88.

debtor in the obligation, or to register the assignation in the Register of Assignations.⁸⁴ The external acts required to complete a transfer of corporeal moveable or incorporeal property cannot be carried out by the deceased, who has no active capacity.

Effectively, these areas seem to be ruled out as a testing ground for the passive capacity of the deceased. However, could an agent (or mandatary, to use the traditional term where the agency contract is gratuitous)⁸⁵ carry out the external act on behalf of the deceased as an exercise of active capacity? It is said death frustrates the contract of agency.⁸⁶ As observed in *Lord Advocate v Chung*:⁸⁷

Agency is terminated by death and obviously a relationship of agent and principal cannot be created after the death of the putative principal.

That it is a rule going back to Stair.⁸⁸ However, there is a notable exception. Macgregor wrote of the rule noted in *Pollok v Paterson*,⁸⁹ whereby an agent is entitled to complete any partially performed transactions irrespective of the death of the principal, and can enter into transactions on the deceased principal's behalf if their death is not known to the agent.⁹⁰ This limited exception does not significantly undermine the strength of the general principle expressed in the rule dating back to Stair. In any event, the exception focuses on the agency of a living principal where the principal subsequently dies, wherein a living principal has given authority before their death. The focus of inquiry here is the position after death, what rights can independently accrue to the deceased through an agency relationship, and in this respect, Lord McCluskey's statement in *Lord Advocate v Chung* is to be preferred.

Death itself seems to rule out any exploration of whether a dead person, if having passive capacity, can or cannot acquire a real right after death. The requirement of an external act removes any ability to test for passive capacity of the dead. A more fruitful discussion, therefore, is to be found in personal rights.

4.5.2 Personal rights and the dead

In respect of personal rights, the effect of death will be explored using the classic taxonomy of voluntary and involuntary obligations.⁹¹ An examination of the effect of death on both

⁸⁴ Moveable Transactions (Scotland) Act 2023, s3(2).

⁸⁵ Stair Memorial Encyclopaedia, *Agency and Mandate (Reissue)*, para 18.

⁸⁶ *Ibid*, para 18. There are some exceptions to this in the case of an agent unaware of the deceased's death discussed on this page.

⁸⁷ 1995 SC 32, per Lord McCluskey at 36.

⁸⁸ *Morte mandatoris perit mandatum*, or the mandate perishes with the death of the mandator, Stair, *Institutions*, I.10.6, quoted in H MacQueen, "It's in the post: Distance contracting in Scotland 1681-1855", chapter in F McCarthy et al, *Essays in conveyancing and property law in honour of Professor Robert Rennie* (2015), 50.

⁸⁹ 10 Dec 1811, FC.

⁹⁰ L Macgregor, "Agency Law: Continuity and change", chapter in A Hutchison & F Myburgh (eds), *Research handbook on international commercial contracts* (2020), para 4.2.

⁹¹ H MacQueen (ed), *Macqueen and Thomson on Contract Law in Scotland*, 6th edn (2024), para 1.44.

voluntary and involuntary obligations in the primary sources again offers little evidence in support of the notion posited by the Living Dead theory that, during the *haereditas jacens*, the deceased has a continuing passive capacity.

4.5.3 Voluntary obligations and the dead

In respect of voluntary obligations, at a basic level, the dead lack active capacity and therefore a contract cannot be formed with the dead.⁹² Consequently, voluntary rights could not be created in their favour. The proponents of the Living Dead theory concede that a dead person (without an executor) has no active capacity, so the issue is somewhat moot. The role of a potential agent to the deceased to enter into contractual rights and obligations has been addressed above. Thus, an examination of voluntary obligations do not help to address the core question of whether the dead have passive capacity to which rights can accrue during the *haereditas jacens*.

4.5.4 Involuntary obligations and the dead

The dead cannot acquire new voluntary personal rights due to the absence of active capacity. Is it possible, however, that they can acquire new involuntary personal obligations? Since delictual liability arises involuntarily as a matter of law,⁹³ the right to recover damages from a breach of a delictual obligation may be acquired without the exercise of active capacity by the holder of the right. It follows that, if the deceased has continuing passive capacity during the *haereditas jacens*, delictual rights could, in theory, be accrued. An executor (when confirmed) could later vindicate these rights and recover damages from the wrongdoer. However, the examination of the case law which follows will establish that the law appears not to have developed in a manner which supports the accrual of delictual rights by the deceased in this way.

4.5.5 *Mackintosh v Morrice's Executors*

It was outlined in the preceding section that an executor is unable to recover *solatium* for negligent acts causing death. The jurisprudence of *Bern's Executor* and other cases have, however, enjoyed a revival in recent times, with more focus on passive capacity of the deceased.

In *Mackintosh v Morrice's Executors*,⁹⁴ a couple had been killed in an accident. Prior to their death, they had made donations to their daughters, which subsequently fell to be charged for

⁹² *Thomson v James* (1855) 18 D 1, per Lord President at 10. A more recent case is worth mention, that of *City of Glasgow District Council v Peart* 1999 Hous LR 117 where the tenant exercising their right to buy their council house died prior to accepting the offer. Following *Thomson*, Lord Philip held that “a contract cannot be made with a deceased person”.

⁹³ S Bogle & B Lindsay, *Thomson's Delictual Liability* 7th edn (2025), 1; and E Reid, *Delict*, para 2.01.

⁹⁴ [2005] CSOH 167.

inheritance tax due to the proximity of the gift-giving to their deaths. The daughters sued the wrongdoer's executor in their capacity as executors for losses, including for the increased inheritance tax liability. Lord Carloway noted the previous decisions dealing with recovery of losses in death noting that:⁹⁵

It was clear that an executor of a deceased, who did have a derivative or representative right, could not sue for all losses to the deceased's estate... It is then an established principle at common law that, where the wrong founded upon has caused the death, an executor can only recover patrimonial losses suffered by a deceased during his lifetime.

It would appear that any losses arising after death, or losses for a negligent act causing death, are irrecoverable for the executor. For example, his lordship cited *McEnaney v Caledonian Railway Co*⁹⁶ where it was held that even funeral expenses were irrecoverable by an executor on behalf of the deceased. Lord Carloway concluded that, as no loss had arisen during the lifetime of either partner, the executors had no claim for the increased tax liability.

4.5.6 *Milligan's Executors v Hewats*

In *Milligan's Executors v Hewats*⁹⁷ The former solicitors of the deceased were sued for professional negligence in respect of estate planning, which had led to increased tax liability. The central problem in these types of executry cases arises because the negligent act (the defective executry and tax planning advice) does not cause loss at the point when the act is executed. It is only after death that loss results to the estate value of the deceased, such as in this case, where the negligent executry advice resulted in the inheritance tax due on the estate being higher than it would have been had appropriate advice been received.

In *Milligan's Exrs*, it was not a question of the loss to the estate or beneficiaries,⁹⁸ but as the executors suing *eadem persona cum defuncto* of the deceased. Thus, the pursuers were effectively trying to argue that loss had been sustained to the deceased person and their estate *after* their death. In consideration of the matter, Lord Tyre noted that there appeared no definitive guidance on the issue of "whether an executor can sue as representative of the deceased where no loss arises until after the deceased's death".⁹⁹ In this respect, Lord Tyre was satisfied that there was no authority directly on the matter, but provided the following opinion:¹⁰⁰

⁹⁵ [2005] CSOH 167, per Lord Carloway at para [9].

⁹⁶ (1913) 1 SLT 373.

⁹⁷ [2013] CSOH 60. There was a concurrent action running at the same time, *Steven v Hewat* [2013] CSOH 61 with the beneficiaries suing for their own loss.

⁹⁸ That point is dealt with in the conjoined action (see above).

⁹⁹ [2013] CSOH 60, at para 9.

¹⁰⁰ [2013] CSOH 60 at para 12.

Where no loss has been sustained during the lifetime of the deceased, there is, in my opinion, nothing that could transmit to the executor and form the basis of an action by the latter. This approach appears to accord with the common law position regarding losses arising from negligent acts causing death, and it is not obvious to me why the rule should be different, depending on the cause of the loss... It respectfully appears to me also to accord with common sense and logic.

Lord Tyre held that nothing had, or could have, *transmitted* to the executor in this negligence case because of the development of the law regarding recovery of losses in negligent acts causing death. Thus, one could imply that there is no passive capacity after death, and all that passes to the executor is the ‘frozen’ patrimony at the date of death.¹⁰¹

4.6 Conclusion

This chapter has considered whether the Living Dead theory, namely whether the deceased continues to have personhood after death, is representative of the current law in Scotland. It has been argued that this is not the case. Many areas of private law such as property law, contract and delict have developed on the assumed rule that the dead have ceased to have personhood. There is a simple clear finality as a consequence, and legal certainty in putting the focus after death onto the law of succession and the rights of surviving relatives to raise claims.¹⁰²

In respect of any active capacity of the deceased after death, the primary sources discussed above suggest that the executor does not act as an agent or representative of the deceased. There is, instead, transmission of the entire deceased patrimony to executors by universal succession. An action may competently be raised against an executor in respect of a debt owed by the deceased because the deceased’s patrimony (which contains any obligation, debt or liability) has transmitted to the executor. However, this is not the same as viewing the executor acting in such a way as to exercise the deceased’s (continuing) active capacity.

It is in the exploration of passive capacity that it becomes clearer that personhood does not continue after death. Whilst there is no clear authority that puts the matter beyond doubt, the development of the law of delict tends to suggest that a person does not continue to exist after death. The decision in *Milligan’s Exrs* provides a recent key development in this regard.

¹⁰¹ In *Peat’s Executors v Assembly Theatre* [2014] CSOH 144, Lord Doherty took an opposing view to *Milligan’s Exrs* by drawing on comments by Lord Carloway in *Mackintosh*. There appears to be inconsistency in this area as a result. However, the historic line of cases which Lord Tyre followed in *Milligan’s Executors* should, it is submitted, be preferred given the volume of successive authorities in this area such as *Bern’s Executor*. In addition, the reasoned opinion of Lord Tyre, which considered the matter at some length, should be preferred to the treatment of the matter as a subsidiary issue by Lord Doherty in *Peat’s Executor*.

¹⁰² By analogy to negative prescription of rights and obligations, see Johnston, *Prescription and Limitation*, para 1.62. With this said, this writer agrees that the law requires some further clarity.

Some civil jurisdictions such as the *Código Civil* of Spain are explicit in dealing with the effect of death in terminating personality:¹⁰³

Civil personality shall be extinguished as a result of death.

For the reasons demonstrated, Scots private law appears to have a similar rule, albeit one that is not clearly set out and which as a result has led to much confusion and inconsistency in the law and academic debate.

With these conclusions reached, it does not resolve the central issue under examination, namely the status of the *haereditas jacens* and the ownership of the deceased's property. If we accept the notion that the dead have ceased to have personality, then there may be some other owner which requires to be identified. A more historic theory is now explored, namely that the estate itself can constitute a person, and thus act as owner of the deceased's property.

¹⁰³ *Código Civil Español*, Article 32. See also the survey conducted in C Waelde & N Whitty, "A rights of personality database", chapter in Whitty & Zimmermann, *Rights of Personality in Scots law*, Ch 11.

Chapter 5: Personhood of the *haereditas jacens*

5.1 Introduction

This chapter examines the theory that the *haereditas jacens* itself has legal personality until the appointment of executor. Similar to the Living Dead theory, this theory would explain why land in the estate is not considered ownerless, since the land remains in a relationship to the former owner in the form of being owned by their estate. It is a compelling theory, but as will be argued, the development of Scots law does not demonstrate that a *haereditas jacens* enjoys personhood.

5.2 The *haereditas jacens* in Roman law

It is worthwhile to begin by exploring the references made by some commentators in Scotland to the *haereditas jacens* being conceived as a person in Roman law.¹⁰⁴ Schmidt has analysed the *haereditas jacens* of the Roman law alongside the German law of succession to identify how the *haereditas jacens* was recognised, and mitigated, in the drafting of the German Civil Code (the BGB).¹⁰⁵ His conclusions provide useful insight into the theory of the estate as a separate juristic person in Scotland too.

5.3 Schmidt's writing, the BGB, and Roman law

In German law, the BGB provides an immediate succession of the inheritance to the entitled heir at the death of the owner (subject to an heir's right to disclaim the estate).¹⁰⁶ Thus German law has dispensed with the *haereditas jacens*. All rights of ownership vest immediately in an heir after death. In this context, Schmidt examined why the drafters of the BGB elected to dispose of the period of the *haereditas jacens*.

Schmidt explored a crucial aspect that is frequently referenced in the debate in Scots law, the position of Roman law. The *haereditas jacens* is said to have arisen in the Roman law where an extraneous heir or *heres extraneus* (meaning an heir not of familial blood to the deceased) was due to take the succession.¹⁰⁷ The issue of a gap in ownership was said not to arise in the context of a familial heir (*heres suus*), who had immediate succession after death. However, an extraneous heir had to undertake an act of entry (*aditio haereditas*) to the estate.¹⁰⁸ There was a period in which the extraneous heir was allowed to decide whether to

¹⁰⁴ See *supra*, section 3.2.

¹⁰⁵ J Schmidt, "Von Monstern, Nebelgestalten und Seelenwanderungen", chapter in N Jansen & S Meier, *Iurium itinera: Historische Rechtsvergleichung und vergleichende Rechtsgeschichte - Historical Comparative Law and Comparative Legal History. Reinhard Zimmermann zum 70 Geburtstag am 10 Oktober 2022* (2022).

¹⁰⁶ BGB, s1922; and s1924.

¹⁰⁷ J Schmidt, "Von Monstern", 496.

¹⁰⁸ *Green's Encyclopaedia of the Law of Scotland*, 2nd edn, (1909), vol 11, 496.

accept the inheritance (the *tempus deliberandi*) which gave rise a gap in succession, the *haereditas jacens*.¹⁰⁹

Schmidt highlighted that the *haereditas jacens* and the necessity for an act of entry to the estate found its way into the *ius commune* throughout Europe in different forms.¹¹⁰ Scotland was no different.¹¹¹ There are examples of the *haereditas jacens* in civilian legal systems such as those of Austria, Italy and Portugal. What becomes clearer, from Schmidt's writing, is that the *haereditas jacens* in Roman law is misunderstood. Schmidt suggested that Roman jurisprudence had not clearly developed the idea that the *haereditas jacens* was a person as some suggest.¹¹² The writings of the Roman jurists were fluid on the issue. As a result:¹¹³

Passages in which the *hereditas* was referred to as “*domina*”, i.e. as the owner of herself, are today considered to be interpolated or at least again only as an attempt at an illustration. As a result, there is broad agreement that the Roman jurists treated the unclaimed estate simply as a temporarily subjectless property and that the idea of inheritance as a legal person was “completely alien” to them.

In effect then, the often-expressed claim that Roman law viewed the *haereditas jacens* as a person during the *tempus deliberandi* or following the disclaimer/abstention (*ius abstinendi*)¹¹⁴ of an estate by heirs, is inaccurate. As Duff noted:¹¹⁵

It appears then, that no Roman or Byzantine lawyer ever conceived the *hereditas* as a ...soulless and mindless Person. For the sake of convenience they sometimes compared it with *domini* and other corporeal persons; but they always shy away when awkward consequences look like following; and it remains true to the end that a *hereditas iacens* is no more a Person than it is a *persona*.

Until acceptance by the heir “the *hereditas* was said to be *iacens* and the objects in it were ownerless”.¹¹⁶ This seems a reasonable argument to follow, given the Romans “were too good practical lawyers to bother about the theoretical”¹¹⁷ such as constructing personhood of an estate.

As Schmidt explained, under the German common law,¹¹⁸ jurists sought to assign ownership to some form of person given the abhorrence of having a situation of *dominus sine domino* (ownership without an owner), a notion which Scots law also feared.¹¹⁹ The resulting

¹⁰⁹ Schmidt, “Von Monstern”, 1056; and *Green's Encyclopaedia of the Law of Scotland*, 496.

¹¹⁰ Schmidt, “Von Monstern”, 1056.

¹¹¹ Kotlyar, “The Evolution of the Scots Law and Practice of Succession: 1300–2000”, 175.

¹¹² See *supra*, section 3.2.

¹¹³ Schmidt, “Von Monstern”, 1059 – 1060.

¹¹⁴ G Mousourakis, *Fundamentals of Roman private law* (2012), para 5.5.1.

¹¹⁵ P Duff, *Personality in Roman Private Law* (1938), 167.

¹¹⁶ A Watson, *The law of succession in the later Roman republic* (1971), 188.

¹¹⁷ W Gordon, “The wrongs and rights of vesting”, 219.

¹¹⁸ Schmidt, “Von Monstern”, 1060.

¹¹⁹ A term found in the pleadings of *Bruce v Melville* (1677) Mor. 14880 at 14888.

interpretation in early German common law was that the *haereditas jacens* was a legal person, in the sense that the patrimony was owned by an entity (with similar and confusing terminology) known as the estate.¹²⁰ The German common law position had a ‘peaceful silence’ for some time before criticism began to emerge.¹²¹ In the face of such criticism, the drafters of the BGB elected to dispose of the *haereditas jacens* in German law.¹²²

This comparative work from Schmidt provides a useful starting point from which to assess the support provided for the estate personhood theory in Scots law. It appears that the position in Roman law, as clarified by Schmidt, is reflected in Scots law: in other words, the *haereditas jacens* does not have personhood in Scotland. This assertion can be evidenced by an examination of two areas of Scots private law. The first is the law of delict. The second is the law of leases and the operation of tacit relocation.

5.4 Delict

If the *haereditas jacens* is a legal person, it should be able to acquire the right to enforce a delictual obligation notwithstanding the death of the deceased. This, for the same reasons as explained above in the discussion of the Living Dead theory,¹²³ would demonstrate that there is passive capacity on the part of the deceased’s estate. Although cases are scarce, it appears that Scots law is unwilling to accept the notion that the estate can acquire a delictual right, which implies that the theory of the *haereditas jacens* as a separate legal person has been rejected.

5.4.1 *Matthews v Hunter & Robertson Limited*

In *Matthews v Hunter & Robertson Limited*,¹²⁴ the Outer House was concerned with a case of professional negligence against the deceased’s conveyancing solicitors concerning a survivorship clause in favour of a spouse (subsequently divorced) which had not been evacuated prior to death. This meant, under the law at the time,¹²⁵ the property vested in the former spouse upon the death of the owner.

The pursuers argued that the defenders owed an obligation to pay damages in delict to the estate of the deceased itself, the *haereditas*, and accordingly anyone who came to be executor was entitled to enforce that delictual obligation.¹²⁶

¹²⁰ Schmidt, “Von Monstern”, 1060.

¹²¹ *Ibid*, 1060. See, in particular, the criticism by von Lübtow and later by Leleu noted by Schmidt.

¹²² See BGB, s1922 and s1924.

¹²³ See *supra*, section 4.5.

¹²⁴ [2008] CSOH 88.

¹²⁵ See now Succession (Scotland) Act 2016, s2.

¹²⁶ [2008] CSOH 88 at para 33.

On counsel for the pursuer's approach, simply by virtue of undertaking duties to their now deceased client the defenders' predecessors must be taken to have undertaken identical duties to her *post mortem* estate in the person of the individual who eventually came to accept office as executor.

Thus, two duties would be imposed on a solicitor, one to the individual, and another to their estate.¹²⁷ Lord Brodie considered the general nature of an estate in this context:¹²⁸

The estate of a deceased is not a natural or juristic person. Rather, it is a fund of property vested in an executor for the purposes of administration in respect of which debtors and beneficiaries have claims. It only vests on the death of the person in whom it was formerly. The intervention of the pursuer as executor, who is of course a natural person, is required in order to enforce the duty but, on counsel for the pursuer's theory, the defenders' predecessors, on accepting the instructions of the deceased, undertook a duty of care to her estate at a time when there was no person, other than the deceased herself, who might be the recipient of the duty. That does not seem to fit very easily with the principle that a duty is an obligation owed by one person to another person. Nor does it fit with the principle that a duty is the correlative of a right and that a right must have a right holder. Who, it might be asked rhetorically, was holding the right in respect of which the pursuer now sues prior to his appointment as executor?

Lord Brodie rejected the theory that the *haereditas jacens* is a juristic person. Therefore, the estate could not acquire rights (such as those in delict) in its own right,¹²⁹ even if later assisted by the executor as its agent as some suggest.

5.4.2 Dobbie v Paton

This issue was revisited in the saga of cases involving the intestate estate of Mrs Ellen Paton. Ms Dobbie, the deceased's surviving daughter, proceeded in an action against Mr Paton, the deceased's surviving son, for vitious intromission with the estate and for losses arising in delict. Among other things, the pursuer argued that Mr Paton's breach by ingathering the estate without being confirmed as executor meant that the pursuer could bring an action in delict on behalf of the estate itself (the pursuer at the time of Paton's ingathering was also unconfirmed as executrix).¹³⁰ Applying *Matthews*, Sheriff Principal Scott considered the delictual case as fundamentally defective:¹³¹

The sort of issues referred to by Lord Brodie in the *Matthews* case are equally pertinent when it comes to the present litigation. As pleaded, the pursuer's second ground of action amounts to the proposition that the defender's actings resulted in a loss to the deceased's estate. It may be that as a consequence the pursuer and, perhaps, other beneficiaries might, indeed, have suffered loss. However, it would then be open to them to sue the defender in such a capacity. As a matter of law, it is

¹²⁷ [2008] CSOH 88 at para 38.

¹²⁸ [2008] CSOH 88 at para 38.

¹²⁹ Macleod, *Contentious executries*, para 1-005.

¹³⁰ [2015] SC GlA 34, at paras [2] to [7].

¹³¹ *Ibid*, at para [18].

not, in my opinion, open to the pursuer to mount an action in her capacity as executrix with a view to recovering loss said to have been sustained by the estate.

These two decisions, albeit first-instance cases, suggest that the estate itself is incapable of being subject to a delictual wrong. This appears to undermine the argument that Scots law has followed the supposed Roman law principle that the dormant estate enjoys its own passive (or rights) capacity. Should passive capacity be a litmus test for personality as is suggested here,¹³² then *Matthews* and *Dobbie* lead to the conclusion that the estate does not have personhood.

5.5 Leases

Another rejection of personhood can be seen in the law of leases, specifically the operation of tacit relocation where there is a death of a party to a lease. Leases straddle the contract/property borderland as being personal rights under an agreement but having real effect.¹³³ Therefore the law of leases provides a useful area in which to examine whether the *haereditas jacens* can acquire rights post-death.

Under the 1964 Act, an executor is able to transfer the tenant's right of lease upon satisfaction of certain requirements.¹³⁴ However, the right does not vest in the tenant's executor until confirmation is granted.¹³⁵ Tacit relocation is, as the Scottish Law Commission noted, the continuation of an existing lease.¹³⁶ In order for tacit relocation to operate, it proceeds on the tacit/implied assumption between both parties that the lease is agreed to be extended for another year.¹³⁷ However, difficulties arise as to the possibility of tacit relocation when the landlord or tenant has died without an executor confirmed. In one view, if the *haereditas jacens* is now vest with the right of lease, the fact of its legal personality should allow for tacit relocation to occur, even though it has no capacity to consent without the aid of an executor. On the other hand, if there is no legal personality, then there is no person in right of the lease who can implicitly consent.

The issues posed by death of the tenant formed part of the Scottish Law Commission's project on recovery of possession of heritable property in 1984.¹³⁸ The Commission identified an unreported case in *Coats v Logan* that held that tacit relocation cannot operate

¹³² See above at 4.5.

¹³³ K Reid, *Law of property*, 1st edn, para 5(5).

¹³⁴ For these rules, see Bartos, *Succession (Scotland) Act 1964*, para 16-01-16.30.

¹³⁵ 1964 Act, s14.

¹³⁶ Report on *Aspects of leases: Termination* (SLC Report No. 260, 2023), 7-8.

¹³⁷ *Ibid.*

¹³⁸ Consultative Memorandum on *Recovery of possession of heritable property* (SLC CM No. 59, 1984).

if the natural tenant had died and the tenant's interest is in the *haereditas jacens*, as there is no tenant to enable tacit relocation to operate.¹³⁹

Coats was subsequently reported, so access to the decision of Lord Ross is helpful to review.¹⁴⁰ Among the arguments, the issue arose of whether tacit relocation had operated taking into account that two of the three co-tenants had died. Lord Ross opined that:¹⁴¹

In my opinion, however, there **could be no tacit relocation here unless all of the original tenants under the lease or their successors continued in existence**. Thus, when the lease first came to be renewed by tacit relocation, tacit consent of the three joint tenants could only be implied so long as they remained in existence. Once Robert Logan died, however, the position was different. If his interest had been taken up by his heir, tacit consent of all three joint tenants might still be implied. But there is no averment as to what happened to his interest, and accordingly, one cannot assume that the heir ever took it up.

If the heir did not take up Robert Logan's interest before the term of the lease expired, Robert Logan's interest would lapse and there would not therefore be any room for tacit relocation... **there can be no question of tacit relocation of the lease since the tacit consent of all parties interested in the lease, or their successors, could not have been obtained.** [Bold added]

Similarly, Lord Robertson's observation in *Rotherwick's Trustees v Hope*¹⁴² that death of a tenant means that no one holds the right of lease.¹⁴³

In the case of a lease continuing from year to year, the landlord is entitled to know, after the death of the tenant, what claims of succession to the lease are to be made by the deceased's successors...In my opinion, since the death of the deceased there has been no one in right of the tenancy under this lease.

That point was later accepted by Lord Keith later in *Morrison-Low v Paterson*.¹⁴⁴

It may be that these cases are a matter of statutory interpretation of the 1964 Act and other tenancy legislation alone. However, at common law the result appears the same. In *Wilson v Stewart*,¹⁴⁵ the First Division held that a decree of removing was competent as the heir had not formally entered into the lease prior to its ish – thereby preventing any tacit relocation. Therefore, tacit relocation could not be said to apply whilst the tenant's right of lease remained in the *haereditas jacens*. It is suggested that this is a logical consequence of the conclusion that the *haereditas jacens* does not have legal personality.

¹³⁹ *Ibid*, para 4.24.

¹⁴⁰ 1984 SLT 113.

¹⁴¹ *Ibid*, per Lord Ross at 225-226.

¹⁴² 1975 SLT 187.

¹⁴³ *Ibid*, per Lord Robertson at 189-190.

¹⁴⁴ 1985 SC (HL) 49, per Lord Keith at 77.

¹⁴⁵ (1853) 16 D 106.

A counterargument to this may be that the cases merely show that the *haereditas jacens* has no active/transactional capacity in which to implicitly consent to the renewal of a lease. On that analysis, tacit relocation would not have operated in the facts of *Coats* and *Wilson* because there is no transactional capacity, rather than because there is no personhood of the estate. That argument seems to fail because, as Rennie highlighted, a lack of transactional capacity “would appear” not to prevent tacit relocation, with examples of an incapax adult or child as a party to a lease where tacit relocation has operated.¹⁴⁶ In other words, a landlord or tenant under a lease who has lost transactional capacity would not be able to prevent tacit relocation from operating. With that said, Rennie cited older authorities and texts which appear to contradict this very point.¹⁴⁷ For example, Rankine wrote:¹⁴⁸

It is no bar to tacit relocation that the party who would have had an interest to arrest it is incapacitated from doing so by insanity, or nonage, or death.

Bell also wrote:¹⁴⁹

The ground of this presumption [tacit relocation] is the want of intimation from either of the parties of an intention to terminate the contract, and it is not affected by the death or supervening insanity of either of them.

Without criticising the learned writers, Bell proceeds on the notion that this “supervening” factor does not bar tacit relocation, i.e.: death or insanity arises *after* the window to exclude tacit relocation has closed (such as within 40 days of an ish). That interpretation seems supported by his mention of the “continuance of intention”.

With this assessment in mind, it is reasonable to conclude that the decisions in *Wilson* and *Coats* illustrate the issue more clearly. If a person dies within 40 days of the ish, and therefore after the relocation date has passed, the lease continues in the *haereditas jacens* for a further year (following *Hume v McLeod’s Reps*). However, if a person dies before the relocation date, there can be no tacit relocation (*Coats* and *Wilson*) because there is no person in right of the lease.

When a situation such as *Coats* and *Wilson* occurs, the tenant’s interest is at an end because there is no person which can be considered to have provided tacit/implicit consent to tacit relocation. The tenant interest appears to have no ‘rightholder’ with whom to it can be said could have implicitly consented.¹⁵⁰ Given the law appears to recognise that even a child or

¹⁴⁶ R Rennie et al, *Leases*, (2015), para 11-06.

¹⁴⁷ *Shearan v McLeod’s Reps* (1808) *Hume’s Decisions* 583 (this judgment itself is titled *Hume v v McLeod’s Reps*); J Rankine, *The law of leases in Scotland* (1916), 599; W Gloag, *The law of contract*, 2nd edn (1929), 735; and G Paton, H Campbell & J Cameron, *The law of landlord and tenant in Scotland* (1967), 223.

¹⁴⁸ Rankine, *Leases*, 599.

¹⁴⁹ Bell, *A Treatise on Leases*, 4th edn (1826), 133.

¹⁵⁰ A point Gloag also recognised when canvassing the law, see Gloag, *Contract*, 735.

an incapacitated adult can tacitly consent to a lease, the law of tacit relocation cannot be explained by way of the supposed fact that the deceased or estate has only lost transactional capacity. Therefore, in the context of leases, it is further suggested that the *haereditas jacens* does not have legal personality.

5.6 Conclusion

In both the law of delict and the law of leases, there appears to be a rejection of the notion of an estate having its own legal personality. It was said that, in Roman law, the estate was regarded as an autonomous person, but this point is now the subject of greater clarity owing to Schmidt's research. It is now clearer that Roman law has been misrepresented based on metaphorical statements of Roman jurists.

In Scots law, the examination of the areas of law set out above leads to a similar conclusion. Scots law does not recognise the personhood of the estate during the *haereditas jacens*. This leaves us with the unanswered question, of who holds the real right of ownership of property pending the confirmation of an executor?

Chapter 6: Retroactive confirmation

6.1 Introduction

Thus far, this thesis has attempted to ascertain whether property during the *haereditas jacens* is ownerless property. It has examined the theories developed to explain ownership of the deceased's property after death. This thesis has evaluated these theories against the developments in the common law. The common law does not appear to support the Living Dead nor the personified estate theories. This thesis moves now to consider whether an executor is treated as if they were already confirmed at the time of making a juridical act concerning the estate (or property) within the *haereditas jacens*. Under this approach, property is technically ownerless during the *haereditas jacens*, but confirmation has retroactive effect to later cure or eliminate this gap in ownership. Bankton identified this as one of the notions imported from Roman law into Scots law, as will be explored further. It is accepted that this is the case though, as will be shown, this has its limits in respect of heritable property.

6.2 Confirmation as retroactive effect

Schmidt highlighted that, in Roman law, the retroactive effect of the accession to the estate had been one of the solutions for the *haereditas jacens*.¹ This Roman position appears to have been endorsed in Scotland. Bankton, in his *Institutes*, notes in the section dealing with the “rules of the civil law, illustrated and adopted to the law of Scotland”² that of heritable property heirs:³

All the rights of the inheritance are vested in the heir's person, upon his entry, as from the period of the ancestor's death... and all the interim acquisitions are therefore good, and accrue to the heir upon his entry, in the same manner as if he had entered immediately on the ancestor's death, according to the purview of this rule. And which is enforced by another of our rules to the like purpose, *Ominia fere jura haeredum perinde habentur, ac si continuo sub tempus mortis exstitissent*, all the rights of the heir are considered in the same light as if they had existed at the time of the ancestor's death.

What Bankton is suggesting here is twofold: (i) that during the *haereditas jacens* “it is feigned to be still in the person of the deceased”;⁴ and (ii) the heir is held, following entry,

¹ J Schmidt, “Von monstern” 1059 (see n39 for Roman sources). See Gaius, D. 45.3.28.4, quoted in V Buchkovski & E Bajram, “Apertura Testamenti and the legal consequences thereof in the Roman Law” (2018) 2 *Ius Romanum* 145, 149.

² Bankton, *Inst*, IV.45.1.

³ *Ibid*, IV.45.163.

⁴ *Ibid*.

to have owned from the date of death. Part (i) has previously been discussed, and dismissed, in the preceding chapters.⁵ However, part (ii) is worthwhile to explore here.

This approach has its supporters in the sources. Reid suggested that this is the answer to the Scottish *haereditas jacens*.⁶ Bartos & Meston also noted:⁷

The heritage which previously vested directly in the heir at law in cases of intestacy...now vests directly in the executor *qua* executor by virtue of confirmation with retrospective effect from the date of death.

Retroactivity might provide some comfort in addressing the issue of the *haereditas jacens* by providing that an unconfirmed executor (whether nominate or dative) can perform juridical acts concerning the estate during this period (without confirmation). Based on the wealth of authorities in this area, both in the common law development and in Bankton's writings, it is submitted that the law has indeed developed on this basis. However, the ambit of the executor's powers which can be validated by the retroactive effect on confirmation is unclear. A review of the more modern authorities illustrate that the law is developing in a haphazard way with some inconsistencies.

The analysis of these authorities will begin by exploring the most frequently cited case,⁸ *Garvie's Trustees v Garvie's Tutors*.⁹ Before exploring this case, it should be understood that an unconfirmed executor has a range of powers, and these have existed for some time, particularly concerning the recovery of debts in court. As Lord McLaren wrote:¹⁰

Under the old law an executor-nominate or executor-dative, who was desirous of avoiding the expense of confirming doubtful debts, might obtain from the Commissary a license to sue for payment... But in modern practice an executor nominate or dative is held to have a title to sue in virtue of his appointment.¹¹

This point was indeed raised in *Garvie's Trustees*. In that case a tenant had died on 14 May 1968, survived by a son (a minor). On 13 January 1969, the executors of the deceased tenant issued a notice under Section 16 of the 1964 Act transferring the tenant interest in a lease to themselves, in their capacity as tutors of the deceased's tenant's son. However, the executors had not been confirmed at the point the notice of transfer was issued. Confirmation was later

⁵ See above at Chs 4 and 5.

⁶ K Reid, "Administration of estates in Scotland", 445.

⁷ Bartos, *Succession (Scotland) Act 1964*, para S14-23.

⁸ As examples, see Bartos, *Succession (Scotland) Act 1964*, para S14-23; Scobbie, *Currie on Confirmation*, para 14-03; D Bain et al, "Landlord and tenant (2nd reissue)" in *Stair Memorial Encyclopaedia*, para 330; MacLeod, *Contentious Executries*, para 1-025ff; and Rennie, *Leases*, para 33-18.

⁹ 1975 SLT 94.

¹⁰ Lord McLaren, *Wills and Succession*, 3rd edn, Vol II, para 1616.

¹¹ See *Chalmer's Trustees v Watson* (1860) 22 D 1060.

issued on 19 February 1969. The landlords objected to the validity of the notice as a consequence. Lord Thomson, in reviewing the authorities, set forth:¹²

It has for long been established that an executor, whether nominated by the deceased or appointed by the court can, before confirmation, sue for a debt due to the deceased's estate, although he cannot before confirmation give a valid discharge or enforce payment... In some circumstances at least an executor can be sued before confirmation... Furthermore, if the grant of confirmation of 19th February 1969 operates retroactively to validate the transfer of the interest in the lease of 13th January 1969, it seems to me necessarily to follow that the notice... was a good notice for there must be deemed to have been a transfer and an acquisition at that date.

Lord Thomson relied on *Mackay v Mackay*,¹³ where it was held that it was competent for testamentary trustees to assign a right in copyright before confirmation. There the Lord President set forth:¹⁴

No doubt confirmation was required in order that they might secure an active title to intromit with and administer the estate, but it seems to me to be perfectly clear that if they subsequently obtained confirmation the defect in their title could be effectively cured, and the cure would draw back to the date of the assignation.

Lord Johnston also noted:¹⁵

I have never been able to understand how an assignation granted by executors unconfirmed cannot be validated by the retroactive effect of confirmation afterwards obtained, but must be treated as an entirely invalid and null deed, which would necessitate the execution of a new assignation after confirmation.

Thus, it appears that a line of authority has developed which accepts that confirmation has retroactive effect, including here in relation to a conveyance of incorporeal property. The doctrine is undoubtedly part of Scots law. However, *Garvie's Executor* was concerned with a testament acting as a general conveyance to the executor. There is a question of whether *Garvie's Executor* is therefore authority only for the proposition that confirmation of an executor-nominate has retroactive effect, with the position of an executor-dative remaining uncertain.

The authorities are unclear in relation to executors-dative. Following Erskine, an executor-dative takes authority solely from the court rather than by testament.¹⁶ It is important to note here, however, that the court performs two distinct roles in granting power to an executor-dative. First, a person entitled to be appointed executor-dative must petition the appropriate court in terms of Section 2 of the Confirmation of Executors (Scotland) Act 1858 to be

¹² 1975 SLT 94, per Lord Thomson at 97.

¹³ 1914 SC 200.

¹⁴ *Ibid*, per Lord President at 203.

¹⁵ 1975 SLT 94, per Lord Johnston at 204.

¹⁶ Erskine, *Inst*, III.9.32.

decerned as executor-dative. If they have not been decerned, they are simply not an executor-dative. Instead, they remain one of the persons entitled to be decerned executor for whatever their interest is in the estate, such as next of kin, universal legatee, special legatee or even the procurator fiscal.¹⁷ The persons entitled to be confirmed executor-dative are hereinafter referred to as ‘interested parties’. Once decerned, an executor-dative must be confirmed to the estate in the usual way. The question may therefore arise of whether, insofar as the retroactivity rule is concerned, an interested party is in a different position to a party who has been decerned as executor-dative but has yet to be confirmed.

In *McGrath v Nelson*,¹⁸ Lady Dorrian in the Outer House implicitly appeared to reject an argument that *Garvie’s Trustees* and *Mackay* were authority for executors-nominate alone.¹⁹ However, argument on this point was not directly addressed in her decision, and neither do the averments indicate the status of the executor. It also was not addressed directly in *Pattinson v Matheson*²⁰ where the next of kin did not decern or obtain confirmation until many years after the death of the deceased – and yet the transfer of a croft by an interested party was held to be valid.

6.3 The limits of retroactivity

Whilst it does appear that executors have limited rights prior to confirmation, which means that any prior juridical act by an unconfirmed executor can be held valid, there are limits. These limits illustrate the absence of any title of an unconfirmed executor during the *haereditas jacens*. Two recent Sheriff Court cases are of interest here.

In *Love v NHS Fife Health Board*,²¹ the daughter of a deceased patient sought to sue Fife Health Board for clinical negligence and damages for personal injuries sustained by her mother prior to her death.²² The patient had died intestate, with the daughter as next of kin.²³ The daughter did not petition for appointment as executor-dative, and consequently neither did she obtain confirmation to the deceased’s estate. In the circumstances, Sheriff Fife held that she had no title to sue.²⁴

¹⁷ Scobbie, *Currie on confirmation*, para 6-03. Enquiries to the Crown Office and Procurator Fiscal Service indicate that procurators-fiscal no longer confirm to estates.

¹⁸ [2010] CSOH 149.

¹⁹ The matter was not addressed directly in the decision, but see the pleadings, *ibid*, para 19.

²⁰ [2022] CSIH 43.

²¹ [2023] SC EDIN 18 (ASPIC).

²² These, for the reasons discussed above at 4.4.8 would be recoverable by an executor under s2 of the Damages (Scotland) Act 2011.

²³ [2023] SC EDIN 18 (ASPIC), per Sheriff Fife at para 18. Of course, this entitles her to be confirmed as executor-dative.

²⁴ The reported decision focuses on the applicability of Qualified One-way Costs Shifting (QOCS), but the discussion here illustrates the limits of the theory of executors being able to validate acts prior to confirmation.

In *Riddell v Arcus Solutions (Holdings) Ltd*,²⁵ an employee died intestate. Prior to her death, she was involved in an (unconnected) industrial accident. The surviving spouse raised an action seeking damages from the deceased's employer for negligence on behalf of the deceased. He claimed title to sue on the basis that he was executor-dative on the deceased's estate, despite not having been appointed as executor by the court, nor having obtained confirmation to the estate.²⁶ He argued that, as the recipient of prior rights under the 1964 Act, he had the paramount and absolute right to be appointed executor.²⁷

Sheriff Mundy disagreed, holding that all next of kin have a right to be decerned if they have a 'beneficial interest' in the estate or familial relation to the deceased.²⁸ Sheriff Mundy also considered the judgment of Lord Adam in *Symington v Campbell*.²⁹ That case concerned the rights of a potential assignee, who had granted rights prior to an assignation. There, Lord Adam noted:³⁰

It has been suggested that this case is like that of executors who have been held able to sue competently before getting confirmation, and that in consequence it is competent for the pursuer here to sue. But the difference between the cases is that the executors had a good title at bottom, which they only required to have formally made absolute, while the pursuer here had absolutely no title, till the assignation had been entered into.

Sheriff Mundy in *Riddell* articulated this point as follows:³¹

This is not a situation where there is any title at all on the part of the pursuer at the time the action was raised. It is not a situation where there is a title, which only requires to be perfected. The pursuer is not in the position of an executor nominate or dative who merely requires to confirm to the estate in order to obtain authority to intromit with the estate and so enforce any decree. It is accordingly not the sort of situation alluded to by Lord Adam in *Symington v Campbell* nor can it be the "substantial right, requiring only formal completion" mentioned by the Lord President in the same case. The right to apply to be executor dative either at common law or in terms of statute does not change that, the right not having been exercised. It matters not in these circumstances whether or not the act of appointment is a judicial or administrative one. None took place.

Therefore, the spouse was unsuccessful in bringing proceedings against the employer on the basis that he had no title to sue at the time the action was raised. *Love* and *Riddell* appear to show that an 'interested party' in an intestate estate, a person entitled to be decerned executor-dative, cannot initiate court actions. There is, to quote Lord Adam in *Symington*,

²⁵ [2022] EDIN 1 (ASPIC).

²⁶ *Ibid*, per Sheriff Mundy at para [12].

²⁷ 1964 Act, s9(4).

