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The Scots Law of Donation

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Abstract

Donation, alongside sale and barter, is one of three recognised derivative modes of property acquisition in Scotland. Furthermore, it has long been said that donations do not need to be accepted to be complete. Yet, these two statements are incompatible. Scots property law requires a transferee to have an *animus acquirendi*, that is to say an intention to become owner, before a transfer can be accomplished. As a donee is a transferee, that person too must have this *animus* and therefore consent to the transaction: simply put, a donee needs to accept the donation. Additionally, Scots law recognises the principle of *beneficia non obtruduntur* - that benefits cannot be obtruded upon a person against that person's will.

Outwith the law, anthropologists and sociologists since Mauss' seminal *Essai Sur le Don* published in 1925 have recognised the social realities of gift-giving beyond a simple economic assessment of the donor's patrimonial diminishment that corresponds to the donee's enrichment. Donations are used in society to cement relationships, create non-patrimonial debts, and exert 'soft' power. It is argued that the law is in error if it ignores these consequences of gift-giving. Together, these factors would seem to contradict the notion that donations need not be accepted.

Given this inherent inconsistency in previous accounts of the law and the widely acknowledged social implications of gift-giving, this thesis seeks to clarify the process for, and the effects of, donative acts in Scots law. It is primarily doctrinal and split roughly into two parts. The first half considers general factors pertaining to all donations and the second half the categories of donation, offering an updated taxonomy to take into account changes in the law and practice.

The first part develops Professor Martin Hogg's suggestion that donation is not one but two distinct juridical acts, one obligatory and one proprietary, and establishes definitions of common terminology employed throughout the work. The boundaries of

the presumption against donation, the *animus donandi* (intention to donate), and the scope of what can be donated are explored, before examining who can be party to a donation. The final chapter of the first part looks to the origin of the 'non-acceptance' rule and fully sets out the argument against its application.

The second part considers different instances of donation and the specific rules for their execution and legal effects, starting with two now apparently defunct categories: donations *inter virum et uxorem* and donations *mortis causa.* The former concerned the revocability of donations between spouses at common law which was abolished by statute in 1920. The latter was a type of donation made in expectation of death but with an implied right of revocation for the donor, purportedly abolished by the Succession (Scotland) Act 2016. These have been included for completeness, as many historical accounts of the law and case law concerned these categories.

The final four chapters take in turn each type of donation in the updated categorisation: pure donations, remuneratory donations, conditional donations, and indirect donations. Pure donations are the simplest form made directly from a donor to a donee. A remuneratory donation is one made in recognition of a previously received good deed or act. A conditional donation is one made subject to a condition. An indirect donation is where a transfer or undertaking is made by the donor to an independent third party but that benefits the donee. For each category the key characteristics are identified followed by an examination of the requisite steps required to complete the donation and the legal effects created at each stage.

Ultimately, this thesis gives an account of the law of donation that is reframed around social and legal aspects which have hitherto not been considered. It is hoped that this will provide clarity and assist overall cohesion with other private law concepts.

Lay Summary

"Donation" is the conferring of a benefit by one person ("the donor") on another person ("the donee") during the donor's lifetime. This can take many forms, for instance handing over a birthday gift, putting money in a charity collection tin, or forgiving a debt. It is a common practice that is universally understood. Yet, conversely, precise definitions of "donation" are elusive. Questions are raised (among other things) about the roles of altruism, motive, capacity, influence, and reciprocity in determining whether an act is truly a gift. These issues become even more pertinent when looking at the subject through the lenses of law and regulation.

Considering how often gift-giving occurs, it may seem surprising that the Scots law on donation has not received much attention to date. As a result, some of the rules are unclear and underdeveloped. In addition, some existing discussions of the area appear to conflict with general principles of the law. It is for this reason that this thesis aims to provide an account of Scots law here.

To date, there has been no consensus about to which area of the law donation belongs. Alongside sale and barter, donation is normally considered one of the three derivative modes of transfer in property law. In other words, donation is one of three ways a person can transfer ownership of property to another person. Yet, the rules normally stated in relation to donation originate in another area: the law of obligations.

It is frequently stated that in Scots law gifts do not need to be accepted by a donee to be complete. The basis for this seems to be the doctrine of promise in the law of obligations, where a person can unilaterally undertake to another person to do (or not to do) something and that undertaking will be legally binding. However, to complete any transfer of ownership of property, the transferee must agree to become owner. Both parties are necessarily involved in the transaction. Thus, there is a conflict between the normally stated rules of donation law and its conception as a derivative mode of property acquisition.

This thesis addresses this conflict between the purported accepted rules and property law by concluding that “donation” in Scots law has two juridical meanings: one obligational and the other proprietary. Additionally, it categorises the different types of donation according to the circumstances in which they normally occur, and identifies the processes for making and accepting them from both an obligational and proprietary perspective. The categories are: pure (donations made without any conditions attached), remuneratory (donations made as a “thank-you” in recognition of a previously received good deed by the donor), conditional (donations made subject to a condition, for example, the occurrence of an event), and indirect (donations made by transferring something to an independent third-party for a donee’s benefit, such as discharging a donee’s debt).

Ultimately, this thesis concludes that donations do need to be accepted to be complete but that this does not impinge on a donor’s ability to be unilaterally bound, merely that by doing so the donee cannot gain a “right” automatically. That is, a donor may come under a legal obligation to perform a donative undertaking but this has no effect on the donee until acceptance. In addition, this thesis takes into account sociological observations regarding the institution of donation and presents the law in a manner consistent with these.

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Abbreviations

References in text are to the following editions unless otherwise stated

Bankton *Inst*	A M'Douall, Lord Bankton*, An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity Between Them and the Laws of England* (1751–1753, repr Stair Society vols 41–43, 1993–1995)
Bell *Comm*	G J Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (J McLaren ed) 7th edn, (1870, repr Butterworths 1990)
Bell *Dictionary*	R Bell, *Bell's Dictionary and Digest of the Law of Scotland* (G Watson ed, 7th edn, 1890, repr Edinburgh Legal Education Trust 2012)
Bell *Princ*	G J Bell, Principles of the Law of Scotland (4th edn, 1839, repr Edinburgh Legal Education Trust 2010)
Buckland *Roman Law*	W W Buckland *A Text-Book of Roman Law from Augustus to Justinian* (1921)
Carey Miller *Corporeal Moveables*	D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* 2nd edn (2005)
Cicero *De Officiis*	Cicero *De Officiis* (M Griffen and E Atkins (transl,1991))
Clark "On Donations"	T T Clark "On Donations" (1874) 18 J Jurisprudence 233-288

Dawson *Gifts and Promises*	J P Dawson *Gifts and Promises: Continental and American Law Compared* (1980)
DCFR	C von Bar and E Clive, *Principles, Definitions, and Model Rules of European Private Law, The Draft Common Frame of Reference (DCFR) Full Edition* Vol 3 (2009)
Eisenberg *Foundational Principles*	M Eisenberg *Foundational Principles of Contract Law* (2018)
Erskine *Inst*	J Erskine, *An Institute of the Law of Scotland* (1773, repr Edinburgh Legal Education Trust 2014)
Forbes *Inst*	W Forbes, The Institutes of the Law of Scotland (1722– 1730, repr Edinburgh Legal Education Trust 2012)
Fried *Contract as Promise*	C Fried *Contract as Promise: a Theory of Contractual Obligation* 2nd edn (2015)
Gloag and Henderson	H L MacQueen and Rt Hon Ld Eassie (eds) *Gloag and Henderson: The Law of Scotland* 15th Edn (2022)
Gordon “Donation”	W M Gordon, “Donation” *Stair Memorial Encyclopaedia* (Reissue, 2011)
Grotius *War and Peace*	H Grotius *On the Law of War and Peace* (ed. S Neff, 2012).
Hogg *Law and Language*	M Hogg, *Obligations: Law and Language* (2017)

Hogg *Obligations*	M Hogg, *Obligations* 2nd edn (2006)
Hogg *Promises and Contract*	M Hogg, *Promises and Contract Law: Comparative Perspectives* (2011)
Hogg "Promise and Donation"	M Hogg, "Promise and Donation in Louisiana and Comparative Law" (2011) 26 *Tulane European and Civil Law Forum* 172
Hyland *Gifts*	R Hyland *Gifts: a Study in Comparative Law* (2009)
Justinian *Inst*	P Birks and G McLeod (eds) P Krueger (transl) *Justinian's Institutes* (1987)
MacCormick *Institutions*	N MacCormick, *Institutions of Law* (2007)
Mackenzie *Institutions*	G Mackenzie *The Institutions of the Law of Scotland* (1684)
MacQueen and Hogg "Donation in Scots law"	H L MacQueen and M Hogg, "Donation in Scots Law" 2012 Jur Rev 1
MacQueen *Contract*	H L MacQueen and J M Thomson, *Contract Law in Scotland* 5th edn (2020)
McBryde *Contract*	W W McBryde, *Contract Law in Scotland* 3rd edn (2007)
Planiol *Traité Pratique*	M Planiol and G Ripert *Traité Pratique de Droit Civil Français, Tome V: Donations et Testaments* (1957)
Reid *Property*	K G C Reid with G L Gretton, A G M Duncan, W M Gordon & A J Gamble, *The Law of Property in Scotland* (1996)

Reid and Zimmermann *History of Private Law*	K G C Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000)
Seneca *De Beneficiis*	L A Seneca *De Beneficiis* (M Griffen and B Inwood (*transl*, 2011)).
Stair	James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland: Deduced from its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations* (1693, repr on demand 2020)
Walker *Principles*	D M Walker *Principles of Scottish Private Law* 4th edn (1988)
Wallace *System of Principles*	G Wallace *A System of Principles of the Law of Scotland* (1760)
Whitty "Unjustified Enrichment"	N Whitty "Unjustified Enrichment" *Stair Memorial Encyclopaedia* (Reissue, 2022)
Zimmermann *Law of Obligations*	R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990)

TABLE OF CONTENTS

CHAPTER 1:

INTRODUCTION

1) BACKGROUND

> "*Social scientists have ascribed a wide range of purposes to the gift. In certain circumstances, gift giving creates solidarity and smoothes the path for future interaction. In other situations, it maintains relationships of domination and may actually create enmity. In other words, gift giving has no unique function. It fills different roles at different times in different societies*".[1]

1.1 Donation is a nebulous and sometimes elusive concept. There have been many attempts at definition which are frequently contradictory. One commentator has described it as "an unforced, one-sided transfer, motivated by generosity and a spirit of selfless love",[2] while another has claimed it is "in theory voluntary, in reality obligatory given and received".[3] In law, some jurisdictions treat donation as a type of nominate contract which provides the basis (*iusta causa*) for a subsequent transfer,[4] whereas others characterise it only as a gratuitous transfer of ownership of property.[5] As Hyland states:

> "In the rich tapestry offered by the gift laws of the world, one of the few commonalities lies in the striking and confusing fact that a systematic

[1] Hyland *Gifts* para 137.
[2] C M Rose "Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges and (More Importantly) Vice Versa" (1992) 44 Fla L Rev 295 at 302.
[3] M Mauss *The Gift* (trans J Guyer, 2016) p 57. This is not "obligatory" in the legal sense but rather that social practice and expectations require gifts to be given in particular circumstances, to be received with appropriate gratitude, and to be reciprocated.
[4] As is the approach taken by DCFR Book IV Part H 1:101(2).
[5] As per the current modern definition in Scots law given by Gordon "Donation" in *Stair Memorial Encyclopaedia* (reissue) para 1.

> definition of *gift* is hard to find. (…) The assumption seems to be that what constitutes a gift is both so difficult to resolve into elements and yet so obvious that a proper definition is not needed".[6]

1.2 Given the lack of consensus about the definition of donation and even the area of law to which it belongs, it may seem unwise to undertake a research project into the subject. However, at the outset the author was blessed with the naivete of ignorance. The journey which has led to this thesis has, however, been rewarding. It is hoped that what follows will go some way to clarifying the law of donation in Scotland.

1.3 The account given here refines the existing understanding of the Scots law of donation, viewed in light of modern sociological perceptions of the practice, legislative changes, and underlying legal principles that conflict with previous statements of the law. This has led to the conclusion that, contrary to existing literature,[7] acceptance is required to complete a donation in Scotland. Furthermore, this thesis offers an updated classification of the types of donation, reflecting contemporary practice and statutory developments. Thus, the traditional categories of donations *mortis causa* (on death) and *inter virum et uxorem* (between spouses) are replaced in an updated taxonomy by the categories of conditional and indirect donations.[8] Throughout, the word "gift" is used synonymously with "donation".

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[6] Hyland *Gifts* para 208.

[7] Gordon "Donation" para 11 fn 11; Hogg "Promise and Donation" p 181; MacQueen and Hogg "Donation in Scots Law" p 17.

[8] These categories no longer apply due to statutory changes. Donation *mortis causa* has been abolished by the Succession (Scotland) Act 2016 s 25(1), and the rules for donations *inter virum et uxorem* are no longer applicable due to the Married Women's Property (Scotland) Act 1920 s 5. The general class of conditional donations has been acknowledged by the legislature: see Succession (Scotland) Act 2016 s 25(2) and the *Explanatory Notes to the Succession (Scotland) Act* para 76. The concept of indirect donations has not previously been explicitly recognised as a legal institution in Scotland, although it exists in other Civilian systems, such as France and Belgium, and is thus the most radical divergence from previous treatments of donation. However, it is becoming a demonstrably common way of making a donation, particularly with online shopping, which has significantly influenced its inclusion here.

2) DONATION AS A SOCIAL PRACTICE

a) General

1.4 "The gift is nothing less than the embodiment of the system of interpersonal social relations".[9] It occurs everywhere and every day for a multitude of socially motivated reasons – a coin placed in a charity box, birthday presents, the payment of a student-child's accommodation fees, to name a few examples. Yet, legal analysis traditionally approaches the subject from a private law perspective. As Hyland notes:

> "…private law concepts evolved to regulate exchange in the marketplace […] whereas gift giving takes place outside of the marketplace. […] The use of concepts from the private law guarantees distortion".[10]

1.5 In the marketplace, transfer of ownership of property is generally made in return for a reciprocal act or presumed equivalence.[11] Furthermore, this reciprocal act has traditionally been seen, at least by economists, as a moral good.[12] The paradigmatic example of this is sale, wherein there is an exchange of property with a symbolic token, money,[13] to which society has attached a patrimonial value. The underlying goal of this exchange mechanism is the accumulation of wealth through assets. Through this wealth, a person can exercise power through the ability to purchase more.

[9] J Godbout and A Caille *World of the Gift* (1998) p 18.
[10] Hyland *Gifts* para 212 (p 128).
[11] Godbout *World of the Gift* p 171.
[12] A B Weiner *Inalienable Possessions* (1992) p 28. See para 3.7 below.
[13] Stair I.9.4.

1.6 Donation inverts this: seemingly, one party is left poorer, at least from a patrimonial point of view. This is why the law traditionally distrusts donation,[14] for it seems to subvert the mercantile ideal of wealth accumulation in favour of a voluntary depreciation. As a result, "unlike exchanges, (…) seen as intrinsically self-policing, gifts have traditionally been the subject of highly formal requirements".[15] This is reflected in the strong presumption against donation.[16] Yet, what this market-driven interpretation of law fails to recognise is that this "impoverishment" of the donor is not a loss; it can be characterised as a gain of power not necessarily measurable in patrimonial terms.[17] A donor can use donation to exert social control, create power imbalances, and place a donee in a state of social debt.[18] Outside the technical legal language of "rights", "wrongs", and "obligations" lie the moral obligations that social practices produce. And these can be powerful things, even if not generally recognised or enforceable in a court of law.

1.7 On the positive side, donations can be used to cement social bonds, help build relationships of trust, and foster social cohesion.[19] To ignore this could have the result that "the only values that would count would be those that could be measured in terms of money and pursued in the dialectic of hedonism".[20] As noted, legal scholarship has hitherto mostly neglected to consider the sociological aspects of donation, whether they be positive or negative. Resultingly, it can be argued that the law does not give adequate weight to the social practice of donations, and thus fails to respond to the needs of the subject appropriately. This means that the law often undermines the social benefits of donation,[21] but also ignores the potential social harms.[22]

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[14] A Braun "Testamentary Promises Between Selflessness and Self-Interest" in A-S Hulin and R Leckey (eds) *L'abnégation en droit civil* (2017) p 26.
[15] J B Baron "Do we believe in generosity? Reflections on the relationship between gifts and exchanges" (1992) 44 Fla L R 355 at 357.
[16] Stair I.8.2; Bankton *Inst* I.9.20; Erskine *Inst* III.3.92; *Ross v Mellis* (1871) 10 M 197. See also below para 3.10.
[17] Godbout *World of the Gift* p 13.
[18] B Schwartz "The Social Psychology of the Gift" (1967) 73 *American Journal of Sociology* 1, 5.
[19] J Baron "Do We Believe in Generosity?" at 361.
[20] R Titmuss *The Gift Relationship: From Human Blood to Social Policy* (reissue, 2018) p 2.
[21] Through its hostility to gifts, reflected in the presumption against donation: see paras 3.2-3.15 below.
[22] See below paras 1.10-1.20.

1.8 When considering Scots law, the neglect of the social implications of a donation is manifested in two principal ways. First, there is apparently no requirement of altruism for a donor,[23] meaning donations can be used for the donor's personal gain that is not quantified in financial or other patrimonial benefits,[24] for instance by enhancing the donor's reputation or standing in the community. Thus, a donor can use a donation, and apparent loss, to make important gains.

1.9 Second, in Scotland it has been said that there no requirement for a donee's acceptance to complete a donation.[25] If this is the case, a donor can unilaterally exploit the social consequences of donation to their own ends by generating a degree of "soft-power" over a donee while also undermining a donee's autonomy. Social scientists have long recognised that an asymmetric gift can create a moral debt for the donee, through a power imbalance between the donor and donee created by an unspoken social "contract".[26] However, in Scotland the moral debt is ignored except with regard to a remuneratory donation,[27] where it serves to weaken the presumption against donation,[28] and also in cases where a gift is suspected to be a bribe.[29] It is argued in this thesis that this position is not only undesirable but mistaken.[30]

[23] See paras 2.34-2.39 below.

[24] This idea appears to be universal, for instance: the definition of "gratuitous" in the DCFR excludes any type of reward that can be equated with counter-performance by the donee (money, goods, or services). See: DCFR p 2816. Thus, only patrimonial reciprocity is considered, which does not include social debts.

[25] Gordon "Donations" para 11 fn 11.

[26] Z Crook "Fictive Giftship and Fictive Friendship in Greco-Roman Society" in L S Michal (Ed.), *The Gift in Antiquity* (2013) pp 66-67.

[27] A remuneratory donation is one that is made for a prior good deed received by the donor: Bankton *Inst* I.9.2. In other words, it is a "thank you" gift.

[28] See paras 3.2-3.15 and 8.7 below.

[29] In this instance, gifts are either monitored, for instance in the Register of Interests of MPs ("The Guide to the Rules relating to the Conduct of Members" (HC 1083, February 2023) p 13), or prohibited altogether. See para 4.33 below.

[30] See chapter 5: "The Non-Acceptance Rule: A Common Mistake?".

b) Donations used for the personal gain of the donor

1.10 Most modern sociological treatments of donation are founded on Marcel Mauss's *Essai Sur Le Don* published in 1925. Mauss studied so-called "primitive" societies, concluding that gift-giving was seldom altruistic, instead being used to create relationships of obligation and dominance by the giver that could only be balanced through reciprocal donations.[31] However, Mauss was not the first to acknowledge that gifts could be used for reasons other than benevolence. For instance, the Roman law of the Classical period, although only lightly regulating donations, barred gifts between spouses lest they be used to dissipate a family's patrimonial wealth,[32] and to promote love and trust between married persons.[33] Similarly, the *lex Cincia* of 204 BCE, which limited how much could be gifted and to whom, was probably introduced in part to prevent wealthy families from using gifts to corrupt public officials, "buy" influence, or induce support to gain positions of power.[34] Thus, the Romans also identified that donations could be used socially to further an individual's agenda and gain power, even if accompanied by a patrimonial loss, long before Mauss's time.

1.11 Further evidence of the Roman acknowledgement of, and distaste for, the ways a donor could potentially exploit donations for their own gain can be seen in philosophical works. As gifts in Roman society underpinned much of social, economic, and political life,[35] they were a prime topic for consideration, particularly when discussing the "ideal conduct" of a person. Cicero claimed that only the "most sordid and impure of reasons"[36] underpinned giving and accepting lavish gifts in exchange for allegiance. Seneca held that giving was a virtue, although the true benefit was not the object of the gift but the intention of the giver.[37] Thus, if the

[31] M Mauss *Essai Sur Le Don* (1925) (transl. J Guyer, 2016) pp 73-75.
[32] Dawson *Gifts and Promises* p 16.
[33] Dawson *Gifts and Promises* p 17.
[34] Zimmermann *Law of Obligations* p 483.
[35] C Corea "Legal Limitations of the Anthropological Notion of the Gift in Roman Law" (2014) 149 *Procedia - Social and Behavioral Sciences* 200, 201.
[36] Cicero *De Officiis* II, XXI.
[37] Seneca *De Beneficiis* I.VI.

giver's real intention was to benefit themselves, it could not truly be a gift, nor was the giver a "good man".

1.12 Given the intertwining of philosophy and law in the Roman era, legal restrictions were at least in part aimed at preventing gifts being used for personal gain. This begs the question: if it was recognised two thousand years ago that using donations to further one's own purpose was a social ill that should be discouraged and guarded against, why is it apparently not a concern in Scotland today? For, if it is true that Scots law does not require the acceptance of a donee to complete a donation,[38] donors are able to unilaterally create social debts in their favour and use donations to wield power. In contrast, if there is a positive requirement of acceptance of a donation, it not only prevents donors from potentially exploiting a position of relative wealth for their own means but ensures that donees who receive gifts do so knowingly and can be held accountable for their actions.

1.13 That said, the law is not completely blind to the potential influence that can be 'bought' through donations. For example, those acting in an official capacity are prohibited from receiving gifts,[39] and individuals are prohibited from making gifts to officials[40] if it is intended to induce the official to perform a function or activity improperly. These restrictions are aimed at preventing gifts being used to subvert the operations of official institutions that are supposed to be impartial or acting in the best interests of the wider public. However, while this limitation may appear clear, its enforcement can be limited by retrospective claims that donations were intended as loans,[41] or denying the connection between the donation and improper behaviour.[42] Additionally, this type of constraint is reserved for specific cases excepted by statute

[38] Gordon "Donation" para 11 fn 11; see para 1.9 above.
[39] Bribery Act 2010 s 2; see also https://www.gov.uk/government/publications/ssro-gifts-and-hospitality-policy/gifts-and-hospitality-policy.
[40] Bribery Act 2010 s 1.
[41] See, for instance, the controversy over Boris Johnson's Downing Street renovations: "Downing Street refurbishment: what is the row over Boris Johnson's flat?" available at https://www.bbc.co.uk/news/uk-politics-56878663.
[42] S Murphy "Robert Jenrick says he regrets dining with donor before planning decision" *The Guardian* 22/07/21 available at https://www.theguardian.com/politics/2020/jul/22/robert-jenrick-says-he-regrets-dining-with-donor-richard-desmond-westferry.

and does not address the general issue of social influence created by gift-giving in the private sphere.

1.14 Although, the courts have shown some, limited, hesitancy to recognise a transaction as a donation if the donor appears to have an ulterior motive behind the transfer. For example, in *Forrest-Hamilton's Trustees v Forrest-Hamilton*[43] the court refused to recognise an alleged donation by a deceased man to his wife made before his death, as the evidence suggested he acted in an attempt to avoid tax. Such a motive, it was suggested, could negate the requisite *animus donandi* (intention to donate)[44] that characterises an act as a donation. However, the case is by no means definitive because the transfer was made into a joint account bearing both the deceased and his wife's names. As such, it was held that the money had not been delivered since it had not been put beyond the reach of the purported donor during his lifetime. Therefore, any attempted donation was incomplete.[45] Hence, it is doubtful whether Scots law effectively guards against donors abusing donations for their own purpose outside restrictions on those acting in an official capacity.

c) Donations as tools of creating power-based relationships

1.15 While the personal gain of the donor may be for broader purposes than the immediate donor/donee relationship, possibly more important is the potential for a donation to be used for an individual to exercise power over another. Levi-Strauss claimed that all goods[46] "are not only economic commodities" but the tools for "influence, power, sympathy, status, emotion".[47] And, as noted above,[48] modern sociological thought about donations stems from Mauss, who asserted the same. While there may be criticisms levelled at Mauss's theory, particularly as he

[43] 1970 SLT 338.
[44] See paras 3.16-3.25 below.
[45] On the role of delivery, see paras 3.26-3.33 below.
[46] "Goods" in this context means transferable property.
[47] C Levi-Strauss "The Principle of Reciprocity" in L Coser and B Rosenberg (eds) *Sociological Theory* (1965) p 76.
[48] See para 1.9 above.

extrapolated a universal proposition from behaviours observed in only a few indigenous societies, few deny the basic truth in his assertions. Intention to use donations for the ulterior purposes of the donor is the so-called "Trojan horse"[49] exercise of donations.[50]

1.16 The law assumes, perhaps wrongly, that all donations are "beneficial" to the donee, merely because they bestow a pecuniary gain.[51] However, accepting a gift "often entails the assumption of certain social obligations to the donor".[52] Eisenberg argues that a gift has a "totemic value"[53] reflecting the strength of the relationship and degree of intimacy between the donor and donee. An inappropriate gift can create an imbalance of power, for instance if it is of a higher value than is representative of the relationship, at least in the eyes of the donee. This creates a social debt of reciprocity for the donee towards the donor. There are, of course, certain relationships or situations which do not necessarily imply reciprocity: a parent giving a child a Christmas gift, for instance. But the types of relationship which do not give rise to a social obligation to return tend to be those of particular close love, affection, and dependence, wherein the social norms are different. Thus, it is a strange paradox of gift giving that where the donor and donee are less proximate in their social interactions a heavier debt of reciprocity is incurred. For instance, I will feel the need to reciprocate a spontaneous gift from a work colleague more urgently than one from a romantic partner.

1.17 Furthermore, even within relationships which could imply a lesser degree of reciprocity, gifts can still be used to reinforce a power-based dynamic of superiority or dependence.[54] Posner gives the example of a parent who pays a child's university

[49] Named, of course, for the Greek infiltration of Troy executed by hiding soldiers in a "gift" of a wooden horse.
[50] The DCFR attempts to guard against the "Trojan horse" use of donations by requiring an "intention to benefit" the donee on the part of the donor. Without this, the act cannot be considered a donation: DCFR p 2800.
[51] Fried *Contract As Promise* p 43.
[52] Eisenberg *Foundational Principles* p 103.
[53] Eisenberg *Foundational Principles* p 104.
[54] Schwartz asserts that "it is generally true that men maintain ascendency by regulating the indebtedness of others to them": B Schwartz "The Social Psychology of the Gift" (1967) 73 *American Journal of Sociology* 1, 4.

tuition fees directly rather than giving the money to the child,[55] possibly because the child is not trusted to apply the money to the intended purpose. Such lack of trust could be considered to demonstrate a lack of respect for the age and responsibility of the university-aged child which, although may be warranted, strengthens the dominance of the giver over the beneficiary. Additionally, a threat to retain an expected gift can be wielded to coerce wanted behaviour: Father Christmas, after all, only comes to "good" children.

1.18 Of course, a donee has the right to reject a gift[56] and thereby the implied social debt arising from it. Yet in the absence of a requirement of acceptance a donee is denied the freedom to reject these social obligations before they are created.[57] Ownership of the property on this basis passes from the donor to the donee through the donor's will alone. If a gift is later rejected, ownership has to be reconveyed to the donor, with the donee incurring associated costs, both economic and social. Moreover, the donor could refuse to accept the reconveyance, leaving the donee with unwanted property. Given that a donation is taken with any burdens attached,[58] ownership could be onerous.

1.19 Historically, the law has shied away from interfering too heavily in private relations. As this is where donations typically occur, it may be a reason that gifts have been treated with a "light touch" and the ensuing social implications marginalised. Indeed, the shadow "gift economy"[59] is hard to regulate, given that most donative transfers of property are informally made. Nonetheless, if we consider that the law increasingly recognises and regulates insidious behaviours of control within personal relationships,[60] requiring an act of acceptance in donations would further the recent trend of protecting potentially vulnerable individuals.

[55] E Posner "Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises" (1997) 3 Wis L Rev 567 at 573.
[56] Stair I.10.4; Erskine *Inst* III.3.90.
[57] *Ibid.*
[58] Such as applicable taxes or proprietary obligations: *Ballantyne's Trs v Ballantyne's Trs* 1941 SC 35.
[59] Hyland *Gifts* paras 61-63.
[60] See, for instance: the Domestic Abuse (Scotland) Act 2018.

1.20 For example, a child under sixteen may be estranged from a parent, perhaps due to abuse or family breakdown. If we accept the claim that donations do not require acceptance[61] then the parent could transfer ownership of property to the child. Subsequently, the parent could then use the gift to attempt to resume contact with the child. If the child only has a right of rejection, there may need to be some interaction with the parent to reconvey the property. This could be years after the transfer, as the child would need to attain the age of capacity to make the reconveyance.[62] Alternatively, the child could feel obligated to demonstrate gratitude towards the parent. Such a rekindling of relations could have serious emotional consequences for the donee. However, if the donation cannot be conveyed, and thus completed, without acceptance, then there are no proprietary consequences of the attempted gift. The child need do nothing and can continue to have no contact with that parent. As such, a positive requirement of acceptance is surely preferable to a simple power of rejection. This view underpins the analysis presented in this thesis.[63]

3) METHODOLOGY AND OVERVIEW OF THESIS

1.21 This thesis is predominantly doctrinal, although practical examples and implications are considered where relevant. With its focus on Scots law, it is not primarily an exercise in comparative law, although the laws of other jurisdictions are discussed at times, particularly where domestic rules seem unclear, vague, or somehow otherwise lacking. Similarly, although this is not an historical examination, analysis of older sources is employed where it assists the understanding of the development of the modern law.

[61] Stair I.10.4; Gordon "Donation" para 11 fn 11.
[62] See paras 4.16-4.22 below.
[63] See Chapter 5 for further discussion on the role of acceptance in donations and paras 7.39-7.42 for the role of a child's representative in accepting a gift where the child lacks transactional capacity.

1.22 Broadly speaking, the thesis is divided into two parts. The first half (chapters 2 to 5) deals with factors pertaining to all types of donation. The second half (chapters 6 to 10) considers the different categories of donation, both past and present, looking at the key characteristics of each and the legal effects created at each stage of their execution.

1.23 Chapter 2 builds on Professor Martin Hogg's contention that Scots law recognises two juridical acts in relation to a donation. The first is obligatory ("J1"), the second proprietary ("J2"). The chapter offers a definition of each before considering the other terminology to be used in this thesis.

1.24 Chapter 3 outlines some matters relevant to all donations, regardless of type. These are: the presumption against donation; the *animus donandi* (or intention to donate); and the scope of the donum (what can be donated). Particular focus is given to ascertaining where the presumption against donation can be displaced, how the *animus donandi* is constituted, and the limitation of the donum to patrimonial assets.

1.24 Chapter 4 considers who can be a donor or donee. The necessity for active transactional capacity is demonstrated and circumstances in which this must be exercised by a legal representative are noted. Analysis is undertaken of both natural and legal persons, focusing on the restrictions on making or receiving donations due to either an office or position held, or the surrounding circumstances in which a purported donation takes place.[64] This chapter also considers the "unknown" donee by offering a brief exploration of the almost forgotten institution of *traditio incertae personae* (transfer to an uncertain person).

[64] For instance, the insolvency of a donor makes the gift open to reduction by creditors as a gratuitous alienation: Bankruptcy (Scotland) Act 2016 s 98.

1.25 Chapter 5 sets out the core argument of this thesis: the assertion donations do not have to be accepted in Scots law[65] is mistaken. It is contended the conventional position arose from a conflation between Stair's account of promise and donation,[66] highlighting that historically there has been some dispute between academic authors regarding the role of acceptance. This strengthens the idea that non-acceptance should not be received as the unquestionable position. It is then demonstrated that the non-acceptance rule conflicts with the principle of *beneficia non obtruduntur* – benefits cannot be imposed upon a person. Further, it contradicts the need for a transferee to have an *animus acquirendi* (intention to become owner) in order to complete a conveyance[67] and thus any transfer must by definition be a consensual, bilateral act.

1.26 Chapter 6 considers briefly the historic, but now defunct, categories of donation: donations *inter virum et uxorem* (between spouses) and donations *mortis causa* (on death). The origins of these are traced followed by an exploration of their demise. Nevertheless, the legislation which purportedly abolishes donations *mortis causa* seemingly makes it possible for the practice to continue.

1.27 Chapters 7 to 10 examine the main characteristics, process for making, and legal effects of the four modern categories of donation in Scots law: pure (chapter 7), remuneratory (chapter 8), conditional (chapter 9), and indirect (chapter 10). Each chapter considers these donations from both an obligational ("J1") and property ("J2") perspective. The last two of these chapters represent a deviation from the traditional categories in light of the changes which brought donations *inter virum et uxorem* and *mortis causa* to an end. These two categories are identified through comparisons with other jurisdictions and observation of practice.

[65] Gordon "Donation" para 11 (fn 11).
[66] See paras 5.4-5.12 below.
[67] Stair *Inst* III.2.4.

1.28 The treatment of pure, or "simple", donations forms the basis for all donative categories. As such, chapter 7 is the most substantial of the four chapters on the modern classification. Building on the argument in chapter 5, it utilises a Hohfeldian analysis in relation to a "J1" donation to contend that the unilateral act of the donor creates a "power" in favour of the donee rather than a "claim-right" in the strict sense. This reconciles the ability of a donor to unilaterally become bound legally without contradicting the principle of *beneficia non obtruduntur*, as a "power" gives the donee the ability to formalise a legal relationship between the parties through acceptance. This completes the donation by transforming the "power" into a "claim-right". In relation to a "J2" proprietary donation, close attention is given to the point at which ownership of the donum is transferred from the donor to the donee, particularly where there is a temporal gap between delivery and acceptance.

1.29 A remuneratory donation, as discussed in chapter 8, is made for a moral cause in response to a benefit or good deed which the donor has previously received from the donee. This moral cause is the principal difference from a pure donation. While not a legal obligation, and thus commensurate with the definition of "gratuitous" discussed in chapter 2,[68] it is pivotal to displacing the presumption against donation. As such, the courts have been more likely to uphold a remuneratory donation than other types of gift. However, care must be taken to distinguish between a remuneratory donation and a disguised sale.

1.30 The category of conditional donations outlined in chapter 9 is the first of two proposed new classifications of donation. This is because not only the courts[69] but also the Scottish Parliament[70] have acknowledged that it is possible to make a conditional donation. A condition affects a donative act, both in terms of the constitution of a J1 obligation and the J2 point of transfer. This is particularly true where the donee may be in prior possession of the donum but the donor's *animus donandi* is not crystallised until the condition is met. Furthermore, a condition may be

[68] See paras 2.21-2.40 below.
[69] For instance: *M'Gibbon v M'Gibbon* 1952 SC 605.
[70] See paras 6.32-6.35 below.

imposed by the donor that permits revocation in certain circumstances. Cumulatively, these considerations warrant conditional donations being given specific treatment within their own category.

1.31 Finally, chapter 10 introduces the category of indirect donations. An indirect donation is where a donor makes an undertaking or transfer to a third party, who is acting as an autonomous legal person, but the transaction results in a benefit to the donee. The paradigmatic example of this is a gratuitous payment of another's debt; however, other acts may also constitute an indirect donation, for instance a purchase by the donor from a third-party seller to be delivered directly to the donee. This category has been introduced due to the implications in a three-party situation for the donee's ability to reject the donation and the legal effects of doing so. It is contended that with a J1, because the undertaking is gratuitous, any original obligation is not extinguished prior to acceptance by the donee. It is also argued in this chapter that the Sale of Goods Act 1979 cannot apply in an indirect J2. This is because the legislation provides it regulates contracts for sale only where the seller transfers the goods to the buyer.[71] As such, the common law governs these transfers, meaning that ownership remains with the seller until possession is acquired by the donee. This makes the law concomitant with the principle that a donor cannot obtrude a gift onto a donee.

1.33 While this thesis attempts to be as comprehensive as possible, there have been practical constraints. Partly this is because this area of law has not been the focus of much modern academic scholarship.[72] Nor are the courts overrun with disagreements concerning donations. Thus, the majority of the primary source material is to be found in the institutional writings and nineteenth century case law. The other main constraint is the thesis word limit. Not all aspects of donation can be

[71] Sale of Goods Act 1979 s 2(1).

[72] In term of scholarship, the only recent works are: Gordon "Donation" (SME, reissue); M Hogg "Promise and Donation"; H MacQueen and M Hogg "Donation in Scots Law"; and Scots law is considered as part of a comparative PhD thesis by J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow). Assis' PhD thesis, while an excellent work, approaches donations with a different focus and deals with separate issues. As such, the analysis herein is not merely a repeat of this previous work.

covered. The focus is predominantly on the common law doctrinal application of donation, so where there are statutory frameworks in place, for instance, regarding the operation of charitable organisations,[73] these are not discussed. Where questions about the common law remain unanswered, these are highlighted. Nevertheless, it is hoped that this thesis will provide some clarity to a subject that has hitherto suffered from a degree of uncertainty, not least regarding the area of law to which it belongs.

[73] Charities and Trustee Investment (Scotland) Act 2005 to be amended by the Charities (Regulation and Administration) (Scotland) Act 2023.

CHAPTER 2:

Donation as Two Juridical Acts and Terminology

1) INTRODUCTION

> "A definitional element adds more than descriptive detail. It establishes limits, creates the subject of dispute, and may require additional proof from those who wish to invalidate a transaction and those who are asking the court to approve it. Each element inspires debate in the scholarly literature and adds factors for judicial interpretation. Because an element in a legal definition may decide which of two claimants gains title to property, even minute differences are meaningful."[74]

2.1 Any person undertaking an analysis of the law must first consider the language that is to be used. Precise definitions can help clarify exposition, highlight inconsistencies, and permit any hidden gaps to be filled. As Professor Hogg notes: "these words can (…) be styled 'fundamental structural language': they form the foundations of the law and give it shape".[75] Therefore, this chapter sets out clearly the intended meaning of the principal vocabulary being used.

2.2 It is particularly important that a study of the law of donation attempts to explain the language employed, given the confusion that has hitherto surrounded the subject. The institutional writer, Mackenzie, writing in the seventeenth century, described donation as "a mere liberality proceeding from no previous compulsion".[76] This definition, however, has too many implicit factors to be of much use to a contemporary examination of the law. For instance, "liberality" is an uncommon word in everyday speech. Additionally, it could potentially cover a very broad spectrum of

[74] Hyland *Gifts* para 222.
[75] Hogg *Law and Language* (2017) p 1.
[76] Mackenzie *Institutions* III.iii.

acts, encompassing far more than a technical definition of donation ought to. In contrast, in the "leading modern discussion"[77] of donation in the *Stair Memorial Encyclopaedia*, the concept is defined as "a gratuitous transfer of property intended to take place *inter vivos*".[78] On the face of it, this is a reasonable and comprehensive statement, limiting the scope of the act enough to avoid confusion. It firmly places donation in the realm of property law.

2.3 Yet this is also potentially misleading, partly because the historical treatment of donation by the institutional writers placed it within the context of the law of obligations.[79] The obligational rules they set out have been applied in modern times to the property law understanding of donation mentioned above, conflating the two concepts and giving rise to conflicts of legal principle. As Professor Zimmermann has observed, any policing of the law "requires (…) some conceptual clarity of what the law of donation is".[80] This is lacking in Scots law at present.

2.4 The absence of clarity in legal exposition is compounded by the fact that "donation" has previously been used to cover a wide range of gratuitous deeds in a variety of different areas of law, including in succession.[81] Colloquially, it covers several activities and circumstances, for instance organ donation and free provision of services. Thus, this chapter attempts to find appropriate definitions for donation. Building on the work of Professor Hogg,[82] this chapter argues that donation should be viewed as two distinct juridical acts: a "J1" obligation and a "J2" proprietary increase to the donee's patrimony. A J1 must be followed by, or coincide with, a J2. For example, a party can bind themselves in a J1 to pay a child's rent at university months before the child moves into the accommodation and payments become due. The undertaking to pay is still a form of donation despite the actual transfer (the

[77] MacQueen and Hogg "Donation in Scots Law" at 3.
[78] Gordon "Donation" para 1.
[79] Stair I.8; Bankton *Inst* I.9; Erskine *Inst* III.3; Bell *Princ* § 64 and Bell *Comm* I, 314.
[80] R Zimmermann *Law of Obligations* (1996) 478.
[81] *Murray v Executors of Rutherford* (1664) Mor 13300. Other jurisdictions, such as France (Code civil art 893), continue to characterise donation alongside testamentary dispositions under the wider moniker of "liberalities".
[82] Hogg "Promise and Donation" at 174.

paying of rent) not occurring until a later date, given the gratuitous character of the act.[83] Contrastingly, a J2 can occur without a preceding J1. For example, the handing of money to a beggar in the street is a donation involving only a J2.

2.5 This chapter first explores the separate definitions of each juridical act, focusing on the respective patrimonial effects. After discussion of the two juridical conceptions of donation, the relevant technical meanings of the language and aspects of what constitutes a donative act are considered. These key terms are "gratuitousness", "unilaterality", "irrevocability" and the "*inter vivos*" nature. The suggested definitions posited in this chapter form the basis for the analysis of the different categories of donation in the second half of the thesis.

2.6 There are certain authors whose writing is relied on heavily here because of the extensive research and scholarship they have undertaken in the areas being considered. In particular, this chapter owes a great debt to Professors Hogg and Gordon for their work on the language of the law and donation in general.[84]

2) DONATION AS TWO JURIDICAL ACTS

2.7 As noted above,[85] this thesis contends that the term "donation" applies to two distinct juridical acts,[86] the first being part of the law of obligations, the second belonging to the law of property. Properly speaking, "donation" is the term used to characterise the underlying cause of the act. However, there are differences

[83] See below paras 2.21-2.40.
[84] M Hogg *Law and Language* and Gordon "Donation" in particular.
[85] See above para 2.4.
[86] A juridical act is "a key term in the civilian lexicon that expresses the fundamental principle of the will (…) premised on the idea that a person (…) can acquire, modify, transfer, or extinguish rights": N Davadros "A Louisiana Theory of Juridical Acts" (2020) 80 La L Rev 1120-1283 at 1120. Furthermore, the theory of juridical acts "elaborates general rules and principles as to the structure and essential elements of a juridical act" (Davadros at 1121).

between a “donation” in the sense that the donor becomes bound to make a divestment in the donee’s favour, creating a *ius ad rem* (a personal right to the donum) for the donee, thus making the donor the donee’s debtor, and a “donation” in the sense that the donor is actually divested of the donum with the donee gaining a *ius in rem* (a real right in the donum).

2.8 The following definitions are proposed for a donative obligation and a proprietary donation:

> J1 – Donative obligation
>
> “A donative act whereby a person (“the donor”) is bound *inter vivos* under a unilateral obligation to gratuitously divest itself of a patrimonial asset or entitlement (“the donum”) in favour of another person (“the donee”) when there is no pre-existing obligation to do this”.

> J2 – Proprietary donation
>
> “A proprietary donation is where a person (“the donor”) gratuitously divests itself of a patrimonial asset or entitlement (“the donum”) for the benefit of another person (“the donee”) whose patrimony is correspondingly invested with a *ius in rem* to the full extent of the value of the donum”.

2.9 Both definitions refer to a divestiture of the donor which results in a patrimonial benefit for the donee. The differences are that the definition of a J1 obligation encompasses the future nature of the act, the unilateral and gratuitous characterisation, and the voluntariness (“no pre-existing legal obligation”). Distinct from this, the J2 definition indicates the donee’s present investiture to the full extent of the donum’s value. Furthermore, it demonstrates a parallel diminution to the donor’s patrimony to the donee’s patrimonial gain.

2.10 The first person of whom the author is aware to assert clearly that "donation" can apply to two distinct juridical acts was Professor Hogg in his article "Promise and Donation in Louisiana and Comparative Law".[87] He noted that in some legal systems (including Scotland) it is possible for a person to become legally obliged to make a donation prior to making a transfer in implement of that obligation. He argued that although both may be stages of the same transaction, each is a separate juridical act.[88] The shorthand of "J1" for the obligational act and "J2" for the proprietary act used in this thesis comes from this article.

2.11 Although Professor Hogg may have been the first to analyse donation explicitly as two separate juridical acts, the idea that there may be an obligatory as well as proprietary aspect to donation has been acknowledged for a long time.[89] It has been recognised that there is a "clear distinction (…) between an obligation to give and a conveyance in implement of that obligation".[90] After all, "*traditionibus… dominia rerum non nudis pactis transferuntur*".[91] But the details of that distinction have not always been given close consideration.

2.12 One significant but subtle difference between a J1 obligation to give and a J2 transfer is that a J1 is an act which creates a novel right. It is "novel" in the sense that the right only comes into existence through the constitution of the act. Contrastingly, in a J2 transfer no new right is created: if I give a copy of Stair's *Institutions* to a friend, I am not authoring the work myself or manufacturing the book. Instead, it is an act whereby I am divested of a pre-existing right of ownership of an

[87] Hogg "Promise and Donation" at 174.
[88] *Ibid*: "In a more extended case of donation, however, the juridical act of transfer may be preceded by a preliminary juridical act, such preliminary act being a commitment of the intending donor to undertake the act of donation at some specified future point (…) This more extended case of donation thus includes two stages as components of the transaction." That is not to say that a J2 is necessarily preceded by a J1, merely that the law recognises the legitimacy of a J1 and that if one is created it will be succeeded by a J2 as part of the same longer transaction.
[89] J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow) p 81. This is not just the case in Scotland: for example, Posner distinguishes between "a gratuitous promise" which is "a promise to give a gift" and "a gratuitous transfer" as the "actual giving of a gift": E Posner "Altruism, Status and Trust in the Law of Gifts and Gratuitous Promises" (1997) 3 Wis Law Rev 567 at 570.
[90] Gordon: "Donation" para 5; Erskine *Inst* III.3.90; Hogg *Obligations* para 2.20.
[91] "Delivery (…) not bare agreement transfers ownership": *Codex* II.iii.20; Stair III.ii.5; Erskine *Inst* II.i.18.

asset in favour of my friend who is correspondingly invested to the full extent of the asset's value for little or no consideration.[92] In other words, the right of ownership may be new to my friend but it is not a new real right: there is a right of ownership in the property and that right is conveyed. Some differences between the juridical acts are implicit in the nature of each, but others are explicitly included or excluded. A donee in a J2 proprietary donation acquires all benefits stemming from having the asset's value and use in the donee's patrimony.[93] As no person can have a benefit forced upon them,[94] this infers that the donee's consent to, and thus acceptance of, the benefit is required to complete the transfer.

2.13 Traditionally, there has been a conflation of the two different juridical acts. Indeed, in Gordon's treatment of donation in the *Stair Memorial Encyclopaedia*, despite describing donation as a gratuitous transfer of property he then applies rules originating in the law of obligations. One of the problems with this approach is that, while voluntary obligations may be unilateral in Scotland (for instance, a unilateral promise), a voluntary transfer cannot be:

> "…there appear to be no cases recognised in our law of non-consensual investiture. The principle remains inviolate that no one can unwillingly become a proprietor."[95]

Thus, this thesis seeks to unpick this conflation and analyse the separate parts of donation from both an obligational and a proprietary perspective. It is hoped that by doing so some clarity can be brought to the subject and apparent contradictions

[92] An act may be considered a donation despite there being a possibility of consideration, see: *Beattie's Trustees v Beattie* (1884) 11 R 846, and in other jurisdictions the extent of a gift is to the value in excess of any charge or remuneration, see, for instance, Quebec Civil Code § 1810. It is the contention of this thesis that this also applies in Scotland.

[93] Patrimony in this sense is aggregate of "the assets which [a person] owns as an individual", see *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76 at para 12 per Lord Malcolm; Discussion Paper on *Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006) para 1.5.

[94] Reid *Property* para 611.

[95] K G C Reid and G L Gretton "All Sums Retention of Title" 1989 SLT (News) 185 at 187.

arising from the blurring of boundaries between proprietary and obligational conceptions of donation can be resolved.

a) Donation as an obligation: "J1"

> "A donative act whereby a person ("the donor") is bound *inter vivos* under a unilateral obligation to gratuitously divest itself of a patrimonial asset or entitlement ("the donum") in favour of another person ("the donee") when there is no pre-existing obligation to do this".

2.14 It could be argued that a J1 donation is merely a subset of a promise, limited by the fact that it can only relate to a *future* transfer of property or permanent increase to the donee's patrimony.[96] The two legal vehicles share many features: they both result in the recipient gaining a personal right; they relate to future performance; they are created voluntarily; the donor is bound upon its constitution without any right to reciprocal performance by the donee; and writing is required for constitution.[97] Given that promise and a J1 have such features in common, a person could be forgiven for assuming that the established rules for the constitution of a promise can be transplanted directly to a J1, for instance that it can be constituted unilaterally by the donor. This has historically, and more recently, been the position taken by jurists.[98]

2.15 However, one of the issues with merely transplanting the rules for promise to a J1 is that this fails to recognise the specific characteristics of a J1. Although both relate to performance of future acts, a J1 presently confers a benefit.[99] Upon creation

[96] This is despite the fact that it is a present act: any transfer or increase to the donee's patrimony must follow on temporally after the constitution of a J1, even if the time between the two acts is minimal.
[97] Unless made in the course of business: Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).
[98] Stair did not mention donation in his treatment of promise (Stair I.10.4) but his successors have commonly cited this passage as authority for the rules applicable to donation: Erskine *Inst* III.iii.88**;** Gordon "Donation" para 11.
[99] J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow) p 96.

of a J1 a donee becomes the creditor of the donor with a right to rank in the event of the donor's insolvency,[100] because the obligation gives the donee a claim to a specific benefit, the donum. This means a J1 has a patrimonial value that can be transferred as an asset. Contrastingly, the subject of a promise does not need to relate specifically to property. It can also be an undertaking not to do something. Such an undertaking does not necessarily have a patrimonial value, and without such value a promisee has nothing to claim for in the event of the donor's insolvency. Furthermore, as a J1 is an asset, the donee's consent is necessary to complete its constitution, if only because anything which amounts to a benefit in a patrimonial sense is subject to the principle of *beneficia non obtruduntur* (benefits cannot be thrust upon another person).[101] Finally, a J1 can also be constituted as a gratuitous contract,[102] whereas a promise is by its nature unilateral. As such, it is the contention of this thesis that a J1 is a special type of juridical act that, although related to promise, has specific rules of its own.

b) Proprietary donation: "J2"

> "A proprietary donation is where a person ("the donor") gratuitously divests itself of a patrimonial asset ("the donum") for the benefit of another person ("the donee") whose patrimony is correspondingly invested with a *ius in rem* to the full extent of the value of the donum".

2.16 As noted above,[103] even if a donation can be characterised in obligatory terms, this does not transfer ownership.[104] All a J1 can do is create a *ius ad rem* – a right *to* the thing, not *in* the thing.[105] Thus, for a donee's patrimony to be enriched by becoming owner of the donum, or fully receive the benefit of the donum into it, there

[100] Bell *Comm* II, 185.
[101] This is explored in more detail in paras 5.65-5.69 below.
[102] For instance, in a conditional donation: see para 9.31.
[103] See para 2.12.
[104] Erskine *Inst* II.1.18.
[105] Erskine *Inst* III.3.90.

must be some further act that must be proprietary in nature. It would be simple, but perhaps misguided, to merely state this as a transfer of ownership of property, for (as noted above)[106] a donation can be the waiving of a debt, an act which does not involve the passing of ownership. This type of donation, which represents an increase to the donee's patrimony of a real right in the donum, is termed in this thesis a "J2".

2.17 One of the principal distinctions this creates with a J1 obligation concerns the handing over, or passing of control over, the donum. A fundamental element of transfer, or a patrimonial increase, is that the donor relinquishes control.[107] With a pure, remuneratory, or conditional J2 this may be a direct transfer of control to the donee. However, control does not always pass directly to the donee, as in the case with constructive delivery.[108] Additionally, where the donation is a transfer to a third party for the donee's benefit, such as with certain types of indirect donation,[109] the donee will never have control over the *donum*, even though the donee's patrimony will be enriched to the extent of its value.[110]

2.18 Furthermore, there may be situations where control of property is transferred but there is no transfer of ownership yet,[111] such as where possession is transferred but the donation is subject to a suspensive condition still to be fulfilled.[112] Alternatively, the transfer may have preceded the donation on another legal basis, as with a donation by waiver of a debt. In this situation the donor's patrimony is diminished while the donee's is correspondingly enriched to the extent of the debt's value. Thus, to encompass all these instances of donation, rather than define a J2 in terms of a transfer of ownership of property from the donor to donee, it is better framed in terms of a patrimonial loss of the donor which corresponds to a patrimonial

[106] See para 2.5.
[107] Reid *Property* para 619.
[108] *Ibid*.
[109] See below chapter 10: "Indirect Donations".
[110] For instance, the example of a parent paying a student child's rent directly to the landlord. See Chapter 11: Indirect Donations.
[111] Due to the difference in Scots law between the rights stemming from possession and from ownership: C Anderson *Possession of Corporeal Moveables* (2015) paras 3.10, 3.19-3.28.
[112] As was the case with the former institution of donations *mortis causa*: see below para 6.24.

gain of the donee. This would also permit sales at significant undervalue to fall into the remit of donation law.[113]

2.19 Upon completion of a J2 there is immediate divestiture of the donor and investiture of the donee.[114] If the donation is a transfer of ownership of property, it is subject to the normal rules of transfer. For instance, in the case of corporeal moveable property, there must be delivery (or equivalent)[115] of the property and the donee must have the requisite *animus acquirendi* to become owner. Thus, the consent of the donee is necessary. Ascertaining the point of consent may prove difficult, especially if there is a temporal difference between the time of delivery and acceptance. This may have implications for who bears the risk in relation to the donum and who is liable in the case of harm caused.[116] If the donation is a waiver of a right, this must be clearly communicated and the donee given the opportunity to accept or reject.[117]

2.20 Importantly, a J2 need not necessarily be preceded by a J1, for instance in a spontaneous donation made by placing money in a charity tin. Nonetheless, the distinction between the juridical acts is important for two reasons. First, it helps establish how a donation is properly executed and completed in each context, and second, it acknowledges the distinction in the nature of the right acquired by a donee as a result of a J2 compared with a J1. In order to do so, there must also be a clear understanding of the language used to describe the law of both a J1 and a J2. Many words have different possible interpretations, both from a social and legal perspective. As such, the following pages explore the different interpretations of the key terminology associated with donations, establishing which apply in Scots law.

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[113] This is despite that "every price which the parties have agreed upon is, in the judgement of the law of Scotland, just, if they have not been drawn into the contract by fraud or deceit": Erskine *Inst* III.3.3. However, recent caselaw would suggest that this position might no longer be considered absolute, and a sale at undervalue may be considered a donation: *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd v Carnbroe Estates Ltd* 2020 SC (UKSC) 23.

[114] See also para 7.100 below.

[115] See below paras 3.35-3.42.

[116] Discussed below at paras 7.68-7.69.

[117] For discussion on acceptance in general, see below chapter 5: "The non-acceptance rule: a common mistake?". On waiver generally, see: E C Reid and J W G Blackie *Personal Bar* (2006) para 3.15.

3) KEY TERMINOLOGY

a) Gratuitous

i) Dual function

2.21 The most common, and perhaps most difficult, word associated with donation is "gratuitous".[118] It can encompass many different elements and has numerous potential interpretations. As Professor Hogg notes:

> "the three English words offered as translations for 'gratuitous' point to subtly different, albeit related, ideas which are reflected in differing legal understandings of the term (…): (i) something undertaken for free, that is without payment or other value being given for the undertaking; (ii) something undertaken spontaneously, without prompting, and (iii) something undertaken without compulsion or without having been obliged to undertake it …"[119]

2.22 All three ideas embrace the voluntary nature of the act. But other acts may be given for free without amounting to a donation, such as giving a person a tour of a building. Likewise, other acts may be "voluntary" and entered into spontaneously or without compulsion, for instance an impulse purchase,[120] which means that voluntariness alone cannot suffice to make an act "gratuitous". In this regard, (ii) and (iii) in Professor Hogg's passage above would be insufficient as the sole possible interpretations of "gratuitousness" as the word applies in relation to donation. Additionally, although related to (i) in the above passage, gratuitousness in donation is slightly different in that it also refers to a donor's inability to compel counter-performance. Thus, "gratuitousness" has both a pre-action component, which entails

[118] J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow) p 88.
[119] Hogg *Law and Language* p 180.
[120] An impulse purchase is one that is made on the spot rather than being pre-planned.

voluntariness (but not exclusively), and a post-action element, concerning the lack of power to enforce a reciprocal performance from the donee (thus entailing a corresponding patrimonial loss and gain between the parties). The distinction between the two conceptions is fine, but the former focuses on the liberal origins of the donor's actions whereas the latter underscores the absence of obligation on the part of the donee.

ii) "No adequate consideration"

2.23 The dual function of "gratuitous" is reflected in Bell's analysis of donation, by recognising both the preceding and subsequent legal rights and obligations of the donor. He describes donation as being "voluntary", which infers the absence of a preceding legal obligation.[121] However, he also further defines gratuitous acts by emphasising they are made for no "adequate consideration",[122] meaning that the donor acquires no right to any reciprocal action or remuneration.

2.24 This focus on "consideration" would suggest that only payment of money or exchange of property would prevent gratuitousness, given that "consideration" necessarily entails something of value. Furthermore, the implication is that this "adequate consideration" would stem from an agreement, as "consideration" is typically a term encountered in contract law.[123] This allows the recognition of "remuneratory donations" which, although made in recognition of some good deed or in satisfaction of a moral obligation,[124] do not stem from a legal obligation to give something in exchange.[125] Additionally, "adequate" would permit an act to be

[121] Consistent with Bankton's definition of gift as a "liberal grant" (*Inst* I.9.2), implying originating from the free will of the donor.
[122] Bell *Princ* § 63.
[123] This is particularly the case in the English common law tradition: C Laske *Law, Language, and Change: A Diachronic Semantic Analysis of Consideration in the Common Law* (2020) 4.
[124] Gordon "Donation" para 8; Bankton *Inst* I.9.2; Erskine *Inst* III.3.91. A discussion of what counts as "adequate" in a comparative sense can be found in Hyland *Gifts* pp137-138. In English law a moral cause can be considered adequate consideration. A "moral cause" could be a gift of money given to a neighbour who had voluntarily mowed my grass for a year. I have no obligation to pay them but wish to give them a gift in recognition of the good deed they have done for me.
[125] See below paras 8.3-8.4.

considered a donation if it is made for nominal or a "remote possibility of consideration",[126] permitting donation to encompass transactions made for significant under-value.

2.25 Even if a transaction is made for substantially less than its full value, should a person wish to challenge a transaction on grounds of gratuitousness, the burden of proof lies upon the challenger. In *Leslie v Leslie*,[127] the pursuer claimed that her former husband had sold the matrimonial home to close friends at significant under-value to her prejudice, and therefore sought to have the transaction reduced. Under the legislation at the time, a significantly under-value transfer could render purchasers "gratuitous recipients" and as a result lacking the good faith required to give their title protection in divorce proceedings.[128] However, it was held that, in addition to the sale being made for significantly under-value, the purchasers must have known this in order to be in bad faith and thus "gratuitous recipients" (i.e. donees). The pursuer failed to prove the purchaser's knowledge of the value she was asserting the property to be worth[129] and lost her case.

2.26 This decision does not appear to be entirely in line with the general law on bad faith and gratuitous transferees. Bad faith normally consists of knowledge.[130] By virtue of being a gratuitous recipient a person will automatically be treated as if in bad faith, even if they are in ignorance of the true facts. Thus, the question of the transferee's knowledge should have been irrelevant: the only enquiry necessary was to whether the sale was in fact made significantly undervalue.[131] If so, as per the legislation, this would have made the transferees "gratuitous recipients" and justified reduction of the sale. Yet, it may be that because the transfer was made for some consideration, even if the sufficiency of that amount was in dispute, the court

[126] Gordon "Donation" para 4; *Beattie's Trustees v Beattie* (1884) 11 R 846.
[127] 1983 SLT 186.
[128] Divorce (Scotland) Act 1976 s 6(1), although both "good faith" and "for value" were specifically mentioned in the legislation.
[129] 1983 SLT 186 *per* Lord Dunpark at 188.
[130] *Rodger (Builders) Ltd v Fawdry* 1950 SC 483; Reid *Property* paras 695 and 699.
[131] In this, the pursuer would still have failed as her averments were vague and lacked any authority as to the purported valuation she was relying on.

required an additional element of the purchasers' knowledge in order to find bad faith in order to reduce the transaction. Therefore, based on *Leslie*, not only must "gratuitous" mean that an act is undertaken without any consideration given in return, but if some consideration has been received, both parties must be aware of the difference between the true value and price paid.

iii) "Lack of ability to compel counter-performance" and "no prior legal compulsion"

2.27 Since, as this thesis argues, "donation" refers to two juridical acts, the interpretation of "gratuitousness" in Scots law should emphasise the donor's lack of ability to compel a counter-performance.[132] This interpretation would enable "gratuitous" to apply to both a J1 obligation and a J2 transfer. Additionally, it should include an understanding of "no prior legal compulsion", even though a J2 transfer may be preceded by a J1 obligation. Although this means a J2 may technically proceed on a prior legal compulsion, so would not meet Professor Hogg's third interpretation cited above,[133] the origin of the initial donative act (the J1) would be voluntary. Although they are two separate juridical acts, the J1 and J2 are connected parts of a single extended donative transaction, as long as the transaction originated from no prior compulsion at point J1 then this extends to J2.

2.28 Furthermore, alongside an understanding that gratuitousness encompasses the absence of a prior legal compulsion on the part of the donor, it must also be taken to exclude any social pressures which amount to undue influence upon them.[134] That is not to say that a gift given in line with social norms, for instance giving a birthday gift to a colleague who had previously done the same, would

[132] The inability to "compel counter-prestation" appears to be the definition accepted most recently in Scots law: Whitty "Unjustified Enrichment" para 282.
[133] See above: para 2.21.
[134] *Gray v Binny* (1879) 7 R 332. In *Gray* a son entitled to inherit under an entail was persuaded to sign a deed of disentail by his mother and her law agent raised an action to have the deed reduced as he claimed (successfully) that it was obtained through misrepresentation and undue influence. Furthermore, the son had not had the opportunity to obtain independent legal advice.

amount to sufficient "social pressure" just because the donor feels a sense of social obligation. For undue influence to be relevant to the question of gratuitousness:

> "regard must always be had to the relation in which the transacting parties stand to one another. If they are strangers to each other, and dealing at arm's-length, each is not only entitled to make the best bargain he can, but to assume that the other fully understands and is the best judge of his own interests. If, on the other hand, the relation of the parties is such as to beget mutual trust and confidence, each owes to the other a duty which has no place as between strangers. But if the trust and confidence, instead of being mutual, are all given on one side and not reciprocated, the party trusted and confided in is bound, by the most obvious principles of fair dealing and honesty, not to abuse the power thus put in his hands."[135]

2.29 From this can be gleaned that the test for undue influence - unfair dealing that renders the transaction void - is threefold: first, whether the relationship between the parties is one that infers trust and confidence; second, whether this trust and confidence is mutual; and third, if the trust and confidence is not mutual whether this has been abused by one party to their own advantage. Typically, where the transaction has been gratuitous, the courts will more readily infer that one party has used a position of trust and confidence to abuse the power for personal gain.[136]

2.30 Related to this is also the general requirement that a person led into a transaction that is "palpably disadvantageous" and "without the individual receiving the aid he ought to" can be challenged on the grounds of facility and circumvention.[137] However, even in a transaction which satisfies this general requirement, where it is found that one party could potentially benefit to the same

[135] *Ibid* per Lord President Glencorse at 342.
[136] *Honeyman's Executors v Sharp* 1978 SC 223; 1978 SLT 177.
[137] *Cluny v Stirling* (1854) 17 D 15 per Lord Justice-Clerk Hope at 17.

extent as the other (regardless of whether they actually have), this will be enough to displace the gratuitous element that could justify reduction.[138]

2.31 This principle stems from one of the few judicial considerations of the word "gratuitousness". In *Royal Bank of Scotland plc v Wilson*, Lord Justice-Clerk Gill held that a cautionary obligation[139] incurred by a wife over the business debts of her husband as a result of an 'all sums' standard security granted by the married couple together could not be gratuitous.[140] This was because the effect of the documentation was that the security also covered the husband's liability for any future debts of his wife. Despite only one party (the husband) actually accruing any debts over which the security right could be exercised, and those debts being in relation to his business activities which his wife did not realise were covered by the security, the fact that the cautionary obligation was mutually undertaken and potentially benefitted both parties prevented gratuitousness from being present.

iv) Motive

2.32 It may be worth developing a definition of "gratuitous" that incorporates the original motive behind the ultimate donative transfer.[141] However, Scots law has hitherto (mostly) been reluctant to consider a donor's motive relevant, instead preferring the wider requirement of the donor's *animus donandi*, or "donative intent". The nature and constitution of the *animus donandi* is discussed fully elsewhere in this thesis,[142] but, as shall be seen, there is precedent to suggest that motive is not entirely immaterial when establishing donative intent. This is because a selfish motive can serve to disprove the existence of the *animus donandi*. This was the case

[138] *Royal Bank of Scotland plc v Wilson* 2004 SC 153.
[139] A cautionary obligation is a "personal security for the performance of obligations under a contract" undertaken by one person (the cautioner) in regards to the debts of another person (the principal debtor) to the creditor: E West "Cautionary Obligations" *Stair Memorial Encyclopaedia* (reissue, 2019) para 1.
[140] *Royal Bank of Scotland plc v Wilson* 2004 SC 153 per Lord Justice-Clerk Gill at para 23.
[141] Such as one which proceeds "from the mere liberality of the giver": Erskine *Inst* III.3.88; Bell *Dictionary* "Donation".
[142] See paras 3.16-3.33 below.

in *Forrest-Hamilton's Trs v Forrest-Hamilton*.[143] It was held that there had been no donation because evidence showed that the putative donor's motive was primarily to avoid inheritance tax.[144]

2.33 Additionally, where the motive underlying the *animus donandi* is to specifically benefit one party over another this will be relevant in establishing any intended limits to the gratuitous act. In *Armstrong v Armstrong*[145] where a father had sold his married son a house at significantly under market value, it was agreed that the sale did not constitute a gift, despite a clear "intention to benefit" the son being present.[146] That said, the intention to benefit the son warranted an unequal division of matrimonial property, because the father's intention was only to benefit the son, not the son's wife. This was supported by witness testimonies that the father "did not like the pursuer" (his son's wife),[147] and it was this motive that caused him to put the property into his son's name alone. Therefore, while motive in and of itself is not an essential element of a donation, it can be relevant to establishing the gratuitousness of an act.

2.34 While the definition of "gratuitous" should encompass an element of motive that is not to say that it completely embraces "altruism". This is because the term "altruism" is not entirely helpful. Seglow notes that the word "altruism" is shrouded in difficulty as it means "promoting the interests of others".[148] Altruism is an attitude of selflessness, or at the very least, it means a person performing an act altruistically will acquire no gain by doing so.[149] Although donations are to an extent an act of

[143] 1970 SLT 338.
[144] Additionally, where the motive is to bribe an official, this may constitute a crime: Bribery Act 2010 s 1 and below at para 4.32.
[145] *Armstrong v Armstrong* 2008 Fam LR 125.
[146] Although, the sheriff did hold that the underpayment was analogous to a gift: see paras [20] and [21] of judgement. As discussed elsewhere in this thesis, sale at undervalue can constitute a gift, see: para 3.46 and *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd v Carnbroe Estates Ltd* 2020 SC (UKSC) 23. Resultingly, the sheriff in *Armstrong v Armstrong* was perhaps in error by creating an artificial distinction between a "gift" and "intention to benefit", given that the result is the same vis a decrease to the transferor's patrimony accompanied by a corresponding increase to the transferee's.
[147] *Armstrong v Armstrong* at paras [7] and [8] of judgement.
[148] N S J Seglow *Altruism* 2007 p 1.
[149] EA Posner "Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises" (1997) 3 *Wisconsin Law Review* 567-609.

selflessness they are limited because they are (generally) selective regarding whose interests they promote.[150] Additionally, they may be made because of a societal norm, such as anniversary or Christmas gifts, rather than from a pure attitude of selflessness towards another.

2.35 Furthermore, there may be incidental benefits to the donor,[151] such as goodwill or an elevation of social standing, generated from the giving of a donation, which may prevent an act being truly altruistic, if "altruism" means the person performing acquires no gain whatsoever. For example, artistic production companies often have wealthy patrons whose names are printed in performance programmes. There is no obligation upon the companies to recognise their benefactors, yet by doing so the donors receive public recognition for their good acts. Indeed, it is often advertised as an incentive to give, meaning the donors know in advance they will be openly acknowledged.[152] Why should this recognition prevent an act from being considered a donation? Given the general sociological acknowledgement of the importance of social expectations and relationships generated through gift-giving,[153] "altruism" is too rudimentary a word to be useful when describing donations. It is perhaps for this reason that Scots law has hitherto shied away from a requirement of altruism in order to establish donative intent.

2.36 This is not the case in other jurisdictions. For instance, French law prioritises the existence of a benevolent motive when establishing donative intent. There, altruism plays such a key part in determining the *animus donandi* that a transaction which involves a mixture of motives, some generous and some self-interested, will be considered onerous, preventing the act being a donation. This is because "from

[150] Seglow *Altruism* p 4.
[151] This led Posner to state that altruism "is an insufficient explanation for gift-giving behaviour": Posner "Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises" at p 572.
[152] For example, the Royal Scottish National Orchestra includes "acknowledgement in our season concert programmes as a sonata, concerto, symphony, or virtuoso member" as an incentive to become a donor: www.rsno.org.uk/support-us/individuals/rsno-circle/.
[153] See, for instance: J B Baron "Do We Believe in Generosity? Reflections on the Relationship Between Gifts and Exchanges" (1992) Flo LR 355-363 and B Schwartz "The Social Psychology of the Gift" (1967) *American Journal of Sociology* 1-11; above paras 1.16-1.20.

the moment that the author of the transaction had acted in his own interest, there is not the smallest fissure through which gratuitousness can intrude".[154]

2.37 This attitude is shared by the authors of the DCFR who deliberately include the need for a donor's "intention to benefit the donee"[155] in their definition of a donation. This is to prevent a so-called "trojan horse" donation where a gift is not made with the intention to benefit the donee but instead to provide some advantage to the donor.[156] By including a requirement of intention to benefit, the DCFR incorporates the social character of donation into the legal one, reflecting the reality of how gifts can be used to exert influence and wield power and excluding these from the definition. If non-patrimonial, or "soft", benefits are the underlying goal of a putative donor then this negates the idea that an act is gratuitous, and the law should guard against such behaviours.

2.38 In Scotland, legislation implicitly recognises the same principle in specific instances, for example the prohibition of Members of the Scottish Parliament receiving any benefits in return for "advocating or initiating any cause or matter" on the part of the giver.[157] But legislative provisions such as these are only necessary to prevent corruption or fraud. Rather than be concerned with the donor's motive as being wholly altruistic the provisions focus on the behaviour of the recipient. Furthermore, it could also be argued that legislation in this case helps clarify an otherwise opaque position in the common law. Therefore, these are statutory exceptions surrounding the requirements concerning the underlying motive of a donation rather than a default rule of altruism.

2.39 Instead, it is perhaps better to characterise the necessary motive for gratuitousness to exist as "predominantly unselfish reasons". By doing so, incidental

[154] L Josserand *Les Mobiles dans les actes juridiques du droit privé* (1928) no 261 *cit* Dawson *Gifts and Promises* p 86.
[155] DCFR Book IV, Part H, 1:101(2).
[156] *Ibid* "Comments" p 2800.
[157] Scotland Act 1998 s 39(4)(a).

benefits gained by the donor cannot prevent an act from being a donation. However, if the "predominant" reasons are of self-interest then the act is precluded from being considered donative. This would allow a degree of subjectivity and nuance to be applied to the specific circumstances.

v) "Gratuitous" meaning in thesis

2.40 In conclusion to this part of the discussion, where mentioned in this thesis "gratuitous" will refer to a liberal (or voluntary) act of a party, made freely and for predominantly unselfish reasons for which no counter-performance can be compelled.[158] It is partly factual, dependent on the effect of the act, but also partly circumstantial, depending on an objective interpretation of the donor's intention and situation at the time of making the act, bearing in mind any external pressures. Should the act have been intended to primarily benefit the donor, or (as in the case of *Forrest-Hamilton's Trustees*)[159] the underlying motive was to disadvantage a third party, this will indicate that the act is not gratuitous and therefore cannot constitute a donation.

b) Unilateral

2.41 A term frequently encountered in discussions of donation is "unilateral". In the same way as "gratuitousness", this can have more than one distinct legal interpretation. It can mean either (a) constituted by one party alone, or (b) a situation where only one party to a transaction assumes obligations.[160] There is also a conception of "unilateral" where, as a sub-species of (b), an overall transaction creates duties for each party (such as in a contract) but one party incurs a specific duty not corresponding to one arising for the other party.[161] For example, A is a

[158] *Gray v Binny* (1879) 7 R 332 per Lord President Glencourse at 342; *Macfarquhar v Mackay* (1869) 7 M 766 at 770.
[159] *Forrest-Hamilton's Trustees v Forrest-Hamilton* 1970 SLT 338 discussed above at para 2.32.
[160] Hogg *Law and Language* p 135-136; Hogg *Promises and Contract* 36.
[161] Hogg *Law and Language* p 136.

kitchen fitter who B hires to install a kitchen. The corresponding duties are for A to fit the kitchen in exchange for payment from B. However, A also undertakes to remove and dispose of B's kitchen units. This duty is ancillary to the principal purpose of the contractual relationship and therefore may be gratuitous. However, it could prove key to providing an understanding of the word "unilateral" in relation to a donation.

2.42 Whether a donation can properly be considered "unilateral" is doubtful. Certainly, as noted above,[162] a J1 obligation shares many characteristics with a promise. Since it is acknowledged in Scots law that a person can constitute an obligation unilaterally through the vehicle of promise,[163] and that a promise can be gratuitous,[164] this would suggest that a J1 can indeed be constituted unilaterally. Furthermore, "a promise is a commitment to a performance of the promisor",[165] indicating that only one party needs to come under an obligation to perform through its constitution. On the face of it, this would appear to be appropriate for a J1 donation.

2.43 However, as mentioned above,[166] and discussed more fully elsewhere in this thesis,[167] to be properly executed a donation must be accepted to be valid because if it is not there is a conflict with the principle of *beneficia non obtruduntur.*[168] As a completed J1 creates a patrimonial right for the donee in the form of a claim against the donor, [169] the principle would appear to preclude it from being unilaterally constituted, at least in sense (a) above.

[162] See above paras 2.14-2.15.
[163] W D H Sellar "Promise" in Reid and Zimmermann *History of Private Law* p 252; W W McBryde "Promises in Scots Law" (1993) 42 Intl CLQ 48-66; Memorandum on *Constitution and Proof of Voluntary Obligations: Unilateral Promises* (Scot Law Com No 345, 1977).
[164] Hogg *Promises and Contract* p 26.
[165] Hogg *Promises and Contract* p 21.
[166] See above para 2.15.
[167] See below paras 5.67-5.70 and 7.24-7.32.
[168] The principle that benefits cannot be obtruded against a person.
[169] Bell *Comm* I, 314.

2.44 That said, it is not claimed here that a donor (or promisor) cannot act unilaterally in a way that results in the donor being bound, merely that by doing so does not create a "right" in the true sense for the donee.[170] Instead, what is created by the donor alone is a "power" in Hohfeldian terms[171] which cannot be rescinded. Thus, though the donor can act unilaterally, this is not necessarily sufficient to constitute a completed J1 donation. Again, this is only in relation to sense (a) identified above. "Unilateral" in sense (b) can potentially apply. In this conception of the word, how the obligation is constituted is irrelevant: all that matters is that only one party (the donor) comes under an obligation to perform. Thus, this thesis adopts the second interpretation of "unilateral" in relation to a J1.

2.45 In relation to a J2, "unilateral" in sense (a)[172] cannot apply, because a J2 is proprietary in nature, the paradigmatic example being a transfer. A donative transfer can only be "unilateral if the involvement [of the other party] is not required to effect" [173] it, or if "only one party is actively involved in the donative act".[174] However, in Scots law all transfers (or equivalent acts) are bilateral acts which require the consent and acceptance of the transferee through having an *animus acquirendi*,[175] and therefore cannot be constituted by one person alone.[176] Thus, the recipient is necessarily involved, due to the general rules of property law. Additionally, and in contrast to a J1, neither could sense (b) apply to a J2, since a present transfer places no obligation on either the transferor or transferee towards the other.[177] Thus, a J2 transfer may have a unilateral origin, in that the donor alone decides to make a gratuitous transfer, but that is not the same as only one party constituting the act or assuming obligations. Therefore, "unilaterality" does not apply to a J2.

[170] See below paras 7.24-7.32.
[171] W Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning: and Other Legal Essays* (W Cook ed, 1919) p 51.
[172] Above para 2.39.
[173] Hogg "Promise and Donation" at 175.
[174] MacQueen and Hogg "Donation in Scots Law" at 4.
[175] "Intention to acquire": Reid *Property* para 597.
[176] Stair III.2.4.
[177] Stair *Inst* I.10.12.

2.46 A final point to make on "unilateral" is that, should sense (b) be adopted in relation to a J1 there may appear little to distinguish between this and the definition offered of "gratuitous" above.[178] However, there is a difference between being unable to compel counter-performance and only one party coming under an obligation to perform, albeit small. For example, if a contract is considered to be an exchange of promises[179] then both parties can compel performance from the other on the basis of the reciprocal promises. Yet, each promise itself only places the promisor under an obligation. Thus, for clarity both "gratuitous" and "unilateral" are employed in the definition of a J1 offered earlier in this chapter.[180]

c) Irrevocable

2.47 Scotland, unlike some other mixed jurisdictions,[181] does not recognise the ability of a donor to unilaterally revoke a gift unless a right to do so has been specifically reserved.[182] Whether it has ever done is a matter of debate. Mackenzie mentions revocation only to distinguish donations *mortis causa* from pure donations, stating that "pure donations are not revokable, yet a donation *mortis causa* is; being of the nature of a legacy" and thus "no donation is presumed to be *donatio mortis causa*".[183] Contrastingly, Stair recognises the possibility of revocation of pure donations, but only in the case of an ungrateful donee, because "…in every gift there is a corresponding Duty of Gratitude; and therefore, by ingratitude the donation becomes void and returns".[184] This duty of gratitude comes from natural law, although Stair recognises that "complaints of ingratitude are so frequent and unclear (…) most of them are laid aside without any legal remedy".[185] Thus, from the early

[178] Para 2.38 above.
[179] As has been a suggested explanation, for instance, of the offer and acceptance requirement: Hogg *Promises and Contract* p 210.
[180] Above para 2.15.
[181] For instance, see Louisiana CC 1557.
[182] Erskine *Inst* III.3.91; J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow) p 95. Such a reservation would constitute a condition: see below para 9.7.
[183] Mackenzie *Inst* III.3. Donations *mortis causa* have purportedly been abolished by the Succession (Scotland) Act 2016 s 25(1) but the extent to which this is has been effective is examined elsewhere: see below paras 6.33-6.38.
[184] Stair I.8.2.
[185] Stair I.8.1.

modern law there have been conflicting opinions about a donor's ability to revoke a donation that is tied up with questions of gratitude, and, even if revocation is theoretically possible, whether it can be enforced in practice.

2.48 Bankton's overall treatment of gifts begins by affirming Stair's natural law position on the role of gratitude, claiming it is best demonstrated by reciprocation.[186] Yet, he is quick to highlight that a donor cannot legally insist on a return gift, and that failure of the donee to reciprocate does not constitute a level of "ingratitude" that would permit revocation in law.[187] This is because "a donation with prospect of the equivalent, is no gift in the intention of the Giver, but rather the effect of a sordid mercenary disposition, which ought not to be encouraged".[188]

2.49 That said, while mere lack of reciprocation is insufficient to warrant revocation, Bankton also recognises that conduct amounting to "ingratitude" may in some circumstances give rise to a donor's right to revoke.[189] This is because "the natural obligation to gratitude (…) secures the donor against ungrateful returns, or injuries for the benefits received".[190] The threshold for what conduct constitutes this degree of "ingratitude" is the infliction of "atrocious injuries"[191] upon the donor by the donee, and this right is limited to cases where "the donor himself resents the injury".[192] The exact nature of such injuries is unclear from Bankton's text, in particular whether "injury" is limited to physical harm. The language in the passage would suggest it is: alongside "atrocious injuries" he mentions a case where a mother was "barbarously used" by her son, wording which conjures images of assault.[193] Unfortunately, there is no citation to the case, nor can any other evidence of it be found, so the precise facts of the complaint remain unknown.

[186] Bankton *Inst* I.9.1.
[187] *Ibid*.
[188] *Supra* n 103.
[189] Bankton *Inst* I.9.4.
[190] Bankton *Inst* I.9.1.
[191] *Ibid*.
[192] Bankton *Inst* I.9.4.
[193] *Supra* n 108.

2.50 However, alongside the case mentioned, Bankton also cites an ancient statute[194] in support of his assertion that "atrocious injuries" can justify revocation. The statute lists six reasons for revocation: (1) "unthankfulness" which includes physical harm to the donor by the donee, "vehement or cruell injurie", conspiring to damage the donor's goods and gear, and attempts on the donor's life; (2) failure of a condition for which the donation is made; (3) "turpitude and filthiness of the paction and convention"; (4) if the donation is unduly large leading to the effective disinheritance of the donor's heirs; (5) if the donation is influenced by the donee's fraud or wrongdoing; (6) or because the thing given is inalienable for some other reason of law (for instance, Ecclesiastical goods). The first of these reasons clarifies that "ingratitude" can amount to more than just physical harm, including damage to the donor's property.

2.51 Bankton's reliance on this statute may belie his overall belief in the authenticity of the *Regiam Majestatem* as part of Scots law, [195] given that it is in the *Regiam Majestatem* that the legislation in question appears. As the provenance, and thus applicability, of the *Regiam Majestatem* was the subject of some controversy in the seventeenth and eighteenth centuries,[196] it is not entirely surprising that statements of law deriving from it were not universally adopted by Bankton's contemporaries and successors. This left the door open for a series of decisions in the eighteenth and nineteenth centuries to apparently reverse Bankton's position on revocation of donations due to the donee's ingratuitide.[197]

2.52 Whether these cases provide a definitive and convincing reflection of the law is questionable, at least in relation to a J1 obligation.[198] The original statement for the non-revocability of donations appears in Bell's *Principles*,[199] which cites *Warnoch v*

[194] Stat Rob III c 17 (1400).
[195] H L MacQueen "'Regiam Majestatem', Scots Law, and National Identity" (1995) 74 *The Scottish Historical Review* 1, 21.
[196] *Ibid*.
[197] *Warnoch v Murdoch* (1759) Mor 7730; *Dugiud v Caddall's Trustees* (1831) 9 S 844; *M'Gibbon v M'Gibbon* (1852) 14 D 605.
[198] Because other gratuitous obligations, such as third-party rights, are (subject to certain limitations) revocable by the creators: Contract (Third Party Rights) (Scotland) Act 2016 s 3(1).
[199] Bell *Princ* § 63-65.

Murdoch[200] as authority for the rule. The first reason this case is questionable as the source for the irrevocability principle is that, while gratuitous, the case did not strictly deal with pure donation. Instead, it was concerned with a *jus quaesitum tertio*, i.e. third party right,[201] arising from a marriage contract. Additionally, the case was subsequently criticised (even in its applicability to third-party rights) by Lord Dunedin in who "reject[ed] the case as an authority".[202]

2.53 The second reason using *Warnoch* is problematic is the judgement did not state irrevocability was an unqualified principle, only that in the particular circumstances of the case a unilateral attempt to revoke the right by the husband before he died was ineffective. The court held that the couple could have jointly dissolved the marriage contract and rewritten it, excluding the third party right, at any point during the marriage prior to the husband's death. This means that the gratuitous obligation could have been rescinded by mutual agreement of the contracting parties and was not fundamentally irrevocable once established. The third reason the court found the gratuitous right to hold good was that the supposed unilateral revocation by the deceased had not been intimated to the beneficiary. For these three reasons, it is submitted that *Warnoch* does not provide good authority for the proposition that donations are irrevocable.

2.54 Nevertheless, the move towards the irrevocability rule continued, with later editions of Bell's *Principles* adding further cases to bolster it. Yet, again, the facts of these cases gave rise to specific circumstances that justified irrrevocability, rather than necessarily claiming it was a blanket rule. Furthermore, all the cases refer to earlier editions of Bell's *Principles* as justification for not permitting revocation of donations, which, as just discussed, used the questionable case of *Warnoch* as a basis for the position.

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[200] *Ibid* § 64; *Warnoch v Murdoch* (1759) Mor 7730.

[201] Whereby contracting parties can agree to give an enforceable right to a third-party. This is an acknowledged exception to the rules on privity of contract in Scots law: Stair I.10.5; L MacFarlane *Privity of Contract and its Exceptions* (2021) paras 3-08 – 3-11. It is argued below that a third party right can in some circumstances be considered a form of indirect donation: see below para 10.1.

[202] *Carmichael v Carmichael's Exx* 1920 SC (HL) 195 at 201.

2.55 The fifth edition of the *Principles*[203] introduces *Duguid v Caddall's Trustees*[204] as an additional authority for irrevocability. In 1818, Isabella Caddall delivered a letter to John Duguid undertaking to give him £40 per annum while she was alive and he lived with her, and £200 per annum after she died as a claim on her estate. The letter stated that the donation was being made because Duguid had "for some time past resided with me (…) and taken charge of my affairs in a confidential and satisfactory manner" and for any further "trouble he was likely to have" in continuing this service.[205] In 1819, Duguid ceased to live with Caddall, at which time she gave him £40 in respect of the year in which he had resided with her since the letter had been delivered. Some years after, she executed a further document purporting to revoke the post-mortem annuity. After Caddall's death, Duguid raised an action for payment. He was successful, as the court found that this was "an obligation with payment postponed, not a testamentary deed".[206]

2.56 However, like *Warnoch*, *Duguid* is not entirely satisfactory. For one, there was a question about whether the undertaking was a donation *mortis causa*, which the court was unresolved on.[207] Additionally, the deed containing the benefit explicitly stated that it was "irrevocable", which had a strong bearing on the decision. Finally, the court could not decide whether the donation was conditional upon the performance by the beneficiary of personal assistance to the deceased or purely gratuitous.[208] They concluded the latter, but it is not clear from the reported evidence this was the case.

2.57 It is submitted that the donation would have been better characterised as remuneratory, which would have justified non-revocability by virtue of the type of donation.[209] Additionally, if implicit in the deed of gift was a condition of performance

[203] Bell *Principles* § 64 n(a), (5th ed by P Shaw, 1860).
[204] *Dugiud v Caddall's Trustees* (1831) 9 S 844.
[205] *Ibid* at 844.
[206] *Duguid v Caddall's Trustees* (1831) 9 S 844 per Lord Cringletie at 847.
[207] *Ibid per* Lord Glenlee at 847.
[208] *Ibid*.
[209] See below para 8.17.

of personal assistance, then the right crystallised as soon as Duguid continued to perform such acts, which he did between 1818 and 1819.[210] Furthermore, Lord Glenlee acknowledged that there might have been other relevant elements that would have justified denying Duguid's claim but these arguments were not pleaded by the defenders.[211] Ultimately, irrevocability was in part due to the delivery of the deed to the grantee. Given all these factors, the case may add weight to Bell's position on *Warnoch*, but it could still be considered challenging to say that it is decisive.

2.58 In the sixth edition of the *Principles*[212] the editor, Sheriff Guthrie, adds a further case to the authority for irrrevocability: *M'Gibbon v M'Gibbon.*[213] This case supports Bell's irrevocability proposition best, but is not unproblematic. The facts are as follows:

In 1817, Mrs Pringle inherited land and executed a disposition granting a liferent of the land in equal one-third shares to herself, her former husband Alexander M'Gibbon, and their three sons, with the fee being granted to the sons equally between them. The consideration for granting the deed was an agreement made by Mr M'Gibbon to bear the expense of Mrs Pringle completing title to the land, and the love, favour, and affection which she bore for her three sons. The deed contained no power of revocation and infeftment was taken on it. Subsequently, in 1819, Mrs Pringle and Mr M'Gibbon (who was acting as tutor for two of the children) granted a further disposition of the same land. It was held to be in corroboration of the earlier disposition but differed in that it gave Mr M'Gibbon a two-third share of the liferent and a discretionary power of division over the fee. This deed was the subject of sasine which was recorded. In 1826 and 1841 Mr M'Gibbon entered into further transactions in relation to the land. The children later challenged these transactions on the grounds that the 1819 disposition was invalid.

[210] See below paras 9.34-9.37.
[211] *Duguid v Caddall's Trustees* (1831) 9 S 844 per Lord Glenlee at 847.
[212] Bell's *Principles* § 64 n(a), (6th ed by W Guthrie, 1872).
[213] *M'Gibbon v M'Gibbon* (1852) 14 D 605.

2.59 The defenders argued that the original disposition of 1817 was revocable because it was gratuitous. Revocation, according to the defenders, had occurred implicitly through the execution of the 1819 disposition. Thus, the later transactions were also valid, due to the discretionary power over the fee granted to the ex-husband in 1819. The court rejected this argument, finding the original disposition of 1817 could not be revocable unless it expressly reserved a power to do so.[214] Moreover, the deed of 1819 could not be taken as valid, given that the children (being underage) did not have capacity to concur to the transfer of the fee and that such a transaction could not stand given that Mr M'Gibbon, in his role as administrator to the children, acted to the children's prejudice in his own interests.

2.60 Despite the decision that revocation can only occur if such a power has been expressly reserved in the original deed, at the core of *M'Gibbon* was the issue of the interests of minors being prejudiced by the actions of an unfit administrator. Considerations of moral and equitable principles clearly influenced the court. The question of gratuitousness was not considered at any great length in the judgement. In fact, Lord Hope stated of the 1817 deed that is "was onerous to its full extent".[215] If the deed was onerous, using it as an authority for the irrevocability of donations is questionable.

2.61 While *M'Gibbon* may be judicial evidence of non-revocability in certain circumstances, particularly where there are issues of maladministration that prejudice the interests of those deemed to lack capacity, it is by no means conclusive regarding all gratuitous obligations and donations. Nonetheless, the position that donations are not normally revocable appears to have persisted.[216] The only categories of donation where an inherent right to revoke continued to be recognised were donations *mortis causa* and *inter vivos et uxorem*. However, as

[214] *M'Gibbon v M'Gibbon* (1852) 14 D 605 *per* Lord-Justice Clerk Hope at 610.
[215] *Ibid* at 610.
[216] Gordon "Donation" para 11 fn 11; MacQueen and Hogg "Donation in Scots Law" 15.

these categories have both now been abolished by statute,[217] apparently so has the right to revoke any donation automatically at common law.

2.62 The statement that donations are not normally revocable, even for ingratitude, unless the donor has reserved a right to do so is repeated in modern accounts of Scots law.[218] This could be because the law's underlying ethos prefers the certainty of concluded transactions over the possibility that a donation could be recoverable by an earlier granter. In this, Scotland is at variance with other civilian and mixed legal systems which do allow revocation for ingratitude where the donee has caused harm or abused the donor.[219]

2.63 In jurisdictions which recognise the right of revocation for ingratitude, the boundaries are clearly delineated. For example, the Louisiana Civil Code defines the behaviours constituting ingratitude by the donee as:

> "1) If the donee has attempted to take the life of the donor; or
>
> 2) If he has been guilty towards him of cruel treatment, crimes, or grievous injuries".[220]

The second clause, by including "guilty", would suggest that the treatment or injuries must be grave.[221] "Grave" is normally interpreted as meaning "any act naturally offensive to the donor".[222] This has included false claims of child molestation made

[217] By the Succession (Scotland) Act 2016 s 25 for donations *mortis causa* and the Married Women's Property (Scotland) Act 1920 s 5 for donations *inter virum et uxorem*. See Chapter 6 below.
[218] Gordon "Donation" para 45; *Pickard v Pickard* 1963 SC 604, 1963 SLT 56.
[219] For instance, Germany (§ 530 BGB) or Louisiana (CC Art 1557).
[220] Louisiana CC Art 1557. Before the civil code was reformed, there was a third instance in which donations could be revoked: if the donee had refused the donor food when he was in distress (former CC of 1870 Art 1483; C Picou "Constraints on Donation in Louisiana" (1991) 18 SUL Rev 101 at 131).
[221] Precisely what "cruel treatment, crimes, or grievous injuries" might amount to a justification for revocation is unclear, as the Louisiana case law considering this aspect is "sparse", however it would seem that the conduct must be severe and proven: M Romero "*Petrie v Michetti*, and the Indelible Nature of Donations *Inter Vivos: Louisiana Civil Law"* (2013) 6 J Civ L Stud 305-315 at 311.
[222] *Porter v Porter* 821 So 2d 663 (La App 2 Cir 2002) p 7.

against the donor,[223] filing a law suit against the donor,[224] adultery by the donor's spouse,[225] or posthumous slander of the donor.[226] Nonetheless, "cruel treatment" appears to depend strongly on the individual circumstances of the case, and the donor wishing to invoke their right of revocation must demonstrate real and significant harm. As such, this means the threshold that must be met to enable revocation is high and requires proof beyond merely an unsubstantiated claim of the donor.[227]

2.64 Restrictions on the revocability of donations found in Louisianan law indicate how the boundaries on revocation might be drawn, should it be later determined that Scots law retains an implicit residual right to revoke on account of the donee's ingratitude. It could not be wide-ranging and would not be applicable except in exceptional circumstances, although some of the examples provided in Louisiana, such as the filing of a law suit, might seem to verge on arbitrariness. However, even though the proposition that Scots law does not recognise an implicit right of revocation is problematic, such questions are academic, given that at present the irrrevocability principle stands.

2.65 That said, there are some circumstances where a donation might be reduced without any specific power reserved to do so. For instance, where a donation is made by a creditor's discharge of a debt or other renunciation of a right, the donation may be reducible if an additional debt later comes to light of which the donor was not previously aware.[228] For example, in *M'Caig v Glasgow University Court*,[229] a woman, the sole surviving heir of her brother, renounced what she believed to be her claim to his estate by assigning it in favour of a university.[230] She was later entitled to have the renunciation reduced upon discovering that the value of her rights at the

[223] *Petrie v Michetti* 59 So 3d 430 (La App 5 Cir 2011).
[224] *Sanders v Sanders* 768 So 2d 739 (La App 2d Cir 2000).
[225] *Perry v Perry* 507 So 2d 881 (La App 4th Cir 1987).
[226] *Petrie v Michetti* 59 So 3d 430 (La App 5 Cir 2011). See also *Erikson v Feller* 889 So 2d 430 (La App 3 Cir 2004).
[227] *Petrie v Michetti* 59 So 3d 430 (La App 5 Cir 2011).
[228] Gloag and Henderson para 3.22.
[229] (1904) 6 F 918.
[230] In some circumstances, a donation can take the form of a renunciation: see below paras 10.50-10.52.

time of the assignation far exceeded that which she had initially thought. Although this was decided as a case of essential error that invalidated her consent, it can also be seen that some circumstances may permit revocation, albeit based upon a doctrine outwith the immediate ambit of donation law.

2.66 Furthermore, as noted above,[231] a party can expressly reserve a right to revoke.[232] The effect of such a reservation would depend on the juridical nature of the donation. Where the donation is a "J1" obligation, the invocation of a right to revoke would presumably automatically release the donor from the duty to perform the subsequent "J2" without the need for further action (bar communication of the revocation to the donee). Thus, it could be a unilateral act.

2.67 However, where the donation is a "J2", if the donor wished to revoke after performance an additional step would be required to reinvest the donor with the donum.[233] This could be a reconveyance of property or a reinstatement of a debt. Both would require the participation and/or consent of the donee. A reconveyance, being fundamentally a conveyance, requires the transferee (the original donee) to consent to re-transfer ownership. Exercising the right to revoke does not simply undo the transfer, as the system of property transfer in Scotland usually separates the conveyance from the underlying obligation to transfer.[234]

d) "*Inter vivos*"

2.68 The final element common to both a J1 obligation and a J2 definition is the *inter vivos* nature of the transfer. This is a crucial factor which distinguishes a donation from other gratuitous acts, such as testamentary dispositions.[235] Formerly,

[231] See above para 2.60.
[232] W W McBryde "Promises in Scots Law" (1993) 42 *International and Comparative Law Quarterly* 48 at 50.
[233] Bankton *Inst* I.9.17.
[234] Reid *Property* paras 606 and 607.
[235] The question of the validity of testamentary promises is beyond scope but these are presumed not to be enforceable after a promisor's death if there is also a formal testamentary document: see *Smith v Oliver (No 2)* 1911 1 SLT 451.

the customary institution of a donation *mortis causa* existed around the edges of both succession and donation. It involved transferring possession to the donee during the lifetime of the donor, with the transfer of ownership suspended until the donor's death.[236] Donations *mortis causa* have now been abolished.[237] Therefore, "*inter vivos*" should be reinforced in a description of each juridical act.

2.69 Regardless, it probably only needs to be specifically stated in relation to a J1 obligation. This is because of the future nature of the act. This is important even if the donor dies in the time between constituting the J1 obligation but before making the J2 transfer. The J1 obligation irrevocably binds the donor[238] to make the transfer, in contrast to a testamentary deed which is revocable up until the donor's death.[239] As such, the donee will have the right against the executors of the deceased's estate to claim the donation in priority to legatees and heirs on intestacy.[240] That a J2 transfer is *inter vivos* is implicit in the fact that the donor must be extant to make the transfer.[241]

4) CONCLUDING REMARKS

2.70 This chapter has concerned itself with outlining key concepts which lay the foundations for any discussion of the law. It has done so in two ways. First, it has outlined the premise that donation has two distinct juridical meanings in Scotland,

[236] Most case law in the nineteenth century involved assertions of a donation *mortis causa*, defined by Lord President Glencorse in *Morris v Riddick* (1867) 5 M 1036 at 1041. See below paras 6.12-6.32.
[237] Succession (Scotland) Act 2016 s 25. The wording of the provision is somewhat ambiguous. After declaring the abolition of the "customary mode of making a donation mortis causa" (s 25(1)) the following subsection permits the making of "a conditional gift other than in the customary mode" (s 25(2)). Precisely what this means, and whether all donations *mortis causa* have been completely abolished, is open to debate. See below paras 6.28-6.32.
[238] *Hann v Howatson* 2014 SC 69.
[239] *Smith v Oliver (No 2)* 1911 1 SLT 451.
[240] M C Meston "General Principles of Succession" in *The Stair Memorial Encyclopaedia* vol 25 (1990) para 666.
[241] Or, in the case of heritable property, at least at the time of granting a disposition: Land Registration etc (Scotland) Act 2012 s 47(2). As with many things, the general situation is more nuanced than this, for instance in the example given of a donor dying after the constitution of a J1 obligation but prior to the J2 transfer. This is discussed below at para 7.49.

one being obligatory in character (a “J1”), the other proprietary (a “J2”), and has offered definitions of each. Second, it examined and clarified the meaning of the key terminology to be used in this thesis: “gratuitous”, “unilateral”, “irrevocable”, and “*inter vivos*”. This thesis will proceed based upon these definitions.

CHAPTER 3:

Presumptions, Intention, and the Donum

1) INTRODUCTION

3.1 This chapter discusses factors relevant to all types of donation, whether obligatory or proprietary, regardless of the category of donation being made. These factors are: (i) the presumption against donation and circumstances where the presumption is reversed; (ii) the need for the donor's *animus donandi* (donative intent) and how it is constituted; and (iii) examination of what can be the subject of a donation in the legal sense, also known as the "donum", which includes discussion of what is excluded from the scope of donation law. These elements weigh heavily in any determination as to whether a donation has been made and, therefore, affect the application of the law. In conformity with the rest of the thesis, the term "J1" will be used to refer to a donative obligation and "J2" to a donative transfer.

2) PRESUMPTIONS

a) Presumption against donation

3.2 The presumption against donation is the default legal position which any claim of donation must displace. A key element of the law of evidence, a full analysis of the presumption could form the basis of its own thesis. However, not being the key focus of this work, only a brief discussion can be offered here. The presumption against donation is found in many jurisdictions, although it is not always encountered in the same form or described in explicit terms. Instead, it is sometimes inferred through other doctrines. For example, in England where a person purchases

property for, or transfers property to, another without consideration, "the recipient is presumed to hold the property on resulting trust for the purchaser or transferor".[242] Thus, rather than a presumption against gift *per se*, English Equity presumes trust rather than a gratuitous transfer.[243] Nonetheless, the effect is the same as Scots law: the default position of the law is not to assume a gift but, rather, to actively operate to infer some other type of juridical act.

3.3 The presumption against donation in Scots law can trace its roots to the Roman civilian tradition.[244] That said, the Romans' formal regulation of donation was not extensive.[245] Therefore, it is informative to provide some social context for the Roman attitude towards donation. Gift "relations were the binder of Roman society",[246] but in reality "donations did not throw up many problems in practice",[247] so strict rules for their governance may have been thought unnecessary. However, even when officially unregulated, gifts were still of high social importance.

3.4 Roman law distinguished two types of donation: *munera* and *dona*.[248] The former was a more limited category, and consisted of mandatory gifts given on the occasion of public holidays and festivals,[249] as well as those given in recognition of public services that were "deemed not to be carried for compensation"[250] but

[242] A Blackham "The Presumption of Advancement: A Lingering Shadow in UK Law?" (2015) 21 *Trusts and Trustees* pp 786-801 at 787. Additionally, this presumption does not apply to transfers of land: Law of Property Act 1925 s 60(3); *Khan v Ali* (2002) 5 ITELR 232.
[243] According to Stair, that trust was presumed rather than donation also used to be the position in Scots law (Stair I.8.2). However, by the time of Bankton, statute had displaced the institution of trusts in these circumstances: Bankton *Inst* I.9.21.
[244] Assis argues that the presumption against donation stems from the Roman maxim *debitor non presumitur donare* – that a debtor is not presumed to be a donor: J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow) p 90. However, it is submitted that this is putting the cart before the horse. Rather, the presumption against a debtor being a donor arises from the broader presumption against donation in general: Stair I.8.2.
[245] See above paras 1.10-1.11.
[246] C Codrea "Legal Limitations on the Anthropological Notion of the Gift in Roman Law" (2014) 149 *Procedia – Social and Behavioural Sciences* 200-205 at 201.
[247] Zimmermann *Law of Obligations* p 480.
[248] Hyland *Gifts* p 25.
[249] Cicero *De Officiis* II.16-17.
[250] Such as organising public works, games, and so forth: C Codrea "Legal Limitations" 201.

contributed to the social standing of the organiser.[251] Political success and status were partly dependent on making "impressive charitable donations".[252] The taking of payment for certain acts, such as advocacy in a legal action, was considered "sordid",[253] and therefore gifts were a method of providing recompense when social mores prohibited remuneration.

3.5 *Dona* had a wider conception, encompassing the giving of gifts in one's private affairs.[254] Arguably, this attracted stronger formal regulation, as the Romans "thought gifts lacked the rationality of exchange".[255] Thus, the main legal governance is to be found in relation to this type of donation, the purpose being twofold: to ensure that assets were not squandered, and to safeguard against potential interruption to the peaceful continuance of personal relationships. For example, as mentioned earlier,[256] there was a prohibition on donations between spouses,[257] possibly driven by a desire to preserve the institution of marriage as one based on mutual love and affection rather than pecuniary interests.[258] Given that the etymology of the word "donation" comes from the Roman "donatio" (the act of gifting in *dona*), the Roman *dona* bears more relevance for an examination of modern law.

3.6 The Roman wariness of donation based upon a fear of the donor's irrationality has persevered through the development of Scots law, providing the foundation for what has become the presumption against donation.[259] This, Bankton claims, stems from the notion that "everyone is understood to mind his own interest

[251] Philosophers, such as Seneca the Younger and Cicero, focused on the importance of a benevolent intention and the virtue of giving, both in public and private life, for instance, see: Seneca *De Beneficiis* V.2; Cicero *De Officiis* I.17.
[252] Hyland *Gifts* p 25.
[253] Dawson *Gifts and Promises* p 13.
[254] *Ibid*.
[255] Hyland *Gifts* p 26.
[256] See above para 1.10.
[257] Apparently, this was customary but evolved to be a legal restriction: Dawson *Gifts and Promises* p 14.
[258] *Ibid*, although Dawson continues by stating that the rule may also have been to prevent the "diversion of assets from one family line to another".
[259] Indeed, Lord Kames made a distinction between gratuitous deeds and those founded upon an "antecedent rational cause" – Kames *Principles of Equity* p 109. This suggests an inheritance of the idea that gratuitous acts, in which category Kames included donations, are irrational.

first".[260] Erskine makes a similar observation, stating that "no person is presumed to do what, in place of bringing him profit, must certainly be attended by some pecuniary loss".[261] Any action seemingly contrary to this "understanding" must be an anathema, and therefore the law will not give unnecessary support to it. In a softer approach, Stair states that where there is a transfer of property there is "implyed [*sic*] an Obligation of Commerce, or Exchange" except where the recipient "have not the wherewith to exchange, and cannot otherways preserve their life", thus privileging charitable donations but only in specific circumstances.[262] This dovetails with the requirement that if a donation is intended that intention must be clear.

3.7 Indeed, it is not just in the law that exchange has been given a privileged position over donations. The early modern economists and philosophers, who are the forebears of our contemporary market-driven society, held reciprocal exchange in such high regard as a way of quietly regulating the economy that even Adam Smith thought that "when people enter into reciprocal exchange they become better people".[263] Tying the notion of moral virtue to exchange in this way represents a shift in societal attitudes from the Enlightenment onwards. Even as far back as Cicero[264] (44 BCE) and Seneca[265] (55 CE), the idea of virtue had been tied to acts of generosity, an idea adopted by the Christian church (whose influence was greater in Scotland pre-Enlightenment) which taught that "if anyone has the world's goods and sees his brother in need, yet closes his heart against him, how does God's love abide in him?"[266] The post-Enlightenment idealisation of exchange could go part way to explaining the strict presumption against donation which exists in modern Scots law.

3.8 It is worth pausing at this point to consider the position that donation is in some way irrational, for it could be argued that this position is itself irrational, not

[260] Bankton *Inst* I.9.20.
[261] Erskine *Inst* III.3.92.
[262] Stair 2.1.6.
[263] A B Weiner *Inalienable Possessions* (1992) p 28. See above paras 1.5-1.6.
[264] Cicero *De Officiis* II, XXI.
[265] Seneca *De Beneficiis* I.6.
[266] 1 John 3.17 (ESV).

least because donation is such a common practice. A simple observation of modern life demonstrates a plethora of occasions daily in which people do not act in their own interest first. Charity collection tins next to tills in shops are frequently fed with change at the end of transactions by departing customers. Colleagues buy gifts for each other on birthdays or to celebrate their achievements. Patrons in bars purchase drinks for musicians. Outside the realm of donation law, volunteers make calls to the elderly, staff charity shops, and build houses for the homeless.

3.9 To hold as the default starting point that people do not regularly, or rationally, act other than in their own interest can very easily be demonstrated to be false. The ideology underpinning this position is almost wholly mercantile, which is not necessarily appropriate for the law of gifts given that, as noted earlier,[267] they normally occur outside of the market.[268] Therefore, caution should perhaps be exercised when unquestioningly asserting a presumption that has been born out of a mercantile ideology that has no place in a fundamentally social practice, a social practice that does not automatically infer a reciprocal exchange based upon mutual patrimonial benefit.[269] Nonetheless, the law continues to side-line these social considerations in favour of a market-based ideology.[270]

[267] See above paras 1.4-1.6.

[268] Hyland *Gifts* para 212; above para 1.4. Godbout and Caille also note that "the system of the gift is not first and foremost an economic system but the social system concerned with personal relationships" reflecting the folly of attempting to consider donations through an economic lens: J Godbout and A Caille *World of the Gift* (1998) p 15.

[269] This position has been promoted by Baron ("Do we believe in Generosity? Reflections on the Relationship Between Gifts and Exchange" (1992) 44 Florida Law Review 355-363) who highlights that other scholars, such as Richard Posner ("Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises" (1997) Wis Law Review 567-609) may be mistaken in favouring an economic legal analysis. However, Hyland may have been optimistic in his prediction that *favor donationis* will replace the presumption against donation: a "pro-gift understanding" where "the law will assume the role of accommodating and assisting social custom" (Hyland *Gifts* para 1358).

[270] Furthermore, this Western mercantile ideal historically has also led to the suppression of donative indigenous practices, such as the Potlatch in North American First Nations tribes. Potlatching was outlawed by an amendment in 1884 to the Indian Act 1876 due to pressure from missionaries and politicians who described it as "a worse than useless custom" (G. M. Sproat, quoted in D Cole and I Chaikin, *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (1990) 15) which, because it "hinders the single families from accumulating wealth" (F Boaz "The Indians of British Columbia," (March 1888) 32 *Popular Science Monthly* 636) posed "the most formidable of all obstacles in the way of Indians becoming (…) civilized." (R Fisher *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890* (1977) 207). Given that we now acknowledge the injustice meted out to indigenous populations at the hands of colonialists, based as it was on these Western ideologies, lends further strength to the argument that perpetuating those same underlying values might not provide not a sound foundation for the current law.

b) The presumption inverted

3.10 The courts and legal commentators in Scotland routinely assert that "the presumption of law against donation is strong",[271] and unless "the evidence in favour of donation is so clear and unambiguous as to redargue the legal presumption against it"[272] the courts will not uphold claims of putative donees. Gordon notes that the presumption "may be stronger in the case of a donation *inter vivos* than *mortis causa*", but adds that, in any case, a donation will only be found "if there is no other reasonable explanation of the transaction in the circumstances".[273] Furthermore, the presumption will be stronger where the purported gift is of all, or nearly all, that the donor owns.[274] Despite this, the law also recognises situations where the presumption is reversed, and donation will be inferred unless there is significant evidence to counter the donative intent of the donor.

3.11 Stair identifies two specific occasions where the presumption against donation is replaced with a presumption in favour of donation. The first occasion is where gifts are made by parents to children or between close family members "because of the Parents Natural Affection, and Natural Obligation to provide [*sic*] children", which was "extended to some Goods and Money of a small value, delivered by a rich Brother who wanted Children, to his brother who was no Merchant".[275] The second is for "Aliment or Intertainment"[276] given to an adult in the absence of a contract.

[271] *Ross v Mellis* (1871) 10 M 197 per Lord President Glencorse at 200; *Bank of North Scotland v Cumming* 1939 SC 448.
[272] *Ibid* at 201.
[273] Gordon "Donation" para 20. Section 25(1) of the Succession (Scotland) Act 2016 purports to have abolished donations *mortis causa* but the extent to which this has been successful is discussed elsewhere: see below paras 6.33-6.38.
[274] *Ross v Mellis* (1871) 10 M 197. Other jurisdictions go further with this, rendering all donations of the whole of a person's patrimony null if they do not retain enough for their subsistence: Louisiana Civil Code Art 1498.
[275] Stair I.8.2; *Anderson v Anderson* (1679) Mor 11509, [1679] 11 WLUK 9.
[276] *Ibid*.

3.12 The presumption in favour of donation where the parties have a close familial relationship appears to bear less weight in modern legal thought.[277] In a contest between two brothers regarding an alleged donation from their mother to one of them, the court found no gift.[278] Instead, the payment was held to have been a loan. This was because the Sheriff found it unlikely that a parent with two children would favour one to the prejudice of the other. Additionally, even when the courts have acknowledged the inversion of the general presumption against donation where the parties are parents and children, they have been keen to stress that the whole circumstances must be considered.[279] The relationship alone may not be "sufficiently compelling to point to gift as the most likely underlying explanation for the transaction".[280]

3.13 Nonetheless, that the presumption against donation has traditionally been reversed when the gift is made between close relatives reflects the social realities of donation, tacitly acknowledging the truth asserted above[281] that gift-giving is most commonly encountered outside the market economy in private relationships. Thus, particular interactions should be subject to different considerations when determining whether they should be upheld. Scotland is not alone in its position on this. England has a similar rule, termed the presumption of advancement.[282] However, this doctrine is more limited in its application than its Scottish counterpart, extending only to transfers or purchases made in another's name where the giver is either in *loco*

[277] When speaking at the University of Dundee in 2015, Lord Reed noted that this aspect of the law was found in authorities that came from a time when "the attitudes and assumptions underlying the decisions, belong (…) to the society depicted by Jane Austen" and that "relying on them now, without taking account of their historical context and the way society has changed, would be (…) equating triremes and steamships": Lord Reed "Triremes and Steamships: Scholars, Judges, and the Use of the Past" *The Scrymgeor Lecture, University of Dundee* (30th October 2015), text available at: https://www.supremecourt.uk/docs/speech-151030.pdf. Thus, the modern view may be shifting. But it is not entirely correct to say that society has shifted entirely – take the aliment provisions of the Family Law (Scotland) Act 1985 s 1 which enforce the parental relationship of provision for children. By doing so, the current law continues (to an extent) to prioritise and give special importance to these close relationships which could also extend to a general attitude in favour of presuming a voluntary diminishment of patrimonial assets in favour of children.

[278] *Kerrigan v Kerrigan* 1988 SCLR 603.

[279] *McGraddie v McGraddie* [2009] CSOH 142.

[280] *Ibid* per Lord Brodie at para [32].

[281] See above paras 1.4-1.6 and 3.8-3.9.

[282] *Halsbury's Laws of England* "Gifts" (Vol 52 (2020)) para 244.

parentis or the husband of the beneficiary.[283] As a presumption, it can be displaced by parole evidence to the contrary.[284]

3.14 There are other circumstances in which Scots law will presume a donation. Bankton asserts that "when one pays what he knows is not due, it is presumed a gift, by the rule of law, founded in nature".[285] This statement is curious, for, as explored later,[286] a donor requires to have the requisite *animus donandi* to execute a donation. It may be that if a person transfers property to another where the person knows it not to be due the law infers the *animus donandi* to prevent a party later making mischievous claims in unjustified enrichment or exerting control over the recipient.[287]

3.15 Erskine, also holds that a payment made by one who knows it not to be due is presumed a gift.[288] This is stated as an exception to the general application of the *condictio indebiti*[289] and appears in his general discussion on enrichment, rather than donation. For Erskine, the ability to claim under the *condictio* is founded upon equity,[290] and it would be inequitable to allow a person redress who has paid despite knowing there is no obligation to do so. Thus, although in this situation a presumption in favour of donation arises, it only does so when balancing considerations in other areas of law in order to uphold the law's deeper principles: equity and fairness.[291]

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[283] And occasionally where property is given to a mistress, although not by property taken in the name of a husband by a wife: J Law (ed) "Advancement" in *Oxford Dictionary of Law* (9th edn) 2018. The Equalities Act 2010 s 199 will abolish the presumption of advancement as between a husband and wife, thus limiting its application further, however the provision is not yet in force and there is no date set for when it will be.
[284] *Ibid*.
[285] Bankton *Inst* I.9.23.
[286] See below paras 3.16-3.25.
[287] See above paras 1.15-1.20.
[288] Erskine *Inst* III.3.54.
[289] The action of *condictio indebiti* applied where "(1) there was a payment of money or transfer of property by the pursuer to the defender; (2) the payment or transfer was not legally due (*indebitum*); (3) it was made under an erroneous belief that the money or property was due by the pursuer to the defender (a liability error); and (4) neither the defence that it would be inequitable for the court to order repayment or retransfer nor any other defence lies": Whitty "Unjustified Enrichment" para 6.
[290] Erskine *Inst* III.3.54.
[291] D Carr *Ideas of Equity* (2017) para 2.03.

3) ***ANIMUS DONANDI***

a) The role, constitution, and expression of the *animus donandi*

3.16 The *animus donandi*, or donative intent, has been held to be paramount in the constitution of a donation,[292] more important than any additional requirement, even delivery.[293] It is universally agreed that a donation cannot be found in absence of the donor's presently formed *animus donandi*.[294] It is through the *animus donandi* that the donor is formally bound to the donation as it demonstrates that the donor has reached the stage of "engagement" according to Stair's tripartite categorisation of acts of will,[295] and is therefore fully committed to the act in a legally relevant way. The *animus donandi* provides the donation's *iusta causa*, thus protecting the donee from subsequent claims of unjustified enrichment.

3.17 Fundamental to the proper formation of the *animus donandi* is that it is entirely voluntary in nature,[296] and "to be voluntary, a grant must be with the full, free and informed consent of the granter".[297] There can be no preceding legal obligation for the donor to act.[298] Any suggestion of duress or prior compulsion will negate it, for this would undermine the voluntary character of the act.[299] As an extension of this, certain relationships which infer trust and confidence, for instance between a professional advisor and a client, may give rise to a presumption of undue influence or 'immorality' where the advisor is an alleged beneficiary.[300] Thus, even though the

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[292] J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow) p 84.

[293] *Crosbie's Trustees* (1880) 7 R 823, although delivery is considered evidence of the formed intention: McBryde *Contract* para 4-09 and see below paras 3.26-3.33.

[294] Gordon "Donation" para 19; MacQueen and Hogg "Donation in Scots Law" p 6. The *animus donandi* must be demonstrable at the time of making the donation. Previous statements of an intention to give will not suffice: *M'Kenzie v M'Kenzie* (1891) 19 R 261.

[295] Stair I.10.2. The other stages are "desire" and "resolution".

[296] MacQueen and Hogg "Donation in Scots Law" p 6. See also para 2.22 above.

[297] *Wilson v Watkins* [2019] CSOH 44 at para 18 *per* Lord Brodie.

[298] See above para 2.27-2.31.

[299] *Gray v Binny* 1879 7 R 332.

[300] *Honeyman's Exrs v Sharp* 1978 SC 223; *Thomson v Royal Bank of Scotland* 2003 SCLR 964 at 985. In *Wilson v Watkins* [2019] CSOH 44 it was held that for a relationship to give rise to undue influence it must also involve an unequal balance of power "giving rise to what amounts to a fiduciary relationship" (*per* Lord Brodie at paras 27-29).

animus donandi is formed through the will of the donor alone, the character and position of the donee will play a significant role in determining whether it is validly constituted.

3.18 What sets a donation apart from other voluntary gratuitous acts, such as *negotiorum gestio*,[301] is that there should be no evidence that the donor will acquire, anticipates acquiring, or intends to acquire a right to be recompensed for the act. Instead, it is expected that a loss will be incurred.[302] This is not to say that the donor cannot have a hope of receiving some sort of reciprocal action. But there is a difference between a vain hope and an expectation.[303] Bankton[304] and Stair[305] both recognised a moral obligation of recompense and gratitude arising for the donee,[306] but, as noted earlier,[307] "a gift [given] with the prospect of the equivalent is no gift in the intention of the giver, but rather the effect of a sordid disposition".[308] Thus, any power to compel reciprocity, or firm expectation of the same, will negate the *animus donandi*.

3.19 The *animus donandi* should not be conflated with the notion of motive.[309] The reason underlying the donative intent is not normally considered significant when establishing the intent itself.[310] The donor may want to donate to another for purely

[301] Although, arguably *negotiorum gestio* is not "gratuitous" at all, as the gestor's intervention automatically gives rise to an obligation upon the beneficiary to recompense them for any expenses incurred. See Hogg *Law and Language* pp 180-181 and above paras 2.21-2.40. Moreover, as a prerequisite for *negotiorum gestio* is the gestor's intention to recover the costs for intervention, this is not gratuitous but instead benevolent. In other words, it is kind rather than free.

[302] Bankton *Inst* I.9.1.

[303] Hogg *Obligations* paras 1.16 and 2.07.

[304] Bankton *Inst* I.9.1.

[305] Stair I.8.2.

[306] See above paras 2.47-2.51.

[307] See above para 2.48.

[308] Bankton *Inst* I.9.1.

[309] For the relevance of motive generally, see above paras 2.32-2.40.