²⁸ [2022] EDIN 1, per Sheriff Mundy at para [17].

²⁹ (1894) 21 R 434. For further discussion, see MacLeod, *Contentious executries*, para 1-028.

³⁰ *Ibid*, per Lord Adam at 437.

³¹ [2022] EDIN SC 1, per Sheriff Mundy at para [18].

no “title at the bottom”. Yet, as noted with *McGrath* and *Pattinson*, the extent to which the courts allow interested parties of an intestate estate to perform juridical acts that can later be retroactively validated seems to be an inconsistent area.

6.4 Retroactive ownership

Whilst it is accepted that confirmation has retroactive effect, the limited powers of an executor during the *haereditas jacens* do not resolve the central issue in this thesis. Retroactive effect does not alter the fact that during the *haereditas jacens* there appears to be no owner. Gretton highlights this point in the context of land registration.³²

6.4.1. Registration required to acquire a real right in land

When title is completed in the Land Register it does not backdate (save as to the date of application of a deed).³³ Without registration of title, the executor has no ownership.³⁴ When an executor completes title following confirmation, ownership is not backdated to the date of death of the former owner; it operates from the date of registration of the deed – not the date confirmation is granted. Implicitly, there is a recognition that there is no owner in the period between death and registration of title. Confirmation does not seem to cure this gap as a matter of property law.

This is something that Bankton had attempted to reconcile by asserting that, during the *haereditas jacens*, property “is feigned to be still in the person of the deceased”. That idea, for the reasons given above, is unsound and has not been developed in Scots law.³⁵ After death, the Land Register is simply inaccurate by listing the proprietor as someone who no longer exists. The property is within the deceased’s *haereditas jacens*.

Even though confirmation has retroactive effect, the authorities do not support the notion that the executor is retrospectively deemed to be an owner (or tenant) from the date of death. The legal fiction of retroactivity is employed in the cases discussed in respect of juridical acts of the executor (such as effecting a notice or title to sue). It does not appear extend to ownership itself.

6.4.2. Doctrine of accretion

With this said, the general doctrine of accretion of title within property law may be of some assistance. This provides that a person without ownership can grant a deed validly, provided they later acquire ownership.³⁶ Under the doctrine of accretion, ownership accrues to the

³² Gretton, “*Quaedam meditationes Caledoniae*”, 116.

³³ Land Registration (Scotland) Act 2012, s37.

³⁴ *Ibid*, s53.

³⁵ See Chs 4-5.

³⁶ K Reid, “Property (Reissue)”, para 1109.

non-owner retrospectively, such that any conveyance or grant to a third-party grantee is held as valid. In this sense, it may be possible for an executor-designate or interested party to grant deeds concerning the deceased's property, with those deeds retrospectively validated if and when the executor-designate or interested party is subsequently confirmed to the estate. An example of this in an executry context can be seen in *Boyle v Ford*,³⁷ where a tenancy granted by the surviving spouse without confirmation was "retrospectively validated to the date of its grant".³⁸

As Reid noted, accretion is a legal fiction owing to the maxim *jus superveniens auctori accrescit successor* (the right accreting to the author accrues to the successor).³⁹ However, legal fictions have their limits, as was noted previously in respect of the executor being considered *eadem persona cum defuncto*.⁴⁰ Reid explains that accretion serves two purposes (i) to validate an original grant to avoid the need for a fresh grant following the non-owner obtaining title; and (ii) to determine rankings between competing grantees.⁴¹ Beyond these, there is no application of the doctrine. As the cases above in respect of tacit relocation highlight,⁴² even where an executor later confirms, that does not retroactively insert a party to a lease when tacit relocation failed to operate, as was the case in *Coats*. At the material time, there is no holder of the right such as a lease or ownership.

6.5 Conclusion

Overall, it can be concluded that confirmation has a limited retroactive effect. However, this effect does not resolve the question of who owns property during the *haereditas jacens*. On the contrary, retroactive effect is required precisely because a gap exists in the middle period between death and confirmation. As Lord Reid described in *Kelly v Cornhill Insurance Co Ltd*:⁴⁴

If the deceased dies intestate there is no executor who can act before confirmation, and even where there is an executor nominate he has no title until confirmation to deal with the estate. Immediately after the death the property must, I think, still be regarded as in the *hereditas jacens* of the deceased.

This statement appears still to be good law despite the retroactive effect of confirmation. Registration of an executor's title does not backdate to the date of death of the deceased. As

³⁷ [2023] UT 04.

³⁸ [2023] UT 04 at para [36].

³⁹ Reid, "Property (Reissue)", para 1111. See also *Swans v Western Bank* (1866) 4 M 663, per Lord Ardmillan at 669.

⁴⁰ See above at 4.4.1.

⁴¹ Reid, "Property (Reissue)", para 1109.

⁴² See above at 5.5.

⁴³ Reid, "Administration of Estates", 438.

⁴⁴ 1964 SC (HL) 46, per Lord Reid at 56.

a matter of property law, confirmation does not backdate ownership of property to remove the *haereditas jacens* entirely. At any given time prior to confirmation, despite the limited powers of an unconfirmed executor, there still appears to be no owner of property in the deceased estate. Therefore, there is still a question of who owns the former property of the deceased during this period.

Chapter 7: The ownerless patrimony theory

7.1 Introduction

This thesis has argued that: (i) the Crown does not have temporary ownership of the unconfirmed estate of the deceased;¹ (ii) the deceased's legal personality does not subsist after death;² (iii) the *haereditas jacens* does not continue as a self-constituted legal person following death;³ and (iv) the retroactive effect of confirmation does not resolve the gap in ownership at the material time (albeit it is accepted that confirmation is retroactive).⁴ The only logical conclusion therefore appears to be that there is simply no owner of a deceased's estate during the *haereditas jacens*. This section will explore whether the *haereditas jacens* is a form of ownerless property. It is suggested that this is the position in Scots law.

7.2 Feudal law and the *haereditas jacens*

It may seem unusual to begin this chapter with an exploration of feudal law, given its abolition. However, an overview of the development of feudal law helps to illustrate the development of the *haereditas jacens* in Scots law and supports the argument presented here that ownerless property is recognised in Scots law. The Lord Chancellor in *Lord Advocate v Marquess of Zetland* described how, in the initial phases of feudalism in Scotland, the vassal did not have any form of ownership in feued property:⁵

At first the vassal held the feu as a pure *beneficium*,⁶ and therefore his interest ceased when he died. By degrees, he acquired a proprietary interest in the feu, and one of the earliest steps was the acquisition by his heir of the right to have investiture renewed on payment to the superior of a sum of money known as relief. It is not certain when the practice arose, or when it hardened into a custom having the force of law.

As the Lord Chancellor explains, in early Scots law, when a vassal died, the feu simply ceased. There was no succession to heritable property as a matter of law. Early feudalism did not recognise that a vassal's right was a right of property in the modern sense. Craig described the position in this way:⁷

In the earliest beginning of feudalism and during its manhood, as I explained above, there were no feus which were not military, and a feu was nothing more than a military vassalage...With the passage of time and the gradual degeneration of the military character of feudalism, this general rule was eroded to the extent that feus

¹ *Supra*, 3.3.

² *Supra*, Ch 4.

³ *Supra*, Ch 5.

⁴ *Supra*, Ch 6.

⁵ 1920 SC (HL) 1, per Lord Chancellor (Birkenhead) at 9.

⁶ A land grant in exchange for services.

⁷ Craig, *Jus Feudale* (Dodd's translation), I.14.1.

were granted, through the indulgence of princes and lords, even to women and children, and others utterly unsuited to military service.

That background is further explained by Lord Kinnear “whose profound knowledge of the feudal law we have always been accustomed to rely upon”⁸ in *obiter* remarks:⁹

By the earlier feudal law, the vassal had no power to transfer his feu without the superior's consent. But when the feu had become property recognised by law as transmissible to heirs... The fee no longer reverted to the superior on the vassal's death, but passed into his *hereditas jacens*.

His lordship acknowledges that a vassal's holding came to be regarded, over time, as a right of property. Succession rights to the feu developed as a consequence. Lord Kinnear also noted that, on the death of the vassal, ownership of the feudal holding passed into a *haereditas jacens* until the heir entered into the estate. This entry could be achieved by the process of “service”.¹⁰ At common law, heritable property did not vest in a deceased's successor automatically by mere survivance alone; the heir had to expedite service to begin the process of obtaining title to the land.¹¹

The law evolved in this way to allow an heir a choice as to whether to enter the estate or not. Lord Balgray noted:¹²

In the progress of time [heirs] became *necessarii* and *voluntarii haeredes* [necessary voluntary heirs]. This is well exemplified in the Roman law... But it is known to all, that the feudal and civil laws suggested and introduced many important regulations which are now engrafted into our law. An heir came to be viewed as *eadem persona cum defuncto*, and was held to step so completely into the shoes of his ancestor, as to be liable for all the burdens and obligations of his predecessor, whatever might be the ‘*emolumentum successionis*,’ [‘benefit of the succession’] Whenever that was understood, it then became a matter of justice to require a declaration from every heir of his consent and willingness to be subjected to his ancestor's burdens and obligations.

Further authority in support of this understanding of the development of the law may be found in Lord Kames. His lordship provided a report for a decision of *Landales v Landale*.¹³ When commenting on the pursuer's pleadings, Lord Kames wrote:

It is true, when the rigour of the feudal law began to abate, and land came gradually to be *in commercio*, a notion crept in of a property in the vassal; and upon that notion was grafted the military vassal's power of alienating the half of the land. This power

⁸ *Argyll v Riddell* 1912 SC 694, per Lord President at 738-739.

⁹ *Ibid.*, at 720.

¹⁰ H Monteath, ‘Heritable rights – from early times to the Twentieth century’, chapter in *Introduction to Scottish Legal History* (Stair Society vol 20, 1958), 174. It was also possible to obtain a precept (and later writ) of *clare constat*, see J Craigie & J Bartholomew, *The Elements of Conveyancing: Heritable Rights* (1908), 270.

¹¹ A Wilkinson & W Wilson, *Gloag and Henderson's introduction to the law of Scotland*, 9th edn, (1987), 715.

¹² *Cochrane v Ramsay* (1828) 6 S 751, per Lord Balgray at 764. See further, Craigie & Bartholomew, *Elements of Conveyancing*, 269.

¹³ (1752) Mor 14465.

of alienation introduced an obligation upon the heir to pay the debts of the former vassal, ... In this country, the maxims of the Roman law having prevailed, we have adopted the identity of person, and their notion of a *haereditas jacens*; and, in following that track, have made the heir universally liable for the predecessor's debts ... The identity of person, *haereditas jacens*, and the *aditio bæreditatis*, are fictions derived from the Roman law, to which our forms were made to bend, after land came to be in commerce, and after the heir upon just and equitable considerations, was subjected to pay his ancestor's debts.

Until such time as the heir completed title, if they wished, then the property remained in the estate of the deceased in *haereditas jacens*. However, this did not leave the heir first in line to the succession with no entitlement whatsoever. The doctrine of the “apparent heir” developed, which gave several rights and obligations to the first in line to the succession of an ancestor.¹⁴ An apparent heir was, as Bell described, “a person to whom the succession to an heritable estate has, on the death of the ancestor, opened...but whose feudal title is not yet completed”.¹⁵

The doctrine of the apparent heir remained until the Conveyancing (Scotland) Act 1874 provided that an apparent heir was given a personal right to land, in the same way as those holding an unfeudalised (or unrecorded) title.¹⁶ The apparent heir’s relationship to the estate was in effect converted into a *jus ad rem* and converted the heir into an uninfert proprietor from death.¹⁷ The effect of this provision of the 1874 Act was that the “amorphous”¹⁸ doctrine of apparenacy was abolished, as the Lord President in *McAdam v McAdam* described:¹⁹

It is needless to trace the previous progress of legislation on this subject, because this [Conveyancing (Scotland) Act 1874] has the effect of making it impossible for any heir to possess an estate on apparenacy. There is now no such thing known in the law of real property in this country.

In a sense the development of the apparent heir doctrine was a mechanism to cover over the gap of the *haereditas jacens* and provide intermediate rights for an heir whilst they decided whether to enter the heritable estate. Section 9 of the 1874 Act provided a similar solution. However, Section 9 was subsequently repealed by the Succession (Scotland) Act 1964. The effect was that the old problem of the *haereditas jacens* was allowed to re-emerge,²⁰ in this case without the benefit of the apparenacy doctrine. The problem of the *haereditas jacens* in

¹⁴ McLaren, *Wills and succession etc.*, vol I, para 178. A useful summary can be found in J Wark et al (eds), *Encyclopaedia of the laws of Scotland*, Vol I (1926), paras 919-944.

¹⁵ Bell, *Comm*, Ch V “Some detached branches”.

¹⁶ 1874 Act, s19.

¹⁷ H Monteath, “Heritable rights – from early times to the Twentieth century”, 174.

¹⁸ *Encyclopaedia of the laws of Scotland*, Vol I, para 944.

¹⁹ *McAdam v McAdam* (1879) 7 R 1256, at 1258.

²⁰ 1964 Act, Sch 3.

modern succession law is effectively a return to this historic problem once solved by apparent heirs.

7.2.1 *Dominium non potest esse in pendente*

The development of the *haereditas jacens* in response to recognition of the heir's right to accept or renounce the succession appeared to challenge a fundamental principle of the feudal system, namely that a fee must always have an owner, or that a fee must always be full.²¹ The Lord President in *Anstruther v Anstruther* makes reference to this:²²

In consequence of [the heir's] entry, all the rights of a vassal open to him; all the obligations of a vassal are incumbent upon him; and all the feudal incidents fall in his person. Were it otherwise, the fee... might remain *in pendente* for centuries, contrary to an axiom or fundamental principle of the feudal law.

As the Lord President noted in *Anstruther*, it was a maxim that ownership cannot be *in pendente*.²³ The full maxim is *dominium non potest esse in pendente*.²⁴ Ownership cannot be uncertain or pending. In feudal language, this is a requirement that the fee must be full with an infeft vassal.

Properly speaking, the *in pendente* maxim seemed to be a rule of conveyancing drafting that a transfer to a non-identifiable or non-ascertainable grantee would be of no effect, as this would be an "impossibility in conveyancing".²⁵ That is true only as a matter of *transfer* and the rule survives the abolition of feudal tenure.²⁶ Lord Ardmillan described the rule as follows:²⁷

A feudal maxim of Scottish law which forbids the fee to float on poised wing till it finds fitting settlement, and which demands that from the first the fee shall have a local habitation as well as a name.

However, the authorities are rather loose in relation to the precise parameters of the maxim. As shown in *Anstruther*, authorities often used the *in pendente* phrase to effectively describe an empty feu, or ownerless property. Under strict feudal theory, an empty feu appeared an impossibility. The holding would, in principle, be liable to escheat *propter defunctum tenentis* (escheat for want of a tenant) and reversion of the feudal holding to the superior.²⁸ As McMillan described:²⁹

²¹ Reid, *Law of property in Scotland*, 1st edn, para 81.

²² (1836) 14 S 272, per Lord President at 285.

²³ G Gretton, "Trusts" 513.

²⁴ Mackenzie, *Inst*, II.2.3.

²⁵ *Colville's Trs v Marindin* 1908 SC 911, per the Lord President at 919.

²⁶ Discussion paper on *accumulation of income and lifetime of private trusts* (SLC DP No. 142, 2010), para 2.48.

²⁷ *Cumstie v Cumstie's Trustees* (1876) 3 R 921, per Lord Ardmillan at 927.

²⁸ *Scottish Coal*, para [107].

²⁹ McMillan, *Bona Vacantia*, 4.

The feudal theory of reversion, or more accurately of escheat *propter defectum tenentis*, was that on the death of a vassal without heirs the feu, i.e.: his interest in the land, was extinguished, and the land reverted to his superior as the author of the feu, but the reason for the reversion was not that the vassal had died without heir but that the superior had lost a vassal to perform the feudal services to which, as superior, he was entitled, as so long as he had a vassal to perform the feudal services the land could not revert to him.

Scots law did not develop strictly in line with feudal theory in this respect. Instead, it facilitated a period in which the heir to a vassal could deliberate on whether to complete title, and afforded rights and duties to an apparent heir in this intervening period.³⁰ The *haereditas jacens* in the feudal system seems a strange exception, given that a vacant feu should have led to escheat due to the *in pendente* maxim. What is argued in this thesis is that the development of the *haereditas jacens* in feudal law effectively appeared to be a temporary exception to the principle that the fee must be full. In his analysis of the feudal law, Gretton noted that death appears to provide an exception to the *in pendente* maxim:³¹

With certain inevitable exceptions, **such as the transitional period caused by a death**, the rule was and is that the fee must be full, that is, that there must always be an identifiable person infeft. The rule is usually expressed by saying that a fee cannot be *in pendente*.

7.2.2 Liferents and fiduciary fiars

It appeared that during the *haereditas jacens*, the fee was empty and had no holder. In other words, “until the inheritance is taken up, these things belong to no-one”.³² With the development of the doctrine of apparent heirs, any concern which arose about property being temporarily ownerless during the *haereditas jacens* may have been lessened given there was a person who could be called up, or charged, to enter into the heritable estate.³³ However, the apparenacy doctrine did not provide a solution in all cases. The succession to the heritable estate may have been a complex matter, particularly where certain devices had been put in place. An entail is one such example, whereby the heritable estate could be required to pass to a specific lineage of the deceased’s family.³⁴ Another example is liferent, whereby a right to possession passes to one party but ownership passes to another. Under these devices, a situation could arise whereby there was ambiguity as to the person to whom succession of the property could pass, resulting in disputes. Case law emerging from one such area, namely

³⁰ *Scottish Coal*, para [107]. Although, it may have been possible for a superior to seek a declarator of non-entry. See further, Reid, *Law of Property*, 1st edn, para 81.

³¹ Reid, *Law of Property*, 1st edn, para 81.

³² Craig, *Jus Feudale*, I.15.23.

³³ McLaren, *The law of Wills and Succession*, Vol I, 3rd edn, para 1010.

³⁴ Report on *Abolition of the Feudal System* (SLC Report No 168, 1999), para 9.8. Difficulties in this area can be illustrated by the cases of *Bruce v Melville* (1677) Mor 14880 and *Mountstewart v Mackenzie* (1707) Mor 14903.

the law of liferent, suggests that the courts and the institutional writers recognised the *haereditas jacens* as a period of ownerless property.

A proper liferent is as Reid described “the right to the use and the fruits of property for the duration of the holder's life”.³⁵ One party, the fiar, holds ownership of the property, whilst another, the liferenter, holds the real right of liferent. After the death of the liferenter, the liferent is extinguished and the fiar has ownership unencumbered by the liferent. Where a liferent is to be created *mortis causa* to a person, and concurrently the fee (ownership) is also to be conveyed to a person who does not yet exist, who should hold the fee for the benefit of the liferenter? This vexed question was the focus of *Frog's Creditors v Frog's Children*.³⁶

7.2.3 *Frog's Creditors v Frog's Children*

Frog's Creditors is infamous in that it is a decision “given with regret, and has been regretted frequently since”.³⁷ The Scottish Law Commission has been critical of the rules established in *Frog's Creditors*, which has led to its abolition in respect of its application to trust law.³⁸ The facts of *Frog's Creditors* are as summarised by the Scottish Law Commission:³⁹

Frog's Creditors v His Children (1735) concerned the disposition by Bethia Dundas of a liferent interest in heritable property to her grandson Robert Frog, with the fee to his lawful heirs. At the time, Robert was 9 years old. He subsequently fell into debt and, to pay his creditors, he entered into a sale of part of the property he had received from his grandmother. The issue for the court was whether, as liferenter, Frog had the power to sell.

The problem in this case was that as Robert acquired a liferent at nine years old, he did not have children who could have held ownership. The issue was who owned the property in which Robert enjoyed the liferent? The children, subsequently born, argued that they had the fee, but the creditors disagreed. Amongst the pleadings in *Frog's Creditors* is a discussion of the idea of ownership *in pendente*, given that the conveyance could not have resulted in ownership being conveyed to non-existent persons. The creditors argued:⁴⁰

It is a principle of law, that a fee cannot be *in pendente*, but must be settled upon some person existing at the time of the disposition; the reason of which maxim is, that it would be inconsistent with common sense to suppose a property without a proprietor.

³⁵ Reid “Property (Reissue)”, para 23.

³⁶ (1735) Mor 4262.

³⁷ *Cumstie*, per Lord Ardmillan at 925.

³⁸ Report on *trust law* (SLC Report No. 239, 2014), para 18.78.

³⁹ Discussion Paper on *Accumulation of Income*, para 2.47.

⁴⁰ (1735) Mor 4262, at 4263.

To avoid this ‘inconsistency with common sense’, the creditors argued that Frog was vested with ownership, as well as a liferent. The children argued in reply: ⁴¹

The maxim, that a fee cannot be pendent, is, like most other rules in law, subject to exceptions; and so many have occurred, that it scarcely merits the name of one... Besides, the case of an *hæreditas jacens* is likewise an instance that a fee may be pendent.

However, the court preferred the creditor’s interpretation that Robert Frog held ownership and not a liferent alone. Whilst the decision itself is not set out in *Morison’s Dictionary*, on the basis of the frequent references in the pleadings to the *in pendente* maxim, it is argued that this was likely one of the court’s main motivations in avoiding ownership being indeterminate whilst, at the same time, deeming the existence of a liferent.

As Gretton noted, conveyancers did not respond favourably to the decision in *Frog’s Creditors*.⁴² The profession continued to attempt to convey ownership to lawful heirs by inserting the word “allennarly” (only) in deeds to make clear that the liferenter was vested with a liferent alone, rather than also having ownership.⁴³ The decision in *Newlands v Newlands’ Creditors*⁴⁴ considered such creative drafting.

7.2.4 *Newlands v Newlands’ Creditors*

The issue of an un conveyed fee in a liferent situation was revisited in *Newlands*. In that case a liferent was created in the father “allennarly” and the fee to be held by his (unborn) children. The father became insolvent, and the creditors sought his heritable property, including the property subject to the liferent in his favour. The children objected, arguing that they had ownership. The creditors argued: ⁴⁵

It is an established maxim of the law, that a fee cannot be *in pendente*. Accordingly, when a right is granted to a father *in liferent*, and to his children, *nascituris* in fee an absolute fee is held to be in the father.

The children argued: ⁴⁶

The maxim that a fee cannot be *in pendente*, owed its origin to the strict ideas formerly entertained respecting ward-holdings, where it was held that a superior could not be deprived of the personal services of his vassal. Even then, however, it was not without its exceptions, as in the period between the death of the vassal and the entry of the heir.

⁴¹ *Ibid*, at 4264.

⁴² G Gretton, “Trusts” 513; Wilson & Duncan, para 6-03; and G Gretton. “Can a fee be *in pendente*?” (1978) 23 *JLSS* 117.

⁴³ Gretton, “Trusts”, 513.

⁴⁴ (1794) Mor 4289.

⁴⁵ *Ibid*, at 4290.

⁴⁶ *Ibid*, at 4291.

The Court of Session, with the House of Lords in agreement on appeal, found:⁴⁷

The whole Bench were clear, that the intention of old Newlands was, that his son should not have the disposal of the fee. They also in general agreed in the principle, that a fee cannot be *in pendente*. There is no subject, it was observed, without a proprietor. An estate descending from ancestor to heir, or conveyed by family deeds, can never be *res nullius*, though it may for a time remain *in hæreditate jacente*; and by the law of Scotland, if it can find no other owner, it will belong to the King.

With the principle that ownership cannot be *in pendente* adhered to, and the deed excluding the father taking the fee, the courts devised the concept that the father held ownership on a fiduciary basis for his unborn children. However, what is crucial for this thesis is that the Court of Session in *Newlands* seems to explicitly recognise the *haereditas jacens* as some distinct form of ownerless property – separate from property that ordinarily falls to the Crown as *bona vacantia*.

7.3 Ownerless property

It has been shown above that ownership cannot be *in pendente* as a matter of a conveyance, and the common law employed creative solutions to avoid such a result. As a consequence, a granter cannot transfer ownership to a non-existent grantee, which is an “impossibility in conveyancing”.⁴⁸ That is true only as a matter of *transfer* and the rule survives the abolition of feudal tenure.⁴⁹ Yet, where the owner themselves dies, the resulting gap of the *haereditas jacens* appears to be a period of ownerless property. This is a point implicitly recognised by the Court of Session in *Newlands*, in noting that “an estate descending from ancestor to heir, or conveyed by family deeds, can never be *res nullius*, though it may for a time remain *in hæreditate jacente*”.⁵⁰

It is submitted that, when receiving the *haereditas jacens* into our legal system, Scots law appears to have accepted a period of temporarily subjectless (or ownerless) property.⁵¹ McMillan, whilst focusing on the law of *bona vacantia*, noted that “the Crown takes a thing in which the ownership is in abeyance”.⁵² McMillan cited Erskine and Bell as authority for

⁴⁷ *Ibid*, at 4293.

⁴⁸ *Colville’s Trs*, per the Lord President at 919.

⁴⁹ Discussion Paper on *Accumulation of income*, para 2.48.

⁵⁰ (1794) Mor 4289 at 4293.

⁵¹ Following the Roman law, see J .*Digest* 1.8.pr, “Something which is subject to human right does in most cases belong within someone’s property, though it can happen that it is not so. For things comprising a deceased person’s estate are not in anyone’s ownership until someone becomes heir.” (translated A Watson, *The Digest Of Justinian* (1985), Vol 1, 24) and G, *Inst* 2.9. See also Schmidt, “Von monstern”, 1058; and A Buono, “The King Heir. Claiming Vacant Estate Succession in Europe and in the Spanish World (13th-18th Centuries)” (2020) 22 *L’Atelier du Centre de recherches historiques* [online], para 10.

⁵² McMillan, *Bona Vacantia*, 8.

this understanding of *bona vacantia*. Erskine, in a discussion on liferents and the decisions in *Frog's Creditors* and *Newlands*, wrote:⁵³

It was a rule, almost universally received by our lawyers till towards the beginning of this century, that *dominium non potest esse in pendenti*; "Property cannot float in an uncertainty," but must, at every period of time, be vested in some one person or another, ... But it appears to have no foundation, either in nature or in law... where the fee or property of any subject is granted to children yet to be procreated, and the bare liferent to the father and mother, the property of that subject must of necessity be pendent till the existence of a child... **And as, by the Roman law, all estates in *haereditate jacente* of persons deceased were without proper owners; so, by ours, the fee is, upon the death of all fiars, *in pendenti*, till the next heir shall make up his titles.** The necessity imposed by the law upon an heir to enter, in order to establish the fee in his person, is a demonstration that he is not fiar till he be entered. Our judges, therefore, have by their late decisions paid but little regard to this rule.

[**Bold added**]

Erskine seems to suggest that Scots law recognises the *haereditas jacens* as a period of ownerless property, as developed from Roman law. On the other hand, Bell, when examining the same issue, wrote: ⁵⁴

The law of Scotland does not recognise a fee in a pendent state, i.e.: where there is no person alive to take it up... The principle on which this rests is, that the superior on the one hand, and the vassal on the other, must have some one to fill the feudal place of superior or vassal; and that the creditors shall be able to know with who the right of property is. The fee, therefore, is not *in pendente* merely by the death of the proprietor; for the creditors of the ancestor can affect it as *in haereditate jacente*, and the heir, or any one in his right, can take it; while in the feudal relation of superior and vassal the remedy is open to either. It is *in pendente* only when there is no one in whom it can be vested.

Erskine's view conflicted with that of Stair and Mackenzie, who held that a fee (or ownership) cannot be *in pendente*.⁵⁵ Bell's interpretation argued that there is no pending ownership in the *haereditas jacens* because it is open to the creditors to take the estate by diligence or to the apparent heir to take it by entry.

The apparent inconsistency in the views of the institutional writers might be explained by loose terminology regarding the use of "*in pendente*". Erskine suggests that title to the deceased estate is '*in pendenti*' until the successor completes title. This terminology seems inaccurate, however, as a person (the apparent heir) would, in most case, have existed and been able to take steps to acquire ownership. Bell rejects the use of term "*in pendente*" where

⁵³ Erskine, *Inst*, 2.1.4.

⁵⁴ Bell, *Prin*, s1711. See also Mackenzie, *Inst*, II.2.3.

⁵⁵ Stair, III.5.50.

there is a readily identifiable apparent heir able to complete title, or creditors who can use diligence to acquire title.⁵⁶

Though Erskine's use of "*in pendenti*" may be inaccurate, it is submitted that his central point is correct. Erskine arguably recognised that the *haereditas jacens* is ownerless. Bell's dismissal of the *haereditas jacens* as being *in pendente* is correct, but he fails to recognise, or at least avoids, the fundamental question of who owns the deceased's estate after death. The personal rights held by creditors or the right of an apparent heir do not bridge that gap as they do not hold ownership. Erskine's endorsement of the Roman law of the *haereditas jacens* as being the position in Scotland therefore appears to be the conclusive answer to the issue. The authorities canvassed in preceding chapters demonstrate the existing owner has ceased to exist, and the estate itself is not recognised as a legal person able to own property. In the leading judgment in *Hunter's Trustees v Carleton*,⁵⁷ Lord Curriehill appeared to also recognise what Erskine had argued in his lead judgment:⁵⁸

The *jus dominii* was of course in the trustees; but the *jus crediti*, or beneficial right to the trust-funds, could not vest in the children before they came into existence. But though the *jus dominii* of property cannot be *in pendente* (except in the peculiar case of property in the *hereditas jacens* of a defunct), the *jus crediti* to a trust-fund vested in trustees can be *in pendente*, the fund being held by the trustees in abeyance until some one comes into existence in whom it may vest; and instantly a child comes into existence, that instant the *jus crediti* vests.

Whilst strictly *obiter*, given the case focused on the beneficiaries' rights in a trust, this is another (comparatively recent) recognition that the *haereditas jacens* is ownerless.

Reconciling these views, it appears that the property in the *haereditas jacens* is ownerless, but rights of successors or creditors will exist which can be taken forward to be able to complete title. Following Bell, it would be wrong to speak of the *haereditas jacens* as having property '*in pendente*' in the traditional sense given the existence of personal rights in respect of the estate held by successors and creditors. These rights of succession or creditor rights are not real rights but fall into antecedent personal rights concerning property.⁵⁹ However, the material point is that the Inner House recognises, along with other authorities such as Erskine and Craig, that the *haereditas jacens* is a period of no ownership.

7.4 Ownerless patrimony

It is submitted on the authorities examined herein, that the current law has developed on the notion that the *haereditas jacens* in Scots law follows Roman law, in holding that all property

⁵⁶ As Bell refers "only where there is no person whom it [i.e: the property] can be vested"

⁵⁷ (1865) 3 M. 514.

⁵⁸ *Ibid*, per Lord Curriehill at 520. -

⁵⁹ G Gretton, "What is vesting?", 148; and W Gordon, "The wrongs and rights of vesting", 218.

and rights are temporarily ownerless in the gap between death and confirmation.⁶⁰ It is an unfortunate position to argue. Scots law has long been comfortable with the idea that property must have an owner. As the Scottish Law Commission noted when discussing moveable property:⁶¹

Once a thing has become the subject of ownership it can never be ownerless.

In the context of the feudal system, the requirement that a fee must be full reinforced that rule. The justifications for the rule are clear. The risks of creditors without debtors, landlords without tenants, and other risks mentioned in the pleadings in the early cases continue to hold true in modern times. Nevertheless, the abolition of the feudal system now removes any feudal aspect to this discussion for land. By reference to Erskine, and other authorities, it has been demonstrated above that Scots law follows Roman law in holding that there is simply no ownership of a deceased's property after death.

How then is the *haereditas jacens* to be conceptualised? It would be wrong to think that the deceased's property enters into a vacuum. The property of the deceased, in some sense, continues to belong to the deceased's estate even in the absence of an owner. Similarly, the debts owed by the deceased are still extant given that, on confirmation, it is the executor's duty to meet these liabilities from the estate's assets. There are then both continuing assets and liabilities forming the *haereditas jacens* which later pass to the executor at confirmation. Likewise, successors hold a vested right from the moment of death, with these claims representing an obligation on the estate which the executor (once confirmed) must fulfil by conveying relevant property, or its realised value. From a successor's perspective, there is no right-debtor from whom to demand a conveyance during the *haereditas jacens*.

Taking these strands together, it seems to be the case that, following death, there is a patrimony without a holder. Effectively this was the position of Roman law as Gretton described:⁶²

A patrimony was a *universitas*. The *haereditas iacens*, which was what the patrimony was called after the death but before the entry of the heir, was a *universitas*.

⁶⁰ This viewpoint of Roman law is not without its critics, for example see U Robbe, *La "hereditas iacet" e il significato della hereditas in diritto Romano* (1975). A helpful summary of this piece, given its indulgence in theory, is found in H Stiegler, "Ubaldo Robbe, La 'hereditas iacet' e il significato della 'hereditas' in diritto romano" (1982) 99(1) *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 455. See also *supra*, n51.

⁶¹ Report on *Lost and abandoned property* (SLC Report No. 57, 1980), para 1.5.

⁶² G Gretton, "Trusts without Equity" (2000) 49(3) *International and Comparative Law Quarterly* 599, 615.

It is suggested here that it is the *patrimony* that is without a holder, not just the property within, to take account of the fact that liabilities are not extinguished by death. The term ‘ownerless patrimony’ might be an apt way to describe such a situation, though properly a patrimony is not property or a thing such that a person can have a right of ownership in a patrimony that the term might suggest it can be.

7.5 The lapsed trust and other comparative examples

The conclusion that the *haereditas jacens* is a period during which property is temporarily ownerless would seem to be novel. However, a similar result can emerge in the law of trusts in Scotland – another area in which debates concerning patrimony and personality are brought sharply into focus. Anderson highlighted that “patrimony is key to the Scottish trust”,⁶³ with the trustee(s) owning the trust patrimony. However, in the case of a lapsed trust, there is no longer an owner by whom the trust patrimony is held. As Reid described:⁶⁴

What happens if all the trustees die or resign? There is then a patrimony but no person. This does not bring the trust to an end. A trust patrimony has a life of its own, which does not depend on the accident of the existence, or non-existence, of trustees. A trust without trustees is like a ship in which all the crew have perished. There is no one to sail the ship. But the ship still remains a ship, and, if a new crew is found, it can take to the seas once more. So it is with trusts. If the trustees have died, the court will appoint new ones. The integrity of the patrimony is unaffected.

De Waal, in a comparative review of South African, Scots, and English law and lapsed trusts noted the problem in Scotland as follows:⁶⁵

But who is owner of the trust property in the period between the death of the last trustee and the appointment of a successor? An unequivocal answer to this question does not appear from any of the available sources.

Some illustrations of the lapsed trust and the *haereditas jacens* are merited. In *Scott, Petitioner*⁶⁶ a *curator bonis* was responsible for an adult without capacity who was a co-owner of an area of land. For reasons unrelated to the incapacity, an action of division and sale was raised, in which division was effected and the curator sought powers from the Court of Session to convey his ward’s estate. The Lord President, in *obiter* remarks, commented that:⁶⁷

We are in practice, where trusts lapse, of appointing a judicial factor to administer the estate and carry out the purposes of the trust... [The title] is in abeyance, and

⁶³ R Anderson, “Words and concepts: Trust and patrimony”, chapter in A Burrows et al (eds), *Judge and jurist: Essays in memory of Lord Rodger of Earlsferry* (2013), 357.

⁶⁴ K Reid, “Patrimony not equity: the trust in Scotland” (2000) 3 *European Review of Private Law* 427, 433.

⁶⁵ M De Waal, ‘The Strange Path of Trust Property at a Trustee’s Death: Theory and Practice in the Law of Trusts’ (2009) *TSAR* 84, 95.

⁶⁶ (1856) 18 D. 624.

⁶⁷ *Ibid*, per Lord President at 626.

therefore it is necessary that the judicial factor be authorised himself to make up a title, in order to administer the trust. In such a case he occupies the place of the proprietor as the trustees would have done.

Similar comments were also made subsequently in *Maconochie, Petitioner*⁶⁸ where Lord Curriehill set forth:⁶⁹

In such a case [of a lapsed trust] there is no existing *dominus* of the estate, and the judicial factor, *qua* such merely, is not in the position of being either a fiduciary owner, or representative of an existing owner, of the subjects. And hence, if in the performance of his factorial duties as to the trust-estate which is in abeyance, it becomes necessary to exercise such powers of ownership...

Thus, Scots law appears to accept the concept of abeyance of ownership in the case of the lapsed trust. This appears similar to the comments made about the estate of the deceased entering into a *haereditas jacens*. Gretton expands on this further with reference to the *haereditas jacens*:⁷⁰

In the interval before a new trustee can be appointed, is there a patrimony which belongs to no one? It is a difficult question, and could perhaps be used as a criticism of the Scots conception of trust.... It is an issue that can arise outwith the context of trusts. When anyone dies, to whom does the patrimony belong immediately after death? The Roman law tradition at one stage seems to have considered the *patrimonium* to be itself a person, or at least a juridical subject, under the name of the *hereditas jacens*.

As previously noted, the notion of the patrimony of the deceased as a person in its own right does not appear to have any support within primary sources of Scots law.⁷¹ Neither is it an accepted view that the Scottish trust is a juristic person.⁷² In any event, it appears that the position with the *haereditas jacens* is the same as a lapsed trust. Both are patrimonies which have come to be ownerless. The Court of Session in *Maconichie* and *Scott* use the term “abeyance” to describe a lapsed trust, a term which has been encountered previously in respect of describing ownership during the *haereditas jacens*.⁷³

To recognise the existence of a patrimony without an owner is perhaps controversial given Gretton further commented that Scots trust law follows the rule articulated by Aubry and Rau that patrimony must be attached to a person.⁷⁴ Aubry and Rau, writing in the nineteenth century, articulated a number of views on patrimony in respect of French law in their *Cours*

⁶⁸ (1857) 19 D. 366.

⁶⁹ *Ibid*, per Lord Curriehill at 372.

⁷⁰ G Gretton, “Up there in the Begriffshimmel?”, chapter in L Smith (ed), *The worlds of the trust* (2013), 532.

⁷¹ *Supra*, Ch 5.

⁷² *Glasgow City Council v Springboig St John’s School* [2014] CSOH 76, per Lord Malcolm at para [16].

⁷³ *Hunter’s Trustees v Carleton*, per Lord Curriehill at 520

⁷⁴ G Gretton, “Up there in the Begriffshimmel?”, 532.

*de droit français*⁷⁵ which achieved “reverential status”⁷⁶ in France.⁷⁷ They offer a highly influential theory on patrimony, which is discussed further below. Among the volumes, are the following passages:⁷⁸

The right of ownership is the only real right which may bear upon the patrimony, during the lifetime of the person to whom the patrimony belongs [Footnote: At his death, it becomes the object of a right of succession]...The patrimony is lost only when a person loses his legal personality, at the time he loses life itself.

Yet, Anderson commented on these sections that:⁷⁹

In various respects the Aubry and Rau theory is unsatisfactory and, on occasion, does not actually work. On death, for instance, the patrimony remains intact although its former holder no longer exists.

Anderson viewed the patrimony remaining intact after death as a *haereditas jacens*, which in his view is an unworkable solution. However, from a review of the primary sources, the observations of Aubry and Rau appear to materialise here in Scotland, in that a patrimony of a lapsed trust (and the estate of the deceased) continues to exist but has no owner after death of the holder(s). Furthermore, despite Anderson’s criticisms, an autonomous patrimony – meaning a patrimony which does not need to be attached to a holder or owner – is a recognised concept which works in some jurisdictions. It is useful to consider some comparative examples to enrich our understanding in Scots law.

7.5.1 Quebec

A similar situation of the Scottish *haereditas jacens* is the Quebecois trust.⁸⁰ Article 1261 of the Civil Code of Quebec (“CCQ”) provides that a trust in Quebec:⁸¹

Constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right.

⁷⁵ The last edition by the authors being *Cours de droit*, 8 vols, (4th edn, 1869-1878).

⁷⁶ Anderson, “Words and concepts”, 355.

⁷⁷ Fortunately for the Scottish reader, an English translation of the relevant passages of the 4th edition now exist, see N Kasirer, “Translating part of France’s legal heritage: Aubry and Rau on the *patrimoine*” (2008) 38(2) *Revue générale de droit* 453, 471 et seq.

⁷⁸ Kasirer, “Translating part of France’s legal heritage”, 480 and 482.

⁷⁹ Anderson, “Words and concepts”, 356.

⁸⁰ A full discussion of the history of the Quebec development of the trust is outwith the scope of this thesis. However, see A Popovici, “Trusting patrimonies”, chapter in R Valsan (ed), *Trusts and patrimonies* (2015) and J Lee, “The nature of the beneficiary’s interest in English, Japanese and Quebec trusts” (2021) 4 *European Review of Private Law* 611.

⁸¹ Quebec Civil Code, s1261.

Thus, the Quebec trust is a patrimony in which neither the truster, the trustee, nor the beneficiary has a real right of ownership.⁸² The Quebecois trustee is a mere administrator with powers of management over the trust.⁸³

Its origins are found in Lepaulle's theory of trust patrimony, which explains the common law trust from a civilian perspective.⁸⁴ In his writings, Lepaulle suggested that a trust enjoys its own patrimony. However, unlike in Scotland, where the trustee owns the trust patrimony (and consequently, the trust property), Lepaulle argued that the trust patrimony needs no owner and that a trustee acts in a management capacity only.⁸⁵ The reason for this was to "preserve the independence of the trust from the identity of specific persons".⁸⁶ Lepaulle's central point was simply that "all that is necessary for the existence of a trust is a *res* and an appropriation of that *res* to some aim".⁸⁷ It is a *patrimoine d'affectation* (a patrimony dedicated to a purpose).⁸⁸ The role of a trustee to Lepaulle can be summarised by his statement that "a trustee is not necessary for the existence of the trust, but becomes indispensable for its normal functioning."⁸⁹

This theory was adopted in Quebec where the trust patrimony is not self-owning or considered to be a juristic person. Instead, the property of the patrimony is unowned, albeit subject to management and administration by the trustees. In effect then, the trust property is ownerless and belongs to no one,⁹⁰ with the trust patrimony being "autonomous".⁹¹ As Smith noted:⁹²

If Scots law breaks the basic rule that every person has only one patrimony, Quebec law seems to break the rule that every patrimony is attached to a person. But if the trust is to be a fundamental legal category – that is, something that cannot be explained in terms of other legal notions, such as contract or legal personality – then you have to break a rule or two. You can't make an omelette without breaking eggs.