[310] There have been suggestions that Bankton thought that a necessary component of donation was the intention to benefit the donee, but this is by no means certain and neither has it been enforced by the courts: Whitty "Unjustified Enrichment" para 282. However, occasional references to motive, such as "intention of benefitting the donee" (*Milne v Cruikshank* (1884) 11 R 887 *per* Lord Young at 891) have been made, leaving the matter still open to interpretation. It is thought that the *animus donandi* is broader than an 'intention to benefit' and permits a degree of self-interest on the part of a donor when making a donation: DCFR p 2800. Additionally, when distinguishing donation from *negotiorum gestio*, Stair states that the latter is done "of

altruistic or entirely mischievous motives, but these purposes cannot automatically negate the *animus donandi*.[311] True, in a question of whether a donor truly has formed the *animus* the motive can have a bearing on the answer.[312] Thus, in *Forrest-Hamilton's Trustee v Forrest-Hamilton*[313] it was held that the purported donor did not have donative intent because he had boasted to others that his intention in moving money into an account marked "either and survivor" was to avoid paying death duties.[314] This said, the motive cannot over-rule the donor's intention to donate if the *animus* is clearly expressed. Normally, the motive will only be considered relevant where the donation is remuneratory in nature, and that is because it is likely to displace the presumption against donation.[315]

3.20 It has been said that a promise to donate in the future is insufficient to constitute the *animus donandi*,[316] at least for a pure donation, although this does not mean that it is not possible to create a conditional donation where the donor is bound to make a donative transfer at a specified point in the future or upon fulfilment of a condition.[317] The difference between a promise to donate and a conditional donation lies in whether the act purports to presently bind the originator to the donation, or, alternatively, whether the donor is demonstrating a firm intention to be bound upon occurrence of a specified event.[318] Furthermore, a promise does not necessarily invest a donee with either a *ius ad rem* or *ius in rem* to the donum, whereas a completed donation always does.[319] The precise wording of the document can indicate whether a person has formed a present intention to give. For example: "I

purpose to oblige the receiver (…) to recompense" (Stair I.8.3). Here, "purpose" could potentially be equated with the motive of the gestor, leaving scope for motive to play some role in the establishment of the animus donandi, if not the definitive one.

[311] "…whether one has fulfilled one's legal duties stands apart from the reasons for which one has conducted oneself." L Smith "Can We Be Obliged to Be Selfless?" in A S Gold and P B Miller (eds*) Philosophical Foundations of Fiduciary Law* (2014) p 142.

[312] *Forrest-Hamilton's Trustee v Forrest-Hamilton* 1970 SLT 338. See also above paras 2.32-2.33.

[313] Discussed above at para 2.32.

[314] *Forrest-Hamilton's Trustee v Forrest-Hamilton* 1970 SLT 338 at 341. The court also found that as there had been no delivery during the donor's lifetime due to the account being in both his and his wife's names, so a *de praesenti* intention to make a gift had not been formed.

[315] Bankton *Inst* I.9.2.

[316] Gloag and Henderson para 13.34; *McGregor v Hepburn* 1979 SLT 87.

[317] See below chapter 9: "Conditional Donations".

[318] See below paras 9.7-9.12.

[319] Even if that right is subject to defeasance, for instance with a donation subject to a resolutive condition: see below paras 9.40-9.45.

wish to give" will not suffice to demonstrate present intention as it appears to indicate desire, rather than firm intention.[320]

3.21 Perhaps the best example of the distinction is found in the case of *McGregor v Hepburn,*[321] where a woman signed a document in favour of her daughter and son-in-law as "sole heirs", and delivered it to them, stating that at her "earliest convenience" she would "sign over the title deeds" to her flat. Thirteen years later she had still not executed a disposition of the property. Although there were elements of promise in the document, the court refused to recognise the document as a *de praesenti* intention to make an *inter vivos* gift, despite the use of phrases such as "I am giving", partly because of the use of the term "heir". An heir, it was held, "was a person who succeeded to a heritable subject on a death" and therefore the use of the word negated any claim to an *inter vivos* donation.[322] However, as the law of promise requires "clear words (…) to express the promisor's intention to bind himself by an enforceable obligation"[323] it may be difficult to distinguish between a promise to donate and a donation in practice.

3.22 If the *animus donandi* can be proved, the donor is irrevocably bound by it "unless [the donor] expressly exercise[s] the right to reserve a power to revoke".[324] As a result, upon completion of a J1 the donor must perform the subsequent J2 if called upon by the donee. If the donor wishes to rescind from the obligation without reservation of a right to revoke, the donee's consent is necessary.[325] That said, where there is a continuing J1 obligation upon which periodical payments are made

[320] *MacDonald v Cowie* 2015 SC 101 *per* Lord Tyre at para 20.
[321] 1979 SLT 87.
[322] 1979 SLT 87 at 88 per Lord Grieve.
[323] *Regus (Maxim) Ltd v Bank of Scotland Plc* [2011] CSOH 129 at para 46 *per* Lord Menzies.
[324] MacQueen and Hogg "Donation in Scots Law" p 9, although there may be constraints on this depending whether a transfer has been effected or not and if the donor has passed the property on to third parties, particularly if they are in good faith and have given value. See also above paras 2.47-2.67.
[325] This appears to be linked to unjustified enrichment law where a person attempting to obtrude benefits upon another loses all rights in relation to the object, for instance the power to sue for recompense, see: N Whitty "Unjustified Enrichment" para 86.

(for example, an alimentary liferent) once the first payment is accepted the donee loses their right to reject subsequently. [326]

3.23 With a J1, the expression of the donative intent must be in writing unless it is made in the course of business.[327] Given the presumption against donation in Scots law,[328] it is likely that the donum would need to be sufficiently described in the J1 constitutional document or any claim based on a purported donation would fail. For example, a document stating "I am giving you my guitar" would be explicit enough in an instance where the donor had only a single instrument. The same statement if the donor had multiple makes and models of guitars would not sufficiently identify the donum, and therefore could not be acted upon by a hopeful donee.[329]

3.24 Additionally, a donee must also be adequately described or at least be identifiable.[330] In this the law is similar to other areas, for instance succession.[331] If the donation is directed towards a too broad or vaguely designated group of recipients then this may be enough to negate it. However, succession law justifies displacing a legacy because of the difficulty in ascertaining the true intent of the deceased. With an *inter vivos* donation it may be possible to return to the donor to ask them to clarify their intention and therefore easier to uphold the provision.[332]

[326] "The legacy must be taken under the condition on which it is given or rejected altogether": *Smith v Campbell* (1873) 11 M 639 *per* Lord Deas. See also: *White's Trustees v. Whyte* (1877) 4 R 786 and *Chrystal's Trustees v Haldane* 1960 SC 127 at 133 where it was found that an alimentary liferent "excludes any question of renunciation when [the beneficiary] starts to enjoy it".

[327] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).

[328] Stair *Inst* I.8.2 and above paras 3.2-3.15.

[329] Unless there were additional evidence submitted to support a contention that a specific instrument was intended. This is reflective of the general principle of specificity in Scots property law: S Farran and D Cabrelli "Exploring the Interfaces between Contract Law and Property Law: A UK Comparative Approach" (2006) 13 *Maastricht Journal of European and Comparative Law* 403, 410; *Rodger v Paton* [2004] CSOH 135.

[330] See below paras 4.49-4.47.

[331] *Angus's Executrix v Batchan's Trustees* 1949 SC 335.

[332] That said, "most disputes concerning donative transfers arise after the death of the alleged donor": J Baron "Gifts, Bargains, and Form" (1988-89) 64 Ind LJ 155 at 169. As such, it may not be possible to ask the donor to clarify their meaning and so the applicable rules would be much the same as succession law.

3.25 Periodical payments based upon a single continuing J1 obligation must be distinguished from a situation where regular donative transfers are made but each one is considered an independent donative act. An example of this can be seen in *Wright's Trustees v Wright*, where a bankrupt's employer made regular payments in addition to the agreed salary.[333] The employer (the donor), who was a brother-in-law of the insolvent man (the donee), had made it clear that the employer retained the power to withhold the additional gratuitous payment at any time. This meant that the donee could not compel the donor to perform due to the absence of a continuing obligation. As an extension, the donee's creditors had no claim against the donor, as the donor retained "the power to give or withhold it at pleasure".[334] Whether or not a periodical payment is made upon a continuing obligation or as an independent act will ultimately turn on the circumstances of the case, and likely require strong evidence of the donor's *animus donandi* to be bound ongoing.

b) Delivery

3.26 Delivery is crucial in any donation, whether a J1 or J2. In the words of Lord Kinnear:

> "gratuitous obligations of any kind cannot be made perfect[335] and effectual without delivery. That is the doctrine uniformly applicable to donations of all kinds. If the subject of a gift is a corporeal moveable, the thing itself must be put into the hands of the donee; if it is an incorporeal right the document of title which enables the donee to make the right effectual to himself must be delivered either to him or to some third person for him."[336]

[333] See, for instance: *Wright's Trs v Wright* (1873) 1 R 237.
[334] *Ibid per* Lord Deas at 242.
[335] "Perfected" in this context has typically been taken to mean "complete".
[336] *Cameron's Trustees v Cameron* 1907 SC 407 at 421 *per* Lord Kinnear.

As noted above,[337] unless made in the course of business, a donative obligation must be in writing,[338] so for a J1 "delivery" will normally be delivery of a document detailing the content of the donation.[339] It could also be a trust deed, as the beneficiary's right can arguably be a specific type of donation, albeit that the benefit is managed and administered by a person other than the donor or donee. Delivery is important because "the existence of unilateral obligations (…) create[s] a fertile ground for disputes about changes of mind".[340]

3.27 According to McBryde, delivery occurs at the point when the donor can no longer change her mind,[341] that is, the irrevocable stage. Normally, this would be when the donor places the document or object out of the donor's control and can no longer recall it.[342] Intention to deliver is insufficient, thus when a signed document was found next to the body of a murdered granter, despite the granter having intimated to the grantee that it was ready to collect, delivery had not occurred and therefore no right was vested in the grantee.[343]

3.28 Although delivery is commonly thought of as an essential step in the creation of a donative obligation, the delivery does not constitute the donation, *per se*. Its function is primarily evidentiary, proving that the donor has formed the requisite intention.[344] This is because delivery requires the donor to perform an external act.[345]

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[337] See para 3.23.

[338] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).

[339] The distinction between the requirements and effects of delivery on both a donative obligation and a donative transfer were discussed in *Macdonald v Cowie* 2015 CSOH 101 per Lord Tyre at paras [29]-[31]. Here it was noted that delivery can either act as the conveyance of property or of a deed entitling the recipient to a claim on the property or granting the recipient the ability to complete their title (for instance, through registration). Moreover, Lord Tyre emphasised that delivery was necessary to evidence the "engagement" of the donor in forming their intention to donate (at para [31].

[340] McBryde *Contract* para 4-01.

[341] *Ibid* para 4-09.

[342] *McGill v Edmonston* (1628) Mor 16991; Gordon "Donation" para 29.

[343] *Creditors of Stamfield v Scot* (1696) Bro Supp IV 344.

[344] *Cawdor v Cawdor* 2007 SC 287 at para 15 *per* Lord Hamilton.

[345] Additionally, where there is a close relationship between the parties and they reside together, it will not necessarily be a bar to a donation that the donor still had access to, and arguably control over, the donum. For instance, in *Edwards v Corrance* (1903) 19 Sh Ct Rep 219, a man bought a raffle ticket in his nephew's name. The ticket subsequently won, and the man took possession of the prize (a piano) in his house where his nephew also lived. The donation of the ticket (and subsequent prize) was found to be effective, despite the

This serves to allow the donor to demonstrate the commitment to be bound to the donative obligation and to protect the donor's creditors and heirs by preventing the donor from "alienating assets by secret deeds".[346] Therefore, it can be said that delivery offers a fulfilment of any publicity requirements. But this also means that other acts can potentially displace the need for delivery of the document containing a contested J1, especially if they are public acts.[347] For instance, when regular periodical transfers are made upon the basis of a purported J1 donation, the donor may have difficulty subsequently denying the existence of the obligation.[348]

3.29 After establishing the necessity of delivery, the next question to consider is: to whom must delivery be made? Primarily, it will be to the donee. A direct delivery to a donee will normally, but not always, suffice to demonstrate proof of intention.[349] However, in some situations further evidence may be required. This is because of the strong presumption against donation. Thus, in *Bank of North Scotland v Cumming,*[350] Lord President Normand held that where a donation was embodied in an endorsed deposit receipt and delivered directly to the purported donee, there may be additional evidence required to corroborate the recipient's claim.[351] As such, the court should take note of all surrounding circumstances, including the nature of the relationship between the parties, previous dealings, and any witness statements. For

ticket having never been handed over to the boy nor control of the piano relinquished. Similarly, a man who retained possession of a deposit receipt in his wife's name was found to have made a valid donation to her: *Thomson v Thomson* (1882) 9 R 911. It should be noted that in both cases there was evidence led as to discussions between the donor and donee about the nature of the donation.

[346] McBryde *Contract* para 4-09.

[347] *Dick v Oliphant* (1677) Mor 6548. See also Lord Mure (*Crosbie's Trs v Wright* 7 R 823 at 825): "I do not think that it has ever been held that actual delivery, in the strict sense of that expression, was necessary, provided there was distinct evidence of an intention to make a donation. In the case of [*British Linen Co* v *Martin* (1849) 11 D 1004] the receipt was not delivered in the strict legal sense, and yet the donation was sustained. In *Ross v Mellis* the question of delivery was scarcely raised. But in *Gibson v Hutchison* ((1872) 10 M 923) it was laid down that actual delivery is not essential; and the import of the leading cases from the date of that of *Martin* is that the question must be dealt with as one of intention, to be gathered from the terms of the receipt in each case, and the import of the other evidence adduced in support of the alleged donation". In this, I humbly suggest that Lord Dunedin was in error when he stated "donation can as a rule not be made out where there has been delivery neither of the thing alleged to be donated nor of the document which is the title to the thing": *Carmichael v Carmichael's Exx* 1920 SC (HL) 195 at 199.

[348] *Shaw v Muir's Exrx* (1892) 19 R 997. That said, there must be proof that the donor intended it to be a continuing obligation: *Wright's Trs v Wright* (1873) 1 R 237. See above at para 3.34.

[349] Erskine holds that "After a deed appears in the custody of the grantee, the presumption of delivery to him is so strong that in no case can it be elided except by his own oath or writing": Erskine *Inst* III.2.43.

[350] 1939 SC 448.

[351] *Ibid* at 461.

a customary gift, such as a birthday present, this is unlikely to be a problem. Furthermore, where a donation delivered directly to a donee forms a significant part of the donor's patrimony, the presumption against donation will be harder to displace, even where witness statements and supporting evidence would otherwise suffice to overcome it.[352]

3.30 Delivery may also be made to a third party for the donee's benefit, where the third party receives the donation on behalf of the donee or as an intermediary entrusted to pass it on.[353] Having a third party involved in the transaction provides distance between the interested parties and, therefore, some external validation of the act. As such, the delivery will normally be presumed sufficient to place the donation beyond the donor's recall. Still, this rule is not absolute, as the case law is littered with instances where no delivery has been found because the third party is held to hold the donation on deposit for the donor.[354] For example, in *Ker v Kers*,[355] a gratuitous disposition was held to have been revocable by a donor on his deathbed, despite having been placed in the hands of a third party some time before.[356]

3.31 Given that delivery is necessary in part to provide an element of publicity to gratuitous acts, registration of a J1 in the Books of Council and Session may also be considered an equivalent act,[357] particularly if registered by the donor.[358] Nonetheless, the case is less certain with regard to other public registers, for instance the Register of Sasines.[359] Here, registration may not be indication of

[352] *Ross v Mellis* (1871) 10 M 197; *Bank of North Scotland v Cumming* 1939 SC 448.
[353] *Crawford v Kerr* (1807) 22 Mor 2. In this Lord Kinnear (*cit* above para 3.35) is mistaken when he states that delivery must be directly to the donee. As in sale, it can be constituted by constructive delivery. However, the grantee must be given the opportunity to refuse, so therefore must be informed: McBryde *Contract* para 4-20.
[354] Erskine *Inst* III.2.43.
[355] (1677) 1 Brn 561.
[356] This is connected to the presumption against donation. Where an obligation is gratuitous, there is a presumption that a third party holds it on behalf of the granter rather than the grantee: Bell *Prin* § 23.
[357] *Cameron's Trs v Cameron* 1907 SC 407.
[358] Erskine *Inst* III.2.44.
[359] McBryde para 4-24; *Cameron's Trs v Cameron* (above). This should be qualified though, as *Cameron's Trs* did not say that registration could not *per se* effect delivery, as it acted as a form of constructive delivery of the land, but only that in this instance it did not. This was because the putative donation took the form of bonds of security held by a trustor which it was argued formed the property of a trust settlement. Rather than act as a form of conveyance from the trustor to the beneficiaries, the entries in the Register of Sasines represented a

delivery, certainly where the donor remains vested in the donum,[360] partly because it is not normally the granter of a deed who is responsible for registering property in a land register. Yet, it is no longer competent to register deeds in the Register of Sasines,[361] and its successor, the Land Register, is a register of title rather than deeds. This difference may mean that registration in the Land Register suffices to prove intention for a J1.[362] However, it is hard to imagine a practical situation where one would, or could, attempt to register a donative obligation in the Land Register that does not have the effect of creating or discharging a real right, and thereby creating a *ius in rem* for the donee.[363] Thus the question may be moot.

3.32 The final thing to consider is whether it is possible for the donor to dispense with the requirement of delivery expressly. The historical starting point would appear to be the answer "no". Thus, in 1683 the court found that a clause purporting to dispense with the requirement of delivery in a gratuitous disposition was insufficient to displace a subsequently executed delivered disposition.[364] Unfortunately, later authorities "muddied the water", claiming that such a clause could be effective if the document was undelivered but only if found in the granter's possession upon their death.[365]

3.33 If this were the case, it could be problematic as it would give such deeds a testamentary nature, being revocable until the donor's death, and therefore conflicting with any characterisation of such a deed containing an *inter vivos* donation. It could be argued instead that they are a form of donation *mortis causa*,

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conveyance from the debtors to the trustor of a security for the bonds (*per* Lord-President Dunedin at 357). Thus, where the donation was the heritable property itself, and the donation being made directly between the donor and donee, it is possible that registration in the Register of Sasines could suffice as effective delivery.

[360] *Cameron's Trs v Cameron* (above n 267).

[361] Land Registration etc (Scotland) Act 2012 s 48.

[362] *Linton v Inland Revenue* 1928 SC 209.

[363] The Land Registration etc (Scotland) Act 2012 s 49 allows the registration of only "registrable deeds", a non-exhaustive list of which can be found at https://kb.ros.gov.uk/land-and-property-registration/pre-registration/registrable-deeds/list-of-registrable-deeds. Nearly all appear to have 'real' effect, (i.e. create patrimonial benefits enforceable against the world) bar, perhaps, a Good Neighbour Agreement, or an Undertaking not to Exercise Pre-Emption.

[364] *A v B* (1683) Mor 17003.

[365] Stair I.7.14; Erskine *Inst* III.2.44; Bell *Princ* §24.

but this also has difficulties in a contemporary analysis of the law. First, a donation *mortis causa* required the possession of the donum to be transferred to the donee with transfer of ownership suspended until the donor's death.[366] No such transfer of possession has occurred in an undelivered J1 donation. Second, even if it were a form of donation *mortis causa*, it could no longer apply due to statutory changes.[367] As such, any notion that there is an exception to the delivery rule through express clause where the document is found undelivered in the granter's possession after their death "should at the earliest opportunity be given a decent burial".[368]

4) SCOPE OF THE DONUM

> "In daily usage, various transactions are spoken of as gifts. These include the presents given to friends and close relatives on special occasions, transfers within the family to reduce taxes or as an advancement of inheritance, surprises between spouses, incentives given to good customers and productive members of the sales force, awards made to employees upon retirement, and donations to charity. Particularly in civilian jurisdictions, however, these transactions are not all subject to the law of gifts…".[369]

3.34 Key to any analysis of donation is identifying what can form its subject. The word "donation" is derived from the Latin "donum": a noun nominating the thing gifted. This remains the technical term for the subject of a donation in Scots law. For the classical Romans, what could constitute the "thing" is clearly demonstrated by

[366] Gordon "Donation" para 7; *Morris v Riddick* (1867) 5 M 1036, although there is some uncertainty regarding the point of transfer in a donation *mortis causa*: see below paras 6.23-6.24.
[367] Succession (Scotland) Act 2016 s 25(1).
[368] McBryde *Contract* para 4-48.
[369] Hyland *Gifts* para 9.

what was excluded from the prohibition of gifts between husband and wife.[370] Particularly, "services – human action or inaction – of every kind"[371] were not included in the prohibition, with the donum being considered solely in patrimonial terms (i.e. assets). This restriction of the concept of donum has been almost, if not entirely, universally adopted.

a) Services?

3.35 Scotland has adopted the omission of services from the scope of the donum, but this is not unique to Scots law. It is the same in many other jurisdictions with a civilian inheritance. For example, Italian law, while permitting donation to be obligatory (a J1), specifically limits J1s to undertakings to give (*dare*) to the exclusion of undertakings to do (*facere*).[372] That services cannot be donated is, perhaps, questionable, particularly in light of recent scholarship in other areas of Scots law. For example, Professor Niall Whitty suggests that the law of unjustified enrichment may be evolving to recognise a gain made by one party through the provision of services in cases for enrichment arising from deliberate conferral (transfer).[373]

3.36 However, the principal authority Whitty gives for this position is *Shilliday v Smith*.[374] In *Shilliday*, although services were involved, the pursuer's claim succeeded on the basis that she had either paid money for work done on the defender's property, transferred money to the defender to pay tradesmen, or purchased items retained by the defender in his garden and kitchen. Strictly speaking, the money and physical objects were the subject of the enrichment claim, not the services. That is not the same as the pursuer succeeding in an action based on enrichment by transfer after personally performing the work, or labour, herself.

[370] D 24.1.3. Dawson explains that the prohibition stems from an "ideal conception of marriage at the highest level of mutual devotion and disinterestedness (…) and that marital harmony must not appear to be 'procured for a price'": Dawson *Gifts and Promises* p 14.
[371] Dawson *Gifts and Promises* p 15.
[372] Italian Civil Code Art 769; Hyland *Gifts* para 342.
[373] Based upon the *condictio causa data causa non secuta* (action for recovery where transfer is made for a cause that does not follow): Whitty "Unjustified Enrichment" paras 312 and 970.
[374] 1998 SC 191.

The law has not (yet) extended the notion of quantifiable patrimonial gain through provision of services alone in order to found an enrichment claim based on transfer.[375] To do so would be to equate a person's labour as a form of property.

3.37 There have nonetheless been some attempts in unjustified enrichment claims to link the law of donation with services. For instance, in *Harris v Douglas*[376] counsel for the pursuer asserted that enrichment law should apply as the "pursuer had not intended to make a gift of his services".[377] However, this indirect assertion that services can be gifted is likely to be reflective of slightly careless use of language, rather than indicative of the fact that services can be gifted. It may have been more appropriate to describe the services as having not been provided "gratuitously".[378] All donations are gratuitous.[379] However not all gratuitous acts are donations. As noted earlier,[380] most definitions of donation include a specific mention of property. Enrichment is more broadly termed "an event (…) which gives rise to an obligation to redress the enrichment".[381]

3.38 Describing unjustified enrichment as "an event" allows the doctrine to cover a much broader spectrum of potential situations than a donation can.[382] Enrichment law originated from broad, equitable principles to allow recovery in a wide range of situations,[383] rather than as a description of a specific type of transaction, such as donation. This means we must be mindful of the difference between the two areas of law, and not conflate concepts from one with the other inappropriately through incautious use of language.

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[375] However, it is possible to be recompensed for provision of services under other heads of enrichment, such as imposition or interference: *Lawrence Building Co v Lanarkshire County Council* 1978 SC 30; *ELCAP v Milne's Executor* 1999 SLT 58.
[376] *Harris v Douglas* (14 February 2003, unreported), sub nom *Harris v Sales' Executors* 2003 GWD 7-186.
[377] *Ibid* at para 17.
[378] See above paras 2.21-2.40.
[379] See above para 2.40.
[380] Such as Gordon's definition cited above at para 3.43 from the *Stair Memorial Encyclopaedia*.
[381] Whitty "Unjustified Enrichment" para 2.
[382] See para 3.43 above; Gordon "Donation" para 15.
[383] Stemming from the broad maxim of "it is fair that no one become richer by the loss and injury of another" (*aequum est neminem cum alteris detriment et iniuria fieri locupletiorem*): D 50.17.206 (Pomponius); Whitty "Unjustified Enrichment" para 1.

3.39 There are other aspects that justify excluding services from a definition of donation. For one, a service is "performed" while a thing is "transferred". This distinction may appear trite, and the reasoning somewhat circular, for if donation is simply defined as involving a transfer of property such a definition excludes performance of a service without necessarily providing a full explanation for doing so. Yet, the demarcation of which services would sufficiently meet the criterion for "donation" creates a murky swamp which hampers, rather than benefits, any analytical venture.[384]

3.40 For example, would there be a difference between a gratuitously provided service by a person who is normally employed professionally to perform those acts and a gratuitously provided service by an amateur? The former incurs a loss, either through diminishment of the normal value of their work by allowing it to be given freely or not receiving usual remuneration. The latter does not, and thus does not meet the corresponding patrimonial loss/gain requirement for donation favoured by this thesis.[385] This would result in the law inadvertently favouring, and recognising the loss, of some persons but not others for providing the same service. For example, a professional healthcare provider could "donate" care services (or claim for the same in enrichment),[386] but a child caring for an elderly, disabled parent could not.[387]

3.41 Furthermore, if a service provided can be considered a donation, there could be a degree of discrimination between certain types of service based on an arbitrary assessment of what the potential patrimonial gain might be. For example, a musician

[384] Although Professor Whitty contends that "donation" should be extended to cover services, he also acknowledges that "the Scottish treatments of donation do not cover the gift of these benefits", albeit suggesting that this "may not be a conscious choice of the law-makers but rather a result of the slow development of the common law" – Whitty "Unjustified Enrichment" para 284. Nonetheless, analysis of the law as it stands appears to exclude their inclusion.
[385] See above paras 2.8 and 2.22 and below para 3.52.
[386] *ELCAP v Milne's Executors* 1999 SLT 58.
[387] Additionally, this would demonstrate another instance of the societal prioritisation of mercantile actions over those outwith the market: see above paras 1.4-1.9.

busking in the street, a service for immediate consumption, results in no direct patrimonial benefit to the recipient, and thus probably could not be considered a donation. In contrast, a tradesperson providing a service in a person's house can lead to a patrimonial increase in the value of the recipient's property and thereby potentially could be. Such a distinction can have an indirectly negative impact on certain professions through the value society attributes to them because of this patrimonial analysis which, arguably, should not be furthered by donation law.

3.42 However, this is not to say that the right to the performance of a service cannot form a donation, for instance a voucher for a massage or a ticket to a theatre production.[388] While the distinction may be fine, the right to performance that is being transferred is a right that has a patrimonial value, much like other incorporeal property such as money in a bank account, or share-holdings. This distinction between a direct provision of services and a right to a service is recognised by the DCFR, which suggests that relevant factors to identify the difference may include "the pre-existence of the right or the fact that the donor is not the service provider".[389] Thus, where the service provider is a third-party, for instance a masseur, and they have issued a voucher in advance, this may be transferred as a gift.

3.43 Admittedly, the exclusion of direct provision of services to the scope of the donum is blurred slightly by the historical position that "aliment and intertainment [*sic*]"[390] provided to an adult with capacity by a person who is not "use to furnish provisions for money" is considered a donation.[391] Nonetheless, this situation could possibly be distinguished by the fact that providing a guest with room and board necessarily entails expenditure in the form of payment for food, cleaning, and heating. As such, it is not so much the "service" provided that justifies this being a donation, but instead those things consumed by the guest which the host has paid

[388] This is in line with the DCFR: Book IV, Part H, 1:103.
[389] DCFR "Commentary" p 2811.
[390] Stair I.8.2. This has not in recent times been tested in the courts.
[391] *Ibid*; Bankton *Inst* I.9.23; Erskine *Inst* III.iii.92.

for. The recipient's gain is the cost saved through not spending on these things themselves - as the adage goes: "a penny saved is a penny earned".

3.44 Additionally, it can also be considered that the institutional writers' acknowledgement of this type of donation is more indicative of a changing societal conception of what constitutes a quantifiable benefit, rather than a statement that service provision can be a form of donation. At the time of the institutional writers the necessities of life – food, shelter, clothing – were likely considered of more practical and financial importance[392] than today's society which considers wealth more in terms of accumulation of non-consumable assets. If Stair were writing today, it might not be as obvious for him to include "aliment and intertainment" in his discussion of donation law.

3.45 That said, there are modern situations which can be considered donative where the donee benefits through immediate consumption. For example, if Jeannie invites Khalid to her house for a Burns' Supper, it could be argued that she is donating a meal to him in the form of haggis, neeps, and tatties.[393] Jeannie will be impoverished to the extent that she has paid for the ingredients of the meal, and Khalid has been enriched to the extent he has been saved the expense of providing his own meal. And the distinguishing feature between this circumstance and the bare provision of services is that the subject of Jeannie's donation would not be considered to be the effort expended in the preparation of the meal, only the physical content. Thus, the situation could still fall under the wider rubric of "donation" despite the perishable nature of the gift, as there has been an identifiable patrimonial gain:

[392] During the 19th century there developed a presumption of remuneration for services provided *gratis* as the industrial revolution changed the economic focus from subsistence to accumulation (Krzanich *supra* n 8 p 161). However, Krzanich notes that the cases she discusses used the language of enrichment law but ultimately were decided through implied contract. This suggests that the courts were reluctant to impose a value on the benefit received and thus steered away from notions of patrimonial transfer through the provision of services. Absent a wage, the service provider has not directly 'lost' from their assets: it may be a matter of public policy that people should be paid for work but that is not a matter for property law. Neither should it be a matter for donation law, which is principally concerned with patrimonial assets, not abstract social goods.

[393] In New Caledonia this type of ceremonial meal is treated as a form of gift, albeit it takes the form of the "presentation of yams" (M Mauss *Essai Sur Le Don* (1925) (transl. J Guyer, 2016) p 88), suggesting that it is socially acknowledged that a gift made for immediate consumption still constitutes a gift.

the expense of the physical content of the meal.[394] However, the "service" of Jeannie cooking the meal would not be included.

3.46 A further argument can be made against the notion that services can be "donated" through comparison with yet another area of the law that is treated alongside donation and unjustified enrichment in Stair's *Institutions*: *negotiorum gestio*.[395] Although necessary expenditure, or pecuniary loss, by a gestor can be recovered, a claim for services provided cannot.[396] Leslie argues that this stems from the original Roman position where altruism was a key component of *negotiorum gestio*.[397] Permitting a claim for services beyond simple recompense for necessary expenditure would introduce an element of self-interest which negates altruism, although it does not bar an enrichment claim.[398] Additionally, if it is possible to "donate" services it implies there is a monetary value in all social interaction which is somewhat crass. Ironically, it undermines the non-patrimonial value in neighbourliness and good relations.

3.47 There could, however, perhaps be an historical and analogous basis upon which to found an argument in favour of including services: location. Location was conceived of as the commercial provision of services, or work, and as a type of contract for lease or hire.[399] It was treated alongside agreements regarding the lease of property, and the two types are presented as intertwined, albeit with slightly different requirements upon the lessor and lessee.[400] Where no formal contract could be identified, it was implied in the same way for a provision of services as for goods through location.[401] Thus, there was a pecuniary value attached to both the use of property and person's labour which could be determined through identifying current market rates.[402]

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[394] See para 3.51 above.
[395] Stair I.8.
[396] R D Leslie "Negotiorum Gestio in Scots Law: The Claim of the Privileged Gestor" 1983 JR 12 at 22 and fn 68.
[397] *Ibid* at p 15.
[398] *Ibid* at p 13.
[399] Bankton *Inst* I.20.1; Erskine Inst III.3.14; M L Pesante "Slaves, Servants, and Wage Earners: Free and Unfree Labour from Grotius to Blackburn" (2009) 35 *History of European Ideas* 289-320.
[400] Bankton *Inst* I.20.1-19.
[401] Bankton *Inst* I.20.8.
[402] *Ibid*.

3.48 There are some problems with founding a justification for including services as an appropriate subject for donation based upon location. First, the lease of services must have been based upon either the hire of the person or the hire of that person's skill.[403] If the former, then that verges on ownership of the person which contravenes laws prohibiting slavery. If the latter, then it may be possible to put a pecuniary value upon the work executed. Notwithstanding this, the value of the service *vis-à-vis* remuneration of the lessor may not match the value of the outcome of the execution of their skill for the lessee.[404] Thus, in a donation the loss of the donor would not necessarily be equal to the gain of the donee. If, as this thesis contends, this equality of patrimonial loss and gain is key to identifying a donation, the essential criteria for a donation is not met.[405] Second, that there is a delineation between a contract for hire of goods and hire for services demonstrates that there is a fundamental difference between the two and a separation between property and services. This is an historical distinction.[406]

3.49 Finally, a lease requires a return of the thing intact at the end of the contract. It is not clear that this would be possible if the 'lease' of the thing were the skill and effort expended through work (and thus the operation of location as a type of 'lease' for skills and labour was somewhat of a legal fiction). With a donation there is no return at the end of the legal act, as this would prevent it being a donation at all. It is, therefore, arguably unwise to draw upon the recognition in the law of location of the similarity between lease of goods and services, which implies an obligation to recompense or compensate for the use, and a permanent gratuitous divestiture of an asset by one person in favour of another.

[403] Pesante "Slaves, Servants, and Wage Earners" at 294.
[404] This was recognised in the English Court of Appeal case *Robinson v Graves* [1935] 1 KB 579 where the defendant was found liable to pay the full balance on a pre-agreed price for a portrait he contended did not meet the standard that warranted it. The court held that as art was subjective the value of the painting in the mind of the defender was not as relevant as the value of the skill and labour provided by the painter.
[405] See paras 2.8 and 2.22 above.
[406] Grotius *The Law of War and Peace* (transl. S Neff) II.12.3.

3.50 Discussion of enrichment, *negotiorum gestio*, "aliment and intertainment", and location aside, as noted above,[407] services are generally excluded from modern conceptions of donation in Scots law regardless. For instance, Professor Gordon, characterises the donum only as "property", including incorporeal property.[408] In his principal definition of donation, ownership of this property must also be transferred,[409] as donation is a basis for the acquisition of property.[410] While it may appear simple to state that donation involves a transfer of property, the scope of that transfer requires determination. For example, where a sale is made at under-value there is a question as to whether the difference between the price paid and full market-value constitutes a donation.[411] Additionally, if donation involves a transfer this implies a diminishment, or promised diminishment (in the case of an obligational conception of donation), to the donor's patrimony accompanied by a corresponding gain to the donee's.

3.51 Although patrimonial, defining the donum as "property" seems not entirely fitting, as this conjures images of a physical thing, at least in a layperson's terms.[412] Yet, a donation does not always consist of an acquisition of physical property (or incorporeal property for that matter) by the donee through an immediate direct transfer. For instance, a discharge of a debt can be considered a donation.[413] The extinction of a debt does not involve a transfer of property but instead involves the destruction of it: a debt ceases to exist once it is forgiven. Thus, what is important is not strictly the acquisition of property but an increase to the value of the donee's patrimony, either through a transfer of assets or through the reduction of liabilities which can be claimed against it.

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[407] See above para 3.35.
[408] Gordon "Donation" para 1; and para 1 fn 1.
[409] Gordon "Donation" para 1.
[410] Gordon "Donation" para 15.
[411] *Leslie v Leslie* 1983 SLT 186; discussed above at paras 2.25-2.26.
[412] Although in legal terms it is universally understood that a debt is the incorporeal property of the creditor.
[413] Similarly, the Bankruptcy (Scotland) Act 2016 s 98 (1)(a)(ii) classes any renunciation of a claim or right of the insolvent party as a "gratuitous alienation". Arguably, in this case the J2 transfer has proceeded the J1 obligation. The J1 has the effect of providing the *animus donandi* and therefore changing the basis upon which the donee holds the property. See paras 7.95-7.99 below.

3.52 Additionally, as the act of waiving a debt extinguishes an obligation, this reinforces the idea that the donum must be something which results in a corresponding loss in the donor's patrimony.[414] Furthermore, by focusing on the patrimonial gain of a person alongside a corresponding loss to the other, a clear delineation emerges between a donation in the strict legal sense and other gratuitous or liberal acts, such as volunteering or *negotiorum gestio*.[415]

3.53 Thus, this thesis favours the definition of the donum as a "patrimonial benefit", rather than more narrowly as "property". "Patrimony" is understood to be the sum-total of a person's assets and debts.[416] "Benefit" is defined by the Oxford English Dictionary both as "advantage, profit, good" and "pecuniary advantage, profit, gain".[417] Therefore, a successfully completed donation must result in a net profit to the donee, given that "profit" appears in both definitions. This permits acts to be considered donations even if a transfer is not made directly to a donee but to a third-party for the donee's benefit.[418] Thus, a payment made by the donor to a third-party creditor of the donee which extinguishes the latter's debt can be the subject of a donation as it results in a gain to the donee's patrimony. However, where there is a transfer (rather than donation by waiver of a debt) the term "asset" is employed for the subject being transferred, with the words "patrimonial benefit" being used to describe the resulting effect of any donation on the donee's patrimony.

[414] The divestment of the donor is key in the definitions of donation in Germany (§ 516 BGB), Louisiana (Civil Code Art 1468) and Quebec (Civil Code Art 1807). The diminution of the donor's patrimony must be voluntary: see above para 3.17.

[415] Hogg *Promise and Donation* p 180. The exact origins of this rule are unclear, but likely to stem from the Roman distinction between a *donatio,* which was a mode of property acquisition (Justinian *Inst* II.7) and *mandatum,* a gratuitous contract in which one party undertakes to do something for another without reward: R Lee *Elements of Roman Law* (1956) paras 514-520. As discussed above (para 3.43ff) the distinction is somewhat blurred in Scots law. Presumably, this is because such provisions involve a reduction in the donor's patrimony due to the expense of providing the goods, as opposed to, for example, a person volunteering in a charity shop in their spare time. While they may normally receive payment for such labour, remuneration is potential, therefore there is no actual reduction to the donor's patrimony.

[416] *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76 at para 12 per Lord Malcolm; *O'Boyle's Tr v Brennan* 2020 SC 217 (IH) at para 31; Discussion Paper on *Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006) para 1.5.

[417] Available at: https://www.oed.com/view/Entry/17694?rskey=JfnX69&result=1&isAdvanced=false#eid.

[418] See below chapter 11: Indirect Donations.

b) Patrimonial gain and non-tradeable assets

3.54 Given that the donum must amount to a patrimonial benefit to the donee, this excludes anything which may have a negative value. It may be the case that a transfer is made by one person to another, but the property transferred entails burdens that exceed its monetary worth. For example, contaminated land may be encumbered with mandatory, and expensive, environmental clean-up costs which are in excess of the price it could be expected to fetch on the open market. The *Scottish Coal Company* case[419] held that ownership of such land cannot be simply abandoned. However, it is not clear whether this would also extend to a voluntary transfer, particularly as the court held that voluntary transfer is one of only two methods of terminating ownership of land while the proprietor is living,[420] the other being where the law operates to divest by a "formal legal process".[421] As a voluntary transfer requires the consent of both parties,[422] if the putative donee agrees to the transfer it could be argued that the donum could potentially have a negative value.

3.55 That said, there is a principle in Scots private law that a person cannot impose obligations upon another without that person's consent.[423] Although a donee takes a gift complete with all burdens,[424] that does not mean a person can off-load property with hidden burdens that outweigh its value under the guise of a "donation". If we recognise a requirement that the donum must amount to a patrimonial gain,

[419] *Joint Liquidators of the Scottish Coal Company Ltd v Scottish Environmental Protection Agency* 2014 SC 372.
[420] *Ibid* at para 103.
[421] E.g. compulsory purchase: *ibid* at para 102.
[422] See para 7.65 below; J MacLeod *Fraud and Voidable Transfer* (2020) para 1.14 and p 4 n 6; Carey Miller *Corporeal Moveables* para 8.08.
[423] In this the law of donation is the same as for third party rights, where "it is axiomatic that a duty could not be imposed upon a third party against its will": McBryde *Contract* para 10.10 (*cit*. L J MacFarlane *Privity of Contract and its Exceptions* (2021) para 2-41). A voluntary juridical act which imposes obligations upon both parties is a contract which requires *consensus in idem*: Gloag and Henderson para 5.06. There are specific exceptions to this position which are discussed in Chapter 10: "Indirect Donations". See also: Whitty "Unjustified Enrichment" para 658.
[424] *Ballantyne's Trs v Ballantyne's Trs* 1941 SC 35.

then this would guard against any attempts by an unscrupulous party attempting to do so, even if the transfer is initially made with the donee's consent.

3.56 As the counter-side of the donee's patrimonial gain is the patrimonial loss for the donor, this raises a question as to whether fruits or income can be donated.[425] In one sense, the donor is not "losing" anything, except perhaps the right to make a gain from property already owned. That said, this right acquires a patrimonial value once the fruits or income become prestable. Thus, fruits or income can be considered a form of conditional donation,[426] the condition being the emergence of fruits or date of the income payment. Similarly, where existing property is permitted to be used for free that is otherwise normally income generating might, in some limited circumstances, be considered a donation. For example, a mother has a second property normally rented out that she lets her son's family live in for free. Given this is a voluntary diminishment in normal income it is possible it could constitute a donation, albeit the patrimonial loss is experienced on an ongoing basis rather than having a complete immediate effect.[427] Similarly, the donee's gain is not the accommodation, *per se*, but rather the saved expense of rent payments.[428]

3.57 Apart from the consideration, or exclusion, of services, a definition of the donum cannot incorporate anything that is generally prohibited from being transferred. To this end, Gordon identifies inalienable property,[429] which includes anything not *in commercio,* as not being donatable. Not *in commercio* encapsulates all property which cannot be freely traded.[430] Thus, this category of property includes "titles of honour", certain pension rights,[431] certain social security benefits,[432] wages

[425] A situation which caused some debate in France: Hyland *Gifts* paras 322-323.
[426] See below chapter 9: Conditional Donations.
[427] This should be distinguished from the provision of services, as the loss experienced stems from the ownership of property being used rather than direct performance of the donor. Normal income stemming from a right of ownership can be distinguished from potential worth of labour.
[428] This is similar to unjustified enrichment where a party's enrichment may be calculated by the saved expenditure of rent payments: *Glen v Roy* (1882) 10 R 239. See also above para 3.45.
[429] Gordon "Donation" para 15.
[430] Mackenzie *Institutions* III.3; Erskine *Inst* III.iii.3.
[431] Gordon gives the example of "pensions payable by the crown" ("Donation" para 15 fn 3; *Mulvenna v The Admiralty* 1926 SC 842).
[432] Social Security Administration Act 1992 s 187(1)(2) (as amended).

or salary[433] and some land held by the National Trust for Scotland or local bodies.[434] As an extension of this, it is feasible that anything not "severable" cannot be the subject of a donation as it is not independently tradeable. For instance, if I paint my neighbour's door it could be argued that the paint is the *donum* (as services are excluded). However, the paint is unusable once applied and can no longer be isolated from the door. Therefore, this would not be a donation, unless it can be demonstrated that the addition of the paint increases the value of the door. Under this analysis, some subordinate real rights would also be excluded, such as liferents, servitudes, real burdens, and so on.

3.58 It is worth mentioning that these rights, although not being voluntarily transferable, may lead to a patrimonial increase that then becomes donatable. For example, child benefit rights in themselves are not assignable or tradeable[435] but once the money is received the recipient is free to dispose of it as they see fit. Thus, a distinction must be made between the initial inalienable right and the resulting benefit accrued because of it.

3.59 Another thing to consider is whether body parts can be the subject of the donum. Although in common practice organ "donation" is spoken of, it is unclear whether this is a "donation" in the sense of the word in private law. This is because in Scotland a person's body or its parts is not "owned" by that person, at least not when contained within the rest of the body.[436] The reason for this is because the legal concept of "property" as ownership is very closely, if not inextricably, tied to economic considerations. Ownership facilitates the commodification of things which in turn serves the societal goals of encouraging commerce and accumulation of

[433] Moveable Transactions (Scotland) Act 2023 s 7.
[434] The exact boundaries of these restrictions are not explored here as they have previously been clearly summarised in Gordon "Donation" para 15 and fns 5-7.
[435] Social Security Administration Act 1992 s 187 (1)(c).
[436] M Earle and N Whitty "Medical Law" *Stair Memorial Encyclopaedia* (Reissue) para 339; T B Smith "Law, Professional Ethics, and the Human Body" 1959 SLT (News) 245 at 245-246; Gordon "Donation" para 16, although it is recognised that in principle body parts could be owned once severed from the body. This is the position taken by Professor Reid: "Body Parts and Property" in D Bain, R R M Paisley, A R C Simpson and N J M Tait (eds), *Northern Lights: Essays in Private Law in Honour of David Carey Miller* (2016).

wealth.[437] To allow the commodification of bodies and body parts "gives rise to the spectre of exploitation which is ethically questionable because it has the potential to harm".[438] Because of these ethical questions, trade in organs, body parts, and "controlled material" is illegal.[439]

3.60 Since trade in body parts is illegal, this makes body parts not *in commercium*. As noted above,[440] things not *in commercium* cannot be the subject of donation because of the need for a patrimonial effect created by the act.[441] Even if it is possible to own body parts as a matter of property law, the law forbids the buying or selling of those parts. This alone would exclude them from being the subject of a donation. True, sale is a mode of derivative transfer different from donation. However, concomitant with the general patrimonial conception of donation in the private law sense means that body parts can still not qualify under the definitions offered in this thesis. To do so would be to suggest they have some economic value, and how does one place an economic value on a life? Therefore, in a strict, private law sense, the donum cannot consist of body parts.[442]

c) Additional limits and final description

[437] Professor Reid dismisses this view: "Insofar as there is objectification or commodification, this is much more due to the use made of body parts in practice than to the application of the label or the principles of property law" ("Body Parts and Property" p 5). See also above para 1.4-1.9.

[438] A-M Farrell, E S Dove, G T Laurie, J K Mason *Mason & McCall Smith's Law and Medical Ethics* 12th edn (2023) para 14.03.

[439] Human Tissue Act 2004 s 32(9). Additionally, in *Holdich v Lothian Health* Board (2014 SLT 495) the pursuer was awarded damages for mental injury rather than compensation for the loss of sperm in a proprietary sense. Lord Steward explained that this arose from a recognition that, while the free man could not own himself in Roman law, they ought to be compensated for injury (Lord Stewart at para 39 of judgement). This developed into the head of damages termed 'solatium' which specifically applies to non-patrimonial losses. Although, in *Holdich* Lord Stewart did suggest that body parts could be owned – referencing a Canadian case where a separated couple had purchased sperm (at para [49] – this fails to acknowledge the different statutory framework between the jurisdictions limiting the trade in body parts.

[440] See above para 3.57.

[441] Furthermore, things not *in commercio* are incapable of being the subject of an obligation: Mackenzie *Institutions* 3.3; Erskine *Inst* III.iii.3. As the donum must be capable of being both obligatory and proprietary, this would further exclude such things as being donatable. See above para 3.53.

[442] It may be preferable to think of organ donation as *sui generis*, particularly as it has its own statutory regime of regulation. Furthermore, there may be differences between "renewable" body parts, such as hair and blood, and "non-renewable" body parts, such as kidneys: D Horton "Indescendibility" (2014) 102 California Law Review 543-602. However, consideration of these matters is beyond the scope of this thesis.

3.61 Another issue about the scope of the donum concerns potential limits to its value, particularly whether it is competent to donate the whole of one's estate. Historically, Scots law reserved the *beneficium competentiae* to the donor,[443] meaning that a gratuitous obligation to gift all a person owned was disapplied to the extent that the donor could retain enough for subsistence. This was limited to situations where the donor was the father or grandfather of the donee,[444] as it was the counter-part of an obligation upon children or grandchildren to support an indigent parent. As the obligation to provide for an indigent parent did not extend to collateral relations, the *beneficium* could not apply where the donee was a person other than a child or grandchild of the donor.

3.62 Since the introduction of the Family Law (Scotland) Act 1985, there is no longer an obligation upon children to support an indigent parent, as the legislation replaced any common law obligations of aliment.[445] Whether this also implicitly displaces the right to retain a *beneficium competentiae* remains to be seen,[446] especially as there is no *de facto* rule preventing a gift of all, or nearly all, of what a person owns.[447]

3.63 Additionally, while from an obligational viewpoint it may be possible to bind oneself to gift property not yet owned, from a property law perspective it is not possible to donation of property not owned by the donor, due to the principle of *nemo plus*.[448] Thus, while the donum can relate to as yet unowned property for a donative obligation (J1) it cannot for a donative transfer (J2).[449]

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[443] Bankton *Inst* I.9.8. See also below para 7.74.
[444] Although, it presumably would have also applied where the donor was the mother or grandmother of the donee: Gordon "Donation" para 44.
[445] Family Law (Scotland) Act 1985 s 1(1).
[446] Gordon "Donation" para 44.
[447] Even if the presumption against donation will be harder to displace in these circumstances: *Ross v Mellis* (1871) 10 M 197; *Bank of North Scotland v Cumming* 1939 SC 448. See above para 3.10.
[448] *"Nemo plus iuris transfere (ad alium) potest quam ipse habet"* – no one can transfer more power than they have.
[449] See paras 4.13-4.14 and 7.57-7.58 below.

3.64 Therefore, the donum should be described in terms that exclude services, as well as that which cannot be acquired for value, and that which is not able to be traded or assigned. On the other hand, it must also incorporate financial benefits to the donee which are not the result of an acquisition of a property right. As such, this thesis concludes that the donum should be taken to mean an alienable patrimonial benefit to the donee which corresponds to a patrimonial loss by the donor. This corresponding gain/loss analysis provides that only quantifiable benefits with an identifiable patrimonial effect can constitute a donation, and thus excluding services but permitting the forgiving of a debt. Furthermore, the inclusion of “alienable” incorporates the categories of excluded property identified by Professor Gordon.

5) CONCLUDING REMARKS

3.65 The areas covered in this chapter apply generally to all categories of donation, regardless of whether they are obligatory or proprietary in nature. And although the matters discussed are as the law appears to stand at the time of writing, there is scope for more work to be undertaken in all these areas. In particular, the exclusion of services from the scope of the donum may prove controversial and it could be that the law broadens to encompass performance of a beneficial act under the wider banner of “donation” in the future.

CHAPTER 4:

THE PARTIES TO A DONATION

1) INTRODUCTION

4.1 This chapter examines the actors in a donative transaction: the donor, the donee, and any third party, whether acting as a representative or as an autonomous legal person. All transactions "require a mutual manifestation of consent to be bound, demonstrated by parties of requisite age and mental capacity".[450] Thus, the first part of this chapter briefly outlines the meaning of active and passive capacity.

4.2 The second part applies this to identify who may be a donor. As the default position is that an owner of property is free to use and dispose of their property,[451] the focus is primarily on who is excluded from this freedom. An examination of the power of natural persons to be a donor due to physical characteristics is undertaken, with reference to statutory provisions related to age[452] and mental capacity[453]. Following this, a brief consideration of the ability of legal (and quasi-legal) persons and entities to donate is outlined. The final part of this section deals with other restrictions on who may donate, such as those linked to criminal activity,[454] insolvent persons,[455] those holding public office, and fiduciaries.

4.3 The last part outlines who may be a donee, or at least who can accept a donation on a donee's behalf. Natural and legal persons are considered, as well as a determination of the extent to which a donee must be sufficiently identified (for

[450] Hogg *Law and Language* p 80.
[451] Erskine *Inst* II.1.1.
[452] Age of Legal Capacity (Scotland) Act 1991.
[453] Adults with Incapacity (Scotland) Act 2000.
[454] These may be open to reduction due to, for instance, the Proceeds of Crime Act 2002.
[455] Bankruptcy (Scotland) Act 2016 s 98.

instance, with a donation made through *traditio incertae personae*[456]) and whether a person must be living at the time the donation is made.[457]

2) CAPACITY

4.4 The question of capacity is key to the ability to make, and in some instances to receive, a donation. This is in part due to the fact that all donations, whether obligatory or proprietary, involve a degree of consent, although this may be more or less important depending on whether the party in question is the donor or the donee. Legal capacity can be either active or passive,[458] with laws being "for the regulation of persons in their active aspect" and "protecting persons in their passive aspects".[459] Active capacity is what enables a person to enter voluntarily, and create, legal relationships or perform juridical acts.[460] Passive capacity gives those whom the law deems lacking active capacity the right to be protected from harm and to own property. However, merely having the ability to own property does not necessarily entail the transactional capacity to form the requisite intent to become an owner. Yet, a person may also be considered to have active capacity in one respect and only passive capacity in another.[461] In other words, what is "requisite" may differ depending on whether the party's role is either donor or donee, or on their personal characteristics or circumstances.

[456] "Transfer to an uncertain person".
[457] This is relevant in relation to unborn children.
[458] See: Erskine Inst I.7.14, or more generally N MacCormick "On Persons" in *Institutions* pp 77-100; Report on *Legal Capacity and Responsibility for Minors and Pupils* (Scot Law Com no 110, 1987); N MacCormick "General Legal Concepts" *Stair Memorial Encyclopaedia* (reissue, 2008) paras 45-63.
[459] MacCormick "On Persons" p 78.
[460] Gloag and Henderson paras 1.05-1.07.
[461] "Different persons or kinds of person enjoy or can exercise different capacities, under appropriate conditions, limitations or qualifications": MacCormick "On Persons" p 83.

4.5 What is set out here is not, and cannot be, a comprehensive exposition of the nuanced and complex subject of capacity. However, a brief discussion is necessary in order to ascertain the boundaries of who may or may not be party to a donation.

a) Active capacity

4.6 Active capacity is the "capacity to act - to enter contracts, make promises, grant conveyances or discharges, make a will, give consent, participate in court proceedings or perform any act of legal significance in the field of private law".[462] In other words, it is a person's ability to have decisions and actions legally recognised. A part of this is "transactional capacity", where a person may transact. Scotland is not unique in restricting who may have active transactional legal capacity: "all legal systems stipulate minimally necessary requirements for the constitution of obligations".[463] A key component of this is consent, and those with active capacity have the ability to consent under the law.

4.7 Some people may be deemed able to consent to certain things but not others. A person under the age of sixteen may be able to consent to some medical procedures[464] but, in general, not to transactions.[465] Therefore, it is not possible to state that certain groups of persons have complete active capacity and may consent to all legal acts while others cannot. It is also possible for a person who has active capacity to lose it. For example, a person who is deemed to have full capacity has an accident which leaves them in a coma. The transition might not be so abrupt. If a person suffers from dementia, for instance, the effects of the disease may slowly erode their ability to make decisions regarding their care or assets. Alternatively, a

[462] Report on *The Legal Capacity and Responsibility of Minors and Pupils* (Scot Law Com No 110, 1987) para 3.22.
[463] Hogg *Obligations: Law and Language* p 80.
[464] Age of Legal Capacity (Scotland) Act 1991 s 2(4).
[465] Age of Legal Capacity (Scotland) Act 1991 s 1(1), although there are exceptions if the transaction is one commonly entered into by a child of that age: Age of Legal Capacity (Scotland) Act 1991 s 2(1).

person who suffers from a chronic mental illness may have periods of good health where they are deemed have capacity but others where they are not.

4.8 In relation to gratuitous transactions, the underlying ethos of the law favours patrimonial protection and presumes that all persons will act according to their pecuniary benefit.[466] This has a significant impact on determining capacity. The starting point is that it is irrational for a person not to act in their best financial interests[467] and underpins the presumption against donation.[468] As such, a donation may be more likely to be set aside than other juristic acts as "prejudicial"[469] or due to lack of capacity,[470] given that the law presumes a donation to demonstrate a of lack of rationality. Furthermore, a person must have active capacity to refuse to accept a benefit.[471] Given that all donations are, to an extent, "transactional" whether as a donor or donee, identifying if a person has active capacity is essential to determine if they can participate in a donative act.

b) Passive capacity

4.9 Passive capacity enables a person to hold property rights and have them protected.[472] Thus, it is competent for children to have a bank account or heritable property registered in their name. However, the ability to hold rights in a passive context is not the same as having the ability to consent to become owner. This requires transactional capacity[473] to form the *animus acquirendi* necessary to complete a conveyance. Where a person is deemed only to have passive capacity,

[466] See above para 3.18; Erskine *Inst* III.iii.91.
[467] See above para 3.6.
[468] See above paras 3.2-3.9.
[469] Age of Legal Capacity (Scotland) Act 1991 s 3(1); Report on *The Legal Capacity and Responsibility of Minors and Pupils* (Scot Law Com No 110, 1987) para 2.3; Stair I.6.44.
[470] *Macdonald v Cowie* [2015] CSOH 101 at para [29]. This is closely linked to the setting aside of transactions due to undue influence, where the legitimacy of a person's consent is denied because of the relationship of trust and confidence between the parties*: Honeyman's Executors v Sharp* 1978 SC 223.
[471] For instance, to renounce an inheritance right: Report on Succession (Scot Law Com No 210, 2008) para 3.96 and n 99.
[472] Report on *The Legal Capacity and Responsibilities of Minors and Pupils* (Scot Law Com No 110, 1987) para 3.22.
[473] MacCormick *Institutions* para 5.4.

the necessary elements of active capacity must be exercised on that person's behalf by a legal representative. This could be someone bestowed with authority by legislation, such as a parent, guardian, or person designated with a power of attorney at a time when the principal had sufficient capacity to appoint that individual.[474]

4.10 A legal representative has a fiduciary responsibility for to act in the best interests of the protected party.[475] Thus, that representative must account for intromissions with the estate.[476] Whether this extends to a positive obligation to accept all donations on behalf of the protected party is unclear. Certainly, if the representative benefits as a direct result of a rejection or renunciation made on behalf of the protected party the representative is held accountable.[477]

4.11 Furthermore, as noted above,[478] passive capacity protects the rights and interests of a legal person who is deemed to lack active capacity. Whether the fiduciary obligations of a legal representative are a manifestation of this general protection or are separate is a question beyond the scope of this thesis. Nonetheless, it is tentatively suggested that the two are linked, because in order to protect the interests of a person not deemed to have active capacity, the law must ensure that representatives act with the utmost care. And while all persons enjoy passive capacity in the respect that their private rights are protected from interference by law,[479] not all persons have capacity to enforce them. Thus, a representative must enforce this protection on their behalf, or, if it is the representative who is at fault, another person authorised by the law.

3) THE DONOR

[474] Children (Scotland) Act 1995 s 1(1)(d); Adults with Incapacity (Scotland) Act 2000 s 1(4).
[475] P Hood "What is so special about being a fiduciary" (2000) 4 Edin LR 308 at 310.
[476] For instance, the Children (Scotland) Act 1995 s 10.
[477] This is an extension of the general rule that those with fiduciary duties must not profit as a result of their actions unless there is express authority permitting this: L Macgregor *The Law of Agency in Scotland* (2013) paras 6-14 – 6-15.
[478] Para 4.9.
[479] Of course, individual rights are also further protected by human rights legislation and more generally by the courts.

a) General

4.12 Any natural or legal person deemed to have sufficient active capacity can be a donor. The default position is that anyone over the age of sixteen has active capacity,[480] but that juridical acts undertaken by a person aged sixteen to eighteen are defeasible if held to be significantly prejudicial to the young person.[481] Additionally, any juristic person such as a company or partnership has capacity to donate property. Despite the default position that all persons deemed to have capacity can be a donor, this is not without certain restrictions, some of which are constituted statutorily, others existing at common law. This part explores the boundaries of who is free to donate.

4.13 There is a general question regarding whether a donor must be owner of the donum at the time of making the donation. Certainly, where the donation is a J2 transfer the donor must be owner due to the *nemo plus* rule.[482] However, with a J1 undertaking there is a possibility that the donor is not yet owner but intends to acquire the donum in order to transfer to the donee unless the acquisition of the donum is far removed from the realm of possibility.[483] This would be concomitant with the principle in succession of a legacy *rei inalienae*[484] where a legacy of property known by the testator not to be owned by them is taken to be an instruction to the executors to acquire it if possible.

[480] Age of Legal Capacity (Scotland) Act 1991 s 1.
[481] Age of Legal Capacity (Scotland) Act 1991 s 3(1) discussed below at 4.20-4.21.
[482] Erskine *Inst* III.1.10; III.3.8; Reid *Property* para 669. See above para 3.63. This is subject to the caveat that in an indirect donation the owner may be the third party but due to the donor's intervention they have the power to direct the owner to transfer to the donee: see below paras 10.66-10.74.
[483] See below paras 7.57-7.58.
[484] M C Meston and N R Allan "Wills and Succession" in *Stair Memorial Encyclopaedia* vol 25 para 855.

4.14 Yet, authority on the position is scant. The only reference appears to be from Bankton, who states that:

> "if one knowingly gifts what does not belong to him, and the receiver suffers damage thereby, it must be repaired by the giver, in case he did it by design to ensnare the other, who possibly lays out great charges in improving it".[485]

The passage deals principally with warrandice for gifts, and seems to be more concerned with protection for a donee against a nefarious non-owner putative donor than with the general question of whether a non-owner can make a donation. Furthermore, it seems to be considering donation from a proprietary, rather than obligatory, perspective. It is contended elsewhere in this thesis that a non-owner may undertake a J1, and by doing so incur an implicit obligation to either acquire the donum to transfer to the donee, or arrange for a transfer to be made directly from the current owner to the donee.[486]

4.15 Finally, a donor's liabilities do not necessarily end once the donation is completed. If the gift is dangerous in nature, the donor may be held liable for any harm caused to third parties if the donee is deemed to lack capacity to comprehend the risk.[487] Additionally, the donor will be liable for any capital gains tax due based on the value of the gift, in the same way as if the donor had sold the donum, if the donum's value has significantly increased between the donor's acquisition and disposal of the it.[488]

[485] Bankton *Inst* I.9.7.
[486] See: paras 3.72 above and paras 7.57-7.58 below.
[487] Gordon "Donation" para 39; *Muir v Wood* 1970 SLT (Notes) 12.
[488] Taxation of Chargeable Gains Act 1992 s 17(1)(a).

b) Natural Persons

4.16 As noted above, in principle all natural persons deemed to have sufficient capacity may make a donation.[489] This means that those deemed not to have sufficient capacity may not. The principal groups of persons to whom this applies are children and those who fall within the remit of the Adults with Incapacity (Scotland) Act 2000.

4.17 For children under the age of sixteen, the default position is they have no capacity "to enter into any transaction".[490] In the context of the Age of Legal Capacity (Scotland) Act 1991 ("ALCSA") a transaction includes both "any unilateral transaction"[491] and "the giving by a person of any consent having legal effect".[492] Therefore, *prima facie* children cannot bind themselves to perform a donative obligation nor make a donative transfer, as a donative obligation can be described as a unilateral transaction[493] and any transfer requires the consent and intention of the donor to cease to be owner. Thus, it would appear that any donative act by a child would be void.

4.18 That said, ALCSA provides exceptions to permit children to exercise capacity in some situations. S 2(1) permits a child to enter transactions "(a) of a kind commonly entered into by persons of his age and circumstances, and (b) on terms which are not unreasonable".[494] As such, it should be acknowledged that just because a gift is made by a child it will not always be void. Persons under sixteen may make gifts provided these are appropriate to the situation: for example, a daughter gives her father handkerchiefs on his birthday. The boundaries of what circumstances and terms are "common" and "reasonable" are a matter of degree but will likely depend on the monetary value of the gift. Thus, a donation of a packet of

[489] See para 4.12.
[490] Age of Legal Capacity (Scotland) Act 1991 s 1(1)(a).
[491] ALCSA s 9(a).
[492] ALCSA s 9(d).
[493] See above paras 2.44-2.52.
[494] ALCSA s 2(1)(a) and (b).

handkerchiefs will be valid but an attempt to gift a house will probably not. Any transaction failing the customary and reasonable test will be void.[495]

4.19 This interpretation is consistent with other gratuitous alienations permitted by ALCSA: for example, the testamentary capacity of persons who have reached the age of 12.[496] Aside from the consideration that for a testament to become enforceable the testator must have died and have no further need for their assets, it still reflects an acknowledgement by the legislator that some circumstances may legitimately justify children divesting themselves of their property. Only donations which involve a transfer would be permissible under the s 2(1) exception. A donation constituted by waiving or failing to assume a right would not. This is because a gratuitous renunciation of a right, particularly a significant entitlement such as an inheritance, would not be considered "reasonable".[497]

4.20 Furthermore, although a person aged sixteen or over may have capacity,[498] and therefore can make a donation, as noted above,[499] a transaction entered into by a person between sixteen and eighteen years old may be set aside if it is deemed "prejudicial".[500] A prejudicial transaction is both one that "an adult exercising reasonable prudence" would not make in the circumstances and that "has caused, or is likely to cause, substantial prejudice".[501] The use of the word "and" in the legislative provision would suggest that both criteria must be met and is a matter of degree, highly dependent on the circumstances. As the language of "reasonable prudence" is employed, the inference is that the test is an objective one. Thus, if a young person gifts another something of particularly high value or consists of a significant part of that person's patrimony, this may be challenged and the donation reduced. In addition, the Scottish Law Commission has suggested that this provision

[495] ALCSA s 2(5).
[496] ALCSA s 2(2). It should be acknowledged that the origins of this rule lie in Roman law and are connected to the age at which a person was deemed to cease being a pupil: A Watson (transl, ed) *The Digest of Justinian Volume 2* (2009) D 28.1.5 (*Ulpian*); D P Kehoe "Law, Agency, and Growth in the Roman Economy" in P du Plessis (ed) *New Frontiers: Law and Society in the Roman World* (2013) pp 177-191 at 180.
[497] Report on *Succession* (Scot Law Com No 210, 2008) para 3.96 fn 99.
[498] ALCSA s 1(1)(b).
[499] See above para 4.12.
[500] Age of Legal Capacity (Scotland) Act 1991 s 3(1).
[501] ALCSA s 3(2).

may also extend to a gratuitous renunciation of an inheritance right.[502] Any application for reduction of a prejudicial transaction must be made prior to the young person's 21st birthday.[503]

4.21 The flexibility of rules surrounding the ability of those who lack capacity due to non-age in Scotland to donate on the face of it appears to conflict with other jurisdictions. This is because, particularly in civilian and mixed jurisdictions, the civil codes expressly deal with most aspects of donation. Thus, in Louisiana, it would appear that no person under sixteen may make a donation except to a child of the donor or the donor's spouse.[504] Yet, although this provision apparently does not permit exceptions for customary gifts, the invalidity of a gift due to incapacity must be proved by the person wishing to challenge it.[505] The practical result is that, should a person under sixteen make a customary gift or a gift of nominal value, it will in practice stand, since any challenge to a donation must be made judicially.[506] Judicial challenges are costly and time-consuming and therefore unlikely to be made for customary gifts or gifts of little value. Therefore, despite the seemingly strict Louisianan code provisions, the practical result is the same as in Scotland.

4.22 Similarly, in Quebec, a minor may only make gifts "of property of little value or customary presents".[507] There is an exception to this rule for an emancipated

[502] Report on *Succession* (Scot Law Com No 210, 2008) para 3.96. It may be the case that renunciation would be reasonable if, for instance, a person was rejecting an inheritance from a former abuser. Alternatively, if accepting an inheritance would have significant tax implications, albeit that this is unlikely for a child or young person, it might not be unreasonable to renounce it in favour of another. This was the case in *Ford v Ford's Trustees* 1961 SC 122, albeit the pursuer was not lacking capacity.
[503] ALCSA s 3(1).
[504] Louisiana CC § 1476. This is an historical position that remained unchanged by the amendments made to the civil code in 1991: L D Clark "Louisiana's new law on capacity to make and receive donations: 'unduly influenced' by the common law?" (1992) 67 *Tulane Law Review* 183, 206. There appear to be no exceptions for customary gifts or those of nominal value. It should also be noted that a child under sixteen can no longer get married: Louisiana CC § 90.1.
[505] Louisiana CC § 1482.
[506] The aim of the legislation is to protect children from alienating their property, given Louisiana's suspicion of gifts in general: Clark "Louisiana's new law on capacity to make and receive donations" p 184-185.
[507] Quebec CC § 1813. This is in part due to Quebec's contractual conception of gifts: S Serafin "Gifts and Contracts: A Comparison with Quebec Civil Law" (2021) 53 *UBC Law Review* p COV5.

minor[508] who may "make gifts of his property according to his means, provided he does not appreciably reduce his capital".[509] This appears to be less restrictive than the normal restrictions for children, permitting larger donations but still providing some protection against impecunious decisions.[510] As a result, both Louisiana and Quebec achieve the same balance as Scotland between permitting small donations to be made by children while protecting them from gratuitously divesting themselves of a significant portion of their wealth.

4.23 Another category of natural persons deemed to lack capacity who may be barred from making a donation are those fall under the remit of the Adults with incapacity (Scotland) Act 2000 due to "reason of mental disorder or of inability to communicate because of physical disability".[511] The effect of the mental disorder or physical disability must render the person "unable to act or to make, communicate, understand or remember decisions".[512] Although the Act is designed to allow limited, minimally intrusive intervention in the affairs of an adult without capacity rather than to prohibit the making of decisions *per se,* since a person must have active capacity to make a donation, anyone meeting the statutory definition will lack the power to gift. The lack of capacity in an adult may also be due to a temporary illness and therefore the inability to donate may be temporary.[513]

Alive or dead?

4.24 As donation is an *inter vivos* act, a donor must be alive at the time of the donation. This is one of the primary differences between a donation and a

[508] Emancipation "releases the minor from the obligation to be represented for the exercise of his civil rights": Quebec CC § 170. Thus, emancipation permits a person otherwise lacking capacity due to non-age to enter into transactions.
[509] Quebec CC § 172. The exact value of a donation an individual minor is permitted to give is left to the discretion of a judge where this provision is invoked: "Wrapping up the year: Gifts and the law" (2016, Dec 01) *University Wire* available at: https://www.proquest.com/wire-feeds/wrapping-up-year-gifts-law/docview/1910339964/se-2.
[510] This is also because of the underlying suspicion surrounding donations and to protect minors from potential abuse or exploitation of minors: P-G Jobin and N Vézina *Baudoin et Jobin "Les Obligations"* 7th edn (2013) para 69.
[511] Adults with Incapacity (Scotland) Act 2000 s 1(6).
[512] *Explanatory Notes* to the Adults with Incapacity (Scotland) Act 2000 para 14.
[513] J Herring *Medical Law and Ethics* (2022) para 6.5.

testamentary act. However, there is a distinction between a J1 obligational donation where the donor binds themselves irrevocably to make a donation and a J2 transfer. A living donor may have performed a sufficient *inter vivos* act to bind themselves (and their executors) to make a donation by way of a J1 despite the J2 transfer occurring after their death.[514] In contrast, in the absence of a completed J1 a deceased person cannot make a J2 transfer, unless the donum has been put irretrievably in the hands of another to be delivered to the donee prior to the donor's death.[515]

4.25 Identifying whether a donor has bound themselves during life has been the subject of much case law.[516] The typical conflict is between a putative donee claiming a donation and the executors or heirs of a deceased person. This is because a completed J1 gives a donee a *ius ad rem* to property.[517] The donee is a creditor of the donor,[518] so a successful claim of donation will have priority over inheritance rights. Historically, such claims have struggled due to the presumption against donation.[519] The modern law offers slightly more protection to a putative donee given that a gratuitous unilateral obligation must be in writing,[520] thus donation will be easier to prove.

c) Legal Persons

4.26 As with natural persons, provided a body claiming legal personality is properly constituted, the starting position is that it may make donations. However, this is also subject to the caveat that the "capacity to make and receive donations depends on the constitutional documents or the constitution of the legal persons or bodies

[514] This is the case regardless of the type of donation being made. Thus, a conditional donation which is contingent on the death of the donor, such as was the case with a *donation mortis causa*, will be classed as an *inter vivos* donation rather than testamentary act: see below paras 6.12-6.32.
[515] *Bruce v Stewart* (1790) 3 Pat 150.
[516] For example: *Sharp v Paton* (1883) 10 R 1000; *Thomson v Dunlop* (1884) 11 R 453; *Brownlee v Robb* 1907 SC 1302; *Macpherson's Exx v Mackay* 1932 SC 505.
[517] See above para 2.13.
[518] Bell *Comm* II, 185.
[519] See, for instance, *Dinwoodie v Wright* (1895) 23 R 234. Though see also *Bruce v Stewart* (1790) 3 Pat 150.
[520] Unless made in the course of business: Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).

concerned, and on the purposes for which they have been constituted."[521] Thus the ability to make a donation will be contingent on "interpretation of the express and implied powers given".[522] In some circumstances, it can be particularly advantageous for a legal person to make a donation, for instance to a political party or a charitable organisation,[523] because of tax or reputational benefits.[524]

4.27 Where the legal person is a company or partnership, there may be a distinction to draw between a donation and sponsorship. Concomitant with the definition of donation in this thesis, a donor must incur a loss through their actions. In a sponsorship arrangement, the sponsor will normally have its name or logo included publicly on materials associated with the sponsorship activity. Thus, there is a reciprocity involved in the transaction: the sponsor benefits to the extent it is openly connected to the event, which serves as a form of advertising. Thus, this precludes it from being considered a donor in the strict sense.[525] On the other hand, as there is no preceding legal obligation for it to offer support and it is essentially a gratuitous act the arrangement may be considered a donation. Authority for the proposition either way is lacking in Scots law.

4.28 A donation by a legal person which is outwith the powers denoted in the constitutional documents is voidable "at the instance of the company"[526] if it is made to an associate of a director or person authorised to transact on behalf of the company. Furthermore, it is incumbent on the director or the associate to account to and indemnify the company for any gain.[527] However, a donation made contrary to a

[521] Gordon "Donation" para 12.
[522] *Ibid*.
[523] https://www.inniaccounts.co.uk/knowledge-hub/article/charity-donations-through-your-company/.
[524] R Kress Weisbord and P DeScioli, "The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving" (2009) 45 *Gonzaga Law Review* 225-290; M Banner "Mutual Benefits of Charitable Giving" (Aug 2011) *Money Management* available at: https://www.proquest.com/trade-journals/mutual-benefits-charitable-giving/docview/880747526/se-2. See also above para 1.6.
[525] In France, this would prevent the altruistic element necessary to establish a donation: Dawson *Gifts and Promises* (1980) pp 84-96.
[526] Companies Act 2006 s 41(2). This is also provided that restitution is possible: s 41(4)(a).
[527] Companies Act 2006 s 41(3). Additionally, in a company limited by guarantee, the same directors' duties apply notwithstanding the apparent abolition of the ultra vires doctrine by the Companies Act 2006 s 39: *Ceredigion Recycling and Furniture Team (CRAFT) v Pope and others* [2022] EWCA Civ 22.

company's constitution will not be challengeable on the grounds of lack of capacity.[528]

4.29 Where the legal person is a charity, such as a Scottish Charitable Incorporated Organisation, the governance of its activities stems from the Charities and Trustee Investment (Scotland) Act 2005 (hereinafter "CTISA"). A body meets the charitable test if it applies its property for the public benefit.[529] Inherent in this is the ability to disburse property gratuitously to those whom the charitable purposes are intended to benefit. Should the charity be operating outwith these purposes, the Office of the Scottish Charity Regulator (OSCR) can suspend operation of the charity's activities.[530] Furthermore, any person purporting to have been acting on behalf of the charity in breach of authorised activities, or any financial institution holding funds for it, can be ordered to pay the charity these funds or prevented from alienating the property by OSCR or the court.[531]

d) Exclusions

4.30 There are other circumstances which may result in the exclusion of a person from being able to make a donation. Alternatively, there may be persons who have the capacity to make a donation but, due to their position or personal conduct, the donation may be subject to recovery. Below is a short summary of those who may not be a donor or, should they make a donation, those whose donations may be subject to reduction.

[528] Companies Act 2006 s 39(1).
[529] CTISA 2005 s 7(1).
[530] CTISA 2005 s 28(3).
[531] CTISA 2005 ss 31 and 34. Similarly, a trustee who alienates trust property *ultra vires* can be held personally liable for loss to a trust estate: P J Follan *Trusts Beneficiaries and Third Parties* (2024) 5-13.

i) Criminality

4.31 Where a person has engaged in and benefited from criminal conduct, any attempt to make a gift whose value derives from this benefit is subject to recovery under the Proceeds of Crime Act 2002.[532] Alternatively, where confiscation of the property is not possible, it will be attributed a value and an order may be made for payment of that amount.[533] Determination of whether the subject of the order is the result of criminal conduct will be decided on the balance of probabilities.[534]

4.32 Additionally, it is a criminal offence for a person to make a gift for the purposes of bribery.[535] The Bribery Act 2010 specifies that this covers both a promise to give (J1) and the actual giving of (J2) a "financial or other advantage" for the purposes of inducing "a person to improperly perform" their professional role or as a reward for having already done so.[536] Under the Act, the motive underlying the donation is key to ascertaining whether a gift amounts to a bribe. However, this does not negate the *animus donandi*, which would prevent the act being donative, but instead is what makes the briber criminal.[537]

ii) Public Officers

4.33 Persons who hold public office are frequently restricted from receiving donations and may be required to register gifts over a certain value,[538] but they might also be unable to make a gift, at least when acting in their official capacity.[539] This is separate from any public image considerations, where, although making a donation

[532] Proceeds of Crime Act 2002 s 92.
[533] Proceeds of Crime Act 2002 s 92(6).
[534] Proceeds of Crime Act 2002 s 92(9).
[535] Bribery Act 2010 s 1(1). See also above para 1.13.
[536] *Ibid*.
[537] For discussion on the interaction between motive and the *animus donandi* see above para 3.19.
[538] For instance, employees of the Scottish Courts and Tribunals Service: "Gifts, Hospitality, and Rewards Policy" *Scottish Courts and Tribunals Service* available at: https://www.scotcourts.gov.uk/docs/default-source/default-document-library/scts-gifts-hospitality-rewards-policy.pdf?sfvrsn=0.
[539] This also extends to quasi-public officers, such as union representatives: *Hopwood V O'Neill* 1971 SLT (Notes) 53.

is permitted, it is not prudent for a person to do so lest it raises questions of impropriety. One reason for this is that, unless authorised, it is contrary to public policy to allow a person to alienate public or quasi-public assets gratuitously, even if they technically have the power to do so, for instance, committee members of private clubs.[540] Additionally, the person in authority may not have the power to alienate the property on grounds of being a non-owner, and therefore cannot donate according to the ordinary rules of property law.[541]

iii) Legal Representatives and Trustees

4.34 Similarly, legal representatives are unable to make donations of the representee's property, unless given express permission to do so, for instance by a principal (in the case of an agent),[542] or by terms of a trust deed (in the case of trustees).[543] Representatives, whether legally determined (such as parents) or appointed (such as an agent) have general fiduciary duties towards their representee. Similarly, trustees have fiduciary duties in their management and distribution of trust assets. These duties comprise a wide range of responsibilities when exercising their role, responsibilities which dictate that the fiduciary "subordinates his interests in favour of his principal's".[544] Given that a representative must act in the representee's interests, and not incur unnecessary losses, this means the representative must not gratuitously alienate the representee's assets without permission. This is provided, of course, that the representee has capacity to give that permission. Additionally, a representative may not make a donation by way of waiver of a right on behalf of their representee.[545]

4.35 Historically, those with individual powers of representation for a person deemed to lack capacity (such as a tutor) could not alienate the property of their

[540] *Murray v Johnstone* (1896) 23 R 981.
[541] Reid *Property* para 669.
[542] L J Macgregor *Law of Agency in Scotland* (2013) para 5.02.
[543] Trusts (Scotland) Act 1921 s 4. This provision is due to be replaced by the Trusts and Succession (Scotland) Act 2024 s 15 (not yet in force).
[544] P Hood "What is so special about being a fiduciary" (2000) 4 Edin LR 308 at 310.
[545] Report on *Succession* (Scot Law Com No 210, 2008) para 3.96.

ward.[546] This is because, unlike a trustee, they had no ownership right over the pupil's property. It is possible that the change in the rights and responsibilities of parents brought about by the Children (Scotland) Act 1995 has altered this position, given that intromissions with (and by extension, alienations of) the property of a child appear to be permitted.[547] It is likely that, given the purposes of both the Age of Legal Capacity (Scotland) Act 1991 and the Children (Scotland) Act 1995 are to promote the interests of, and protect, children that any dispute would result in either the asset or its value being restored to the child's patrimony, so the question of the ability of the representative to make such alienations is academic.[548]

4.36 That said, a gratuitous disposition by a representative is not necessarily a breach of a fiduciary duty. If not, it could instead be characterised as negligent.[549] Thus, should there be a donation made by a representative, the representee may have a few options for recovery or redress. The representee could opt to claim against the representative for breach of fiduciary duty (due to an *ultra vires* act) or negligence, or potentially claim against the transferee.[550] If the representee claims against the representative for breach of duty, the loss will have to be made good from the representative's patrimony. If negligence, the appropriate remedy is damages. If the representative is unable to pay, it is possible the transferee may be considered to hold the property on constructive trust for the representee.[551] If the claim is in unjustified enrichment, the representee could be granted restoration, repetition, or recompense for their loss.[552]

[546] Stair I.6.18.
[547] Albeit that the parent or guardian must account for such intromissions: Children (Scotland) Act 1995 s 10.
[548] Subject to the caveat that if the recipient becomes insolvent the child will rank alongside other unsecured creditors. However, in such a case if the full value cannot be restored, the representative will have to account for the loss: Children (Scotland) Act 1995 s 10.
[549] P Hood "What is so special about being a fiduciary" (2000) 4 Edin LR 308 at 313.
[550] J MacLeod *Fraud and Voidable Transfer* (2020) paras 1.10-1.11.
[551] *Mortgage Corporation v Mitchells Robertson* 1997 SLT 1305. It must be noted that the concept of "constructive trust" is controversial in Scots law and it is unclear whether the institution applies in this jurisdiction: G L Gretton "Constructive Trusts: I" (1997) 1 Edin LR 281. However, full discussion of this is beyond the scope of this thesis.
[552] The judicial remedies are most commonly "decree for payment of money, delivery of corporeal moveable property, or reduction of deeds and discharges": Whitty "Unjustified Enrichment" para 41. See also below para 4.58.

iv) Insolvency

4.37 A person who is insolvent may make a donation, but this may be subject to reduction or restoration to the estate on the request of the debtor's creditors if the estate is sequestrated.[553] This extends to donations made before a person becomes insolvent[554] and also applies to sales made for significant undervalue.[555] There are exceptions to this, namely where the donor's assets exceeded the donor's debts at the time of making the donation[556] or the gift was a customary gift (e.g. birthday present), or charitable donation that was reasonable for the person to make.[557] This reflects the desire of the law to favour commercial transactions and interests over those of a gratuitous transferee while also treating donative acts as suspicious.[558]

v) Other?

4.38 While a person may have capacity to make a donation, there may be other circumstances which leave a gift open to challenge or reduction. This is certainly the case in jurisdictions which have a system of forced heirship that enables gifts to be "clawed back" if made within a certain number of years before death.[559] Scotland, unlike some other jurisdictions, does not have a rule requiring reduction of donations in order to preserve the expected part of heirs.[560] Thus, there are no restrictions on a donor alienating property prior to death merely because it would frustrate any expectations of inheritance. That said, while there is no general principle enforcing recovery of donations due to forced heirship, gifts made to legitim (the donor's child

[553] Bankruptcy (Scotland) Act 2016 ss 98(1) and (2); Insolvency Act 1986 s 242. In addition to the statutory provisions there also remain relevant common law rules: A Macpherson and D W McKenzie Skene "Gratuitous Alienations and the Implications of *MacDonald v Carnbroe Estates Ltd*" 2022 JR 59-79, 59 (fn 2).
[554] If the donation is made up to 5 years before the donor becomes insolvent, if the donee is the donor's "associate", or up to 2 years if they are not: Bankruptcy (Scotland) Act 2016 s 98(4).
[555] *Joint Liquidators of Grampian Maclennan's Distribution Services Ltd v Carnbroe Estates Ltd* 2020 SC (UKSC) 23.
[556] Bankruptcy (Scotland) Act 2016 s 98(6)(a).
[557] Bankruptcy (Scotland) Act 2016 s 98(6)(c).
[558] See above para 1.6.
[559] For instance, France: CC Art 913.
[560] The exception to this was with donations *mortis causa* (now abolished by the Succession (Scotland) Act 2016 s 25: see below chapter 6 "The Defunct Categories" paras 6.33-6.38) which were subject to prior rights and legitim: Stair III.8.39 and Gordon "Donation" para 7.

heirs) during the donor's lifetime may be subject to collation and affect an heir's part of an inheritance or be considered a loan.[561] In other words, where a parent has favoured one or more child over any others by making an *inter vivos* gift, the value of the donation will be included when calculating the legitim and deducted from the inheritance of the donee.[562] Furthermore, gifts made by a person within seven years of death may be included in their estate for calculation of inheritance tax.[563]

4) THE DONEE

a) Natural persons

i) General

4.39 All living persons can be the beneficiary of a donation.[564] Thus, any person from the cradle to the grave (or from birth to death) can receive a donation. Similarly, any legal person can be a donee, although there may be restrictions dictated by the

[561] *Kerrigan v Kerrigan* 1988 SCLR 603.
[562] Meston "Wills and Succession" *Stair Memorial Encyclopaedia* para 808; *Trevelyan v Trevelyan* (1873) 11 M 516; *Douglas v Douglas* (1876) 4 R 105; *Elliot's Executrix v Elliot* 1953 SC 43, 1953 SLT 91; K*errigan v Kerrigan* 1988 SCLR 603.
[563] This is dependent on certain factors, such as the relationship between donor and donee, the value of the gift, and how many years have passed since the transfer: Inheritance Act 1984 ss 3, 3A, 4, 7(4), and 8A(2).
[564] Gordon "Donation" para 11.

constitutional documents of the organisation.[565] Indeed, all charities regularly receive donations as a routine part of their functioning. However, whether a person, particularly a natural person, can accept the benefit is also subject to that person's ability to understand the nature and consequences of the gift. This is because any recipient of an obligation in that person's favour, or transferee of property, must be able to form the requisite *animus acquirendi* to become owner.

4.40 If the property itself requires any administrative duties outwith the understanding of the donee then it can be argued that the donee cannot properly form the *animus* necessary to accept ownership. For instance, a child of three would not be deemed to have capacity to manage certain property where ownership entails obligations, such as paying tax or maintenance requirements, and therefore could not accept ownership. In contrast, a child of the same age would be able to comprehend the nature and purpose of a gift of a train set. Thus, where the nature of the gifted property or its ownership obligations are beyond the comprehension of the donee, acceptance should be exercised on the donee's behalf by a legal representative. Additionally, where the donee is deemed to lack capacity and the gift is in some way dangerous in nature, it may be the case that the donor will be liable to third-parties for any harm resulting from the donum.[566]

4.41 The inability of those deemed to lack capacity to form the requisite *animus acquirendi* for certain type of property reinforces the central contention of this thesis that donations require acceptance to be completed in Scots law.[567] There may be many reasons why a donation might not be wholly advantageous to the recipient. As noted above,[568] there may be management responsibilities attached beyond the capability or understanding of the donee.[569] If there is no positive requirement of acceptance, then a person who is deemed to lack capacity could become owner of

[565] *Hopwood v O'Neill* 1971 SLT (Notes) 53.
[566] Gordon "Donation" para 39; *Muir v Wood* 1970 SLT (Notes) 12.
[567] See chapter 5: "The non-acceptance rule: a common mistake?".
[568] Above para 4.40.
[569] A person takes ownership of a gift complete with all burdens and liabilities attached: *Ballantyne's Trustees v Ballantyne's Trustees* 1941 SC 35.

property which that person is unable to manage. Additionally, the counterpart of the ability to receive a donation is the ability to reject a donation.[570] If a person is deemed to lack the capacity to understand the consequences of acceptance due to the nature of this act, then that person cannot be held to have the capacity to understand the implications of rejection either.[571]

4.42 That is not to say that a person deemed to lack capacity cannot become owner through a legal representative acting on that person's behalf: for instance, a parent for a child. That said, it is unclear whether a parent (or other legal representative) has a duty to accept a donation for their ward, at least statutorily. For example, while a parent must account for all intromissions with a child's patrimony,[572] that would only include property already belonging to the child. The Children (Scotland) Act 1995 does not impose any responsibility upon a parent to acquire assets for the child. As noted above,[573] it may be the case that at common law there is a general duty to act in the best interests of the representee which includes a positive obligation to acquire assets or increase wealth, particularly if the gain is gratuitous, but the position is unclear.[574]

ii) Alive or dead?

4.43 Similarly, it may be possible for a person not yet born to benefit from a J1 donation, although the J1 cannot be complete until the birth. There are limits to this principle which also exemplify the difference between a promise to donate and a J1. For example, where a child is *in utero* a person may presently bind themselves through a unilateral promise to make a donation once the baby is born.[575] Such an undertaking would bind the promisor but there would be no one who could compel the promisor to act, at least until birth and neither would anyone gain a legally

[570] Stair *Inst* I.10.4.
[571] For example, children: Report on *Succession* (Scot Law Com no 210, 2009) para 3.98 and fn 99.
[572] Children (Scotland) Act 1995 s 10.
[573] See above paras 4.34-4.36.
[574] See above paras 4.10-4.11.
[575] This would be subject to an implied condition that there was a live birth. It is arguable that this could be a form of conditional donation: see below paras 9.13-9.18.

significant power or right as a result of their promise. This is because a J1 vests the donee with a *right ad rem* - a patrimonial right – and a person not yet in existence has no legal personality and therefore no patrimony.[576]

4.44 On the other hand, it may be that the donor's act constitutes a conditional donation where the condition suspends either the coming into force of the obligation or the effect of the donation. Thus, a donor might not be bound until the child is born alive. Whether the act is a promise or a conditional donation is a matter of interpretation in the given circumstances.[577]

4.45 While living persons (once born) can be donees, in certain circumstances deceased persons potentially can be too. This is only in relation to a J2 transfer which follows a J1 completed while the donee is alive, and, strictly speaking, it is not the deceased person but that person's estate which benefits. This is because a completed J1 makes the deceased a creditor of the donor[578] and the executors can (and must) gather in all debts due to the estate.[579] However, it is not possible for a donor to execute a J1 or J2 in favour of a person who has already died.[580]

iii) <u>"Uncertain persons"</u>

4.46 While the previous paragraphs have dealt with persons who are expressly identified, even if not yet in existence, there is a possibility that in certain situations a donee may be a person who is in existence but not expressly identified or ascertainable at the time the donation is made. For example, it is possible for a J1 donative undertaking to be made in favour of a person whose identity is not yet known but who may later become a donee. This may be someone who falls into a

[576] Erskine *Inst* III.3.90.
[577] See generally below: "Chapter 9: Conditional Donations".
[578] Bell *Comm* II.185.
[579] Meston "Wills and Succession" *Stair Memorial Encyclopaedia* para 1103.
[580] As only the living may hold rights. This is similar to succession law*: Drummond's Judicial Factor v HM Advocate* 1944 SC 298.

wider class of persons or group.[581] For instance, the George Heriot's Foundation "provides full fee remission to the children of widows and widowers who live in Edinburgh and the Lothians, Fife, the Scottish Borders and Central Scotland."[582] Alternatively, the donation may be conditional and anyone performing or meeting the condition may then enforce it.[583] In both cases, although not yet known to the donor, if a person matching the criteria comes forward to claim the donation, the donor is bound to perform to them.[584] The person claiming becomes the donee when they choose to enforce the donor's undertaking.

4.47 There may be situations where the intended donee is not an individually identified person nor part of a group of persons with specific characteristics or meeting particular criteria. Instead, the donor intends to transfer the gift to anyone who wants to take it. Scots law recognises the possibility of this through the doctrine of *traditio incertae personae*, although the exact boundaries of this are unclear. This is in part because of its close connection with abandoned property.

4.48 The pedigree of *traditio incertae personae*, or "transfer to an unknown person" can be traced to the post-classical Roman period. It was posited as an alternative legal interpretation to the Sabinian view that all property "abandoned" in a public place became *res nullius* (owned by no one) and therefore could be acquired by through *occupatio*[585] perfected by *usucapio*.[586] The precise reasons *traditio incertae personae* emerged as a recognisable form of transfer is unclear, but seems to have occurred to prevent a debtor committing fraud upon their creditors by "abandoning"

[581] For instance: *Morton's Trustees v Aged Christian Friend Society of Scotland* (1899) 2 F 82; *Masters and Seamen of Dundee v Cockerill* (1869) 8 M 278.
[582] https://www.george-heriots.com/our-school/the-foundation/. A waiver of a fee or other obligation due can constitute a donation, provided it amounts to a patrimonial gain on the part of the donee, see above paras 2.18 and 3.51-3.53.
[583] Similar to the finding in *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256.
[584] *Ibid*. This may be subject to other criteria outlined in the undertaking. For example, eligibility for the George Heriot's Foundation is also dependent on the "usual entrance assessment", financial, and residential considerations: https://www.george-heriots.com/our-school/the-foundation/.
[585] D Daube "Derelictio, Occupatio, and Traditio: Romans and Rabbis" (1961) 77 LQR 382 at 382.
[586] This is the reasoning later adopted by Justinian: C van Der Merwe "The Roman Law of Occupatio" (1966) p 39 available at https://scholar.ufs.ac.za/bitstream/handle/11660/6021/VanderMerweCG.pdf?sequence=1&isAllowed=y.

property which could then be immediately picked up and usucaped by a colluding acquaintance.[587] Characterising the leaving of the property as the leaver's part of a two-sided direct transfer meant that a creditor could bring an action under the *Actio Pauliana* against the acquirer as a party to the transferor's fraud.[588] Thus, it was asserted that all property left in a public place should be presumed to be an attempt to transfer it to an uncertain person.

4.49 This interpretation was controversial, and by the time of Justinian the Sabinian view that the property was abandoned and could be acquired through *occupatio* had re-emerged as the preferred statement of the law.[589] Justinian did discuss the idea of *traditio incertae personae* indirectly when considering the case of a politician distributing largesse (normally coins) to a crowd[590] (also known as the "*inactus missilium*"),[591] but only to discredit it. Rather than see the *inactus missilium* as a donation to the broad group of "uncertain persons", Justinian adopted the interpretation that the distributor had abandoned the coins. This left the money free for anyone to acquire, because the intention of the distributor was to be rid of the property as opposed to directly transfer it.

4.50 Despite Justinian's repudiation of *traditio incertae personae*, it would appear that Scots law has, at least in a limited sense, tentatively adopted it.[592] Predominantly, it has been encountered through the tradition of the "wedding scramble" – a practice not dissimilar to the *inactus missilium*. Either the bride's father, as he left with the bride to go to the church, or the groom or best man after the ceremony, would throw coins to groups of children who would in turn "scramble" to get as many for themselves as possible.[593] Another wedding-related example is

[587] Daube "Derelictio" p 387.
[588] *Ibid* p 383.
[589] Justinian *Inst* 2.1.46; Buckland *Roman Law* p 207.
[590] Justinian *Inst* 2.1.46, 47.
[591] Daube "Occupatio" p 383.
[592] There are passing references to the practice in Report on *Lost and Abandoned Property* (Scot Law Comm no 57) 1980 para 2.5 fn 9 and Reid *Property* para 568.
[593] M Bennett *Scottish Customs from the Cradle to the Grave* (1992) 146; "5 Old Wedding Customs of Scotland" *The Scotsman* 14th Feb 2018 available at: https://www.scotsman.com/arts-and-culture/5-old-wedding-customs-scotland-588806.

the tradition of the bride throwing her bouquet to the unmarried women at the wedding reception.

4.51 The Roman model of abandonment followed by occupation could not apply in Scotland, principally because abandoned property[594] is "*quod nullius est fit domini regius*".[595] Not only is the owner known during the wedding scramble, it is clearly not the intention of the distributor to "abandon property" for the Crown's taking. The intention is to transfer to those quick enough to catch or collect the coins from the assembled crowd.[596] Therefore, *traditio incertae personae* provides a simpler, and more practical legal vehicle to describe this situation.

4.52 By examining the wedding scramble we can attempt to glean an outline of the key elements to *traditio incertae personae*. These appear to be fourfold. First, there must be a divestiture of property by the donor, or at least it must be put out of the donor's possession. Second, the donor must intend to transfer ownership rather than abandon it: abandonment "requires both a mental and a physical act"[597] with the mental act being an intention to simply relinquish ownership rather than to convey it to another person. Third, the intended recipients must belong to a specific group of persons (although not individually identified). In the case of the wedding scramble, this is the gathered children. Finally, the recipients must acquire possession of the property. Taken together, there is not much difference between a *traditio incertae personae* and a standard act of *traditio*, as there is an intention to transfer and delivery. The main area of distinction is that the identity of the transferee is less defined in a *traditio incertae personae*.

[594] "things which were once in ownership but have ceased to have any known owner" Report on *Lost and Abandoned Property* (Scot Law Com No 57, 1980) para 1.5.
[595] "Owned by the crown": Report on *Lost and Abandoned Property* (Scot Law Com No 57, 1980) para 1.5; Bell *Princ* § 1291.
[596] Moreover, if the distributor were abandoning the property those picking it up would be inadvertent thieves.
[597] Report on *Prescription and Title to Moveable Property* (Scot Law Com No 228, 2012) para 5.3.

4.53 Nonetheless, given that the potential recipients must belong to a certain group of persons there are questions as to how well defined this group must be, whether *traditio incertae personae* can apply more broadly than just to situations such as the wedding scramble, and whether the donor must be present at the time the recipients take the property. In the Roman tradition, the intended recipients were defined in a negative context, that is, that the offeror must intend to exclude certain persons.[598] For example, in the *inactus missilium*, Daube argues that a politician would presumably intend to exclude a rival's supporters from taking the coins[599] and thus anyone except this group could be a recipient. It is unclear whether this holds true for Scots law.

4.54 Although the group of potential beneficiaries are "unknown persons", they should be sufficiently defined to allow someone to take the property legitimately, but that is not to say that it must be a small group. It could be anyone living in a certain location or members of an online group, for instance the Meadows Share in Edinburgh which currently has over 74,000 members.[600] The practice is not, nor can it be, without limits, partly because it could be used to attempt to circumvent penalties arising from fly-tipping.[601] Thus, should no taker emerge within a reasonable time, the would-be donor remains liable.

b) Legal persons, representatives, and exclusions

4.55 As is the case with the ability to be a donor, whether a legal person such as a company can be a donee will depend on the articles of association or constitutional documents.[602] Likewise, further general duties arising from "any rules governing the exercise of the general powers possessed, whether these be internal rules or

[598] Daube "Occupatio" p 383.
[599] *Ibid*. See above para 4.49.
[600] See https://www.facebook.com/groups/TheMeadowsShare.
[601] Environmental Protection Act 1990 s 33.
[602] Gordon "Donation" para 12 and above paras 4.35-4.38.

external rules such as those on performance of fiduciary duties"[603] will also have a bearing on the ability of the legal person to be a donee.

4.56 There are persons who may not be a donee, either due to acting in their official, rather than private, capacity, for instance a member of the judiciary when presiding over a case, or because the donor is acting improperly in trying to gain a personal advantage by making the donation.[604] In both instances the donation may be reduced, or the "donee" will be regarded as holding the property on behalf of another. Additionally, a person receiving a donation intended as a bribe may be guilty of a criminal offence.[605]

4.57 A person who is a fiduciary is under a duty not to receive property on that person's own behalf, if the property is acquired as a result of exercising the fiduciary role. However, if a fiduciary nonetheless receives a donation, they must disgorge it. Thus, if an agent receives a secret profit, the agent must account to the principal for this.[606] The principal can then opt either to raise an action for count, reckoning, and payment to make the agent transfer the benefit,[607] or seek damages. Similarly, any other legal representative cannot profit from fulfilling the representative role.[608]

4.58 It may be the case that a person has received a donation purportedly as a donee but the donum has been irregularly or inappropriately transferred to the person, for example: where the donor is a trustee and gifts the trust's property to someone not entitled to benefit under the terms of the trust. In this instance, the transferee might become owner in one sense, that sense is as a constructive

[603] *Ibid*.
[604] See above para 1.13.
[605] Bribery Act 2010 s 2.
[606] L Macgregor *The Law of Agency in Scotland* (2013) para 6-30; L Macgregor, D Garrity, J Hardman, A MacPherson, L Richardson, F Davidson *Commercial Law In Scotland* 6th edn (2020) para 4.5.4.2.
[607] *Sao Paolo Alpargatas SA v Standard Chartered Bank Ltd* 1985 SLT 433.
[608] See e.g. Children (Scotland) Act 1995 s 10.

trustee.[609] This stems from the fact that the donee cannot be considered a "good faith" acquirer, due to not having given value for the benefit, and would be seen as having "profited" from the improper alienation by the transferor.[610] Thus, the original beneficiaries can pursue the "donee" for restitution of property or repayment of the alleged donation.[611] Repayment is the remedy where the donum is money, restitution where the donum is property other than money. If restitution is not possible, for example because the recipient has sold or consumed the donum, the beneficiaries can seek recompense. Alternatively, the transfer could be considered voidable due to being *ultra vires* by the trustee and thus reduced at the request of the beneficiaries.[612]

5) THIRD-PARTY AUTONOMOUS ACTORS

4.59 The final persons considered in this chapter are third parties not acting in a representative role but as autonomous actors. Their participation in a donation is limited to what this thesis terms "indirect donations". Examination of the legal stages and effects of indirect donations is the subject of a separate chapter,[613] and as such only a brief outline of the role third-parties persons play is offered at this stage and only for completeness.

[609] N Whitty "The 'No Profit From Another's Fraud Rule' and 'Knowing Receipt' Muddle" (2013) 17 Edin LR 37-62; Y Evans "Trusts, Trustees, and Judicial Factors" *Stair Memorial Encyclopaedia* (reissue, 2016) para 186. It is acknowledged that the idea of constructive trusts is highly controversial in Scots law: G L Gretton "Constructive Trusts: I" (1997) 1 Edin LR 281. See also above para 4.36.

[610] The profit is determined by the fact that they would not be in a poorer position than they would have been should the transfer have not occurred: *Bank of Scotland v MacLeod Paxton Woolard* 1998 SLT 258 *per* Lord Coulsfield at 274-275.

[611] Whitty "The 'No Profit Rule" at p 50; *M & I Instrument Engineers Ltd v Varsada* 1991 SLT 106 at 108 per Lord Milligan.

[612] Evans "Trusts, Trustees, and Judicial Factors" para 185.

[613] See Chapter 10: Indirect Donations.

4.60 An indirect donation is where a donation is made involving a transfer or undertaking from a donor to a third party, but the net patrimonial benefit is to the donee. For example, Carlotta owes Brian £100. Andreas pays Brian the £100 to settle Carlotta's debt as a donation to Carlotta. Andreas incurs a £100 loss to his patrimony, Carlotta is enriched to the extent she no longer owes £100, and Brian's patrimonial position remains unchanged, since the £100 due[614] to him was a patrimonial asset and the payment has merely substituted for this. This raises interesting questions surrounding the power of the donee to reject the donation, since the donee is not party to the transaction. However, full discussion of this is kept for chapter 10.

4.61 As the third party is acting autonomously, it is essential that the person has capacity to do so. Fundamentally, the underpinning juridical act of donation is separate to the legal transaction which is constituted solely between the donor and third party, either as a contract or a transfer. Thus, the third-party must have capacity in that person's own right to enter into an independent transaction with the donor. Furthermore, the third-party is subject to all normal restrictions on any person entering a transaction, such as legality.

6) CONCLUDING REMARKS

4.62 This chapter has outlined the limits of who can be party to a donation, whether as a donor, donee, or a person acting as a representative. In particular, it has been noted that a person must have active capacity to be able either to act independently or instruct another to act. Otherwise, the law designates a person to do so, either automatically due to the relationship to the donee or through appointment. Additionally, the extent to which a donee must be individually identified has been examined, concluding that it suffices for a donee to be part of a general class of people provided that the group is adequately identified. Broadly speaking, the law

[614] See below paras 10.20-10.21.

favours protection of the vulnerable (specifically) and against loss (generally), thus, who can or cannot be party donation is broadly based on equitable decisions.

CHAPTER 5:

THE NON-ACCEPTANCE RULE: A COMMON MISTAKE?

1) INTRODUCTION

> *"The making of a gift is a thing of such ordinary occurrence, and in the majority of cases is effected in a manner at once so rapid and simple, that one is apt to overlook its true nature, and to regard it as embracing a single act only, viz., that on the part of the giver, and not, as it really does, two separate and individual acts – one on the part of the donor or offeror, and another on the part of the acceptor or donee. Instead of being an individual or unilateral act, it is truly a complex and bilateral transaction."*[615]

5.1 Despite this opinion published in the nineteenth century, modern accounts of donation by Scottish legal academics state that the acceptance of a donee is not required to make it effective.[616] This, it has been said, is regardless of whether the donation is of an obligatory or proprietary nature.[617] A core argument of this thesis is that the position that donations do not require acceptance in Scots law is mistaken.[618] This chapter explores the origins of the "non-acceptance" rule and offers arguments against its continued application.

5.2 The first part considers the historical evolution of the rule from the institutional writers to its application in case law, beginning with Stair. This is principally because the earlier Scottish sources paid little attention to the matter and, therefore, Stair is

[615] Anon "On Donations" (1874) 18 *J Jurisprudence* 233 at 234.
[616] Gordon "Donation" para 11, fn 11; Hogg "Promise and Donation" 184 and 185.
[617] Hogg "Promise and Donation" 184 and 185.
[618] Similar criticisms have been made of assertions that in English common law a gift is a "unilateral act of a donor" (Penner *The Idea of Property in Law* (1997) p 97) as this position fails to recognise the need for a donee's consent: J Hill "The Role of a Donee's Consent in the Law of Gift" (2001) 117 Law Q Rev 127.

normally cited as the rule's primary source.[619] It is highlighted that the historical authorities are not agreed on the matter and Stair's justification (to enable those deemed to lack capacity and absentees to receive donations)[620] is weaker in light of modern statutory developments. Furthermore, it is clear that some donations, for instance conditional donations and donative transfers of property, necessarily require some form of acceptance in law.[621]

5.3 The final part of this chapter offers further considerations as to why acceptance, or lack thereof, may be an important factor in the law of donation. Primarily, it will be argued that there is a difficulty reconciling the non-acceptance rule with fundamental principles of Scots law, such as *beneficia non obtruduntur* and the need for a transferee's *animus acquirendi*. The result of this is that the law, as currently asserted, lacks coherence, at least in relation to a donative transfer of property, and furthermore ignores the social nature of donation and its implications in the private sphere.[622] Given the lack of need for the donor's *animus donandi* to be altruistic in Scots law,[623] not having a requirement of acceptance increases the potential for a donation to be used as a "Trojan Horse" to create a relationship of dominance of donor over donee. Taken together, these reasons support a positive requirement of acceptance, or at least that the non-acceptance "rule" should be an exceptional, rather default, position.

2) THE HISTORICAL JUSTIFICATION FOR NON-ACCEPTANCE

a) Stair

5.4 The origins of the non-acceptance rule for modern Scots law are found in Stair's treatment of voluntary obligations in Book I, Title 10 of the *Institutions*: "a

[619] *Supra* n 616.
[620] Stair I.10.4.
[621] Stair I.10.3; III.2.5.
[622] See above paras 1.4-1.20.
[623] See above paras 2.34-2.38.

promise is that which is simple and pure, and hath not implied as a condition, the acceptance of another".[624] Immediately, it can be seen that the passage refers to "promise" as opposed to "donation", and it is also the foremost foundational authority for the validity of a unilateral promise in Scots law.[625] The general premise is that a person has the power to bind themself to do almost anything unilaterally, and this power enables (1) those without capacity or (2) those *in absentia* to be beneficiaries of another's benevolence.[626] Despite not requiring a positive act of acceptance, any recipient of a benefit instead has a right of rejection.

5.5 There are two main objections with the application of this rule to donations. First, it does not actually refer to donation nor can it be said that Stair had in mind a donative transfer. The focus on non-acceptance is to distinguish Scots law from the position of Grotius[627] in giving legal force to a unilateral act of will. Grotius conceived of donation as contractual[628] and therefore bilateral. Furthermore, Grotius did not recognise a difference between gratuitous promises and donative transfers in this regard.[629] That is not to say that Grotius did not acknowledge the binding effect upon a promisor through execution of a unilateral act, merely that this could not invest the promisee with a right.[630] In contrast, Stair in this passage is asserting the effectiveness of a unilaterally constituted gratuitous obligation as bestowing a right upon the party to whom it is directed. Thus, if it does indeed apply to donations, it can only do so in an obligatory sense. True, there is not much to distinguish a donative obligation from a unilateral promise,[631] but the same cannot be said for a donative transfer.[632]

[624] Stair I.10.4.
[625] W D H Sellar "Promise" in Reid and Zimmermann *History of Private Law* p 252; *Cawdor v Cawdor* 2007 SLT 152; H L MacQueen "Promises, promises: be bloody, bold and resolute" (2007) 11 Edin LR 146.
[626] Stair I.10.4.
[627] Grotius *War and Peace* II.11.1-6.
[628] J Gordley *Foundations of Private Law: Property, Tort, and Unjust Enrichment* (2006) p 353.
[629] Grotius *War and Peace* II.6.2.
[630] Grotius *War and Peace* II.11.3-4.
[631] See above paras 2.15-2.16.
[632] Additionally, it has been said that a promise to donate is not a donation: Gloag and Henderson para 13.34.

5.6 Stair implicitly acknowledges the difference between a promise and a donative transfer later in the same Chapter, stating that a donation "perfected by a present act of tradition [delivery]"[633] creates no obligation for either party. Furthermore, he also differentiates other circumstances that can be considered donative where there is no "present act of tradition", such as where a person promises to "bestow a horse",[634] reinforcing the idea that a donative obligation (or promise) and a donative transfer are two separate acts.

5.7 As Stair implies that there is a distinction between a promise and a donative transfer, it is necessary to consider his account of transfer of ownership by tradition (delivery) to ascertain the rules on this. Stair considers that the dispositive will of the owner of property should alone suffice to "alienate his right",[635] but acknowledges that transfer of moveables by tradition additionally requires delivery of possession.[636] Possession, having both physical and mental aspects,[637] requires an intention on the part of a receiver of property to become possessor.[638] This means that, for Stair, a donative transfer requires some intention on the part of the donee to be effective. The donee must consent to the transfer. Consent infers acceptance of the benefit, and therefore casts doubt on the assertion that this is unnecessary, at least for a donative transfer of ownership.

5.8 The second objection to the application of Stair's non-acceptance rule to the modern law of donation lies in whether Stair's justification for the rule is as applicable in today (i.e. for the protection of incapax or to facilitate those *in absentia* receiving benefits)[639] as it was in the seventeenth century, given statutory and social developments. Principally, those without capacity are children[640] and those identified

[633] Stair I.10.12.
[634] *Ibid*.
[635] Stair III.2.4.
[636] Stair III.2.5.
[637] Stair II.1.17.
[638] Delivery is not essential for acquisition of ownership where the acquirer is already in possession: Stair III.2.5.
[639] See above para 5.4.
[640] Age of Legal Capacity (Scotland) Act 1991 s1(1). See above paras 4.39-4.42.

as lacking capacity under the Adults with Incapacity (Scotland) Act 2000.[641] As explained in the previous chapter, under modern legislation, while children may have capacity in a passive sense to own property, those under 16 do not have capacity to consent to the transfer.[642] This consent must be exercised on their behalf by a parent or legal guardian,[643] a responsibility which "supersede[s] any analogous duties imposed on a parent at common law".[644] Similarly, a guardian for an adult incapax also has power to exercise capacity on their behalf.[645]

5.9 Furthermore, if a person does not have capacity to accept, how can it be said the same person has the capacity to reject?[646] If a donee is deemed unable to consent in law due to an inability to comprehend the consequences of doing so properly, how can the donee be deemed to comprehend the consequences of rejection? Surely, such an attempt to reject would fall due to lack of capacity. Thus, Stair's concern with the protection of these parties, and to enable them to acquire property by way of gift, is no longer necessary as lack of capacity is cured through statutory representation.

5.10 The second category of persons whom Stair is trying to benefit is those *in absentia*. However, modern developments in telecommunications, particularly with the advent of the digital era, mean that a person is unlikely to be completely uncontactable and unable to be informed of the potential gift. Therefore, a donee will have the opportunity, or at least some means, to indicate acceptance or rejection. If a party does voluntarily "disappear" it can be reasonably inferred that they wish to have no dealings with those they left behind and are therefore unlikely to want to receive gifts anyway.

[641] Adults with Incapacity (Scotland) Act 2000 s1(6). Above paras 4.39-4.42.
[642] Age of Legal Capacity (Scotland) Act s 1(1); Reid *Property* para 599.
[643] Children (Scotland) Act 1995 s1(1)(d).
[644] Children (Scotland) Act 1995 s1(4).
[645] Adults with Incapacity (Scotland) Act 2000 s 64(1).
[646] Also, Stair states that the promise gives the recipient a "faculty or a power" which, although pre-dating Hohfeld by some two hundred and fifty or so years, suggests that the nature of the right is of a specific rather than general kind: Stair 1.10.4. See also above para 4.40-4.41.

5.11 Moreover, if an absent person can be the recipient of a donation, it could potentially result in the rather absurd situation that the person becomes owner of property, never possesses, sees, or even never knows of it, and then is subsequently declared dead under the Presumption of Death (Scotland) Act 1977, with the gift swiftly passing to the donee's heirs. In other words, the intended beneficiary never, in fact, benefits from the gift. Given that a donor's *animus donandi* is generally specific to an individual donee[647] this particular outcome is less than satisfactory. Therefore, Stair's justification for the lack of acceptance rule no longer is as necessary, nor as practical, as it may have been in the seventeenth century.

5.12 Finally, Stair cites the provenance of his rule as the Canon law but does not specify where in the annals of the church this can be found.[648] This is not the place to enter a discussion regarding the merits (or otherwise) of continuing an historic influence of Christian teaching in the modern law,[649] but, this aside, without the ability to examine Stair's sources caution should be exercised before applying this rule without scrutiny. Indeed, some of Stair's close successors either ignored his position or were more circumspect about its absoluteness. One commentator goes as far to define a gift as "being truly the acceptance of an offer to alienate gratuitously".[650]

[647] Except in the case of *traditio incertae personae* discussed above at paras 4.46-4.54. Additionally, if a donation is accepted (at least a J1) then this right will pass to the donee's heirs: see below para 7.49.
[648] Evidence would suggest that Canon law actually takes the opposite position that acceptance is necessary to complete a donation: "In the canonical and civil law tradition, on the contrary, the completion of the gift transfer follows a knowing acceptance of the gift, and any conditions associated with it, by the receiver." (R E Jenkins, 'Gifts, Donations and Donor Intent in the Canon Law of the Catholic Church' (2012) 72 Jurist 76 at 81).
[649] There has been much already written regarding the influence of faith on Stair's legal scholarship, for instance, see: D Reid "Thomas Aquinas and Viscount Stair: The Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense" (2008) 29 *Journal of Legal History* 189. In the words of Stephen Bogle "Stair (…) brought philosophical and theological perspectives to bear on his legal point of view (…) it demonstrated a direct connection between the positive law of Scotland and God's moral law": S Bogle *Contract Before the Enlightenment: The Ideas of James Dalrymple, Viscount Stair, 1619-1695* (2023) p 85. Indeed, it could be argued that a failing of Scots law has been the predominant focus and promotion of mercantile interests over moral and social considerations since the nineteenth century. Such an argument, however, is best reserved for discussion elsewhere.
[650] Anon "On Donations" 234.

b) Forbes

5.13 Although occasionally overlooked in favour of the authority of Stair and the later institutional writers discussed below, William Forbes' position on donation is of interest because it stands in direct opposition to the non-acceptance rule. Like Stair, Forbes also discusses donation in his treatment of obligations, where a donation is a "lucrative obligation (…) made for mere love and favour of the Receiver, or for which nothing is done or paid".[651] "Love and favour" refers to the motive for the act: the affection which the donor has for the donee. Moreover, Forbes' definition emphasises the voluntary nature of the act, indicating that there is no reciprocal performance required of the donee.

5.14 However, Forbes states that a donation is perfected by the "consent of the donor and the acceptance of the donee or donatary".[652] Acceptance is a positive act required to complete the transaction. What is unclear is if this acceptance is only in relation to "perfecting" the transfer or is essential to the constitution of a donative obligation, as Forbes makes no direct distinction between the two. It may be that he was mistaken in the law and was conflating the distinction between a donative obligation and donative transfer of ownership, giving preference to the maxims of property law over obligations. It is impossible to be sure.

c) Bankton

5.15 In accordance with Stair, subsequent institutional writers mainly discussed donation in the context of obligations.[653] Bankton, however, discusses the role of acceptance directly twice, the first being in Book I on Personal Rights, the second in

[651] Forbes *Inst* III.1.2.2.
[652] Forbes *Inst* III.1.2.3.
[653] Bankton *Inst* I.9; Erskine *Inst* III.3.88-93; Bell *Princ* § 63.

the appendix following Book IV on Actions. The principal section in Book I is contained in a rather confusing passage:

> "A donation may become effectual without acceptance in *[sic]* behalf of the donee. Thus, if one grant a disposition of his estate to another ignorant of it, and delivers the same to some person for the disponee's behoof, it becomes an effectual right, which the disponer can never recal *[sic],* unless he has, by express provision in the deed, reserved such power. The disponee may indeed reject, and by such renunciation the right would return to the granter; but still he was presently, on delivery of the deed, divested of the right to the subject, and the disponee invested with it, without acceptance; so that here the simple deed of the donor divests him; and if the other repudiate the gift, it returns to the donor: but generally acceptance is requisite to state the right in the donee's person".[654]

5.16 It can first be seen that Bankton does not assert that acceptance is always irrelevant, merely that a donation *may* have effect without it. His subsequent explanation of a disposition granted to another on the donee's behalf suggests that this is a limited circumstance in which an ordinary requirement of acceptance is unnecessary. This is reinforced by the last sentence: "generally acceptance is requisite". Acceptance is therefore usual and non-acceptance uncommon. Moreover, the passage does include an act of acceptance – by a third person on behalf of the donee. Therefore, this is not definitive authority that there is no need for acceptance.

5.17 Secondly, the type of right of which the donor is divested upon delivery is unclear. The language suggests a *jus ad rem* rather than a *jus in rem*, which would be concomitant with a personal right to the gift in an obligational sense rather than a real right. In this regard, the lack of the donee's acceptance would be unremarkable, as the constitution of a donative obligation is, to an extent, always unilateral, at least

[654] Bankton *Inst* I.9.9.

in its binding effect upon a donor.[655] This passage is perhaps more reflective of the importance of delivery to make deeds an effective source of personal rights.[656] Furthermore, the final sentence suggests that to complete the transfer of a real right acceptance is required because he refers to "the right *in* the donee's person" [emphasis added]. However, it may also be wrong to attribute too much weight to the distinction between the word "to" in one sentence and the word "in" in another.

5.18 Thirdly, it is unclear what type of property Bankton is considering in this passage. The words "disposition" and "estate" suggest that he is referring to land. Therefore, it is possible that he is restricting the "exception" to the acceptance rule to heritable property. And, like Forbes, that Bankton is suggesting that the donative character of the act forms the motive for the obligation and subsequent transfer. But delivery alone in 1750 (when Bankton was writing) would have been insufficient to transfer a real right in heritable property. A ceremony of sasine, drawing up an instrument of sasine, entry with the superior, and, crucially, registration[657] would also have been necessary.[658] Consequently, only a personal right could be created through the delivery of the deed.[659] As such, it is justifiable to apply the same rule as for a gratuitous promise, given the effect of delivery is the same. The donee could subsequently reject the donation on discovery of it or fail to register the deed, which would have the same effect that ownership does not transfer, but until rejection a personal right might be vested in the donee.

5.19 Fourthly, another anomaly is that Bankton claims that upon rejection the right "returns to the donor". However, a donation "is the liberal grant of any thing to which one cannot be compelled by law".[660] If it is obligatory in nature as a *jus ad rem*, then the juridical act creates this right.[661] Much like a right created by a contract, it is born,

[655] See below paras 7.19-7.30.
[656] McBryde *Contract* para 4-02.
[657] Reid *Property* para 89 (G L Gretton). See generally: G Donaldson "Early Scottish Conveyancing" in *Formulary of Old Scots Legal Documents* (Stair Soc vol 36, 1985).
[658] As substitutes for the delivery of sasine upon the ground being transferred.
[659] See generally: McBryde *Contract* chapter 4.
[660] Bankton *Inst* I.9.2.
[661] See above para 2.12.

lives, and dies with the existence of the underlying obligation. The act of rejection would have the effect of extinguishing the obligation; it would annul the right (*jus ad rem*) rather than "return" it.

5.20 These criticisms aside, later in the same chapter Bankton also denies the requirement of acceptance when "rights intended to be holden as compleat [*sic*]"[662] are created solely through the will of the donor. But this also appears to be an exception to the general rule, for the statement is made in the context of donations made to those who know nothing of them or lack capacity (or "idiots or madmen")[663] and thus are "incapable of acceptance". Like Stair, for Bankton this is in order to allow such persons to acquire rights.[664] Furthermore, he asserts that the right is "revocable by the granter", which means either that the donor retains control over the actual property, or that this is reflective of his general position that donations may be revocable,[665] which is no longer held to be the case.[666] Additionally, given that this position on non-acceptance is directed specifically to those who are absent or incapax, it could be argued from this passage that the converse can be implied about donations to those who know of them or have capacity: that acceptance plays a role.