It is submitted that in the case of the *haereditas jacens*, Scots law follows Quebecois law in breaking the rule that patrimony is attached to a person in the case of death.⁹³ The Quebec

⁸² Smith identified similar concepts (albeit identified by others) in Ethiopian, Ecuadorean, Czech and Mauritian law. See L Smith, "Scottish trusts in the Common Law" (2013) 17 *ELR* 283, 286.

⁸³ L Smith "Trust and patrimony" (2008) 38(2) *Revue générale de droit* 379-403, 398.

⁸⁴ M De Waal. "The core elements of the trust: Aspects of the English, Scottish and South African Trusts compared" (2000) 117(3) *S African LJ* 548, 560.

⁸⁵ G Gretton, "Up there in the Begriffshimmel?", section III(A).

⁸⁶ R Becker, *Die Fiducie von Québec und der Trust* (2007), 168.

⁸⁷ P Lepaulle "An outsider's view point on the nature of trusts" (1928) 14 *Cornell LQ* 52, 55.

⁸⁸ Y Emerich, "The civil law trust: a modality of ownership or an interlude in ownership?", chapter in L Smith (ed), *The worlds of the trust* (2013), 23.

⁸⁹ Lepaulle "An outsider's view", 55.

⁹⁰ J Lee, "The nature of the beneficiary's interest in English, Japanese and Quebec trusts", 626; Gretton, "Up there in the Begriffshimmel?", section III(C).

⁹¹ Gretton, "Up there in the Begriffshimmel?", section III(C).

⁹² Smith, "Scottish trusts in the Common Law", 286.

⁹³ Gretton, "Up there in the Begriffshimmel?", 532.

trust is a method of detaining property to allow it to be ownerless but still preventing it being conceptualised as *res nullius* (and falling to the Crown).⁹⁴ It appears that the same development has occurred in Scotland, albeit at the time of the majority of the cases decided and the texts of the institutional writers, patrimony as a legal concept in Scotland was not developed as it is today.

Quebec places a focus on the fact that the trust has no titularity.⁹⁵ There is no one with the real right of ownership of the trust property. Gretton, from a perspective of Scots law, made the following observations on the Quebec trust:⁹⁶

Take a [Quebec] trust asset such as a house. A right exists. It is, I think, a right of ownership, because I do not see what other right it could be. (And if it is not a right of ownership, the right of ownership vanished when the trustee acquired the property, and will re-appear if the trustee sells it to a third party, or transfers it to a beneficiary. That would be strange.) There is a right of ownership, but no owner. This is different from the ordinary case of ownerless property, where there exists neither an owner nor a right of ownership. Nevertheless it is hard to see why it does not engage the Quebec rules about ownerless property passing to the state, for those rules, as I read them, are triggered not by the lack of a right of ownership, but by a lack of owner.

Many of these criticisms and confusions could be argued against the theory advanced in this thesis. In the case of a Scottish *haereditas jacens*, if a natural person owns a house and subsequently dies, the question of the ownership of the house is a difficult question. However, if the Quebec model is followed, the house continues to be owned, in the sense that the real right of ownership continues to exist, but there is no person in whom ownership is vested. There is ownership but no owner. The patrimony of the deceased continues to have the right of ownership attached but there exists no person in whom it is vested, albeit there are successors with personal rights of succession, who can complete title via an executor after confirmation.

At its core, much like the Quebec trust, the *haereditas jacens* of Scotland (alongside the lapsed trust) appears to be a form of ownerless patrimony. Yet, in contrast to the Quebecois trust, the *haereditas jacens* is a transitional period until another living owner (the executor) can receive the patrimony through transmission arising out of universal succession. Much the same can be said for a lapsed trust, it is temporary until new trustees are appointed. For both in Scotland, the patrimony is in limbo until a new owner completes title.

⁹⁴ Lee, “The nature of the beneficiary’s interest in English, Japanese and Quebec trusts” 628.

⁹⁵ Anderson, “Words and concepts: Trust and patrimony”, 352.

⁹⁶ Gretton, “Up there in the Begriffshimmel?”, 535.

7.5.2 Zweckvermögen and Sondervermögen

In reviewing the Quebec trust model, one may ask as Grotton has, what is that holds this patrimony together in the absence of a patrimony holder? What stops it collapsing in on itself and the property within an ownerless patrimony becoming *res nullius* and falling to the state? The membrane that seems to hold the patrimony together is its purpose, which Lepaulle's *patrimoine d'affectation* was modelled upon.

The concept of a *patrimoine d'affectation* which Lepaulle advocated, and which has found its way into Quebecois law, arises from debates on patrimonial theory in the 19th century.⁹⁷ At that time, many Romance legal theorists debated the nature of private law rights and obligations, which co-incidentally arose from debates on the status of rights falling into the *haereditas jacens* as it then existed in German law.⁹⁸ This involved learned writers such as Savigny, Puchta, Jhering, and Windscheid.⁹⁹ The debate centred on whether rights exist in private law to reflect the will of a person, and the need to have 'subjective' rights held by a person according to their will.¹⁰⁰ In essence this was the subjective or will theory, which Aubry and Rau developed into their writings on patrimony.¹⁰¹ Their view on patrimony was that "patrimony is an emanation from personality" and the patrimony is a reflection of the will of the holder.¹⁰² As Becker further summarised:¹⁰³

Every person has a patrimony, every patrimony is necessarily vested in a person, and the patrimony of a person is in essence unitary... Patrimony, for Aubry and Rau being the "émanation de la personnalité", cannot be separated from a person and thus cannot exist as an independent entity.

Opponents of this subjective approach to patrimony and rights placed a focus on the purpose of rights and its end result.¹⁰⁴ The theory by Brinz and Bekker is said to be the inspiration for the writings on patrimony by Aubry and Rau, albeit they take different approaches.¹⁰⁵ Brinz focused on the *Zweck* (interest or purpose) that a patrimony could be dedicated to, without the need for a juristic person in which to embody the purpose and to own the

⁹⁷ R Becker, *A question of trust – An analysis and comparative assessment of the new Quebec trust thesis*, McGill University (1995), 50.

⁹⁸ *Ibid*, 96.

⁹⁹ Schmidt, "Von Monstern", section 3.

¹⁰⁰ Schmidt, "Von Monstern", 1060.

¹⁰¹ A Popovici, "Trusting patrimonies", section C(2).

¹⁰² *Ibid*.

¹⁰³ R Becker, *A question of trust*, 102.

¹⁰⁴ *Ibid*, 102.

¹⁰⁵ Popovici, "Trusting patrimonies", 211.

patrimony's property and hold other rights.¹⁰⁶ This builds on Windscheid's theories of the *haereditas jacens* in the 19th century, wherein Windscheid viewed the estate thus:¹⁰⁷

Is it so difficult to find a simple, understandable expression for a simple relationship? Someone has died; he has left behind property, a new master is not immediately available for the same. Will it thereby become ownerless and abandoned to occupation? No one is saying that. The property continues to exist as it has existed, it holds together as it has held together. But as whose property? Well, as nobody's property; just as property. Isn't the law sovereign enough to allow for a combination of property rights and property obligations – for that is property – in this coherence, without a dominant subject being there for it? It will not, of course, do so without sufficient reason; But no one doubts that it exists here.

As Schmidt explained “Windscheid thus emphatically disputed the above-mentioned premise that the rights and duties pertaining to inheritance could not exist without an associated subject”.¹⁰⁸ In this view, Brinz devised a patrimony theory in which patrimonies can belong to persons but can also exist to be devoted to a particular purpose.¹⁰⁹

The particular purpose patrimony theory was termed the *Zweckvermögen* theory, which required no owners for the property as the patrimony is restricted to a specified purpose.¹¹⁰ This is said to be the ‘objective’ or purpose theory of patrimony, in which the patrimony need not be attached to a person and is tied to a purpose.¹¹¹ It is also said to be the “modern theory” of patrimony, as opposed to the traditional subjective or will theory of patrimony.¹¹² As Popovici described:¹¹³

The starting point of [the objective] theory is that personality is not necessarily what brings property together as a whole in the eye of the law. Other purposes can bring property and liabilities together. What changes with this vision of patrimony is what triggers the “container”. For Aubry and Rau, the container and the person are one and the same; for scholars of the purpose theory, the containers can be multiple and can change according to the purpose or the necessity. For Aubry and Rau and their followers, will is the key. For purpose theory thinkers, interest is the key.

The *Zweckvermögen* appears to have influenced Lepaulle in his view of the *patrimoine d'affectation* without the need for a holder, or owner, of the patrimony.¹¹⁴ In any event, the *Zweckvermögen* approach was not adopted into general German law, albeit the *Zweckvermögen* theory fed into the development of the Foundations (public trusts) of

¹⁰⁶ Becker, *A question of trust*, 97.

¹⁰⁷ B Windscheid, “Die ruhende Erbschaft und die vermögensrechtliche Persönlichkeit” (1853) 1 *Kritische Ueberschau der deutschen Gesetzgebung und Rechtswissenschaft* 181, 185.

¹⁰⁸ Schmidt, “Von monstern”, 1065.

¹⁰⁹ Becker, *A question of trust*, 102.

¹¹⁰ Panico, *Foundations: Law and practice* (2014), 4.

¹¹¹ Becker, *A question of trust*, 37.

¹¹² Popovici, “Trusting patrimonies”, 211.

¹¹³ *Ibid*, 211.

¹¹⁴ Gretton, “Up there in the *Begriffshimmel*”, 533.

German law, which are endowed with legal personality.¹¹⁵ However, it did also contribute to the development of the *Sondervermögen*, which is another theory of patrimony in which property intended for a specific purpose is regarded as being held within a special (*Sonder*) patrimony and the property is restricted to be used for a specified purpose.¹¹⁶ One sees echoes of the Scottish dual patrimony theory here, which Gretton noted:¹¹⁷

In the language of the place where the underlying theory comes from, the Quebec patrimony is a *Zweckvermögen* whilst the Scots trust patrimony is a *Sondervermögen*. German law *de lege lata* recognizes the *Sondervermögen* (special patrimony), but not the *Zweckvermögen* (purpose patrimony, i.e. autonomous patrimony).

Whilst Scots law, when a trustee holds property, is akin to the *Sondervermögen*, Brinz's original concept of a *Zweckvermögen* is worth some consideration in the context of the *haereditas jacens* in Scotland.

In Scots law, at death, the law of succession governs the distribution of the property in the deceased's patrimony, which will include honouring the deceased's testamentary intentions. As outlined in Chapter 2, the distinction in Scottish succession law is testate, succession *provisione hominis* (by provision of man) by a will or testament, or intestate, succession *provisione legis* (by provision of law).¹¹⁸ However, despite the distinction, the overall objective is "to effect a conveyance of the items in the deceased's estate to the relevant beneficiaries so that they are wholly distributed".¹¹⁹ Thus there is a purpose imbued on a deceased's patrimony, irrespective of whether it is dedicated by testate provision or by presumption under the law of intestacy. However, until confirmation is granted, the property is ownerless.

In effect, there is an ownerless patrimony dedicated to a purpose – which in the case of an estate is the distribution of the property formerly held by the deceased. Much can be said in the view of a lapsed trust, that a *Zweckvermögen* operates until new trustee is appointed and continues the trust as a *Sondervermögen*. One may see a conversion between the two theories here but for Lepaulle "a trust is both a *Sondervermögen* and a *Zweckvermögen*".¹²⁰ As Becker described, in the context of analysis the Quebec trust:¹²¹

¹¹⁵ BGB, s80. See Panico, *Foundations: Law and practice*, 4.

¹¹⁶ R Becker, *A question of trust*, 103.

¹¹⁷ Gretton, "Up there in the Begriffshimmel?", 533.

¹¹⁸ *Green's Encyclopaedia of the Law of Scotland*, 403.

¹¹⁹ Paisley, "Forfeiture clauses and events in Scots law", 115.

¹²⁰ Gretton, "Trusts without equity", 617.

¹²¹ Becker, *Die Fiducie von Québec*, 165.

It is by no means logically impossible that rights under civil law are not assigned to a person but to a purpose. [This writer's translation]

Lepaulle, in his theory of autonomous trusts, explains trust property as follows:¹²²

The *res* [things] of a trust presents this extremely striking feature that it is a *patrimonium* which, instead of being crystallized around an individual or legal entity, owes its unity to the end to which it is devoted, i.e. to its appropriation.

It is submitted that, given the purpose of succession is to distribute assets by provision of man (testate succession) and by provision of law (intestate succession), this endows the patrimony, or estate, itself with that purpose. In this respect, it is reasonable to view the *haereditas jacens* as a patrimony endowed with a purpose of distribution. The executor is bound to follow these distribution rules once they acquire ownership through confirmation. In this respect, Walker is to some extent correct to say that:¹²³

Legal personality terminates with natural death, though it may be said to continue to the extent that a deceased person's wishes for the disposal of his estate, if expressed on a document held to have testamentary intention, will be legally enforceable...Between the moment of death and the confirmation by the court of an executor, the deceased's property is *haereditas jacens*, vested in nobody, though the executor's confirmation vests it in him, retrospectively to the time of death.

What can be challenged in Walker's statement is the idea of continued legal personality. Rather, it is the wishes of the deceased as to how the estate is to be distributed that are continued and respected after death, and which provide the trust's purpose. In that view, it appears that the *haereditas jacens* in Scotland has some of the key characteristics of Brinz's *Zweckvermögen* theory, and consequently Lepaulle's *patrimoine d'affectation* in that the estate of the deceased is dedicated under the law of succession to distribution either by operation of the rules of intestacy, or in accordance with the terms of a will.

7.5.3 Austria

Historically, Austrian inheritance law encountered the same issue as the Scottish *haereditas jacens*, as it requires a constitutive court order in favour of the heir in order for ownership of the deceased's property to be transferred to them.¹²⁴ Pending this point, an estate in Austria would be a *ruhender Nachlass* (dormant estate). Prior to reform, the operative provision of the ABGB, section 547 read:¹²⁵

¹²² P Lepaulle, "Trusts and the Civil Law" (1933) 15 *J Comp Legis & Int'l L* 18, 20.

¹²³ Walker, *Principles of Scottish private law*, Book III, 207-208.

¹²⁴ Schmidt, "Von monstern", 1068; C Wendehorst, "Administration of estates in Austria", chapter in K Reid et al (ed), *Administration of Estates, Vol 4: Administration of Estates* (2025), 239; and H Hausmanninger, *The Austrian legal system*, 4th edn (2011), 247.

¹²⁵ The ABGB until 2015.

Upon the heir accepting the estate, the heir represents the testator in consideration of it. Both are considered one person in relation to a third party. Before the heir accepts, the estate is regarded as if it were still owned by the deceased.

The last sentence is an uneasy provision that does not read very clearly in German or in English. As Gschnitzer described “the estate does not yet belong to the heir, but also no longer to the testator, whose legal personality expired with death”.¹²⁶ Gschnitzer also further explained:¹²⁷

A subjective right without a legal subject seems to be a contradiction in terms... However, there are cases in which a beneficiary is temporarily absent or uncertain. This is the case with the estate between the inheritance and the acceptance. It is artificial to attribute it to the deceased (§547) or to the as yet uncertain heir. The dormant estate has been constructed as a legal person, but there has also been talk of subjectless rights. In any case, there is a legal obligation. The same applies to real rights that are connected to a piece of land if it is ownerless.

Gschnitzer noted that it did not seem appropriate to assume a juristic person for a temporary transitional stage.¹²⁸ In his view, the estate “is best viewed as a complex of purpose-bound, currently subjectless rights”.¹²⁹

The interpretation of the *haereditas jacens* was a point of debate in Austria as to the interpretation of ABGB pending the grant of probate, with inconsistent decisions of courts and various theories by commentators.¹³⁰ Becker identifies four possible theories arising from the Austrian commentary: (i) ownership remained with the deceased person; (ii) the heir’s acceptance of the estate is retroactive to the date of death; (iii) the estate of the deceased is a temporary patrimony without titularity; or (iv) the estate is constructed as a person.¹³¹ One may again see similarities with the theories of Scots private law, given the prior discussion in this thesis.

The predominant theory in Austrian private law was to construe the *haereditas jacens* as some form of legal entity, whether a continued personality of the deceased, or the estate as a person.¹³² In 2015, the law in Austria was changed. Now, under Austria’s General Civil Code, the ABGB, section 546 provides:

The estate as a juristic person § 546.

Upon death, the estate as a juristic person continues the legal position of the deceased.

¹²⁶ F Gschnitzer, *Erbrecht* (1964), 56.

¹²⁷ F Gschnitzer, *Allgemeiner Teil des bürgerlichen Rechts* (1966), 61.

¹²⁸ *Ibid.*, 95.

¹²⁹ *Ibid.*

¹³⁰ For cases and commentaries, see A Kletečka & M Schauer (eds), *ABGB-ON Kommentar* (2010), s547.

¹³¹ Becker, *A question of trust*, 104.

¹³² Kletečka & Schauer, *ABGB-ON Kommentar*, section 547.

Thus, the prevalent view in Austria, affording personality to the estate itself, has now been endorsed into the Civil Code. As Schmidt noted, this was no surprise, and “a substantive change should not be linked to this, but only that the prevailing view is merely codified”.¹³³

7.5.4 Portugal and Italy

Schmidt also highlighted that Italy and Portugal each face their own respective *haereditas jacens*.¹³⁴ In those jurisdictions, there is an increasing development of the ‘temporarily subjectless asset’ theory articulated by Windscheid and other proponents of the objective (or purpose) theory of patrimony,¹³⁵ which this thesis suggests Scots law already reflects.

In Portuguese *direito das sucessões* (succession law), personality ceases at death.¹³⁶ However, the heir(s) must accept or decline the inheritance in order to acquire the property of the deceased.¹³⁷ The period between death and the acceptance by the heir is known as the *herança jacente*.¹³⁸

Similar arguments to Scotland and Austria have been made in respect of the *herança jacente* in Portugal.¹³⁹ Oliveira Ascensão wrote:¹⁴⁰

From the opening of the succession until the acquisition [by an heir], the legal positions of the ownership of the *de cujus* are in an anomalous situation. They no longer belong to the author of the succession, since he has died; which is an essential content of the opening of the succession is the loss, by the *de cujus*, of the situations in which he was the owner. But they do not belong to the successor, since there has not yet been acceptance...The theoretical problems are linked to the determination of the ownership of legal situations in the intermediate time. To whom do they belong? Should we admit that in these cases there are rights without a subject?

Rodrigues justifies the *herança jacente* as a result of the conflict of three ‘needs’: (i) the need to satisfy creditors; (ii) the need to respect the interests of the heirs; and (iii) the need to respect the deceased’s wishes.¹⁴¹ In his view, the resulting temporary period of both assets and liabilities is that the estate was a patrimony.¹⁴² However, Rodrigues does not view a need for this to transform the estate into having personhood, or being connected to a person, because the various purposes of the estate to reflect the three ‘needs’ is, in itself, sufficient. The existence of the rights of succession of the heir, the deceased’s free will in making

¹³³ Schmidt, “Von monstern, nebelgestalten und seelenwanderungen”, 1068.

¹³⁴ *Ibid*, 1069.

¹³⁵ *Ibid*, 1069.

¹³⁶ *Código Civil* (Civil Code of Portugal), Article 68(1).

¹³⁷ *Ibid*, Article 2050.

¹³⁸ *Ibid*, Article 2046.

¹³⁹ See the discussion in B Ferreira, *A usucapabilidade de uma herança jacente*, Masters thesis (Universidade de Coimbra, 2021), 14-27.

¹⁴⁰ J de Oliveira Ascensão, *Direito civil: sucessões*, 5th ed (2000), para 229.

¹⁴¹ A Rodrigues, “Herança jacente” (1951) 11 *Revista da Ordem dos Advogados* 252–281, 281.

¹⁴² *Ibid*, 280.

provision for the distribution of the property, and the rights of the creditors are satisfactory to “prevent [the estate] from being considered a legal entity”.¹⁴³

Once again, this discussion evokes similarities with Scots law. The operation of universal succession transmits liabilities to the universal successor, the executor. The development of liability limited to the inventory was a subsequent development. Likewise, after death, the deceased’s obligations do not generally terminate. Whilst a convoluted discussion, Rodrigues appears to endorse a *Zweckvermögen* approach to the *haereditas jacens* as a way to reconcile the various interests in the estate. This is analogous to the position argued here for Scotland, in that the wishes of the deceased in a testament, or under the rules of intestacy, provide a purpose for the property of the deceased’s patrimony to exist whilst continuing the existence of liabilities and balancing the heir’s freedom to choose whether to enter the estate.

In Italy, succession to the deceased’s property is not immediate as it requires a constitutive act to accept the estate (*acquisto dell’eredità*).¹⁴⁴ Without acceptance, the estate is *dell’eredità giacente* (a vacant estate or *haereditas jacens*).¹⁴⁵ Nervi described that the design of the *Codice* in 1942 was to recognise an heir’s free will, or autonomy, in deciding whether to accept the estate.¹⁴⁶ In doing so however, the drafters of the *Codice* provided a number of important solutions. One is that a curator can be appointed to manage the estate,¹⁴⁷ the second is that the heir can perform certain juridical acts in respect of the estate,¹⁴⁸ and thirdly, that acceptance of the estate is retroactive to the date of death.¹⁴⁹ For reasons previously discussed, it appears that Scots law has similar solutions developed at common law.

Schmidt identified that in both Portugal and Italy, the developing dominant theory is that the estate should be regarded as “temporarily subjectless assets and thus that the view founded by Windscheid should be followed”.¹⁵⁰ It is argued that Scotland should endorse this approach to provide better clarity to a confusing area.

¹⁴³ *Ibid*, 281.

¹⁴⁴ *Codice Civile*, Article 459.

¹⁴⁵ *Codice Civile*, Arts 528-532. See the discussion in G Christandl, “Administration of Estates in Italy”, chapter in Reid et al, *Comparative Succession Law*, Vol 4, 117-122.

¹⁴⁶ A Nervi, “Delle successioni: artt. 456–564” in: V. Cuffaro/ F. Delfini (eds.), *Comentario del Codice Civile* (2009), 69.

¹⁴⁷ *Codice Civile*, articles 528ff.

¹⁴⁸ *Codice Civile*, article 460.

¹⁴⁹ *Codice Civile*, article 459.

¹⁵⁰ Schmidt, “Von Monstern”, 1069.

7.6 Conclusion: The *haereditas jacens* as an ownerless patrimony

It has been argued that the *haereditas jacens* in Scots law is a period of ownerless property. The patrimony of the deceased remains intact after death but until an executor is confirmed there is no holder of the patrimony. Consequently, the property has no owner and any liabilities have no debtor. This writer acknowledges that this is a controversial position to argue in the context of Scots law which has long sought to attribute ownership to a person (or rights or obligations to a person). It is also an uneasy concept to have ownerless property, and the *haereditas jacens* may well be a legal monster, as Leleu argued,¹⁵¹ but it is our monster to tame. In any event, such a period is a temporary matter until an executor is confirmed. In normal circumstances, this may take some months, but in complex executry cases, or where there are disputes, the *haereditas jacens* may endure for some time. However, by conceptualising the *haereditas jacens* in line with comparative examples, it seems possible to rationalise its existence.

¹⁵¹ Y Leleu, *La transmission de la succession en droit comparé*, (1996), 489.

Part 2: Conclusion

It has been argued in this part of this thesis that the *haereditas jacens* is simply a transitional period where a patrimony has no holder, and any property within it is ownerless. The 1964 Act provides no answers to the *haereditas jacens*. As a result, the solution to the *haereditas jacens* must be found in the older common law. It is submitted, in line with the arguments made throughout this part of the thesis, that these authorities construe the *haereditas jacens* as a period of temporary ownerlessness. However, the development of the common law in respect of the *haereditas jacens* is one of confusion and inconsistency.

The arguments advanced by proponents of the Living Dead and personified estate theories attempt to find an owner of some sort for a *haereditas jacens*. However, it appears that the law has developed to accept that the *haereditas jacens* is a temporary, transitional period in which the estate has no owner. It has been argued that all property, rights, and liabilities of the deceased are held in an ownerless patrimony pending the grant of confirmation.

Unlike comparative examples such as Quebec, the *haereditas jacens* is only a temporary period, and the doctrine of ownerless patrimony only operates until an executor is confirmed. As has been acknowledged, once confirmed, the executor has the benefit of the retroactive effect of confirmation in limited circumstances. Therefore, some juridical acts by an executor-nominate or executor-dative can be retroactively validated. However, ownership during the *haereditas jacens* is not resolved by the availability of retroactive powers.

The theory advanced is an unfortunate doctrine, given the practical and conceptual problems to which it gives rise. However, the *haereditas jacens* shares many similarities with the aforementioned comparative examples. Following the *Zweckvermögen* theory of patrimony, it may be therefore helpful to view the deceased's patrimony and property as wholly being subject to a purpose, namely the distribution of the estate to beneficiaries (whether by provision of will or by the intestacy). The Quebec trust demonstrates that an ownerless patrimony is workable, and much could be learned in Scotland from Quebec.

However, the intention of this thesis is to explore all ownerless land following a person ceasing to exist. When the majority of legal reasoning such as that of Erskine was written the concept of other legal personalities was somewhat uncommon. The focus was on the death of natural persons not the termination of juristic persons. On that point, this thesis now turns to explore the termination of juristic persons and the operation of the *bona vacantia* doctrine.

PART THREE - CESSATION OF JURISTIC PERSONS

Chapter 8: Termination of juristic persons

“The law provides a number of methods by which a person's ownership of land can be terminated... there are situations where the owner disappears; not in the sense of simply vanishing from view but actually ceasing to exist. Thus, a company may be dissolved or an individual may die leaving no heirs.”

Scottish Coal, paras 101-102.

8.1 Introduction

This thesis is concerned with identifying the existence of ownerless land in Scots law. To do so, it utilises the structure established by Lord Carloway in *Scottish Coal* by examining the cessation of the owner's personhood as a recognised situation whereby land may come to be ownerless. This includes both natural persons and juristic persons. The cessation of natural persons has been examined, and it has been argued that the *haereditas jacens* is (usually) a temporary period of ownerless property, including any land formerly owned by the deceased. More properly phrased, it is a period of ownerless patrimony until an executor confirms to the estate.

Consideration is now given to the cessation of juristic persons. It is in this area that the *bona vacantia* doctrine is commonly engaged. This doctrine provides for the Crown to take property formerly owned by a juristic person, or an heirless estate under the Crown's role as *ultimus haeres*, owing to the maxim *quod nullius est fit domini regis*. The interaction of this rule with the existence of ownerless property will be fully explored in this Part. However, in the first instance, this chapter examines the cessation of juristic persons and consequently how the *bona vacantia* doctrine may come to be engaged. McMillan, in his seminal work in 1936, undertook a similar canvass of the contemporary juristic persons and the operation of the *bona vacantia* doctrine.¹ Since then, a number of new juristic entities have been created by statute. It is useful to provide a modern account of how common juristic entities terminate, and the consequences that follow for any ownership of land which they held. This chapter examines companies, partnerships, trusts, SCIOs, mutual societies, and unincorporated associations.

8.2 Companies

Companies form one of the most important juristic persons in Scotland as a corporate vehicle for businesses. Only companies incorporated under the Companies Acts will be examined here,² with the governing statute now largely being the Companies Act 2006. In addition,

¹ McMillan, *Bona Vacantia*, Part II(B).

² Companies may also be incorporated by Royal Charter, or private or special Act of Parliament. See further, Morse, G., (ed), *Palmer's Company Law*, Vol 1 (looseleaf), paras 1.215 to 1.218. Accessed 24 January 2025.

there is a range of tools in law to assist companies from avoiding financial distress, collapse and dissolution.³ This thesis is not focused on corporate debts and insolvency law,⁴ so the discussion which follows will centre on provisions governing dissolution of an insolvent company, rather than on aspects of insolvency law albeit terminology and procedure will be touched upon. There is a blurred boundary in this respect, for “the last act in a winding up of a company is its dissolution”.⁵ The focus of this section is the dissolution of the company where assets, particularly land, are still held by that former owner and the consequences that follow.

8.2.1 Dissolution

The law on dissolution of a company is found in the Insolvency Act 1986, but the aftermath of the dissolution is regulated by the Companies Act 2006.⁶ Dissolution originally required a court order,⁷ but is now largely an administrative procedure carried out by Companies House.⁸ The intimate link between registration with Companies House (and the role of the Registrar of Companies) and the company having legal personality, is that a company ceases to exist if it is removed (or ‘struck-off’) from the Companies Register.⁹

8.2.2 Liquidation

A distinction must always be made between liquidation and dissolution. Liquidation, or winding up, is the terminal phase of a company’s life.¹⁰ It is important to note that until dissolution, the company is still in existence, even if going through liquidation or administration. As Anderson outlines:¹¹

“Liquidation’ is used in the Companies Acts and the IA 1986 in the same sense as it might be used by a totalitarian state security service: to liquidate is to kill. A synonym for liquidation is ‘winding up’ and this latter term better describes the process, which may be swift but may, in some cases, be tortuous. Death of a company comes only with the expiry of the three month period following publication of a notice of dissolution in the register of companies at the end of the winding up process.

³ This can include Administration, Company Voluntary Arrangements, Liquidation, Receivership etc.

⁴ There is an abundance of commentary and texts on this area of law. As a starting point, see R Anderson & E Roxburgh, “Corporate insolvency”, chapter in R Anderson (ed), *Scots Commercial Law* 2nd edn (2022).

⁵ A Keay, “The pursuit of legal proceedings against dissolved companies” (2000) (9) *JBL* 405, 405.

⁶ A Keay (ed), *McPherson & Keay’s Law of Company Liquidation*, 5th edn (2021), para 17-011.

⁷ Companies Act 1985, s568 (repealed).

⁸ Morse, *Palmer’s Company Law*, para 15.506.

⁹ Companies Act 2006, s16.

¹⁰ Anderson & Roxburgh, “Corporate insolvency”, para 14.29.

¹¹ *Ibid.*

Accordingly, until dissolution occurs, property is still owned by the company¹² (unless the liquidator has taken title).¹³

8.2.3 Remaining property after dissolution: *Bona vacantia*

After dissolution, the situation is different. Section 1012 of the Companies Act 2006 provides:¹⁴

When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be *bona vacantia* and... **accordingly belong to the Crown.**

Thus, subject to any property held in trust where the company is trustee, all property and rights fall to the Crown as *bona vacantia* under the 2006 Act. The King's and Lord Treasurer's Remembrancer (KLTR) is tasked with acting on behalf of the Crown in Scotland in connection with dissolved company assets.¹⁵

8.2.4 *Bona vacantia* provisions in the 2006 Act

The Crown has choice on whether to claim or disclaim the property of the dissolved company. The Crown may exercise a disclaimer (Crown disclaimer) in respect of property falling as *bona vacantia*.¹⁶ The right to make a Crown disclaimer falls away if the Crown expressly renounces disclaiming, or takes possession.¹⁷ Where the KLTR disclaims, the KLTR must publish a Notice of Disclaimer in the Edinburgh Gazette and give notice to the Registrar of Companies, as well as any other interested parties.¹⁸

8.2.5 Time limits for Crown disclaimer

There are strict time limits in respect of making a Crown disclaimer by the KLTR. The 2006 Act requires a Crown disclaimer to be made within three years of: (i) the date on which the property *may* have fallen to the Crown; or (ii) the end of a period of inquiry for the KLTR to establish ownership.¹⁹ However, an interested party can accelerate this process by calling upon the KLTR to make a decision whether or not to disclaim, which in this case reduces

¹² An example of this rule can be found in a case regarding a legacy to a charitable company, *In re ARMS (Multiple Sclerosis Research) Ltd* [1997] 1 WLR 877.

¹³ This process is found in the Insolvency Act 1986, s145 (and s112).

¹⁴ 2006 Act, s1021(1) [Bold added].

¹⁵ The KLTR has developed a set of policies dealing with *bona vacantia* property available at the KLTR's website: <https://www.kltr.gov.uk/> and Policies BV1 to BV17.

¹⁶ Companies Act 2006, s1013(1).

¹⁷ *Ibid*, s1013(2).

¹⁸ *Ibid*, ss1013(6) and 1013(7).

¹⁹ *Ibid*, s1013(3).

the Crown disclaimer time limit to twelve months.²⁰ A disclaimer issued after the time limit has passed is of no effect.²¹

8.2.6 Effect of Crown disclaimer

The 2006 Act is slightly ambiguous in its terminology as to the effect of the Crown disclaimer. Section 1020 provides:

- (1) The Crown's disclaimer operates to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company, and the property of the company, in or in respect of the property disclaimed.
- (2) It does not (except so far as is necessary for the purpose of releasing the company and its property from liability) affect the rights or liabilities of any other person.

This provision will be focused on in later parts of this thesis.²² However, for the moment, it suffices to say that it appears that “determine” has been construed as terminated.²³ Thus, all rights, interests and liabilities, and ownership of the company’s property, are considered terminated to the extent that it does not affect third parties.

8.2.7 Vesting Orders

Following disclaimer, any party with an interest in disclaimed property or liability (such as a creditor) is entitled to make an application for a vesting order.²⁴ The effect of the vesting order is in terms which are rather difficult for a Scottish lawyer to understand, given the need for an external act to transfer title in Scots law:

On a vesting order being made under this section, the property comprised in it vests accordingly in the person named in that behalf in the order, **without conveyance or assignation** for that purpose.²⁵

The vesting order may or may not be a “registrable deed” for the Land Registration (Scotland) Act 2012.²⁶ The Keeper’s position appears to be that the vesting order itself is *not* a registrable deed, so it cannot be registered in the Land Register of Scotland, but it remains open to the person in whose favour the vesting order has been made to complete a Notice of Title instead. In this sense, a vesting order appears to have the effect of making the successful petitioner an unregistered holder (holding a *jus ad rem*)²⁷ by judicial conveyance.

²⁰ *Ibid*, s1013(4).

²¹ *Ibid*, s1013(5).

²² See Ch 11.

²³ *ELB Securities v Love* [2015] CSIH 67.

²⁴ 2006 Act, s1021.

²⁵ 2006 Act, s1021(3) [Bold added].

²⁶ Land Registration (Scotland) Act 2012, s49. By this section, the question is whether the Vesting Order is or not registrable deed (whether expressly registrable or by implication) by the 2006 Act.

²⁷ For discussion on this see 2.5.1 above.

8.2.8 Restoration of a dissolved company

It is possible for a company to be resurrected through the process of restoration. In the words of Lord Blanesburgh:²⁸

The company is restored to life as from the moment of dissolution, but, continuing a convenient metaphor, it remains buried, unconscious, asleep, and powerless until the order declaring the dissolution to have been void is made. Then, and only then, is the company restored to activity.

Restoration under the 2006 Act can be administrative²⁹ or by court order.³⁰ The effect of either restoration is the same:

The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.³¹

The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.³²

8.2.9 *Bona vacantia* property and restoration of the former owner

Section 1032 of the 2006 Act provides that, upon restoration, the company is deemed to have continued in existence. However, under section 1012, the property of the company had, for the intervening period, fallen to the Crown. The 2006 Act attempts to reconcile this as follows:³³

The person in whom any property or right is vested by section 1012 (property of dissolved company to be *bona vacantia*) may dispose of, or of an interest in, that property or right despite the fact that the company may be restored to the register under this Chapter.

Further protections are provided to the restored company in this respect. Should property have been disposed of during the dissolved period, then the Crown is liable to pay to the company the consideration, or price, paid for the property or its market value.³⁴ However, the disposal itself remains valid despite the revival of the owner and the third party acquirer has good title.³⁵ The restoration provisions are not entirely clear about the effect of the Crown disclaimer issued in respect of any property during the company's dissolution. This is a point of contention, and the issue will be explored further shortly.³⁶

²⁸ *Morris v Harris* [1927] AC 252, per Lord Blanesburgh at 269.

²⁹ 2006 Act, s1024.

³⁰ *Ibid*, s1029.

³¹ *Ibid*, s1028(1).

³² *Ibid*, s1032(1).

³³ *Ibid*, s1034.

³⁴ *Ibid*, s1034(2).

³⁵ *Ibid*, s1034(1).

³⁶ See Ch 11.

8.3 Partnerships

Partnerships are largely regulated by the Partnership Act 1890. In Scotland, an added feature of partnerships is that “a firm is a legal person distinct from the partners of whom it is composed.”³⁷ In other words, the partnership itself is a legal person. This form of partnership law is known as an “entity” approach, in that the partnership (firm) as an entity sits as a separate personality from its partners.³⁸ Formerly, it was said that a partnership could not own land in its own name.³⁹ The 2000 Act now permits title to be registered in the name of the firm.⁴⁰ However, for reasons to be discussed, it remains easier to have title registered by individual partners as partners of, and as trustees for, the firm and to manage the property under a trust.⁴¹

8.3.1 Dissolution

With Scottish partnerships, the continued personality of a firm is problematic given the relative instability of the partnership’s members. Partners may resign, or new partners may be assumed. In strict partnership entity theory, the personality of an old firm ceases with any change of partners. As Chan summarised:⁴²

Partnership A consisting of Messrs Allan, Bates and Chan is a legal person consisting only of Messrs Allan, Bates and Chan. If Mr Davis was to join, partnership A ceases as a legal entity as it would consist of different people and partnership B consisting of Messrs Allan, Bates, Chan and David instead comes into existence.

Whilst this *de facto* cessation of personality can occur frequently, there are also more formal dissolution processes. A partnership can be formally dissolved by a variety of methods that need not be explored here.⁴³ Similar to *de facto* dissolution, a consequence of formal dissolution is that the firm loses its legal personality.⁴⁴ This is a fundamental problem with Scottish partnerships, in that their personality can cease without the intention or wish of the partners. In this respect, Clark and Smith describe a partnership as having a *quasi*-personality.⁴⁵ Miller, in his seminal text, writes that:⁴⁶

Even in Scots law where a separate personality is accorded to the firm itself, that quality does not carry with it the attribute of perpetual succession which is a feature

³⁷ Partnership Act 1890 s4(2). For the situation before the 1890 Act see the discussion in P Hemphill, “The personality of the partnership in Scotland” (1984) *JR* 208, 212ff.

³⁸ H Wells, “The personification of the partnership” (2021) 74 *Vanderbilt Law Review* 1835, 1836; and Report on *Partnership Law* (SLC Report No 192, 2003), para 2.9.

³⁹ Gretton & Reid, *Conveyancing*, para 28-02.

⁴⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000, s70.

⁴¹ Gretton & Reid, *Conveyancing*, para 28-02.

⁴² S Chan, *A practical guide to partnership law in Scotland* (2018), para 8-08.

⁴³ Partnership Act 1890, ss32-35 and s41.

⁴⁴ L McGregor (ed), *Commercial law in Scotland* 6th edn (2020), para 5.5.3.

⁴⁵ T Smith, *Short commentary on the law of Scotland* (1962), 275-277; F Clark, *A Treatise on the Law of Partnership*, vol 1 (1866), 31.

⁴⁶ J Miller, *The law of partnership in Scotland* 2nd edn, (1994), 470.

of a fully corporate body; and thus a change in the membership of the firm means a new firm.

The practical consequences of the lack of perpetual succession arise in the impact that a cessation of personality has in respect of obligations owed by, or to, a firm.⁴⁷ The doctrine of contracts being able to be continued “with the house” of the partnership has been developed as one such mechanism.⁴⁸ However, there is a vexed question of generally what happens to the rights and obligations of a dissolved partnership.

8.3.2 Consequences of dissolution

At dissolution, the former partners have the right to apply partnership property in satisfaction of the partnership’s liabilities, with any surplus being shared amongst the partners.⁴⁹ In rather clumsy wording, Section 38 of the 1890 Act also provides that:

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

In effect, this allows partners to hold out as if the partnership continues to exist and to perform juridical acts on behalf of the non-existent firm. These mechanisms have proven problematic in respect of the ownership of the (former) partnership’s property. The central problem is that Section 38 creates an ambiguity as to whether the partnership has truly ceased to exist. Anderson identified this as a similar situation to the *haereditas jacens* of a natural person:⁵⁰

The Partnership Act 1890 appears to envisage that dissolution of the partnership prior to the affairs of the partnership being wound-up, at least in the case of death or bankruptcy of a partner. If dissolution, followed by winding-up, is inconvenient, it is not unique, for this is essentially the position with natural persons: personality ceases with death, yet between death and confirmation of executors there is limbo, a patrimony but no person to represent it.

In this area, Gretton put forward an argument similar to the Living Dead theory:⁵¹

My own view is that when a firm is dissolved, its personality is not actually extinguished until its winding-up is carried out, i.e. until the assets have been realised or transferred.

⁴⁷ Chan, *Partnership Law*, para 8-09.

⁴⁸ *Alexander v Lowson’s Trs* (1890) 17 R 571. See *Partnership law joint paper* (SLC DP No 111, 2000), para 2.38.

⁴⁹ 1890 Act, s39. Shared here means distributed in accordance with the partnership agreement, or equally under the common law, *Eason v Miller and others* [2016] CSOH 59, per Lord Doherty at para [25].

⁵⁰ Anderson, *Scots commercial law*, para 5.43.

⁵¹ G Gretton, “Who owns partnership property” 1987 *JR* 163, 178.