5.21 Regardless of any ambiguities which may surround the role of acceptance in Bankton's obligational treatment of donation, none such exist in the appendix to his *Institute*. In a clear statement he declares:

> "…that a gift or benefit cannot be conferred upon one without his consent; that as a gift must proceed from the will of the donor, so it must be in the other person's option whether he shall accept it or not".[667]

[662] Bankton *Inst* I.9.10.
[663] *Ibid*.
[664] The paragraph is written in general terms making it difficult to understand, but this is my interpretation.
[665] Bankton *Inst* I.9.4.
[666] See above paras 2.47-2.67.
[667] Bankton *Inst* IV.45.135

5.22 The justification for this comes from the obligation of gratitude which Bankton and Stair alike hold is incurred by a donee upon receipt of a gift.[668] For Bankton, no person should by default come under such an obligation if the giver is of "so abject character, that an ingenuous man would not chuse [*sic*] to accept a favour of them (…) or enter into an intercourse of good offices with them".[669] Unless there is a positive requirement of acceptance, Bankton acknowledges that the autonomy of the donee in managing personal relationships is compromised.[670] Thus, we can conclude that Bankton does not hold strictly to the non-acceptance rule and citing him as an authority for it must be an error.

d) Wallace

5.23 Another compelling source from the eighteenth century in support of a positive requirement of acceptance is George Wallace's *A System of Principles of the Law of Scotland*,[671] not least because his treatment of donation is the most extensive of all the early modern jurists', running to seventeen pages.[672] Wallace emphatically asserts a positive requirement of acceptance for donations throughout his discussion, even including it in his foundational definition of a gift: "a valuable or pecuniary bounty, given gratis by one who is not bound and cannot be forced to give it, and accepted by him to whom it is given".[673] He claims three "axioms" from this definition:

[668] Bankton *Inst* I.9.1; Stair I.8.2. See above paras 2.47-2.51.
[669] Bankton *Inst* IV.45.135.
[670] This is commensurate with modern sociological observations on donations which, this thesis argues, should be given more weight: see above paras 1.15-1.20.
[671] Edinburgh born George Wallace was an advocate, jurist, and writer, and one of the founder members of the Royal Society of Edinburgh: C Waterson and A Shearer *Biographical Index of Former Fellows of the Royal Society of Edinburgh* 1783-2002 (2006). His *System of Principles* was published in 1760 and, despite being titled "volume I", for reasons unknown no "volume II" followed. He was a prominent voice in the anti-slavery movement emerging during the Enlightenment, and an important part of the *Principles* was dedicated to criticising empire built on slavery: A S Curran *The Anatomy of Blackness: science and slavery in an age of Enlightenment* (2011) p 182-183.
[672] Wallace *System of Principles* § 664-678 with a separate title on donations *mortis causa* §679-682.
[673] Wallace *System of Principles* § 664.

"I. That a gift is a valuable or pecuniary bounty;

II. That it is given *gratis*; and

III. That it must be *given* on the part of the donor, and *accepted* on that of the donee".[674]

These foundational principles form the basis for his analysis.

5.24 Wallace is perhaps the historical author who comes closest to making the clear distinction between an obligational and proprietary sense of donation, acknowledging that a donor may bind themself in a document which will give a donee a *ius ad rem* but that no *ius in rem* is transferred at this point.[675] He also distinguishes a promise to donate at a future time, which he claims is not a donation, from a *per verba de praesenti* donation which binds the donor before any transfer of property.[676] This is a distinction still recognised today.[677]

5.25 Further unpacking the act of donation, Wallace sees it as a two-step process with action required by both parties before it is complete.[678] The donor must be "divested of the faculty of repentance" by putting the donation (or a document signalling the present intention to donate) beyond recall, thereby binding the donor.[679] This is commensurate with the modern requirement of delivery, both to constitute a binding obligation[680] and to fulfil the *corpus* element for a transfer of property.[681]

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[674] *Ibid*.
[675] Wallace *System of Principles* § 673.
[676] Wallace *System of Principles* § 673.
[677] Gloag and Henderson para 13.34, although a condition donation is possible see above para 3.20 and below chapter 9: Conditional Donations.
[678] Wallace *System* of *Principles* § 673.
[679] Wallace *System of Principles* § 673.
[680] H L MacQueen "Delivery of Deeds and Voluntary Obligations" in A J M Steven, R G Anderson and J MacLeod (eds) *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017) p 103.
[681] Erskine *Inst* II.1.18.

5.26 Unlike most other historical authors discussed here, Wallace requires a positive acceptance on the part of the donee because he is concerned with the autonomy of the donee as a positive legal actor rather than merely a passive recipient. By doing so, he pays close attention to the donee's position after the donor's execution of their part as opposed to focusing predominantly on the donor. For Wallace, it is not that the donee gains a right, either *ius ad rem* or *ius in rem* to the donum, thereby negating the need for acceptance, but that the donee gains a right to accept. However, the term "right" is being used here in a broad sense. If it were a "right" to accept in the sense of being a claim-right, this would suggest that the donee has gained something of patrimonial importance (or value) and therefore has had a benefit forced upon them without any exercise of will.[682] Alternatively, if we analyse Wallace's "right to accept" in Hohfeldian terms, it would be more akin to a "power", as it is the ability to "effect the particular change of legal relations that is involved in the problem".[683]

5.27 Perceiving the donee as having a "power" rather than a "right" at this stage is attractive. Indeed, Wallace even uses the term when he states that the first stage of a donation is not complete until the donor is "divested of the faculty of repentance and the donee has it in his *power* to accept".[684] For one, it leaves the donor's position unaffected. The donor can still be bound, albeit not in an obligative "duty" (in the Hohfeldian sense) but by creating an obligational "liability" towards the potential donee. At the same time, it leaves the legal autonomy of the donee intact. This, to an extent, solves the difficulty of ascertaining the point of completion of a donation and distinguishing the legal effects of each stage of donation on the donor and donee. It ensures that (pure) donations are not revocable at the donor's whim. But it also prevents the unauthorised investiture of the donee, reconciling the principles of property transfer with the act of donation.

[682] See below paras 5.65-5.66 and 7.29.
[683] W Hohfeld, W Cook (ed) *Fundamental Legal Conceptions as Applied in Legal Reasoning: and Other Legal Essays* (1919) p 51.
[684] Wallace *System of Principles* § 673 (emphasis added).

5.28 It could be argued that the power to accept is itself a form of benefit which is bestowed upon the donee without the donee's consent, particularly given the donor's inability to repent once committed. Even before transfer of the donum, the donee gains a benefit by having the power to enforce the donor's performance. Wallace acknowledges this but avoids ever-decreasing circles of consent requirements by explaining that, while the donee must accept the power to accept bestowed by the donor's actions, there is a presumption that this power is accepted. This, he claims, is an extension of the same reasoning underpinning the presumption against donation: that no person is presumed to do that which must be accompanied by pecuniary loss.[685] But he reinforces the principle that the donee does not become owner of the property until acceptance, and in doing so strengthens the distinction between the "right" to accept a donation and the actual acceptance, and therefore completion, of it. The former occurs upon the donor completing their performance, the second is the performance required by the donee to complete the transfer.

5.29 There are some problems with this analysis. For one, if no person is presumed to do that which is accompanied by pecuniary loss, surely that should extend to the acceptance of the donation, not just the acceptance of the right to accept?[686] To institute an intermediary stage whereby the donor remains owner of the donum but unable to deal with it until the donee decides to accept or reject the right to accept prescribes, can be argued to be adding an unnecessary layer of legal complexity to what is essentially a common social practice.

5.30 To an extent, Wallace answers this question by holding that acceptance, while necessary, can be inferred from the actions of the donee. This is despite the donation being incomplete until the donee "declares his *animus* of accepting".[687] That acceptance can be inferred avoids potential difficulties that could arise surrounding formalities of acceptance. However, once accepted a donation can no longer be rejected, for Wallace sees acceptance and rejection as mutually exclusive.

[685] Wallace *System of Principles* § 673.
[686] This is the position of Erskine: Erskine *Inst* III.iii.90. See below para 5.36.
[687] Wallace *System of Principles* § 673.

After acceptance a donor no longer has any interest or rights regarding the property. The power of disposal is vested in the donee, so any attempt to return the donation would require a new transfer. The corollary of this is that should the donee reject the donation, the donor will be unbound and the parties returned to their original positions, without any powers, liabilities, rights, or duties on either side.

5.31 The right, or power, to accept is paramount to Wallace, to the extent that he holds it extends to the donee's heirs should the donee die before accepting.[688] This is because, once constituted, it exists "independent on *[sic]* the will of the donor".[689] In this respect, the act of the donor must be construed as creating a unilateral obligation from which the donor cannot rescind. However, there is something slightly unsatisfactory about the purported transmissibility of the right to accept in Wallace's analysis.

5.32 After the donor has become bound, the donee has a power to accept, but at this point the donee has neither a *ius ad rem* nor a *ius in rem* to the donum. As noted above,[690] in the Hohfeldian sense, this is a "power" to change the legal relationship between the parties. Whether this power equates to a patrimonial right which can form part of a deceased's estate is questionable as it would undermine the distinction between a "power" and a completed *ius ad rem*.[691] Moreover, a donation is generally considered to be made for the "love, favour, and affection"[692] of the donee, suggesting a degree of *delectus personae.* As such, there is an argument that such a power should be excluded from heritability, for why should the donor be bound to give something away to a party they do not necessarily have any affection for if the intended donee has not undertaken some additional act (acceptance) to require this of the donor?

[688] Wallace *System of Principles* § 672.
[689] *Ibid*.
[690] See above para 5.26.
[691] See above paras 2.14-2.15.
[692] This is the phrase which is commonly used in place of the price in gratuitous dispositions of heritable property.

5.33 For example, Betty has an old friend, Alf. Betty writes to Alf stating that she has withdrawn £500 from her bank which she has given to Clive to deliver to Alf next week as a gift. Before the letter or Clive arrives, Alf dies. Alf's daughter Deborah claims the power to accept the donation. Under Wallace's analysis, Deborah, as her father's heir, is entitled to the gift. Betty has bound herself to make the donation. She has put it beyond her recall by posting the letter and delivering the money to Clive. However, a comparison with contract law would seem to suggest that Wallace is in error, for where an offer is made to a specific person, "only the specified offeree can accept the offer".[693] So, while Wallace's overall analysis is attractive from a property law perspective, there are still some problematic elements remaining.

e) Erskine

5.34 Like Stair and Bankton, Erskine considers donation within his general treatment of obligations. He defines "donations" narrowly as "the doctrine of gratuitous obligations", ignoring any property conception.[694] That his subsequent discussion refers specifically to a donative obligation is further emphasised by his stating that "it can hardly be distinguished from an absolute promise".[695] Indeed, it appears that Erskine is in fact only truly concerned with the doctrine of promise, despite paying attention primarily to obligations to gift moveable property.[696] As this is the only occasion Erskine deals with the Scots institution of unilateral promise, that what he had in mind was not a discussion of what we would now consider "donation" (as a transfer of property) seems likely, although he appears to limit the doctrine of promise to gratuitous undertakings to make a transfer. Modern conceptions of promise accept a wider scope of application than this, including undertakings to do,

[693] MacQueen *Contract Law in Scotland* para 2.31. This is to be contrasted with a promise or offer made to a larger group: *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256. Additionally, where there is a *traditio incertae personae* the donation is presented as an offer to anyone eligible who wishes to take it – the act of taking being acceptance: see above paras 4.49-4.57.
[694] Erskine *Inst* III.3.88.
[695] *Ibid*.
[696] *Ibid*.

or refrain, from doing something or to provide a service,[697] things which cannot necessarily be the subject of a donation.[698]

5.35 However, Erskine acknowledges the difference between a donative obligation and a donative transfer, by stating that although a:

> "*pactum donationis* confers on the donee a *jus ad rem*, it gives him no right in the thing itself; the donor continues proprietor till delivery".[699]

Moreover, he asserts also that the donee only becomes proprietor upon that party's right being "perfected by tradition".[700] This reinforces the notion that there has long been a recognition of donation as two separate juridical acts in Scots law, supporting the contention of this thesis.[701]

5.36 Erskine does not acknowledge the need for a formal, positive acceptance. He reaches this conclusion by first citing Stair's statement that acceptance is not necessary, contrasting it with Grotius and Pufendorf's shared contrary view.[702] But Erskine takes a slightly more nuanced approach, attempting to reconcile the two positions by claiming that acceptance can be reasonably inferred in the absence of rejection.[703]

5.37 This is a practical solution, especially if we think of donations of moveable property transferred by delivery, where it is perfectly reasonable to suggest that a failure to reject a gift can infer acceptance. But it is not entirely satisfactory in all circumstances. The formal rules for conveying certain types of property in Scotland

[697] M Hogg *Promises and Contract* pp 21-22.
[698] See above paras 3.35-3.52; Hogg *Promises and Contract* p 47.
[699] Erskine *Inst* III.3.90.
[700] *Ibid*.
[701] See above paras 2.7-2.20.
[702] See above para 5.5.
[703] Erskine *Inst* III.3.90.

(such as heritable property) do not necessarily require participation on the part of the acquirer.[704] Therefore, the law as Erskine is stating it would allow one to become an owner of property because the donee's acceptance is presumed if the property is not rejected. But a donee may not have the opportunity to reject a donation if ignorant of it. By equating promise and donation, Erskine creates a conceptual difficulty in relation to these institutions.

f) Bell

5.38 Bell's treatment of donation, which includes the question of acceptance, is brief.[705] It appears only as part of the exposition in his *Principles* of the distinction between unilateral and mutual obligations.[706] Donation is solely considered in this obligational sense. He does not mention acceptance, and therefore any rules regarding this must be gleaned from general propositions on conventional obligations, given that donation is voluntarily undertaken and invests the intended recipient with a right to demand performance.[707] As such, an obligation only arises once the appropriate intention of the donor is formed, because Bell reinforces Stair's tripartite distinction between different types of will: deliberation, resolution, and

[704] This is a controversial statement, but the formal requirements of land registration do not necessarily involve the participation of the transferee. There are no conditions regarding the identity of the applicant for registration, at least where the land has previously been registered on the Land Register: see Land Registration etc (Scotland) Act 2012 s 26(1). Although typically this would be the disponee this is a matter of custom and practice rather than a statutory formality, the exception being for first registration of land (i.e. the first time the plot is entered in the Land Register) where the applicant must be the grantee: Land Registration etc (Scotland) Act 2012 s 23(1)(a). Registration of a valid disposition transfers ownership under the Land Registration etc (Scotland) Act 2012 s 50(1), and, although a disposition must be in writing (Requirements of Writing (Scotland) Act 1995 s 1(2)(b)), it is executed by the disponer alone. Cumulatively, this means that in accordance with a strict reading of the legislative provisions a donor could execute a valid disposition of previously registered land and register it in the name of the donee without the donee's knowledge or acquiescence. However, this is not universally accepted to be the case. Professors Reid and Gretton hold the view that an application to register heritable property must be made by the disponee: K G C Reid and G L Gretton *Land Registration* (2017) p 123. It should also be noted that although someone is stated on the Land Register to be the owner, this does not in and of itself make that person the owner.

[705] There is only direct treatment in his *Principles,* and reference to donations are only made in passing in the *Commentaries*. Therefore, only the *Principles* are considered in this chapter.

[706] Bell *Princ* § 63

[707] Bell *Princ* § 7.

engagement.[708] Engagement alone creates the obligation.[709] Like Stair, he addresses promise separately within his general discussion of conventional obligations, rather than as part of gratuitous obligations as Erskine does. But he follows the latter's view that acceptance of a promise is presumed,[710] although it can be rejected expressly or by implication.[711]

5.39 This is reflective of a bilateral relationship, contractual in nature. But again, we have a problem surrounding recipients who are ignorant of their right. How can such recipients reject something either expressly or by implication? True, once a person becomes aware of the right that person can reject it and Bell does not mention any property effects in relation to a donation. As with all the institutional writers this then brings into question the wisdom of applying the same obligational rules to both juridical acts that can constitute a donation.

5.40 Thus, as has been demonstrated, even although the institutional and historical writers are often cited as authority for the non-acceptance rule, they are by no means unanimous in this position. Additionally, Stair, Bankton, Erskine, and Wallace recognise (even if only implicitly) the distinction between a donative obligation and a donative transfer, recognising that for the latter acceptance is a necessary part. Therefore, caution should be exercised in unquestioningly accepting the non-acceptance rule as the definitive position in Scot law.

[708] Stair I.10.2.
[709] Bell *Princ* § 7. This is also the case for Bell with offer and acceptance in sale. The offeror is bound by making the offer until such time as the offer expires due to a stated condition, or one implied by law: see H L MacQueen "It's in the Post: Distance Contracting in Scotland 1681-1855" in F McCarthy, J Chalmers, and S Bogle (eds) *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015) p 56.
[710] Bell *Principles* § 9.
[711] Bell *Principles* § 8.

g) Case law

5.41 It is not only the institutional writers who are cited as provenance for the non-acceptance rule; there is also case law which appears to support it. Very little of it, however, deals directly with the subject. This is likely because the paradigmatic case is a contest between a putative donee asserting a right to the donum and a legatee or executor under a will. The donee's act of raising a claim can infer acceptance of the disputed gift.

5.42 Yet, it is worth briefly examining the cases that do consider the matter to ascertain the extent to which the courts have clarified the position. Professor Gordon cites three in the *Stair Memorial Encyclopaedia*: two cases to support the non-acceptance rule[712] (*British Linen Co. v Martin*,[713] and *Ford v Ford's Trustees*)[714] and one which appears to deny it (*Torrance v Torrance's Trustees*).[715] Additionally, a nineteenth century article cites the case of *Bruce v Stewart* in support of a requirement of acceptance.[716] Finally, two more recent cases, *Chalmers v Chalmers*[717] and *Greenshields v Carey*[718] indirectly seem to negate the need for a donee's acceptance, but by doing so highlight some of the problems with the rule. These cases are considered below.

i) *British Linen Co v Martin*

5.43 In *British Linen Co v Martin*, James Burns instructed his clerk to lodge money in a bank account under the name of his former housekeeper, Sarah Unsworth, the day before his death. The clerk retained the deposit receipt. Mr Burns had previously executed a will by which he had established a trust-deed primarily in favour of the

[712] Gordon "Donation" para 11 fn 11.
[713] (1849) 11 D 1004.
[714] 1961 SC 122.
[715] 1950 SC 78. Gordon claims this case is "in error": Gordon "Donation" para 11 fn 11.
[716] Anon "On Donations" (1874) 18 J Jurisprudence 233-288 at 235; *Bruce v Stewart* 1790 3 Pat 150.
[717] 2016 SC 158.
[718] [2019] SC LIV 59.

housekeeper. The executor and trustee nominated in the will claimed that the money lodged in the name of the housekeeper was not a donation and should be included in the trust-settlement, partly because Mrs Unsworth was ignorant of the deposit at the time it was made. The court dismissed this argument and found a valid donation had been made.[719]

5.44 However, this decision was not reached because the donee's ignorance, or acceptance, was irrelevant. Indeed, implicit in the judgement is that some sort of acceptance was necessary, for "although Mrs Unsworth was unaware of it, the Bank, acting for her (…) received the money for her behoof and must have retained it until paid by her authority".[720] Thus, although Mrs Unsworth did not accept the donation herself, the bank accepted it for her and could not dispose of it until she directed them to do so. Acceptance occurred, even if not by the donee directly.

5.45 Furthermore, Mrs Unsworth's own power of acceptance (or rejection) remained unchanged upon the transfer. All that had happened was that the money had been put beyond the power of the donor's control during his lifetime. The court found that Mr Burns could no longer have transacted with the funds directly, and because the clerk retained the receipt there was no suggestion that he intended Mrs Unsworth to apply the funds on his behalf under instruction.[721] As such, the Bank was a mere depository of the funds until Mrs Unsworth chose to accept them through implication, uplift, or by directing the Bank as to their purposes. Had she rejected the donation, the monies would have needed to be returned to the donor's estate or held in its name. Given that Mrs Unsworth was laying claim to the funds in the action, this inferred that she accepted the donation. Therefore, using the case as authority for the non-acceptance rule is questionable.

[719] *British Linen Co v Martin* (1849) 11 D 1004 per Lord Fullerton at 1010.
[720] *Ibid*.
[721] (1849) 11 D 1004 *per* Lord Fullerton at 1009 contrasting with *Henderson v M'Culloch*, June 12, 1839.

ii) *Ford v Ford's Trustees* [722]

5.46 In *Ford v Ford's Trustees*, a beneficiary of an alimentary liferent under a testamentary trust deed sought declarator that he was entitled to reject it. The court granted the declarator. It is curious that this case should be cited as authority for the non-acceptance rule, for it does not mention acceptance at all, either directly or indirectly. Instead, the discussion focuses entirely on the right to reject.[723] Nor is it clear that the case is directly relevant to *inter vivos* donations, as opposed to testamentary bequests, albeit that the authorities cited by the trustees were Stair and Erskine's discussions on donations[724] and it is doubtful whether the rules would differ greatly between succession and donation in this regard.[725]

5.47 It might be more appropriate to see this case as reinforcing the *beneficia non obtruduntur* principle.[726] The court found that the pursuer could not have the benefit forced upon him against his wishes. This, in fact, implies that it is not sufficient solely for the transferor to have done all required to divest themself of ownership: there must be a corresponding acceptance before transfer is complete. The testator's action in this case directed an intended destination but the funds merely sat at the beneficiary's gate until admitted or, in this instance, sent away. Therefore, it is dubious whether this case really provides authority for the non-acceptance rule.

iii) *Torrance v Torrance's Trustees* [727]

5.48 The final case mentioned by Professor Gordon is *Torrance v Torrance's Trustees*, where he refers to one short quotation that asserts that there is a positive requirement of acceptance, claiming it "is in error".[728] The obiter remark comes from

[722] 1961 SC 122.
[723] 1961 SC 122 at 124.
[724] *Ibid*; Stair I.10.4; Erskine *Inst* III.3.90.
[725] Some writers have defined a tripartite scheme of donations, of which "testamentary donations" are one, see: Anon "On Donations" (1874) 18 J Jurisprudence 233-288 at 233.
[726] Discussed below paras 5.67-5.71.
[727] 1950 SC 78.
[728] Gordon "Donation" para 11 fn 11.

Lord Mackay, who states that "gift requires delivery to the taker with his full knowledge thereof and indeed with his express acceptance thereof".[729] The case itself deals primarily with a series of truster-as-beneficiary settlements for administration during the truster's lifetime. The first settlement contained a survivorship destination. The question concerned the revocability of the trusts in relation to the trustees' duty to preserve funds for the pursuer. It cannot be held to be completely in point, bar that a trust can be established for generous reasons, in which case it could be considered a form of gift. That said, of the three cases cited by Professor Gordon, it is the only one to directly mention acceptance in relation to gifts. Therefore, perhaps the "error" is to dismiss the role of acceptance at all.

iv) *Bruce v Stewart* [730]

5.49 There are other cases not mentioned by Professor Gordon that are relevant to the role of acceptance. One such case, *Bruce v Stewart*,[731] is referred to in an anonymous article penned in the nineteenth century to assert the need for a donee's acceptance, although it is far from clear that the facts support this position.

5.50 Charles Stewart, then living in India, executed a will but subsequently entrusted a friend, Captain Dundas, who was returning to Scotland, to carry £1000 to give to his father. Before Dundas arrived home, Charles Stewart was killed in the Second Anglo-Mysore War,[732] and the news of his death travelled faster than Dundas. The executors under the will claimed the money for the estate, as did the father. The court ruled in favour of Stewart's father.

5.51 The article claimed that the case ruled that "the gift was effectual on his acceptance of it, although this acceptance did not take place until after the donor's

[729] 1950 SC 78 per Lord Mackay at 96.
[730] *Bruce v Stewart* (1790) 3 Pat 150.
[731] Anon "On Donations" at 235.
[732] 1780-1784.

decease".[733] Yet, this analysis seems odd given that the executors argued that the gift was incomplete in the testator's lifetime, as the gift had not yet been put in the hands of the donee. The father argued that it was complete when the intention of the donor is manifest in some way, the strongest evidence of this being delivery of possession. This, he claimed, had been achieved through delivery to Dundas. Thus, Stewart's father actually argued, and was successful, for the proposition that a donation is completed unilaterally by the intention and actions of the donor, which would appear to contradict the position being asserted by the article.

5.52 That said, as many of the cases demonstrate, acceptance of the gift can be inferred from the act of raising a claim. Moreover, it is not necessarily that the donation is complete upon the formation of the donor's intention, but that the donor no longer has a power of recall. This is accentuated when the donor has delivered the possession of the property, even if that delivery is to a third party, especially if (as was the case in the eighteenth century) that third party was undertaking a long international journey. In *Bruce*, communication with Captain Dundas *en route* would have been challenging and therefore it could be reasonably inferred that Stewart's intention was fixed. As he no longer had the power of recall, neither can his executors have had it. Furthermore, a creditor of an estate takes precedence over legacies,[734] and as a donee is a creditor of the donor,[735] Stewart's father had a claim over a deceased donor's estate.[736] Thus, it appears that the court arrived at the correct result, albeit because of a slightly inaccurate analysis of the law.

v) *Chalmers v Chalmers* [737]

[733] Above fn 731.
[734] M C Meston "General Principles of Succession" in *Stair Memorial Encyclopaedia* (Vol 25) para 666.
[735] Bell *Comm* I, 314.
[736] It is also argued later in this thesis that a donee should be given the opportunity to accept or reject a donation if the donor dies before the act can be communicated to the donee: see below para 7.30.
[737] 2016 SC 158.

5.53 Unsurprisingly, there are not many cases in which a pursuer complains of being presumed to have accepted an unknown benefit. However, the matter of acceptance does occasionally arise as an ancillary issue, especially as part of a defence. A recent example is the case of *Chalmers v Chalmers.*[738] In brief, during a marriage a husband had bought a property and registered it in his wife's name without her knowledge or consent.[739] He later forged her signature on a disposition transferring the property to their son which was registered in the Land Register. During their divorce the wife discovered her previous registered ownership and the subsequent forgery. After divorce (and the matrimonial property had been divided) she sought reduction of the forged disposition.

5.54 At first instance, the Lord Ordinary found that since the pursuer had not been aware of her proprietorship before the forged disposition she had "no interest" in it.[740] He likened her position to that of a bank account holder whose account is being used by a fraudster to make money transfers without holder's knowledge. As such the pursuer was not entitled to a reduction in the same way that, as an account holder, she would not be entitled to the money that had been moved in and out of a bank account. On appeal the Inner House overturned this decision, stating:

> "It is in our view irrelevant that she did not know about the title, or that she had not contributed any funds towards the purchase, or that she had never lived in the property".[741]

That she had been registered owner was enough to render the fraudulent disposition void, as it had not been subscribed by the granter, and thus could not affect the pursuer's title in Scots law. But this might not reflect a general principle, more the

[738] *Ibid*.
[739] The initial registration took place under the Registration (Scotland) Act 1979 s 3, when the "Midas Touch" rule made her owner by virtue of registration.
[740] *Chalmers v Chalmers* 2015 SCLR 299 at [88].
[741] *Chalmers v Chalmers* 2016 SC 158 at [28].

court's desire to enforce wider policy objective and legal principle: not to allow parties to a fraud to benefit from it.[742]

5.55 The court also gave weight to the fact that the pursuer's title had been registered in the Land Register.[743] This meant she had a real "interest" in the property. Whether the pursuer's lack of knowledge could have been relevant in a different type of property, for instance a diamond brooch, is unclear. It is certainly desirable that the integrity of the Land Register is preserved and not allowed to be abused for fraudulent purposes. Indeed, the court claimed:

> "the system of Scottish land registration could be subverted if it were possible to forge a signature on a disposition which was duly registered, and then put forward equitable circumstances supporting a contention that the forged disposition should not be reduced, with the ultimate result (in the context of land tenure) depending upon the discretion of the court".[744]

Therefore, while the decision might seem to imply that one need not accept a donation, the likelihood is that the intricacies of donation law were far from the minds of the judges in this case so little can be inferred from it.

5.56 However, the lack of consideration of this matter raises a problem for donation law. As the court found in favour of the pursuer, determining that she need not have been aware of her proprietary right, they effectively found that the property had been donated to her. True, it found that the initial transfer had been part of an attempt by her ex-husband to conceal assets rather than there being any suggestion of donative intent. Indeed, the pursuer agreed in her testimony that the transfer had not been a

[742] D Reid *Fraud in Scots Law* (2013) (PhD thesis: University of Edinburgh) p 244.
[743] Above n 739.
[744] *Chalmers v Chalmers* 2016 SC 158 at [23].

gift,[745] thus negating donation as a possible ground for the transfer. Nonetheless, as the disposition registered in her name had been valid, so also was the conveyance. The court could not be seen to uphold a fraudulent action, so by default the pursuer's title effectively became founded upon a donation from her former husband as she had no other legal ground for it, despite the acknowledged lack of donative intent.

5.57 This contradicts the majority of case law that firmly asserts that the *animus donandi* must be proved to make a donation effective[746] and overcome the strong presumption against donation in Scots law.[747] Clearly this had not been done. Therefore, in seeking to uphold the integrity of the register, the Court undermined donation law.[748] Rather than clarify that donations do not need to be accepted, this case muddies the water about whether intention is required to make a gift at all. It is likely that the pursuer's former spouse may have a claim in unjustified enrichment against her.[749] In any regard, the case is unsatisfactory in many ways.

vi) *Greenshields v Carey*[750]

5.58 Here a man settled a loan owed by his romantic partner. She was ignorant of his actions until after the fact. When the relationship ended, he sought repayment for the money he had spent discharging her debt. The court found that the payment had been a gift and was therefore irrevocable.[751]

[745] *Chalmers v Chalmers* 2015 SCLR 299 at [7].
[746] *Forrest-Hamilton's Trustees v Forrest-Hamilton* 1970 SLT 338.
[747] Stair *Inst* I.10.2 and above paras 3.2-3.15.
[748] It should be noted again that the case was based upon provisions of the Land Registration (Scotland) Act 1979 under which the 'Midas touch' of the Keeper rendered the person entered as owner on the Land Register the true owner: Land Registration (Scotland) Act 1979 s 3. See also Report on *Land Registration* (Scot Law Comm no 222, 2010) paras 3.11, 12.66, 13.11-13.18.
[749] Where the presumption against donation is not overcome. See, for instance *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151; *Shilliday v Smith* 1998 SC 725.
[750] [2019] SC LIV 59.
[751] *Ibid.*

5.59 This case raises many interesting points regarding donation. The first is that a gratuitous discharge of another's obligation toward a third party can constitute a donation.[752] Second, it upholds the general principle that donations are irrevocable. But it is also relevant in a question about the need to accept a gift, because the defender was unaware that the pursuer had paid her debt at the time the donation was made, and the donation was made in the hands of a third party.

5.60 It appears that the donation was valid at the point the debt was discharged. That is the moment in time when the donation became effective, releasing the defender from her previous obligation.[753] Thus, it appears that acceptance is indeed unnecessary. Moreover, she subsequently became aware of the pursuer's actions, and (needless to say) did not exercise her right of rejection. But does this indicate that her acquiescence was unnecessary, or that the donation was only provisionally valid until her acceptance, inferred by her failure to reject the benefit?

5.61 Moreover, if she had wished to reject the donation upon discovery of it, could the effects have been reversed? Would the creditor have been required to reinstate the defender's loan agreement on its original terms? More likely she would have needed to contract a new loan to repay the pursuer. This may have been on less advantageous terms than the original agreement. By having a right of rejection as opposed to a positive requirement of acceptance for the donee, the law leaves those who have received unwanted gifts vulnerable to potential loss.

5.62 It could be considered that the bank acted in the capacity of the defender's agent when the pursuer settled the debt, accepting it on her behalf.[754] Therefore, it is not that there is no requirement of acceptance, merely that in this instance

[752] See chapter 10 "Indirect Donations" below for further discussion of donations made by transfer to a third party.

[753] It is generally held in Scots law that a payment made by a third party in respect of another person's debt can extinguish the original obligation: Bell *Princ* § 557; MacQueen "Payment of Another's Debt" in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) p 470; L J Macgregor and N R Whitty "Payment of Another's Debt, Unjustified Enrichment, and *ad hoc* Agency" (2011) 15 Edin LR 57 at 65. However, the point is not settled by authority: see below paras 10.27-10.33.

[754] Much like the analysis for Mrs Unsworth in *British Linen Co v Martin* (1849) 11 D 1004: see above, para 5.46.

acceptance was exercised by a third party. When the beneficiary learns about the gift and chooses not to reject it, this has the effect of ratifying the agent's actions. It would offer a degree of protection for the absent donee if this were the case. If such a person decided to reject the gift, the bank's actions would not be ratified, and the purported donation would be void.[755] This would likely mean the bank would have to repay the donor and reinstate the loan on the original terms, thus returning everyone to the position prior to the aborted donation. However, the position is not clear.

5.63 Although in this case these problems did not arise, it does highlight that acceptance should play a role in the law of donation. A right of rejection is inadequate, as it does not necessarily allow restoration of a donee to their original position where the donation is made in the hands of a third-party and the donee does not become aware of it until after its effects had been realised.

5.64 Taken together, these cases cannot be definitively said to deny the role of acceptance to perfect a donation. If anything, the evidence seems to point to the opposite conclusion: that acceptance is requisite for the valid execution of a donative transfer, if not also for a donation in an obligatory sense. The confusion appears to have arisen from a conflation of the law of unilateral promise with the law of donation. In the event there is still any doubt, the following section considers alternative arguments in support of the necessity of acceptance in a donation from both a legal and social perspective.

3) OTHER CONSIDERATIONS IN SUPPORT OF A POSITIVE REQUIREMENT OF ACCEPTANCE

[755] For more on ratification and agency in general see: L J Macgregor *The Law of Agency in Scotland* (2013) paras 11.27-11.49; F Davidson, D Garrity, L Macgregor, L Richardson *Commercial Law in Scotland* 4th ed (2016) para 2.4.

5.65 Scotland would be anomalous amongst other mixed and Civilian systems if acceptance is not required to complete a donation.[756] This is probably no surprise, given that the purported non-acceptance rule stems from Stair's deliberate divergence from the Civil law in this.[757] Other Civilian jurisdictions conceive of donation in contractual terms,[758] rendering it a bilateral act requiring the consent of both parties.[759] In addition to the apparent incongruity with the continental Civilian tradition, there are considerations within Scots law that further strengthen the position that the "non-acceptance" rule is not an appropriate statement of the true legal position here.

5.66 There are two underlying principles of Scots law that apparently conflict with the non-acceptance rule, the first being general in nature and the second relating specifically to property transfers: *beneficia non obtruduntur*, and the need for a transferee to have *animus acquirendi* before a transfer of ownership is complete. Such apparent inconsistency in the law must be questioned.

5.67 *Beneficia non obtruduntur* is the principle that no person can have a benefit thrust upon them against their will. Not only did Wallace[760] and Bankton[761] assert the validity of this in Scots law, but in more recent years the principle has been reasserted by contemporary authorities, such as the Scottish Law Commission ("the SLC").[762] It should be noted that the SLC see this principle as a reflection of Stair's right to reject a promise,[763] as this gives protection to a party from receiving unwanted benefits. However, this is not an entirely logical analysis. If Stair's justification for not requiring acceptance is that it allows a party to receive benefits

[756] For instance, France requires notarised acceptance: CC arts 893 and 932; Germany views gifts as a type of nominate contract but allows tacit acceptance: BGB § 516(2) and Hyland *Gifts* para 1315; and Quebec, like France, requires formal notarised acceptance but makes an exception for gifts of moveable property: Quebec CC art 1824.
[757] Stair *Inst* I.10.4 and above para 5.5.
[758] BGB § 516; Louisiana CC art 1468; Quebec CC art 1806.
[759] That Scotland does not aligns it more closely with England, where donation cannot be contractual because of the lack of consideration.
[760] Wallace *System of Principles* §673; above para 5.26.
[761] Bankton *Inst* IV.45.135; above para 5.22.
[762] Discussion Paper on *Third Party Rights in Contract* (Scot Law Com DP No 157, 2014) para 2.79.
[763] Stair *Inst* I.10.4.

purely through the unilateral act of the promisor,[764] there is no protection from the bestowal of unwanted benefits in the first place. The benefit can be "thrust" upon the beneficiary without their participation. Rejection can only occur after the fact of the imposition of the benefit. Therefore, to uphold the non-acceptance rule would be in contradiction to the *beneficia non obtruduntur* principle.

5.68 It may be the case that a donation in an obligatory sense can be effective without acceptance, given that a unilateral promise is binding in Scotland. And, if an obligatory sense of donation is in effect a subspecies of promise, then it should also be effective unilaterally. Yet, if we consider Wallace's analysis of donation that a presumption arises, not of the donee's acceptance of the donation but of the right to accept,[765] there cannot be any instance of any type of donation completed solely by the donor. That said, the donor's role can still be performed unilaterally, and the donor bound, it is only that this act cannot invest the donee with a *ius ad rem* and render the whole donation complete.[766]

5.69 It could be argued that *negotiorum gestio* is an area of law where benefits can, to an extent, be "obtruded" but the circumstances are limited and easily differentiated from donation. In *negotiorum gestio*, benefit can only be obtruded when it is (1) necessary to protect the interest of the beneficiary and the gestor must not intervene to a greater degree than is essential to achieve this; (2) when the beneficiary is unable to act for themselves; and (3) the law implies a mandate to provide the gestor with authority to act on the beneficiary's behalf as a prophylactic defence against claims of officious intermeddling.[767]

5.70 If these criteria are looked at through the lens of donation law, (1) a gift is seldom, if ever, "necessary" in a legal, or even practical, sense. Even if it could be argued that some situations give rise to a social duty to perform, such as a parent giving a child a Christmas gift, this is not a legally enforceable obligation, nor is it

[764] *Ibid*.
[765] Wallace *System of Principles* §673 and above para 5.28.
[766] See below paras 7.19-7.30.
[767] Bankton *Inst* I.9.24; N Whitty "Negotiorum Gestio" in R Black (ed) "Obligations" *Stair Memorial Encyclopaedia* (vol 15, 1995) para 91.

imperative. (2) cannot apply, as even if a beneficiary cannot act for themselves, the lack of urgency in the situation of gift-giving makes *negotiorum gestio* incomparable. Furthermore, as discussed above,[768] the law now specifies who has authority to act for an incapax. As regards (3), the law does not, nor need not, imply mandate in donative acts as a pre-emptive defence.

5.71 Finally, rules on *negotiorum gestio* are generally found under the heading of "recompense"[769] – it is primarily a remedy for a gestor to recover any expenses they have incurred. A donor seeks no restitution or recompense: integral to the act of donation is the intention to incur a loss. Thus, *negotiorum gestio* may provide a legal vehicle that can operate to displace the principle of *beneficia non obtruduntur*, but only within specific, clearly defined boundaries. Furthermore, reasons underpinning *negotiorum gestio* do not apply to gift-giving and thus it should not be taken as analogous or otherwise justifying deviation from *beneficia non obtruduntur* in donation law.

5.72 The second principle underlying Scots law that conflicts with the non-acceptance rule, and as noted earlier in this thesis,[770] is a fundamental maxim of Scots law that a party must have the requisite intention to become owner before a transfer can be considered complete. A voluntary transfer is, at its most basic level, a bilateral transaction, with the transferor requiring an *animus transferendi* and the transferee an *animus acquirendi*.[771] Consent is essential on both sides.[772] Even Stair, from whose writing the non-acceptance rule stems,[773] acknowledges this in his book on property in the *Institutions*.[774] Where a person lacks capacity, legislation now provides for someone else to exercise capacity on that person's behalf, as

[768] Para 5.9.
[769] For instance, Stair I.8; Bankton *Inst* I.9. Recompense is "the obligation[s] to do one good deed for another" (Stair I.8.1).
[770] See paras 2.45 and 4.41.
[771] Reid *Property* para 597. There are exceptions to this rule with involuntary transfers, but the *animus acquirendi* is always required by the transferee regardless.
[772] Carey Miller equates the *causa* of a gift with that of sale, stating that "there may be mutual consent to transfer ownership if the *causa* (…) is sale or gift" implying that for transfer both parties must consent: D L Carey Miller *Corporeal Moveables* para 8.10.
[773] See above paras 5.9-5.10.
[774] Stair *Inst* III.2.5.

noted above.[775] Therefore, the recipient of a donation of a property right must consent to the transfer before the donation is complete. This consent is equivalent to acceptance. Ascertaining when this acceptance occurs is not always a simple matter, but full analysis of this is reserved for elsewhere in this thesis.[776]

5.73 There are certain types of donation to which other areas of law may apply, and the rules governing these areas may appear to negate the need for a donee's consent, for example: where a donation is made by paying the donee's debt.[777] The law generally does not demand the consent of the debtor (donee) in this situation.[778] However, it is the contention of this thesis that to remain consistent with the legal principle of *beneficia non obtruduntur*, the donation should not be taken to automatically extinguish the original debt without the donee's acceptance. This would ensure that, should the donee wish to reject the donation, the previous arrangement with the creditor would still be valid.

4) CONCLUDING REMARKS

5.74 This chapter has considered the purported non-acceptance rule for donations in Scots law, concluding that not only are the historical foundations for its assertion misinterpreted or wrongly ascribed, but that it ignores the social consequences of gift-giving. The scant case law on the subject, when taken as a whole, is equally equivocal and does not provide a conclusive basis for affirming or denying the role of acceptance. These factors, alongside the fundamental principles of Scots law of the requirement of a transferee's *animus acquirendi* and *beneficia non obtruduntur*, and the social implications of donation,[779] justify this thesis' position that not only should

[775] Children (Scotland) Act 1995 s 1(1)(d); Adults with Incapacity (Scotland) Act 2000 s 64(1). See section above on Stair paras 5.8-5.11.
[776] See generally below chapter 7: Pure Donations.
[777] See above paras 5.58-5.63 and below 10.28-10.34.
[778] H L MacQueen "Payment of Another's Debt" in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) p 471.
[779] See above paras 1.5-1.20.

acceptance be required for a donation, but that it already is an important element in Scots law.

CHAPTER 6:

DEFUNCT CATEGORIES

1) INTRODUCTION

6.1 So far, this thesis has been concerned with general matters pertaining to all donations. The remainder considers the different categories that a donation may fall into. Each category has individual features and rules, and as a result may involve different elements to be completed. This thesis favours a four-part classification for contemporary Scots law consisting of (1) pure, (2) remuneratory, (3) conditional, and (4) indirect donations. Each type has its own chapter detailing its key characteristics and analysis of the resulting legal effects of each stage of the donation.

6.2 This differs from the historic division, which recognised (1) pure, (2) reumeratory, (3) donations *inter virum et uxorem*, and (4) donations *mortis causa*.[780] As can be seen, only two of the traditional categories (pure and remuneratory) have been retained for the updated classification. This is due to legislative and societal change rendering donations *inter virum et uxorem*[781] and *mortis causa*[782] apparently defunct. However, no analysis of the subject would be complete without at least a brief examination of each of these types of donation, the place they formerly held, and role they had in shaping modern Scots law.

[780] Although seldom expressly divided this way, the precise categorisation into these four groups can be gleaned from various treatments, for example: Gordon "Donation" paras 1, 3, 6, 7, and 8 mention all types, noting the differences between them; Mackenzie omits the category of *Inter Virum et Uxorem* in his general treatment (*Institutions* III.iii) although does outline rules regarding gifts between husband and wife elsewhere (I.vi); Bankton *Institute* I.9.2 notes that a remuneratory donation is different to a pure donation, while I.9.6 and I.9.18 acknowledge the different nature of a donation *mortis causa,* and I.5.95 notes the prohibition on donations *inter virum et uxorem*; Erskine, too, recognises a difference between pure donations and both remuneratory donations and donations *mortis causa* (Erskine *Inst* III.iii.91), and, while he does not use the term *inter virum et uxorem*, notes the revocability of donations between husband and wife: Erskine *Inst* I.6.2.
[781] Married Women's Property (Scotland) Act 1920 s 5.
[782] Succession (Scotland) Act 2016 s 25(1).

2) ***INTER VIRUM ET UXOREM***

6.3 *Inter virum et uxorem* was a specific category used to describe gifts between spouses. These gifts differed from other types of donation as they were revocable, subject to an exception for remuneratory gifts.[783] As such, these gifts were an exception to the general rule against revocation.[784]

6.4 Historically, restrictions on gifts between spouses were common, originating in Roman law. The Romans originally prohibited donations between husband and wife[785] to promote the idea that "true affection"[786] should lie at the heart of marriage. There was a belief that permitting the exchange of gifts outside of the *dos*[787] or *donatio propter nuptias*[788] risked demeaning the institution of marriage by making it a tawdry, purely financial exchange.[789] Furthermore, if spouses could give gifts to one another, it might entice people with less money to "marry up", encouraging the wealthier party to deplete their finances by making donations to the poorer spouse. As marriages could be easily ended through a declaration by either spouse, the restrictions on donations between spouses "may have pointed up the need for protection of the vulnerable or unwary",[790] or reflected a general desire to keep a family's patrimony intact.[791]

6.5 This complete ban on spousal gifts applied to all acts that could possibly constitute a donation, rendering any attempted transaction void.[792] If possession had been transferred, it could be recovered.[793] If the donum had been consumed, the

[783] Gordon "Donation" para 8; Erskine *Inst* I.iv.29 and III.3.91.
[784] See above paras 2.47-2.67 for discussion of the irrevocability of donations.
[785] Dawson *Gifts* p 14; D 24.1.1 Ulpian. There were exceptions for token customary gifts, for instance on an anniversary, or small gifts for "personal adornment" – Dawson *Gifts* p 15.
[786] D 24.1.3 Ulpian.
[787] The dowry.
[788] Gifts made on account of a marriage.
[789] Dawson *Gifts* p 14.
[790] *Ibid*.
[791] Above fn 789.
[792] Dawson *Gifts* p 17; D 24.1.5.18.
[793] D 24.1.5.18 Ulpian.

receiver was liable to restore its value to the giver.[794] If a gift had been exchanged or sold and the money used to purchase a new thing, in a system bearing remarkable similarity to a modern constructive trust, the acquired object would belong to the original giver who would also bear the risk for it.[795] An attempt at sale for undervalue was held to be a gift to the extent of the discount, but the husband and wife would either be held to own the donum in proportion to the value paid[796] or the gift would be void to the extent of the difference between price and value.[797] Any attempt at forgiving a debt between spouses,[798] or paying,[799] promising, or guaranteeing the debt of a spouse to a third party[800] would have no effect. The Roman prohibition on gifts between spouses was extensive and strictly upheld.

6.6 In Scotland, donations between spouses were revocable as opposed to being prohibited.[801] This is in part because the underlying justification for the restrictions appears to be different from the Roman ideology. The institutional writers' treatments of spousal donations make little or no mention of the affection between the parties and do not seem to be concerned with preserving the notion that marriage should be based upon love. Instead, "fondness"[802] is given as a reason for the revocability of spousal gifts, in case a person, blinded by affection for a spouse, should be tempted to lavish gifts on the other leaving one "empoverished *[sic]* and the other enriched".[803]

6.7 This is further demonstration of the negative attitude long taken by Scotland's law to private generosity: that gifts given for "love and affection" are inferior to transfers made as part of sale or exchange, or even a quasi-exchange.[804] This is highlighted by the fact that, despite the restrictions on donations between married

[794] D 24.1.5.18.
[795] D 24.1.29 Pomponius.
[796] D 24.1.31.3.
[797] F Dumont *Les Donations Entre Époux en Droit Romain* (1928) pp 92-116; D 18.1.38 Ulpian.
[798] D 24.1.5.1.
[799] D 24.1.7.7 Ulpian.
[800] D 24.1.5.4.
[801] Stair I.iv.18; Bankton *Inst* I.v.95; Erskine *Inst* I.vi.29.
[802] Bankton *Inst* I.v.95.
[803] *Ibid*.
[804] See above paras 1.6 and 3.6-3.7.

persons, “mutual remuneratory grants between the spouses, made in consideration of each other, are not revocable”.[805] Remuneratory donations are quasi-exchanges[806] and therefore the donor’s loss is not as significant as in, for instance, pure donations. Hence, historically, remuneratory donations between spouses deserved to be upheld, whereas pure donations did not.

6.8 Another reason behind the revocability of donations *inter virum et uxorem* was that, upon marriage, a wife’s moveable estate passed to her husband through an “implied universal assignation”[807] under the *jus mariti*. The husband also gained a right of administration of the wife’s heritable estate.[808] Even if the *jus mariti* was excluded in an antenuptial contract, Scots law did not permit a married woman to contract on her own behalf,[809] effectively giving her husband control over her assets regardless. As such, it would make no sense to permit gifts between spouses (except small trinkets or jewellery) as essentially the husband would be attempting to donate to himself.

6.9 In the nineteenth century, and under the influence of developments in English law, a series of legislative changes began to see the restrictions on married women owning property and entering into contracts waning. First, the *jus mariti* was excluded in certain circumstances, before being abolished altogether.[810] However, it was not until the Married Women’s Property (Scotland) Act 1920 that a married woman gained full power of administration over all her property, so until this point it was still possible for the husband to deal freely with any gift he may have given his wife. The 1920 Act also abolished the revocability of gifts between spouses.[811] Thus, anything given from one spouse to another would remain irreversibly the donee’s.

[805] Erskine *Inst* I.vi.30.
[806] See below para 8.3-8.4.
[807] A E Anton “The Effect of Marriage Upon Property in Scots Law” (1956) 19 *Modern Law Review* p 653.
[808] *Ibid*.
[809] Erskine *Inst* I.6.12.
[810] Anton “Effect of Marriage” p 655 and fn 10.
[811] Married Women’s Property (Scotland) Act 1920 s 5.

6.10 However, this position has altered slightly in the past century with the introduction of yet more legislation. Although gifts are generally excluded from calculations of matrimonial property,[812] this only applies to those acquired from third parties. Thus, any gifts between spouses will not be void or revocable, but upon divorce or dissolution of a marriage will be held to belong in equal shares between the parties. That said, the specific category of donations *inter virum et uxorem* is no longer relevant in a modern treatment of the law.

3) DONATIONS *MORTIS CAUSA*

6.11 Donations *mortis causa* ("DMC"), or gifts made in the contemplation of death, were the category of donation which caused the most difficulty to Scots law, and as a result generated most of the case law on donations in general.[813] Part of the problem was that they trod a fine line between *inter vivos* gifts and legacies, with some commentators describing DMC as a hybrid act.[814] Technically, the gift was a lifetime act but did not take effect until the donor's death. With origins in the Civil law, many jurisdictions have adopted the term although not all with the same definition.[815] In Scots law, DMC involved the physical handing over of property from the donor to the donee, with the condition that should the donor die, the donee keeps the gift. Conversely, the property would revert to the donor should the donee die first. Furthermore, there was an implied condition of revocability should the donor wish to reclaim the donum at any time before the donor's death. In this, it is said that "the giver therein prefers the grantee to his heir, but prefers himself to both".[816]

[812] Family Law (Scotland) Act 1985 s 10(4).
[813] Gordon "Donation" para 3.
[814] C Aboucaya "Les applications de la "donatio mortis causa" dans le pays de droit écrit et de coutumes du XVIe siècle aux ordonnances du Chancelier Daguesseau" (1967) 39 *TvR* 1 at 9-10.
[815] I Kotylar *Influence of the Ius Commune on the Scots Law of Succession to Moveables: 1560-1700* (2017) (PhD Thesis: University of Edinburgh) p 77.
[816] Bankton *Inst* I.9.18.

6.12 Despite its longevity, the institution was plagued by problems. For one, the close similarity DMC bore to testamentary acts could give rise to claims that an act was an improperly executed will rather than gift, as (if proven) this would render a transfer void due to the absence of writing.[817] The nature of the donee's right as either proprietary or obligational was also debated.[818] If proprietary, then the donee would become owner during the life of the donor subject to a condition of revocation at the donor's behest. This appears to have been the position of Lord Curriehill when he stated: "the right of property passes to the donee, yet the powers, the combination of which constitutes the right of property, appear to remain with the donor".[819] However, this interpretation could potentially confuse the unitary conception of ownership in Scots law.[820] On the other hand, if purely obligatory then a donation *mortis causa* would not neatly fit into the general scheme of donation law, as (unlike other types of donation) the donee would not rank alongside general creditors upon a deceased's estate in preference to the *ius relictae* and *legitim*.[821] Instead, the donee would come secondary to such claims.[822]

6.13 These difficulties and apparent contradictions, alongside a fall into desuetude due to the rise in utilisation of trusts,[823] have led to the category being apparently abolished. This section charts the lifespan of DMC, from their birth in classical antiquity until their death, at least nominally, through the Succession (Scotland) Act 2016.

a) Birth

[817] This was argued by the defenders in *Milne v Grant's Exrs* (1884) 11 R 887.
[818] In *Morris v Riddick* (1867) 5 M 1036 although the bench agreed on the decision, obiter comments from the Lord President at 1041 and Lord Deas at 1043 appear to conflict on this point.
[819] *Morris v Riddick* at 1042.
[820] Reid *Property* para 6.
[821] Wallace *System of Principles* § 673.
[822] *Howell v Cuming* (1796) Mor 11583 (cited in A M Bell *Lectures on Conveyancing* 3rd edn (1882) p 105).
[823] Report on *Succession* (Scot Law Comm no 215, 2009) para 7.40.

6.14 The category of DMC has a long pedigree. The origins of its legal governance are normally credited to Roman law,[824] and indeed that is possibly when the practice first became formally regulated. Yet, as Hyland notes,[825] references to a gift with very similar conditions can be found as far back as *The Odyssey*, when Telemachus, distrusting of the suitors he is about to meet, says to Piraeus of Menelaeus' gifts:

> "If the suitors kill me in my own house and divide my property among them, I would rather you had the presents than that any of those people should get hold of them. If on the other hand I manage to kill them, I shall be much obliged if you will kindly bring me my presents."[826]

All the characteristics of a DMC are present in this dialogue: the donee (Piraeus) has possession of the gifts; Telemachus is contemplating his own death; should the suitors kill Telemachus (the donor), Piraeus is to become owner; but should Telemachus survive he wishes to recover the property. This may indicate that this type of gift has been commonplace far longer than many have previously thought.

6.15 However, whether there was any legal regime governing DMC prior to Roman law is unclear. Nonetheless, that it was well established during the Roman Republic can be seen from the Digest,[827] albeit the common example used to illustrate the practice is that of Telemachus quoted above. The Digest identifies three different types of DMC.[828] The first is where a person makes a gift, not because of an immediate threat of death, but because of a general apprehension of, and reflection on, mortality. The second is where a person in immediate danger of death makes a gift which becomes the property of the recipient immediately. The third is where a

[824] R Hughes "The Exception is the Rule" (2003) 7 *J South Pac Law* 2.
[825] Hyland *Gifts* para 315.
[826] Homer *The Odyssey* (Book XVII 77-83) transl. S Butler (2017) p 136.
[827] D 39.6.1 (Marcian).
[828] D 39.6.2.

person in immediate danger of death makes a gift with the suspensive condition that it does not become the recipient's until the donor dies.[829]

6.16 The Roman jurists had difficulty distinguishing the third type of DMC from testamentary deed,[830] and by the time of Justinian these had been fully amalgamated with testaments.[831] The *Institutes* state: "we have enacted that in virtually every way they should be counted as legacies".[832] This would suggest that DMC would rank alongside legacies, but the same paragraph also states that "the donor's intention is to prefer himself to the donee, the donee to his heir.[833] This would mean that a DMC would take priority over testamentary deeds.[834]

6.17 The medieval jurists originally adopted this same approach, assimilating DMC with testamentary acts,[835] but "tormented by the hybrid nature"[836] eventually began to consider DMC as a type of donation. Ultimately, these jurists distinguished *the inter vivos* act from testamentary bequests through the immediate delivery of possession to the donee and the Romanistic notion that the donor "prefers himself" to the donee.[837] In particular, the *Ius Commune* writers identified that the aspect of delivery rendered the act more similar to other *inter vivos* donations,[838] albeit with the condition of revocability.

6.18 The early Scots writers inherited this conception, also considering DMC in the wider pantheon of donation law. Craig described DMC primarily as a method of

[829] M Sobczyk "Donation in Contemplation of Death as an example of *Datio ob Rem* in Roman Law" 23 *Stadia Iuridica Toruniensia* (2018) 291 at 294.
[830] See for instance: D 39.6.17 (Julian); D 39.6.35 (Paul); D 39.6.37 (Ulpian).
[831] C 8.56.4.
[832] Justinian *Inst* 2.7.
[833] *Ibid*.
[834] Given the similarity between this definition and Bankton's, it would appear the latter owed much to this paragraph of the *Institutes* when offering his definition more than 1000 years later: Bankton *Inst* 1.9.18 and see above para 3.3.10.
[835] I Kotylar *Influence of the Ius Commue* p 77.
[836] Aboucaya "Les applications de la "donatio mortis causa"" at 4 (*trans*).
[837] *Ibid*.
[838] Aboucaya "Les applications de la "donation mortis causa"" at 5 n 12.

distinguishing a type of donation which was revocable, as opposed to a pure donation, which was not.[839] Thus, Scots law clearly adopted the practice early on. What is not clear is the degree to which the boundaries of DMC were delineated. There are some cases which bear a striking resemblance to the practice although not strictly termed as such. A number of instances are recorded where the receiver of property became owner and was to hold it for a certain purpose in the event the transferor died.[840] If the transferor survived, the property was to be returned. Professor Gretton identifies these as types of "trust-like arrangements",[841] or even a type of deposit,[842] but the similarity to DMC cannot be denied. The only difference appears to be that the receiver was not to keep the property in the event of the giver's demise but instead transfer to others.

b) Life in Scots Law

6.19 It is clear that DMC were an established mode of donation by the time modern Scots law started to emerge. That said, the institutional writers do not appear to have agreed as to whether there was a preference for a donee over a legatee. Stair, while equating DMC with legacies,[843] states that DMC "are only effectual as to the Defunct's free goods at his disposal". As a result, all DMC and legacies must be abated to allow the debts and legitim[844] to be paid. Although he does not consider the position of DMC when in direct competition with legacies, and, therefore, which takes precedence, it would suggest that Stair saw little difference between the two.

[839] T Craig *Jus Feudale, With an Appendix Containing the Books of the Feus* (translated by J A Clyde, 1934) III.4.16.
[840] As did Oswald Porteus (W Angus (*ed*) *The Protocol Book of Gilbert Grote 1552-1573* (1914) 131) and Alexander Mortoun of Randerstoun (J Anderson (*ed*) *The Protocol Book of Sir Alex Gaw 1540-1558* (1910) 11).
[841] G Gretton "Trusts" in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* vol 1 (2000) pp 486-489.
[842] *Ibid* p 489.
[843] Stair III.8.39.
[844] The "bairn's part" of a deceased's estate. Scotland retains an element of forced heirship for spouses and children of a deceased person.

6.20 Bankton, on the other hand, claimed that a precedence of DMC over testamentary legacies was clearly established.[845] Nonetheless, both took second place in contest with debts and legitim. This position indicates that Scots law must have chosen to consider DMC only in the third sense that the Digest did: that the receiver took possession, but ownership was subject to a suspensive condition of the donor's decease. This is more explicit in Erskine, who stated "these bonds partake much of the nature of a legacy (…) as they are (…) suspended during the life of the granter".[846] For these writers, the suspensive nature of a DMC permitted the donor to revoke them and regain possession of the donum. Only possession, not ownership, was transferred during the donor's lifetime.[847] Thus, any potential issue with the transfer of ownership itself being conditional is avoided.

6.21 Yet, some of the specific criteria for establishing a DMC remained opaque. These details were refined during the 19th century through a series of cases. Indeed, as noted above,[848] much of the case law surrounding donations in general has traditionally involved alleged DMC, the conflict normally occurring between a person purporting a donation had been made and a legatee or heir.[849] As such, the border between testamentary acts and DMC required some careful consideration. Moreover, other questions such as whether death required to be imminent, when ownership was transferred, and whether delivery must be made directly to the donee were given (sometimes contradictory) judicial determinations.

6.22 In particular, it is not clear whether the question of when title to the donum passed was ever properly settled. Although most modern authorities, including the *Stair Memorial Encyclopaedia*[850] and the Scottish Law Commission Report on

[845] Bankton *Inst* 1.9.18.
[846] Erskine *Inst* III.3.91.
[847] In Scots law there is a distinction between ownership and possession, although possession is a property right which gives a possessor protection against interference: C Anderson *Possession of Corporeal Moveables* (2015) para 1.03.
[848] See above para 6.11.
[849] Gordon "Donation" para 3.
[850] Gordon "Donation" para 7 and M C Meston "Wills and Succession" *Stair Memorial Encyclopaedia* (Vol 25, 1988) para 735.

Succession[851] cite *Morris v Riddick* as authority for the proposition that ownership passed immediately but was subject to a resolutive condition that the donor could revoke at any point until their death, this is at odds with the position of the institutional writers noted above. Although commensurate with other case law,[852] it is not entirely clear why the courts apparently departed from the institutional writers.[853] Some decisions likened the institution to the donor reserving a liferent in the donum while granting the donee the fee,[854] which may indicate that they were searching for the most appropriate comparison to reconcile the practice in Scots law to passing of a conditional title. However, the construction of the donation as subject to a resolutive condition could potentially have caused problems should the donee have alienated the property prior to the donor's death.[855]

6.23 Furthermore, it is not clear is how the notion that ownership passed upon initial delivery could be squared with the rule that DMC could be recovered by a deceased donor's estate if there were insufficient free assets to meet debts,[856] legitim, and *jus relicti*.[857] The donor, during their lifetime, had a personal right as against the donee to revoke the gift at will. The resolutive condition which terminated this was the donor's death. The executry can only ingather debts due to the estate, and since the death of the donor terminated the donee's debt, then there should be no power to recall the gift. Nor would it form part of the estate's moveable property from which to pay debts and legal rights.

[851] Report on Succession (Scot Law Com No 215, 2009) para 7.38.
[852] *Mitchell v Wright* (1759) Mor 8082; *Graham's Trustees v Gillies* 1956 SC 437; see also Lord President Clyde in *MacPherson's Executrix v Mackay* 1936 SC 505 (at 515): "when the *mortis causa* donor predeceases the donee without having revoked, nothing passes by succession or otherwise to the donee; he is then (as he has been all along) owner of the property by virtue of the *de presenti* donation the only difference being that the double resolutive condition to which the donation was subject has flown off in both its branches".
[853] Although there are some judgments which appear to disagree, for instance Lord Shand in *Blyth v Curle* (1885) 12 R 674 at 682-683 states: "If the person making the gift deliberately intends that it shall become the property of the person to whom it is given in the event of the predecease of the donor, that is a *mortis causa* donation". This suggests that ownership does not transfer until the donor's death.
[854] *Mitchell v Wright*; *Morris v Riddick* (1867) 5 M 1036 per Lord Curriehill.
[855] Meston "Wills and Succession" para 735.
[856] *Howell v Cuming* (1796) Mor 11583 (*cit*. A M Bell *Lectures on Conveyancing* 3rd edn (1882) p 105).
[857] It should be noted that this rule was originally based upon a premise that a donation *mortis causa* was revocable if it were needed for legitim to be met only if circumstances appeared that the gift was made in an attempt to defraud the legitim: [1672] 2 Brn 610 (*no names reported*).

6.24 The situation would be different if, instead of a resolutive condition, DMC were subject to a suspensive condition of the donor's death alongside a secondary implicit condition that the donor's estate had sufficient funds to meet its liabilities. The donor's *animus transferendi* would be suspended until death. Thus, the donee held the gift as possessor, rather than owner, during the donor's lifetime, with title only completed when the donor died. By remaining owner until death, the donor could revoke the gift either explicitly or implicitly (for instance by selling the donum).[858] This would effectively put the donum in the same secondary status in relation to legitim and other debts.[859]

6.25 Questions of the point of transfer aside, a rule which became clear was that it must be evident the donor intended an *inter vivos* gift.[860] The donor must have intended to be bound irrevocably to the gift (subject to the characteristic suspensive and resolutive conditions of a donation *mortis causa*) while alive. Also, while the transfer must have been made in contemplation of death, it was not necessary that the donor's death be imminent.[861] There had at one time been suggestion that it need be, but Lord President Inglis' decision in *Blyth v Curle*[862] gave a thorough justification as to why this was not the case. As such, as long as the situation and words used indicated that the donor had mortality in mind while making the gift, the donation was considered *mortis causa* regardless of whether that death was looming.

[858] This is commensurate with Lord Curriehill's description of the donor's powers in *Morris v Riddick* cited above at para 3.3.11**.** There are also *dicta* which seemed to suggest that if the donor survives the danger or conditions in which they are contemplating their death then there is an implicit condition of revocation which operates automatically: Gordon "Donation" para 46. However, this position was subsequently rejected, although the donor's ability to explicitly include such a condition was not affected: *Blyth v Curle* (1885) 12 R 674 *per* Lord President Inglis at 679.

[859] Italian law adopts this approach, although once the condition is met it has retroactive effect: Hyland *Gifts* para 297 and fn 280.

[860] *Mitchell v Wright* (1759) Mor 8082.

[861] *Blyth v Curle* (1885) 12 R 674.

[862] *Ibid* starting at 680.

6.26 The lack of a requirement of imminent death could be one of the factors that brought DMC dangerously close to testamentary acts, as the Lord President stated that DMC could even be made years before the donor died. Thus, it could be argued DMC were testament by act instead of testament by deed. This is further complicated by the fact that DMC could be proved by parole evidence without writing.[863] Testaments were,[864] and still are, only valid if in writing.[865] Thus, the lack of an imminent death requirement was problematic.

6.27 Resultingly, during the nineteenth century it was held that a DMC must be made for the donee's benefit alone and not partly for administrative purposes.[866] This was because to give someone something which included directions as to how it should be distributed was found to be an attempt to verbally appoint an executor and therefore invalid as a will due to lack of writing.[867] However, this was contradicted in *Prentice v Shearer*,[868] where the court held that such a situation was merely delivery of a DMC to a third person on the donee's behalf, despite the gifts being executed on the deceased's deathbed. This was partly because actual delivery appeared to be less important in donations *mortis causa* that other types of gift.[869] Whether this was entirely satisfactory has been debated,[870] but it nonetheless allowed for DMC to be made via a third party.

6.28 It is in case law concerning DMC that the courts have come closest to making the distinction between a J1 and J2 expressly. In *Graham's Trustees v Gillies,*[871] Lord-President Clyde stated:

[863] W G Dickson *A Treatise on the Law of Evidence in Scotland* 3rd edn (1887) I.158. This is subject to the caveat that evidence of the donee alone would be insufficient: *Prentice v Shearer* 1909 SC 15.
[864] *Milne v Grant's Exrs* (1884) 11 R 887.
[865] Requirements of Writing (Scotland) Act 1995 s 1(2)(c).
[866] *M'Gregor's Exrs v Dunlop* (1884) 11 R 453.
[867] *Ibid per* Lord Young at 459.
[868] 1909 SC 15.
[869] Gordon "Donation" paras 28 and 30.
[870] *Royal Bank of Scotland v Perpetual Trustee Co Ltd* 1954 SLT (Notes) 48.
[871] 1956 SC 437.

> "the fundamental distinction between a testamentary provision and a donation *mortis causa* is that the former only takes effect at death, prior to which no right passes, whereas a donation *mortis causa* operates as from its date as an immediate though conditional transfer of a right to the donee".[872]

The comparison being drawn here infers that the "right" referred to regarding a donation *mortis causa* is personal in nature, since a testament gives a legatee a personal right to the deceased's property at death. No right *in rem* is gained until the transfer from the executry takes place. This implicitly acknowledges that donations can be personal in nature, as well as a simple transfer of property. However, it could also be that the court was conflating the personal and real aspects of donation, because if there were only a personal right being referred to in this passage it would mean that the question of when ownership transferred in a donation *mortis causa* was unresolved. There is a strong possibility that this is the question that the Lord President thought he was addressing at the time.

c) Death?

6.29 Case law concerning DMC dwindled in the second half of the twentieth century, not because the courts had clearly stated the boundaries of the category, and thus there were fewer conflicts requiring judicial solutions, but because they became "unknown in current practice".[873] *Inter vivos* gifts tend to be transferred during the donor's lifetime while *mortis causa* acts are carried out by testament or trust. This is because if a donor retained any benefit it would be "ineffective for inheritance tax planning".[874] As such, the Scottish Law Commission recommended prohibiting DMC altogether, unless the conditions were expressly stipulated. Its draft bill was worded:

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[872] *Ibid* at 448.

[873] Report on *Succession* (Scot Law Com No 215, 2009) para 7.40.

[874] *Ibid*. Additionally, the paragraph states that the benefit would form part of the donor's patrimony, suggesting the retention of a real right and thus negating the earlier contention that ownership was conveyed to the donee prior to the donor's death.

> "A gift made in contemplation of death, called a donation *mortis causa*, should be presumed to be an outright gift unless the donor clearly stipulates otherwise."[875]

6.30 The Scottish Parliament agreed with the Commission's recommendations regarding the abolition of DMC, but the legislative drafters decided to alter the wording. The bill as introduced read as follows:

> (1) The customary mode of making a conditional gift in contemplation of death known as making a donation mortis causa is abolished.
>
> (2) Subsection (1) does not prevent the making of a conditional gift in contemplation of death other than as a donation mortis causa.[876]

6.31 The first thing to note here is that the legislative drafters opted to try to clearly state the abolition of DMC, rather than introduce a rebuttable presumption of pure donation as the Scottish Law Commission had suggested. The second thing to note is that they did so in a way that makes (2) nonsensical. In the words of Professor Paisley:[877]

> "*Donatio mortis causa* means a donation in contemplation of death. It is a direct Latin translation. A gift in contemplation of death other than a donation *mortis causa* means a gift *mortis causa* other than a donation *mortis causa*. It is just complete nonsense. You are saying that it has to be this but it cannot be that at the same time; it is logically incoherent."

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[875] Report on *Succession* (Scot Law Com No 215, 2009) para 7.41 and Draft Bill s 51.
[876] Succession (Scotland) Bill s 20 (as introduced) 17 June 2015 available at: https://archive2021.parliament.scot/S4_Bills/Succession%20(Scotland)%20Bill/b75s4-introd.pdf.
[877] *Stage 1 Report on the Succession (Scotland) Bill* (Delegated Powers and Law Reform Committee, SP Paper 821, Nov 2015) para 127.

6.32 The Scottish Government responded by explaining that they wanted to make it clear that a person may still make a gift in the contemplation of death, but that the conditions of such a gift must be expressly stipulated and can no longer be implicitly inferred.[878] But Professor Paisley's criticism was taken on board and by the time the legislation passed, the wording of the section had been changed. The Act now reads:

> (1) The customary mode of making a donation in contemplation of death known as making a donation *mortis causa* is abolished.
>
> (2) Subsection (1) does not prevent the making of a conditional gift other than in the customary mode.[879]

6.33 It could be argued that the amended text still has difficulties, particularly in comparison with the Commission's draft text. First, "customary mode" is an imprecise term. Given the apparent contradictions in the case law regarding whether DMC could be made via a third party or when ownership transferred, it may be possible to argue that the facts of a situation deviate from the "customary" DMC and therefore could stand regardless of the legislative provision.

6.34 Second, the explanatory notes state that it is still possible to make a DMC if a person wishes but the change is merely that "the conditions are no longer automatic".[880] If the conditions are express, does this clarify that the property transfers to the donee immediately and therefore removes the possibility of the property being "counted as part of the donor's estate for the purposes of any claim for legal rights" or being "liable for the donor's debts on death in the event that the

[878] *Ibid* at para 128.
[879] Succession (Scotland) Act 2016 s 25.
[880] *Explanatory Notes* to the Succession (Scotland) Act 2016 No 76.

rest of the donor's estate is insufficient to meet them",[881] since these were unusual conditions of the customary mode?

6.35 Finally, it is not clear that writing is required for a DMC if it is categorised as a conditional donation. This would depend on whether conditional donations are unilateral gratuitous obligations or whether the conditional aspect renders them somehow bilateral.[882] If no writing is required then it is unclear how to make a gift "other than in the customary mode", rendering the section confusing and potentially meaningless. Nevertheless, given the confusion surrounding the matter this thesis accepts the *prima facie* position that DMC are no longer a specific class of donation in Scots law and instead replaces them with a broader category of "conditional donations".

4) CONCLUDING REMARKS

6.36 While both donations *inter virum et uxorem* and *mortis causa* have now been abolished in Scots law they offer an insight into both the changing social landscape of Scotland and the attitude taken to donations in general historically. Although no longer applicable, the attitude of suspicion and distrust towards purported generosity still underpins the law, demonstrated (for instance) through the presumption against donation. Additionally, DMC provide a good framework from which to start an examination of conditional donations, as ultimately they were but one specific type of conditional donation

CHAPTER 7:

PURE DONATIONS

[881] *Ibid* no 75.

[882] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii). See also below paras 9.28-9.33.

1) INTRODUCTION

7.1 The following chapters focus on each category of donation in the updated taxonomy adopted by this thesis: pure, remuneratory, conditional, and indirect. Each is taken in turn, identifying and explicating key characteristics before analysing the precise legal effects created at each stage of execution. As this thesis contends that there are two juridical acts that can properly be called "a donation", one based in the law of obligations, the other in the law of property, each category of donation will be looked at from the perspective of both. The earlier used shorthand of "J1" and "J2" will be employed.[883]

7.2 This chapter considers the simplest category of donation: pure donations. As the paradigmatic and most basic type of donation, it is the foundational category that other types of donation are essentially variations of. As such, the analysis in this chapter regarding the legal effects of a completed gift is broadly applicable to all completed donations,[884] regardless of their classification. Additionally, given that pure donations involve only two parties – the donor and the donee – they offer the simplest example from which to build principles that can be adapted and expanded for more complex arrangements.

7.3 The key characteristics of a pure donation are:

a) the donation is made without any conditions attached, either expressly or impliedly;

[883] See Chapter 2 "Donation as Two Juridical Acts and Terminology".
[884] Provided, of course, that it is not made with a condition attached.

b) there is an absence of any factor implying that the donation is being made out of gratitude for previous good deeds of the donee towards the donor;

c) the only parties whose patrimonies are involved are the donor and donee;

d) the donation is made for the donee's benefit only;

e) the donor has no power to compel any counter-performance from the donee.

2) THE KEY CHARACTERISTICS

7.4 Pure donations are the simplest form of gift. Being simple, they are the easiest to understand. However, that simplicity can make definition difficult.[885] Like an elephant, a pure donation can elude description but not many would have difficulty identifying one when seeing it. As such, some of the defining characteristics are couched in negative terms. That is, the characteristic identifies what a pure donation is *not* through a lack of some element or other which is present in other types of donation. That is because the features identified to distinguish the different types of donation are additional to the general definitions proposed in Chapter 2 of a J1 obligational donation and a J2 proprietary donation. Being the simplest form of donation, key elements of a pure donation will not vary greatly from the underlying core description. Nonetheless, to avoid any potential confusion and for thoroughness, the essential characteristics are described as follows.

[885] See above para 1.1.

a) The donation is made without any conditions attached, either expressly or impliedly

7.5 This criterion is key to what makes a donation "pure" in Stair's view: that which is done and "hath not implyed [*sic*] any condition".[886] By "condition" is meant a contingency that has the effect of: suspending the performance, or (in the case of a J1) the coming into force, of the donation; terminating the performance of a donation where the donation is based upon continuing obligation; or permitting the recovery of the donum in the case of a completed J2.[887] These conditions normally require to be specifically stated, although sometimes custom may imply them in certain circumstances. For example, where an engagement ring is given, there is an implied condition that continued ownership is contingent on the marriage occurring.[888]

7.6 Although couched in strict terms, this does not mean that conditions that are ancillary to the formation, enforceability, or termination of a donation cannot be attached to a pure donation. For example, a condition that a J1 donation (i.e. the right acquired by the donee to have property transferred to them or to another for their benefit) is not transferable by the donee to a third party would not affect the donation itself. This would merely limit the duty of the donor to the donee as a matter of *delectus personae*. Indeed, it could be argued that the courts, while not going quite so far as to hold that all donative obligations are subject to *delectus personae*,[889] have skirted very close to the edge of doing so. For example, in *Wright's Trustee v Wright*,[890] Lord Ardmillan stated that:

[886] Stair *Inst* I.10.4. It should be emphasised here that although it is the contention of this thesis that applying this passage of Stair to donation as well as promise is mistaken (see above paras 5.4-5.12), it is still instructive to refer to it for the purposes of distinguishing the relevant language in the context of the word "pure".
[887] For instance, a suspensive condition might be the birth of a child. Alternatively, where there is an ongoing donative obligation to pay for a child's accommodation while at university this will be terminated upon the child's graduation. See below: Chapter 9 "Conditional Donations".
[888] Whitty "Unjustified Enrichment" para 289.
[889] "Choice of person" or a person specifically chosen for their individual characteristics or skill: R Black "Obligations" *Stair Memorial Encyclopaedia* Vol 15 (1995) para 859.
[890] *Robertson (Wright's Trustee) v Wright* (1873) 1 R 237.

> "affection is necessarily personal. It cannot be transferred as a debt can be transferred from one to another. A gift to one for whom I have an affection cannot be so assigned as to make me donor to one for whom I have a dislike."[891]

7.7 However, this obiter statement cannot be held to be absolute authority of non-assignability of donative rights. The case dealt with a trustee in sequestration attempting to claim that the donors had incurred a continuing obligation to make gratuitous payments, and that these payments constituted income of the insolvent donee. After his bankruptcy, the donee (Wright) had assigned "one third of his whole income" to his trustee in sequestration (Robertson) to be paid to his creditors. Thus, Robertson argued, the continuing obligation entitled him to one third of the gratuitous payments.

7.8 The court found that the payments were not part of a continuing obligation, but each one was an individual gratuitous act. There was no compulsion upon the donors to make any payment. Even if it had been considered a continuing gratuitous obligation, the assignation agreement by the donee would not have necessarily included it because the assignation was an entitlement to Wright's income and the payments made under the alleged continuing gratuitous obligation were for alimentary purposes. The reason the donors (Wright's employers) wished to make such alimentary payments was because one of them was a close relation of the donee, and it was from this relationship that the affection mentioned by Lord Ardmillan arose.

7.9 However, had there been a continuing gratuitous obligation undertaken by the donors, and the donee chosen to include this in the assignation, the assignation would have been effective. This is because a completed J1 constitutes an obligation through which the donee acquires an enforceable debt against the donor.[892] It is difficult to see justification for an inherent condition of non-assignability in a donation

[891] *Ibid* at 244.
[892] Bell *Comm* I, 314.

other than “because it is gratuitous”. Gratuitous or not, the donor voluntarily undertakes to incur a patrimonial loss. To then curb the donee’s ability to use the donation for their own purposes, either through assignation or re-gifting, simply because the original undertaking was gratuitous does not seem a proportionate position. There seems to be no legal precedent that a completed donation should not be transferable by the donee. Furthermore, a completed donation is capable of being inherited by the donee’s heirs.[893] As such, unless there is an express condition of non-assignability, or the circumstances would seem to suggest it, a pure donation should not normally be presumed to entail *delectus personae* after it has been completed.[894]

b) <u>The donation lacks any factor implying it is being made out of gratitude for previous good deeds of the donee towards the donor</u>

7.10 This characteristic distinguishes a pure donation from a remuneratory donation.[895] The reason it is important to reinforce this element is because the courts are more likely to disapply the presumption against donation where the donation is remuneratory.[896] This is because a moral cause is considered a type of consideration for the donation, even though this cause is not legally enforceable.[897]

7.11 Furthermore, the emphasis in the language on “any factor implying” is that there may be certain circumstances where a remuneratory donation might be inferred although not overtly indicated. For instance, if Wesley pays for Vizzini’s dinner one week and the next week Vizzini buys Wesley dinner, there is an implication that Vizzini’s generosity is motivated by gratitude due to the element of reciprocal action. Therefore, this would be a remuneratory, rather than pure, donation. If, however, Wesley buys dinner for Vizzini in May and Vizzini buys drinks

[893] See paras 7.46-7.47 below.
[894] In contrast to a donation prior to completion, where the donee has only a “power”: see above para 5.32.
[895] i.e. made for a moral cause: Bankton *Inst* I.9.1.
[896] Balfour’s *Practicks* p 160 (c XXI); and Erskine *Inst* III.3.91.
[897] See below paras 8.3-8.4

for Wesley in September, the lapse in time between the two acts would suggest that the donations are not linked and therefore are both individual, pure donations. Which category of donation an act falls into will turn on the particular facts and circumstances of the situation.

c) Only the patrimonies of the donor and donee are involved

7.12 As with the previous characteristic, this criterion is present to distinguish a pure donation with yet another category of donation: an indirect donation.[898] In an indirect donation a donor renders performance to a third party but the donee receives the benefit. Although the donee's patrimony ultimately receives the net gain from the transaction, the third party's patrimony also gains rights or has a transfer made to it. The absence of the involvement of a third party in a pure donation means that it is made either as an undertaking to perform to, or as a transfer directly between, the donor and donee.

7.13 This does not mean, however, that a pure donation cannot involve a third party at all. For instance, there may be a third-party carrier instructed to deliver the donum, such as the Post Office. Alternatively, where the donee is deemed to lack transactional capacity, for instance due to non-age, capacity may need to be exercised on their behalf by a legal representative.[899] Notwithstanding this, the third party in these cases never becomes owner, nor is that person's patrimony ever affected by the donation, either through the substitution of one asset for another or by receiving any benefit.

d) The donation is made for the donee's benefit only

[898] See below chapter 10: Indirect Donations.
[899] See above paras 4.40-4.42.

7.14 Pure donations must be made for the benefit of the donee and not partly for the donor's own benefit. In *Rankin v Wither*,[900] where a husband expended money on rebuilding his wife's property, a claim of donation failed because he "was expending this money, not (…) for the sole behoof of his wife, but for his own benefit also".[901] The question of donation was relevant as at the time donations between spouses were revocable.[902] Although not expressly stated, it appears that acting for one's own interest, even in part, negates the *animus donandi* that may otherwise have been present,[903] and (as the donative intent is the key element in a donation)[904] the absence of this prevents an act from being donative.[905]

7.15 Further to this, if a person has made a transfer of, or expended money on, property with the intention of sharing the benefit with another, should either party not have the opportunity of enjoying the property, donation will not be inferred nor be available as a defence. Thus, in *Newton v Newton*[906] a husband was entitled to reclaim money expended on improvements to property owned by his estranged wife that he had wrongly believed to belong to him. Likewise, in *Shilliday v Smith*[907] the pursuer was found entitled to repetition and recompense for money transferred to the defender and expended on improvements to his property. In both these cases, the pursuer had resided in the property at the time they incurred the expense but had shortly after relocated elsewhere because the relationship had broken down.

e) <u>The donor has no power to compel any counter-performance from the donee</u>

[900] (1886) 13 R 903.
[901] *Ibid per* Lord Justice-Clerk Moncrieff at 907.
[902] See above paras 6.6-6.9.
[903] The case was also argued on unjustified enrichment grounds and offers a prime example of the *in suo* defence: see Whitty "Unjustified Enrichment" *Stair Memorial Encyclopaedia* (Reissue) paras 39 and 971.
[904] See above paras 3.16-3.33.
[905] Furthermore, other legal institutions may bar the constitution of donation where it is the intention of the performer to be reimbursed for their actions, such as in *negotiorum gestio*: Stair I.8.2; Bankton *Inst* I.9.24; para 3.28 above.
[906] 1925 SC 715.
[907] 1998 SC 725.

7.16 This is a key element in any donation and is concomitant with the definition of "gratuitous" favoured by this thesis.[908] The donor may have a hope of receiving something in return, perhaps as a result of social norms, but this hope has no legal power of enforcement. As Hogg has noted,[909] a power to compel counter-performance would indicate mutuality of obligations and onerousness. Instead of being donative, the transaction would be more akin to an onerous contract.

7.17 There may be informal agreements that, while not strictly legally enforceable, may infer a degree of mutuality and lead a court to determine lack of donative intent. The donor must intend to incur a patrimonial loss, which excludes the possibility of remuneration, [910] and as such cannot continue to enjoy the benefit of the donum as before the donation. Thus, in *Yule v South Lanarkshire Council*[911] a woman who transferred her house to her granddaughter in fee while reserving a liferent for herself was found not to have made a donation because her day-to-day position remained unaltered.[912] The intention was not donative; instead the pursuer's real motive was to reduce her paper assets to avoid paying care costs. The transfer was merely a formality.

7.18 *Yule* was distinguished in *Argyll and Bute Council v Gordon*[913] where the defender successfully argued that at the time of the transfer the donor had sufficient alternative resources to cover anticipated care costs. This indicated there was no underlying intention to deliberately deplete her assets solely to entitle her to council-funded care. Although both *Yule* and *Gordon* were based on the interpretation of

[908] See above paras 2.21-2.40.
[909] Hogg *Law and Language* p 181.
[910] Bankton *Inst* I.9.1.
[911] (2001) 4 CCLR 383. The liferent is treated as the capital of the putative donor: J Kessler and W Grant *Drafting Trusts and Will Trusts in Scotland* 2nd edn (2017) para 19.9.
[912] Strictly speaking, the liferent makes this an attempted conditional, rather than pure, donation. See below paras 9.9-9.12.
[913] 2016 SLT (Sh Ct) 196.

statute,[914] the underlying principles of donation applied, at least with regard to establishing true donative intent.[915]

3) EXECUTION AND LEGAL EFFECTS: J1

a) The donor's role

7.19 The commonly stated position is that a donor is unilaterally placed under an obligation towards the donee upon forming the *animus donandi* and the deed being placed beyond the donor's recall.[916] The donee is in turn invested with a right to the donum (a *ius ad rem*). This is concomitant with promise which is "a unilateral obligation requiring neither acceptance or mutual consent".[917] Yet, as explored in chapter five, a person cannot have a benefit forced upon them.[918] Therefore, the language and nature of "right" must be called into question.

7.20 The word "right" can, of course, be used in a general sense to indicate any legal ability or claim a person can have.[919] However, the language typically used in relation to donation suggests that a "right" infers a patrimonial benefit, partly because

[914] Health and Social Security Adjudications Act 1983 ss 21 and 22.
[915] These cases are also illustrative of the role motive may play in establishing donative intent: see above paras 3.16-3.25.
[916] *Ibid*.
[917] W W McBryde "Promises in Scots Law" (1993) 42 ICLQ 48. There is an interesting question regarding the Scottish foundation of this rule, originating in Stair I.10.4. Lord Rodger argued that Stair's following passage (I.10.5) *on jus quaesitum tertio* should be read alongside I.10.3 and I.10.4 as part of an overall treatment of promise or pollicitation (A Rodger "Molina, Stair and the Jus Quaesitum Tertio" 1969 JR 34 at 131). Stair I.10.5 cites Molina as an authority that promises do not need acceptance, however, as Lord Rodger noted (*ibid* at 137) this is a misunderstanding of Molina's position. Molina, instead suggested that the promisor "may be bound for his part before acceptance", indicating that even though the promisor cannot rescind after committing themselves to the promise this does not necessarily bestow a right upon the promisee prior to acceptance.
[918] See above paras 5.67-5.71; Bankton *Inst* IV.45.135.
[919] L Smith "Powership and its Objects" in A J M Steven, R G Anderson, and J MacLeod (eds*) Nothing So Practical as a Good Theory: Festschrift for George L Gretton* (2017) p 223.

conventional thought holds that a donee is considered a creditor of the donor.[920] This would imply that either there is a specific meaning of "right" intended by commentators, or there is confusion about what the donee actually receives through the donor's act alone.

7.21 Without acceptance, even in a J1 donative obligation, this would contradict the principle of *beneficia non obtruduntur*, since a J1 has a patrimonial value. Furthermore, one commentator has noted that one difference between a gratuitous contract and unilateral voluntary obligation is that the latter "cannot be enforced against the beneficiary",[921] suggesting that whatever the legal product is that is created by the donor's action alone, it cannot be imposed upon the donee. As such, it must be something lesser that a "right" in a patrimonial sense, although, given that the donor cannot rescind, it must be some sort of legal tie.

7.22 Any modern legal discussion of the language of rights cannot ignore the work of Hohfeld, so it is in that direction this analysis now turns. In brief, in the Hohfeldian scheme any "right" in the strict sense must have a correlative "duty".[922] "Right", it is noted, is normally restricted to be used in relation to "property".[923] If the obligation created by the donor is some sort of property (or patrimonial) right, as personal rights undoubtedly are, then to hold that no acceptance is required would suggest that the donor would be unilaterally able to vest a donee with a property right. This would be forcing a benefit upon the donee. And, following from the obligation, the donor would have an irrevocable "duty" to transfer ownership to the donee. Thus, it cannot be that the donor has created a patrimonial "right" in favour of the donee simply by forming

[920] Bell *Comm* I, 314. Additionally, as Gordon acknowledges, a J1 is a type of incorporeal property (Gordon "Donation" para 1 where he states that donation can be used to refer to "the creation of an obligation to transfer property, which can itself be considered a form of incorporeal property"). Incorporeal property is a patrimonial asset and, as such, a "benefit" in terms of this thesis.
[921] Walker *Principles* p 42.
[922] W N Hohfeld *Fundamental Legal Conceptions as Applied in Judicial Reasoning: and Other Essays* (ed. W W Cook) (1919) p 36.
[923] *Ibid* p 37.

the requisite *animus donandi*.[924] Therefore, it is necessary to closely consider what is the true legal effect of the donor's actions alone.

7.23 The etymology of the word "obligation" lies in the Roman verb *ligare*[925] – to bind. As Professor Zimmermann notes:

> "the term obligation is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance".[926]

It is helpful to visualise a completed obligation as a rope which binds the obligor to the obligee, serving as a conduit along which the claim-right can flow. With a J1, the donor's unilateral act has the effect of paying out the rope with the donor tied to one end. This bind is such that the donor cannot alone unpick the knot by resiling: the rope cannot simply be dropped again.[927] This is in accordance with the general position that promises are binding upon the promisor (or donor) without acceptance,[928] based upon principles of moral fairness.[929]

7.24 Nonetheless, the donor's unilateral act leaves the other end of the rope lying loose at the donee's feet. The obligation is incomplete and the claim-right is unable to "flow" into the donee's patrimony. However, the donee has the power to pick up the rope and "perfect" the obligation, gaining a claim-right to the donum. By doing so, the donee will be also be bound to the obligation, which will entail a requirement to receive the subsequent J2. If, in contrast, the donee chooses to not pick up the rope

[924] See paras 3.16-3.25 above.
[925] Hogg *Law and Language* p 13.
[926] Zimmermann *Law of Obligations* 1.
[927] W W McBryde "Promises in Scots Law" (1993) p 50.
[928] This appears to be the position of Molina (who seems to have influenced Stair in this area – see H L MacQueen "Third Party Rights in Contract" in Reid and Zimmermann *A History of Private Law* vol 2 p 225; and n 913 above) who made the distinction between the effect upon the promisor and the patrimonial effect upon the promisee.
[929] M Hogg *Promises and Contract Law* p 94; J Rawls *A Theory of Justice* (reissue edn, 2005) 112.

and reject the J1, the donee also "unties" the donor, who will be released from the undertaking.

7.25 The idea that the donee has a power is also useful in a Hohfeldian analysis of the act. That is because "power" enables the donee "to effect the particular change in legal relations".[930] Thus, the donee can pick up the end of the obligational "rope" presented by the donor to effect this change. This will formalise and create a binding legal bilateral relationship between the donor and donee,[931] the latter gaining a patrimonial right which is capable of being transmitted to another party, for example by succession, assignation, or to a trustee in sequestration. Until then the power is not transmissible to other parties by the donee.[932]

7.26 A corollary of this is that the donor cannot then have a *duty* to perform unless this additional step of acceptance is performed by the donee. Although the donor is "tied" by their act, and therefore cannot rescind,[933] the nature of the tie is a liability (being the corollary of a power) which is wholly individual to the donor. There is only a potential debt in their patrimony rather than a realised one. The power is purely personal to the donee and therefore cannot be inherited upon the donee's death nor attached by their creditors.

7.27 Although this is in direct contrast to the position asserted by Wallace,[934] it provides a sharper distinction between "the right to accept" (here termed a "power") and the "right" gained by accepting a J1 obligation in his analysis.[935] Therefore, the donor's heirs cannot be burdened with the liability should the donor predecease the

[930] Hohfeld *Fundamental Legal Conceptions* p 51.
[931] L Smith "Powership and its Objects" p 226.
[932] Arguably, an attempt of the donee to transmit the "power" is itself an acknowledgement that the right subsists and implies acceptance, thereby converting it into a right in the proper sense.
[933] This leaves undisturbed the principles set out by Stair and commonly accepted: Stair I.10.4. Additionally, there would appear to be a general rule in gratuitous obligations that an "agreement [becomes] irrevocable when the pursuer [is] able to found upon it": *Love v Amalgamated Society of Lithographic Printers* 1912 SC 1078 *per* Lord Salvesen at 1082. Professor Walker's claim that promises and gratuitous obligations are revocable is surely in error: Walker *Principles* p 43.
[934] Wallace *System of Principles* § 672. See above paras 5.32-5.34.
[935] *Ibid* § 673.

donee before acceptance has occurred, for there is no formal debt against the estate until then.[936] Thus, the donee's power to accept will expire.

7.28 For example, Aidan is ill in hospital and writes to his niece, Helen, telling her to go to his house and take to keep whatever she wants from it. Helen does not act upon the request despite living nearby and having the opportunity to do so. Nor does she indicate either through words or actions that she has any intention to take Aidan up on his offer. A fortnight later, Aidan passes away in hospital and his testament leaves his entire estate to a local cat charity. Helen no longer can act upon the letter, as she was aware of her uncle's failing health and did not take the opportunity offered.[937] Rather than imply acceptance, her inaction suggests rejection and loses her a potential benefit.

7.29 It could be argued that in these circumstances Aidan's lack of specificity regarding the donum would render a J1 void for uncertainty anyway.[938] Furthermore, given the strong presumption against donation, courts have been reluctant to rule in favour of an unclaimed purported *inter vivos* donation when it is in competition with an executed testamentary document, partly for reasons of proof.[939] In this regard, despite the claim that acceptance is to be inferred from lack of overt rejection,[940] it can be seen that demonstrable acceptance would be an essential component in displacing the presumption against donation and thus the donee's ability to enforce the gift.

7.30 The situation where a donee is aware of a donor's actions but has not acted needs to be contrasted with one where an offered J1 has not yet been

[936] Erskine *Inst* III.3.91.
[937] It is likely that her lack of action amounts to an implied waiver of the power, although waiver is normally used to describe discharge of ancillary obligations rather than to "terminate the relationship between the parties completely": E Reid and J Blackie *Personal Bar* (2006) para 3-09. As such, this would extinguish the obligation. However, determination of whether the power is held to be waived may depend on the length of time of non-action in light of the circumstances.
[938] See above para 3.23.
[939] *Ross v Mellis* (1871) 10 M 197; *Dinwoodie v Wright* (1895) 23 R 234; *Grant's Trs v McDonald* 1939 SC 448.
[940] Erskine *Inst* III.3.88. Bankton held that "acceptance is presumed in law" by a donee who knows of the donor's act: Bankton *Inst* I.9.9 (para 2).

communicated to the donee.[941] Although authority is scant on the matter, it appears that if an intended donee is unaware of a donative obligation in their favour, opportunity to accept or refuse it should be given before the power can lapse. [942] This is so the intention of the donor can be given the chance to be implemented, since *inter vivos* actions take precedence over testamentary acts.[943] After communication, however, failure to act on the part of the donee will result in the evaporation of the power.

b) The Donee's Role

7.31 It is traditionally understood that the donee's role in a donation is strictly a passive one. That is, a donation is held to be a unilateral act[944] by the donor requiring no action on the donee's part to render it effective. At the risk of being repetitive, this thesis contends that this is not the case. For instance, it has been stated that a J1 donee is a creditor, entitled to rank in the estate of an insolvent alongside creditors who have given consideration.[945] In truth, if the donee was simply a passive actor receiving a right through the donor's actions alone this could not be the case, as "a creditor must submit a claim to the trustee in sequestration in order to obtain an adjudication as to that person's entitlement (…) to a dividend out of the debtor's estate".[946] This claim is a juridical act and thus only a person with active capacity may exercise it.

7.32 Furthermore, in order to make such a claim the donee would need to know of the donation. If, as Stair contended, one reason that no acceptance is required is to

[941] *Bruce v Stewart* (1790) 3 Pat 150. Money was given by Charles Stewart in India to his friend, Captain Dundas, to deliver to the Stewart's father (James Stewart) in Scotland. After handing over the money, Charles Stewart died. The news of his death arrived in England before Dundas, and Stewart's executors tried to claim the money as part of his estate. The court held that the donor's intention was evident through delivery of possession to Dundas and that this meant James Stewart should be given the opportunity to accept the gift before the estate became entitled to it. See also the discussion at paras 5.49-5.52 above.
[942] *Ibid*.
[943] Bankton *Inst* I.9.9 (para 2).
[944] "Unilateral" in this sense is normally taken to mean constituted by the donor alone: see above paras 2.41-2.46.
[945] Bell *Comm* I, 314; above para 2.15.
[946] T Burns "Bankruptcy" *Stair Memorial Encyclopaedia* (reissue, 1998) para 98A.

enable those *in absentia* to gain benefits[947] then the donee could "miss the boat" if the donor becomes insolvent, purely because of ignorance. A person who is unaware and absent cannot enforce rights. Moreover, all attempts at enforcing a J1 donation are a demonstrable acknowledgement of a right by a donee. This in turn implies acceptance.

7.33 Therefore, the donee's role must, to an extent, be active. That is, the donee must exhibit some sort of consent for the donation to be completed and the donee's patrimony must now have a *ius ad rem*. The main question is: to what degree must this consent be performed as an overt act? As noted above, any attempt to enforce a J1 would certainly be indication of assent. Erskine holds that acceptance may be "reasonably inferred" in the absence of rejection, but then goes on to say that it is "presumed".[948] This would suggest that acceptance may be implied from the circumstances.[949]

7.34 For this to be the case two criteria must be met. First, the donee must be aware of the donor's act, for how can someone choose to reject something as regards which that person is unaware? Second, the donee must have a legal ability to exercise consent, in other words sufficient capacity to act.[950] This is implicit in the claim that acceptance can be presumed, for if acceptance is in any way a part of the transaction, then it could not be presumed of one who is incapable of acting. Thus, the donee must be capable of understanding the consequences of their actions[951] in order to consent. Similarly, in order to reject a donation, a donee must have capacity, as rejection is itself a juridical act, i.e. an act intended to have legal effect.[952]

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[947] Stair *Inst* I.10.4.

[948] Erskine *Inst* III.3.88. This could be considered the corollary of the presumption against donation: acceptance is presumed because no one is presumed to do that which would be accompanied by loss or against that person's patrimonial interests.

[949] This is also the position in Germany: BGB § 516. Gloag suggests that acceptance can be inferred if a promisee (or donee) does not communicate their rejection in a reasonable time: W Gloag *Gloag on Contract* 2nd edn (1929) p 25.

[950] See paras 4.4-4.11 above.

[951] i.e. have a "capability for rational and intentional action": MacCormick *Institutions of Law: An Essay in Legal Theory* (2007) p 83.

[952] N A Davrados "A Louisiana Theory of Juridical Acts" (2020) 80 Louisiana LR 1120.

7.35 If either of these criteria cannot be met by the donee, the law normally provides for another person to act on the donee's behalf.[953] Where a donee is unaware of the donation, or absent, but would otherwise have capacity then a representative may have been appointed by the donee. This person would be bound by the general rules of agency law.[954] Where a donee lacks the legal ability to exercise consent, a series of statutory rules bestow upon an appropriate person the responsibility to act on the donee's behalf.[955]

7.36 The main question is if there is any significant difference between how overtly acceptance must be demonstrated depending on whether it is the donee acting personally or if another is on the donee's behalf. The first type of representative is one who is appointed by a donee with requisite capacity to act: an agent. Agents must have a "high degree of trust and loyalty"[956] towards their principal (in this case, the putative donee) and must act to their "utmost advantage".[957] As an agent is appointed to act in a transactional capacity, this would suggest that the agency relationship itself is to benefit the principal's patrimonial interests. If the starting point is that a donation constitutes a patrimonial benefit to the donee, then this would suggest that an agent must accept on the donee's behalf. If the agent must accept, then it will be inferred that the agent has done so unless the contrary can be shown.

7.37 However, where the law automatically confers representational capacity, for instance through parental responsibility,[958] there is not a clear statutory duty to acquire property on a child's behalf. The Children (Scotland) Act 1995 places a parent under a duty to act as the legal representative of a child[959] but only so far as

[953] See paras 4.40-4.42 above.
[954] See generally: L Macgregor *The Law of Agency in Scotland* (2013).
[955] Such as a parent: Children (Scotland) Act 1995 s 1(d); Adults with Incapacity (Scotland) Act 2000 s 3; see also MacCormick *Institutions* p 88.
[956] L Macgregor *The Law of Agency in Scotland* (2013) para 2-01.
[957] *The York Building Co v Mackenzie* (1795) Paton's Appeal Cases 378 at 398.
[958] Children (Scotland) Act 1995 s 1(1)(d).
[959] Defined as a person under 16 years old: Children (Scotland) Act 1995 s 1(2)(a).

is “practicable and in the interests of the child”.[960] It has been noted that this is not a duty to always act advantageously for the child and “parents may do things that are neutral or even mildly disadvantageous, so long as their actions are not clearly against the interests of the child.”[961] Thus, there is not the same duty for a parent to accept as there is for an agent.

7.38 Furthermore, where the Children (Scotland) Act 1995 mentions property in relation to children it is only regarding liability for the administration of the child’s existing property.[962] This excludes application to property not yet acquired for or on behalf of the child. Therefore, there is no obligation upon a parent to accept a donation for a child and, as such, it is not as easy to say that acceptance can be inferred. Thus, the circumstances may need be more closely considered and acceptance more overtly demonstrated.

7.39 For example, after a separation, Charles writes a letter to his lawyer listing certain pieces of antique furniture that he believes are his. These are still located in the family home where his estranged partner, Lenora, still lives with their three children. The letter purports to gift a piece of furniture to each of the children.[963] He also sends a copy of the letter to Lenora who has sole parental rights and responsibilities for the children. If Lenora does nothing to acknowledge the receipt of the letter, it is not clear that she can be considered to have accepted on behalf of the children. She may need to take an additional step, for instance informing the children of the gifts for them to be valid. Otherwise, the donations may fail for lack of an external act verifying their validity. Alternatively, if she does nothing to change the location of the dona this could imply acquiescence and acceptance of the J1 and, as a result, the J2 in implement of it.[964] This is more likely, for in the absence of any

[960] Children (Scotland) Act 1995 s 1.
[961] K Norrie *The Law Relating to Parent and Child in Scotland* 3rd edn (2013) para 6.03.
[962] Children (Scotland) Act 1995 s 10.
[963] For purposes of this example, it is assumed that the children do not fall under the exceptions to lack of capacity in the Age of Legal Capacity (Scotland) Act 1991 s 2(1). For further discussion of circumstances in which an incapax may be considered to have requisite capacity see: Chapter 4 “The Parties to a Donation”.
[964] See below paras 7.93-7.97 on gifts already in possession of the donee.

competing claim to the property the law will surely favour the interests of the children.

7.40 On the other hand, if Lenora disputes Charles' title to the furniture, claiming that it is co-owned by them, does that amount to rejection which would thereby discharge Charles' liability? Certainly, Lenora would be acting in a way that would not be commensurate with overt acceptance, but is this sufficient to amount to rejection and thus undo Charles' obligation? Regrettably, the situation is unclear. It may be that if the issue arose in the courts, the courts would prioritise determining the question of ownership before deciding on the efficacy of the J1.[965] If Charles was found to have title, then Lenora's disputation would have no effect on the constitution of the J1. As a result, any attempt by Charles to change his mind regarding the J1 before the question of ownership was resolved would be of no consequence.

7.41 A pure donation can be either accepted or rejected but the choice is a binary one.[966] Once it has been accepted the donee cannot unilaterally withdraw after a change of mind: the donee is bound to receive the subsequent J2.[967] The donor would need to consent to the dissolution of the completed obligation. Likewise, if the donee rejects the proffered J1, there is not the possibility to decide an hour to take the benefit.[968] There would need to be a renewed intention of the donor to form a J1 which could then be accepted.

7.42 Moreover, the donee must acknowledge in some way the existence of the obligation, for if not the obligation will automatically prescribe in five years from the

[965] If Charles and Lenora were married or in a civil partnership, this would be determined by reference to the Family Law (Scotland) Act 1985 s 25, wherein all property is presumed to be owned by both persons unless acquired by gift or succession from a third party (s 25(1)). If the parties are cohabitants, then there is also a presumption of co-ownership except for property acquired by gift or succession under the Family Law (Scotland) Act 2006 s 26(2) but the legislation expressly makes this presumption rebuttable (s 26(3)).
[966] McBryde "Promise in Scots Law" p 65.
[967] Wallace *System of Principles* § 673.
[968] *Ibid*.

point the donor is bound,[969] unless the donation relates to land.[970] This acknowledgement can be express or through conduct. If the donee is unaware of the existence of the obligation, the prescription period will run from the point of the constitution of the J1. However, if there is a breach of the J1 which would result in a loss to the donee while they are unaware of the J1's existence, the prescription period will begin when the donee learns of the breach.[971] Furthermore, there is a possibility that the power may lapse through personal bar before the prescription period has elapsed if the donee is aware of it.[972] Thus, silence alone will generally not suffice to operate as implied acceptance.

7.43 That said, as noted above, the donee does not need to communicate acceptance to the donor. Instead, the donee may act in a way which implies acceptance. For example, returning to the example of Aidan and Helen above,[973] if Helen is in possession of the delivered document in which the J1 is constituted and puts it in a safe place, or mentions it in a testament, this would indicate her acceptance of the obligation without formally notifying the donor. If, in contrast, she behaves in a more cavalier manner with the document, perhaps by shoving it in the bottom of a bag and taking no further action, then it would be more difficult to imply her acknowledgement and acceptance.

7.44 There is a further question to be raised in relation to a J1 donation constituted through the acceptance or rejection of a third-party representative: whether the donee retains a residual power to accept or reject the donation contrary to the actions of their representative. For example, in the scenario of Charles and Lenora above, if Lenora's dispute of Charles' title amounts to rejection can their children later accept the J1 when they come of age? To say that they can undermines the purpose of the legal representation: that where a person is incapax another can

[969] Prescription and Limitation (Scotland) Act 1973 s 6(1). See also paras 7.48-7.54 below.
[970] In which case, the prescription period is twenty years: Prescription and Limitation (Scotland) Act 1973 s 8 and Sch 1 para 2(e).
[971] Prescription and Limitation (Scotland) Act 1973 s 11(3) and (3A).
[972] E C Reid and J W G Blackie *Personal Bar* (2006) paras 1.18 and 3.15.
[973] See above para 7.28.

exercise capacity on their behalf. The representative's actions are a substitute for the incapacity. Therefore, once the representative has acted the putative donee is stuck with that decision.[974]

c) Effect

i) General

7.45 Upon the donor and donee (or their representatives) completing their respective roles, there arises a bilateral relationship between the parties with the donor bound to make the transfer without undue delay and the donee bound to receive it. That is not to say that the relationship is mutual; there are no reciprocal onerous duties, and one party (the donor) will incur a loss against the other's gain. It is still unilateral in the sense that only one party comes under a positive obligation to perform.[975] However, the donee comes under a negative obligation that prevents refusal of a subsequent transfer in implement of the J1 obligation. This makes the completed J1 more akin to a unilateral contract[976] than a promise. As this is an obligation, ownership is not transferred at this stage. A subsequent act of conveyance will be required.

7.46 What is created is a personal right – a *ius ad rem* – in favour of the donee to the donum.[977] As such, the donee is classed as a creditor of the donor and has the right to claim in the event of the donor's insolvency with no distinction made between the donee and later creditors, even those who have given for value.[978] Nevertheless,

[974] However, if the representative has acted in a way that has caused significant damage or loss to the putative donee, the donee will have a claim against the representative for the representative's actions.
[975] Hogg *Law and Language* p 131.
[976] "Unilateral" in this respect denotes how many parties come under an obligational burden: Hogg *Law and Language* p 131.
[977] Erskine *Inst* III.3.90; "a right *ad rem* is not real but personal" G L Gretton "Trusts" in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* vol 1 (2000) p 483.
[978] Provided the donor was not insolvent at the time of making the donation: Bankruptcy (Scotland) Act 2016 s 99; Bell *Comm* II, 185.

ownership of the donum remains in the donor's patrimony. As such, the donee is entitled to rank alongside other creditors, rather than have the right to the whole value of the donum protected as, for instance, a beneficiary under a trust, where there is a separate patrimony, would.

7.47 Likewise, since after acceptance the donee is vested with a "right" in the true sense, it forms part of the estate of a deceased person and will therefore pass to a donee's executors to be collected in and distributed in line with the rules of succession should the donee die before the donum's transfer. Correspondingly, the donor's estate now has a formal debt against it which must be paid prior to distribution of any legal rights or legacies, since *inter vivos* acts take priority over those which only crystallise upon death. [979]

ii) Prescription

7.48 One reason for the distinction made in this thesis between a J1 obligation and a J2 transfer is because a J1 obligation is subject to the short prescriptive period of five years.[980] Contrast this with the negative prescription period of twenty years for ownership of corporeal moveable property,[981] or imprescriptible period for ownership of land.[982] Until a transfer is made in implementation of the J1 obligation, the donee's right is more precarious. This difference in prescriptive periods between an obligation

[979] Claims for debts against a deceased's estate should be made within six months of the date of death: R Grant and J Henderson "Do Your Debts Die With You?" *The Gazette* available at https://www.thegazette.co.uk/wills-and-probate/content/100384. After six months, the executor no longer has any personal liability for the estate so if a gratuitous creditor comes forward after six months and the estate has already been distributed the creditor cannot claim against the executor: Act of Sederunt of 28 February 1662 anent Executors-Creditors. However, where the estate has been distributed to beneficiaries, a creditor (even a gratuitous one) may be able to recover the debt from the beneficiaries: G Gretton and A Steven *Property, Trusts, and Succession* 4th edn (2021) para 26.59.

[980] Prescription and Limitation (Scotland) Act 1973 s 6 and Sch 1 para 1(g). This is unless the J1 relates to land, in which case the prescriptive period will be 20 years: Prescription and Limitation (Scotland) Act 1973 s 8 and Sch 1 para 2(e).

[981] Prescription and Limitation (Scotland) Act 1973 s 8; Report on *Prescription and Title to Moveable Property* (Scot Law Com No 228, 2012) para 2.2 and fn 5.

[982] Prescription and Limitation (Scotland) Act 1973 Sch 3 para (a).

and ownership affects the overall value of the right in the sense that something that lasts longer is more desirable and harder to extract from a person.

7.49 Even so, the point at which the prescriptive period of a J1 starts to run is not necessarily clear. If the donor's act alone only gives the donee a power rather than a right in the strict sense does this trigger the start of prescription or is it suspended until the donee's acceptance? Despite the difference in nature between the "power" and "right" detailed above they are nevertheless part of the same overall obligation. Prescription should run from the point the donor puts the donation "beyond recall".[983] As the donor cannot rescind after becoming bound, the time should be calculated to minimise the exposure to the inevitable loss while still giving effect to the donative intent. This is regardless of whether or not the donee is aware of the J1.

7.50 The justification for this is self-evident, given the donor is the only one bound to perform under the completed J1 and will be made poorer through the donation. Resultingly, the law should prioritise protecting the donor's interests in regard to prescriptive periods. Thus, a subsequent acceptance by the donee will not extend, or restart, the prescriptive period. That said, where there is a breach of the J1 resulting in a loss for the donee, prescription of the donee's claim will run from the point of the breach.[984]

7.51 For example, Grant binds himself through a J1 to give Tim 100 shares in a company on 5 April 2023. The prescriptive period for Tim to enforce the J1 starts to run then, even if he does not accept the J1 until 8 April. This means that Tim will lose the ability to enforce the obligation after 4 April 2028. However, if Grant sells the shares to Donna on 9 April 2024, Tim will have suffered a loss resulting from Grant's breach of the J1. Grant then incurs a new obligation to make good Tim's loss and the prescriptive period will run from the date of the breach, i.e. 9 April 2024. This

[983] McBryde *Contract* para 4-09; Gordon "Donation" para 29; *McGill v Edmonston* (1628) Mor 16991. See also para 3.36 above.
[984] Prescription and Limitation (Scotland) Act 1973 s 11(1).

prescription period is also five years,[985] meaning Grant will be liable for the extent of Tim's loss until after 8 April 2029.

7.52 Additionally, where the donee is unaware of the breach of the J1, and could not reasonably have been aware, the prescriptive period will not start to run until they first learn of or "could with reasonable diligence" learn of, the breach.[986] Thus, if Tim is abroad kayaking down the Amazon (with no access to internet or other forms of communication) when Grant binds himself to give the shares, and Tim does not return until 31 May 2026, the prescription period with regard to the breach of the J1 will not begin to run until then. Thus, a J1 undertaken to an unaware donee could leave the donor liable for a significantly longer period of time if the donor subsequently breaches the J1 rather than simply do nothing at all to implement it.

7.53 However, the prescriptive period may be curtailed if the donor dies before the donee's acceptance. This is regardless of whether the donee is aware of the undertaking or not. This is because only creditors can make a claim against the estate and the donee is not a creditor (i.e. with a vested *ius ad rem*) until acceptance.[987] Thus, should Grant pass away on 31 October 2025 and Tim not return from the Amazon until 31 May 2026, Tim's power to accept the J1 may have expired.[988]

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[985] Prescription and Limitation (Scotland) Act 1973 s 6(1) and Sch 1(1)(g).

[986] Prescription and Limitation (Scotland) Act 1973 s 11(3) and (3A) (as amended by the Prescription (Scotland) Act 2018 s 5). In order for prescription to start running following a breach of the J1, the donee must i) know of the loss, ii) know that the loss was caused by the donor's act or omission, and iii) know the donor's identity: A Kentish "Risk: Tick tock, stop (or start) the clock" *Journal of the Law Society of Scotland* 16 Oct 2023 available at: https://www.lawscot.org/members/journal/issues/vol-68-issue-10/risk-tick-tock-stop-or-start-the-clock/. Furthermore, the Prescription (Scotland) Act 2018 s 13 also amended the Prescription and Limitation (Scotland) Act 1973 to allow the parties (donor and donee) to agree to extend the prescription period but only up to one year: Prescription and Limitation (Scotland) Act 1973 s 13. Of course, this will not apply where the donee is unaware of the donor's act, as a person cannot agree to something of which that person is ignorant.

[987] See paras 7.26, 7.46-7.47 and fns 933 and 979 above.

[988] Subject to the general rule that those ignorant of the donor's unilateral act should be given an opportunity to accept: see para 7.32 above. This opportunity cannot be unlimited, however, and should the estate have been otherwise distributed and a significant time have passed between the donor's death and the putative donee learning of the J1 it may be that the claim will be held to have lapsed. Ultimately, this will depend on the precise facts and circumstances.

7.54 Where the donee is under a legal disability due to non-age or other reason the start of the prescription period may be delayed until capacity is attained,[989] for instance where a child reaches sixteen.[990] However, if capacity has been exercised on the child's behalf by a representative, the donation will be deemed complete[991] and prescription will run from the point of the donor's undertaking. This is because the representative exercises capacity on behalf of the representee and thus has the power to complete transactions. The representative will have the ability to enforce the obligation as well as to accept it.

iii) Warrandice

7.55 Unless expressly stated otherwise, only simple warrandice is implied through the donor's act: the power granted to the donee is protected from the donor's future acts and deeds only,[992] unless they are the donor's acts of "fraud and deceit".[993] It follows from the fact that the donor has "tied" themselves by acting that the donor cannot subsequently act in a way to defeat the power of the donee. Nevertheless, as it is a gratuitous act borne from generosity, the protection deemed necessary for the donee is minimal, for the donee will suffer no loss if the donor cannot fulfil their promise.[994] Thus, the donor does not warrant current ownership of the property promised, nor offers any guarantees regarding either the quality or value of the donation. This is reflective of an underlying attitude in the law that those who are "getting something for nothing" through a J1 obligation are less deserving of extra

[989] Prescription and Limitation (Scotland) Act 1973 s 6(4)(b).
[990] Age of Legal Capacity (Scotland) Act 1991 s 1(1)(b).
[991] Even if this is to the disadvantage of the person they are representing, although they may be liable to account for losses: K Macfarlane *Thomson on Family Law* 8th edn (2022) para 10.2.
[992] Stair *Inst* II.2.46; Bankton *Inst* 1.9.7; Gordon "Donation" para 39; A Todd and R Oliphant "No Guarantees?" *Journal of the Law Society of Scotland* (Feb 2010) available at https://www.lawscot.org.uk/members/journal/issues/vol-55-issue-02/no-guarantees/. This is a similar position to other civilian jurisdictions, for instance Germany, where "The donor is responsible only for intent and gross negligence" (BGB §521) although perhaps Scots law's simple warrandice gives slightly wider protection.
[993] Bankton *Inst* 1.9.7.
[994] Stair *Inst* II.2.46.

protection than, for instance, a transferee who is giving value through a contract of sale.[995]

7.56 Returning to the example of Grant and Tim,[996] on 5 April Grant binds himself to give a hundred shares in a company to the Tim, valued that day at £300. Due to simple warrandice, Grant cannot subsequently transfer the shares to Donna or he will be in breach of the J1. However, if on 9 April prior to transferring the shares to Tim the value of the shares drops to £50, Grant is not liable to make up the difference. Equally, if instead of shares the donum is an antique chair, it cannot be implied that Grant is making any guarantee regarding the chair's condition.[997]

7.57 Moreover, should the donor have promised to give a gift not owned by the donor, the donee will have no right to compel the donor to acquire the donum in order to fulfil the J1, as simple warrandice does not guarantee that the donor has good title to the donum.[998] However, implicit in the J1 is that, where the donor is patently not owner, they must either arrange for the donum to be transferred directly to the donee (for instance, through purchase through a third-party) or acquire it themselves to make the J2 transfer.[999] Notwithstanding this, the donee will not have a claim to the value of the donum should it be beyond the donor's means at the time of making the J1.[1000]

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[995] In contrast, in a contract of sale, there is an implied term that the seller "has the right to sell the goods, or will do at the time when the property is to pass": Sale of Goods Act 1979 s 12(1). Additionally, there is an implied term that the goods are of satisfactory quality: s 14(2). In a consumer sale, this implied term is set out in a more explicit way and covers (among other things) the quality, fitness for purpose, and description: Consumer Rights Act 2015 ss 9-17. Warrandice only applies to the quality of the right to the thing being transferred as opposed to the quality of the thing itself.

[996] Above at para 7.51.

[997] The donee can, of course, refuse to accept a chair in a sorry state of disrepair.

[998] In this the law of donation differs from other "liberalities" such as the doctrine of legacies *rei alienae*: Erskine *Inst* III.9.10; M C Meston "Construction of Wills" in "Wills and Succession" *Stair Memorial Encyclopaedia* (Vol 25) para 855.

[999] This is similar to the position stated in the DCFR which states that donation may apply to "goods which (…) are to be acquired by the donor": DCFR Book IV, Part H – 1:102. The commentary explains this as meaning "nothing (…) prevents a donor from undertaking to transfer gratuitously simply on the grounds that he or she is not owner": DCFR "Comments" p 2806. The donation incurs an additional obligation on the donor of acquiring the goods.

[1000] For "the donor does not guarantee that the donee's right is good": Gordon "Donation" para 39; Bankton *Inst* I.9.7; Erskine *Inst* III.3.90.

7.58 For example, Ruby, who only owns a Reliant Robin and has assets of £100, purports to bind herself to give Alice a Ferrari. Given Ruby's circumstances, Alice will have no claim to insist that Ruby acquires a Ferrari in order to fulfil the J1. However, if at the time of making the J1 Ruby had a Ferrari which she then sells, Alice will have a claim to the value of the Ferrari at the time of the constitution of the obligation. Thus, a purported J1 made in circumstances that indicate there is little or no chance of the donor being able to subsequently perform the J2 in implement of the obligation will be void: it "must manifest more than an illusory commitment or one which the [donor] is patently unable to fulfil".[1001]

7.59 Additionally, a donee has no protection from the "offside goals rule" when in competition with a third party who has given value.[1002] Thus, should a donor presently bound by a J1 subsequently sell the donum, the donee cannot have the transfer reduced and the donum transferred by way of a J2 in implement of the J1. Instead, all the donee has is a claim against the donor for the value of the gift.

7.60 The origin of this rule can be traced to the historical notion of fraud, where:

> "a gratuitous benefit conferred or obtained by one party and gained through the fraud of another cannot be retained by the person benefited, even though innocent of the fraud".[1003]

Dr Dot Reid explains that the connection of fraud with gratuitousness stems from the application of the Pomponian phrase "*quod nemo debet locupletari aliena jactura*",[1004] highlighting the suspicion with which Scots law typically has approached donations,

[1001] Hogg *Promises and Contract Law* (2011) p 22. This is probably because the unlikelihood of the donor being able to fulfil the obligation, and their knowledge of their own situation, would prevent any true donative intent. This is similar to the position of *sponsio ludicra* whereby the courts will not entertain fanciful or ridiculous promises: Kames *Principles of Equity* p 22; *Kelly v Murphy* 1940 SC 96.
[1002] *Rodger (Builders) Ltd v Fawdry* 1950 SC 483.
[1003] *Gibbs v British Linen Co* (1875) 4 R 630 *per* Lord Shand at 634.
[1004] D Reid *Fraud in Scots Law* (2013) (PhD thesis: University of Edinburgh) p 244.

and by noting that the presumption against donation serves to redress situations of inequity.[1005] It would be inequitable for one party to be denied a right where another party gains something for nothing. Therefore, where there is competition between two parties the law will favour the side who has more to lose compared with how they started off. This will not be the donee.