Whilst not entirely re-opening this theory, which has been dismissed in respect of the *haereditas jacens*, it is worthwhile to explore this area once more from a partnership perspective. Bailey undertook a review of the law of the continued personality of the firm post-dissolution.⁵² This identifies that prior to the 1890 Act, there did appear to be a development of authorities holding that the dissolved firm continued to have legal personality.⁵³ In particular, the judgment of Lord Curriehill is referenced:⁵⁴

The goods and effects of which it is the owner prior to dissolution, do not *ipso facto*, on the dissolution, become *res nullius*, nor are the partners transferred into the position of being joint and *pro indiviso* owners of every separate article of its property, and joint creditors in every debt owing to it. **The Company itself continues to be a separate *persona* in law, and to perform the functions of owner of those funds and effects which belonged to it before the dissolution.**

Bell's observation is also of note:⁵⁵

Partnership subsists after dissolution for the purposes of winding up the concern. The partnership is dissolved in so far as the power of contracting new debts is concerned; but continued to the effect of levying the debts, paying the engagements of the company, and calling on the partners to answer the demands.

Bailey questioned how Section 38 of the 1890 Act can continue to bind a non-existent principal:⁵⁶

But in relation to Scottish partnerships, it is difficult to see how section 38 can operate without the preservation of legal personality. How can the partners bind *the firm*, as a separate legal entity, unless there still exists a firm to bind? Moreover, how can a transaction be completed if its underlying contractual basis has disappeared?

The case of *Inland Revenue v Graham's Trustees* attempted to reconcile such questions.⁵⁷

That case concerned whether a tenancy let to a partnership continued to subsist following the dissolution of the partnership itself. In the Inner House,⁵⁸ Lord Hunter set forth:⁵⁹

A more accurate statement may be that the surviving partners of the dissolved firm have, in such circumstances, the rights and powers necessary to enable them to wind up the affairs of the dissolved firm and distribute its assets.

In this sense, Lord Hunter placed the surviving former partners on an executry basis, with limited power to wind up the partnership rather than holding out the partnership as continuing to exist as a separate person. Thus, it appears to be a similar legal fiction as an

⁵² J Bailey, "Phantom partnerships and post-dissolution profits: *Sheveleu v Brown and Ducker*" (2019) 23(2) *ELR* 230.

⁵³ *Ibid*, pp231-232.

⁵⁴ *Buchanan v West of Scotland Malleable Iron Co* (1855) 17 D 461, per Lord Curriehill at 474.

⁵⁵ Bell, *Commentaries*, Vol II, para 527.

⁵⁶ Bailey, "Phantom partnerships", 233.

⁵⁷ 1971 SC (HL) 1.

⁵⁸ The Inner House as Land Valuation Appeal Court.

⁵⁹ 1971 SC (HL) 1, per Lord Hunter at 4.

executor acting as *eadem persona cum defuncto*. On appeal to the House of Lords, Lord Reid agreed with Lord Hunter:⁶⁰

In my opinion, it must be held that this contract of co-partnership came to an end on the death of [one of the partners]. All that remained was to wind up its affairs. It must follow that thereafter there was no tenant, because the farm had been let to the co-partnership and to no one else... for it is clear that surviving partners have no right to bind the assets of the dissolved firm by making new bargains or contracts. Their right and duty is to wind up its affairs. In my view this must mean that the surviving partners have the right and duty to complete all unfinished operations necessary to fulfil contracts of the firm which were still in force when the firm was dissolved. Otherwise the position would be intolerable.

Thus, the House of Lords seemed to be clear that the dissolution of a partnership is indeed the termination of its personality. Many decisions have followed this aspect of *Inland Revenue* since.⁶¹ The difficulties in determining the cessation of personality prior to distribution of property has not escaped criticism. For example, Lord Reed in *Duncan v The MFV Marigold Pdl45* wrote:⁶²

The approach adopted in *Inland Revenue v Graham's Trs* creates a difficulty in relation to property rights in partnership assets, following the dissolution of the partnership, which the earlier authorities avoided by deeming the partnership to continue in existence until the winding up had been completed.

Lord Reed in *Duncan* does not address the cessation of personality directly but noted:⁶³

Whatever the property rights might be following dissolution, it can hardly be doubted that the [property] would continue to constitute an asset of the firm for the purposes [of Section 38]... When the partnership was dissolved, it follows (on the approach adopted in *Inland Revenue v Graham's Trs*... that the holder of the beneficial interest in the [property] prior to dissolution ceased to exist. The [property] would have to continue to be regarded as “partnership assets” for the purposes of the 1890 Act, and would be held by the registered owners for the purpose of winding up the affairs of the partnership.

In *Sheveleu*, the Inner House noted that “the 1890 Act contemplates the possibility of a dissolved partnership having (or being treated as if it had) rights and obligations”.⁶⁴ However, in *National House Building Council v Gavin Henderson Contractors* the Sheriff Appeal Court declined this approach.⁶⁵ In particular, the Sheriff Appeal Court set out:⁶⁶

Attempting to analyse partnership law by analogy with law as it applies to natural persons, or to limited companies, may be to assume an equivalence which does not

⁶⁰ 1971 SC (HL) 1, per Lord Reid at 20-21.

⁶¹ *Lujo Properties Ltd v Green* 1997 SLT 225; *Balmer v HMA* [2008] HCJAC 44; and *Sheveleu v Brown & Ducker* [2018] CSIH 68.

⁶² *Duncan v The MFV Marigold Pdl45* 2006 SLT 975, at para [40].

⁶³ *Ibid*, at para 40.

⁶⁴ *Ibid*, at para 38.

⁶⁵ [2023] SAC Civ 11. See L Macgregor, “The impact of dissolution on partnership contracts: *NHBC v Gavin Henderson*” (2023) 27(3) *ELR* 414.

⁶⁶ [2023] SAC Civ 11, at para 37.

exist. The Scottish law of partnership has a number of aspects which are not straightforward.

Section 38 gives the partners the necessary powers to wind up the partnership and to remain answerable for its debts after dissolution. However, it seems to read too much into this provision to attribute (or resurrect) legal personality to the firm. The same criticisms can be levelled at earlier common law authorities such as Bell in holding the continued personality of the dissolved firm. The criticisms are similar to those made earlier in this thesis in respect of the notion that, by an executor acting *eadem persona cum defuncto*, this continues the personality of the dead. These are limited legal fictions, which do not support a wider idea that a person continues to exist following death or dissolution. Without such fictions, it would be, as Gow observes, a manner to prejudice creditors by making dissolution a means to escape liability.⁶⁷ In itself, having partners under a duty to manage the dissolved firm's liabilities and assets (similar to that of the executor acting as *eadem persona cum defuncto*) does not extend to a wider notion that the partnership as a separate firm remains in existence.

If this argument is correct, what then happens to partnership property after dissolution? As Bailey noted, the logical consequence of a firm's legal personality ending at dissolution would be that the partnership's former property falls to the Crown as *bona vacantia*.⁶⁸ The law does not appear to have developed in this way at common law given Lord Curriehill's aforementioned statement in *Buchanan v West of Scotland Malleable Iron Co* that the property of the partnership is not "*res nullius*".⁶⁹ There is little literature or authority to support the idea that the firm's property falls to the Crown. For example, McMillan, in his survey of *bona vacantia* makes no mention of partnerships.⁷⁰

The suggested answer is the identification of another ownerless patrimony here as with the *haereditas jacens*, though as will be seen below the Crown may well still play a role in claiming former partnership property. It would seem easy to argue for the transplant of the ownerless patrimony theory to the law of partnerships. However, as the Sheriff Appeal Court rightly noted in *National House Builders Council*, ideas of succession law cannot be readily transplanted to the law of corporations.⁷¹ Therefore, a justification for this approach must be given.

⁶⁷ J Gow, *The mercantile law of Scotland* (1964), 550.

⁶⁸ Bailey, "Phantom partnerships", 232.

⁶⁹ *Buchanan*, per Lord Curriehill at 474.

⁷⁰ McMillan, *Bona Vacantia*, Part B.

⁷¹ [2023] SAC Civ 11, at para 37.

Partnerships have long enjoyed recognition at common law as a juristic person before the passage of the 1890 Act.⁷² There is, therefore, an argument that similar concepts concerning the law of persons have developed over time. It is suggested that this is one such area, and will be illustrated herein. At a basic level, every person enjoys a patrimony. As Gretton notes “if one recognises personality one must recognise patrimony: personality implies patrimony”.⁷³ Therefore a partnership as a legal person in Scots law enjoys a patrimony. When the partnership dissolves what happens to this patrimony? It is clear from the above that the liabilities of the firm continue after dissolution, tending to suggest that the patrimony survives. As Lord Brodie highlighted in *Sheveleu*.⁷⁴

The 1890 Act contemplates the possibility of a dissolved partnership having (or being treated as if it had) rights and obligations. While it will depend on the nature and terms of the contract, a contract to which a partnership is party is not necessarily brought to an end by the dissolution of the firm.

There are still obligations and liabilities held within the dissolved firm’s patrimony. In terms of rights formerly held by the partnership, the authorities are more conflicting as *Inland Revenue* illustrates. However, Lord Brodie appears to recognise as a generality that contracts continue, so rights must continue to be held within the former firm’s patrimony.⁷⁵ The former partners are, under section 38, able to continue to manage assets and meet liabilities within the patrimony until the patrimony is exhausted. Brown suggested that when a new partnership of the remaining partners is formed, this may be a case of universal succession whereby the patrimony of the dissolved firm can transmit and merge with the patrimony of the newly established firm.⁷⁶

Whilst this would be controversial, and certainly no authority in support of this approach exists,⁷⁷ one could see the merit in such an analysis as explaining why some obligations can run “with the house” of the partnership.⁷⁸ Indeed, Lord Keith in the English appeal case *National Bank of Greece and Athens SA v Metliss* appears to recognise that universal succession can occur in the case of juristic persons.⁷⁹ Such an approach could be evidenced

⁷² L Macgregor, “Partnerships and legal personality: Cautionary tales from Scotland” (2020) 20(1) *Journal of Corporate Law Studies* 237, 247ff.

⁷³ Gretton, “Trusts without equity”, 609 and 616.

⁷⁴ [2018] CSIH 68, per Lord Brodie at para [38]. See also Lord Reid’s bridge analogy in *Inland Revenue* at 21.

⁷⁵ In *Inland Revenue* the House of Lords found that a right of lease was terminated by dissolution, though as Rennie argued, this seems to be a highly contextual decision due to “unusual features”. See Rennie, *Leases*, para 8-07.

⁷⁶ J Brown, “On partnerships, promises and succession”, 135.

⁷⁷ Though see the consideration in *Scottish Pension Fund Trustees Ltd v Ross & Munro and others* [2018] CSIH 39. In *Andrew Marr International Ltd v MacKinnons Solicitors LLP* [2025] CSOH 20, Lord Braid at para 26 appears to attribute this rule to an express or implied novation or unilateral obligation on the part of the new firm.

⁷⁸ Rennie, *Leases*, para 8-09.

⁷⁹ [1958] AC 509, per Lord Keith at 530.

in statutory provisions which provide that a newly constituted corporate body assumes the rights, liabilities and obligations of the dissolved corporate body.⁸⁰

8.3.3 *Bona vacantia*

Having established what happens to a partnership's property after dissolution, the subsidiary question is whether there are any circumstances in which the (former) partnership's property could fall to the Crown as *bona vacantia*?

To answer this, it is important to distinguish between the two arrangements that partnership land may be owned under. Firstly, for land it is typically the case that the partners of the firm act as trustees for the firm. Therefore, the partners take ownership as trustee for the firm, with the firm being the beneficiary under an express trust.⁸¹ If the firm is dissolved, then the beneficiary of the trust ceases to exist. In effect, the situation that follows is a resulting trust.⁸² In a resulting trust, the Crown has no claim to trust property as *bona vacantia*. As McMillan described:⁸³

In the case of trust property the doctrine of resulting trust operates to exclude the right of the Crown to an undisposed residue. If the trust is a private one and its purposes have been accomplished, or has failed, and a surplus remains in the hands of the trustees, a trust generally results for the truster and his representatives, the trustees are bound to re-convey the surplus funds to them, and the Crown has no right to the property. The circumstances may, however, be such that in conveying the funds to the trustees the truster has either expressly or by implication completely divested himself of the property. In such a case no trust results, and the surplus funds fall to the Crown as *bona vacantia*.

To apply this to the trust model, the property reverts to the truster (the former partner(s) providing, or purchasing, the property).⁸⁴ There then appears interplay with trust law and partnership law. It appears that the property is to be distributed in accordance with the rules of distribution of partnership property to all the former partners concerned.⁸⁵ If a partner has died, and has no successors whomsoever, or the partner was a corporate body that has been dissolved, then the Crown may take their place in the distribution under the *bona vacantia* doctrine.

⁸⁰ See, for example, The Local Authorities (Property Transfer) (Scotland) Order 1995 SI 1995/2499, Reg 1(2); Building Societies Act 1986, s93(4); or British Aerospace Act 1980, s1(1).

⁸¹ A Stewart, *Conveyancing Practice in Scotland* 9th edn (2025), para 11.45; and Gretton & Reid, *Conveyancing*, para 28-03.

⁸² Gretton & Reid, *Conveyancing*, para 28-10.

⁸³ McMillan, *Bona Vacantia*, 37.

⁸⁴ *abrdn (SLSPS) Pension Trustee Company Limited, Noters* [2023] CSIH 31, paras [33] – [34].

⁸⁵ 1890 Act, s44; and *Eason* at para [24].

The second model is where the firm itself holds ownership. This is typically the case with moveable property. It is possible, though rare,⁸⁶ that land can be owned directly by the firm itself under the Abolition of Feudal Tenure (Scotland) Act 2000.⁸⁷

Where the firm holds property directly, the resulting situation where the property is dissolved seems to be akin to the *haereditas jacens* argument previously advanced in this thesis. In this situation, there is no trust. However, the patrimony (of the firm) remains but no longer has an owner since the firm has dissolved. The partners have a personal right to the property (in accordance with the distribution rules of the 1890 Act or as under the partnership agreement.) In this situation, the right of ownership of firm property is held in the firm's patrimony but there is no right-holder. However, this does not mean the assets become *res nullius*.⁸⁸ In this sense, the Crown has no claim to the distribution of partnership property as *bona vacantia*. That is, of course, unless a partner has died without heirs or been dissolved, , then the Crown may take their share in the distribution under the *bona vacantia* doctrine.

8.4 Limited Partnerships and Limited Liability Partnerships

A Limited Partnership is constituted by the Limited Partnerships Act 1907. A limited partnership is composed of general partners (with unlimited liability) and limited partners (with limited liability).⁸⁹ A limited partner is intended to be a silent partner, with no management in the firm.⁹⁰

8.4.1 Dissolution of a Limited Partnership

There are some variations from 1890 Act partnerships in respect of limited partnerships. The death or bankruptcy of a limited partner does not terminate the limited partnership, but the death or bankruptcy of the general partner will.⁹¹ Otherwise, the general law of partnerships under the 1890 Act will apply in respect of dissolution.⁹² The previous section on partnership thus guides the dissolution and distribution of limited partnerships.

8.4.2 Limited Liability Partnerships

A limited liability partnership (LLP) is constituted by the Limited Liability Partnership Act 2000. This is a separate legal personality from the partners and can exist after the death of all partners.⁹³ A debate existed prior to the 2000 Act on whether an LLP was a corporate

⁸⁶ Stewart, *Conveyancing Practice*, para 11.45.

⁸⁷ Abolition of Feudal Tenure etc (Scotland) Act 2000, s70.

⁸⁸ A point Lord Curriehill identified in *Buchanan*, at 474.

⁸⁹ Limited Partnerships Act 1907, ss4(2) and 4(2A).

⁹⁰ *Ibid*, s6(1).

⁹¹ *Ibid*, s6(2).

⁹² *Ibid*, s6(3).

⁹³ Anderson, *Scots Commercial Law*, para 5.10.

body, or a partnership emboldened with legal personality.⁹⁴ The preferred view appears to be that the LLP is a separate corporate body similar to a company.⁹⁵ Regulations apply the *bona vacantia* provisions of the Companies Act 2006 to LLPs.⁹⁶ Additionally, an LLP can return to life through restoration to the register.⁹⁷ With this mind, the discussion on companies above applies to LLPs also.

8.5 Trusts

The law of trusts is a complex area, albeit many inroads have been made by the Trusts and Succession (Scotland) Act 2024. The trust has developed into an institution with doctrine and principles relating to the office of trustee, their duties, and liabilities.⁹⁸ However, the law has not developed in such a manner as to give the trust itself legal personality. As Lord Malcolm described:⁹⁹

I note that a trust is not a separate juristic entity¹⁰⁰ It is not a legal person. Only the trustee or trustees can make contracts or incur debts, and only the trustee or trustees can own the trust property. In the case of a plurality of trustees, they own the trust property jointly.

The trustee holds property, including ownership of land, for a trust purpose.¹⁰¹ This gives rise to the trustee having a trust patrimony, in which the assets and liabilities of the trust are kept. However, the *bona vacantia* doctrine may come into play where a trust encounters practical difficulties in the absence of a truster, trustee, or beneficiary.

8.5.1 Private Trusts

Private trusts are ones where the trust purposes are limited to private purposes. Once the provisions of Trusts and Succession (Scotland) Act 2024 are brought into force, there will be two categories of private trust expressly recognised in Scots law: namely, private purpose trusts and private beneficiary trusts.¹⁰² Private purpose trusts have no beneficiaries.¹⁰³ If the purposes fail, then the trust becomes a resulting trust which is discussed below.

⁹⁴ Morse, *Palmer's Company Law*, para 1.208.

⁹⁵ *F&C Alternative Investments (Holdings) Limited v Barthelemy* [2011] EWHC 1731 (Ch) per Sales LJ at para 205(i).

⁹⁶ Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 SI 2009/1804 regulations 52 to 55.

⁹⁷ *Ibid*, regulations 56 to 58.

⁹⁸ R Burgess, "Thoughts on the origins of the trust in Scots law" 1974 *JR* 196, 198.

⁹⁹ *Glasgow City Council v Board of Managers of Springboig St John's School* [2014] CSOH 76, para 16.

¹⁰⁰ The Scottish Law Commission consulted on separate legal personality for a trust, and concluded that it was not necessary, Discussion Paper on *Nature and Constitution of Trusts* (SLC DP No 133, 2006), para 1.3.

¹⁰¹ *Ibid*, para 2.3.

¹⁰² On private purpose trusts, see Trusts and Succession (Scotland) Act 2024, Chapter 6 [not yet in force]

¹⁰³ 2024 Act, s46(1)(b).

Private beneficiary trusts are trusts with a purpose for a specific class of persons, such as children of the truster.¹⁰⁴ In private beneficiary trusts, there is a need to distinguish between: (i) exhaustion of beneficiaries; and (ii) exhaustion of trustees. The former produces a resulting trust, and the latter a lapsed trust. Broadly, these are two situations where *bona vacantia* may come into play, given the absence of persons holding rights in a trust relationship.

8.5.1A Resulting Trust

As noted above, McMillan identified that a resulting trust arises where the trust's purposes have been accomplished or failed without exhaustion of the trust assets.¹⁰⁵ Generally, the issue of resulting trusts is mired in complexity owing to development of the theory that the truster retained a "radical right" of property.¹⁰⁶ This theory, at its dominance, was that the truster continued to hold some form of ownership of trust assets alongside the trustee. The modern theory, given the unititular nature of ownership, is that ownership is fully divested by the truster to the trustee(s) but there is an implied term by law that the trust assets revert to the truster where the trust purposes fail.¹⁰⁷ In effect, then, this is a personal right of reversion to the truster.

The general concept of a resulting trust is expressed by Lord Young in *Edmond v Lord Provost of Aberdeen*:¹⁰⁸

If a man makes a trust of any part of his estate, or of the whole of it, to take effect in his lifetime, and either declares no trust purposes, or the purposes which he has expressed fail, there is a resulting trust for himself, and the trustees will have to convey the property back to him, although he has given them possession of it.

However, a trust does not simply fail in the temporary absence of any beneficiaries, as Lord Curriehill noted in *Hunter's Trustees v Carleton*:¹⁰⁹

The *jus crediti* to a trust-fund vested in trustees can be *in pendente*, the fund being held by the trustees in abeyance until some one comes into existence in whom it may vest.

Thus, a resulting trust will only arise where there is a clear failure of the purpose of the trust. The problem under examination here for private beneficiary trusts, in particular, is therefore the total permanent absence of beneficiaries, where no other person(s) able to be a

¹⁰⁴ C Barker et al, *Charity law in Scotland* (1996), para 3.2.4.

¹⁰⁵ McMillan, *Bona Vacantia*, 37.

¹⁰⁶ G Gretton, "Trusts", section 10.

¹⁰⁷ Discussion Paper on *Nature and constitution of trusts*, para 2.5; and G Gretton, "Constructive Trusts: Part 1" (1997) 1 *ELR* 281, 309.

¹⁰⁸ (1898) 1 F 154, at 163.

¹⁰⁹ (1865) 3 M 514, at 520.

beneficiary is likely ever to come into existence.¹¹⁰ For private purpose trusts, if the purposes appear to have failed, there may yet be a possibility of their subsequent revival. An example of this *Templeton v Burgh of Ayr*¹¹¹ wherein a resulting trust was held not to have formed because there remained the possibility that a postponed bridge building project may still later come into effect, even if uncertain.

A truster may have expressly excluded the operation of a resulting trust and for the property to be returned to the truster or their successors.¹¹² McMillan argued that if the trust was irrevocable, then no resulting trust can arise and the implied right to re-conveyance of trust property passes to the Crown.¹¹³ This is a point Chalmers considered:¹¹⁴

But what if the truster has both excluded the possibility of a resulting trust and the trust purposes genuinely fail? There appears to be no Scottish authority on the point, but it may be that the only logically possible answer in this scenario is that the property falls to the Crown as *bona vacantia*.

In support of that statement, Chalmers drew attention to the English case of *Westdeutsche Landesbank Girozentrale v Islington LBC*.¹¹⁵ In that case, Lord Browne-Wilkinson noted:¹¹⁶

If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as *bona vacantia*.

Whilst great care must be taken with the use of English cases in the context of Scottish trust law,¹¹⁷ this seems a reasonable interpretation of this situation in Scots law also.¹¹⁸ Wilson & Duncan provide the example that contribution of funds by society members where the society's purposes lapse would fall into a resulting trust.¹¹⁹ However, depending on the nature of the society, the members may not be entitled to distribution of the funds of a resulting trust and the funds become *bona vacantia*.¹²⁰ The Inner House in *abrdn (SLSPS) Pension Trustee Company, Noters* seemed receptive to this point:¹²¹

If there is a real contradictor, it is the Crown which might seek to argue that all or some of the assets in the fund ought to be treated as *bona vacantia* rather than being held on a resulting trust in favour of the employers. The petition was not served on the Crown and so no opportunity was afforded for such an argument to be presented.

¹¹⁰ A Mackenzie Stuart, *The Law of Trusts* (1932), 43.

¹¹¹ 1910 2 SLT 12; 1912 1 SLT 412.

¹¹² J Chalmers, *Trusts: Cases and materials* (2002), para 2.29; and Mackenzie Stuart, *Trusts*, 45.

¹¹³ McMillan, *Bona Vacantia*, 37.

¹¹⁴ Chalmers, *Trusts*, para 2.29.

¹¹⁵ [1996] AC 669.

¹¹⁶ *Ibid*, at 669.

¹¹⁷ G Gretton, "Trusts", 481.

¹¹⁸ Mackenzie Stuart, *Trusts*, 46.

¹¹⁹ Wilson & Duncan, *Trusts*, para 6-55.

¹²⁰ *Ibid*, para 6-55.

¹²¹ [2023] CSIH 31 at para 28.

This is a point Mackenzie Stuart also noted:¹²²

There may be a contractual element in the constitution of the trust which excludes the possibility of a resulting trust... If, therefore, a surplus arises in such a trust, although the trustee takes no beneficial interest, there would be no resulting trust...and the surplus would go to the Crown as *bona vacantia*.

It does seem a logical application of the *bona vacantia* doctrine that an irrevocable trust (which has renounced any reversion of the property to a truster) would engage the Crown's *bona vacantia* rights, and the property will fall to the Crown.

Equally, if a resulting trust does arise, the truster may no longer be in existence. The truster may have been a juristic person that has been dissolved, with the truster's reversionary right falling to the Crown as *bona vacantia*. Alternatively, the truster may have died. In that situation, the trustee owns, or holds, the trust property on behalf of the truster's heirs.¹²³ There is interplay here with the Crown's rights once again. In *Finnie v Lords of Treasury*,¹²⁴ a testator with no heirs (because the testator was born out of wedlock) died testate. A *mortis causa* trust provided for the vesting of estate in trustees and payment of legacies. A residue remained in this trust after the legacies had been paid. In the circumstances, the Court of Session ruled that the trust residue fell to the Crown as *ultimus haeres*. This case is why Lord McLaren gave the following observation:¹²⁵

The Sovereign may acquire property beneficially through a trustee, either in consequence of the granter's declared intention, or as *ultimus haeres* upon failure of the trust purposes.

8.5.1B Lapsed Trusts

A lapsed trust arises where all trustees have died. The immediate question becomes, who owns trust property?

At an earlier period, the answer to that question was by no means simple. Bell states that a "trust is at an end, by the death of the trustee".¹²⁶ Bell supplements this with:¹²⁷

If heirs have not been mentioned, there is greater difficulty, as the trust terminates with the trustee's death, and there is nothing in the heir. But the trust-estate is *in haereditatem jacente* of the deceased trustee.

¹²² Mackenzie Stuart, *Trusts*, 45.

¹²³ *Anderson v Smoke* (1898) 25 R 493.

¹²⁴ (1836) 15 S. 165.

¹²⁵ J McLaren, *A treatise on the law of trusts*, Vol I (1863), 92.

¹²⁶ Bell, *Commentaries*, para 2001.

¹²⁷ Bell, *Commentaries*, para 2001.

In addition, Forsyth, in one of the early treatments of the law of trusts, follows Bell by writing “a trust has come to an end by the death of the trustee, where only one existed”.¹²⁸ It is perhaps not fleshed out in Bell’s observations, but the learned writer does seem to recognise that the trust *does* continue. Bell states that the trust estate had fallen into the trustee’s *haereditas jacens*. Thus, there is still a trust but no trustee. However, from a modern analysis, holding the trust property to be in the trustee’s *haereditas jacens*, the dual patrimony theory seems somewhat undermined. As a form of joint ownership, the share in trust property should not be in the *haereditas jacens* of a trustee as the *haereditas* (or deceased’s estate) is the trustee’s own personal patrimony. This is something that Lord McLaren had difficulty comprehending:¹²⁹

Where the beneficiaries are not of the next of kin [of the truster], it has been suggested that they might make up a title by confirmation as executors-creditors...but unless we assume that a trust is an *inheritable right* (which it clearly is not), this course would seem to be incompetent, since confirmation can only be used to take up an inheritance.

Lord Curriehill’s dissent in *Marquess of Ailsa v Jeffray* outlined this view also:¹³⁰

The case where a trust has lapsed by the death of the trustee, without the trust-subject having been conveyed to the beneficiary, and where the trust investiture was not destined to the heirs of the deceased trustee. What created the difficulty in such a case was, that on the death of the trustee the feudal right did not become in *hereditate jacente* of him, and there was no party who could voluntarily enter as heir to him in the trust-subject.

Menzies attempted to explain this further:¹³¹

Death, of course, thins the *personnel* of the trust, but it is incorrect to describe it as a divestment of the office – it is an extinction of the *persona* to which the office was attached. In an analogous manner, upon the trustee’s being completely divested of the trust estate by his conveyance thereof in favour of the beneficiaries, he is not divested of his office, but the *matériel* of the trust, and consequently, the office of trustee, ceases to exist, for there can no longer be an office of trustee when there is no trust estate.

Menzies continued this commentary further by describing:¹³²

It is to be noted that death in the case of one or more trustees differs in its effect upon the trust title from death in the case of a sole trustee. In the former case death divests the trustee of the title’ he is, as has been said, ‘blotted out of the title’. **In the latter**

¹²⁸ C Forsyth, *The principles and practices of the law of trusts* (1844), 428.

¹²⁹ Lord McLaren, *Wills and Succession*, Vol II, 3rd edn, para 2366. Lord Curriehill’s dissent in *Marquess of Ailsa v Jeffray* (1859) 21 D 492 also expresses his objection to the view that a trust falls into the *haereditas jacens* of the last trustee.

¹³⁰ (1859) 21 D. 492, per Lord Curriehill at 502.

¹³¹ Menzies, *Trustees*, 36.

¹³² *Ibid*, 83 [Bold added].

case the title still remains in him, and has to be taken out by process of conveyancing.

What Menzies appears to mean by “the title still remains in him” is that the trust is in the *haereditas jacens* of the deceased trustee. It is not clear whether historically a trust simply ceased upon the cessation of all trustees as Bell appears to suggest. However, in the modern law, this view does not seem to be accepted to be the case.¹³³ The trust is said to continue to exist despite the exhaustion of all trustees.

The modern view of a lapsed trust is more comfortable with a trust temporarily having no owner, as Reid described:¹³⁴

What happens if all the trustees die or resign? There is then a patrimony but no person. This does not bring the trust to an end. A trust patrimony has a life of its own, which does not depend on the accident of the existence, or non-existence, of trustees.

It is suggested that the comments noted above in older sources were an attempt to hold that the trust continues and conveyancing must be effected to remove the trust property from the deceased’s estate. In consideration of Reid’s statement, Lady Wolffe in *Kennedy v Bonnici* sets out “that a trust does not fail for want of any trustees”.¹³⁵ At this stage, under the modern view of trusts under the dual patrimony theory, it appears when all trustees have died then there is no owner of a lapsed trust. Theoretically, this would engage the Crown’s rights as *bona vacantia* as claimant to the ownership of the trust.

However, there does not appear to be any academic accounts in the leading writings of trust law which gives credence to the application of the *quod nullius etc.* principle being applied in the case of a lapsed trust. Previously, the fiction of holding trust property in the *haereditas jacens* of the deceased trustee had been employed as a solution. Yet, in modern times, it appears that there is simply a period of ownerless property. Lady Wolffe in *Kennedy* appeared to endorse this view:¹³⁶

A trust without any trustees in post does not mean a trust or its estate ceases to exist; it simply means that there is no one in whom the trust estate is presently vested and able validly to intromit with it or be held liable in respect of claims against it. While in those circumstances no one holds the trust estate as owner, the trust estate does not become *bona vacantia*.

This follows on from Lord Drummond Young’s comments in *Aitkenhead v Fraser*¹³⁷

¹³³ Though the remedy under s6 of the Executors (Scotland) Act 1900 seems to have developed in such a way, see Lord Tyre’s comments in *Shenken v Phoenix Life Limited* [2015] CSOH 96, at para 15.

¹³⁴ Reid, “Patrimony not equity”, 433.

¹³⁵ [2021] CSOH 106, at para 22.

¹³⁶ [2021] CSOH 106, at para 23.

¹³⁷ [2006] HCJAC 51 at para 7 [Bold added].

On occasion the trustees may fail, through death or resignation or because a corporate trustee is struck off. **In such a case the trust continues in existence and the trust property remains impressed with the trust purposes**, but the trust is normally incapable of performing any legal acts without the appointment of new trustees, usually by the court.

The lines of traditional trust jurisprudence seem somewhat blurred by placing the trust patrimony into the *haereditas jacens* of the deceased given trust property is not open to rights of succession. For reasons explained in this thesis in respect of the *haereditas jacens*, it is argued that the more coherent interpretation is, as Lord Drummond Young and Lady Wolffe described, that the trust continues in existence in an ownerless patrimony.¹³⁸ As such, whilst ownerless the *bona vacantia* doctrine is not engaged.

8.5.2 Public Trusts

Public trusts are those “set up for the benefit of the public in general, or of a specified class of public in general”.¹³⁹ The doctrinal foundations for public trust are little explored, as Gretton explained:¹⁴⁰

Jurists had little interest in them. The institutional writers say little. It may even be asked as to whether the category of public trust existed at all until the nineteenth century.

Traditionally it was unclear whether public trusts were wholly charitable trusts, or whether charitable trusts were a form of public trusts.¹⁴¹ It now appears that a charitable trust are a sub-species of public trusts.¹⁴²

A public trust may fail if the trust’s purposes may no longer be able to be fulfilled. This poses a problem for how the property of the public trust is to be distributed. It is frequently asserted that a failed public trust could be remedied by the *cy-près* doctrine, being the court’s power for “rescuing a public trust from failure”.¹⁴³ In the context here, focus is placed on supervening failures given the trust has the property vested but subsequently runs into difficulty.

Under *cy-près* powers, the Court of Session can make schemes for the trust’s purposes to be altered, or trust property applied or distributed to similar entities.¹⁴⁴ It appears one of the

¹³⁸ See above at 7.5.

¹³⁹ K McNorrie & E Scobbie, *Trusts* (1991), 17.

¹⁴⁰ G Gretton, “Trusts”, 509.

¹⁴¹ Barker, *Charity law*, para 3.2.6.

¹⁴² *Ibid*, para 3.2.6.

¹⁴³ S Thomson, *The nobile officium* (2015), 51. Whilst outwith the scope of this work, Thomson notes that it is unclear whether this is an exercise of the Court of Session *cy-près* powers derive from common law, or under the *nobile officium*.

¹⁴⁴ Discussion Paper on *Supplementary and Miscellaneous Issues relating to Trust Law* (SLC DP No 148, 2011), para 12.20.

objectives of this is to avoid eligible trusts falling to the Crown as *bona vacantia*, as Lord President Clyde described:¹⁴⁵

One of the familiar principles of [the *nobile officium*] is that the Court will not allow a charitable bequest or trust to be held void from uncertainty, or to fail, if that can possibly be avoided. Pious intentions, in short, are more favoured than the claims of the heir-at-law or of the Crown; which is an equitable principle or nothing.

However, there was also a historical confusion on whether *cy-près* was available to all public trusts or charitable trusts alone.¹⁴⁶ It is now accepted that *cy-près* applies to all public trusts rather than solely to charitable public trusts, despite confusing terminology in some judgments and literature.¹⁴⁷

In addition, there are two other modern remedies for a failed public trust. If the public trust is a charitable trust, then the charity may apply for a charity reorganisation scheme.¹⁴⁸ For other non-charitable public trusts, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provides for a mechanism to have a court authorise a reorganisation scheme. All of these remedies can involve making over or distributing the trust's property to other bodies carrying out similar purposes. However, these methods have their limits, and the Crown's *bona vacantia* interests may be engaged as a result. This is now further explored.

Whilst *cy-près* can avoid property passing to the Crown, the court's role can be excluded from operating in respect of failed public trusts.¹⁴⁹ This frequently arises where the truster did not have a general intention to commit funds for a wider 'public' purpose (or at least where no such intention can be inferred by the court).¹⁵⁰ As Lord Drummond Young described in *Trustees of RS MacDonald Charitable Trust*:¹⁵¹

An exception... occurs where property is dedicated not to a general purpose of a public or charitable nature but to a specific purpose, albeit of a public nature.

Lord Drummond Young cites *Young's Trustee v Deacons of the Incorporated Trades of Perth*¹⁵² as an example. In that case, funds were provided to supplement the income of a schoolmaster as part of a charitable legacy made by a testator. When the school later closed, the residual legatees claimed the funds be made back over to them. The Inner House found

¹⁴⁵ *Gibson's Trs, Ptrs*, 1933 SC 190, per Lord President Clyde at 199.

¹⁴⁶ Y Evans, "Trusts, trustees and judicial factors (Reissue)", *Stair Memorial Encyclopaedia*, para 101.

¹⁴⁷ *Ibid*, para 101.

¹⁴⁸ Charities and Trustee Investment (Scotland) Act 2005, Ch 5.

¹⁴⁹ H Macqueen & Lord Eassie, *Gloag and Henderson: The law of Scotland* 15th edn (2022), para 41.43.

¹⁵⁰ Wilson & Duncan, *Trusts*, para 6-51; and Evans, "Trusts (Reissue)", para 101.

¹⁵¹ [2008] CSOH 116, at para 21.

¹⁵² (1893) 20 R 778.

that *cy-près* was excluded because there was no “general charitable intention” in reviewing the testator’s will, which created a resulting trust for a testator’s residual legatees.

This approach of a resulting trust is not without its complications. In the case where a number of trustees had provided funds in a public trust, it may prove complex to return all property to them. For example, in *Ewing v McGavin*, funds had been raised for victims of the 1825 Miramichi Fire in Canada.¹⁵³ Relief payments were made but some funds remained to be distributed. A dispute arose as to how the remaining funds should be applied. Lord Fullerton at first instance (affirmed by the Inner House) mentions in *obiter*:¹⁵⁴

It is possible that cases may occur in which there is such clear and absolute evidence of the non-existence of any objects falling under the scope of the subscription, as to warrant a demand on the part of the subscribers for a division of any balance remaining unapplied in the hands of the committee.

However, Lord Fullerton’s approach in *Ewing* was subsequently rejected by the court in *Trs of Falkirk Certified Industrial School v Ferguson Bequest Fund*, who held that the general public are not entitled to return of their subscriptions.¹⁵⁵ In that case, a *mortis causa* trust paid funds alongside other subscribers to establish a school in Falkirk. However, the school subsequently closed, and the school’s trustees applied to the Court of Session for authority to sell the trust property and divide the residual assets of the School trust to other educational institutions. The bequest trustees challenged this proposal and sought repayment of their subscription. The Inner House declined to hold that subscribers were entitled to return of their property, but rather the subscription was to be treated as a gift or donation, as Lord McLaren noted:¹⁵⁶

I think it is consistent with the general understanding regarding subscriptions to societies for public purposes that money paid by a subscriber does not constitute a trust, but is a gift under conditions.... I am far from saying that a gift may not be made in such terms as to constitute a trust, but I think that there are few societies which would be willing to accept subscriptions on a footing which would make every individual subscriber a trustee, entitled to call the society to account, and would put upon the society the burden of discovering the donor or his heirs, if its objects became impracticable.

The similarities in *Young’s Trustees*, *Ewing* and *Falkirk Certified Industrial School* illustrate the dependency on the manner of construction of a conveyance as either creating a gift or trust relationship. Generally, identifying the limits of *cy-près* is a complex area. The

¹⁵³ (1831) 9 S 622.

¹⁵⁴ (1831) 9 S. 622, per Lord Fullerton at 623.

¹⁵⁵ *Trs of Falkirk Certified Industrial School v Ferguson Bequest Fund* (1899) 1 F 1175.

¹⁵⁶ *Ibid*, per Lord McLaren at 1178.

introduction of the 1990 Act and the 2005 Act have lessened the concern somewhat given that these may be regarded as avoiding the need to search for a “general charitable intention”. However, the 1990 Act requires the court to consider “the spirit of the trust deed”¹⁵⁷ and likewise the 2005 Act requires both OSCR and the court to consider the “spirit” of the charity’s constitution.¹⁵⁸

Whilst the courts in recent years have adopted a more ready attitude to public trust or charitable reorganisation,¹⁵⁹ discrete circumstances may still arise where the truster’s actual or implied intention was such that the public purpose they intended is too narrow to allow for approval of distributing trust property to another body. If a trust relationship is created, and the trust purposes fail with no room for *cy-près* or statutory re-organisation, the situation will be a resulting trust as the court decided in *Young’s Trustees*.

Of course, it may also be possible that a resulting trust is expressly excluded. As noted in the context of private trusts, where a resulting trust is excluded, the property may fall as *bona vacantia* upon failure of the public trust. Likewise, if a resulting trust is found to have come into being, the return of the former public trust property may pass to the Crown as *ultimus haeres* in the absence of any nearer heirs.

8.6 Co-operative and community benefit societies

Formerly, co-operative and community benefit societies were known as “Industrial & Provident Societies” (IPS).¹⁶⁰ Following reform, the Co-operative and Community Benefit Societies Act 2014 now regulates these entities. There are now three entities recognised under the 2014 Act, together all known as registered societies. These are:

- (1) A community benefit society;
- (2) A co-operative; or
- (3) A “pre-commencement society”¹⁶¹ that was registered, or treated as registered, under the Industrial and Provident Societies Act 1965.¹⁶²

A new eligible society may elect to become either a (i) co-operative or (ii) community benefit society (i.e.: not both). Existing IPSs continue to enjoy the same privileges as a post-2014

¹⁵⁷ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s9(2).

¹⁵⁸ Charities and Trustee Investment (Scotland) Act 2005, ss39(1)(b)(i) and 40(1)(b)(i).

¹⁵⁹ As noted by Lord Drummond Young in *RS Macdonald*, at para 21.

¹⁶⁰ On the name of this association, see I Swinney, “Industrial and Provident Societies, Credit Unions and Friendly Societies” in *Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 12, para 606. See also *Stansell Limited v Co-operative Group (CWS) Limited* [2006] 1 WLR 1704, per Mummery LJ at para 2.

¹⁶¹ Co-operative and Community Benefit Societies Act 2014, s150.

¹⁶² *Ibid*, s1.

Act society.¹⁶³ In modern times, registered societies can be used to form community-owned enterprises, housing co-operatives, housing associations, community land trusts, recreational clubs, institutes, and education facilities.¹⁶⁴ All of these are important to our social fabric but (crucially) also involve either the ownership or lease of land in Scotland to operate their community enterprises.

8.6.1 Formal Dissolution

A registered society may elect to dissolve itself. To do so, a special document, an Instrument of Dissolution (the Instrument), is required to be approved by a super-majority of the society's membership.¹⁶⁵ The Instrument must detail the the intended distribution of the society's property, or it may propose that the Financial Conduct Authority or Prudential Regulation Authority determines the distribution.¹⁶⁶

The Instrument is then to be filed with the FCA (and the PRA if dual regulated, such as credit unions) with an accompanying declaration.¹⁶⁷ Following the submission of the final return, the FCA will register the Instrument as a binding amendment to the society's rules.¹⁶⁸ The FCA will advertise a Notice of Dissolution in the Edinburgh Gazette and also in a newspaper in the locality of the society's registered office.¹⁶⁹

8.6.2 Dissolution and termination of registered societies

In terms of the conclusive point of 'death' of the registered society, Lewison J. observes that the corporation will cease to exist when "it has been dissolved by one of the methods prescribed by the [2014 Act] or its registration has been cancelled".¹⁷⁰

It has been noted above of the more formal method of 'self-dissolution'. However, a dissolution will not be effective until an office-bearer files a required certificate with the FCA ('Section 126 Certificate') confirming that all property held by society has been conveyed or transferred to the relevant persons.¹⁷¹ If the Instrument process has been competently followed and the Section 126 certificate filed confirming no remaining assets, the dissolution of the registered society is effective from the date of the Notice of Dissolution or the filing of the Section 126 Certificate (whichever is the later).¹⁷²

¹⁶³ I Snaith (ed), *Handbook of co-operative and community benefit society law* (2014), 60.