4) EXECUTION AND LEGAL EFFECTS: J2

a) General

7.61 Before considering the steps to make a J2 donation, there are a few general comments that must be made that are applicable to all transfers of property in Scotland. First, due to the abstract system of transfer, a conveyance is separate from the underlying contract or obligation.[1006] Second, donation is one of the three bases of voluntary derivative acquisition in Scotland.[1007] As such, it is subject to the common law rules on transfer of ownership.[1008] As with a J1, it is necessary to prove intention and have some "positive act" of delivery (or equivalent) of the donum.[1009] However, these criteria serve slightly different purposes in a J2 to those in a J1 obligation. Although the donor's *animus donandi* is still important, providing the

[1005] D Reid *Fraud in Scots Law* p 257.
[1006] T B Smith *A Short Commentary on the Law of Scotland* (1962) p 539; Reid *Property* paras 608 and 609; L Van Vliet "The Transfer of Moveables in Scotland and England" (2008) 12 Edin LR pp 173, 193. Given that donations do not fall under the remit of the Sale of Goods Act 1979 (s 2), the conflation in the Act between contract and conveyance does not apply, nor the disapplication of the requirement of delivery: see below paras 10.54-10.57.
[1007] The other two being sale and barter: Walker *Principles* Vol III p 418.
[1008] All derivative transfers require an act of will and an act of delivery: D L Carey Miller with D Irvine *Corporeal Moveables in Scots Law* 2nd edn (2005) para 8.03.
[1009] Reid *Property* para 613.

causa for the transfer,[1010] and thus a defence for the donee against subsequent claims of unjustified enrichment,[1011] it alone is not enough to complete the J2 act.

7.62 Instead, the intention required is twofold: the *animus donandi* is accompanied by the *animus transferendi* (the intention to presently transfer ownership). One *animus* may precede the other, for instance where a J2 follows from an earlier J1, but equally they may coincide. Additionally, delivery is not considered merely proof of the donative intent but is a separate and independent requirement.[1012] This is because of the need for transfer of possession in a transfer of property at common law.[1013] In the words of Lord Young:

> "Now, the law of gifts, I mean gifts *inter vivos*, is in the general case quite clear. If the owner of (…) property, is minded to bestow that money or property on anyone, he (…) does so by transferring the money or property to the person whom he wishes to benefit; if that is done (…) then the gift is complete.
>
> […] If the donee is put in such a position that he requires no aid from any Court of law, unless it be to enable him to retain possession, then the gift is complete; but if he does require any such aid to complete his possession, then the gift is not complete, or, rather, there is no gift".[1014]

7.63 However, in a J2 donation, delivery only completes the donor's role. In all conveyances at common law, ownership does not pass until the transferee consents

[1010] For "one can never wholly separate the parties' "agreement" to transfer ownership from the underlying contract which is normally the source of their motivation": D L Carey Miller *Corporeal Moveables in Scots Law* (1991) para 8.08 and Carey Miller *Corporeal Moveables* 2nd edn (2005) para 8.06.
[1011] *Greenshields v Carey* [2019] SC LIV 59; *Morgan Guaranty Trust Co. of New York v Lothian Regional Council* 1995 S.C. 151.
[1012] Bell *Princ* §1458; T B Smith *A Short Commentary on the Law of Scotland* (1962) p 538; *Thomson v Dunlop* (1884) 11 R 453; *Macaulay v Milliken* 1967 SLT (Notes) 30.
[1013] Stair *Inst* III.2.5.
[1014] *McGregor's Exrs v Dunlop* (1884) 11 R 453 *per* Lord Young at 458. In this, his lordship clearly had in mind a J2, given that he speaks of "possession".

and takes possession, either themselves or through a third party.[1015] In other words, completion of a conveyance requires an element of both *animus* and *corpus* on the part of the transferee. As an act of property transfer, this is equally true for donation, at least for a donation comprising corporeal property. Upon completion, the donee gains a *ius in rem*: a right in the donum (i.e. ownership) as opposed to the *ius ad rem* (right to the thing) created by a J1.

7.64 In non-gratuitous *inter vivos* transfers (i.e. sale and barter) the transferee can be held to have demonstrated the *animus acquirendi*, or consent to become owner, through agreement to the preceding transaction and by undertaking mutual obligations. In particular, with a contract of sale for corporeal moveable property ownership passes when the parties intend,[1016] with the default for specific goods in a deliverable state being upon formation of the contract.[1017] For donations, this is not necessarily the case, as a J2 transfer does not always follow a preceding J1 obligation. Even if it does, if a J1 donee's acceptance can be inferred from the donee's actions rather than requiring to be an overt act, as it would be in non-gratuitous obligations, can this really be said to form the basis for the necessary *animus acquirendi* in a subsequent transfer? Thus, it is potentially more difficult to ascertain the point at which the donee has consented to the transaction, or at least not rejected the gift and, therefore, at what point the transfer is complete.

7.65 Additionally, it is not clear whether a misunderstanding on the part of the donee as to the grounds for the transfer affects the validity of a J2.[1018] For example, the donor intends donation, but the donee accepts possession of the donum under the misapprehension it is a loan. The reason for this uncertainty is, as Professor Gordon noted, that "this is a situation less likely to give rise to the problem (…) than the converse".[1019] In other words, where there is a contest over whether there has

[1015] J MacLeod *Fraud and Voidable Transfer* (2020) para 1.14 and p 4 n 6; Carey Miller *Corporeal Moveables* para 8.08.
[1016] Sale of Goods Act 1979 s 17.
[1017] Sale of Goods Act 1979 s 18.
[1018] Reid *Property* para 617.
[1019] W M Gordon "The Importance of the Iusta Causa of Traditio" in P Birks (ed) *New Perspectives in the Roman Law of Property* (1989) p 128.

been a gift or not, it is normally the would-be donor who is claiming loan rather than donation in order to recover property. Arguably, such an error could potentially be a vice of consent on the part of the donee, thereby negating the *animus acquirendi.*[1020] That said, there is a prevailing view that, so long as the donor has the *animus donandi* it is irrelevant that the donee misunderstands the nature of the transaction and the transfer will be a valid donation.

7.66 The donee's possession of the donum need not be physical: what is important is that the donee acquires control of the property.[1021] In its simplest form, a transfer occurs where there is a mutual present intention to pass ownership of the property, and the donor's divestiture and the donee's investiture occurs simultaneously[1022] when control of the property is handed over.[1023] But in other circumstances, ascertaining the moment of where possession passes is not always straightforward, and as a result it is not as obvious when a donative transfer is complete. This will potentially affect which party bears liability for any damage or harm arising from the donum. For instance, if the subject of a J1 donum is a dog but the J2 is not yet complete, the donor will be liable for an injury caused by the dog biting someone.[1024]

7.67 This is due to the primary, and most obvious consequence, of a donative transfer: a donor does not cease to be owner of the *donum* until the J2 is complete.

[1020] However, with a loan for consumption or use, ownership is still transferred. As a result, the *animus acquirendi* would be present so the transfer would stand, particularly if Scotland does indeed adhere to the abstract system. This is a logical reading of the law but sits uneasily alongside the argument of this thesis that donations must be accepted, in part so they do not to conflict with the principle of *beneficia non obtruduntur*. If the donee acquires a gift based on a misunderstanding of the grounds for transfer, then a benefit is being obtruded upon them because there is no corresponding debt accrued to their patrimony. Unfortunately, space here is too limited for an in-depth consideration of the relationship between the abstract system of transfer, *beneficia non obtruduntur*, and the donee's misapprehension of the underlying basis for that transfer. As a result, the analysis offered in this part assumes that the donee is aware of the reason for the transfer.

[1021] See: C Anderson *Possession of Corporeal Moveables* para 3.01.

[1022] Reid *Property* para 603.

[1023] For example, a guest physically hands their host a bottle of wine when arriving for dinner.

[1024] In certain circumstances, the donor's liability may also extend beyond the transfer of property. If the donee possesses certain characteristics which makes their use of the donation potentially dangerous the donor may be liable for any damage caused: *Muir v Wood* 1970 SLT (Notes) 12 OH. For instance, if a child is given a gift which they are unable to fully appreciate the potential dangers of, for instance an air rifle, where the donor can reasonably foresee the likelihood of harm the donor may be liable to both the donee and third parties for any subsequent harm caused through the child's use of the gift: E C Reid *The Law of Delict in Scotland* (2022) paras 10.31-10.36.

That said, as noted above, although the donor is still owner until this point, simple warrandice arising from a preceding J1 prevents the donor from alienating or burdening the property to the detriment of the donee.[1025] However, the warrandice does not protect a donee's completed J2 ownership when in competition against an undertaking to transfer to a third party made for valuable consideration. In this, in a case of competing titles the donee is in a more precarious than a creditor who has given value in a so-called "off-side goals" case.[1026] In such cases, a prior creditor could have a subsequent transfer reduced. Moreover, in donation warrandice would only seem to cover resulting losses suffered by the donee from the breach of donative obligation, such as expenses incurred in anticipation of ownership,[1027] as opposed to a right of reduction or full value of the lost *donum*.

7.68 This part will now briefly consider the circumstances in which a pure J2 can occur: when it is made following a preceding J1 obligation; when there is no preceding J1 but where there is a concurrence of animus, delivery, and transfer; and where there is preceding possession not based on ownership. In each point, the format adopted in the analysis of a J1 donation will be used. Thus, the requirement for execution of the donor's role will be considered first, followed by the donee's. The consequences will not be considered separately as ultimately the result is an irreducible transfer of ownership. As is the case for a J1, only simple warrandice continues to apply.

b) Where there is a preceding donative obligation

i) The donor

7.69 As discussed above, the donor who has made an unconditional J1 obligation is bound to make the transfer in implement of it without undue delay.[1028] Although

[1025] Gordon "Donation" para 39; paras 7.55-7.60 above.
[1026] *Morrison v Somerville* (1860) 22 D 1052 at 1089 per Lord Kinloch; Reid *Property* para 695.
[1027] Bankton *Inst* 1.9.7.
[1028] See para 7.45 above.

the J1 is a separate juridical act, the *animus donandi* expressed in the J1 provides evidence for the donative intent underpinning the J2. Thus, what is required is the *animus transferendi* coupled with delivery of the donum, concomitant with the abstract theory of property transfer.[1029] However, "the mental element of delivery may be derived or transposed from the antecedent agreement"[1030] so the distinction between the *animus donandi* and *animus transferendi* is a little artificial. Furthermore, in contrast to a J1, as with all transfers of property, the donor must own the property being gifted, due to the principle of *nemo dat quod non habet*.[1031]

7.70 As a result, the donor who does not yet have the promised asset must take steps to acquire it in order to execute the transfer or arrange to have it directly transferred to the donee via a third-party (for instance, a shop-keeper).[1032] As noted above, if the asset is clearly unattainable or out of the donor's reach (for instance, if its value exceeds that which the donor can be reasonably be expected to afford) then there is no obligation and therefore, no onus on the donor to acquire the property to transfer.[1033]

7.71 As with all forms of donation, delivery is essential. This is achieved by the donor relinquishing possession of the donum and where it can no longer be recalled.[1034] Once this has been done, the gift cannot be revoked, even if the transfer has been made in error.[1035] Historically, Scots law recognised a residual power of the donor to revoke a J2 donation after delivery on the grounds of the donee's

[1029] T B Smith *A Short Commentary on the Law of Scotland* (1962) p 539; Reid *Property* paras 608 and 609; L Van Vliet "The Transfer of Moveables in Scotland and England" (2008) 12 Edin LR 173, 193.
[1030] Carey Miller *Corporeal Moveables* para 8.06.
[1031] Reid *Property* para 669; Carey Miller *Corporeal Moveables* para 8.03. See paras 7.57-7.58 above.
[1032] Although, purchase of the donum by the donor from a third-party to be delivered directly to the donee would constitute a form of indirect donation: see below paras 10.53-10.63.
[1033] See paras 7.57-7.58 above.
[1034] See paras 3.26-3.33 above.
[1035] *Masters and Seamen of Dundee v Cockerill* (1869) 8 M 278.

ingratitude, but, in contrast to other civilian jurisdictions,[1036] this no longer appears to be the case.[1037]

7.72 Additionally, as discussed elsewhere,[1038] there previously existed the principle of the *beneficium competentiae*, where a transfer based upon a J1 donation could be prevented from being implemented if the result would be to reduce the donor to indigence. According to Gordon, over the course of the eighteenth century the application of this was restricted to gifts made by parents or grandparents to a donee who would have a "reciprocal obligation to aliment in case of want".[1039] Since the coming into force of the Family Law (Scotland) Act 1985 this reciprocal obligation has been abolished and the ability of a donor to retain the *beneficium competentiae* alongside it.[1040]

7.73 If it transpires that the J1 was invalid, for instance because of a lack of formal writing,[1041] it is still possible for a J2 to follow upon it and be upheld. As Professor Reid puts it: "a good conveyance will save a bad contract".[1042] Therefore, so long as the transfer is valid the donation simply is converted into a J2 without a preceding J1. That said, should relations sour and title be later contested it may be more difficult for a J2 recipient to prove the *animus donandi* of the donor.[1043] This is more so than with an ordinary J2 without a preceding obligation as the defective or incomplete J1 may provide evidence that the donor had not yet formed the *animus donandi*. Any such contest would necessarily be decided upon the individual facts of the case.

[1036] For instance: Germany (BGB §530) and Louisiana (Civil Code Art 1557); see above paras 2.47-2.67.
[1037] Stair Inst I.8.2; Bankton *Inst* I.9.4. See above paras 2.47-2.67. It should be noted that the courts have not been requested to rule on the matter in some time, although the general inability to revoke a donation was restated in *Greenshields v Carey* [2019] SC LIV 59.
[1038] See above paras 3.61-3.62 and 4.38.
[1039] Gordon "Donation" para 44.
[1040] In this, Scotland appears to be standing alone in the Civilian world. For example, Germany still recognises a right of recovery for a donor if the donation leaves them unable to fulfil their maintenance obligations (BGB § 528) and Louisiana law states that any attempted donation of a person's entire estate or to the extent it would leave them without subsistence is simply void (Louisiana Civil Code Art 1498).
[1041] As per the Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).
[1042] Reid *Property* para 610 n 3.
[1043] *Dinwoodie v Wright* (1895) 23 R 234.

ii) The donee

7.74 The main issue in the case of a J2 following from a J1 is whether the donee's assent to the prior J1 can provide an adequate *animus acquirendi* for the transfer, similar to the position with a contract of sale.[1044] In a contract of sale, where the transfer is to take place between the seller and buyer,[1045] the mutual intention at the point the contract is concluded is sufficient to transfer ownership,[1046] subject to specific circumstantial exceptions. However, contracts of sale are governed by the Sale of Goods Act 1979, which is a statutory departure from the common law position. At common law, delivery is essential to transfer ownership by *traditio*.[1047] Therefore, acceptance of a J1 is not necessarily a substitute for the *animus* for a following J2 transfer.

7.75 As a result, the principal question becomes whether a donee's previous assent to a J1 bars them from refusing to accept the subsequent J2 transfer in fulfilment of the obligation. Wallace thought so,[1048] and it has already been argued above that this is the consequence of a completed (therefore accepted) J1.[1049] The duty of the donee who has accepted the J1 donation and created a legal bond is to accept the transfer of the gift. Furthermore, given that the simple warrandice entailed in a J1 does not guarantee the condition of the donum,[1050] the donee cannot refuse to accept it because it is in a less than optimal state.[1051] Contrast this with a consumer sale, where a buyer may have the right to reject even after ownership has transferred due to the condition of the goods not meeting the expected standard.[1052] This is because in a sale there is an exchange, so the law provides protection to a

[1044] See para 7.66 above.
[1045] Sale of Goods Act 1979 ss 2(1) and (4).
[1046] Sale of Goods Act 1979 ss 17 and 18.
[1047] Van Vliet "The Transfer of Moveables in Scotland and England" pp 193-194.
[1048] Wallace *Principles* § 672.
[1049] See para 7.45 above.
[1050] See para 7.56 above.
[1051] Nonetheless, they may have a case for rejection based upon the "fraud and deceit" of the donor should they have been significantly misled as to the state of the donum: Bankton *Inst* 1.9.7.
[1052] Consumer Rights Act 2015 ss 9, 10, 11, 18, and 20.

buyer from potentially suffering a loss not anticipated when entering into the original agreement.

7.76 In distance sales the right to reject is particularly extensive, being unconditional for fourteen days after the goods come into the buyer's possession[1053] (subject to certain restrictions on bespoke or fresh goods, or alcoholic beverages subject to fluctuating market valuations).[1054] The justification for this is that when purchasing from a distance, a buyer has not had the opportunity to examine the goods beforehand and is therefore at a disadvantage when entering the contract. Thus, a buyer is at higher risk of making a bad bargain and suffering a loss. However, in a donation there is no potential loss to the donee – they are not disadvantaged merely by the receipt of shabby goods. A donation results in the donee's net gain.[1055] As such, there is generally no need for an equivalent protection for a donee as that in a sale, and thus a right to reject a transfer following acceptance of a J1 should not be reserved to them.

7.77 Nonetheless, there may arguably be limited circumstances where fairness dictates that the donee should still be permitted to reject the goods. For example, if it transpires the gift is dangerous, such as old toys decorated with lead paint being given to a child, the donee should not be forced to take ownership. This would be particularly true if, by assuming ownership, the donee would incur costs if it were necessary to dispose of the property.[1056] That said, just because ownership of a donum comes with an onerous burden,[1057] this is not necessarily a sufficient reason to justify a refusal to accept a transfer in implement of a J1, particularly as the donee presumably had the opportunity to examine the nature of ownership prior to accepting the J1. Thus, the donee must normally accept a J2 following from a J1 unless there is a significant justification not to do so.

[1053] Consumer Contracts (Information, Cancellation, and Additional Charges) Regulations 2013 s 30(3).
[1054] Consumer Contracts (Information, Cancellation, and Additional Charges) Regulations 2013 s 28.
[1055] See above paras 2.18 and 3.53.
[1056] It is the contention of this thesis that if the costs of disposal exceed the value of the donum it is not a donation at all as there is a negative effect on the donee's patrimony, see above paras 3.54-3.55. See also: *Joint Liquidators of Scottish Coal Co Ltd v Scottish Environmental Protection Agency* 2014 SC 372, 2014 SLT 259.
[1057] *Ballantyne's Trs v Ballantyne's Trs* 1941 SC 35.

7.78 Once the donor has delivered possession of the donum following a J1 and the donee accepted it, the transfer is complete. Thus, the donee becomes owner and the donor no longer has any right to the property. The donee therefore becomes liable for any subsequent damage or injury caused by the donum (for instance, in the dog example given above).[1058] The donee is free to further transfer or dispose of the property at will.

c) Where there is no preceding donative obligation

7.79 Where a donative transfer is to happen spontaneously, or without a preceding J1 obligation, identifying the donor's *animus donandi* (and thus the *causa* from which an *animus transferendi* may be inferred) underlying any purported donative transfer may be harder. This is because "where the issue of the transferor's intention to pass ownership has arisen, the tendency has been to refer back to the parties' contractual relationship".[1059] If there is no contractual, or obligational, relationship to refer to then there may be no apparent basis justifying a transfer and thus the donor's intention to relinquish title to the property. Likewise, there is nothing to indicate the donee's assent to become owner.

7.80 Whether a transfer is made with the requisite *animus donandi* is the key issue upon which donations are normally contested. However, most of the case law deals with the now (apparently) defunct[1060] practice of donation *mortis causa*,[1061] where the donor was no longer available to consult regarding the intention behind the conveyance.[1062] As the donee was normally the party asserting the existence of the donation the courts required very strong proof of intention to displace the

[1058] See above para 7.66.
[1059] Carey-Miller *Corporeal Moveables* para 8.10.
[1060] Succession (Scotland) Act 2016 s 25. Further discussion as to how successful the attempt to abolish the practice can be found above paras 6.29-6.35.
[1061] For instance: *Blythe v Curle* (1885) 12 R 674.
[1062] In truth, historically most disputes regarding purported donations arise after the death of the putative donor, whether *mortis causa* or *inter vivos*: A Gulliver and C Tilson "Classification of Gratuitous Transfers" (1941) 51 Yale LR 1 at 4.

presumption against donation.[1063] In the case of a pure donation the intention of the donor can (potentially) be ascertained by asking the donor directly, although an attempt to deny donative intent long after a transfer may not always be successful.[1064] Ultimately, in a dispute the courts will look at the surrounding circumstances to determine whether donation is intended. The analysis in this section will proceed upon the understanding that this is not in doubt.

7.81 This section identifies and analyses two instances where the donation is made in absence of a preceding obligation to do so: where there is a concurrence of delivery and acceptance (the "don manuel"), and the little-known practice of *traditio incertae personae*.

i) The "don manuel" – concurrence of *animus*, delivery, and transfer

7.82 The term "don manuel" has been appropriated from French law, where it describes spontaneous, small, moveable gifts of that are transferred directly from the donor to the donee "from hand to hand".[1065] For example, Martin gives Lindsay a box of chocolates for her birthday. The reason France developed this as a specific category is because the Civil Code establishes strict formalities regarding the constitution of donations, including notarisation of the gift and formal acceptance which is then notified to the donor before a donation is complete.[1066] Due to the impracticality, and impossibility, of policing every single birthday, anniversary, Christmas, or other conventional gift in this way, the emergence of the "don manuel" as an exception to the strict formalities was perhaps inevitable. This type of donation is the most common in all jurisdictions, and the simplest form of gift-giving, hence the adoption of the term here. The "don manuel" requires little explanation, but should be

[1063] *Ross v Mellis* (1871) 10 M 197.
[1064] *Greenshields v Carey* [2019] SC LIV 59.
[1065] M Planiol and G Ripert *Traité Pratique de Droit Civil Français* vol V 2nd ed (1957) § 378.
[1066] Code Civile Français Arts 931-932.

mentioned for completeness, if only to distinguish it from other circumstances where there may be a time lapse between the donor's actions and the donee's receipt.

7.83 In short, upon no preceding obligation, the donor hands over the donum to the donee transferring possession and ownership immediately. This normally occurs on the occasion of a customary celebration, such as a birthday or achievement, or from a spontaneous act of generosity, for instance putting change into a charity collection tin. The *animus donandi* can be inferred from the donor's words and actions, particularly by the lack of any indication that reciprocity is expected.[1067] Likewise, the *animus transferendi* can be demonstrated from the act of handing over. The handing over itself is delivery. It could also be held that delivery demonstrates a crystallisation of the *animus donandi,* for in the absence of a preceding J1 the donor has it in their power to keep the donum for themselves until there is an external act demonstrating the formation of their will.[1068]

7.84 At the point of handing over the donum the donee either accepts possession (and, as an extension, ownership) or elects to reject it. If the latter, the donee must do so without delay, for otherwise either acceptance or a waiver of the right to reject[1069] will be inferred. The donee's acceptance, either express or implicit, indicates an *animus acquirendi* and the transfer is complete and irreducible.

ii) *Traditio Incertae Personae*

7.85 The practice of *traditio incertae personae* ("transfer to an uncertain person") has already been outlined above in relation to the identity of the donee,[1070] but is mentioned again here as an example of a pure donation. This is because first, there is a delay between the donor "delivering" the donum and the donee assuming

[1067] This is aside from any moral obligations that may arise as a matter of social practice: Eisenberg *Foundational Principles* p 103-104 and paras 1.4-1.18 above.
[1068] "Engagement" according to Stair's tripartite distinction of will: Stair *Inst* I.10.2.
[1069] Waiver being "implied from conduct consistent with the intention positively to abandon a right": Reid and Blackie *Personal Bar* para 3.15.
[1070] See above paras 4.46-4.54.

possession which has broader applicability, and second, because it demonstrates one of the few practices where the identity of the donee is unknown to the donor but can still be an effective donation.

7.86 As described in chapter 4,[1071] the institution of *traditio incertae personae* has its origins in Roman law. In Scotland, the most obvious inheritance is through the custom of the "wedding scramble", where the father of the bride or the groom would throw coins to onlooking children. However, the doctrine could equally be applied to situations where the donor leaves the donum in a public place with the intention that it should become owned by any person who wishes to take it. This person would be the donee.

7.87 It is critical that the leaver of the property intends to surrender ownership. This should be evident from the surrounding circumstances. For instance, placing a sign on the donum will be clear indication that this is the case, as with a person who leaves rhubarb at a garden gate with a note stating "please take". If the surrounding circumstances suggest anything different, then there will be no obvious donative intent. For example, there was no donative intent where a person whose house was being renovated left a painting leaning against a wall outside to avoid it being damaged, and thus the subsequent taking of the artwork constituted theft.[1072]

7.88 Furthermore, it is key to identify the donor's intention to transfer rather than abandon the property. This can be a fine distinction, particularly in situations where items are left in the street, such as a sofa left next to a bin. I have argued elsewhere that to facilitate the circular economy and reduce waste, where property is left on the street, such as the sofa, there should be a presumption in favour of an intention to

[1071] *Ibid*.

[1072] J-P Clark "Cops hunt Lord Nelson Painting after thieves swipe 'five figure' masterpiece from Edinburgh home" Daily Record 14th October 2023 available at: https://www.dailyrecord.co.uk/news/scottish-news/cops-hunt-lord-nelson-painting-31189389.

donate rather than abandon.[1073] However, this could interfere with the application of legislation governing fly-tipping,[1074] particularly if no person takes the items. Therefore, any such presumption should serve primarily to make the title of the taker valid as opposed to being applicable as a defence.

7.89 While the group of persons to whom the donative offer is being made must be identifiable, this does not need to be a limited class nor the donee individually known to the donor. In other words, it can extend to any person who has the ability to take the items, such as someone who walks down the street where an item is left, or a person who is a member of an online upcycling group, such as Freecycle.[1075] While this might seem to be the general public at large, it seems necessary to have some limitation to the potential donees in order to distinguish a gift by *traditio incertae personae* from simple abandonment. This will be easier where the donor has provided some indication as to their intention, such as posting online.

7.90 Finally, in order to transfer ownership, the taker must take possession of the property with the intention of becoming owner. This is even if it is only temporary before delivering to another person. For example, a woman takes the rhubarb from outside the garden to give to her husband to make a pie. This would be a chain of donations with the initial taker completing the *traditio incertae personae*. Until the possession has transferred, ownership remains with the donor. Thus, they remain responsible for the donum and any risks or liabilities associated with it, for instance, under the Environmental Protection Act 1990 for fly-tipping.[1076]

7.91 This final point has broader applicability regarding pure donations made where there is a temporal gap between the delivery, or surrendering of possession,

[1073] S Macdonald-Mulvihill "Any takers? An alternative interpretation to abandonment to facilitate the circular economy in Scots law" *Edinburgh Private Law Blog* 13th June 2022 available at: https://blogs.ed.ac.uk/private-law/2022/06/13/any-takers-an-alternative-interpretation-to-abandonment-to-facilitate-the-circular-economy-in-scots-law/.
[1074] Environmental Protection Act 1990 s 33.
[1075] https://uk.freecycle.org.
[1076] Environmental Protection Act 1990 s 33.

by the donor, and taking of possession by the donee. The donor will remain owner until the donee accepts the donum. This is even the case where the donum has been left within the donee's property, for instance by posting through a letterbox, and cannot be recalled. This is because there can be no inference of an *animus acquirendi* regarding a specific donum merely from having a letterbox.[1077]

d) When there is preceding possession not based on ownership

7.92 There may be some circumstances in which the donee is already in possession of the donum upon some other agreed basis, for instance loan, but the donor later forms the intention to donate the donum to the donee. This could be either by transferring ownership of an item or forgiving a debt. In the former case this would be characterised by the operation of *traditio brevi manu* which has long been accepted by the courts.[1078] Carey Miller highlights that, given the emphasis in Scots law on possession as evidence of ownership, "there has been no difficulty in accommodating the device (…) [because] delivery is only necessary where possession has not been attained by the transferee".[1079] Where a third party is in possession of the donum constructive delivery may occur.[1080]

7.93 In these instances there potentially arises a "J3" since the transfer of possession was not initially executed with a requisite *animus donandi*. The donor must intimate, either to the donee or the third-party custodian, an intention that the basis for possession is to change to donation. However, it is not clear whether this must be in writing, for although this is a donative act it is not an obligative act: the donor comes under no liability or obligation to perform any further.[1081]

[1077] See above para 7.63.
[1078] W M Gordon *Studies in the Transfer of Property by Traditio* (1970) p 216; Hope *Major Practicks* II.4.3; *Arbuthnot v Paterson* (1798) Mor 14220.
[1079] Carey Miller *Corporeal Moveables* para 8.21.
[1080] *Ibid* at para 8.22.
[1081] The Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii) only demands that gratuitous obligations are in writing.

7.94 If the purpose of writing or delivery is an external act to fulfil the publicity principle, and if the donee is already in possession (publicly), then it would seem there is no need to put anything in writing if it is the donee who holds the property. However, if a third party is holding the donum on behalf of the donor and the donor wishes to make a gift to the donee it would follow that, to ensure the custodier is "duly intimated" of the change of ownership, this must be done in writing.[1082] Furthermore, if the donor wishes to make a gift to the donee of assets in the hands of a third party, the donee must also be informed of the donor's intention to give the donee an opportunity to accept or reject the donation.

7.95 The donor who wishes to make a gift by forgiving a debt owed by the donee must do so explicitly and preferably in writing, although this is not a statutory requirement.[1083] This is partly because it would be impossible to prove the debt was no longer due in the event of the donor's decease. The donor who simply does not enforce a debt over a long time may be held to have waived a right if the donor has acted in ways that are inconsistent with "a continuing intention to exercise the right".[1084] As this is not readily inferred, coupled with the presumption against donation, an implied waiver would be very difficult to prove in this circumstance and therefore, for certainty, writing should be employed.

7.96 As this thesis argues that the donee's consent is considered essential to perfect a donation, the donee must be given the opportunity to reject the donor's actions. Furthermore, unlike a J2 following a preceding J1,[1085] the donee's assent to a prior obligation cannot be considered to serve as consent to the transfer given that the basis for possession will have changed. That said, the donee's assent can likely

[1082] *Anderson v McCall* (1866) 4 M 765 per Lord Cowan at 770.
[1083] The Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii) states that writing is required for the creation of a unilateral gratuitous obligation except those made in the course of business but makes no mention of the gratuitous extinction or variation of an obligation.
[1084] E Reid and J Blackie *Personal Bar* (2006) para 3-11. Additionally, the right may be extinguished through prescription (Prescription and Limitation (Scotland) Act 1973 s 6) but this is independent of any questions of donation.
[1085] See paras 7.64 and 7.75 above.

be more readily inferred, given that rejection while already in possession of the donum would take a more overt act (such as a reconveyance) that would clearly indicate dissent.

e) Effects

7.97 It is trite to state that a completed J2 transfers control of the donum and ends the donor's interest in it. However, as noted above a donee is in a slightly more precarious position than a transferee for value, for instance in the case of a donor's insolvency[1086] or in an "off-side goals" case.[1087] This is because "the law leans towards the protection of an onerous bona fide acquirer".[1088] Despite this, a contrast can be made between a completed J1 and J2 in the operation of the presumption against donation, for it would appear that the courts are more likely to infer donation where ownership has already passed, at least when there is a claim in unjustified enrichment.[1089] This could indicate that the courts are reluctant to interfere with ownership unless it can be shown to be manifestly unjust not to.

7.98 Another reason that the courts may be more likely to find the presumption against donation displaced after a J2 transfer is that it provides stronger proof of a completed *animus donandi*. Certainly, with regards to evidence of the *animus transferendi* and *animus acquirendi*, "the intention of transferor and transferee that ownership should pass usually follows as a matter of inference from the circumstances of delivery".[1090] In other words, the act of delivering property infers that the deliverer intended to alienate it in favour of the deliveree. This in turn is

[1086] Bankruptcy (Scotland) Act 2016 s 98.
[1087] *Rodger (Builders) Ltd v Fawdry* 1950 SC 483.
[1088] Carey-Miller *Corporeal Moveables in Scots Law* para 8.04.
[1089] *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151 per Lord President Hope at 165E and Lord Cullen at 175G although these are obiter remarks which have probably stirred more confusion into an already murky pot of understanding of the law of donation, so should be handled with care.
[1090] D L Carey Miller *Corporeal Moveables in Scots Law* para 8.08.

highly indicative of an intention to donate where there is no evidence of another agreement underlying the transaction, for instance sale or loan.[1091]

7.99 Notwithstanding this, a completed J2 donation will still be vulnerable to reduction should it be found that it was made in error. Indeed, as the donee would suffer no additional loss beyond the donum should the donation be reduced, it could be argued that the courts are quicker to find error which undermines the validity of *the animus donandi*[1092] compared to where the transfer is made on some other basis, such as sale. Additionally, the gratuitous nature of the act also diminishes the need for the error to be induced in order to permit reduction.[1093] Such an approach is reflective of the disdain the law appears to have for a donee's interests, instead favouring the position of a person somehow more "worthy" of the donum – in this instance, the donor.

7.100 Moreover, it is not always just the interests of the donor that are protected. There are statutory instances where third parties have the right to apply for a donation to be reduced where their rights have been prejudiced by the gift, for instance in the insolvency of the donor.[1094] This stems from an historic attitude that a gratuitous transferee is a partaker in the fraud of the author, as one should not profit from another's loss.[1095] Furthermore, it is only by giving the donation that the donor is able to frustrate the expectations of a creditor. Given that a transfer is bilateral, the participation of the donee through receipt enables this.[1096] Thus, the law prioritises the expectations and interests of a third-party creditor out of fairness and equity.

[1091] This position has been criticised, especially the dictum noted above (*supra* n 1089) suggesting that in a claim for unjustified enrichment the pursuer must disprove donation was intended: see R Evans-Jones and P Hellwege: "Swaps, Error of Law and Unjustified Enrichment" (1995) 1 SLPQ 1 at p 8.
[1092] *M'Laurin v Stafford* 1875 3 R 265.
[1093] *Hunter v Bradford Property Trust Ltd* 1970 SLT 173.
[1094] Bankruptcy (Scotland) Act 2016 s 98.
[1095] N Whitty "The 'No Profit From Another's Fraud' Rule and 'Knowing Receipt' Muddle" (2013) 17 Edin LR 37-62.
[1096] J MacLeod "Before Bell: The Root of Error in the Scots Law of Contract" (2010) 14(3) Edin LR 385-417.

7.101 Where it transpires that the donor did not in fact have title of the donum to give to the donee the normal property rule of *nemo plus* applies,[1097] and thus the donee cannot become owner. As the possibility of positive prescription for acquisition of corporeal moveable property in Scots law is dubious,[1098] it is unlikely that an alleged donee who receives from a non-owner can ever gain good title to the donum.[1099] Additionally, as a gratuitous recipient is excluded from being in *bona fides* and therefore being able to avail of remedies enabling acquisition in certain circumstances,[1100] it is possible that this also excludes the donee from being a *bona fide* possessor. As such, the donee's entitlement to any fruits is also in doubt.[1101] That said, "*mobilia non habent sequelam"*[1102] – it is not possible to trace and prove title to moveable property. As a result, anyone wishing to dispute the right of a donee to a donum of moveable property must prove their stronger right on the balance of probabilities.[1103] This is likely to be a difficult task and so the donee's position in practice is less vulnerable than a strict reading of the law at first makes it appear.

5) CONCLUDING REMARKS

7.102 This chapter has outlined the key elements of the simplest form of donations: pure donations. That is, donations made without any condition attached, freely without a moral cause, and directly between the donor and donee. It has examined the requirements for the execution and completion of donations in both obligatory and proprietary conceptions of the practice. Furthermore, there are some areas which could provide interesting investigation for further research, such as the extent to which error or misrepresentation can affect both a donor and donee's consent or ability to rescind from a donation, that have been identified.

[1097] Reid *Property* para 669.
[1098] Carey Miller *Corporeal Moveables* para 7.05.
[1099] However, there is a presumption of ownership based on possession: *Prangnell-O'Neill v Lady Skiffington* 1984 SLT 282.
[1100] See para 7.98 above.
[1101] Erskine *Inst* II.1.26.
[1102] Stair *Inst* III.2.7.
[1103] Carey Miller *Corporeal Moveables* para 10.15.

7.103 Given that pure donations are the simplest form of donation, they contain the basic elements of, and form the starting point for, all other categories of gift. Furthermore, the analysis here regarding the effects of a donation will underpin all completed donations, even if made for a moral cause, subject to a condition, or through a third-party. The following chapters will examine the features particular to these other categories of donation but it should be borne in mind that this chapter will underlie the analysis therein.

CHAPTER 8:

REMUNERATORY DONATIONS

1) INTRODUCTION

8.1 On the face of it, there is little to distinguish a pure and remuneratory donation, as the donation is made between the donor and donee directly and is not subject to any future condition. However, the law treats remuneratory donations differently because, even though there is no legal compulsion for the donor to act, the donation is made for a moral cause.[1104] In other words, the donation is made in respect of a prior good deed or gift from the donee to the donor.[1105] This moral cause has some implications regarding how likely the courts are to uphold a remuneratory as opposed to a pure donation, as the prior good deed may serve to displace the presumption against donation. As remuneratory donations have long been recognised as distinct from pure donations, they are readily observable in practice, and they have not been abolished by legislation, their continuation as an autonomous category of donation is adopted accordingly.

8.2 The key characteristics of a remuneratory donation are:

a) the donation is made to fulfil a moral obligation;

[1104] There is a school of thought that the moral obligation removes, to an extent, the voluntary nature of the act: "Once we have received something good from another person (…) we no longer can make up for it completely, no matter how much our return gift or service may objectively or legally surpass his own. The reason is that his gift, because it was first, has a voluntary character which no return gift can have" G Simmel "Faithfulness and Gratitude" in K Wolff (ed) *The Sociability of Georg Simmel* (1950) p 389. However, this sociological observation does not impact the lack of legal compulsion underpinning the remuneratory donor's act.

[1105] Bankton *Inst* I.9.2.

b) the moral obligation arises from a prior good act or deed (normally by the donee) received by the donor;

c) the element of reciprocity weakens the presumption against donation;

d) the donation is not made to disguise an exchange; and

e) a donation can still be remuneratory although the previous good deed was performed by a person other than the donee.

As with the treatment of pure donations, this chapter begins with an exposition of these key characteristics. However, the treatment of the legal effects are brief as there is little to distinguish a completed remuneratory donation from a pure one except that a remuneratory donation is not normally reducible. As such, the analysis of the previous chapter also applies here apart from the differences highlighted.

2) KEY CHARACTERISTICS

a) The donation is made to fulfil a moral obligation

8.3 Remuneratory donations are those that are "made in response to a moral obligation or carrying some reciprocal advantage which is in a sense the consideration for the gift".[1106] In other words, they are donations that are made to repay a previously received good act from another person (normally the donee). What distinguishes this type of donation from a contract is the lack of legal compulsion on the part of the donor to make the gift. The donee has no power (or right) as against the donor. Yet, because of the donee's previous good act, they can

[1106] Gordon "Donation" para 8.

be distinguished from pure donations:[1107] "for though the donor could not have been compelled to it by law, he was bound to it by gratitude; which makes it accounted to be the discharge of a debt, or the giving in exchange".[1108] Thus, although there is no legal obligation the moral obligation of gratitude has the effect of making the donation a type of quasi-exchange, subject to slightly different considerations than other forms of gift.

8.4 Although it is a quasi-exchange, that is not to say that the act is not voluntary. As it is lacking legal compulsion, the donor is as free not to make the gift as to make it. The donee, despite any previous acts of generosity, cannot require the donor to act.[1109] Like a pure donation, it is an unconditional gift. Therefore, it is binding and immediately enforceable upon being made.

b) <u>The moral obligation arises from a prior good act or deed (normally by the donee) received by the donor</u>

8.5 The prior act for which a remuneratory donation is made is not limited to a preceding gift to the donee. Any action can suffice to be the "good deed" for which the donation is made. For example, Ahmed mows Belinda's lawn every week out of neighbourly kindness. To thank him for his act, Belinda bakes Ahmed a cake. As Ahmed is acting voluntarily, and without a formal bilateral agreement in place, he cannot force Belinda to bake the cake for him. This is the case, even if Belinda has taken to giving him a Victoria sponge every week. He may have an expectation of receiving the gift but has no right to demand it.[1110] In other words: "Love goeth not by mastery, and a gift is free, and not compellable".[1111]

[1107] Bankton *Inst* I.9.2; Erskine *Inst* III.3.91.
[1108] Erskine *Inst* III.3.91.
[1109] Bankton *Inst* I.9.1.
[1110] *The King's Trumpeters v Andrew Wood, Bishop of Caithness* [1681] 3 Brn 402. The same principle can also bar a claim in enrichment law: *Rankin v Wither* (1886) 13 R 903 *per* Lord-Justice Clerk Moncrieff at 907.
[1111] *Wright's Trs v Wright* (1873) 1 R 237 *per* Lord Ardmillan at 244 quoting J W Goethe *Das Märchen* (1795).

8.6 According to Professor Gordon, the historical distinction between remuneratory donations and other types of gift was drawn principally as an exception to the rule that permitted the revocation of gifts between spouses.[1112] The rationale behind such a rule stems from a time when a married woman could not own her own property, bar jewellery and other items for personal adornment (such as clothing), and given that this rule was abolished nearly a century ago,[1113] the historical basis is now irrelevant. However, recent case law has demonstrated remuneratory donations will still have a bearing on whether a gratuitous undertaking will be upheld, particularly when in competition with a subsequent act which purports to defeat the putative donee's right.[1114] This is because of the reciprocal nature of a remuneratory donation as a quasi-exchange.[1115] Thus, inclusion of remuneratory donations within a modern classification of donation is warranted.

c) The element of reciprocity weakens the presumption against donation

8.7 The implicit bilaterality of a remuneratory donation also weakens the presumption against donation.[1116] Thus, it can be seen as an example of where the law deviates from the strict position that "no person is presumed to do what (…) must certainly be attended by some pecuniary loss",[1117] tacitly acknowledging the social realities of gift giving above and beyond that of a mercantile lens.[1118] In this we can see the law bending to enforce moral considerations. That said, the courts will still require a high degree of proof of donation. In *Hann v Howatson*[1119] (relying heavily on *Paterson v Paterson*)[1120] the Outer House found there must be clear, written

[1112] Gordon "Donation" para 8.
[1113] Married Women's Property (Scotland) Act 1920 s 5.
[1114] *Hann v Howatson* [2014] CSOH 69 which relied heavily on *Paterson v Paterson* (1893) 20 R 484.
[1115] Bankton *Inst* I.9.2. However, Bankton also held that a remuneratory donation could potentially be revoked for ingratitude if it exceeded a "just recompense" because to the extent it did it counted as a pure donation: I.9.14. Revocation for ingratitude is no longer recognised in Scotland.
[1116] *Ibid*; Balfour's *Practicks* p 160 (c XXI); and Erskine *Inst* III.3.91.
[1117] Erskine *Inst* III.3.92.
[1118] There are related provisions in other jurisdictions that also acknowledge the special nature of remuneratory donations. For instance, in Louisiana there are "clawback" provisions for donations where a deceased's estate fails to meet the expected forced heirship portion but remunerative donations are expressly excluded from this: Louisiana CC Art 1510.
[1119] [2014] CSOH 69.
[1120] (1893) 20 R 484.

agreement which was irrevocable to demonstrate that the donor had undertaken a binding *inter vivos* act. Had no such writing been available, both cases would have failed.

8.8 Despite this weakening of the presumption against donation, it is not clear that it will be completely displaced. In *Lamont v Burnett*,[1121] an offer to purchase the Royal Hotel in Crieff for £7000 also contained the words "I will be pleased to give to Mrs Lamont[1122] a sum not less than one hundred pounds as some compensation for the annoyance and worry of the past few days, and for her kindness and attention to me on my several visits to Crieff". Given that the money was stated to be as a compensation for previous kindness and good deeds, this is a paradigmatic example of a remuneratory donation, albeit constituted as a third-party right. However, Lord Traynor noted that should this promise not be contained in the same document as the offer to purchase the hotel it would "not amount to an obligation for the fulfilment of which an action would lie".[1123] The other judges concurred that the obligation to pay £100 was a part of the price made in the offer of purchase rather than an independent donation. Lord Traynor's words indicate that the mercantile and onerous nature of the overall transaction made the promise enforceable, indicating that if it were gratuitous it would not have been.

d) The donation is not made to disguise an exchange

8.9 The difficulty that arises with remuneratory donations is the extent to which the donation and the donee's previous good act or deed are effectively counterparts of each other. If there is a high degree of mutuality, then both the preceding good deed and the remuneratory act will be considered part of an exchange rather than a donation. For instance, in *M v S*[1124] Lord Ericht cast doubt on whether a conveyance of a flat made by a son to his father "for love, favour, and affection" was really a gift,

[1121] *Lamont v Burnett* (1901) 3 F 797; (1901) 9 SLT 39.
[1122] Mrs Lamont was the wife of the seller.
[1123] (1901) 3 F 797 at 800.
[1124] [2017] CSOH 151.

as the father made an apparently remuneratory grant of money which the son put towards obtaining a discharge of a standard security over the property.[1125] As the disposition indicated a gift, the transfer was exempt from Stamp Duty Land Tax, which suggested an element of fraud to avoid paying the tax. In this instance, Lord Ericht decided not enough evidence had been led to conclude that the transaction was indeed a sale, and therefore fraudulent. Additionally, the close relationship between the transferor and transferee (son and father) made mutual gift giving more plausible than it would have been if the parties had not been related or otherwise socially strongly connected.

8.10 The case illustrates that the difference between remuneratory gifts and sale can be difficult to ascertain. Elements which may determine whether there has been remuneratory gift might include:

i) the relative reciprocity or equality between the gift and the deed for which it was granted, and whether this implies exchange;

ii) the time-period between the gift and the deed for which it was granted;[1126]

iii) whether the relationship between the parties is one where expectation of reciprocal action beyond normal social practice can be inferred (which would also imply exchange);

[1125] *Ibid* at para 16.

[1126] Among sociologists, it has been argued that all gifts are part of a "gift exchange" which would render most gifts apart from an initial transfer "remuneratory" to an extent: "the notion of time in relation to acts of giving and receiving is significant and implies the further notion of credit" R Titmuss *The Gift Relationship: From Human Blood to Social Policy* (Reissue, 2019) p 55. See also: J B Baron "Do We Believe in Generosity?: Reflections on the Relationship Between Gifts and Exchanges" (1992) 44 Fla LR 355-363; B Schwartz "The Social Psychology of the Gift" (1967) 73 *American Journal of Sociology* 1-11. However, these theories are based around observations of social practice in general rather than considering the direct connection between the original good act and the remuneratory gift. Therefore, the time between the two acts may be relevant in determining the legal characterisation of the particular gift.

iv) whether the parties were agreed as to the gratuitous nature of each of their undertakings; and

v) whether the parties' characters reflect a possible tendency to act in a less than honest manner by disguising an exchange as reciprocal donations.

8.11 This is not intended as an exhaustive list, but instead sets out some considerations that might prove helpful to separate the wheat of a remuneratory donation from the chaff of a disguised exchange. Nor is the list meant to be cumulative. It could be that any one of these elements singly may be the deciding factor as to whether the transaction is truly a gift.[1127]

8.12 There are other actions which may resemble a remuneratory donation. Indeed, there is a clear parallel with the duty to repay found in *negotiorum gestio,* as a gestor is performing an act of benevolence and the requirement of reimbursement, although being a legal one, has its foundations in morality borne from equity.[1128] The key difference is that in *negotiorum gestio* the gestor may reclaim no more than their actual expenses; the amount of recovery is limited. However, a remuneratory donation has potentially no limits, as it is based entirely upon the will of the donor. What is not clear is whether a remuneratory donation made in respect of a previous good deed could potentially bar a claim of *negotiorum gestio*. It is unlikely, due to the legal requirement for reimbursement in monetary terms under *negotiorum gestio*. That said, the courts may wish to consider any significant gift made to a gestor in respect of their good deed when quantifying a claim.

[1127] In some jurisdictions, for instance France, a "disguised" or sham gift is used as a legitimate vehicle to avoid strict gift-giving formalities: Dawson *Gifts and Promises* p 74. This is not the case in Scotland.
[1128] Kames *Equity* I.180; Stair I.8.2; Bankton *Inst* I.9.24.

e) <u>A donation can be remuneratory although the previous good deed was performed by a person other than the donee</u>

8.13 The final issue issue regarding remuneratory donations is whether they must be made to the same person who originally performed the good deed. In recent times there has emerged a practice of "paying it forward", where a person who performs an act of generosity to someone asks the recipient to in turn do something good or generous towards another.[1129] For example, Carlos discovers when purchasing apples in a supermarket that he does not have his wallet on him. Donalda, who is behind Carlos in the queue, pays for the apples instead. When Carlos asks for Donalda's details in order to repay her at a later time she declines, instead asking him to do something generous for someone else when he has the chance. Later in the week, Carlos is in a restaurant and notices a mother and child sharing a piece of cake. Remembering Donalda's request, he goes to the counter and pays for the cake, asking the server to pass on the same message Donalda gave him.

8.14 In this scenario, is Carlos' purchase of the cake a remuneratory donation made due to a moral obligation towards Donalda, or is Donalda's gift merely a motivating factor and the donation a pure one? The action is "gratuitous" as per the definition offered in Chapter 2,[1130] as all this requires is a predominantly unselfish motive. The two donations are connected, but given the parties to the second donation are different, is there sufficient proximity to categorise it as "remuneratory"?

8.15 The position is unclear, but if a remuneratory donation arises from a donor's moral obligation then it is arguable that the identity of recipient is unimportant. Therefore, there should be no problem with categorising the donation as "remuneratory" as the first donation provides this moral duty. This position may be

[1129] See: D Cellitti "Pay it Forward and Random Acts of Kindness" available at: https://advisor.morganstanley.com/dominic.cellitti/documents/field/d/do/dominic-cellitti/PhilanthopyPart8_v3.pdf.
[1130] See above paras 2.21-2.40.

even stronger when the parties are not strangers. For instance, Eric allows Francesca to stay in his house rent-free for two years. Years later, Francesca, out of gratitude for Eric's previous generosity, hosts his daughter Greta. Here there is a direct link between the two good deeds and the moral obligation could be held to originate in the first while executing the second, thus allowing it to be categorised as remuneratory.

8.16 It should also be noted that a remuneratory donation can be either a J1 or a J2. For instance, in the above example Francesca could have made a binding undertaking when leaving Eric's house to host Greta. Alternatively, the act of hosting Greta could simply be a J2. As discussed elsewhere in this thesis, the main difference between the two is the legal consequences and rights created by each type of act.[1131]

3) FURTHER ELEMENTS AND CONSEQUENCES OF A REMUNERATORY DONATION

a) Warrandice

8.17 Stair noted that Craig thought remuneratory donations implied a greater degree of warrandice than pure donations, as they are made for "gratitude or merit" and thus a guarantee against prior deeds should be implied.[1132] However, Stair dismisses this position on the ground that, as they follow from no "civil obligation (…) which could receive legal compulsion", remuneratory donations also bear no more than simple warrandice.[1133] This is partly because, as noted above, the gratuitous nature of the act means the donee will have suffered no loss from the donor's prior

[1131] See Chapter 7: "Pure Donations".
[1132] Stair II.3.46.
[1133] *Ibid*.

actions or obligations which the donor may be called upon to fulfil.[1134] However, posterior deeds of the donor are protected against because such actions would amount to fraud.[1135]

b) The transaction is not normally reducible

8.18 Despite a remuneratory donee only being protected by simple warrandice, as a result of the quasi-bilateral nature of a remuneratory donation the transaction is not normally, or easily, reducible. This is because the law recognises that the donee is not wholly *lucratus*, since the donee has already given or performed something for which the gift was given in return.[1136] As such, even if the donation were one which for some other reason would normally be reducible, perhaps because of a reserved right of revocation, the remuneratory nature would prevent this. So, in *Cuthill v Burns*[1137] it was held that a gift of £1500 by a wife to her husband was not revocable as her husband had conveyed the fee in a house to her which made the donation remuneratory. This is despite that, at the time, donations *inter virum et uxorem* were generally revocable.

c) Writing?

8.19 It has been noted above[1138] that, although remuneratory donations are more likely to be upheld by the courts than pure donations, there still needs to be strong evidence of the *animus donandi*. In *Hann v Howatson*[1139] and *Paterson v Paterson*[1140] this was evidenced by writing. However, whether writing was essential for constituting the obligation or merely serves a separate evidentiary function is

[1134] See above para 7.55.
[1135] *Ibid* and above para 7.60.
[1136] Bankton *Inst* I.9.2.
[1137] *Cuthill v Burns* (1862) 24 D 849.
[1138] See above paras 8.7-8.8.
[1139] [2014] CSOH 69.
[1140] (1893) 20 R 484.

unclear. It should be noted that in both *Hann* and *Patterson* the donor was deceased and the contest was between the putative donee and an heir regarding a lifetime undertaking. The situation may be different when the donor is alive and capable of speaking to their intention.

8.20 Additionally, whether a remuneratory donation is a "gratuitous, unilateral undertaking" in terms of the Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii), and thus statutorily requires to be in writing, is unclear. The quasi-bilateral nature of the donation may negate the "unilateral" condition. Furthermore, given that the donation is made for a previous good cause, this might undermine its gratuitousness.[1141] That said, a narrow interpretation of "gratuitous" might be limited to "no prior legal obligation" and, as the donee is under no prior legal obligation to perform, a J1 remuneratory donation would require writing per the statute. Nonetheless, given that the law is traditionally more accepting of remuneratory donations than other categories of donation, if there were a question on this point before the courts it may be that a broader conception of "gratuitous" is employed to waive the need for writing. This is in part because some recompense, even if not technically required, would be "equitable", as then neither party would be enriched at the expense of the other.[1142]

4) CONCLUDING REMARKS

8.21 Remuneratory donations are a curious category. They resemble pure donations, but the quasi-bilateral nature of the act means that some significant features of pure donations are tempered if the donation appears to be made in respect of a moral obligation. As has been demonstrated in this chapter, one such

[1141] In Hogg's analysis of "gratuitous" (Hogg *Law and Language* p 180-181), a remuneratory donation would be gratuitous in that the donee has no further obligation to perform to the donor, nor does the donor expect any reciprocal performance. However, that there has been a prior performance would exclude "gratuitousness" in one sense. See above paras 2.21-2.22.

[1142] "The intrinsic normative force underpinning Scots law means that the law itself is the embodiment of equity": D Carr *Ideas of Equity* (2017) para 2.03.

feature is the displacement of the strong presumption against donation. Connected with this is the heightened irreducibility of a remuneratory donation.

8.22 It has been highlighted that should there be too great a degree of mutuality in a remuneratory donation it will instead be considered to be an exchange. The distinction between the two can be fine and the boundaries between them not always clear. This is in part because there is regrettably little case law that is concerned with this type of donation and this is an area that would benefit from further exploration.

CHAPTER 9:

Conditional Donations

1) INTRODUCTION

9.1 Despite the abolition of donations *mortis causa* by the Succession (Scotland) Act 2016,[1143] the legislation is clear that it is still competent to make a conditional donation.[1144] This could even include a donation with the same conditions attached as a traditional donation *mortis causa*, as the effect of the statute is merely to prevent these conditions arising automatically.[1145] Furthermore, general academic thought seems to support the legitimacy of conditional donations "provided that the donee cannot be compelled to fulfil the condition".[1146] In light of this recognition, this thesis adopts the wider category of "Conditional Donations" for its updated classification to allow for a donor's broad discretion regarding the conditions that may be attached to a gift.

9.2 The key characteristics of a conditional donation are:

a) The donation is made subject to a condition;

b) The condition can be future, suspensive, or resolutive;

c) The condition must be clear and understood by both parties or the donation will be presumed a pure donation;

[1143] Succession (Scotland) Act 2016 s 25(1). See also above paras 6.29-6.35.
[1144] Succession (Scotland) Act 2016 s 25(2).
[1145] *Explanatory notes* to the Succession (Scotland) Act 2016 para 76.
[1146] Whitty "Unjustified Enrichment" para 282.

d) If the condition is contingent on an event that is not certain to happen, the event must be clearly definable; and

e) The donee's title can only continue to be affected by a condition after transfer if the donor has expressly reserved a right or power to do so, and only if the condition relates to a right or potential residuary benefit for themselves.

9.3 These characteristics are general and apply to both J1 and J2 donations. It could be argued that all conditional donations are a type of J1. This is because of the abstract nature of property transfer, where all that is required to effect a conveyance is the *animus transferendi* of the donor and corresponding *animus acquirendi* of the donee irrespective of any underlying *causa*.[1147] Moreover, as a matter of property law, it is not certain that it is competent to make a transfer where the transferor can reserve a right to reclaim at will, as this would be contrary to the unitary notion of ownership in Scots law[1148] and undermine the doctrine of publicity that allows free and easy movement of goods within a polity from which the presumption of ownership based upon possession arises.[1149]

9.4 Yet, practice and history suggest the donum may be transferred subject to a condition reserving the donor's right to revoke.[1150] That said, this may not have the effect of reducing the transfer automatically, stripping the donee of title to the donum. Instead, such a condition would negative the underlying donative intent which provided the *causa* for the conveyance. As a result, the donor would gain a right to retransfer of the donum.[1151]

[1147] At least, for corporeal moveable property: see above para 7.69 and fn 1029.
[1148] Reid *Property* para 6. If the condition is resolutive, this may empower the donor to bring an action for reconveyance: Bankton *Inst* I.9.17.
[1149] *Prangnell-O'Neill v Lady Skiffington* 1984 SLT 282
[1150] This was formerly the case with donations *mortis causa* where a right to revoke was implied (see above paras 6.11). It appears the Scottish Government continues to recognise the power of a donor to reserve a right to revoke in conditional donations: *Explanatory Notes* to the Succession (Scotland) Act 2016 no 76.
[1151] Bankton *Inst* I.9.17.

9.5 Following the same format used when examining other categories of donation, this chapter first explains the key characteristics of conditional donations before turning to identify the legal consequences in both a J1 and J2. General provisions regarding warrandice are not considered, as the position is the same for conditional donations as it is for pure donations. Given the variety and complexity of conditional obligations generally in Scots law, acute consideration is given to determining the effect each type of condition has regarding suspension of either the formation of the *animus donandi* (and therefore the coming into existence of the J1) or merely of the performance of the obligation. This analysis in turn can help to determine whether any transfer of possession of the donum is intended to transfer title to the donee subject to a right to revoke or instead retain ownership for the donor until a condition is met.

2) KEY CHARACTERISTICS

a) The donation is made subject to a condition

9.6 A condition is a contingency affecting the nature of the right, or power, bestowed upon the donee through the donative act. The condition can variously: suspend the coming into existence of the donation;[1152] suspend the point at which a donation becomes enforceable;[1153] suspend the point of transfer; or cause the extinction, and associated rights generated by it, of the donation.[1154] A donor can attach almost any condition to a donation. Thus, even a condition permitting the donor to revoke a donation is possible.[1155] However, this is subject to the usual

[1152] D Sellar "Promise" in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* vol 2 (2000) p 253.
[1153] Hogg *Promises and Contract* p 32.
[1154] Gloag *Contract* p 272.
[1155] Erskine *Inst* III.3.91 states that "no deed, though gratuitous, is revocable (…) if a faculty to revoke be not reserved in it" from which can be gleaned that it is possible and legitimate to reserve such a right. Additionally, the Succession (Scotland) Act 2016 s 25(2) also acknowledges this: *Explanatory Notes* to the Succession (Scotland) Act 2016 note 76.

caveats pertaining to most juridical acts: that they be possible, legal, and not contrary to public policy.[1156] That said, the condition cannot be that the donor will receive any benefit in compensation for the donation. This would make the transaction onerous and negate any donative intent.

9.7 Despite the general importance of donative intent[1157] to all categories of donation, it is perhaps more important for it to be drawn clearly for a conditional donation. This is because the condition may rely on some sort of act or performance by the donee, albeit that it cannot be an act or performance which will directly benefit the donor, nor one which the donor can compel the donee to perform. Nonetheless, this performance may give the donation an appearance of a contract and thus be miscategorised as an exchange, meaning the protections the law of donation normally provides to a donor and donee (such as the presumption against donation) are not applied. Thus, donative intent must be obviously manifest in a conditional donation.

9.8 As an extension to this, it could be argued that motive plays a more significant role in determining whether the *animus donandi* is properly formed than with other categories of gift.[1158] If a conditional donation appears to be hiding a different intent, then it will be vulnerable to being disregarded. In *Yule v South Lanarkshire Council*,[1159] a woman transferred her house to her granddaughter in fee for "love, favour, and affection" while reserving a liferent for herself. This took place a year before an assessment by the Council with regards to the woman's eligibility for support. If the house were in her name, its value would form part of her assets and take her above the threshold from which she would be required to make financial contributions.