¹⁶⁴ *Ibid.*, 48-50.

¹⁶⁵ 2014 Act, s119. If the society is dormant, then a special resolution can be passed instead, 2014 Act s119(3)(b).

¹⁶⁶ *Ibid.*, s119(2).

¹⁶⁷ *Ibid.*, s121(2).

¹⁶⁸ *Ibid.*, ss121(5) and 121(7).

¹⁶⁹ *Ibid.*, s122(1).

¹⁷⁰ *Boyle v Collins* [2004] EWHC 271, per Lewison J at para [34].

¹⁷¹ 2014 Act, s126.

¹⁷² *Ibid.*, s122.

What is curious amongst the survey of corporate personalities, is that registered society legislation has long attempted to avoid assets falling to the Crown as *bona vacantia*. The reason for this is an English case, *In re Ruddington Land*.¹⁷³ Ruddington had been dissolved before it had disposed of all its assets, leading to a question of who held title to the (former) society's property.¹⁷⁴ Unfortunately, from the perspective of this thesis, the Crown did not advance a claim to the property as *bona vacantia* in the litigation that followed, so it was unclear whether the Crown had title to the property under English law.¹⁷⁵ The ramifications of the procedural errors in *Ruddington* lead to an amending provision being inserted into the Industrial and Provident Societies Act 1913¹⁷⁶ and this requirement persists today in the form of the Section 126 Certificate.¹⁷⁷

8.6.3 Cancellation and termination of registration

The Financial Conduct Authority also holds the power to cancel or suspend any registration of a registered society.¹⁷⁸ The reasons for cancellation¹⁷⁹ or suspension¹⁸⁰ are as listed in the 2014 Act. Cancellation also terminates a registered society's legal personality.¹⁸¹ The effects of this cancellation will be explored below, particularly from a perspective of Scots law, as this area is not well understood. It presents a question on whether assets can fall to the Crown as *bona vacantia* despite the efforts of IPS and registered societies legislation.

8.6.4 Effect of cancellation

IPS differ from other juristic persons (except partnerships) in that, in order to become a registered society under the 2014 Act, there first must be a *society*, or unincorporated association.¹⁸² There is, as Brightman J terms it, a "substratum" or bedrock association underlying the registered society.¹⁸³ The issue is expressed by Lewison J. in respect of the Industrial and Provident Societies Act 1965 as follows:¹⁸⁴

One of the effects of cancellation is to cancel the effect of incorporation, since a society is only incorporated "by virtue of" registration. Thus as from the date of cancellation of the registration the society (if it still exists) becomes an unincorporated association, to which the principle of spontaneous dissolution may apply. If the substratum of the corporation has ceased to exist before the cancellation, then the cancellation will terminate the existence of the corporation and there will be

¹⁷³ [1909] 1 Ch 701

¹⁷⁴ [1909] 1 Ch 701 at 706.

¹⁷⁵ [1909] 1 Ch 701 at 707.

¹⁷⁶ Industrial and Provident Societies Act 1913, s8.

¹⁷⁷ 2014 Act, s126.

¹⁷⁸ *Ibid.*, ss5 and 8.

¹⁷⁹ *Ibid.*, s5, Conditions A to E.

¹⁸⁰ *Ibid.*, s5 Conditions C to E.

¹⁸¹ *Ibid.*, s6(7).

¹⁸² Snaith, *Co-operative and Community Benefit Society Law*, para 3.3.2.

¹⁸³ *In re William Denby & Sons Ltd Sick and Benevolent Fund* [1971] 1 WLR 973, per Brightman J. at 980.

¹⁸⁴ *Boyle v Collins*, per Lewison J at para [34].

no putative successor unincorporated association. What I do not think is possible is for the corporation to cease to exist unless either it has been dissolved by one of the methods prescribed by the 1965 Act or its registration has been cancelled.

Thus the 2014 Act deprives the society of the “privileges” of registration and reduces them to an unincorporated association.¹⁸⁵ Corporate personality is lost but should the bedrock society upon which that personality rested subsist, i.e.: there continues to be an association of members, then the society continues as an unincorporated association. Lord Tomlin in the House of Lords in *Hole v Garnsey*¹⁸⁶ noted that:¹⁸⁷

Such cancellation or suspension does not destroy the society but only deprives it of and relieves it from the privileges and obligations which follow from registration.

8.6.5 Property in Scotland

In respect of land in Scotland the question is then, who owns any co-operative or community benefit society land if that registered society is subject to a cancellation or suspension of registration? The proprietor registered in the Land Register of Scotland, the corporate person, no longer exists at the point of cancellation or suspension of registration. If it is accepted that an unincorporated association also exists at this stage, it is unclear if property is then held by all members of that association jointly, or in a trust held by the office-bearers of the association as trustees.¹⁸⁸ If property is so held, how has title moved to this unincorporated association from the former registered corporate body? Is there any conveyance of property?

At the point of registration of a new society onto the Mutuals Register, all property held by the trustees of the unincorporated association vest in the newly incorporated society.¹⁸⁹ For cancellation or suspension of registration, there is no clear legislative provision to ‘re-vest’ the members jointly (or office-bearers as trustees) of the resulting unincorporated association with the property formerly owned by the incorporated society.

8.6.6 *Mount Wellington Mine Limited v Renewable Energy Co-operative Limited*

A solution may be drawn as to the above problem from the situation of a company converting to a co-operative under the 2014 Act. In *Mount Wellington Mine Limited v Renewable*

¹⁸⁵ 2014 Act, 2014 s6(7). It is suggested that a temporary suspension of registration under s8 has the same effect, Snaith, *Co-operative and Community Benefit Society Law*, para 12.7.5.

¹⁸⁶ [1930] AC 472.

¹⁸⁷ *Ibid*, per Lord Tomlin at 499.

¹⁸⁸ This is Snaith’s suggestion in respect of English law, Snaith, *Co-operative and Community Benefit Society Law*, para 12.7.4. For the Scots law, “in the absence of agreement to the contrary the assets of an association belong to the members jointly”, Report on *Unincorporated Associations* (SLC Report No 217, 2009), para 2.11 citing *Murray v Johnstone* (1896) 23 R 981.

¹⁸⁹ 2014 Act, s3(5); see also *Queensbury Industrial Society Limited v Pickles* (1865-66) LR 1 Ex 1.

*Energy Co-operative Limited*¹⁹⁰, the High Court in England was presented with a case of the judgment of an arbitrator involving a lease dispute. The tenant had converted from a company to a co-operative.¹⁹¹ One of the issues became whether the new co-operative remained the tenant under the lease, or was now a separate legal person. The position of the landlord was that the tenant (as a company) ceased to exist and the registered society was not entitled to the tenancy as there had been no assignment.¹⁹²

Under the conversion provisions of the 2014 Act, there is no express provision dealing with the vesting of the company's property in the new society.¹⁹³ Matthews J. considered that a conversion to a registered society is a change of *status* rather than change of personality: "The legal regime changes, but the person remains the same. So do the assets and liabilities."¹⁹⁴ On this point, Matthews J relied on the decision of *Re London Housing Society Limited's Trust Deeds*¹⁹⁵ wherein Farwell J. (dealing with a similar issue of conversion) set out:¹⁹⁶

In my judgment the only practical way of dealing with a question of this sort, having regard to the terms of the Act and the express provision in the Act for enabling a registered society to convert itself into a limited company, is to treat for this purpose the two things, the registered society and the limited company, *as the same thing in different costume*. [*Italics added*]

If this theory is applied here, when a society is cancelled or suspended, it is simply a change of status. The corporate "shield" is taken off and the status of an unincorporated association is again held by the society, there is no issue of *bona vacantia* assets and title can be completed (jointly) by the members of the unincorporated association.

However, there are conceptual difficulties with that view, given that an unincorporated association has no legal personality. On registration, there a fundamental change of personhood, not just one of status. The logical, albeit harsh, approach would be to suggest that assets formerly held by a registered society fall as *bona vacantia* following suspension or cancellation of registration. The incorporated body has ceased to exist and there is no implied conveyance over to the resulting unincorporated association, thus the property is *bona vacantia*. Conversion is not the same in law as termination of the legal person, the

¹⁹⁰ [2021] EWHC 1486.

¹⁹¹ [2021] EWHC 1486 at para 9.

¹⁹² *Ibid*, para 28.

¹⁹³ *Ibid*, paras 29-30.

¹⁹⁴ *Ibid*, para 33.

¹⁹⁵ 1940 Ch 777.

¹⁹⁶ *Ibid*, at 784.

status (such as governing law) changes with conversion but the person remains. This is a point touched upon in *Mount Wellington Mine Limited*:¹⁹⁷

The point to make is that, either way, dissolution is, as Farwell J said [in *London Housing Society Limited*], a quite different process compared to conversion.

If this theory is followed through, the resulting situation for cancelled or suspended registered societies would be similar to that of a strike-off of a company from the Companies Register. The assets following cancellation of registration become *bona vacantia*. However, it does not appear that the High Court in England (at least) has developed this view in respect of cancellation or suspension of registration.¹⁹⁸

8.6.7 *J M Sanderson v Hi Peak Property Limited*

A recent case in England also illustrates the rejection of a *bona vacantia* approach. In *J M Sanderson v Hi Peak Property Limited*¹⁹⁹, an allotment association (an IPS) had owned land which had been conveyed to Hi Peak Property Limited subject to an overage provision.²⁰⁰ However the allotment association's registration had subsequently been cancelled by the Financial Services Authority. In the High Court, Morgan J. considered that the contractual rights would 'devolve' down to the underlying unincorporated association.

However, if the underlying association no longer existed, the issue becomes more problematic. A corporate person seemingly continues to exist, but there is no underlying association 'bedrock' to whom the contractual rights could have devolved or been transmitted. As Morgan J. noted:²⁰¹

One possibility is ... the Association continued to exist but it no longer had corporate status, it was an unincorporated association of its members. The other legal possibility is that the Association did not exist following cancellation of the registration.

However, Morgan J. rejected any idea that the right to the overage payment would fall to any third party. Implicit in this is again the idea that the assets do not fall to the Crown as *bona vacantia*. If the allotment society continued to subsist as an unincorporated association following suspension / cancellation, the property becomes owned between the members of the association. In respect of whether there was no longer a societal association (which could be deemed an unincorporated association), Morgan J. believed that members of the corporate body at that point in time would be the equitable joint owners of the assets.²⁰² Therein lies

¹⁹⁷ [2021] EWHC 1486 (Ch) at para 37.

¹⁹⁸ N Ing, *Bona Vacantia* (1971), 199.

¹⁹⁹ [2014] EWHC 4918 (Ch).

²⁰⁰ *Ibid*, at para 7.

²⁰¹ *Ibid*, at para 18.

²⁰² *Ibid*, at para 21..

a problem for the application of this finding to Scots law, the issue of equitable joint owners, which is discussed further below. The defendants had taken issue with the idea that former members could continue to enforce the contractual rights, arguing they were not the persons legally entitled to do so,²⁰³ but Morgan J. dealt with this issue swiftly:²⁰⁴

I asked Mr Gallagher²⁰⁵ where the contractual rights had gone. He submitted that they must have gone somewhere and the candidate he identified was the Financial Services Authority, which was the body which to an extent regulated industrial and provident societies at the time of the cancellation of the registration in 2011. He was not able to point to any statutory provision which had that effect nor to any case which identified that as being the effect. I consider that that is not the legal effect of a dissolution, if there ever had been a dissolution. [Brackets added]

Although the exact state organ is wrong in the defendant's submission, i.e.: that the Financial Services Authority would be vest with assets, it looks as though Morgan J. rejects the notion that any right could fall to the Crown in a wider sense.

8.6.8 Application to Scots law

These decisions demonstrate a reluctance in English law to have the Crown found to be the person entitled to a registered society's assets. However, Ing considered this issue directly when writing on *bona vacantia* in England & Wales:²⁰⁶

The position is more arguable as regards a society registered under the Building Societies Acts or Industrial and Provident Societies Acts, as presumably loss of corporate status follows from the cancellation of the registration of such societies – with, it might be said, a similar result to the dissolution of a company under the Companies Acts and corresponding claim arising on the part of the Crown as *bona vacantia*. However, it appears that this is not the correct view, the latter being as stated by Lord Tomlin in *Hole v Garnsey*.

In some respects, this is correct. Lord Tomlin in *Hole* had been focused on the situation where a society's registration is cancelled but an association or society continues to exist. However, the position where an association has predeceased the incorporation is less clear. Ing argued a persuasive position dealing with this:²⁰⁷

Indeed, if by reason of a society having ceased to exist (this resulting also in cancellation), the property of the society has become *bona vacantia*, it is no longer the society's property and is therefore not liable to answer any claims which may still be enforceable against the society.

²⁰³ *Ibid.*, at para 22.

²⁰⁴ *Ibid.*, at para 23.

²⁰⁵ Regrettably, it appears there is an error in the judgment here, given Gallagher represented the society's members, and perhaps it was Gomer (counsel for the defendant) who answered this question. That seems the more logical position given it was the defendant's submissions.

²⁰⁶ Ing, *Bona Vacantia*, 198-199.

²⁰⁷ *Ibid.*, 200.

If the substratum association underlying the registered society has disappeared (which is a criterion for cancellation of the registered society under the 2014 Act), it appears logical that when the Financial Conduct Authority takes steps to suspend or cancel its registration,²⁰⁸ the property becomes ownerless, and therefore liable to be *bona vacantia* and made over to the Crown. However, this conclusion argued by Ing appears to be at odds with the decisions in *Boyle v Collins* and *Sanderson*.

Strictly speaking, Ing's view seems correct (and an explanation will be offered in relation to Scots law shortly). The assets become ownerless and become liable to be taken by the Crown. Under the theory of association developed by Lord Tomlin in *Hole v Garnsey*, they are no longer the property of the association (which has dissolved) or of a registered society (which has been cancelled). However, in *Boyle* (as in *Ruddington Land* discussed above) the Crown did not advance a claim, so the *equitable* decision appears to afford these to the former members either (i) under the rules of the former association/registered society, such as in *Boyle*; or (ii) or free from rules of the former association, as was suggested in *Sanderson*.

How does this discussion of these decisions in the English courts apply if similar factual circumstances required application of Scots law? The answer seems somewhat unresolved in Scots law. There are two issues here:

- (1) In Scots law, can land owned by a registered society, which is cancelled or terminated, simply be passed to the underlying unincorporated association with no express conveyance or reversion to the unincorporated association?
- (2) In Scots law, if the underlying unincorporated association ceases to exist, which then results in cancellation or termination by the FCA, can the land be transferred to the former members of the association without express authority?

Regarding issue (1), equity has played a role in influencing the decisions of English courts in the above cases but the jurisprudence of the Chancery Division cannot be applied easily in Scotland.²⁰⁹ As Gretton observes:²¹⁰

Equity has its maxims, one of which is that *equity looks on that as done which ought to have been done*. This is often criticised nowadays: McKendrick, for example, has

²⁰⁸ 2014 Act, s5(3)(c).

²⁰⁹ D Carr, "Are equity and law in Scotland fused, separate or intertwined", chapter in J. Goldberg et al (eds.), *Equity and law: Fusion and fission* (2019), 180.

²¹⁰ G Gretton, "Constructive trusts: part 1", 283.

described it as "silly". But whatever the criticisms, it has proved a powerful influence and seems as alive now as it ever was.

The idea of equity in Scots law is controversial.²¹¹ Whilst it is difficult to interpret the approach in England without considering equity, if we hold that there is some form of implied conveyance, assignation, or transmission to the unincorporated association (perhaps as a form of universal succession), then this removes any scope for determining there is a *bona vacantia* interest of the Crown in Scots law. However, for the reasons noted above, this may be a stretch of the imagination given the 2014 Act is silent in this regard.

In respect of issue (2), the preferred view here would be to say that if the underlying association bedrock is gone and the top layer corporate society then ceases to exist, the property is simply ownerless. The former members have no claim to the property, it was vested in the registered society, and there is no equitable interest in Scots law either by statute or common law that would allow ownership to be transferred to them. Accordingly, the property is *bona vacantia* and liable to be taken by the Crown. That approach is a strict application of the theory of *bona vacantia*, in the same regard as *bona vacantia* applies at the dissolution of a company. In contrast, under the Companies Acts, mitigation to the hardship described exists in the form of (i) restoration of the company to revive their ownership²¹²; or (ii) a vesting order to persons that a court considers entitled. There are no such mechanisms for registered societies.²¹³

However, the view argued here conflicts with the position as it has developed in English law, which appears to advocate a more equitable approach in favour of the former members of the society. Cases involving IPSs were rare in England & Wales,²¹⁴ and the same may apply in respect of the application of the 2014 Act, least of all in Scotland where there does not seem to be any reported authority on these points. It remains to be seen how the courts will develop their approach in Scotland. It may be the case that an implied statutory conveyance is considered to be the answer to the question in Scotland as opposed to allowing the property to fall to the Crown.

²¹¹ D Carr, 'Are equity and law in Scotland fused, separate or intertwined?', 179.

²¹² Assuming no Crown disclaimer or onward disposal of the property.

²¹³ "If a society has ceased to exist, then it cannot be 'revived'. If some or, indeed, all of the former members of that society subsequently decide to form a new society, then the new society is a different society." *Wimbledon & Merton Democratic Club Society Limited v Registrar of Friendly Societies*, unreported, 4 December 1998 per Parker J.

²¹⁴ I Snaith, *Handbook of Industrial and Provident Society Law* (1993), 1.

8.6.9 Regulatory powers

Three further issues must be noted in respect of the above and any residual land ownership prior to dissolution.

The first is that if the registered society operates as a registered social landlord, additional regulation comes into play from the Housing (Scotland) Act 2010. This will likely involve the divestment of any land (such as tenanted homes) from the registered society prior to dissolution.²¹⁵

The second is that if the registered society is also a charity registered with the Office of the Scottish Charity Regulator (OSCR), then OSCR must consent to the winding up or dissolution.²¹⁶ This early intervention may result in a reorganisation scheme under the 2005 Act,²¹⁷ resulting in divestment of the property prior to dissolution.²¹⁸

The third issue is that an ‘asset lock’ may also apply.²¹⁹ Asset locks were introduced in respect of certain community benefit societies in 2006, and have been expanded to co-operatives in 2023.²²⁰ These prevents assets from being used or transferred except in certain ways, which can prevent the distribution to members at dissolution.²²¹ Instead the property may have to be transferred to other registered societies, charities, or social landlords prior to dissolution.

8.7 Scottish Charitable Incorporated Organisations

Scottish Charitable Incorporated Organisations (SCIOs) are constituted by the Charities and Trustee Investment (Scotland) Act 2005.²²² Further provision is made in regulations.²²³ A SCIO offers legal personality for an organisation carrying out of charitable work.²²⁴ SCIOS can own land, with special statutory rules dealing with conveyances to charities (including SCIOs) entered onto the Scottish Charity Register.²²⁵

It is open to a SCIO to dissolve itself through two mechanisms: (i) solvent dissolution; and (ii) insolvent dissolution. A further process exists for creditors, ‘creditor-led sequestration

²¹⁵ Housing (Scotland) Act 2010, s67.

²¹⁶ Charities and Trustee Investment (Scotland) Act 2005, s16.

²¹⁷ *Ibid*, Chapter 5.

²¹⁸ *Ibid*, s42(3(b)).

²¹⁹ 2014 Act, s29.

²²⁰ Community Benefit Societies (Restriction on Use of Assets) Regulations 2006; and Co-operatives, Mutuels and Friendly Societies Act 2023.

²²¹ *Ibid*, reg 3.

²²² 2005 Act, s49.

²²³ The Scottish Charitable Incorporated Organisation Regulations 2011; and The Scottish Charitable Incorporated Organisations (Removal from the Register and Dissolution) Regulations 2011.

²²⁴ 2005 Act, ss7-9.

²²⁵ Charities References in Documents (Scotland) Regulations 2007.

and dissolution.²²⁶ What is baked into all of these processes is that OSCR retains an overall control about when to remove the SCIO from the Charity Register, which is the point of dissolution.²²⁷

If OSCR deems the SCIO to no longer be a charity and removes them from the Charity Register, the SCIO simply ceases to exist.²²⁸ This is part of the intrinsic link between SCIO and charity, as a SCIO cannot be used for non-charitable purposes. This gives rise to concerns that a SCIO may simply cease to exist as a result of the decision of the regulator to remove them from the Scottish Charity Regulator.²²⁹ Where this happens, the design of the law has again been such to prevent assets falling as *bona vacantia*. As the Cabinet Secretary for Finance noted:²³⁰

The original policy intention of the 2011 regulations, which was that a SCIO should always be wound up prior to its being removed from the register. No other exit route from the charity register should be available. That is particularly important, as it ensures that the interests of beneficiaries, creditors and other third parties are protected. All outstanding debts and liabilities should be transferred, and any surplus assets should be transferred, to another body or bodies, the charitable purposes of which are the same as, or resemble as closely as possible, those that are set out in the SCIO's constitution.

The (Removal and Dissolution) Regulations 2011 allow OSCR to issue directions following completion of an inquiry as to the charitable status of the SCIO, including the power to direct the SCIO: (i) to carry out a reorganisation scheme; or (ii) to commence the voluntary dissolution processes outlined above.²³¹ If the direction is not complied with, OSCR can apply to the Court of Session for an intervention order, with a range of remedies open to the court.²³²

The current 2011 Regulations were subject to a review by the OSCR Dissolution Working Group, consisting of a number of stakeholders from regulatory, legal and charity sectors.²³³ The issue of undisposed property at dissolution was raised by the working group.²³⁴ OSCR has outlined that currently a judicial factor can be appointed for remaining assets to divest a SCIO of its property, with there also being a possible alternative through Section 35 of the 2005 Act for the Court of Session to make a transfer of assets order.²³⁵

²²⁶ Dissolution Regulations 2011, reg 7.

²²⁷ *Ibid*, regs 3(11), 6(7), and 7(5).

²²⁸ 2005 Act, s55(7).

²²⁹ J McNeil, *A practical guide to charity law in Scotland* (2016), para 3-18.

²³⁰ Official Report, *Scottish Parliament Justice Committee*, (3 December 2013), col 3861.

²³¹ Dissolution Regulations 2011, reg 8(1).

²³² Dissolution Regulations 2011, reg 8(3); and ss 34(2) and 34(5) of the 2005 Act.

²³³ *Ibid*.

²³⁴ *Ibid*.

²³⁵ 2005 Act, s35.

OSCR acknowledged that should these remedies not be utilised, property of a SCIO may fall to the Crown as *bona vacantia* should the SCIO be removed from that register.²³⁶ Therefore in the absence of any caselaw or direct statutory provision, it appears this would be the case.

8.8 Unincorporated associations

Unincorporated associations have, as the name suggests, no juristic personality. These form a vast array of associations,²³⁷ where persons come together for a purpose (otherwise than for business or profit).²³⁸ In Scotland, little has been discussed of the law regarding dissolution of clubs and associations. It is not an overstatement to say that law lacks clarity in this area.²³⁹ Many texts defer to English law, with the Scottish Law Commission noting that English, Welsh and Privy Council commonwealth decisions are analogous with the position of the law in Scotland.²⁴⁰ Wherever possible in this section, the Scottish authorities are afforded precedence here.

Given the absence of legal personality, the law of persons is of limited relevance in this discussion. Instead, the relationship between members of the association is said to be governed by contract: “the members of the association for the time being are bound *inter se* by the contract: each member agrees with all the other members to be bound by the rules”.²⁴¹ Thus a contractual relationship governs the members and their relationship to the property of the association. In some respects, the law of England and Wales is similar but in respect of the property of the association, the law differs significantly.

8.8.1 A distinguishing feature from England: Joint ownership

It is important at this stage to highlight one major difference with English law that means it is not as simple as transplanting all aspects of the law of unincorporated associations from England and Wales to Scotland given the fundamentally different principles in respect of the property of the association. In contrast to developments in other jurisdictions focused on trusts and equitable interests, it has been held that property owned amongst members of an association is a form of joint ownership.²⁴² As Lord Cooper described:²⁴³

²³⁶ SCIO Dissolution Working Group, *Recommendations to Scottish Government on preferred options to strengthen the Scottish Charitable Incorporated Organisation (Removal from Register and Dissolution) Regulations 2011* (3 March 2020), 34.

²³⁷ For clarity, there is a traditional distinction between ‘members clubs’ and ‘proprietary clubs’, where a person provides services and enjoy facilities or services. This section aims to focus on members clubs.

²³⁸ *Conservative & Unionist Central Office v Burrell* [1982] 1 WLR 522 (CA), per Lawton LJ at 525. A business or profit association may well be a partnership under the 1890 Act.

²³⁹ C Tyre, “Persons unknown” (2009) 54(1) *JLSS* 22.

²⁴⁰ Report on *unincorporated associations*, para 2.2.

²⁴¹ *Crocket v Tantalton Golf Club* 2005 SLT 663, per Lord Reed at para [29].

²⁴² As Reid described, Gloag & Henderson adopted this view, which eventually was endorsed by the courts (after some hesitation), see K Reid, “Common property: Clarification and confusion” 1985 *SLT (News)* 57.

²⁴³ *Magistrates of Banff v Ruthin Castle Limited* 1944 SLT 373, per Lord President Cooper at 388.

So far as has been traced, there is no instance of a joint right in the strict sense having been held to exist except in persons who were interrelated by virtue of some trust, contractual or *quasi*-contractual bond - partnership or membership of an unincorporated association being common examples - and it seems to me that such an independent relationship is the indispensable basis of every joint right. The distinctive feature of the right of such joint proprietors is the *jus accrescendi*, which excludes the possibility of separate shares in the several joint owners, and still more emphatically excludes the possibility of severance of the tie, except, of course, by dissolution of the relationship on which the joint ownership rests.

Joint owners hold a non-divisible right of ownership. As Lord President Cooper described, the *jus accrescendi* is a form of survivorship destination, in that a departing members' share of automatically accretes to the remaining association members. Thus, in *Murray v Johnstone*,²⁴⁴ the infamous case of a cup gifted to an association, Lord Trayner opined:²⁴⁵

The cup is therefore the property of the members of the club. Each member of the club has as much right and interest in the cup as another. It is quite true that each member has that right only so long as he remains a member, and cannot, even during his membership, sell or transfer his interest. But so long as he remains a member he has a joint right with all other members in everything that belongs in property to the club.

It is a strange outcome that members' ownership subsists in such a transient manner. These features are all because of the independent relationship between members, as Lord President Cooper described, arising from contract or *quasi*-contract bonds.²⁴⁶ However, these bonds seem to blur the distinction between personal and real rights, given they regulate the transfer of property. As Reid argued:²⁴⁷

The extrinsic relationship leads to the property-holding, and not the other way around. In joint property the holders own, not as ordinary individuals, but by virtue of membership of an extrinsic organisation. And their ownership both originates, and ultimately terminates, with that membership.

8.8.2 Trust-model of unincorporated associations

Whilst joint ownership of all members is possible, there are serious shortcomings for associations. It is said by sources that (at least in the feudal system) unincorporated associations cannot own heritable property.²⁴⁸ In some respects, given the absence of legal personality, this is still true in the modern form of Scottish property law. Practical issues also

²⁴⁴ (1896) 23 R. 981.

²⁴⁵ (1896) 23 R. 981, per Lord Trayner at 989.

²⁴⁶ D Kleyn & S Wortley, "Co-Ownership", chapter in R Zimmermann et al, *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2005), 710.

²⁴⁷ K Reid, "Common property", 59.

²⁴⁸ Stair Memorial Encyclopaedia, *Clubs and associations*, para 12. This is based on J Wood, *Lectures on Conveyancing* (1903), 624. However, this quote deals with partnership property in the feudal era. This rule was changed by s70 of the 2000 Act. In respect of unincorporated associations, unless title is registered in the name of all members (which may be cumbersome), or in trust, this does appear to be the law given the absence of legal personality.

arise with joint ownership of moveable property, given the obscure rules of joint ownership and the difficulty of co-ordinating all joint owners to reach consensual decisions in respect of property. The “normal practice”²⁴⁹ for property of an unincorporated association is that it is held in trust by office-bearers of the association for the benefit of the association. Thus, there is interplay with the law of trusts in this area, which has been viewed as a remedy to the complexity and opaqueness of joint ownership.²⁵⁰

Gloag and Henderson attempts to introduce a distinction within the law of unincorporated associations.²⁵¹ Firstly, there are clubs which provide social benefits for members. Secondly, there are societies formed for charitable, religious or scientific purposes. The former is said to be governed by joint ownership, whereas the second is governed by the law of trusts. However, the boundary between these two categories may not be so clearly defined as the learned authors suggest. For example, a bowling club may have their lawn and clubhouse owned or under a lease by office-bearers, as trustees for the association. In those circumstances, the law of trusts would apply to clubs also. Conversely, a prize may be awarded to a research society, which could be construed to be owned jointly by all members despite the existence of office-bearer trustees. Thus, in any association, there may be a hybrid of both trusts and joint ownership arrangements.

8.8.3 Dissolution of an unincorporated association

Ordinarily, the rules of an association will govern the dissolution of an association and the distribution of assets. However, it is naïve to think that all informal associations have the foresight to consider dissolution and its consequences. As Ashton & Reid describe:²⁵²

It is a matter of concern that many clubs do not have adequate rules when it comes to dissolution of the club; this is especially so in unincorporated members' clubs. One does not need to look far for the reason, however. The rules are drafted at the beginning of the club's life, when dissolution is not on the agenda. Nobody has thoughts of dissolution and the topic is dismissed as irrelevant.

Traditionally, the courts are reluctant to involve themselves in matters of clubs and associations.²⁵³ Where possible, any association rules will be given effect to avoid judicial

²⁴⁹ *Canning v Glasgow Caledonian University* [2015] SC GLA 75, per Sheriff Reid at para 147.

²⁵⁰ R Anderson, “Unincorporated association reform”, 509.

²⁵¹ MacQueen & Lord Eassie, *Gloag and Henderson*, para 47.04.

²⁵² D Ashton et al, *Ashton & Reid on Clubs and Associations*, 3rd edn (2020), para 3.1.

²⁵³ *Gardner v McLintock* (1904) 11 SLT 654, per Lord Pearson at 655. However, the courts now seem to have adopted a more intrusive role into disputes of this nature, such as *Crocket* or *Irvine v Royal Burgess Golfing Society of Edinburgh* 2004 SCLR 386.

questions of distribution of assets.²⁵⁴ However, where the rules are silent, the general common law will apply.²⁵⁵ With great difficulty, an attempt is made here.

8.8.4 Trust model

McMillan focused heavily on the trust model of unincorporated associations.²⁵⁶ In doing so, McMillan considers the possibility of a resulting trust arising for members when an association ceases.²⁵⁷ In that situation, the members are free to demand any property previously made over by them to the association.²⁵⁸ As Wilson & Duncan described:²⁵⁹

A related question arises as to the funds contributed by members of a society when the purposes of the society can no longer be carried out. If the society's rules deal with the disposal of the funds they will be given effect. If there are no relevant rules, there may be a resulting trust for the existing members.

Thus, when an association utilising a trust is dissolved, in the absence of rules, all property is liable to reconveyance to the members as a resulting trust. As a consequence, *bona vacantia* appears to be excluded. However, as Wilson & Duncan noted:²⁶⁰

It is, of course, important to distinguish between funds held in trust for the general purposes of the society and funds held in trust for a particular purpose.

It may be the case that the association raised funds for a specific purpose, as well as the general purposes of the society. The proprietary consequences of this may be different at dissolution. Generally, *Gloag & Henderson* notes:²⁶¹

Where subscriptions are contributed to an association or society formed for the promotion of a certain object, the sums so contributed are held in trust for that object.

Thus, if property had been made over by members for a specific purpose other than the running of the association, it may be for a public purpose. If it is a public purpose, an interposed trust or a “*quasi* trust” is created, as described by Lord Deas in *Connell v Ferguson*:²⁶²

²⁵⁴ See, for example, *Leven Penny Savings Bank, Petitioners* 1948 SC 147.

²⁵⁵ *McKenna v Rafique* [2008] SC ABER, 15 January 2008, unreported, per Sheriff Principal Young at para 30.

²⁵⁶ McMillan, *Bona Vacantia*, 45-47.

²⁵⁷ *Ibid*, 45.

²⁵⁸ MacQueen & Lord Eassie, *Gloag and Henderson*, para 47.11.

²⁵⁹ Wilson & Duncan, *Trusts*, para 6-55.

²⁶⁰ *Ibid*, para 6-55.

²⁶¹ MacQueen & Lord Eassie, *Gloag and Henderson*, para 47.10 [Underline added] .

²⁶² (1857) 19 D 482, per Lord Deas at 487. See also *Ewing v McGavin*.

Where parties join in a subscription to effect a particular object, and place the money subscribed in the hands of certain persons to carry out that object, I think the *quasi* trust, thereby created, is for the alternative purpose of either carrying out the object of the subscription, or, if that cannot be done, of paying back the money.

Wilson & Duncan describe that if a public purpose trust is created, *cy-près* may apply where the purposes fail and can be applied to similar purposes.²⁶³ This again avoids a *bona vacantia* result. For example, in *Anderson's Trustees v Scott*,²⁶⁴ a church and manse were held in trust for a congregation's worship. The congregation (an unincorporated association) ceased, and the trustees rented out the church and collected rents. The trustees then died, and an action of multiplepinding was raised to identify the correct person entitled to the church and rental income. At first instance, Lord Cullen held that the property and funds were *bona vacantia* and belonged to the Crown. However, the Inner House did not agree with this analysis:²⁶⁵

No authority was quoted to us as supporting the view that property held in trust for a particular congregation of dissenters²⁶⁶ falls to the Crown when the congregation has been dissolved without any prospect of its being reconstituted.

In particular, Lord Skerrington noted that "it does not seem to have occurred to anyone that the *interim* revenues should be paid to the Crown".²⁶⁷ Thus the Inner House found that the funds fell to be administered *cy près* and that another congregation of similar denomination should be afforded the opportunity to claim the former congregation's property. Again, this illustrates the traditional tendency to avoid a *bona vacantia* result in public trusts, but also for unincorporated associations with interposed *quasi*-trusts.

As noted previously, there is now also the possibility of statutory reorganisation for public trusts under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990²⁶⁸ or for a charitable trust under the Charities & Trustee Investment (Scotland) Act 2005.²⁶⁹ However, it may be possible that neither *cy-près* nor statutory reorganisation is available, for example where the trusts lacks a general charitable (or public) intention, or the property held in a public trust cannot be applied for a similar purpose owing to its restrictiveness.

If this is the case, then as noted above, a resulting trust may arise.²⁷⁰ Again, one may assume that the Crown has no interest here. However, in this situation, the Crown as *ultimus haeres*

²⁶³ Wilson & Duncan, *Trusts*, para 6-54.

²⁶⁴ 1914 SC 942.

²⁶⁵ 1914 SC 942, per Lord Skerrington at 952.

²⁶⁶ A form of Presbyterians.

²⁶⁷ 1914 SC 942, per Lord Skerrington at 954.

²⁶⁸ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, ss 9 – 11.

²⁶⁹ Charities and Trustee Investment (Scotland) Act 2005, Chs 5 and 5A. See also the Charities Restricted Funds Reorganisation (Scotland) Regulations 2012 SSI 2012/219.

²⁷⁰ *Ewing v McGavin*, per Lord Fullerton at 623.

may be of relevance. *Gloag and Henderson* noted that “if a subscriber could not be traced it is possible that that subscriber’s share would fall to the Crown as *bona vacantia*”.²⁷¹ Likewise, Wilson and Duncan note that “if the subscribers cannot be traced, it appears that the only solution is for the funds to be treated as *bona vacantia*”.²⁷² Among the authorities for these statements is *Bain v Black*.²⁷³ In *Bain*, a society had been formed to construct new churches in Glasgow. Funds had been raised by various means, including by collections at church doors after services. As a result, the origins of the funds were somewhat untraceable. Some of the contributors sought the sale of heritable property and distribution of profits as a manner to reclaim their funds, arguing that the discrete purposes of the trust no longer existed. On appeal to the House of Lords, the court held that the purposes had not failed and as a consequence the subscribers could not insist on return of their contributions. However, in the Inner House,²⁷⁴ Lord Mackenzie in *obiter* had noted:²⁷⁵

If such application became truly and finally impossible, I should think that the Society formed for affecting it must be dissolved, its affairs wound up, and the money returned to the subscribers, as far as possible, including the Church, and the Crown also, representing non-apparent subscribers, as having right to *bona vacantia*.

The final problem may be that a resulting trust could have been expressly or impliedly renounced by the members (as trustees) of the association. The result is that the property becomes *bona vacantia* because there is no resulting trust.²⁷⁶ This is frequently encountered where a member enjoys benefits in return for their contributions.²⁷⁷ For example, in *Smith v Lord Advocate*,²⁷⁸ the Society of Sailors of Dunbar had administered a relief scheme. As a friendly society, it operated on a trust-model basis of association. The number of members had dwindled to just one former sailor alongside annuitant widows. The last member attempted to petition the Inner House to exercise *cy près* but the court refused because the association was private, with assistance to a discrete class of persons (Dunbar sailors and their families) who received assurance benefits rather than one of a public trust or charity. The Lord Advocate had entered an appearance claiming the funds as *bona vacantia*.²⁷⁹ Several years later after the member’s death, the court agreed to appoint a judicial factor “on the assumption that the fee has practically vested in the Crown”.²⁸⁰ Whilst only an

²⁷¹ MacQueen & Lord Eassie, *Gloag and Henderson*, para 47.11.

²⁷² Wilson & Duncan, *Trusts*, para 6-54.

²⁷³ (1849) 6 Bell 317.

²⁷⁴ (1849) 11 D. 1286.

²⁷⁵ (1849) 11 D. 1286, at 1306.

²⁷⁶ Wilson & Duncan, *Trusts*, para 6-56; MacQueen & Lord Eassie, *Gloag and Henderson*, para 47.12.

²⁷⁷ See *Abrdn (SLSPS) Pension Trustee Company, Petitioner* at para 35.

²⁷⁸ (1899) 1 F. 741.

²⁷⁹ *Ibid.*, at 744.

²⁸⁰ (1903) 10 SLT 572., per Lord Pearson at 575.

‘assumption’, given the general trend in the law of trusts and the exclusion of resulting trusts, this appears to reflect the law as it applies to unincorporated associations.

As Wilson and Duncan note, the law in this area is unsatisfactory.²⁸¹ However, the following attempt at a doctrine can be extracted:

1. Where an unincorporated association is dissolved, with a trust in the office-bearers, the (former) rules governing the association as to disposal of assets will be given effect.
2. If the rules are silent, a resulting trust arises for members under the general law of trusts. If the members (or their heirs) cannot be located or traced, the Crown takes custody of their share as *ultimus haeres*.
3. If a resulting trust is excluded, and the trust was for a *private* purpose, the whole property falls to the Crown as *bona vacantia*.
4. However, if the property held by the association trustees was also for a *public* purpose, then the Crown generally cannot take the property as *bona vacantia*. The property is to be applied to another organisation *cy prè*s or by statutory reorganisation.
5. If applying the public trust funds is not possible *cy prè*s or by statutory reorganisation, the failed public trust becomes a resulting trust, and the property reverts to subscribers. If the subscribers cannot be traced the funds fall to the Crown as *bona vacantia*.

8.8.5 Joint ownership model

In respect of joint property, the *jus accrescendi* operates only because of the existence of the association’s mutual bonds. Generally, the rules of the association will be given effect in regulating dissolution.²⁸² The association’s rules (and bonds) appear to govern the disposal of assets at voluntary dissolution between the members. The law in this area is, however, far from clear, as Gordon & Wortley noted:²⁸³

In the case of joint ownership, termination of the relationship depends on the rules regulating the relationship which gave rise to the joint ownership. All that can be said in the present context is that there is no general right to insist on division as in the case of common ownership.

Yet this is dependent on (i) if such rules are made; and (ii) where the property is distributed pre-dissolution. A more problematic area can then be identified – that of remaining association property post-dissolution. The classic example which often arises is where an association becomes “moribund”. By that, moribund means the situation of “death of all its

²⁸¹ Wilson & Duncan, *Trusts*, para 6-57.

²⁸² *Hopwood v O'Neill* 1971 SLT (Notes) 51.

²⁸³ Gordon & Wortley, *Scottish land law*, Vol 1, para 15-28.

members or through members becoming so reduced in numbers that it is impossible to continue the association or dissolve it by agreement”.²⁸⁴ Frequently, this would be where membership falls below a required quorum (or absent a quorum, two members). At that point, there is no association but the former association had property jointly owned amongst the remaining members. The question in this situation then becomes, who owns the property of that dissolved association?

There is apparently no express treatment in Scots law on the issue of a moribund association. However, it is worthwhile to remember Lord Cooper’s definitive statement on joint ownership:²⁸⁵

The distinctive feature of the right of such joint proprietors is the *jus accrescendi*, which excludes the possibility of separate shares in the several joint owners, and still more emphatically excludes the possibility of severance of the tie, except, of course, by dissolution of the relationship on which the joint ownership rests.

What may be inferred in Lord Cooper’s statement is that through “dissolution of the relationship” there is an effect on joint ownership. Two results could follow: (i) ownership itself in all members ceases, so the property of an association becomes ownerless and can be claimed by the Crown as *bona vacantia*; or (ii) joint ownership converts to *pro-indiviso* common property and is severable with no rules of the association governing it. In respect of (ii), if only one member remains, then that surviving member receives the full ownership of the property. This seems akin to a Tontine society, whereby the last surviving member receives the full assets of the society.²⁸⁶

McMillan did touch upon the joint property model in clubs:²⁸⁷

Their funds are the joint property of all the members for the time being. If a member resigns or dies, his interest does not revert to his representatives but remains in the club and accresces to the interests of the surviving members. In the event of all members either resigning or dying, it would appear that the funds of the club will be *bona vacantia*.

McMillan appears to reject the idea that the last surviving member of a moribund association is entitled to all property of the association. No authority is cited in support of this statement but his speculation likely turned on decisions in the English courts, which are now further explored.

²⁸⁴ McMillan, *Bona Vacantia*, 47.

²⁸⁵ *Magistrates of Banff*, per Lord President Cooper at 388.

²⁸⁶ A McDiarmid, *The Tontine: A history* (2025), 2.

²⁸⁷ McMillan, *Bona Vacantia*, 48.

8.8.6 England & Wales: The contract-holding theory

Reconciling the case law in Scotland under the joint ownership model is difficult because of the scant authority available. McMillan relied heavily on English cases, and where he does, it focuses on the trust-model of property ownership. However, the manner in which the law has developed in England provides some persuasive authority about how the matter may be decided. Again, there is the caveat that English property law has fundamental differences in approach. However, some similarities arise in the context of dissolution of unincorporated associations, which may be of assistance to Scotland.

Generally, in England (aside from proprietary clubs), ownership is vested in trust with beneficial ownership enjoyed by members.²⁸⁸ However, problems can arise where property remains, as *Ashton & Reid* described:²⁸⁹

This may occur because a developer makes an attractive offer to purchase the club premises, thereby resulting in a windfall profit, or the club may founder through lack of members whilst retaining an undistributed fund of money.

Baughen highlighted that the courts in England and Wales, when faced with an issue of property (typically money) held by a dissolved association, have developed the following responses:²⁹⁰

- (i) Any remaining surplus property at dissolution is treated as *bona vacantia*, with property going to the Crown;
- (ii) Any remaining surplus is treated as a resulting trust for members, with distribution *pro rata* based on the member's subscriptions or contributions to the trust fund; or
- (iii) Any remaining surplus is distributed amongst the members in equal shares based on the number of members remaining at dissolution.

Panesar highlights that originally the courts in England employed the first approach of holding the property as *bona vacantia*.²⁹¹ At the time of his writing, it is likely that McMillan was influenced by this approach.²⁹² Thereafter, the second (ii) approach was utilised to allow a distribution to members and former members. The third (iii) approach has now recently been developed, which is relevant when examining the Scottish joint ownership model of

²⁸⁸ Ashton, *Clubs and Associations*, para 8.2.

²⁸⁹ *Ibid*, para 8.1.

²⁹⁰ S Baughen, "Performing animals and the dissolution of unincorporated associations: the "contract holding theory" vindicated"(2010) 3 *Conveyancer and Property Lawyer* 216, 216.

²⁹¹ S Panesar, "Surplus funds and unincorporated associations" (2008) 14 *Trusts & Trustees* 698, 707.

²⁹² McMillan, *Bona Vacantia*, 48.

property. This view of distribution originates in what is termed in England as the “contract holding theory” which Baughen explained is viewed as:²⁹³

[The theory] explains how unincorporated associations hold property during their lifetime--as a species of joint tenancy for the current members, but subject to their contractual obligations to each other under the rules of the association.

The contract-holding theory is not without critics in England.²⁹⁴ However, in some respects, the contract-holding theory appears remarkably similar to the law of joint ownership in Scotland in the way in which the *jus accrescendi* operates. As Cross J. described in *Neville Estates Ltd v Madden* as:²⁹⁵

In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect.

However, what muddies the water is that equity plays a role in explaining the “contract-holding theory”. As Collins J. further explained:²⁹⁶

Members for the time being of an unincorporated association are beneficially entitled to “its” assets, subject to the contractual arrangements between them ... It is important to stress that this is a form of beneficial ownership; that is to say that in some sense the property belongs to the members.

The manner in which each member ‘owns’ property in England is one which Lord Denning terms as a “beneficial equitable joint interest in the property”.²⁹⁷ As noted above, it is difficult to transplant the jurisprudence of the Chancery Division to Scotland.²⁹⁸ However, a recent case in the English courts provides the insight into how the approach in Scots law may be viewed. In *Hanchett-Stamford v Attorney General*²⁹⁹ litigation arose regarding the dissolution of The Performing and Captive Animals Defence League. The League having been in existence since 1914, had accrued a significant number of assets.³⁰⁰ Despite these significant assets, the League apparently only had two members by the 2000s, Mr and Mrs Hanchett-Stamford. Mr Hanchett-Stamford died in 2006, leaving Mrs Hanchett-Stamford as the last remaining member of the League. Mrs Hanchett-Stamford wished to make over all the League’s assets to the Born Free Foundation, a similar organisation. A question arose on

²⁹³ Baughen, “Performing animals”, 218.

²⁹⁴ A Morris, ‘Unincorporated associations and the property problem: The ‘contract-holding’ theory as the ace of clubs? (2023) 87(1) *Conveyancer and Property Lawyer* 9.

²⁹⁵ *Neville Estates v Madden* [1962] Ch 832, per Cross J. at 849.

²⁹⁶ *Hanchett-Stamford v Attorney General* 2008] EWHC 330 (Ch) at para 31.

²⁹⁷ *Abbatt v Treasury Solicitor* [1969] 1 WLR 1575, per Lord Denning at 1583.

²⁹⁸ See above at 8.6.5.

²⁹⁹ [2008] EWHC 330 (Ch).

³⁰⁰ *Ibid.*, at para 6.

whether she was entitled to do so. In determining this question, Lewison J. relied on the authorities relating to the “contract-holding theory”:³⁰¹

The thread that runs through all these cases is that the property of an unincorporated association is the property of its members, but that they are contractually precluded from severing their share except in accordance with the rules of the association; and that, on its dissolution, those who are members at the time are entitled to the assets free from any such contractual restrictions.

In effect, Lewison J. found that when an association has dissolved, the former contractual bonds that regulated the ownership and disposal of property fall away given the association has ceased to exist. The resulting decision was that Mrs Hanchett-Stamford was entitled to all of the League’s property:³⁰²

I consider that the League ceased to exist upon his death in January 2006, when its membership fell below two. Since Mrs Hanchett-Stamford is the sole surviving member of the League, she is, in my judgment, entitled to its assets. She is therefore entitled to be registered as proprietor of [the house] and as shareholder of the shares now held in the League's name. Her entitlement is free from any restrictions imposed by the rules of the League, which must have ceased to bind on the death of her husband. It follows that she is free, if she so chooses, to give all the former assets of the League to the Born Free Foundation.

Scots law appears to have an unresolved question regarding the nature of joint ownership in an unincorporated association. When McMillan wrote his statement arguing for a *bona vacantia* approach, he did so with reference to the traditional English cases that decided the property of a dissolved unincorporated association became *bona vacantia*. However, that approach appears to be no longer endorsed in English law, and the “contract holding theory” which has developed appears similar to how Scots law has long viewed joint ownership in the context of an unincorporated association.

Lord Cooper in *Magistrates of Banff* seemed to endorse the view that the *jus accrescendi* falls away at dissolution of the society,³⁰³ suggesting that the position developed in English law under the “contract holding theory” may also be the position in Scotland. The consequence would be that when membership reduces to one, the remaining member acquires the whole ownership of all assets of the former association. Generally, McMillan’s statement that a moribund association’s property falls as *bona vacantia* can no longer be regarded as a sound statement that reflects either English or Scots law. However, further

³⁰¹ *Ibid*, at para 47.

³⁰² *Ibid*, at para 50.

³⁰³ *Magistrates of Banff*, 388.

analysis of this area is required, not least to test the theory that succession of property in an unincorporated association operates in a “tontine” manner.³⁰⁴

The following conclusion on the joint ownership model of unincorporated associations and its interaction with *bona vacantia* is therefore offered:

1. When ownership of association property is held jointly amongst all members of the association, voluntary dissolution and distribution of the association property at dissolution will be governed by the rules of the association or as made at the final meeting of the association.³⁰⁵
2. Where no express provision is made for the distribution of the jointly-owned property, the dissolution causes joint ownership to convert to *pro-indiviso* common ownership and the property is severable in equal shares.³⁰⁶
3. When the association involuntary dissolves by becoming moribund, the last surviving member is entitled to the whole property of the former association. Any rules in the association’s governing document regarding distribution of property cease to have effect because there is no longer an association.³⁰⁷
4. If the last surviving member has subsequently died after cessation of the association, and their successors cannot be traced, the property becomes liable to a claim by the Crown as *ultimus haeres*.

8.9 Conclusion

This chapter has sought to offer an authoritative account of the ways in which the Crown may come to claim property formerly owned by juristic persons, trusts, and unincorporated associations. As has been shown, the *bona vacantia* doctrine enjoys a general application both within statute and the common law. Therefore, the right of the Crown to acquire ownership of property after an owner has ceased to exist can arise with different juristic persons and entities – though its application to some entities remains unclear. Having now established the circumstances in which the Crown may claim property as *bona vacantia* where a non-natural owner ceases to exist, detailed consideration is now given to the right of the Crown itself, and the operation of the doctrine in transferring ownership to the Crown.

³⁰⁴ *Buckinghamshire Constabulary Widows and Orphans Fund Friendly Society (No.2), Re* [1979] 1 WLR 936, per Walton J at 943.

³⁰⁵ *Report on Unincorporated Associations*, para 2.13.

³⁰⁶ *Magistrates of Banff*, per Lord President Cooper at 388.

³⁰⁷ *Ibid.*

Chapter 9: The nature of *bona vacantia*

9.1 Introduction

Having considered how property may come to be ownerless as a result of a juristic person ceasing to exist, and therefore how the Crown's right towards that property may come to be engaged, this chapter explores the development of the *bona vacantia* doctrine in modern times. It provides an analysis of the Crown's rights towards ownerless property and the underlying basis for such a right. Examining how the underlying theory of *bona vacantia* came to be accepted at common law (and later codified by statute in the case of companies) provides an insight into the way in which the Crown's right to *bona vacantia* operates and can be classified in property law.

Through an examination of these areas, this chapter will argue that the Crown does not immediately obtain the right of ownership in property by virtue of the *bona vacantia* doctrine. Instead, the Crown has the right to acquire ownership should it wish to do so. Accordingly, when a juristic person is dissolved, the property formerly belonging to that entity becomes ownerless, pending the decision of the Crown to elect to acquire ownership.

9.2 The *bona vacantia* doctrine: the theory

There had been debate amongst the institutional writers and other earlier sources of Scots law as to the basis for the rule that the Crown is able claim any property that subsequently comes to be without an owner. It is not proposed to examine this debate in detail (as McMillan had)¹ as it is Stair's theory of *bona vacantia* that now provides the basis for the modern law. However, a brief overview is noted here.

Different justifications were offered by the institutional writers for the *bona vacantia* doctrine in Scots law. However, rather than there being one single doctrine, in early Scots law there was a range of disparate rules whereby the Crown could claim certain property.²

Formerly, there used to be a distinction in the right of the Crown to claim the estate of a deceased person. There was (i) the right of the Crown to claim an illegitimate person's estate and (ii) the right of the Crown to claim an estate as *ultimus haeres*. The Crown claimed both the heritable and moveable estate of a person born out of wedlock who died without heirs.³ This is because illegitimate status restricted succession rights to a deceased person's estate

¹ McMillan, *Bona Vacantia*, 8–12.

² *Quoniam Attachamenta*, Ch 45 [Fergus's edition, Stair Society Vol 44 (1996), 199].

³ *Regiam Majestatem* Part II.81 [Taylor's edition, Stair Society Vol 68, (2022), 305]; Balfour, *Practicks*, Vol I. "Anent bastards" C.II. [Stair Society Vol No 21, (1962), 23]; and Hope, *Major Practicks* IV.8.4, [Lord Clyde's edition, Stair Society Vol No 3, (1937), 320].

as they were treated as a *filius nullius* (child of no one).⁴ The result would be that the line of succession could be entirely exhausted if the illegitimate person had no descendants of their own. This was because the wider family of the deceased, such as ascendants or collaterals, may be unable to succeed to the estate.⁵

Separately, the Crown claimed moveable estates as *ultimus haeres* because a person, legitimate or not, died with no heirs. The reason for this (confusing) distinction was that historically, according to Craig, the Crown could only exercise its role as *ultimus haeres* over the moveable estate of a deceased person.⁶ In Craig's view, *ultimus haeres*, in that the Crown claims property as 'last heir', did not apply to the heritable estate of a person dying without heirs. Instead, the feudal superior was the 'last heir' of an heirless person's heritable estate.⁷ This was because if a vassal died without heirs, then the feu escheated to the superior.

Craig had based the right of the Crown to succeed to an illegitimate persons' heritable or moveable estate by "virtue of the right of the Crown".⁸ The acquisition by the Crown of the illegitimate deceased person's entire estate was effectively a confiscation of the estate in consequence of the sin of being born illegitimate. As Craig wrote:⁹

The principle underlying the doctrine of *ultimus haeres* should not be confounded with that which explains the title of the fisc in cases of bastardy – for a bastard is incapable of having any lawful heir – nor in cases of banishment for crime, nor in cases of condemnation for treason. In none of these does the king succeed as '*ultimus haeres*'. In bastardy the law forbids all succession by way of inheritance, whereas the right of '*ultimus haeres*' is a legal right of succession coming into operation on the establishment of the fact that the deceased has left no heir among his own kinsmen...

After Craig, it seemed the law abandoned this distinction.¹⁰ Stair adapted aspects of Craig's approach but sought to remove the distinction between illegitimacy and the Crown claiming estates as *ultimus haeres*. Instead, Stair sought to create a 'unified' theory for the basis of the Crown to claim *any* property that came to be without an owner. This included the right of the Crown to claim treasure, abandoned goods, and its role as *ultimus haeres*.¹¹

⁴Stair, *Inst*, III.3.42-46. .

⁵ See generally, see J Clark (ed), *Fraser on parent and child, and guardian and ward*, 3rd edn (1906), Ch V.

⁶ Craig, *Jus Feudale* II.17.12. [Lord Clyde's translation, (1934), 724].

⁷ *Regiam Majestatem* Book II.55.1 [Cooper's edition, Stair Society Vol 11, (1947),163]; and *Regiam Majestatem* Part II.83 [Taylor's edition, 307].

⁸ Craig, *Jus Feudale* II.17.12 [Lord Clyde's translation, 724].

⁹ *Ibid*, II.17.12.

¹⁰ *Buchanan v Campbell* (1601) Mor. 1353 and *Halcro v Somervell* (1626) Mor 1348.

¹¹ In respect of treasure, see the observations of the court in *Cleghorn and Bryce v Baird* (1696) Mor 13522.

In considering the Crown's rights to wreck, waith (abandoned goods) and treasure, Stair considered this all to flow from the same conceptual basis:¹²

Shipwreck, and waith-goods, or treasures in the ground, whose owner appeareth not, are confiscated as caduciary, whereby the owners are presumed to relinquish, or lose the same. And so *a jure suo cadunt* [they fall from their own right], and the things become *nullius*, and yet belong not to the first possessor, as things relinquished do, by the common law, but do belong to the King, by his royal prerogative, or to others having right from him.

For Stair, the Crown's right to *bona vacantia* derived from the royal prerogative and operates as a "caduciary" right. The term caduciary derives from the Latin *caducum*, "that which falls", and was used to describe *bona caduca* in Roman law, whereby property could fall to the Emperor's private treasury (the fisc, or *fiscus*) under Roman succession laws.¹³

The idea of the Crown's right to acquire property as a 'caduciary' right appears again in Stair's discussion of succession law:¹⁴

Bastardy and last heir make things befall to the Fisk, as caduciary, because such things can be lawfully claimed by none, and therefore are applied to the Fisk.

Subsequent institutional writers after Stair came to accept this unified approach.¹⁵ Reid sets out that by the 18th century, the rules in this area expanded from being limited initially to treasure, wreck, waifs and strays, or heirless estates, to include *all* property that subsequently came to be without an owner.¹⁶ It was Mackenzie that seemed to be first to use the maxim '*quod nullius est, est Domini regis*',¹⁷ which has developed into the modern maxim *quod nullius est fit domini regis*.

Stair seemed to adapt Craig's point regarding illegitimacy estates being acquired "by virtue of the right of the Crown"¹⁸ in explaining the broader right of the Crown to all ownerless property as part of the Crown's royal prerogative.¹⁹ This view is shared by Bankton,²⁰

¹² Stair, *Inst*, 3.3.27. Craig uses the term caduciary too, Craig *Jus Feudale* I.16.30, though seemingly only to discuss the Crown claiming heirless property rather than encompassing treasure, wreck and waith.

¹³ G Long, "Bona Caduca", in W Smith (ed), *A dictionary of Greek and Roman Antiquities* (1875); T Rüfner, "Intestate succession in Roman law", chapter in K Reid et al (eds), *Comparative succession law, Volume II: Intestate Succession* (2015), 21; R Świrgoń-Skok "The impact of wars on Roman legislation regarding *vicesima hereditatis* and *caducum*" (2019) 28(3) *Studia Iuridica Lublinensia* 101; and A Wallace-Hadrill, "Family and inheritance in the Augustan marriage laws" (1981) 27(207) *Proceedings of Cambridge Philological Society* 58.

¹⁴ Stair, *Inst*, III.3.42.

¹⁵ Bankton, *Inst* I.3.14; Erskine, *Prins*, II.1.5; Erskine, *Inst* III.10.4; Bell, *Prin*, s5, and ss1291ff; Bell, *Comms*, Vol I, 4.2.8; Hume, *Lectures*, IV.II.205 [Stair Society Vol 16, (1955), 205].

¹⁶ Reid, "Property (Reissue)", para 1024.

¹⁷ Mackenzie, *Inst*, III.10.1.

¹⁸ Craig, *Jus Feudale* II.17.12 [Lord Clyde's translation, 724].

¹⁹ Stair, *Inst*, 3.3.27.

²⁰ Bankton, *Inst*, 3.4.91.

Hume,²¹ and Bell.²² Hume termed the right as a *regale*,²³ in other words that the right is *inter regalia*.²⁴ With that said, other institutional writers still took a more literal approach to the fact that the Crown is “*ultimus haeres*”. Mackenzie believed that the Crown takes heirless estates as a form of heir.²⁵ In other words, instead of it being some form of state confiscation of ownerless property, the Crown held a right of succession to its subjects. This is a view shared by Erskine, who considered that the Crown had the character of an heir.²⁶ Given the *bona vacantia* doctrine has been shown to apply to juristic persons, who do not have heirs or successors, this theory seems somewhat dated. However, one should not be totally dismissive of this approach, as will be discussed later in this chapter.

9.3 Modern endorsement of Stair’s theory

It is now considered settled that the overarching right of the Crown to appropriate *bona vacantia* is part of the royal prerogative.²⁷

It is in the cases concerning land tenure in Orkney and Shetland that Stair’s view that the right to *bona vacantia* arises under the royal prerogative was adopted and developed by the courts. Orkney and Shetland have, since their incorporation into Scotland, retained a legal system based on Norse law principles known as Udal law. The feudal theory of property law in Scotland never extended to Orkney and Shetland as a result. In place of feudalism, Udal land tenure operated an allodial system of title, similar to that which is now found in the rest of Scotland, where each udaller held outright ownership rather than a vassalage. As a result, the Crown would not be able to exercise any feudal rights that it held elsewhere in Scotland. It is in the cases regarding Udal law that it became clear that the Crown’s right to *bona vacantia* arose from the royal prerogative. In *Smith v Lerwick Harbour Trustees* in 1897,²⁸ a pursuer sought to assert that he owned the foreshore adjoining his land, which was resisted by the harbour authority. In *obiter*, Lord Kincairney noted that even if Udal law applied in terms of land tenure, the Crown would still have its *jus coronae* (literally, the Crown’s right) under the royal prerogative to acquire heirless property as *ultimus haeres* in any event.²⁹

²¹ Hume, *Lectures*, IV,208.

²² Bell *Principles*, s1669.

²³ Hume, *Lectures*, IV,208.

²⁴ Gordon classified the right as *regalia minora*, Gordon and Wortley, *Scottish Land Law* vol 2, para 29-18.

²⁵ Mackenzie, *Inst*, 3.10.2.

²⁶ Erskine, *Inst*, III.10.4.

²⁷ K Reid, *The Abolition of Feudal Tenure in Scotland* (2003), 11.

²⁸ (1897) 5 SLT 175. A related case was heard under (1903) 5 F. 680.

²⁹ (1897) 5 SLT 175, per Lord Kincairney at 178.

9.3.1 *Lord Advocate v University of Aberdeen and Budge*

The royal prerogative theory to the Crown's right to *bona vacantia* came to be accepted by the Inner House in *Lord Advocate v University of Aberdeen and Budge* ("The St Ninian's Isle treasure case").³⁰ The facts of the St Ninian's Isle treasure case are well known but briefly summarised here.³¹ The University of Aberdeen discovered treasure during an archaeological dig on St Ninian's Isle in Shetland. The university and the landowner (or udaller), Mr Budge, sought to retain the treasure, but the Crown claimed it as *bona vacantia*. A dispute arose as to title to the treasure, and in the university's view:³²

The Crown's right to treasure trove derived from the sovereign's position as the ultimate superior in the feudal tenure context; on this basis, it did not apply in Shetland where udal tenure, giving an absolute right of ownership, prevailed.

The university's position was that:³³

The right of the Crown to treasure... is an incident of the feudal system and does not apply to udal lands where the tenure is allodial in character. Moreover... the maxim *quod nullius est fit domini regis* is not applicable since the objects in the present case are not ownerless but are, for the reasons stated, the property of the udaller.

In the Outer House, Lord Hunter rejected the university's argument that Udal law prevented the application of treasure trove.³⁴ In doing so, Lord Hunter noted that "once the development of a national community has taken place, ownership of treasure by the fisc can be based on a perfectly clear general principle, namely *quod nullius est fit domini regis*".³⁵ Lord Hunter did recognise a difficult distinction between treasure and lost property more generally. His lordship noted:³⁶

It is no doubt in a sense curious that the law as to things lost should be less emphasised in the institutional writers than that of treasure and that the incidents of the two rights should in some respects differ. No doubt this was because treasure tended to have much greater attractions for the Crown and was considered a right which might appropriately be granted to a subject. But despite these differences I consider that the right of the Crown to things lost is based, like treasure, upon the broad principle *quod nullius est fit domini regis*, and that the attempt by the defenders to argue that that principle is itself nothing more than an incident of feudalism is without any sound foundation. In my opinion, the origins of the principle are to be found in quite a different quarter, namely, in the capacity of the King as sovereign and head of a national community. The principle was a wide one and it embraced many things besides lost and derelict property and treasure.

³⁰ 1963 SC 533.

³¹ See D Carey Miller, "St Ninian's Isle Treasure", chapter in J Grant & E Sutherland (eds), *Scots Law Tales* (2010).

³² D Carey Miller, "St Ninian's Isle Treasure", 116.

³³ 1963 SC 533, per Lord Hunter at 539.

³⁴ *Ibid*, per Lord Hunter at 547.

³⁵ *Ibid*, per Lord Hunter at 548.

³⁶ 1963 SC 533, per Lord Hunter at 548.

In effect Lord Hunter believed that the Crown's right to *bona vacantia* arose under the royal prerogative, as a reflection of the Crown's embodiment of the national state. The University and Mr Budge appealed to the Inner House but their appeal was refused. The Inner House judges were unanimous that the treasure belonged to the Crown under the royal prerogative, rather than as a right arising from the feudal system. Lord Patrick was clear that:³⁷

The Crown's rights to the *regalia minora* are ascribed to the prerogative, not to any estate in land. Thus, the Crown's right to moveables as *ultimus hæres* which is one of the *regalia minora* cannot possibly be said to depend on an estate in land.

Lord Mackintosh also noted that:³⁸

[The Lord Advocate] claims them as moveable objects which have become ownerless and so fall to the Crown under its prerogative right to appropriate ownerless property—and he also claims them under the specialised form of ownerless property known to our law as treasure or treasure trove. This claim is based on the Crown's right as sovereign and like the Crown's right of *ultimus hæres* has nothing to do with the overlordship of the land.

9.3.2 Shetland Salmon Farmers Association v Crown Estate Commissioners

Finally, in *Shetland Salmon Farmers Association v Crown Estate Commissioners*,³⁹ a Special Case⁴⁰ was brought before the Inner House regarding whether the Crown had ownership of the seabed surrounding the Shetland Islands. The question of the title to the seabed was disputed given the Crown was not the ultimate feudal superior of Shetland. Part of the submissions by the association was that the seabed was “properly *res nullius*” in that it had never been owned by the Crown given Orkney and Shetland's later incorporation into Scotland.⁴¹ The Crown submitted that even if feudal law did not extend to Shetland, the Crown has ownership of the seabed land by virtue of the royal prerogative instead. That failing, under the rule *quod nullius est fit domini regis*, the Crown owned the seabed as it was *res nullius* and able to be claimed as *bona vacantia*.⁴²

The Inner House agreed with the Crown that generally ownership of the seabed fell to the Crown under the royal prerogative.⁴³ However, their lordships also seemed to go further. In dealing with the alternative submission, a majority of the Second Division agreed that the

³⁷ 1963 SC 533, per Lord Hunter at 554.

³⁸ *Ibid*, per Lord Hunter at 561.

³⁹ 1991 SLT 166.

⁴⁰ This is form of court action in which facts are agreed but a party in a fiduciary or official government capacity can bring proceedings directly to the Inner House for a determination of the applicable law, Court of Session (Scotland) Act 1988 s27.

⁴¹ 1991 SLT 166 at 170.

⁴² *Ibid*, at 170.

⁴³ As the Scottish Law Commission noted, it was suspected that this judgment may have gone to appeal to the House of Lords but this appears to have been later abandoned, Discussion Paper on *Abolition of Feudal System* (SLC DP No 93, 1991), 147.

quod nullius maxim also applied to the Shetland seabed if it was held to be unowned or a *res nullius*. Lord Ross commented that “the maxim *quod nullius est fit domini regis* applies to heritable property as well as moveable property, and that the rule is not confined to cases where the land had previously been owned by someone else.”⁴⁴ In effect, any *res nullius* land also becomes owned by the Crown under the royal prerogative, whether owned previously or not. As Lord Ross noted, even new “ground gained by the sea must be viewed as belonging to the Crown.”⁴⁵

Lord McCluskey agreed with the Crown’s argument, in that the right of the Crown to *bona vacantia* derived from the royal prerogative and “the [*quod nullius*] maxim applies generally and specifically to land in Shetland including the solum of the sea bed within territorial waters”.⁴⁶ However, like Lord Ross, Lord McCluskey agreed that the Crown’s right under the *quod nullius* maxim was wider than just previously owned property and also applied to any unowned heritable property such as the seabed.⁴⁷

That case then deals with one of the few instances in which there might be land belonging to no one and which had never belonged to anyone. Other instances that come to mind include, for example, the emergence through volcanic processes of an island such as that which emerged in recent years close to Iceland; and the case of lands newly seized, or received in some such way as the Shetland Islands. I see no difficulty, therefore, in applying the *quod nullius* rule to the sea bed as defined in the present case. If that sea bed were not instantaneously the property of the Crown at the moment when the territorial waters around the Shetland Islands came to be within the sovereignty of the Crown then, in my opinion, the sea bed, being then owned by no one, was a *res nullius* and instantly became the property of the Crown.

Whether this is entirely correct is a matter of debate. As was noted at the introduction to this thesis, newly created unowned moveables such as shells, pearls and wild animals are recognised in Scots law as having no owner.⁴⁸ It would seem illogical that new heritable property such as fresh landmass arising by volcanic eruption would be subject to a different rule from unowned moveable property. However, this point is immaterial for present purposes given this thesis is concerned with ownerless, rather than unowned, land.

The three cases concerning Shetland show recognition at common law that the right of the Crown to *bona vacantia* was founded upon the royal prerogative, rather than deriving from the feudal system. As a result, the abolition of feudal tenure on 28 November 2004 did not disturb these rules. The 2000 Act expressly preserves the royal prerogative, including the

⁴⁴ 1991 SLT 166, per Lord Ross at 175.

⁴⁵ 1991 SLT 166, per Lord Ross at 175, quoting *Irvine v Robertson* (1873) 11 M 298, per Lord Cowan at 301.

⁴⁶ 1991 SLT 166, per Lord Ross at 175.

⁴⁷ 1991 SLT 166, per Lord McCluskey at 187.

⁴⁸ *Supra*, Introduction, “Terminology”.

rights of the Crown towards ownerless or unclaimed property.⁴⁹ However, the exact status of the right of the Crown requires some further analysis.

9.4 The time of vesting of the Crown's ownership

Whilst it is settled that the right to *bona vacantia* is part of the royal prerogative, significant questions remain as to how the right operates. In particular, the question arises of whether the Crown holds the real right of ownership in *bona vacantia* property, or some other species of right. This and subsequent sections considers this point. This section begins with considering the exact moment that the Crown acquires ownership under the *bona vacantia* doctrine.

It is helpful to start with McMillan's definition of the Crown's right to *bona vacantia* as:⁵⁰

A right of occupancy exercised by the sovereign over things, situated within the territory, which are of economic value, but which at the moment have no owner in common law...There is no existing ownership to terminate, and the Crown takes a thing of which the ownership is in abeyance.

To McMillan, all property which comes to be without an owner, heritable or moveable, corporeal or incorporeal, falls to the Crown as ownership is in abeyance. Carey Miller suggested that "the right to a thing vests in the Crown upon termination of the existing right in circumstances which would otherwise, in principle, leave it unowned and so open to acquisition".⁵¹ Therefore, McMillan's description of abeyance is taken here to mean that the property is ownerless, and thus why the Crown may claim the property as *bona vacantia* as Lord Mackintosh described in *Lord Advocate v Budge*. This is a point that the Inner House confirmed in *Scottish Coal* by recognising that the Crown's right is engaged when property becomes ownerless:⁵²

There must be land which can be described as ownerless, since it is only then that it will be classified as *bona vacantia*.

Yet what may be noted in Carey Miller's statement above is that the Crown right seems to 'prevent' property becoming ownerless. There appears some ambiguity on the exact moment in which the Crown acquires ownership. Before *Scottish Coal*, there appeared to be a view that the Crown acquires ownership at the moment the property comes to be without an owner. Thus, there is no 'gap' in ownership between the former ownership ceasing and the Crown's acquisition of ownership. To some extent, this is what Lord McCluskey suggested in *Shetland Sea Farmers Association* in respect of the seabed, as noted above, that it

⁴⁹ Abolition of Feudal Tenure (Scotland) Act 2000, s58.

⁵⁰ McMillan, *Bona Vacantia*, 7 to 8.

⁵¹ Carey Miller & Irvine, *Corporeal Moveables*, 36.

⁵² *Scottish Coal*, per Lord Carloway at para 108.

“instantly” became the Crown’s property. This approach can also be found in Scottish Law Commission reports relating to moveable property, such as that in 1980, which said:⁵³

It is a general principle of Scots law – differing in this respect from many legal systems, including Roman and English law – that things which were once in ownership but ceased to have any known owner become the property of the Crown. Once a thing has become the subject of ownership it can never be ownerless. It belongs to the person entitled to it until he loses his right by abandonment, prescription or statutory procedures, and at common law the thing vests in the Crown as soon as the private right is lost.

The Civic Government (Scotland) Act 1982 had consequently made provision for lost and abandoned property, which describe the Crown’s right of ownership as unaffected by the police taking custody of lost property.⁵⁴ This tends to suggest that the Crown immediately becomes the owner of any lost or unclaimed property, albeit the statutory wording is somewhat opaque. Later, in a separate project on positive prescription and title to moveable property, the Commission stated:⁵⁵

Under our law abandoned property passes automatically and immediately to the Crown. The commonest example is the discarding of litter. Each day Her Majesty becomes the proprietor of countless cigarette ends, crisp packets, drinks cans, chewing gum blobs, and numerous sagging sofas, worn-out washing machines and defunct cars.

This again tends to suggest that the passing of ownership to the Crown is automatic. Under that view, there can truly be no ownerless property because ownership is immediately transferred to the Crown under the *bona vacantia* doctrine. This understanding of the doctrine was recently reiterated by Reid. Reid suggested that a distinction can be drawn between the operation of *bona vacantia* towards treasure or abandoned moveable property on the one hand, and, on the other hand, property acquired by the Crown as a result of the cessation of its former owner.⁵⁶ Reid suggested that in the case of treasure and abandoned property, ownership passes “without any gap in time”.⁵⁷ Some support for this can be found with Craig:⁵⁸

Ownership of property which falls to the fisc passes, by operation of law, from the very moment of the event or of the offence which causes it to fall.

⁵³ Report on *lost and abandoned property* (SLC Report No 57, 1980), para 1.5.

⁵⁴ Civic Government (Scotland) Act 1982, s78(3).

⁵⁵ Discussion Paper on *Prescription and Title to Moveable Property*, para 9.2.

⁵⁶ The reason for this distinction is discussed further below at 10.7.4.

⁵⁷ Reid, “Property (Reissue)” para 1025, citing *Discussion paper on prescription and title to moveable property*, para 7.39.

⁵⁸ Craig, *Jus Feudale*, I.16.47 [Dodd’s translation, 503].

Craig seemed to believe this on the ground that the Crown cannot infest itself, so “the nature of the Crown’s right supplies that defect; for the property is made his, as far as ownership is concerned, by operation of law”.⁵⁹

McMillan did not appear to take this approach when describing the *bona vacantia* doctrine as a whole. He described ownership as being first in ‘abeyance’ following which the thing is claimed by the Crown, with ownership then acquired. This approach was subsequently endorsed by the Inner House in *Scottish Coal*:⁶⁰

However, it may be wrong to describe the exercise of what is a prerogative right of the Crown, to administer land which has become *bona vacantia*, as creating a real right of ownership in the Crown in the private law sense. The right of the Crown is more properly described as one derived from public law. It enables the Crown to take possession of “lost” property, including land with no owner. The Crown can then administer the land for the benefit of the community and dispose of it to another person... The problem then is what happens to land if the right is expressly waived or simply not exercised by the Crown. In that event, ownership of the land may be acquired by means of an *a non domino* habile disposition... Otherwise, it may simply lie dormant in an ownerless state.

This view tends to suggest that property becomes ownerless, then is dormant, and thereafter ownership is acquired by the Crown. In this alternative view, which is endorsed by the Inner House in *Scottish Coal*, ownership by the Crown is not acquired automatically.

There then appear to be two different approaches that have been advanced for Scots law, both in primary and secondary sources. The first theory is that the Crown instantly becomes owner of any *bona vacantia* property at the moment that the factual situations arise which makes it ownerless. Specifically, at the exact moment that the following circumstances occur the Crown becomes owner instantaneously:

1. A juristic person is dissolved whilst still holding property;
2. A natural person dies without successors whilst owning property; or
3. Moveable property is abandoned expressly or impliedly,⁶¹ or ownership is lost by negative prescription.⁶²

⁵⁹ *Ibid.*

⁶⁰ *Scottish Coal*, per Lord Carloway at paras 108-109.

⁶¹ Abandonment of moveable property engages the Crown’s rights, *Kane v Friel* 1997 JC 69, per Lord Rodger at 71. However, the loss of a right of ownership through implied abandonment is not one viewed generously by the court, see *Sands v Bell & Balfour* 22 May 1810, FC, and *Carey Miller & Irvine, Corporeal Moveables*, 37.

⁶² Negative prescription of ownership is only excluded in the case of land alone, Prescription and Limitation (Scotland) Act 1973, Sch 3. This means for corporeal moveables, 20 years non-possession would extinguish the right.

The second theory is that there is a period of abeyance during which the Crown can elect whether to exercise its right to *bona vacantia*. If the second theory is correct, then the period of ‘abeyance’ is a period in which the property is ownerless. For this to be possible, the right that the Crown ‘immediately’ acquires would not be the real right of ownership. It must be a different form of right. It is necessary to further examine the right that the Crown enjoys to ascertain whether ownerless property exists in Scots law or whether it is truer to say that the Crown acquires the real right of ownership immediately.

9.5 The classification of the Crown’s right

This section examines the central question of this thesis, whether ownerless land exists in Scotland. Much of the discussion in sources discussing *bona vacantia* notes that heirless, abandoned or unclaimed property “belongs” to the Crown. However, the word “belong” is perhaps the central ambiguity. It is unclear whether the maxim *quod nullius est fit domini regis* (that which belongs to no one belongs to the Crown) means literally “the ownership of that which belongs to no one is transferred to the Crown” in the way that some sources suggest. In other words, it may be too generous to speak of *belonging* as meaning *owning*.⁶³

In respect of land, a complication of testing the two theories arises. Under the feudal system the Crown did not require infeftment to complete title because the Crown was deemed seized in all land in Scotland.⁶⁴ In modern parlance:⁶⁵

The Sovereign does not require to record a deed in any land register in order to complete title to heritable property. The Sovereign, by virtue of being Sovereign, completes his or her right in heritable property as fully as infeftment does the right of a vassal.

Accordingly, under the feudal system there may have been force in the argument that the Crown automatically becomes owner of any ownerless land. On the land becoming *bona vacantia*, ownership may have already transferred to the Crown without conveyance or external act instantaneously. This appears to be what Craig is describing above in that ownership “passes, by the operation of law, from the very moment of the event or offence which causes it to fall”.⁶⁶ He further wrote that:⁶⁷

I once heard it argued learnedly... that the king can summarily appropriate property which has devolved to him, whether it comes to him through hereditary right or from right of the fisc; therefore there is no need for either investiture or sasine. The prince cannot, in his own name, arrange precepts for his own benefit, either by

⁶³ The limits of a language in explaining technical legal aspects is noted by G Gretton, “Owning rights and things” (1997) 8 *Stellenbosch Law Review* 176.

⁶⁴ K Reid, *Law of Property*, 1st edn, para 48. See Craig, *Jus Feudale*, I.16.47.

⁶⁵ D Gardner, “Legal Storm Clouds over Rockall” 1976 *SLT (News)* 257, 258.

⁶⁶ Craig, *Jus Feudale*, I.16.47.

⁶⁷ *Ibid.*

acknowledging himself as heir or by investiture, for no-one can declare his own right. But the nature of the Crown's right supplies that defect; for the property is made his, as far as ownership is concerned, by operation of law.

In those cases, ownership could be acquired automatically without any infeftment or external act - such as the registration or recording of a deed in the property registers. There is accordingly likely to be little evidence of how precisely the Crown came to be an owner of land in feudal era sources given the Crown was deemed seized in all land in Scotland as *dominium eminens*. If anything, there may be an argument that the feudal system prevented the Crown from becoming 'owner' of land (in the sense they became the holder of a vassal's *dominium utile*) if they were the *ultimus haeres* of a vassal. This is, because as Erskine, expressed:⁶⁸

Nay, the sovereign cannot continue to hold the property thus acquired by him, since he cannot be a vassal to any of his subjects; he lies therefore under the necessity of naming a donatary, who, in order to complete his title, must first obtain a decree of declarator of his gift.

If, as Erskine suggested, the Crown could not hold a vassal's *dominium utile* as a matter of feudal theory, then it follows that the Crown would not acquire ownership of heritable property when it fell to them as *bona vacantia* under the royal prerogative. Instead, the Crown held a right to name a donatary and infeft them with the feu. The Crown themselves did not, at any time, hold the *dominium utile* in such circumstances.

9.5.1 The Crown's choice

The defining feature of the Crown's right that appears to show the Crown did not immediately have ownership of *bona vacantia* property is that it appears that the Crown is able to reject land falling as *bona vacantia*. McMillan, although offering no source of authority (and no reported decision has been found in this present research), suggested that the Crown was able to "waive" its prerogative right to any species of *bona vacantia* property.⁶⁹ McMillan noted that this waiver is often exercised where there is no commercial value in the *bona vacantia* property.⁷⁰ The Scottish Law Commission note this point:⁷¹

The fact that the Crown may be deemed in certain circumstances to be the owner of abandoned property does not, of course, mean that the Crown will wish to exercise its rights of property in every case.

⁶⁸ Erskine, *Institute*, III.10.3.

⁶⁹ McMillan, *Bona Vacantia*, 12. It is noted in the preface to McMillan's text that the then KLTR reviewed the text, which perhaps leads to a question of whether this was the view of the KLTR in the Exchequer Office at that time.

⁷⁰ *Ibid*, 12.

⁷¹ Report on *Lost and Abandoned Property*, para 2.5.

If it is true that such a waiver exists, then there is a period of no ownership whilst the Crown decides whether to take title. Separate from the common law ‘waiver’, successive Companies Acts since the Companies Act 1948 have also allowed the Crown, through the KLTR executing a statutory notice, to grant a disclaimer of similar effect in respect of property formerly held by a company which has fallen to the Crown.⁷² Under the Civic Government (Scotland) Act 1982, specific provision was made for the Crown’s “rights” towards lost or abandoned corporeal moveable property to be extinguished when the property is disposed of by a Chief Constable.⁷³ Whether it was ownership itself that was waived, extinguished, abandoned, or disclaimed is unclear, and indeed until the decision in *Scottish Coal*, the issue of abandonment of ownership of land whether by the Crown or any other owner had never been determined by a court.⁷⁴

With the court in *Scottish Coal* holding that no person generally can abandon title to land in Scots law, it would appear curious that the Crown solely can abandon, waive or disclaim ownership of land. Whilst the Crown holds a unique position in law, allowing the Crown to abandon ownership would seem to undermine the general rule now established that abandonment of land is not possible. The less incoherent approach would be that what the Crown ‘automatically’ acquires is not ownership but a lesser right, and thus when it abandons or disclaims the right, the Crown is not abandoning ownership. This would be the case whether in the feudal or post-feudal era, since the abolition of feudal tenure did not disturb the Crown’s prerogative rights. One may think of the Crown’s right as an entitlement, or option, to acquire ownership rather than ownership itself.

McMillan appeared to reject the idea that the Crown acquired ownership for any species of property:⁷⁵

The institutional writers are also agreed in stating the right of the Crown arises “by operation of law”⁷⁶ and vests in it without title... But the right can be said to arise by operation of law only in the sense that the right to use the prerogative in any particular case emerges as soon as it is apparent that an owner will not come forward, but it is for the Crown to determine whether or not it will exercise its right and the right is inchoate until exercised.

What McMillan appears to be describing here is an issue like that noted at the outset of this thesis, namely that the discussions of “vesting” has historically been in a state of confusion as to whether ownership “vested” in the Crown *ipso jure*. McMillan, although describing the

⁷² Companies Act 1948, s355; Companies Act 1985, s656; and Companies Act 2006, s1013.

⁷³ Civic Government (Scotland) Act 1982, s78(2).

⁷⁴ Combe & Rudd, “Abandonment of land and the *Scottish Coal* case”, 301.

⁷⁵ McMillan, *Bona Vacantia* (1936), 13.

⁷⁶ No citation is offered and one senses McMillan was using quotation marks as a turn of phrase for *ipso jure*.

Crown's right as "inchoate", in other places described the Crown obtaining a "possessory" right or right of "occupancy".⁷⁷ All of this terminology is slightly unclear, but it appears that he did not consider the Crown *ipso jure* to acquire the real right of ownership in the way writers such as Craig suggested.

The term "possessory right" has been employed in a similar situation, that of an apparent heir in heritable succession.⁷⁸ As noted above, an apparent heir in heritable succession acquired the right to succeed *ipso jure* under the *jus sanguinis* (blood right) but entertained a choice as to whether to exercise his right by serving as heir. As *Green's Encyclopaedia* states:⁷⁹

The apparent heir was entitled to continue his ancestor's possession. He could enter into actual possession of the mansion-house, lands, etc., and might continue the civil possession. He could cut the wood on the estate. He could defend tenants or others, who possessed upon titles derived from his ancestor against third parties challenging their titles. He could sue tenants for their rents.

In other words, between serving and thereafter entering the estate, the heir enjoyed a "possessory right": a right to possess, or gain possession, of the heritable estate.⁸⁰ Adam Smith, followed by Hume,⁸¹ goes so far as to classify the right that an heir held in respect of succeeding to the heritable estate as a real right.⁸² This is the disputed real right of 'exclusive privilege'.⁸³ However, they did not enjoy ownership, and during the apparency heritable property remained within the *haereditas jacens* as a form of ownerless property.

It is perhaps in this sense that McMillan is describing the Crown's rights, in that the Crown acquires a right to occupy, or a right to claim, the property as akin to an apparent heir. In some respects, this could be described as an "inchoate" right in the sense that ownership had not been obtained, but the Crown still enjoys the right to demand possession from third parties, as in the circumstances described in *Lord Advocate v Budge*. Upon taking possession, in the case of corporeal moveables, title would then be completed. However, before taking possession and completing title, the Crown does not have ownership of the corporeal moveable property.

⁷⁷ McMillan, *Bona Vacantia* (1936), 12.

⁷⁸ *Supra*, 8.2.

⁷⁹ W Stevenson, "Apparent heir" in J Wark (ed), *Encyclopaedia of the law of Scotland* (Volume 1, 1926), paras 926 et seq.

⁸⁰ Erskine, *Inst*, III.8.58.

⁸¹ Hume, *Lectures*, Vol IV, pp 38 – 71.

⁸² E Cannan, *Lectures on Justice, Police, Revenue and Arms, delivered in the University of Glasgow by Adam Smith* (1869), page 7 and page 129.

⁸³ Reid, *The law of property in Scotland*, 1st edn, para 5(8).

The application of the theory set out above may have produced a different result in relation to land under the feudal system than it would do under current law. Under the feudal system, if the Crown did not need to complete title to have ownership of land as some sources suggest, land falling as *bona vacantia* would immediately be in Crown ownership. Yet, in the post-feudal era, it is suggested that the Inner House's approach in *Scottish Coal* is correct. The Crown exception to the requirement of recording title, or infestment, was swept away with the feudal system, and the Crown is now treated as any other proprietor of land.⁸⁴ The 2000 Act binds the Crown and removes the fiction of it being ultimately seized of all land in Scotland. Accordingly, the Crown must complete title in the Land Register to obtain ownership. The only way to conceptualise the Crown's rights, without undermining Scots law's requirement for registration of title, is to view the right of the Crown as something less than ownership.

Consequently, before the Crown completes title to the property, property falling as *bona vacantia* is ownerless, a point the Inner House was correct to describe in *Scottish Coal*.⁸⁵ It follows that earlier sources are incorrect, or least no longer accurate, to describe the right to *bona vacantia* as an automatic and instantaneous transfer of ownership to the Crown.⁸⁶

9.5.2 A right to claim the property

The conclusion above builds on the earlier parts of this thesis. In the case of juristic persons, dissolution can result in property falling as *bona vacantia* unless an interested person has a right to recover it. In the case of natural persons, it has been argued above that the *haereditas jacens* is a period of ownerless patrimony. Where no successors or heirs exist, the patrimony can be claimed by the Crown as *ultimus haeres*. Ownerless property might otherwise arise by express or implied abandonment (in the case of moveable property alone). Whilst the Inner House in *Scottish Coal* appeared to exclude express abandonment of land, Erskine seemed to suggest that implied abandonment of land may be possible.⁸⁷

In any *bona vacantia* situation, whether arising through the death of a natural person without successors, corporate dissolution, treasure trove, or abandoned property, it appears that the Crown acquires a right to claim the property but retains discretion on whether or not to claim it. In a sense, the property "belongs" to the Crown, as the Crown holds a right to claim possession and thereafter complete title to it. However, it is wrong to speak of this as ownership. Third parties who possess property which has become *bona vacantia* "hold the

⁸⁴ Report on *Abolition of the Feudal System*, paras 2.14ff. This is unless the title predates the coming into effect of the Register of Sasines, for which see s6 of the 2000 Act.

⁸⁵ [2013] CSIH 108, at para 108.

⁸⁶ Discussion Paper on *Prescription and Title to Moveable Property*, para 9.2.

⁸⁷ Erskine, *Prin*, II.1.15; and *Inst* II.1.11.

custody for the Crown as *ultimus haeres*, and should give intimation to the King's and Lord Treasurer's Remembrancer accordingly".⁸⁸ Upon the KLTR taking possession on behalf of the Crown, or completing title in the Land Register, ownership is obtained.

The requirement for the Crown to have performed an external act to obtain ownership is not a new or novel concept in relation to *bona vacantia* corporeal moveables, which may be instructive of the situation with land after the abolition of feudal tenure. One sees attempts made to argue for this approach in older cases such as *The Duke of York v The Earl of Argyle*.⁸⁹ In this case, the Duke of York was Lord Admiral of Scotland and thus entitled to recover all shipwreck on behalf of the Crown as *bona vacantia*.⁹⁰ A ship from the Spanish Armada lay sunk near Mull, having been shipwrecked in 1588. The Earl of Argyle had intended to raise the ship, which was challenged by the Admiral. The Earl of Argyle produced a grant from the Duke of Lennox, the previous Admiral of Scotland, who with the King's consent, had allowed the Argyles to recover the ship. This was challenged on the basis that:⁹¹

Until there be actual possession and seizure, they are still *bona vacantia*; and by the death of any Admiral who gave right to follow and recover, it doth expire with him, and *in jure* belongs to the next succeeding Admiral, as is clear not only by the law, but by many instances of England lately.

The Court found that the Earl of Argyle had the right to recover the ship on the basis that the Admiral, as the Crown's representative, had granted a right and that "by seizing upon the ship, after which the right becomes perfect" the Earl would validly acquire ownership. What seems to be accepted is that neither the Crown nor the grantee obtained ownership until title was completed through possession, which would involve exhuming the ship from the seabed. The pleadings tend to suggest that the Crown acquires a right *to acquire* ownerless property, rather than a right *in* ownerless property such as ownership. As Lord Ardmillan in *Lord Advocate v Hebden*⁹² later described in respect of shipwrecks:⁹³

By our law the right to wrecked property is in the Crown. It is *inter regalia minora*. It is not of that class of *regalia* which are inseparable from the royal dignity, but of that class of *regalia* which may be communicated by grant of the Crown to a subject.

The approach can be seen again in *ultimus haeres* situations too. In *Irvine v King's and Lord Treasurer's Remembrancer*⁹⁴ the Sheriff allowed a creditor under two small debts to confirm

⁸⁸ *Rutherford v Lord Advocate* 1932 SC 674, per Lord President Clyde at 679.

⁸⁹ (1677) Mor 16792.

⁹⁰ A task now performed by His Majesty's Receiver of Wreck under the Merchant Shipping Act 1995, Ch 2.

⁹¹ (1677) Mor 16792, per Lord Gosford at 16796.

⁹² (1868) 6 M 489.

⁹³ (1868) 6 M 489, per Lord Ardmillan at 496.

⁹⁴ 1949 SLT (Sh Ct) 19.

as executor-creditor before the KLTR had taken possession of the deceased's estate as *ultimus haeres*. Thus, the Crown was not the owner, it merely had the ability to become owner but had not done so.

Whilst cases are scarce, what authority does exist tends to confirm the Inner House's statement in *Scottish Coal* - that it is not ownership that is obtained when the Crown acquires a right to acquire *bona vacantia* property. Therefore, when one quotes *quod nullius est fit domini regis*, its meaning must be interpreted "that which belongs to no one, is able to be claimed by the Crown".

9.6 Mode of acquisition

Having concluded that the right that a Crown acquires initially under the doctrine is not immediate ownership, it is now considered how to classify the method of acquisition of ownership where the Crown does elect to claim ownership.

Reid suggested that upon dissolution or death of an owner, the property becomes ownerless, and the law confers ownership on the Crown.⁹⁵ This is true, but it is argued that there is an intermediate period during which the Crown can decide whether to take title or not, following the observations in *Scottish Coal* noted above. Reid then offers a conundrum, as to whether the Crown acquires by original or derivative acquisition.⁹⁶

In original acquisition, the owner acquires a right of ownership independent of that of the former owner, thereby extinguishing any right of ownership that the former owner held. In derivative acquisition, the existing right of ownership is transferred to the new owner, whether by voluntary or involuntary lawful means. Reid suggests that the Crown's acquisition of ownership could be construed as original acquisition but accepts an argument could be made by derivative acquisition by way of involuntary transfer.⁹⁷

For reasons to be explained fully in Chapter 10, the argument made here is that the holder of the right has ceased to exist, but the right of ownership itself continues to subsist.⁹⁸ Thus, there is a right but no holder of that right. To borrow from the discussion within the ownerless patrimony chapter,⁹⁹ this is a non-titularity.¹⁰⁰ The Crown acquires this existing right by way of derivative acquisition. However, the method of acquisition of this right differs depending on whether the former owner was a natural person or a juristic person.

⁹⁵ Reid, "Property (Reissue)" para 76.

⁹⁶ *Ibid*, para 76.

⁹⁷ *Ibid*, paras 76 and 1025.

⁹⁸ *Infra*,

⁹⁹ *Supra*, 7.5.

¹⁰⁰ Anderson, "Words and concepts: Trust and patrimony", 352.

Reid suggests that, if it is to be the case that the Crown's acquisition of property under the *bona vacantia* doctrine is derivative, then what the Crown acquires "is the patrimony of the deceased (or dissolved) person following on from a forced transfer".¹⁰¹ However, a distinction has to be drawn between the Crown claiming property of a natural person as *ultimus haeres*, and the Crown claiming property of juristic persons under the general *bona vacantia* doctrine. The two, regrettably, appear to differ in approach.

When a juristic person is dissolved, its moveable debts and liabilities die with it.¹⁰² Some exceptions and mechanisms exist to allow a creditor to recover a moveable debt against the dissolved juristic person. In the case of companies, the 2006 Act allows the company to be restored so it can be sued.¹⁰³ Similarly for partnerships, the accepted theory is that a partnership's debts continue to be enforceable after the dissolution of the partnership, in some respect as a corporate ownerless patrimony.

In the case of dissolved juristic persons, the Crown is able to claim the *bona vacantia* property irrespective of any moveable debts that the owner may have had. When the Crown claims, they claim the individual property in isolation to other property or moveable debts. What these situations may be described as is singular succession, as the Crown acquires one or more specific assets free from unsecured debts.¹⁰⁴ The Crown acquires the ownerless property as a singular successor as a form of derivative transfer of ownership, whilst subject to any subordinate real rights in the property.¹⁰⁵

In respect of *ultimus haeres* and the property of an heirless natural person, the right of the Crown operates differently. In cases where no successors exist, the estate is able to be claimed by the Crown as *ultimus haeres* or last heir. The term "heir" traditionally is a heritable succession term, but the operation of *ultimus haeres* applies to both succession to the heritable and moveable estates.¹⁰⁶ It appears to be an acquisition of a patrimony by universal succession.

It has already been argued in Part 2 of this thesis that the property in any *haereditas jacens* is ownerless. As has been shown, in a *haereditas jacens*, the debts of the deceased continue to exist. Therefore, when the property within an heirless *haereditas jacens* is claimed by the

¹⁰¹ Reid, "Property (Reissue)", para 1025.

¹⁰² *Wright v Wright* [2024] SAC (Civ) 48.

¹⁰³ The Third Party (Rights Against Insurers) Act 2010 also removes this problem, but it is rather narrow in its availability.

¹⁰⁴ Reid, *Law of Property*, para 598.

¹⁰⁵ For example, ownership is taken subject to a tenant's right of lease: *Dunn v The Crown* 1989 SLCR 48; *Urquhart v Sweeney* 2006 SC 591; and *Grains v Gifford's Executors* 2016 SLCR 86.

¹⁰⁶ Succession (Scotland) Act 1964, s7.

Crown as *ultimus haeres*, the debts of the deceased, both heritable and moveable, require to be satisfied. In *ultimus haeres* cases, it appears that the Crown takes the entire patrimony, both assets and liabilities. The Crown's liability for the deceased's debts differs compared to other instances of *bona vacantia*, in that it also includes any personal debts. It does not appear open to the Crown to 'cherry-pick' the heirless deceased's property and claim these as *ultimus haeres* whilst leaving debts unsatisfied. As Lord Gosford reported in the decision in *Alexander v Lord Saltoun*:¹⁰⁷

Seeing that the King or his donatar of *ultimus haeres* are liable to the defunct's debts, to whom the King succeeds as *ultimus haeres*, as well as any other heirs who succeed to their predecessors, and in that only there is a difference betwixt them, that the King or his donatar are only liable *secundum vires*, or the value of the estate.

Likewise in *Gray v Earl of Haddington and Officers of State*,¹⁰⁸ a donator (the person receiving a gift from the Crown of an *ultimus haeres* or illegitimate estate) attempted to resist payment of the heirless deceased's debts because "the king and his donatar are not obliged to pay debt".¹⁰⁹ The court found the donator liable for the debts "conform to his intromission with the defunct's estate and no farther".¹¹⁰

McMillan attempted to explain this curious feature of the operation of *ultimus haeres* as some form of discretionary and 'equitable' decision by the KLTR. McMillan noted that:¹¹¹

Although...through the operation of the principle that the Crown is bound to respect the common law rights of property of a subject, and to compensate him if they are invaded, the right of the Crown as *ultimus haeres* is in effect controlled by the common law, it is in theory and origin not a common law right but an arbitrary and quasi-legal right exercised by it as sovereign. In Scotland, therefore, the common law rules which are binding on an heir in taking possession of an estate are binding on the Crown only by analogy and on equitable grounds.

McMillan described the Crown paying debts as "equitable", in that there is no legal obligation on the Crown to do so, but this does not seem to be an accurate reflection of the law given the cases above.¹¹² The institutional writers all appeared to agree that in *ultimus haeres* estates, the Crown must pay all debts due by the deceased. For example, Erskine commented:¹¹³

Because in this case [of *ultimus haeres*] the King succeeds as heir, he or his donatary is liable in the payment of the debts due by the deceased.¹¹⁴ Stair indeed...and some

¹⁰⁷ *Alexander v Lord Saltoun* (1671) Mor 9208, at 9209.

¹⁰⁸ (1655) 2 Bro Sup 373.

¹⁰⁹ (1655) 2 Bro Sup 373, at 374.

¹¹⁰ (1655) 2 Bro Sup 373, at 374.

¹¹¹ McMillan, *Bona Vacantia*, 19.

¹¹² *ibid*, 27.

¹¹³ Erskine, *Inst*, III.10.4. See also Bankton, *Inst*, III.3.105.

¹¹⁴ Mackenzie makes a similar observation, *Inst*, III.10.2.

others led by his authority, affirm, that the King's right is not a proper succession; that it arises more from the condition of the subject which, as *bona vacantia*, falls to the sovereign in the way of caducuary confiscation... The chief reason in support of this opinion is neither the king nor his donatary are universally liable for the debts of the deceased, but only to the amount of his estate. It seems incorrect, however, to give the name of *bona vacantia* to subjects which pass from the deceased proprietor directly to the crown... It bears much greater resemblance to the right of an heir; for the subject of it is an *universitas*, which in other cases is called an *haereditas*, comprehending the whole estate of the deceased; and it passes, as succession does from the dead to the living.

Erskine termed the Crown's right under *ultimus haeres* as a "special right of succession in the sovereign from the law itself".¹¹⁵ What Erskine is essentially describing above is the notion that the Crown takes the estate as a universal successor. They take the entire *haereditas*, both assets and accordingly their debts, under the principle *cujus est commodum, ejus debet esse incommodum* (to whose advantage, it must be his disadvantage).¹¹⁶

Yet, the problem that immediately arises with categorising *ultimus haeres* as universal succession is, as Erskine alluded to, that it has been frequently asserted that the Crown did not take an *ultimus haeres* estate as a right of succession. Rather, the estate comes to the Crown as a 'caducuary confiscation' as Stair argued.¹¹⁷ Stair conceded that the right "may seem to be a succession from the dead" but believed it to be more akin to a confiscation, and indeed considered *ultimus haeres* alongside his treatment of confiscations of property under escheat, such as those arising by rebellion or where the owner was an outlaw.¹¹⁸ This ambiguity, regarding whether the Crown enjoys a right of succession, is a point Lord Hunter had noted in *Lord Advocate v University of Aberdeen and Budge* but had left open:¹¹⁹

The defenders also presented an argument in relation to the pursuer's second plea-in-law, which was designed to establish that the claim of the Crown as *ultimus haeres* is not a proper right of succession. This is a point on which different views have been expressed and which possibly has not yet been finally resolved in Scotland... Indeed, both parties contended that the great weight of authority is against the theory that the claim of the Crown as *ultimus haeres* is one of proper succession.... The King takes as sovereign authority, if not by a proper right of succession (for which neither party argued) at any rate under the general principle [*quod nullius est fit domini regis*] to which I have referred.

It is conceded that many of the sources reject the idea that the Crown as *ultimus haeres* has a right of succession, but the problem that arises in the historical discussion is that the concept of succession is too closely conflated with a blood or familial relation to the

¹¹⁵ Erskine, *Inst*, III.10.4.

¹¹⁶ Erskine, *Inst*, III.8.50.

¹¹⁷ Stair, *Inst*, III.3.47; Bell, *Prin*, s1669.

¹¹⁸ Stair, *Inst*, III.3.1ff.

¹¹⁹ 1963 SC 533.

deceased. For example, McMillan, in rejecting the notion that the Crown had a right of succession, commented:¹²⁰

The theory that it is a true right of succession is untenable, except on the assumption that the state is organised on a tribal basis, that its members are united in descent from a common ancestor represented by the sovereign.

It is accepted that this aspect is correct, the Crown is certainly unlikely to be a blood relative of all deceased persons with a Scottish domicile. However, succession rights and blood relations have to be distinguished. The term “heir” instantly gives rise to a misinterpretation that the successor is somehow related by blood to the deceased. However, notwithstanding the fact that rights of succession to the heritable estate traditionally arose because of a blood relation to the deceased in older Scots law, “heir” is not a solely familial concept. In Roman law the heir or *heres* was often a familial or blood *heres*, but there could also be a non-familial extraneous heir, an *heres extraneus*.¹²¹ In moveable succession, an executor was often termed as the heir-in-moveables (the *heres-in-mobilibus*).¹²² Executors, whilst often family members, did not necessarily have to be so, which again tends to suggest that ‘heir’ is not a solely familial connection. Even today a spouse can confirm as executor-dative,¹²³ as can a person organising a deceased’s funeral as “funerator”.¹²⁴

It appears that Stair had been too rigid in trying to ascribe the concept of ‘heir’ to that of a blood relation, which led to an attempt to reject categorising the right of the Crown in *ultimus haeres* as a succession right in place of a “caducuary confiscation”.¹²⁵ Yet the Crown enjoyed rights that only an heir could claim. In *Goldie v Murray’s Trustees*,¹²⁶ the pursuer obtained a gift of the estate from the Crown. The deceased had made a disposition on her death-bed, which under the old law entitled an heir to seek to reduce it.¹²⁷ The donator wished to challenge the deed, but challenges made on death-bed was only available to “heirs” rather than any third party who benefitted from the estate. Accordingly, the competency of the action was challenged. The court found that the pursuer was entitled to raise the action as the Crown’s donator. Lord Kames as reporter of the decision noted:¹²⁸

The King is named last heir, not that he is an heir in any proper sense; but only that he has a right *jure coronæ* to all goods which have no proprietor.

¹²⁰ McMillan, *Bona Vacantia*, 3.

¹²¹ Schmidt, “Von Monstern”, 496.

¹²² Craig, *Jus Feudale*, II.17.7; and Erskine, *Inst*, III.4.5.

¹²³ Succession (Scotland) Act 1964, s9(4).

¹²⁴ Scobbie, *Currie on Confirmation*, Ch 6.

¹²⁵ Stair, *Inst*, 3.3.42.

¹²⁶ (1753) Mor. 3183.

¹²⁷ D Sellar, “Juridical Acts Made in Contemplation of Death”, chapter in H MacQueen (ed), *Continuity, Influences and Integration in Scottish Legal History: Select Essays of David Sellar* (2022), 277.

¹²⁸ (1753) Mor. 3183, at 3186.

Lord Kames rejects the idea that the Crown is a ‘proper’ heir, but still the court found that the Crown (or their donator) was able to challenge the disposition. If the Crown is not ‘heir’ then it is curious that the court still held the action competent, and the decision was upheld by the House of Lords and in subsequent cases.¹²⁹

In modern times, holding the right of the Crown as a succession right looks less problematic. The law has moved away from affording rights of succession to “blood” relations alone. Legal rights, the *jus relictæ* and legitim, are properly treated as debts and available solely to the spouse or children (or representing descendants thereof). Yet, the right to a free intestate estate is no longer available only to blood relations - with a spouse of the deceased able to succeed under the 1964 Act.¹³⁰ As Lord Sands commented in *obiter* in *Smith’s Trustees v MacPherson’s Trustees*:¹³¹

The word “heir” connotes not a natural but a legal relationship. In general, the basis of the legal relationship is a natural relationship, but this is not absolute. The Crown is the *ultimus hæres*, and under recent legislation it would seem that a wife may take as heir in certain circumstances.¹³² The word “heir” was originally used solely of the heir in heritage, but long ago the word crept into usage in relation to moveable succession. A deceased’s heirs as regards moveable succession are the persons who, if he dies intestate, are entitled by law to his moveable estate by way of succession. I say by way of succession, for a wife’s claim in Scotland to a share as *jus relictæ* is a claim of debt, not a claim to a share by way of succession as an heir.

What Lord Sands noted here is that the Crown is an heir, albeit not related by natural relationship to the deceased, a point which seemed to be historically confused. It is perhaps the sole example of a non-familial heir at common law before statutory modifications.¹³³ The Crown is given an “extraneous” right of succession, in the sense that they are not a blood relative, but it is still a right of succession in the same manner as any family member may enjoy.

The defining feature that Stair attempted to argue to distinguish the Crown’s right under *ultimus hæres* from that of familial successors is that the Crown enjoyed limited liability to the extent of the value of the estate claimed:¹³⁴

Ultimus hæres may seem to be a succession from the dead, and to come in amongst other heirs; yet though it hath the resemblance of an heir, because it hath effect, when there is no other heir, and makes the heritage liable to pay the defunct’s debts, it is

¹²⁹ Lord McLaren, *Wills and Succession*, 3rd edn, Vol I, para 138.

¹³⁰ Succession (Scotland) Act 1964, s2(1)(ab).

¹³¹ *Smith’s Trustees v Macpherson’s Trustees* (1926) SC 983.

¹³² Referring to the Intestate Husband’s Estate (Scotland) Act 1911.

¹³³ There may also be a possibility of “stranger” heirs, which was the circumstances where an apparent heir sold land without serving as heir, leaving it to the third-party purchaser to serve heir in their place, see *Mercer v Scotland* (1745) Mor 9786.

¹³⁴ Stair, *Inst*, III.3.47.

only a caduciary confiscation of the defunct's estate, with the burden of his debt, but no proper succession to him therein.

An executor in the moveable estate has always enjoyed limited liability provided they obtain confirmation, with their liability of the estate limited to the estate inventoried.¹³⁵ However historically if an executor did not obtain confirmation before taking possession of the moveable estate, they were universally liable for the deceased's debts as a vitious intromitter.¹³⁶ In succession to the heritable estate, Scots law also imposed on the heir-at-law unlimited liability for the deceased's heritable debts. The Apparent Heirs Act 1695 then modified the common law by offering an heir limited liability to the extent of the inventory lodged by the heir.¹³⁷ As Lord McLaren described:¹³⁸

The entry of the heir-at-law, whether of line or of conquest, by general service, imports by the common law of Scotland, a title of universal succession, and carries with it (if benefit be derived from the title) a universal responsibility for the debts and obligations of the ancestor.

This seems to be why Stair drew a contrast between the heir of heritable property and the Crown. The Crown has always enjoyed limited liability, albeit the executor and heir-at-law did not unless they availed themselves of entry or confirmation under an inventory. Even with the benefit of an inventory, an executor is still considered as the universal successor of the deceased.¹³⁹ In respect of the Crown and the executor today, many of the same principles appear to overlap. Both are universal successors, albeit both enjoy limited liability to the extent of the value of the estate. The fact that the Crown always benefits from limited liability at common law is perhaps the reason that the Crown does not need to obtain confirmation before taking ownership of an estate.¹⁴⁰ Therefore, whilst the Crown takes a juristic person's property as singular succession, in *ultimus haeres* the law treats the Crown as a universal successor.

9.7 Conclusion

It has been shown how the rights of the Crown have developed from piecemeal rights into a more universal concept that the Crown enjoys a caduciary right to claim any ownerless property. The notion of a general caduciary right has been developed on the basis that it forms part of the royal prerogative, which has come to be accepted in the common law.

¹³⁵ McLaren, *Wills and Succession*, Vol II, para 2405, citing Erskine, *Inst*, III.9.41, Stair, *Inst*, 3.8.64 and Bell's *Prin*, s1922.

¹³⁶ McLaren, *Wills and Succession*, Vol II, para 2430. See *Cunninghame v McKirdy* (1827) 5 S 315.

¹³⁷ *Ibid*, para 2391.

¹³⁸ *Ibid*, para 2388.

¹³⁹ *Lady Taylor v Brunton* 1998 SLT (Sh Ct) 72; *West Lothian Council v Clarks' Executors* [2021] SAC (Civ) 11.

¹⁴⁰ Currie, *Confirmation of Executors*, 99.

However, this chapter has argued that the caduciary right is not an immediate transfer of ownership. *Scottish Coal* seems to suggest an intermediate stage, whereby the Crown, like apparent heirs of old, enjoys a time to deliberate over whether to claim property and obtain ownership. Where it does elect to claim ownership, the method of derivative acquisition differs based on the former owner's personhood. In the case of juristic persons, the Crown takes as singular successor. In the case of natural persons, the Crown is a universal successor with the patrimony of the deceased transmitting to it in whole. Having shown how the Crown obtains ownership, it remains to be considered what happens if the Crown declines, or disclaims, to claim ownership of ownerless property.

Chapter 10: *ELB Securities v Love*

10.1 Introduction

It has been argued in the preceding chapters that Scots law recognises ownerless land. This situation regularly occurs upon the death of any natural person who owns land. On death, the land falls into a *haereditas jacens*. The Crown's right to claim the ownerless property within a *haereditas jacens* is typically excluded by the existence of any 'higher ranking' right of succession to the estate held by a blood relation or spouse. When a family blood-relation or spouse is 'in view', the Crown cannot validly claim the deceased's property as *ultimus haeres*. Similarly, in the case of the dissolution of a juristic person, the Crown is often the only person that lawfully can take ownership of the property as *bona vacantia*.

The decision in *Scottish Coal* suggests that the *bona vacantia* doctrine does not operate as an immediate transfer of ownership of land to the Crown, not least because the Land Register does not instantaneously update. The Crown need not exercise its right to claim *bona vacantia* property. The Crown is free to reject it. The term for the Crown's rejection of the property is 'disclaim'. The Crown declines, or disclaims, ownership of the property. McMillan suggested that this power existed at common law as a form of waiver. Section 1012 of the Companies Act 2006 provides a statutory mechanism for Crown disclaimers in relation to property formerly owned by dissolved companies.

Where a Crown disclaimer occurs, either at common law or under Section 1012 of the 2006 Act, the necessary question becomes: without the Crown's claim, is the property truly ownerless in the sense that no one has any right to complete title to it? To answer this question, the Inner House's decision in *ELB Securities v Love*¹ requires examination. As will be argued in this chapter, the court's decision in *ELB Securities* appears to suggest that the Crown's statutory power to disclaim the property creates a vacuum in which there is no longer anyone able to acquire ownership of the property by derivative acquisition.

10.2 *ELB Securities Limited v Love*

The pursuer, ELB Securities Ltd, was owner and landlord of premises on Buchanan Street, Glasgow.² On 14 June 2013, the tenant of the property, Prestwick Hotels Limited, was dissolved. The tenant's rights under the lease came to the attention of the Queen's and Lord Treasurer's Remembrancer ("QLTR") on 25 June 2013. Under the 2006 Act, all property

¹ [2015] CSIH 67.

² *ELB Securities Limited v Love and Prestwick Hotels Limited* (Glasgow SC, 26 August 2014, unreported).

held by a company falls to the Crown upon dissolution of that company.³ For Prestwick Hotels Ltd, the company property included its interest as a tenant under a lease. The QLTR issued a disclaimer of the Crown's right in respect of the lease on 15 July 2013.

On 3 October 2013, Hamilton Sheriff Court restored the tenant to the register. The restored tenant then proceeded to defend eviction proceedings raised by the landlord at Glasgow Sheriff Court. The tenant submitted that, as it had been restored to the register, the lease between the pursuer and defender continued.

At this stage it is important to remember that the 2006 Act provides that, in Scotland, a Crown disclaimer "determines" "the rights, interests and liabilities of the company, and the property of the company, in or in respect of the property disclaimed".⁴ "Determines" as used in the statute appears to mean "terminates".⁵ In *ELB Securities*, the tenant argued that restoration to the Company Register meant that the lease should be treated as if it was still in existence, rather than the company being restored but divested of the property subject to the Crown's disclaimer. Conversely, the landlord argued that the Crown's disclaimer had indeed terminated the real right of lease held by the tenant. At first instance, Sheriff Crozier found in favour of the tenant and dismissed the eviction proceedings.⁶ However, the landlord appealed to the Sheriff Principal.

10.3 Sheriff Principal's decision

Sheriff Principal Scott noted that certainty is a desirable feature of any legal system, and considered the tenant's argument that a company, once restored, is entitled to an unqualified reversion of its pre-dissolution rights to be "imbued with uncertainty".⁷ To allow the tenant to resume the lease would, in the eyes of the Sheriff Principal, be "a recipe for commercial chaos".⁸ The Sheriff Principal rejected the tenant's argument that, following restoration of the company, its rights in respect of property reverted to the position it held prior to dissolution where a Crown disclaimer had been issued.

10.4 Inner House

The tenant appealed to the Inner House.⁹ In its decision, the Inner House accepted that, following restoration, a company will be treated as if the company had never been

³ Companies Act 2006, s1012.

⁴ *Ibid*, s1020.

⁵ The phrase is known in Scotland but appears more common in England in respect of leaseholds, see J Bignell et al (eds), *Megarry & Wade: The Law of Real Property*, 10th edn (2024), para 17-001.

⁶ *ELB Securities Limited v Love* [2015] CSIH 67 at para 3.

⁷ *ELB Securities Limited v Alan Love, Prestwick Hotels Limited* (Gla SC, 26 August 2014) at para 25.

⁸ *Ibid*, at para 26.

⁹ [2015] CSIH 67.

dissolved.¹⁰ Thus, on one view, the Crown disclaimer could be treated as *pro non scripto* and the real right of lease would continue to exist. However, the Inner House considered that the Companies Act 2006 governed the treatment of *bona vacantia* property after a Crown disclaimer as follows:¹¹

Property vesting in the QLTR and not disclaimed: On the company's dissolution when being struck off the register, its property vests in the QLTR as *bona vacantia* ... If the QLTR does not disclaim the property, that property remains vested in the Crown, who may dispose of the property to third parties. If the company is later restored to the register, a disposal to a third party (for example a disposition of heritable property) is not affected by the restoration, but the Crown must pay to the restored company an amount equal to the price received, or the value of the consideration given, or the value of the property.¹²

With the issue of the Crown disclaimer, the Inner House considered the 2006 Act operated as follows:¹³

Property vesting in the QLTR but disclaimed by the QLTR: On the company's dissolution when being struck off the register, its property vests in the QLTR as *bona vacantia*... If the QLTR disclaims the property...that has two important effects. First, in terms of section 1020...all the company's rights in the property are specifically brought to an end. Secondly, in terms of section 1014(1)... It would appear therefore that the property at that stage is neither the company's nor the Crown's. Interested third parties – for example, a creditor, or a sub-tenant – would be entitled to apply to the court to have the property transferred to them... But whatever else, the company's rights in the property are at an end.

As a result, the Inner House found that the lease was brought to an end by the issue of the Crown disclaimer on 15 July 2013.¹⁴ The effect of Section 1020 of the 2006 Act is that a Crown disclaimer terminates the company's rights upon issue of the disclaimer. Parliament could not have intended for a tenant to have the revival of a tenant's interest following restoration given the commercial disruption that would flow from such an entitlement to the pre-disclaimer *status quo*.¹⁵ Accordingly, the Inner House refused the tenant's appeal.

10.5 The Crown disclaimer

10.5.1 Neither the company's nor the Crown's

On a narrow construction, the decision in *ELB Securities* is authority for the proposition that the termination of a subordinate real right (the real right of lease) occurs upon the issue of a Crown disclaimer. However, the *ratio* of the decision appears somewhat wider when taking

¹⁰ *Ibid*, at para 20.

¹¹ *Ibid*, at para 23.

¹² This refers to the provisions in s1034 of the 2006 Act.

¹³ *Ibid*, at para 24.

¹⁴ *Ibid*, at para 25.

¹⁵ *Ibid*, at para 28.

the decision in *Scottish Coal* into account. The Second Division in *Scottish Coal* had recognised that a disclaimer by the Crown would create “dormant” property, where there is no ownership.¹⁶

The problem then is what happens to land if the right is expressly waived or simply not exercised by the Crown. In that event, ownership of the land may be acquired by means of an *a non domino* habile disposition followed by occupation for the prescriptive period... Otherwise, it may simply lie dormant in an ownerless state.

ELB Securities appears consistent with the observation of the Inner House in *Scottish Coal* that, after a disclaimer of ownership, the property is dormant. The key aspect of the decision in *ELB Securities* supporting this conclusion is the Extra Division’s statement that, after the issue of a Crown disclaimer, the property is “neither the company’s nor the Crown’s”. What logically follows from that statement, if the right that was disclaimed was ownership itself, is that the property must be ownerless. In other words, the Crown disclaimer would create “truly” ownerless property.

10.5.2 Subjectless rights

The conclusion that property is ownerless after the issue of a Crown disclaimer is perhaps unsurprising given it has been previously argued in this thesis that the decision in *Scottish Coal* recognises ownerless land more generally. However, what perhaps needs to be made clearer is that the treatment of *bona vacantia* in *Scottish Coal* dealt with the initial stage of ownerless property. The 2006 Act provides that “all property and rights” of a dissolved company vest in, and “belong to”, the Crown.¹⁷ Following *Scottish Coal*, immediately after dissolution the property becomes ownerless, but the right of ownership remains available to be claimed by the Crown. This is the sense in which the property “belongs” to the Crown. Ownership itself does not vest in the Crown, either at common law or under the 2006 Act. Rather, what vests in the Crown is a right to acquire that ownership.

In this intervening period, whilst the Crown deliberates over whether to acquire ownership, the real right of ownership exists but appears to have no right-holder. As discussed in the preceding chapter, the Crown can acquire this right of ownership as a form of involuntary derivative acquisition. Conceivably, one might be tempted to consider this as akin to a *haereditas jacens*, in that the company’s patrimony subsists and can be acquired by the Crown. However, with juristic persons, the debts and liabilities of the dissolved company are extinguished by dissolution. In the case of a juristic person, it is not as simple as to say

¹⁶ *Ibid*, at para 109.

¹⁷ 2006 Act, s1012.

that the debt subsists but without a debtor. This argument was recently tested in *Wright v Wright*, where a company had been dissolved whilst owing debts. The pursuers had argued:¹⁸

Dissolution of a company does not extinguish its debts; it is a procedural bar to enforcement of a company's debts, as there is no legal entity to sue.... Dissolution does not extinguish the underlying substantive obligation owed by a company.

This approach was rejected by the Sheriff Appeal Court, instead determining that the debt was extinguished by the company's dissolution.¹⁹ To reconcile this point, it has to be understood that the patrimony of the company is dissolved alongside its personhood. The "cellular membrane" that forms the patrimony is destroyed. As part of this, debts or obligations are extinguished with it. However, property rights apparently survive and become open to claim by the Crown as *bona vacantia* by way of derivative acquisition. If the Crown subsequently elects to disclaim these rights, then the disclaimer terminates the right too. Whilst a complex approach, it seems the only way to reconcile the working of complex statutory provisions.

10.6 Conclusion: The emergence of truly ownerless land

ELB Securities goes further than *Scottish Coal* by focusing on the situation after a Crown disclaimer. The Inner House's statement in *ELB Securities* suggests that a Crown disclaimer creates permanently ownerless property. Upon the issue of a Crown disclaimer, the right of ownership can be said to have been determined, terminated or extinguished. The 2006 Act provides that "the rights or liabilities of any other person"²⁰ are unaffected by the Crown disclaimer - which would appear to preserve any subordinate real rights despite the extinction of ownership.²¹ In one sense, this is to be expected given subordinate real rights are rights that are held in the land itself as *jura in re aliena* (rights in another's property) rather than attaching to ownership itself.²² However, the primary real right, ownership, no longer exists after a disclaimer.

The only logical conclusion is that property enters a truly ownerless state after a Crown disclaimer is issued. This seems to reflect the common understanding of the effect of the Crown's disclaimer in Scotland following *Scottish Coal* and *ELB Securities*. This situation frustrates the traditional ways of acquiring land and bringing it back into productive use. No

¹⁸ [2024] SAC (Civ) 48, at para 30.

¹⁹ A MacPherson & A Sweeney, "Dissolution, Debt and Third-Party Security" (2025) 29(2) *ELR* 291, 293.

²⁰ 2006 Act, s1020(2).

²¹ A similar approach is found in English land law under *Fivestar Properties Ltd, Re* [2015] EWHC 2782 (Ch) and *Pall Mall 3 Ltd v Network Rail* [2021] EWHC 1835 (Ch). See further A Clark et al (eds), *Emmet and Farrand on Title* (looseleaf), para 26.247.

²² A complication of this theory is that some in Scotland argue that a subordinate real right has two objects, the property itself and the real right of ownership, G Gretton "Ownership and its objects" (2007) 71 *RechtsZ Bd* 802, 841ff.

one can acquire the property by voluntary transfer from the Crown, as they have disclaimed any right to it, and likewise the company (if restored) can no longer transfer ownership as their right has been extinguished.

The present situation appears to leave two principal remedies to bring the land back into an owned state. A party may acquire the property by way of positive prescription, or by petitioning for a vesting order under Section 1021 of the 2006 Act. These two approaches now appear to be growing in usage. For example, in *GCN Scotland Ltd v Gillespie*²³ the pursuer had made a prescriptive claim under Section 43 of the Land Registration (Scotland) Act 2012. The averments narrate that the last registered owner of the land, Whitechurch Developments Limited, had been dissolved in 2012 and the Crown issued a disclaimer as Lord Pentland summarised:²⁴

The pursuers aver that they have taken all necessary and legal steps properly to acquire the property. They say that neither the previous owners of the property nor the QLTR has any interest in it. Consequently, there is no legally entitled owner of the property.

Similarly, examples can also be found in the Edinburgh Gazette of applications for Vesting Orders under the Companies Act 2006 albeit no reported decisions can be found – seemingly owing in part to the fact that no interested parties to the petitions have entered an appearance.²⁵

Whether a Vesting Order is a method of derivative or original acquisition is a difficult question. Similar provisions in England under the Trustee Act 1925²⁶ and the Law of Property Act 1925 appear to suggest that the right is “reconstituted” by the Vesting Order. A vesting order under the 1925 Act is to be treated as if it can “create the legal estate disposed of in like manner as if the same had been a conveyance executed by the estate owner”.²⁷ In

²³ [2019] CSOH 82.

²⁴ [2019] CSOH 82, at para 7. Notice of Disclaimer, 24 August 2012, Edinburgh Gazette. Available: <https://www.thegazette.co.uk/notice/E-27137-216>

²⁵ Notice of petition by Alexa Paddock dated 11 October 2024 (available: <https://www.thegazette.co.uk/notice/4723080>); Notice of petition by Crossroads Caring Scotland Ltd dated 13 August 2024 (available: <https://www.thegazette.co.uk/notice/4682088>); Notice of Vesting Order in favour of Scottish Water dated 24 December 2021 (available: <https://www.thegazette.co.uk/notice/3979400>); Notice of petition by The Ridge SCIO dated 2 July 2021 (available: <https://www.thegazette.co.uk/notice/3835304>); Notice of petition by Illiam Limited dated 13 August 2019 (available: <https://www.thegazette.co.uk/notice/3365417>); Notice of petition by Arnold Clark Automobiles Ltd dated 3 November 2017 (Available: <https://www.thegazette.co.uk/notice/2899255>); Notice of petition by Doreen Mary Robertson dated 9 June 2017 (Available: <https://www.thegazette.co.uk/notice/2800078>); Notice of petition by Benjamin James McCosh dated 29 November 2016 (Available: <https://www.thegazette.co.uk/notice/2654844>); Notice of petition by Lothian Shelf (176) Limited dated 22 December 2015 (Available: <https://www.thegazette.co.uk/notice/2451931>); Notice of petition by Colchester Funding Limited dated 28 August 2015 (Available: <https://www.thegazette.co.uk/notice/2392304>). [all last checked 19 March 2026].

²⁶ Trustee Act 1925, s41.

²⁷ Law of Property Act 1925, s 9.

Scotland, if the Crown disclaimer terminates the right of ownership that has no holder, then a vesting order must be a way of original acquisition to constitute ownership in the successful applicant.

A third option does exist, namely the compulsory purchase powers available to government bodies. These three processes appear to be the only methods available to obtain ownership of the property and recover it from its truly ownerless state after a Crown disclaimer.²⁸

It is submitted that the decision in *ELB Securities* is undoubtedly correct as regards the effect of the 2006 Act. However, the present law appears to stymie the voluntary transfer of ownership of *bona vacantia* land. The principal party who can transfer ownership, the Crown, is unable to do so following a Crown disclaimer, and as a result of the disclaimer, the right of ownership appears to have been extinguished. Whilst this may seem a strange situation, the following chapter will demonstrate that the situation has arisen because of the abolition of feudal tenure, a point that Parliament when drafting the 2006 Act has failed to appreciate.

²⁸ The compulsory community rights to buy are excluded from property falling as *bona vacantia* or *ultimus haeres*. See Land Reform (Scotland) Act 2003, s97C(5(e)) and Land Reform (Scotland) Act 2016, s46(2(d)). It is unclear whether these rights are exercisable in respect of land after being disclaimed by the Crown.

Chapter 11: Truly ownerless land

11.1 Introduction

It has been argued in the preceding chapter that the Crown disclaimer creates truly ownerless land in Scotland. The Crown disclaimer permanently extinguishes the company's real right of ownership. The commencement of court proceedings for a vesting order, the making of a prescriptive claim, or the compulsory purchase process each involve their own challenges but together they appear to be the only solution for acquiring ownership of disclaimed land instead of being able to obtain title from the Crown. This chapter attempts to explain how the present situation has arisen and demonstrate an unintended consequence of the abolition of feudal tenure in Scotland, whilst reinforcing the argument that truly ownerless land exists in Scots law.

11.2 The origins of the Crown disclaimer

It is worth explaining how the Crown disclaimer in respect of property belonging to dissolved companies came into being. Further support for the conclusion that the Crown's disclaimer creates truly ownerless property can be found in the legislative history of the Crown's disclaimer. Whilst express provision that dissolved companies' property became *bona vacantia* was first introduced in 1929,¹ statutory provision for a Crown disclaimer was only introduced into UK company law in the Companies Act 1948.²

The relevant provision, Section 355 of the 1948 Act, reads as follows:

Where a notice of disclaimer under this section is executed as respects any property, that property shall be deemed not to have vested in the Crown under the last preceding section, and subsections (2) and (6) of section [323] and section [324] thereof shall apply in relation to the property as if it had been disclaimed under subsection (1) of the said section [323] immediately before the dissolution of the company.

Sections 323 and 324 of the 1948 Act relate to a *liquidator's* power to disclaim "onerous" property held by a company when it is being wound up.³ It is notable that these provisions apply only in England and Wales, and Northern Ireland. There is no equivalent provision for liquidators in Scotland for reasons to be explained in the next section. However, the relevant

¹ Companies Act 1928, s71; and Companies Act 1929, s296.

² *Land registration for the twenty-first century: A conveyancing revolution* (LC Report No 271, 2001), para 11.25.

³ The statute provides for disclaimer for any rights burdened with "onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable".

provisions of Sections 323(2) and 323(6) of the 1948 Act largely reflect the wording now found in Section 1020 of the 2006 Act relating to the Crown disclaimer.⁴ Further similarities can also be found between the Insolvency Act 1986 and the *bona vacantia* provisions of the Companies Act 2006, including the power of a court to grant a Vesting Order following disclaimer.⁵ Therefore, the Crown disclaimer in Scots law largely derives from the provisions on the disclaimer held by a liquidator under English insolvency law.

The reason that such provisions were extended to the Crown was, as the Law Commission described:⁶

It was appreciated shortly after the enactment of the Companies Act 1929 that the Crown was potentially at risk in relation to real property that passed to it as *bona vacantia*. The legal estate in such property vests in the Crown and there was a fear that the Crown might find itself subject to the liabilities attaching to the property if it was of an onerous character. The Companies Act 1948 introduced a number of provisions to protect the Crown from this risk.

Alongside the provisions of the Crown Proceedings Act 1947,⁷ Parliament provided that the Crown can disclaim property. Therefore, the Crown enjoys an element of choice on whether to claim the property or not as a matter of risk analysis. However, the operation of a disclaimer in English law fundamentally differs from Scots law.

11.2.1 The Crown disclaimer in English law

The reason that such divergences arise is due to the fundamentally different nature of ownership of land in Scots and English law. In English land law, a proprietor holds an ‘estate in land’. An estate is often regarded as ownership in England, but its true nature derives from the ‘doctrine of estates’ of medieval English land law, in which all land was held of the Crown and proprietors held an estate for a period of time.⁸ Only two forms of estate are now possible in English land law: freehold (tenure for an indeterminate amount of time) and leasehold (tenure for a fixed period of time).⁹

These two estates can exist coterminously, for example there can be both a freeholder and leaseholder with legal estates in the same piece of land.¹⁰ Despite progressive reforms over the centuries in English land law, “land is still the object of feudal tenure; the Sovereign remains the lord paramount of all the land within the realm.”¹¹ The Crown in England still

⁴ See also the Insolvency Act 1986, s178.

⁵ *Ibid.*, ss181-182.

⁶ *Land registration for the twenty-first century*, para 11.25.

⁷ s40(4) provides a protection to the Crown for liability in tort and delict arising out of any property falling to the Crown as *bona vacantia*.

⁸ Bignell, *Megarry & Wade*, para 2-006.

⁹ Law of Property Act 1925 s1(1).

¹⁰ There may also be equitable estates but that matter need not be discussed for present purposes.

¹¹ Bignell, *Megarry & Wade*, para 2-030.

remains vested in, or owns, all land in England with proprietors holding an estate as tenure from the Crown.¹² In many respects the system of English land law is similar to the old feudal law of Scotland. One noticeable difference is that subinfeudation, the process by which a vassal could validly grant feus to sub-vassals, was prohibited in England by the Quia Emptores of 1290. However, at the top of the (smaller) English feudal chain, the Crown remains the ultimate owner of all land in England, Wales and Northern Ireland as the only person with allodial title.¹³

In older English feudal law, the maxim '*nulle terre sans seigneur*' (no land without a lord) applied. This carried a similar meaning to the Scottish feudal maxim that a fee must always be full.¹⁴ As *Halsbury's Law of England* described:¹⁵

It is fundamental to the English law of real property that all lands of subjects (whether freehold or leasehold) are held by a form of tenure... The monarch was said to hold land but he did not hold it from anyone. He was sovereign, with no earthly superior. By analogy with non-feudal tenures in Europe this is termed allodial.

Until 1929, the effect of the doctrine of estates was that if a leasehold ended up without a rightsholder, the leasehold estate simply terminated.¹⁶ However, the freehold estate continued to be held by the freeholder. On the other hand, if freehold estate became without a rightsholder, the land would revert to the Crown Estate, as escheat.¹⁷

Beginning with the Companies Act 1929 and repeated in every subsequent Companies Act, provision is now made that both leasehold and freehold estates which come to be without a rightsholder as a result of dissolution of a company fall to the Crown as *bona vacantia*.¹⁸ If HM Treasury Solicitor (acting on behalf of the Crown) disclaims a leasehold estate falling as *bona vacantia*, the leasehold terminates.¹⁹ If a freehold estate is disclaimed, the land itself reverts to the Crown Estate as escheat. As McBride J. explained of the effect of escheat:²⁰

As the company held no interest in the lands and because the lands were freehold lands they reverted to the Crown in accordance with the doctrine of escheat. The doctrine of escheat is one of the last relics of the medieval doctrine of tenure. Under the doctrine of tenure all estate owners in fee simple hold directly from the Crown as "tenants in chief" and when this relationship comes to an end the freehold title reverts to the Crown on the principle that all freehold estate originally came from the Crown.

¹² Bignell, *Megarry & Wade*, para 2-005.

¹³ *Land registration for the twenty-first century*, para 11.5.

¹⁴ Reid, *The Law of Property*, para 88.

¹⁵ *Halsbury's Law of England, Crown and Crown Proceedings* (Volume 29, 2019), Chapter 3, Section 1(iii), para 134 'Radical title of the Crown'.

¹⁶ *Hastings Corporation v Letton* [1908] 1 KB 378.

¹⁷ *Scmla Properties Ltd v Geso Properties (BVI) Ltd* [1995] BCC 793.

¹⁸ Companies Act 1929, s296.

¹⁹ Bignell, *Megarry & Wade*, para 17-098 *et seq.*

²⁰ *Re Carrowreagh Management Co Ltd* [2018] NiCh 18, at para 37.

In the present case therefore, given that no one was entitled to the freeholder's estate by law, the freehold title reverted to the Crown.

If the land has onerous conditions, the Crown Estate may refrain from taking possession, as the Crown Estate outlined in a letter lodged in court proceedings:²¹

Where freehold land is disclaimed by the Treasury Solicitor, the land may be deemed subject to escheat to the Crown, and we act for the Crown Estate in relation to such matters. Longstanding legal advice to the Crown Estates Commissioners is that if they undertake no act of possession, entry or management, no liability or responsibility in respect of the Property arises in the circumstances of escheat.

At the time of the introduction of the 1948 Act, there were concerns in England about how the Crown disclaimer operated, notably from Elliott.²² Elliott focused on a question to the Ministry of Housing and Local Government in the House of Commons in respect of a disclaimed graveyard site in Bristol, England. An MP asked the then local government minister, Harold Macmillan:²³

If he is aware that the Ridgeway Park Cemetery, Eastville, Bristol, which was the property of a limited company, now dissolved, is in a mouldering condition with no one responsible for its upkeep; and, of the distress caused to those with relatives buried there, what action he is taking to deal with the problem.

To which, Mr Macmillan replied:²⁴

This is a very extraordinary case. This cemetery did belong to a limited company, which is now dissolved. It then vested in the Crown under the Companies Act, 1948, as *bona vacantia*, but the Crown then disclaimed title, and the cemetery, therefore, belongs to nobody and nobody is responsible for its maintenance. It is a somewhat obscure problem which I am now trying to resolve.

In respect of Ridgeway Park Cemetery, HM Treasury Solicitor, as empowered by the then Section 354 of the Companies Act 1948, had issued a Notice of Disclaimer to the property. As Harold Macmillan described, the result was a “very curious and almost unique case”²⁵ albeit it now seems a more common occurrence than that which the future Prime Minister had described. Elliot’s argument in respect of the cemetery was that:²⁶

Even if the legal estate has been successfully disclaimed into thin air... it is clear that the Crown is still possessed of its seignior. The only way in which it could divest itself of that would be withdrawing from the land altogether and abandoning part of

²¹ [2018] NiCh 18, at para 13.

²² D Elliott, “Land without an owner” (1954) 70 *LQR* 26.

²³ Hansard (Tuesday 5 May 1953, Volume 515), cols. 199 - 200.

²⁴ Hansard (Tuesday 5 May 1953, Volume 515), cols. 199 - 200.

²⁵ (1953) Hansard (Tuesday 5 May 1953, Volume 515), cols. 199 - 200.

²⁶ Elliott, “Land without an owner”, 28.

its realm, which would mean that Eastville Cemetery would cease to be part of the U.K.

Elliot's argument was that if the Crown disclaimer operates to entirely reject the Crown's rights, including its allodial title as lord paramount, the parcel of land would cease to be a part of the United Kingdom. The legal position in England appears to follow Elliott's theory that the Crown continues to be owner of any disclaimed land as one of the last relicts of feudalism in England. The Crown disclaimer provisions of the Companies Acts as they operate in English law has not escaped criticism. The Law Commission noted that:²⁷

It scarcely needs to be said after this account that the present law is indefensible. It also has unfortunate practical implications. *Bona vacantia* is administered by the Treasury Solicitor, whereas escheated property is a matter for the Crown Estate. Those who have an interest in such property and wish to take steps in relation to it, are often bewildered because they do not know with which organ of state they have to deal.

However, whilst there exists a strange division of administrative powers, what is apparent in English law is that there is a constant bedrock in the Crown. The Crown is the allodial owner of land in England, so the termination of a freehold estate in land results in the property returning to them as escheat. The estate in land (the right) first devolves as *bona vacantia* to the Treasury Solicitor *qua* Crown, and if disclaimed the land (not the right) formerly subject to the freehold then escheats to the Crown Estate *qua* Crown. As Enever outlined:²⁸

In the case of the Crown's title by way of escheat in respect of the real estate of inheritance of a person dying before 1926 intestate and without an heir at law the Crown did not acquire any right or interest of the deceased, but continued to be the owner of the land, freed from the estate previously carved out of the Crown's interest in the land.

Scotland has no such equivalent system in the post-feudal era. All proprietors in Scots law are allodial owners, and the Crown only holds a right under the royal prerogative to obtain the real right of ownership (*dominium*). If this claim is disclaimed, there is no equivalent of escheat as found in English law. The land becomes truly ownerless. This has no consequences for the Crown's sovereignty as the Inner House in *Scottish Coal* described:²⁹

The fact that a parcel of land is ownerless, in the private law sense, does not mean that it ceases to be part of Scotland. It does not. That matter is determined by international public law principles and not those of private law.

The present situation in Scotland is that the land remains (territorially) part of Scotland, but where the Crown has issued a disclaimer the Crown (or others) later have no mechanism

²⁷ *Land registration for the twenty-first century*, para 11.26.

²⁸ A Enever, *Bona Vacantia Under The Law of England* (1927), 15.

²⁹ [2013] CSIH 108, at para 109.

upon which to complete title without the assistance of a vesting order, compulsory purchase or by making a prescriptive claim.

11.2.2 The English liquidators' disclaimer

Unlike the Crown disclaimer, as noted above, a liquidator's power to disclaim has never been extended to liquidators winding-up a company registered in Scotland.³⁰ In English law, the liquidator's disclaimer can be justified as follows:³¹

The policy which underlies the existence of the statutory power of disclaimer is to enable trustees and liquidators to put an end to ongoing costs and outgoings from the estate that are brought about either through some quality that is inherent in an item of property belonging to that estate, or is a consequence of some unprofitable contract to which the debtor is a party. The "clean break" that can be achieved by the act of disclaimer causes a crystallization of the debtor's liabilities, thereby assisting the trustee or liquidator to complete his administration and to close his files and accounts within a reasonable time span.

In corporate insolvency in either Scotland or England, title to the property remains held by the company undergoing liquidation. The property does not vest in the liquidator and the liquidator does not normally complete title or acquire ownership of the property.³² Therefore when a liquidator disclaims property in England, the liquidator disclaims the property *qua* company, rather than disclaiming any right vested in them personally.³³ As the Inner House in *Scottish Coal* made clear:³⁴

There is no separate "patrimony" of a company, mummified, mothballed or otherwise in a winding up. The whole assets of a company remain its property, which the liquidator is under a statutory duty to take into his custody...Equally the company's whole liabilities remain its debts, for which the creditors are entitled to rank.

In English insolvency law, a disclaimer by a liquidator is possible for leaseholds,³⁵ but is also possible for freehold estates too.³⁶ A liquidator's disclaimer of a leasehold simply terminates the leasehold estate. Disclaimer of a freehold estate, on the other hand, triggers an escheat of the land back to the Crown. The *bona vacantia* doctrine in England is not engaged by such disclaimer as it is dealt with as a form of escheat.³⁷ However, examining

³⁰ Companies Act 1948, s323(8).

³¹ Morse, *Palmer's Company Law*, para 15.428.

³² Limited provision does exist under Insolvency Act 1986, s145 and the Titles to Land Consolidation (Scotland) Act 1868 s25.

³³ D Cavill (ed), *Ruoff & Roper: Registered Conveyancing* (looseleaf), para 39.028.

³⁴ *Scottish Coal* at para 123.

³⁵ Insolvency Act 1986, s179.

³⁶ *Scmlla Properties Ltd v Gesso Properties*. See Bignell, *Megarry & Wade*, para 2-023(i).

³⁷ *Scmlla Properties Ltd v Gesso Properties*, at 805.

why the liquidator's power to disclaim was never extended to Scots law further illustrates the problems encountered by the Crown disclaimer in Scotland.

The Scottish Law Commission's review of insolvency, bankruptcy and liquidation legislation in the 1970s rejected giving liquidators the power to disclaim land in Scotland.³⁸ Instead, in the subsequent Insolvency Act 1986, a Scottish liquidator was granted the same powers as a Scottish trustee in sequestration.³⁹ In personal insolvency in Scotland, all property vests in the trustee as an involuntary transfer as a consequence of the decree awarding sequestration.⁴⁰ The trustee can then become owner of any land formerly owned by the sequestrated debtor by completing a Notice of Title in the property registers.⁴¹ Halliday provided a separate note in respect of the Commission's 1971 consultative memorandum to further explain the powers of a trustee in sequestration:⁴²

Where land is held by the bankrupt on feu the trustee may abandon it. The position then is that he [the trustee] is not the vassal in a question with the superior. The bankrupt is the entered vassal and the superior, since the bankrupt will have failed to pay the *reddendo*, may exercise the rights available to him against the land, e.g.: he may irritate the feu and take back the land.

However, the Inner House in *Scottish Coal* were somewhat critical of Halliday's characterisation of 'abandonment':⁴³

The court does not quite agree with [Halliday's] analysis in so far as it might suggest that a real right, once acquired, can be abandoned to the four winds, but otherwise it agrees that a trustee can avoid taking title to land.

As the Inner House in *Scottish Coal* clarified, in refusing to 'take up' the ownership of any land owned by the debtor, the trustee did not abandon or terminate the *dominium utile* itself and leave the land without a vassal or to become *bona vacantia* – instead they left title to the property in the debtor's name.

The reason that the Scottish Law Commission ultimately rejected introducing a power to disclaim property for liquidators in Scotland but instead advocated equiperating the powers of Scottish liquidators to those of trustees was owed in part to (i) public demand for such a power but (ii) also to proposed reforms to the feudal system.⁴⁴ The latter of these two reasons is important for present purposes.

³⁸ Consultative Memorandum on *Insolvency, bankruptcy and liquidation in Scotland*, Vol 1 (SLC CM No 16, 1971), para 105.

³⁹ Insolvency Act 1986, s169.

⁴⁰ Bankruptcy (Scotland) Act 2016, s78.

⁴¹ Reid & Gretton, *Conveyancing*, para 25-03.

⁴² Consultative Memorandum on *Insolvency, bankruptcy and liquidation in Scotland*, Appendix D, 143.

⁴³ *Scottish Coal*, para 125.

⁴⁴ Consultative Memorandum on *Insolvency, bankruptcy and liquidation in Scotland*, para 105.

In 1969, two years before the Commission's 1971 consultative memorandum on insolvency law was published, a White Paper⁴⁵ was published in which "[t]he Government at the time took the view that the feudal system of land tenure should be replaced by a new system altogether."⁴⁶ Had a power to disclaim been given to liquidators in Scotland whilst the feudal system was in place, the disclaimer would have terminated the vassal's *dominium utile*. As a result, the superior could resume the property as the feu had been destroyed.

Under the then government's proposals, every proprietor of a *dominium utile* would become the absolute owner of the land as a result of feudal abolition.⁴⁷ To recommend the introduction of a power for liquidators to disclaim title would have enabled the total abandonment of ownership under the proposed new system of land ownership. Unlike England, which benefits from the concept of the Crown being ultimate allodial owner of all land, the proposals would have also removed any concept of escheat (whether to the direct feudal superior or the Crown). Therefore, it appears that the Commission did not consider it appropriate to introduce a power of disclaimer as it would place land in a truly ownerless state. Notwithstanding the fact that the power of a liquidator to disclaim was rejected by the Scottish Law Commission in order to avoid this outcome, the Crown disclaimer subsequently introduced in Scotland was modelled upon the liquidator's disclaimer.

With the eventual abolition of feudal tenure, the Scottish Law Commission's concerns that land would fall into an ownerless state have now been realised. Where the Crown disclaims in Scotland there is no underlying person upon whom the land can devolve and it places the land in a truly ownerless state. The concept of superiorities, and consequently a superior resuming possession of the land, has been swept away by the abolition of feudal tenure in Scotland.

Where the Crown disclaims, unlike in England, the land (or a right to the land) can no longer pass to any other person either by way of feudal reversion or escheat *propter defectum tenenietis* (escheat for want of a tenant). Unique to the rest of the United Kingdom, which has fundamentally different concepts of ownership and the role of the Crown in its land tenure, the 2006 Act creates a truly ownerless state in Scotland due to a failure to fully appreciate the effect of the Crown disclaimer after the abolition of the feudal system in Scotland in 2004.

⁴⁵ *Land Tenure in Scotland – A plan for reform* (Cmnd 4099, 1969).

⁴⁶ Discussion Paper on *Abolition of feudal tenure* (SLC DP No 93, 1991), para 2.9.

⁴⁷ *Ibid*, para 2.10.

11.3 The Crown ‘boomerang’

The above argument is of course premised on the notion that a Crown disclaimer under the 2006 Act also waives the Crown’s rights to *bona vacantia* at common law. It has been suggested that if the Crown disclaims its right to *bona vacantia* under the 2006 Act, it may not fully disclaim its right at common law (whether to heritable or moveable property). The theory that the Crown’s statutory disclaimer does not totally end the Crown’s rights to claim the property as *bona vacantia* is attributed to Swinton.⁴⁸ Swinton’s theory draws on the wording of the 2006 Act at Section 1012, which states:

When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company...are deemed to be *bona vacantia* and... accordingly belong to the Crown.

Swinton has argued that the term “belong” under the 2006 Act means something different to the common law *jus coronae* right or “mere power of administration” that the Inner House had described in *Scottish Coal*.⁴⁹ His central contention is that the 2006 Act does not repeal the common law doctrine of *bona vacantia*, and therefore following a Crown disclaimer under the legislation, the *jus coronae* common law right of *bona vacantia* would still apply.⁵⁰ What Swinton argued can be termed the ‘Crown boomerang’, in which the property is disclaimed by the Crown by statute but the property ‘boomerangs’ back to the Crown under its common law right to ownerless property.

Similar arguments have been made elsewhere in respect of ownerless property under the common law rules of *bona vacantia* alone. It has been said that the Crown cannot abandon property or waive its right to *bona vacantia* at common law, as the *bona vacantia* doctrine would instantaneously revest the property back in the Crown. As the Scottish Law Commission explained in respect of moveable treasure:⁵¹

A further difficulty is that the Crown is itself unable technically to abandon property because the result of abandonment is that the property becomes the Crown's.

In effect there would be no ownerless property in Scotland because a claim to the right of ownership will always boomerang back to the Crown under the *bona vacantia* doctrine. Thus, the Crown’s rights are inalienable and can never be waived or disclaimed.

Whilst this theory has merit, there is little evidence to suggest that it is correct. The KLTR’s policy appears to suggest that a 2006 Act disclaimer (at least) will “remove the Crown

⁴⁸ K Swinton, “Dealing with abandoned property” (2015) 83(4) *SLG* 64.

⁴⁹ *Ibid*, 65.

⁵⁰ *Ibid*, 65

⁵¹ Report on *Prescription and Title to Moveable Property*, para 5.4.

interest” in the property – which it is suggested means that the Crown’s role is removed from the property altogether.⁵² The accepted situation of the law in Scotland appears to be that a disclaimer results in the Crown being subsequently unable to dispose of or complete title to the property, whether under the 2006 Act or at common law. As was averred in *GCN*, “there is no legally entitled owner of the property” following a Crown disclaimer.⁵³

Further, Swinton’s approach in respect of the 2006 Act would appear a strange interpretation of the interaction of statute with common law and raises more fundamental questions deriving from constitutional law on whether statutory provision can override common law principles dealing with the same area of law, or whether statute merely supplements the common law.⁵⁴ Swinton conceded that if he is wrong in his interpretation, then the property would fall into a “vacuum” in which the Crown is prevented from dealing with the property or taking title, as is the company even if restored:⁵⁵

So when the property [in *ELB Securities*] was disclaimed by the QLTR could it become *bona vacantia* again, to be administered by the Crown under the common law as the Companies Act provisions had been exhausted? That route was fully canvassed in *Scottish Coal*. The Companies Act 2006 does not repeal the common law of *bona vacantia*... If that is not the case the alternative is to conceptualise property falling into a vacuum with neither the restoration of the company to the register nor any further action competent by the QLTR being competent to deal with the property.

It is suggested in this thesis that this is indeed the present law in Scotland.

One final criticism of the boomerang theory can be made. To some extent, the boomerang theory appears to introduce a form of *quasi*-feudalism, in which the Crown can never fully waive or disclaim its rights under the royal prerogative and will always have a claim to ownerless property. At the time the Abolition of Feudal Tenure (Scotland) Bill was progressing through the Scottish Parliament, vocal debate arose as to whether the Crown should retain some form of ultimate superiority in form of public guardianship over all land in Scotland. Critics of that proposal include Rennie who suggested:⁵⁶

It makes no sense to abolish the feudal structure and retain the paramount superiority of the Crown. If that happens, we will not have abolished the feudal system.

Ultimately the total abolition of the feudal system is what followed under the 2000 Act. It would be a curious outcome to remove the Crown from the landownership structure

⁵² KLTR, *Bona vacantia* policies (16 June 2025), para BV1 available < <https://www.kltr.gov.uk/about/our-policies/> >.

⁵³ [2019] CSOH 82, at para 7.

⁵⁴ Stair Memorial Encyclopaedia, “Sources of law”, Volume 22 (Reissue), para 258.

⁵⁵ Swinton, “Dealing with abandoned property”, 65

⁵⁶ Scottish Parliament Official Report, *Justice and Home Affairs Committee*, (9 November 1999), col 366.

generally, but to then hold that a Crown boomerang exists under the inalienable royal prerogative meaning that the Crown will always have a claim to any ownerless property (heritable or moveable) in Scotland even if it wishes to disclaim or waive such a right.

For the reasons noted, it is suggested that the Crown boomerang does not exist, either at common law or a result of the 2006 Act. What is argued in this thesis is that the vacuum that Swinton spoke of is indeed the present law in Scotland, and what now appears to be reflected in practice. Accordingly, one should be comfortable with speaking of the existence of ownerless land in Scots law rather than presuming it is automatically owned by the Crown, or that the Crown will always have an inalienable claim to it.

11.4 Restoration of the former owner: divergences

One final comment must be made in respect of the divergences now found between Scotland and England in respect of *bona vacantia* and the Crown disclaimer. *ELB Securities* appears to have placed Scotland on a tangent from the other jurisdictions of the United Kingdom in how restoration of the former owner (the company) is dealt with by law, particularly where a Crown disclaimer has been issued. This section will illustrate these divergences.

Where a company is restored to the Companies Register, either by administrative restoration or through restoration by court order, the 2006 Act provides that it is to be treated as “deemed to have continued in existence as if it had not been dissolved or struck off the register.”⁵⁷ Difficulties can arise if any property has fallen to the Crown and has been disclaimed in the intervening period. Limited provision under the 2006 Act provides that any property disposed of by the Crown by “disposition” is still divested from the company despite restoration, albeit the Crown is liable to pay the restored company compensation.⁵⁸

What is unclear within the 2006 Act, which ultimately is what the Inner House in *ELB Securities* had to reconcile, is the effect of restoration of a company following a Crown disclaimer. The Inner House had found that as a matter of construction of the 2006 Act, any right disclaimed must be treated as terminated – even if the company is later restored. The company is restored but divested of the right disclaimed by the Crown. This approach differs from other interpretations of this part of the 2006 Act in the other jurisdictions in the United Kingdom.

⁵⁷ Companies Act 2006, s1028(1) and s1032(1).

⁵⁸ *Ibid*, s1034.

11.4.1 Restoration after disclaimer in England before *ELB Securities*

In England and Wales, successive court decisions have interpreted the restoration provisions of the 2006 Act as resurrecting any rights that a company had before dissolution, including ownership or any estate in land. This includes resurrecting any determined right, including both forms of estate (leasehold and freehold).

In *Allied Dunbar Assurance Plc v Fowle*,⁵⁹ a company having a leasehold was struck off the Companies Register. The Crown disclaimed the leasehold, but the company was subsequently restored. An issue arose as to whether the guarantors' (sureties') obligations under the leasehold revived upon the restoration of the company. In considering the relevant provisions of the then-applicable Companies Act 1985, Garland J found:⁶⁰

In my view, both the natural meaning of the words used and the policy of Ch. VI of Pt. XX of the 1985 Act point to an 'as you were' situation once the company is restored to the register, subject to the court's power to 'tidy up'.

Thus, in *Allied Dunbar Assurance* the restoration of the company meant the Crown disclaimer must be treated as *pro non scripto*.⁶¹ This approach was later extended to freeholds too. In *Fivestar Properties Limited, Re*,⁶² Cooke J considered whether a freehold estate had re-vested in the restored company despite a Crown disclaimer being issued. Ultimately his lordship concluded that:⁶³

The effect of restoration is that the freehold estate is retrospectively re-created and re-vested in the Company in all respects as if it had never been dissolved and as if the freehold had never been disclaimed.

Whilst the Inner House in *ELB Securities*, echoing the concerns of the Sheriff Principal, had been concerned about the "commercial chaos" that such an approach would create, Cooke J considered that:⁶⁴

There is if anything less reason to seek to protect the Crown (rather than a landlord) from uncertainty caused by Crown disclaimer, given that (a) the disclaimer is the Crown's own act and (b) if the Crown had in mind any dealing with the land that might be at risk on an unexpected restoration it has the more straightforward option of disposing of the *bona vacantia* interest rather than disclaiming it.

Therefore, different considerations were taken into account by the court in England and the courts in Scotland in relation to the need for certainty. These decisions preceded *ELB Securities*, and it may be that the Inner House provided greater clarity for the courts in the

⁵⁹ [1994] BCC 422.

⁶⁰ *Ibid*, at 433.

⁶¹ R Bagwell et al (eds), *Aldridge Leasehold Law* (loose-leaf, 134th release), para 6.243. See also *Shire Court Residents Ltd & Anor v Registrar of Companies* [1995] BCC 821.

⁶² [2015] EWHC 2782 (Ch).

⁶³ *Ibid*, at para 23.

⁶⁴ *Ibid*, at para 22.

rest of the United Kingdom. However, the remaining jurisdictions have since repudiated the approach in *ELB Securities*.

11.4.2 Northern Ireland: *Carrowreagh Management Company Limited*

The question of whether a Crown disclaimer remains effective after restoration has resulted in different answers across the United Kingdom, including in Northern Ireland with one of the first cases to consider the issue post-*ELB Securities*. *HSBC Bank Plc v The Registrar of Companies for Northern Ireland*⁶⁵ concerned the dissolution of Carrowreagh Management Company Limited (“Carrowreagh”).

Carrowreagh held a freehold estate of land forming a business park in County Down, Northern Ireland. In 2012 Carrowreagh was dissolved. In 2015 the Treasury Solicitor disclaimed the company’s freehold estate. HSBC Bank Plc held a charge in one of the leasehold estates within the business park. The Bank sought to vary some of the onerous covenants under the leasehold, which required the involvement of the freeholder (i.e. the dissolved Carrowreagh). The Bank engaged in discussions with the Crown Estate Commissioners to see whether the Commissioners would transfer the freehold interest held by Carrowreagh to the Bank, which in effect would extinguish the leasehold estate.⁶⁶ The Crown Commissioners declined this request.

The Bank then successfully restored Carrowreagh by court order to the Register of Companies on 11 May 2018. Consequently, the Bank brought proceedings to obtain a declaration that the freehold was vested in the now restored Carrowreagh, or that failing, the Bank sought a Vesting Order for transfer of the relevant part of the freehold estate. The Bank argued that the Crown disclaimer meant that the freehold estate “revested” in the dissolved company following restoration, even where a Crown disclaimer had been issued. McBride J opens her judgment with the following words:⁶⁷

Although each case [the decisions in England and Wales, and Scotland] considered essentially the same issue, the Scottish court reached a completely different conclusion to that reached by the courts in England and Wales. A recent article by Burgess Salmon LLP, dated 21 January 2016 and entitled, “*Bona Vacantia, Escheat and Company Restoration – A Grand Mess*” is an apt title to describe the difficulties which now exist in this area.

Her ladyship considered the English authorities, which are discussed below, and the Inner House’s decision in *ELB Securities*:⁶⁸

⁶⁵ [2018] NICH 18 (sub nom *Re Carrowreagh Management Co Ltd (No. N1606237)*).

⁶⁶ I.e.: Confusion (*confusio*).

⁶⁷ [2018] NICH 18, at para 2.

⁶⁸ *Ibid*, at para 31.

The Court of Session held that the 'general effect' of restoration of the company, was that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register. It held however that this general approach must give way to the specific and detailed provisions in the 2006 Act dealing with the company's property. The court held that the company's right in the lease came to an end on the date the Crown disclaimed the property and consequently the company did not retain the benefit of the lease and the landlord was entitled to possession.

McBride J acknowledged the divergence in English and Scots law:⁶⁹

The courts in England and Wales and the Inner House in Scotland have answered this question differently. The courts in England and Wales have concluded that the effect of restoration of a company to the Register is to re-vest the disclaimed property in the company. In contrast the Inner House concluded that restoration did not have this effect. Given the disparity of views expressed and given that none of the decisions is binding upon this court, it is necessary for this court to consider the statutory scheme and determine what effect dissolution of the company, followed by disclaimer of the lands and the subsequent restoration of the company had on its title to the lands.

Her ladyship, upon reviewing the construction of the 2006 Act and the interplay between restoration and the *bona vacantia* provisions, found:⁷⁰

The lands are treated as never having reverted to the Crown by escheat. Consequently, when the company was restored to the register it is treated as if it had never been dissolved and as if there had been no interruption by the disclaimer and the escheat of the lands and therefore treated as retaining title to the lands.

Conscious of diverging from the Inner House, her ladyship sets out as follows:⁷¹

The fact that Parliament considered it necessary to legislate separately for the jurisdictions suggests that there may well be underlying conceptual differences between Scots law on the one hand and the common law on the other hand in relation to the effect of disclaimer on its property rights. As a consequence I consider it more appropriate for this court to follow the English approach as it reflects the interpretation of the 2006 Act against the common law theory of property rights.

Accordingly, McBride J held that restoration restored Carrowreagh to the freehold estate despite the issue of a Crown disclaimer under 2006 Act. However, in Scotland, the decision in *ELB Securities* treats a Crown disclaimer as having the effect of terminating all of the company's rights, with resumption of ownership or other disclaimed rights through later restoration of the company seemingly being an impossibility.

11.4.3 The English approach after *ELB Securities*

Whilst it has been settled previously under *Allied Dunbar Assurance* and *Fivestar* that a disclaimer is to be treated as *pro non scripto*, the courts in England, upon considering *ELB*

⁶⁹ *Ibid*, at para 38.

⁷⁰ *Ibid*, at para 39.

⁷¹ *Ibid*, at para 46.

Securities, have declined to follow its persuasive authority, notably in *Mistral Asset Finance Limited v The Registrar of Companies*.⁷² Mistral had provided credit for the purchase of passenger vehicles. In 2017, Mistral provided a secured loan to Buzzlines Travel Limited with a charge granted over Buzzlines' leasehold estate. Buzzlines subsequently defaulted on the loan and was placed into liquidation and on 7 January 2020, and thereafter dissolved. HM Treasury Solicitor subsequently issued a Crown disclaimer. Mistral raised proceedings that it remained entitled to the charge over the leasehold estate, notwithstanding the Crown Disclaimer. However, whilst proceedings began, the former directors of Buzzlines obtained an administrative restoration of the company. Given the company's restoration interrupted matters, Halliwell J had to consider the following question:⁷³

On the hypothesis that the Crown's disclaimer took effect, did the Property automatically re-vest in the Company on restoration?

In contrast to *ELB Securities*, Halliwell J. found that the restoration re-vested the leasehold estate in Buzzlines. His lordship found:⁷⁴

Upon restoration, the Company was deemed to have continued in existence as if it had not been dissolved or struck off ... On that basis, the Company's property and rights could no longer be deemed *bona vacantia* ... and there could thus be no room for the Crown to have disclaimed such property In Scotland, the Inner House of the Court of Session have reached a different conclusion. However, the statutory regime in Scotland is not precisely the same as the regime applicable in England and Wales.

Again, similar to the Northern Ireland authority discussed above, *Mistral* conflicts with the Inner House's decision in *ELB Securities*, which held that the Crown disclaimer divests the company even after restoration.⁷⁵ However, a different approach is now being taken in England (and also in Northern Ireland) in respect of the effect of restoration, despite the issue of a Crown disclaimer.⁷⁶

11.5 Conclusion

The decisions of *Scottish Coal* and *ELB Securities* arguably offer authority for the proposition that the Crown disclaimer places property in a truly ownerless state. In doing so, a divergence with the approach taken to the effect of the disclaimer in the other jurisdictions of the United Kingdom has been created. Two main issues arise.

⁷² [2020] EWHC 3027 (Ch).

⁷³ *Ibid*, per Halliwell J. at para 15.

⁷⁴ *Ibid*, per Halliwell J. at para 15.

⁷⁵ *ELB Securities v Love* [2015] CSIH 67 at para [26].

⁷⁶ See further, Keay, *Company Liquidation*, para 17-042.

The first is that English (and Northern Irish) law appears to continue to allow disclaimed property to fall to the Crown by operation of the doctrine of escheat. Scots law no longer has any similar concept because of the abolition of feudal tenure. As a result, in Scots law, the position appears to be that a disclaimer of land creates a situation in which no person is able to complete title by way of derivative acquisition from the Crown. The Crown has rejected the possibility of taking ownership of the land. Post-disclaimer, in most cases the only recourse is by way of original acquisition by positive prescription or, by way of a vesting order under Section 1021 of the 2006 Act as forms of original acquisition.

In some respects, it appears that the drafters of the 2006 Act did not consider fully the consequences of implementing the English provisions for company liquidators into Scots law, creating a complex situation in which property is unable to be acquired by derivative acquisition and otherwise places the land into a ‘truly’ ownerless, or dormant, state. Yet, it may be that the Crown’s *bona vacantia* rights at common law have not been totally abolished or superseded by the 2006 Act in respect of companies alone. Currently in Scotland this possibility does not seem to be recognised to be the case. However, the post-feudal era is still relatively new to Scotland so further judicial authority may yet confirm that the Crown’s rights to *bona vacantia* do indeed continue to boomerang back to the Crown and the Crown is unable to disclaim property totally. From the statements that do exist in *Scottish Coal* and *ELB Securities*, alongside the practice of the KLTR, for the moment it would appear that this is not the case.

The second aspect is the interaction of restoration and the Crown disclaimer. In the rest of the United Kingdom, if a company is restored subsequent to the issue of a Crown disclaimer, the company’s property ‘re-vests’ into the restored company. However, following *Scottish Coal* and *ELB Securities*, the situation in Scotland is that restoration does not ‘re-vest’ title to the company following the Crown disclaimer.

ELB Securities and *Scottish Coal* appear to move Scots law away from the traditional view that property, once owned, can never be ownerless again.⁷⁷ With limited sources existing at this stage, it may be the case that further authority will be required before the issue is put beyond doubt. Whilst property law in Scotland remains unique to Scotland, the divergences between the different legal systems of the United Kingdom in respect of company law, which remains reserved to the UK parliament,⁷⁸ present a challenge for maintaining the UK as a single “economic unit”⁷⁹ if the Companies Act 2006 is now subject to different

⁷⁷ Gretton & Steven, *Property*, para 9.2.

⁷⁸ Scotland Act 1998, Sch 5, Head C.

⁷⁹ *Scotland’s Parliament*, (Cmnd 3658, 1997), para 4.3.

interpretations across jurisdictions. It may well be the case that this requires reconciliation by the Supreme Court in due course.

CONCLUSION

This thesis has sought to prove that ownerless land exists in Scots law, and to demonstrate that the observations by the Inner House in *Joint Liquidators of Scottish Coal, Noters* [2013] CSIH 108 were correct. It has done so by identifying and analysing three sets of circumstances in which land is ownerless.

The first is where a natural person dies, and subsequently their estate comes to be classified as a *haereditas jacens*. By examining the law in this area, alongside evaluating the competing theories discussed by academics, it has been concluded that this is a period of ownerless patrimony, in which the estate is unowned by any one person. During this period, any property that was owned by the deceased is ownerless on death pending an executor obtaining confirmation.

The second area where ownerless land has been identified is when certain juristic persons, such as companies, ceases to exist whilst still owning property. In these situations, the property becomes ownerless at dissolution. The Crown is able to claim this property as *bona vacantia*. It is submitted that prior discussion has misinterpreted the meaning of the maxim *quod nullius est fit domini regis* in relation to the *bona vacantia* doctrine by construing it to mean that ownership transfers to the Crown instantly. Instead, it is argued that the Crown does not hold ownership itself, but a lesser right to claim ownership that derives from the royal prerogative. The Crown is under no obligation, whether voluntary or whether by operation of law, to claim ownership and can decline to do so, whereby the property will remain in an ownerless state.

The third area is closely related to the second, and is arguably an extension of the same concept. If the Crown elects to disclaim or waive its right to claim ownership then the land becomes “truly” ownerless and the property can no longer be acquired by derivative acquisition.

Having outlined these arguments, it is hoped that the legal community in Scotland will recognise this phenomenon to better inform and enrich our understanding of the law in Scotland.

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