[1156] For instance, in trust law. An example of this being applied can be found in *McCaig v University of Glasgow* 1907 SC 231.
[1157] See above paras 3.16-3.33.
[1158] See above paras 2.40 and 3.19.
[1159] (2001) 4 CCLR 383, also discussed above at paras 7.17-7.18.

9.9 It was held that the reservation of a liferent amounted to a condition that rendered the donation a sham transaction: it was merely an attempt to divest herself of assets on paper alone. Her day-to-day position was unchanged as she could continue to reside in the property as she had done before. As such, the value of the house was included in the calculation of her assets. Thus, if a condition has the effect of maintaining the original positions of the donor and donee, with the donor retaining primary control over the donum, it may be more susceptible to be set aside due to lack of true donative intent.[1160]

9.10 Furthermore, depending on the type of condition, the existence of the *animus donandi* may be contingent on that condition being met. Should the condition fail, the *animus donandi* falls away, or at least will not be considered to have been completely formed.[1161] As a result, the donation will be susceptible to claims of unjustified enrichment.[1162]

9.11 As noted above,[1163] although the condition can be regarding almost anything the donor wishes, the donee cannot be compelled to fulfil it.[1164] This is because part of the gratuitous nature of a donation is that only one party becomes comes under an obligation to perform.[1165]

b) <u>The condition can be future, suspensive, or resolutive</u>

9.12 In accordance with the general taxonomy of conditions in Scots law, a condition can be future, suspensive, or resolutive. First, where the condition

[1160] It is perhaps difficult to reconcile the decision in *Yule* with other frequently used legal vehicles, such as trusts where the truster names themselves as beneficiary and retains a power of direction in the trust deed, which would not be subject to the same considerations. It may be the case that because the defendant was a public authority the court took a narrower approach than they would in other circumstances. *Forrest-Hamilton's Trustees v Forrest-Hamilton* 1970 SLT 338 would support this theory.
[1161] R Jenkins "Gifts, Donations and Donor Intent in the Canon Law of the Catholic Church" (2012) 72 Jurist 76.
[1162] N Whitty "Unjustified Enrichment" para 2.
[1163] See above para 9.7.
[1164] Whitty "Unjustified Enrichment" para 282.
[1165] See above para 2.40.

concerns events which are certain to happen, even if the date at which this will occur is unknown, it is a future condition.[1166] For example, the condition may be the death of a person. For the purposes of this thesis, this type of conditional donation will be termed *CD(f).* A *CD(f)* is binding upon the donor at the point of creation.[1167]

9.13 Second, there are obligations which are contingent on an uncertain event occurring. These types of condition may be either suspensive or resolutive.[1168] If suspensive, the effect of the condition may be either that performance of the obligation is not due until the condition is fulfilled, or to suspend the obligation coming into existence prior to the condition being fulfilled.[1169] With the former, the donor is bound upon creation although cannot be compelled to perform until a later date. This thesis terms this type of conditional donation a *CD(sp)*. However, if the condition suspends the creation of the obligation the donor is not bound until the condition is fulfilled. This type of conditional donation is termed *CD(so).*

9.14 Whether a suspensive condition is a *CD(sp)* or a *CD(so)* will depend heavily on the individual circumstances under which the donation is undertaken and the likelihood of the event occurring.[1170] For example, a person undertakes to give a large amount of money to an unborn child on the condition that the child is given a specific middle name. If the child is *in utero* then this might be seen as a *CD(sp)*, as the birth of a child to which the donor is bound appears to be forthcoming.[1171] However, if the person who would be the parent is not pregnant, in a committed

[1166] Report on *Third Party Rights* (Scot Law Comm No 245, 2016) para 2.27.
[1167] This is similar to the Roman concept of "postponed" stipulations where the promisor came under an obligation at the time of making but the promisee could not raise an action until the specific date: Justinian *Inst* III.15.
[1168] Report on *Third Party Rights* (Scot Law Comm No 245, 2016) para 2.28.
[1169] J M Thomson "Suspensive and Resolutive Conditions in the Scots Law of Contract" in A J Gamble (ed) *Obligations in Context: Essays in Honour of Professor D M Walker* (1990) p 127.
[1170] If there is uncertainty regarding the likelihood of an event ever occurring then the obligation will not be immediately prestable by the donee: *Smith v Stuart* [2010] CSIH 29; 2010 SC 490.
[1171] This is closely related to the *nasciturus* rule: that an unborn child in utero can be the beneficiary of obligations as if they were already born: Erskine *Inst* III.1.8; W W McBryde *The Law of Contract in Scotland* 2nd edn (2001) para 10.16; R Paisley "The Succession Rights of the Unborn Child" (2006) 10 Edin LR 28, 31. The scenario could be conceptualised as having two conditions: the birth of the child and the name. However, the condition only suspends the performance until both conditions are met. Notably, this is also a situation where the condition is an act of a third party rather than the donee.

relationship, or considering parenthood the chances of a child being born are more remote and the donation more likely to be a *CD(so)*.

9.15 Finally, if the condition is resolutive, upon its occurrence the obligation will be extinguished.[1172] Therefore, the obligation will exist until this happens. This type of condition only applies where there is an ongoing performance of the donation until the event occurs, for instance a periodical payment. The resolutive event can be either certain or uncertain to happen. If it is certain, this is termed *CD(rc).* An example may be a person undertaking to give another a bunch of flowers once a week for a year. In contrast, if the point at which the resolutive event may occur is uncertain, this is a *CD(ru)*. For instance, a mother pays for a son's driving lessons until he passes his test. However, where the conditional donation is a continuing obligation to make ongoing payments or transfers, the end point must be definable or ascertainable or each performance of the donation will be considered an individual, not continuing, act.[1173] This is because the condition must be clearly delineated to facilitate certainty in transactions. For example, the end point might be "when you leave university" which, while not a fixed date, is an identifiable occasion.

9.16 Although a pure J1 binds the donor unilaterally at the point the donor commits to the gift,[1174] and thus cannot be revoked, the same default rule does not necessarily apply to a conditional J1. Depending on the type of condition, the donor may be able to resile at will prior to the performance. This is dependent on when the obligation is held to come into existence. A donor is bound upon making a *CD(f)*, *CD(sp)*, a *CD(rc)*, and a *CD(ru)*, even if the condition is uncertain to occur. This is because it is not the performance itself (or cessation of performance) which is conditional but rather the time at which performance must be rendered or ceased.[1175] However, a donor is not bound at the time of making a *CD(so)* because the intention

[1172] *Balfour's Practicks* p 160 c. XX; *Houston v Lyle* 1507.
[1173] *Masters and Seamen of Dundee v Cockerill* (1869) 8 M 278; *Robertson (Wright's Trustee) v Wright* (1873) 1 R 237. For further discussion on this point see below at paras 9.38-9.43.
[1174] See above paras 7.19-7.30 for discussion of the nature of the bond tying the donor at each stage of the execution of a pure donation.
[1175] Hogg *Promises and Contract* p 31.

is that the obligation should not come into force (and thus they should remain free to rescind) until the condition is met.[1176]

9.17 A good test to ascertain the type of conditional donation, and therefore when the donor is bound, may be to ask whether the donation is qualified with an "if" or a "when". For example, if the donor states "I will give you *x* <u>if</u> you attend university" the inference might be that this is a *CD(so)* because the language suggests that the event is uncertain to the degree that the donor does not intend to be currently bound. However, if the donor states "I will give you *x* <u>when</u> you attend university" could more likely signal a *CD(sp)* as the language indicates the donor anticipates the event with some certainty, and therefore intends to be presently bound. The following are possible examples of each of these types of condition:

1) Arwen undertakes to give Boromir £25 the following Sunday. As this is an event in the future which is certain to happen (the arrival of Sunday), this is an example of *CD(f).*

2) Celebrian binds herself to give Denethor her car when his horse dies. This is a future event, the exact date of which may be uncertain but is sure to happen. This is also a *CD(f).*

3) Eowyn undertakes to give Frodo her ring when they reach Mordor. The parties are journeying together and Eowyn currently has possession of the ring. There are no other conditions which may affect her liability to make the transfer. This is a *CD(sp).* That the pair may not reach their destination is not relevant as all suspensive conditions are to an extent uncertain.

[1176] Discussion Paper on *Third Party Righst in Contract* (Scot Law Comm, DP no 157, 2014) para 2.8; J M Thomson, "Suspensive and Resolutive Conditions in the Scots Law of Contract" in A J Gamble (ed) *Obligations in Context: Essays in Honour of Professor D M Walker* (1990), pp 126-129. McBryde suggests that there may be instances where the coming into force of the obligation is suspended but nonetheless the creator cannot resile: McBryde *Contract* paras 5.35-5.40. Detailed discussion of this is beyond the scope of this thesis but it is suggested here that, unless expressly stated otherwise, a donor should be able to rescind from a donation subject to a condition which suspends the constitution of the obligation at any time before that condition is met. This would be subject to the operation of any rules on personal bar, see: E Reid and J Blackie *Personal Bar* (2006) paras 3-12 – 3-25.

4) Gandalf undertakes to give Haldir a ring on the condition he accepts it in writing. Although it is the contention of this thesis that all donations must be accepted to be complete,[1177] the condition here is the explicit requirement that acceptance is expressed in writing. This is a *CD(so)* as it can be inferred that Gandalf does not intend to be bound until such acceptance is made.

5) Kili undertakes to give Legolas a silver arrow should he have a child. As fatherhood is not impending, this should be considered a *CD(so).* This is because the occurrence of the condition is uncertain and may never occur. However, if Legolas' child were currently *in utero* then the J1 would be better characterised as a *CD(sp).*

6) Merry undertakes to pay for Nali to stay at the Prancing Pony until Sunday. This is a *CD(rc)* as the obligation terminates upon a specific date.

7) Oin undertakes to pay for Pippin to stay at the Prancing Pony until such time as all Orcs may be gone from Middle Earth. This is a *CD(ru)* as it is uncertain whether the event will ever occur, or even if it does, when.

9.18 The table below shows indicates the effects of different conditions upon the creation and extinction of a donation. Primarily, these will be more applicable to a J1 donation. However, as is discussed in the third part of this chapter, the type of condition may also have a bearing on a J2, if only because the failure of a condition may give rise to a claim in unjustified enrichment.[1178] As can be seen, only a *CD(f)* is not susceptible to extinction through either occurrence or failure of the condition, and only in a *CD(so)* does the remain donor unbound until the occurrence of the condition.

[1177] Although, this can be inferred from the donee's behaviour: see Chapter 5 "The non-acceptance rule - a common mistake?" and above para 7.45.

[1178] Arguably, in absence of the donee's rejection only a conditional donation can be the subject of an unjustified enrichment action on the grounds of failed donation, as it is not so much the failure of the donation *per se* but the failure of the condition which makes the transaction lack a just cause for the transfer.

Condition	Binding upon creation	Binding upon occurrence of condition	Extinguished on occurrence of condition	Extinguished through failure of condition
CD(f)	✓			
CD(sp)	✓			✓
CD(so)		✓		
CD(rc)	✓		✓	
CD(ru)	✓		✓	

c) The condition must be clear and understood by both parties or the donation will be presumed to be a pure donation

9.19 If a donor wishes to make a conditional donation, the condition must be clearly expressed to the donee in advance.[1179] If the condition is not obvious, then the donation will be presumed to be pure, because the donee's acceptance must reflect the understanding of the precise nature of the gift.[1180] This is to prevent claims for recovery being brought against the donee in the future based on a condition the donee was unaware of. In any case, the addition of a condition prevents the donation

[1179] Erskine *Inst* III.2.45.

[1180] This stems from the principle that duties cannot be imposed on a person against that person's will, despite a condition being unable to compel performance of a donee: McBryde *Contract* para 10.10; Gloag and Henderson para 5.06.

being “simple and pure”[1181] which (should the non-acceptance rule be adhered to) is the only instance in which acceptance would not be required.

9.20 It may also be the case that a donee wishes to attach a condition to acceptance of the gift. For example, a gift of crockery to a person moving into a rented property might be accepted on the condition that there if there are plates already *in situ* the donee will not take the gift. In such circumstances, the donor must acknowledge the condition and, should it fail or not be met, the donee cannot be compelled to accept a subsequent transfer following on a J1.

9.21 This characteristic has been framed as a presumption and can therefore be displaced by evidence to the contrary. It could even be the case that the circumstances, or customs, surrounding the giving of a gift may imply the condition. For example, a gift given to a couple as a wedding gift can be conceived as a conditional donation which depends on the wedding taking place, due to the gift being made for a specific occasion. If the wedding does not occur, the condition will not be met and the gift must be returned.

d) If the condition is contingent on an event that is not certain to happen, the event must be clearly definable.

9.22 This criterion is closely related to the general requirement of clarity for donations.[1182] The possibility of the event may be remote but the circumstances in which the condition may occur must be clear to enable its identification. For example, a *CD*(*ru*) may involve a transfer of money from A to B, with A saying “you may keep this on the condition that you return it should I become insolvent”. The likelihood at the time of the transfer of A’s insolvency could be remote. However, as “insolvency” has specific legal definitions,[1183] the event which triggers the condition is clearly

[1181] Stair *Inst* I.10.4.
[1182] See above para 3.23.
[1183] Or at least “apparent insolvency” does: Bankruptcy (Scotland) Act 2016 s 16.

identifiable. Thus, should A become insolvent, the condition which terminates the donation is met and B must therefore retransfer the money.

9.23 A comparison of a condition not certain to happen can be drawn with third party rights, particularly the case of *Love v Amalgamated Society of Lithographic Printers of Great Britain and Ireland*.[1184] The members of the society's scheme had an unrestricted power to withdraw or alter benefit rights that dependants of scheme members were entitled to. Should this have happened, the resolutive condition would have been fulfilled and the society's obligation come to an end. However, as the possibility for the scheme to be amended was open-ended, whether it would happen was uncertain.

9.24 The reason this may be important is because it leaves open the possibility that a person may be bound by a conditional obligation for a significant period of time, subject to general prescriptive limits for obligations.[1185] Additionally, if the likelihood of the event occurring is very uncertain, it may mean that the donor is held not to be under an obligation until it happens, or at least until it becomes more likely to happen. For example, a person promises another £1000 if the other climbs Mount Everest. If the potential donee is unfit and generally sedentary it may be held that there is no binding obligation upon the donor unless and until the donee starts to train for the trek. This may mean that the type of conditional donation can change alongside developing circumstances. It may be that initially the donation could be classed as a *CD(so)* but transform into a *CD(sp)* if the donee takes steps to fulfil an otherwise unlikely condition. Thus, the classes of conditional donation are not static.

[1184] 1912 SC 1078. Third party rights can often be considered a type of donation, as the third party, not being party to the contract from which they arise, comes under no obligation from the underlying agreement. Thus, the benefits they receive are gratuitous as defined above in para 2.40**.**

[1185] Typically five years for obligations unless relating to land: Prescription and Limitation (Scotland) Act 1973 ss 6 and 8.

e) <u>The donee's title can only continue to be affected by a condition after transfer if the donor has expressly reserved a right or power to do so, and only if the condition relates to a right or potential residuary benefit for the donor.</u>

9.25 This element of a conditional donation is purely personal. It does not affect the initial transfer, nor does it mean that should the donor revoke the donation title will automatically revert to them. A reconveyance will be necessary.[1186] Like the previous two key characteristics it reflects the need for a condition to be clearly expressed[1187] and preferably documented, ideally contained within any original deeds pertaining to the transfer.[1188] Without this, the courts have been reluctant to acknowledge any residual right of the donor to the donum.

9.26 It could be argued that where the donor wishes to reserve a right of revocation, due to the conditional nature of the transfer the donation is not unilateral – either in the sense identified earlier in this thesis as binding only on one party[1189] or constituted by one party alone. Instead, it is a gratuitous contract. It is contractual because the donee must accept and acknowledge a duty to return the gift if the condition is met and thus comes under an obligation as a result of the donation. However, there is no requirement of consideration for the gift and therefore is gratuitous.[1190]

9.27 If a conditional J1 is considered a gratuitous contract, one of the practical implications of this would be to negate the need for it to be in writing. However, there may be problems identifying whether the parties are in agreement and the idea of reciprocity may play a significant factor. It seems the courts are reluctant to characterise gratuitous acts as contracts in Scots law. In *Gibson v Gibson*,[1191] the pursuer (the first defender's mother) had sold her daughter and partner a house at

[1186] Bankton *Inst* I.9.23.
[1187] Above para 9.19; *M'Gibbon v M'Gibbon* 1852 SC 605.
[1188] *Gibson v Gibson* [2010] 8 WLUK 51.
[1189] See above paras 2.41-2.46.
[1190] See above para 2.40.
[1191] [2010] 8 WLUK 51.

£23,000 undervalue. The pursuer argued that the defenders had a contingent obligation (or *CD(so)*) to repay her £23,000 should they at any point sell the house to a third party. The Sheriff Court did not accept this argument, in part because the Sheriff Principal stated that if there were to be an effective *CD(so),* as a unilateral gratuitous obligation it needed to be in writing.[1192] Thus, the claim failed.[1193]

9.28 This is not entirely satisfactory. For one, the Sheriff focused on the unfulfilled second act as the gratuitous one. The initial sale at undervalue could (and should) have been seen as a conditional donation,[1194] given the relationship between the parties. As such, the focus on the disputed gratuitous act being that which the daughter was alleged to have undertaken is arguably misplaced. If the Sheriff had instead concentrated on the pursuer's donation – the £23,000 discount on the original sale price - subject to a resolutive condition (a *CD(ru)*) of the defenders selling the house to a third party, then the contentious issue could have been characterised as a gratuitous contract.

9.29 It would be gratuitous in the sense that the defenders were being given "something for nothing" through the discount (this, it seems, was given freely).[1195] Yet, because they purchased the property for undervalue, they engaged in some sort performance by accepting the donation. Moreover, as the donor thought she was reserving a right through a resolutive condition, there was potentially an obligation undertaken by the recipients (which could possibly be classed as a remuneratory *CD(so)*) albeit with no immediate, or even essential, performance unless the condition occurred. This would have given the whole transaction a more contractual

[1192] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).
[1193] An alternative claim was made based on failed contract, but this too dismissed as the missives were silent on the matter and the Sheriff found that as it related to land and such ancillary part of the contract must be in writing: Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(i).
[1194] Although if any payment is made the courts can be reluctant to characterise the difference between the price paid and the true value as a gift, particularly where the purchaser is a third party: *Leslie v Leslie (No 1)* 1983 SLT 186 (discussed above paras 2.25-2.26). In this case the court did characterise the first act as at least generous but failed to categorise the type of donation it was. For an example where sale at undervalue was held to be a relevant "benefit" (although the court found it fell short of a "gift") when justifying a variation of equal sharing in matrimonial property see: *Armstrong v Armstrong* [2008] 8 WLUK 139.
[1195] E West "The Parent Trap: constitution of contracts in writing and unjustified enrichment" 2015 JR 245, 255.

flavour. As such, writing would not have been necessary regarding the condition.[1196] However, the case illustrates that the courts will be reluctant to see a gratuitous undertaking as anything other than unilateral.[1197]

9.30 There may be circumstances in which the courts will be more willing to find a gratuitous contract, for instance if the donor specifies that the donee must accept the donation explicitly. There is performance required of the donee in order for the donor to be bound, however it is not a performance which is reciprocal or benefits the donor in any way, making it gratuitous. Upon acceptance, the donee will be bound to receive the subsequent J2. However, being able to prove that a conditional donation takes the form of a gratuitous contract will be difficult. The easiest proof may be writing, rendering any ambiguities a principally academic concern.

3) EXECUTION AND LEGAL EFFECTS

a) J1

9.31 Given that conditions in conditional donations must be accepted and understood by both parties,[1198] as noted above[1199] this can be argued to render a conditional J1 a gratuitous contract. Gratuitous in that only one party comes under an obligation to perform,[1200] but contractual in the sense that both parties must be in agreement. And, as with all donations, a conditional J1 donation must demonstrate a

[1196] Interestingly, the presumption against donation was neither argued nor considered in the judgement, meaning the Sheriff upheld a donation despite the pursuer denying any *animus donandi*. Furthermore, there could have been an alternative construction of the case as one of an unfulfilled remuneratory donation which should have been more likely upheld. However, this would necessarily have been a unilateral undertaking by the defenders and required writing.

[1197] The other consideration regarding writing, that the contract was invalid as it was related to heritable property per the Requirements of Writing (Scotland) Act s 1(2)(a)(i), may have still been fatal to the claim.

[1198] See above paras 9.19-9.20.

[1199] See above paras 9.26-9.28.

[1200] See above para 2.40.

formed *animus donandi* and be delivered to be binding upon the donor.[1201] However, the condition may pertain to the point at which the *animus* will be crystallised and therefore the donor will not be bound until then. And, as already demonstrated, the condition must be clearly communicated to the donee, preferably in writing.[1202]

9.32 There is a difference between the crystallisation of the *animus donandi* and the formation of the *animus donandi*. The presence of a condition does not prevent the donor forming the *animus donandi*. Instead, it suspends the operation of the *animus donandi*. This is what is meant by "crystallisation". The crystallisation has the effect of determining the point at which the donation becomes prestable.[1203] This means that, depending on the type of condition, the donor could be bound from the point of the constitution of the J1 to perform the subsequent J2 when the condition is met. An example could be to deliver a disposition to the donee on a certain date. Alternatively, the donor could remain free to rescind up until the point the condition is crystallised. Should the donor not do so, the donor will be bound at this point. This will depend on interpretation of the particular facts and circumstances of the case.[1204]

i) *CD(f)* and *CD(sp)*

9.33 With a *CD(f)* and *CD(sp)*, the *animus donandi* is crystallised at the point the J1 is undertaken. Thus, as with a pure donation, the donor is bound and cannot rescind. However, the right of a donee to insist upon performance is suspended until the future certain event occurs.

[1201] See above paras 3.16-3.33.
[1202] See paras 9.19-9.21 above.
[1203] Similarly, under the Moveable Transactions (Scotland) Act 2023 ss 2 and 3 an assignation made subject to a condition prevents the assignee becoming holder of the claim, even if intimation to the debtor has been made or there has been registration of the document in the register of Assignations.
[1204] See paras 9.18-9.21 above.

9.34 The main issue to be considered is by when the donee's acceptance must be communicated. There are three options. First, within a reasonable time after they become aware of the donor's undertaking. Second, by the time the J1 becomes prestable. Third, within a reasonable time of the J1 becoming prestable. Authority on this is scant to the point of non-existence. Given that the donor cannot rescind, the donee's acceptance is probably not necessary before performance falls due. Thus, it would appear that the third option is most likely to apply. That said, if the donor is bound at the point the J1 is formed, the donee's power to accept is operable from then.

9.35 As a *CD(f)* and a *CD(sp)* both relate to future events, the donee cannot insist on performance prior to the time the condition occurs. Thus, even if the donee has accepted the J1, the right gained is latent and there is no patrimonial increase until fulfilment of the condition.

ii) *CD(so)*

9.36 As demonstrated in the table above, a *CD(so)* is the only type of conditional donation which is not binding until occurrence of the condition.[1205] As such, it is the only type of donation from which the donor is free to rescind, by virtue of its non-existence until the condition occurs. The effect of the condition is to suspend the crystallisation of the *animus donandi.* In other words, the donative intent is not purified (and therefore cannot be binding) until the condition has occurred.

9.37 As with any conditional donation, it is imperative that the wording clearly demonstrates that the donor does not intend to be bound until the occurrence of the

[1205] It has been argued that this type of conditional donation is not a true donation, as the *animus donandi* must relate to a present intention to be bound: MacQueen and Hogg "Donation in Scots Law" p 8. However, this would not be concomitant with the general scheme of conditional obligations in Scots law, so it is humbly asserted that a *CD(so)* can be considered a type of valid conditional donation. See also above paras 3.20-3.21.

condition. Words such as "if" could indicate that the donor anticipates that the event may not happen and as such only intends to be bound if it does.[1206]

iii) *CD(rc)*

9.38 A *CD(rc)* is where a donation is made but will come to an end at a specific time or date. It can only apply where the donation is continuing, for instance through periodical payments. If the juridical act involved a single transfer that would require to be returned after a definite time or upon the occurrence of the condition then this would constitute a loan, not a donation. In a *CD(rc)*, nothing need be retransferred when the event occurs: all transfers or payments made up to this point are valid and irreducible. The effect of the condition is that it terminates the donor's *animus donandi* and thus releases them from any future obligation to continue to make a donation.

9.39 Key to this type of donation is that no claim can be made by the donor for recovery of any transfer made in implement of the donation up until the point at which the obligation comes to an end. This is because the donor knows at the time of constituting the J1 that the donation is finite and anticipates an end-point.[1207] Thus, all transfers have a legal cause and are not reclaimable in unjustified enrichment.[1208]

iv) *CD(ru)*

9.40 Like a *CD(rc)*, a *CD(ru)* can also involve a continuing donation, such as periodical payments, but these do not have a set end date. For example, A may

[1206] See above para 9.17.
[1207] Contrast with *King v Adam* [2022] SC KIL 43, where the parties did not anticipate their living arrangements coming to an end. This is subject to ordinary principles of misrepresentation of future events, and the gratuitous nature of the act "is entitled to great weight" W M Gloag *Contract* 2nd edn (1929) p 52.
[1208] *Shilliday v Smith* 1998 SC 725 *per* Lord Rodger of Earlsferry at 727.

undertake to pay B £5 per week until Raith Rovers win the Scottish FA Cup. The event may or may not happen, so the obligation could potentially continue for all A's life. However, unlike a *CD(rc)*, a *CD(ru)* can also involve an obligation whose performance may be a single transaction which is reducible, or where performance is suspended rather than being continuing.

9.41 To illustrate this, a comparison can be made with the institution of vesting subject to defeasance in succession law.[1209] For example, Colin grants Dariel a liferent in his will leaving the fee to any children she may have. If she has no children, the fee is to go to Ethan. Upon Colin's death, Ethan is vested with a right to the fee. However, should Dariel have children, Ethan's right will be defeated by the children's superior entitlement to the fee under the terms of Colin's will.

9.42 If this were a lifetime instead of testamentary gift, Ethan's right to the fee would be continuing. However, it is subject to the condition that Dariel has no children. Should this happen, his donative right would be extinguished. Furthermore, should Ethan predecease Dariel before she has children, his conditional right would pass to his heirs, as the right is validly constituted and therefore forms part of Ethan's patrimony, albeit subject to a contingency.[1210]

9.43 As a *CD(ru)* is subject to an occurrence that is not certain to happen, the condition (if it is fulfilled) may give rise to a claim in enrichment for transfers made prior to the event. For example, Geraldine purchases a car for Harriet on the condition that Harriet does not fail her driving test. Whether Harriet will pass her test is uncertain and until she sits the driving test the condition continues. If Harriet fails her test, Geraldine may reclaim the car.[1211] If Harriet passes the test the condition is fulfilled and Geraldine loses any right to reclaim.

b) J2

[1209] See generally R Candlish Henderson *Law of Vesting* 2nd edn (1938) Chapter 6.
[1210] *Taylor v Gilbert's Trs* (1878) 5 R (HL) 217; Henderson *Law of Vesting* p 4.
[1211] *Shilliday v Smith* 1998 SC 725; *King v Adam* [2022] SC KIL 43.

i) General

9.44 Bankton is the only institutional writer to consider conditional donations,[1212] and, although his treatment was brief, it is still arguably the foremost authority on this category. Although he placed his treatment of donations within his general discussion of obligations,[1213] it appears from the passage that he predominantly had proprietary consequences in mind. Therefore, it is prudent to fully reproduce the passage here.

> "When a gift, either *inter vivos*, or *mortis causa*, is made with certain burdens and conditions, it is called a donation 'Sub Modo' i.e. for certain ends and purposes. If these are conceived by way of Conditions or Provisos, the non-implement of them makes the right of the receiver, if the giver pleases, to cease; and then he, or his heirs, may insist either personally for performance, or for the recovery of the thing, by a proper action, while it remains with the receiver.
>
> But, if these burdens are only imposed upon the person of the receiver, as that he, by acceptation thereof, becomes bound to pay 'such a sum , or perform some thing to the giver, or a third person', then a failure, in such Conditions Subsequent, does not annul the fit; unless it is expressly so provided by the same, but only affords a personal action against the grantee for performance; but these burdens or conditions must be imposed before compleating [*sic*] the gift by delivery, and not otherwise, without the receiver's consent."[1214]

[1212] Bankton *Inst* I.9.17.
[1213] See para 5.15 above.
[1214] Bankton *Inst* I.9.17.

9.45 What is clear from this passage is that Bankton, by speaking of possible recovery of a donation, envisages the condition affecting the donation after the donee has received the donum, giving it a proprietary character. The failure of the condition gives the donor the power to reduce the donation. If there has been a transfer of property, the donor can seek recovery "by the proper action". Presumably, this would be through unjustified enrichment remedies.[1215] However, this is qualified with "while it remains with the receiver", suggesting that this right to recovery is only good against the donee, not the donee's successors, making the power personal in nature.[1216] It is curious that there is no qualification as to whether the donee's successors must be in good faith or for value, suggesting that any subsequent disposition by the donee would prevent the donor reclaiming the property.

9.46 Additionally, the first paragraph mentions that the failure of a condition gives the donor the right to insist on performance. This can be seen as an implicit acknowledgement of the ability to donate through waiver of a debt, as the failure of the condition would result in the power to enforce the original obligation. In this instance the personal nature of the donor's right is evident.

9.47 The second paragraph seems more concerned with the nature of the condition itself, and raises some questions regarding the donative quality of the overall act. It appears that a donation can be made conditional on some sort of reciprocal act, which would undermine the gratuitous element key to a donation,[1217] given that an enforceable reciprocal performance would give the transaction a contractual, as opposed to donative, character.[1218] This is reinforced by the need for

[1215] Whitty "Unjustified Enrichment" para 281.

[1216] This position has been reflected in modern scholarship. Professor K Reid states "being contractual in nature, the conditions would not bind any third party to which the [donum] came to be transferred, even if the third party knew of them": K G C Reid "Body Parts and Property" in D Bain, R Paisley, A Simpson, and N Tait (eds) *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (2018) p 267.

[1217] See paras 2.21-2.40 above.

[1218] Lord President Glencorse thought that such a condition would prevent a transaction being a pure donation in the legal sense: "I cannot understand how a donation that is irrevocable can be coupled with a condition of an onerous kind. That is no donation at all. It may be a gift in a certain sense, but it cannot be what is known to

the donee's consent to the condition(s) prior to delivery of the donum.[1219] Indeed, any possible question of ambiguity surrounding the need for acceptance is removed with conditional donations: the donation is no longer "simple and pure". However, it may be that the conditional performance does not have the element of mutuality necessary for it to be seen as onerous.[1220]

9.48 In addition to Bankton's analysis, it can be seen that a condition can have two possible effects on a J2 post-transfer of possession. First, it can prevent or delay the crystallisation of the *animus donandi* and therefore the permanent investment of the donee's patrimony. Second, the failure of a condition could negate the original *animus donandi*, essentially removing the basis for the donee's ownership. Thus, it can give rise to a claim in unjustified enrichment, for instance under the *condictio causa data causa non secuta,*[1221] or possibly the *condictio ob causam finitum*.[1222]

9.49 An example of where a condition, or conditions, can suspend the crystallisation of the *animus donandi* can be seen in the (now generally defunct)[1223] practice of donations *mortis causa*.[1224] Here, possession was transferred to the donee but full ownership rights did not pass until the donor died. In fact, there were two inherent operative conditions in this form of donation. First, that the donee survived the donor. Failure of this condition automatically gave the donor the right to recover possession and prevented the donee from becoming owner, thus the donum

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the law as donation." *Macfarquhar v M'Kay* (1869) 6 SLR 500 at 500. However, this did not prevent a conditional donation being possible in the form of a donation *mortis causa* in this case. The condition of revocability inherent in a donation *mortis causa* was operative.

[1219] Erskine likewise requires the donee's consent to a condition in order for the condition to be effective, but also states that delivery does not indicate assent: Erskine *Inst* III.2.45. This reflects Hope's *Major Practicks* where "all gifts and dispositions of lands, pensiones of goods, made for service to be done ar null and reducible if the donator, being required, faylie in doeing thereof" [*sic*]: Hope Maj Prac II.7.4.

[1220] Gloag and Henderson para 10.11.

[1221] *Shilliday v Smith* 1998 SC 725.

[1222] *King v Adam* [2022] SC KIL 43. Whitty suggests that the *condictio indebiti* could also apply in some circumstances: Whitty "Unjustified Enrichment" para 286. It has been argued that there is a specific sub-category of the *condictio sine causa* to permit recovery of failed donations (the "*condictio donandi*"), particularly where one of the other *condictiones* does not apply to the particular circumstances of the donation: R Evans- Jones *Unjustified Enrichment* vol 1 (2003) paras 6.82-6.96; Whitty "Unjustified Enrichment" paras 2.81 and 2.88. However, this *condictio* has not yet been expressly applied by the Scottish courts.

[1223] See paras 6.11-6.35 above.

[1224] Gordon describes the practice as having "special implied resolutive conditions": Gordon "Donation" para 9.

did not form part of the donee's estate. The second condition was the reservation of the donor's right to revoke up until their death. This can be seen as a form of *CD(ru).* Should the donor not exercise their right to revoke, the condition expired upon the donor's death. Both these conditions suspended the crystallisation of the *animus* until after the donor's death and thus the donee's possessory right converting into full ownership.

9.50 Despite the fact a conditional donation is a valid type of donation, the courts have been reluctant to find an operative condition that would justify reduction of a gift, choosing instead to categorise a donation as pure. Thus, in the case of *Gibson v Gibson*[1225] the court held that the donation had been a pure donation as opposed to a conditional donation, preventing the donor reclaiming the gift. Nonetheless, there are occasions where recovery has been permitted. In *Thomson v Mooney*[1226] the court held that "a gift is not repayable at the whim of the donor (…) however, exceptionally, [it] may become repayable if it is made in the contemplation of a particular happening".[1227] As such, if the condition is clear – either explicitly or implicit in the circumstances in which it is made – it may serve to justify the donor's recovery of the donum.

9.51 There will be no claim for recovery where the failure of the condition is as a result of the donor's actions to prevent fulfilment of the condition. Thus, in the example of an engagement ring given by a fiancé to his fiancée in contemplation of a marriage, if the man calls off the engagement before the wedding his claim for recovery of the ring based on the *condictio causa data causa non secuta* will be barred,[1228] unless he ends the engagement due to the woman's unreasonable behaviour.[1229]

[1225] *Gibson v Gibson* [2010] 8 WLUK 51, discussed at paras 9.27-9.29 above.
[1226] *Thomson v Mooney* [2013] CSIH 115. In this case a man sought recovery of £35,000 with respect to his contribution to the deposit of a flat after his relationship with his fiancée ended and the property was sold.
[1227] *Ibid per* Lord Eassie at [10].
[1228] Gordon "Donation" para 42.
[1229] For instance, he discovers she has been having an affair. This is due to the equitable nature of enrichment law: Whitty "Unjustified Enrichment" para 80.

ii) Prescription

9.52 The final point for consideration is the point at which prescription runs for a J2 conditional donation. Generally, this is when the condition becomes operable. So, for a *CD(f)*, *CD(sp)*, or a *CD(so)*, the prescription period in which the donee is able to claim is five years from the point at which the condition is met.[1230] Where the condition is a *CD(ru)*, the time the donor's right to recovery begins to prescribe is when the condition occurs.[1231] Thus, in *Thomson v Mooney* it was found that Mr Thomson's right of recovery ran from the point he ceased to live with Ms Mooney rather than when he had provided the deposit for the property in which they formerly lived.[1232]

4) CONCLUDING REMARKS

9.53 This chapter has given a brief overview of the ways in which a condition can operate on a donation, particularly regarding the effect a condition can have on the constitution of the *animus donandi*, either by suspending its formation or its crystallisation. First, the key characteristics of a conditional donation were established, which included requirements for the constitution of a conditional donation and a taxonomy of the different types of condition that can affect a donation. Second, a consideration of the legal consequences of a donation from both an obligational and proprietary perspective was undertaken.

[1230] Prescription and Limitation (Scotland) Act 1973 s 6 and sch 1(1)(g); D Johnston *Prescription and Limitation* 2nd edn (2012) para 4.08.
[1231] *Thomson v Mooney* [2013] CSIH 115; 2014 Fam LR 15; *King v Adam* [2022] SC KIL 43.
[1232] *Thomson v Mooney* [2013] CSIH 115. Contrast this with *Virdee v Stewart* [2011] CSOH 50 where the prescriptive period ran from the point at which the pursuer completed construction on a building on the defender's land and had therefore expired.

9.54 Of particular note is the interaction between conditional donations and unjustified enrichment. Although only a brief account has been given here, this is an area which would benefit from further research.

CHAPTER 10:

INDIRECT DONATIONS

1) INTRODUCTION

10.1 An indirect donation is where a donor either makes or undertakes to make a transfer to a third party for the donee's benefit. This type of donation can relate to, for example: payment of a money debt due, or to become due, by the donee to the third party, such as rent payments; a contract constituted between the donor and third-party nominating the donee as the beneficiary, such as an insurance policy; the renunciation of a right the donor has against the third-party in favour of the donee, for instance an inheritance; or the purchase of property by a donor from a third party to be delivered directly to the donee or registered in the donee's name.[1233] This chapter will use the terminology of D to refer to the donor, T to refer to the third party, and B to refer to the beneficiary (donee).[1234]

10.2 The following are key identifying characteristics of an indirect donation:

a) The donation is made to a third party for the benefit of the donee only;

[1233] Belgian law recognises four instances of indirect gifts: third party beneficiary contracts (Civil Code art 1121); release of a debt (Civil Code arts 1282-88); renunciation of a right in favour of another (Civil Code arts 622, 784, 1043, 2180); and payment of another's debt (Civil Code arts 1236). The indirect gift frees the donor from the normal formalities surrounding other types of gift and are only applicable where made "by means of those institutions that are by nature gratuitous": Hyland *Gifts* para 828. Likewise, French law recognises indirect donations in these situations but also where the act can also be carried out for consideration: Planiol and Ripert 410-412.

[1234] A similar triangulation has been used to describe other three-party situations, for instance in unjustified enrichment. Robin Evans-Jones (R Evans-Jones) *Unjustified Enrichment* Vol 2 (2013) para 6.01) described the three as the Payer (P), the Creditor (T), and the original debtor (D). Professor MacQueen employs P (payer), C (creditor), and D (debtor) in H L MacQueen "Payment of Another's Debt" in D Johnson and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) ch 17.

b) The third party must be acting as a separate, independent legal actor on their own behalf;

c) If obligational, the undertaking can be made to the third party, the donee, or both and will be considered a single donation; and

d) The donee is the only party who receives a net gain from the act.

10.3 Inclusion of this category marks the most significant change to the traditional classification of donations in Scots law. However, its introduction is warranted due to the potentially different legal effects it creates. And, although Scotland has not historically recognised indirect donations as an autonomous category, these are readily observable: for instance, where a parent undertakes to pay a child's rent while at university, or the purchase of flowers from an online florist to be delivered to a loved one directly. A further reason this category has been nominated as a specific type of donation is because of the impact it may have on the legal relationship between B and T.[1235] As Friedman and Cohen observed regarding payment of another's debt:

> "Inherent in this type of benefit is that it involves the complexities of a three-parties situation. Payment does not move directly from the payor to the debtor. It is made to the creditor but it may affect the creditor-debtor relations as well as those of the payor-debtor and those of the payor-creditor".[1236]

10.4 As in previous chapters dealing with the individual categories of donation, this chapter begins by discussing each of the key characteristics in turn. Following this, general considerations regarding indirect donations are outlined. These are whether

[1235] D Friedman and N Cohen, "Payment of Another's Debt" in *International Encyclopaedia of Comparative Law* (1991) vol X chap 1 §1.
[1236] *Ibid*.

the indirect donation is constituted as a contract or a promise and the revocability of an indirect donation.

10.5 As the nature of an indirect donation often results in the obligational and proprietary aspects becoming closely intertwined, the final part of this chapter considers the J1 and J2 together in relation to specific instances of indirect donations rather than treating them separately. These instances are: where the indirect donation relates to an individual pre-existing debt between T and B; where the donation relates to an ongoing legal relationship between T and B; where the indirect donation creates a new right for B; and where the donation involves the transfer of a right from T to B.

10.6 Mention should also be made of trusts. Although it can be argued that these might be considered a type of indirect donation, trusts bear more resemblance to pure donations. This is because, while transfer is made to the trustee who is exercising capacity on the trustee's own behalf,[1237] trustees are not acting in their own interest. They act as a conduit through which the truster's benevolence towards the beneficiaries can flow. Thus, the analysis in this chapter does apply to trusts.

10.7 As with remuneratory and conditional donations, the basic principles underlying the constitution and effects of a pure donation upon the donor and donee continue to apply,[1238] except where variations are identified. This is done in light of this thesis' overall contention that donations must be accepted to be complete.[1239]

[1237] Trustees without capacity can be removed either by a quorum of fellow trustees or the court: Trusts (Scotland) Act 1921 ss 21 and 23. These sections will be replaced by Trusts and Succession (Scotland) Act 2024 ss 6 and 8.
[1238] See above: "Chapter 7: Pure Donations".
[1239] See above: "Chapter 5: The non-acceptance rule: a common mistake?".

2) KEY CHARACTERISTICS

a) The donation is made to a third party for the benefit of the donee only

10.8 As described in an earlier chapter, "benefit" in terms of donation relates to a net patrimonial gain to the donee[1240] which corresponds to a patrimonial loss of the donor. This gain can be either of a personal right, in the case of a J1, or of a real right, in the case of a J2.

10.9 The typical example of an indirect donation is where T is a creditor of B, and D either pays, or undertakes to pay, B's debt. As the obligation or transfer is made to T, T's patrimony is benefitted to the extent that the debt or obligation is extinguished by the donation, but this is no more than T would be due had D not intervened. Thus, T does not acquire a net gain from the transaction. However, B makes a net gain since B's patrimony is enriched through the abrogation of the debt.[1241] Thus, D experiences a voluntary loss which corresponds to the net gain or enrichment of B. D has no power to compel performance for D's own benefit because of the donation, although D may be able to insist that T continues to tender performance to B, for example through the continuance of a tenancy agreement. This is what gives the transaction its donative character.

10.10 It is not intended that this characteristic should be deemed to prevent the act being a donation in situations where a donor gains an ancillary advantage. For instance, a mother who pays the rent of a child may benefit to the extent that she does not have to support the child at home. Or, for example, if the mother is already in the position as guarantor for the rent, penalties for the child failing to make timely

[1240] See above paras 3.53.

[1241] This has been described as "one of the rare categories of 'imposed enrichment'" in Scots law: L J Macgregor and N R Whitty "Payment of Another's Debt, Unjustified Enrichment, and *ad hoc* Agency" (2011) 15 Edin LR 57 at 66.

payments may be avoided. This is because the *animus donandi* is relatively unaffected by motive in Scots law.[1242]

b) The third party must be acting as a separate, independent legal actor on their own behalf

10.11 Indirect donations are where T, the party to whom the J1 is undertaken, or to whom the J2 transfer is made, is acting as an independent legal person. For instance, if an intended donee (B) has taken a loan from a bank (T) which is subsequently repaid by the donor (D), the bank receiving the payment in lieu of the debt owed to them by the donee becomes owner of the actual money as an independent legal person.

10.12 This must be distinguished from a situation where the third party is not acting in their capacity as an independent legal actor but instead is acting as a representative of the donee, providing substitute capacity for a donee who lacks capacity: for example, where a parent acts for a daughter who has no capacity to do so.[1243] These are not true indirect donations because although there is a third party acting, T is not doing so as an independent legal actor on its own behalf: T is acting solely for the donee.[1244] T does not personally gain a property or obligational right as against D at any point. Thus, though there is a third person involved in the donative process, these are in practice more similar to the other categories of donation than to the peculiarities of true indirect donations.

10.13 As an extension of this, payments made directly from D into a current account of B should not be properly considered an indirect donation. On one hand, the bank is operating as an independent legal actor on its own behalf in carrying out its normal

[1242] See above para 3.19.
[1243] Age of Legal Capacity (Scotland) Act 1991 s 1.
[1244] Although they will be subject to various duties of care, for instance a fiduciary duty if they are acting in an agency capacity or a duty to account (Children (Scotland) Act 1995 s 10).

business by providing banking services to B. This would make any transfer by D in respect of B's debt a true indirect donation. However, "opening the account is evidence that the beneficiary's bank has the actual or ostensible authority to receive funds on his or her behalf".[1245] Thus, the bank is acting as B's representative. As a representative, the bank is "not a contracting party"[1246] as the contract (or transfer) is between D and B.[1247] This position is bolstered by the fact that banks do not need to notify the account holder of decisions to accept funds on the holder's behalf nor seek permission for each transaction,[1248] further emphasising the implicit authority a bank account holder gives to the bank to handle money transfers on its behalf.

10.14 One reason for this may be the frequency and diversity of transactions that a person carries out using the funds available in a bank account. If a donor therefore wishes to execute a donation through transfer to an account it will be handled as any other transaction, particularly if they have been given the account details by the donee. Nevertheless, the situation can possibly be distinguished from one where the relationship between T and B is related to a specific debt, for instance an unsecured car loan, even if T is an institutional lender. This is because a debt created for a singular purpose implies a greater degree of privity between the parties, not to mention generally being for a larger amount of money, thus making third-party interference more serious. Therefore, it is harder to imply from this situation that B has given ostensible authority to T to accept funds on their behalf from a person not party to the original agreement. This would make a donation of this kind an indirect donation.

10.15 Similarly, a distinction can be drawn with *negotiorum gestio* in this regard. This is because although a *gestor* is acting without mandate,[1249] and therefore as an independent legal actor, the *gestor* does so on the "presumption",[1250] or

[1245] D Fox *Property Rights in Money* (2008) para 5.68.
[1246] L J MacFarlane *Privity of Contract and its Exceptions* (2021) para 3-06.
[1247] T B Smith *Short Commentary* para 774; L MacFarlane *Privity of Contract* para 3-05.
[1248] *Momm v Barclays Bank International* 1977 QB 790 per Lord Kerr at 801.
[1249] N Whitty "Negotiorum Gestio" in R Black (ed) "Obligations" *Stair Memorial Encyclopaedia* (1996) vol 15 para 91.
[1250] Bell *Princ* § 540.

(alternatively) "assumption",[1251] that the *dominus* would have given authority had the dominus been aware of the necessity of the *gestor's* actions. This means the *gestor* is acting on the *dominus'* behalf, much the same as one with direct representative authority. Importantly *negotiorum gestio* applies where the *gestor* acts with the intention of recovering expenses,[1252] or at least without an *animus donandi*.[1253] Thus, such actions are outwith the scope of an indirect donation.

c) <u>If obligational, the undertaking can be made to the T, B, or both and will be considered a single donation</u>.

10.16 The rationale underpinning this characteristic is that, while a proprietary ("J2") donation must be made to the third party to qualify as an indirect donation, this is not necessarily the case for an obligatory ("J1") donation. A J1 can be directly created through an undertaking by D to T (scenario (*a*)) but there is also the possibility that it can be created through an undertaking by D to B to pay T (scenario (*b*)). This is because although the undertaking might be made by the donor to the donee, and *prima facie* is therefore more similar to a pure J1, the obligation is to pay or perform to the third party. Thus, it is not the underlying obligation which characterises this type of donation but rather the subsequent performance in implement of it. However, both scenarios must take into account the general rules of *jus quaesitum tertio*, or "third-party rights".

10.17 A third-party right "is a contractual benefit".[1254] As such, if the J1 is constituted as a contract, either between D and T or between D and B, then the person not party to the contract can enforce it,[1255] so long as they are either specifically named or identified in the contract.[1256] Although definitions of contract are multitudinous,

[1251] *Parker's Executors v Esso Petroleum Co Ltd* 1971 SLT (Sh Ct) 28 at 32.
[1252] It is recognised that this assertion has long been the subject of academic debate: Whitty "Negotiorum Gestio" para 110; R Zimmermann "Unauthorised Management of Affairs (Negotiorum Gestio)" in R Zimmermann, D Visser, and K Reid *Mixed Legal Systems in Comparative Perspective* (2005) p 325.
[1253] Stair *Inst* I.8.2.
[1254] L J MacFarlane *Privity of Contract and its Exceptions* (2021) para 3.11.
[1255] Contract (Third Party Rights) (Scotland) Act 2017 s 1(2).
[1256] Contract (Third Party Rights) (Scotland) Act 2017 s 1(3).

McBryde endorses the following definition of McGregor as the most appropriate for Scots law:

> "the agreement of two or more parties which is intended to establish, regulate, alter or extinguish a legal relationship and which gives rise to obligations and has other effects, even in respect of one party only".[1257]

Thus, if the J1 meets these criteria then the third party (either B or T) would have the right to insist upon performance by D. It is likely that in scenario (*a*) above, the J1 would be constituted contractually, particularly if it relates to a pre-existing debt of B,[1258] because such relationships tend to occur in market or commercial situations. This would mean that T is carrying on a business and would likely seek the protection of a formal, written contract.

10.18 However, there is the possibility that a formal contractual agreement is not entered into and D undertakes an indirect J1 by way of a unilateral promise either to T or B. In such cases, a third-party right cannot arise.[1259] A conventional approach might lead to the conclusion that there appears to be no reason why this should be so. A unilateral promise is binding on the promisor,[1260] and promisors may bind themselves to do anything legal, possible, not immoral, and not contrary to public policy.[1261] Therefore, although the third-party, whether it be B (in scenario (*a*)) or T (in scenario (*b*)) is not the person to whom the promise is specifically undertaken, the content of that promise can be to perform to another.

[1257] McBryde Contract para 1.03 *cit* H McGregor "European Contract Code" (2004) 8 EdinLR Special Issue art 1(1).
[1258] An indirect J1 can also occur where there is no pre-existing debt between T and B, for instance in life insurance contracts*: Carmichael v Carmichael's Exx* 1920 SC (HL) 195.
[1259] *Smith v Stuart* 2010 SC 490; Report on *Third Party Rights* (Scot Law Comm No 245, 2016) para 2.4.
[1260] Stair Inst I.10.4; H MacQueen "Third Party Rights in Contract: Jus Quaesitum Tertio" in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland* (2000) p 225.
[1261] See generally: McBryde *Contract* chapter 13.

10.19 That said, if the donor's unilateral act merely creates a power in the donee rather than a claim-right in the Hohfeldian sense, as is contended by this thesis,[1262] it is not clear whether the third-party could gain a right to insist on performance prior to the acceptance of the indirect J1 by the promisee. This is because such a right would be ancillary to the promisee's, and ancillary rights are dependent on the status of the principal right.

10.20 Furthermore, the case of *Auchmoutie v Hay*[1263] found that, in the absence of a promisor acknowledging a third-party's right, no such right can arise. In *Auchmoutie*, a promise made to a party other than the purported promisee was held not to be obligatory, as it was not directed to the promisee nor accepted by him.[1264] This was despite it being alleged that the person to whom the promise was made was acting on behalf of the defender. Thus, even if D undertakes a J1 in the form of a unilateral promise to either T or B, the third-party cannot gain any rights from it. In other words, if D undertakes a J1 as a promise to T to pay B's debt, B cannot enforce the promise and is reliant on T's insistence that D perform in order to gain the benefit.

d) <u>The donee is the only party who receives a net gain from the act.</u>

10.21 As noted above,[1265] while the donation may be made to T, and therefore has an impact on their patrimony, the effect of this impact is neutral in economic terms. This is true regardless of whether the donation is made in respect of a pre-existing debt or if T is a third-party seller from whom D purchases a gift to be delivered directly to B. The reason is that the donation provides T with what is already due and does not result in a benefit in terms of a patrimonial gain.[1266]

[1262] See above paras 7.19-7.30.
[1263] (1609) Mor 12126.
[1264] Interestingly, although the case report is sparse, it could be implied from the decision in *Auchmoutie* that acceptance is a key element in the constitution of a promise. This is because the decision was reached with emphasis on the defender's lack of acceptance.
[1265] Above paras 10.8-10.10.
[1266] As defined above para 3.53. This is without prejudice to the normal commercial practice of seeking profit in the course of business.

10.22 This does not preclude T's ability to make a profit arising from ordinary business practices, although this would be technically a patrimonial net benefit. For instance, where D purchases flowers from T to be delivered directly to B the price paid will (in all likelihood) include a profit margin over and above the cost price of the flowers and potentially a delivery fee. This, however, is merely factored into the normal functioning of a market economy and is no more than T is reasonably entitled to when providing the goods or services which are being paid for by D. Therefore, the act is economically neutral in relation to T.

3) INSTANCES OF INDIRECT DONATION

10.23 There are four general circumstances in which an indirect donation can occur: where there is an individual pre-existing debt between B and T; where there is an ongoing legal relationship between B and T; where D and T create a new right in favour of B; and where T, upon request by D, transfers a right to B. These instances may involve other parts of law, some of which has already been the subject of recent academic attention, such as third-party rights.[1267] As such, while this part offers illustrations and discussion of each general circumstance in which an indirect donation may occur, it will only concern itself with the elements peculiar to donation. First, however, general matters pertaining to each circumstance are briefly outlined, namely the form an obligational indirect donation can take, and the exception to the irrevocability of donations where an indirect donative obligation is constituted as a contract.

a) General Matters

i) J1 Contract or promise

[1267] For instance, see L J MacFarlane *Privity of Contract and its Exceptions* (2021).

10.24 An indirect J1 can be constituted either as a contract between either D and T or D and B, or as a promise from D to T or D to B. This distinction is relevant to ascertaining who can enforce the undertaking. If the undertaking is constituted as a contract, the person not party to the contract, be it T or B, may gain a third-party right to enforce the obligation if the contacting parties so intend.[1268] For example, D enters into a contract of life insurance with T, nominating B as the beneficiary.[1269] The parties intend B to be able to enforce the beneficial right when it becomes prestable.

10.25 However, if the J1 takes the form of a promise,[1270] only the party to whom the promise is made will gain an enforceable right.[1271] As a result, if D promises T to make B's monthly standard security payments, only T can demand D does so. Similarly, if D makes the same promise to B instead of T, T cannot pursue D for any missed payments. D can, of course, make a promise to both T and B, in which case each would gain an individual right to enforce the obligation.

ii) Revocation

10.26 Unlike other types of donation,[1272] and given its third-party nature, if an indirect donation is constituted as a contract the contracting parties may alter or revoke by agreement[1273] without being required to reserve expressly the right to do so. This is because, as with all third-party contractual rights, an indirect donation created contractually is subject to the Contract (Third Party Rights) (Scotland) Act 2017. However, the right to revoke is subject to statutory exceptions,[1274] such as:

[1268] Contract (Third Party Rights) (Scotland) Act 2017 s 1(1); L MacFarlane *Privity of Contract* para 3.08; *Finnie v Glasgow and South-Western Rly Co* (1857) 20 D (HL) 2.
[1269] *Carmichael v Carmichael's Exx* 1920 SC 195.
[1270] This would be an exception to the assertion in this thesis that a J1 is separate to promise: see above para 2.15.
[1271] *Auchmoutie v Hay* (1609) Mor 12126; *Smith v Stuart* [2010] CSIH 29; Report on *Third Party Rights* (Scot Law Comm no 245, 2016) para 2.4; above para 10.18-10.20.
[1272] See above paras 2.47-2.67.
[1273] Contract (Third Party Rights) (Scotland) Act 2017 s 3(1).
[1274] Contract (Third Party Rights) (Scotland) Act 2017 ss 4-6.

where the third person who is not party to the contract has started to enforce the undertaking the contracting parties may not revoke the donation with retroactive effect.[1275] If the indirect donation is made by way of promise it is not revocable.

b) Circumstances in which an indirect donation can occur

i) Pre-existing debt between the third-party and donee

10.27 D can either pay, or undertake to pay, B's debt to T, for example, an outstanding electricity bill.[1276] The principal questions are: (i) whether D's act extinguishes the original debt; (ii) whether B can reject the donation; and, if so, (iii) what effect such a rejection will have.

D pays B's debt to T

10.28 The prevailing view in Scots law is that when a payment is made by a third party (in this case D), the debt between the debtor (B) and creditor (T) is extinguished.[1277] But this causes some problems, because (unlike a pure donation where a transfer is made directly to the donee) with an indirect donation the donee is not necessarily involved at any stage of the transfer or obligational process.[1278] As such, the likelihood that B is unaware of the transfer is increased. B cannot decide whether to accept the donation if B does not know of the transfer.

[1275] Unless the contract provides that they may do so: Contract (Third Party Rights) (Scotland) Act 2017 s 4.
[1276] Or the balance remaining on a standard security: *Greenshields v Carey* [2019] SC LIV 59.
[1277] L J Macgregor and N R Whitty "Payment of Another's Debt, Unjustified Enrichment, and Ad Hoc Agency" (2011) 15 Edin LR 57-87 at 65; H L MacQueen "Payment of Another's Debt" in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 470; *Reid v Lord Ruthven* (1918) 55 SLT 616 at 618. The origins for this are in Bell *Princ* § 557, where "(1) Payment, to the effect of extinguishing the obligation, may be made not only by the debtor himself, but by any one acting for the debtor: Or even by a stranger, where the debt is pecuniary, due, and demanded; or where any penal effect may arise from delay; or where the creditor has no interest in demanding performance from the proper debtor. (2) The debtor cannot prevent any stranger from paying and demanding an assignation if the creditor chooses to grant it. (3) The creditor cannot be compelled to grant an assignation, unless the debtor shall consent, and the granting of the assignation shall not interfere with any other interest of the creditor himself.".
[1278] Macgregor and Whitty "Payment of Another's Debt" at 64.

10.29 This creates difficulties if B wishes to reject the donation. If the original debt is extinguished by the payment, it is unclear whether B's rejection can have retroactive effect, reinstating the original debt. If this is not possible, then the debt would need to be reconstituted between the donee and third-party creditor. It might not be possible to do this on the original terms. For instance, where T is a commercial lender, internal practices and market fluctuations, such as increased interest rates, may mean the original product is not available to be reissued. Thus, B could end up poorer as a result of the donor's intervention in their private affairs, because if, after rejecting the donation, B ends up with a different financial product with higher interest rates, the amount B will eventually pay in relation to the original debt will be more than it would have been without D's gift. Conversely, interest rates may go down as well as up, meaning the lender could be disadvantaged if the original rate cannot be reinstated. Thus, from the perspective of protection for both T and B, there is an argument against holding that an indirect donation extinguishes the original debt prior to B's acceptance.

10.30 It should be noted that, while most authority favours the discharge of the underlying debt in a third-party payment situation, this is not universally agreed. Kames[1279] and Hume[1280] argue that the debt subsists until the discharge is ratified by the debtor. This is in part because to allow the extinction of the debt would infringe on B's autonomy and the principle of non-interference in Scots law. This principle is perhaps most evident in *negotiorum gestio*, which has inbuilt protections for the benefitted party against officious intermeddling "when there is no necessity or occasion for it",[1281] barring the gestor from reclaiming their expenditure. Applying this to an indirect donation, where D pays a debt due by B to T, unless B is struggling to make the payment[1282] there can be no justification for the automatic extinction of the

[1279] Kames *Principles of Equity* 5th edn (1825) pp 330-331.
[1280] Hume Lectures vol III (Stair Soc vol 15, 1952 ed G C H Paton) pp 16-17.
[1281] Bankton *Inst* I.9.24. It could be argued that the purpose of this in *negotiorum gestio* serves as a bar to the gestor being able to bring a claim against the dominus if their intervention was unwanted and unnecessary, while also providing the grounds for the dominus to hold them to account for their intromissions. [1281] This would ensure that the dominus is recompensed for any loss incurred as a result of the gestor's negligent intervention: Bankton *Inst* I.9.24-25. However, it would not extend to any losses incurred as a result of the dominus rejecting an otherwise beneficial intervention, provided that it was necessary.
[1282] Where the debt is "pecuniary, due, and demanded" however, and B cannot pay, D's donation could extinguish the original debt: Bell *Princ* § 557.

debt, as this would encourage officious intermeddling and infringe on B's autonomy.[1283]

10.31 Furthermore, the prevailing view that the original debt is extinguished by payment by a third-party payer is normally encountered in enrichment law, where the payer is seeking payment from the original debtor.[1284] In these situations, if the original debt was held to subsist, the defender could argue that there has been no enrichment as the payment has had no patrimonial effect. In contrast, if (for the purposes of enrichment law) the original debt is extinguished, the payer seeking recompense can demonstrate the debtor's enrichment to the extent of the payment.[1285] Furthermore, enrichment claims arise only if the creditor fails to assign the original debt to the payer, which is possible given the "general assignability of money debts in Scots law".[1286] The involvement (or lack thereof) of the original debtor is not usually important in a three-party situation concerning a single debt as the original debt continues, just with a new creditor,[1287] or by giving rise to a claim in enrichment.

10.32 Contrast this with a donation, where no repayment is sought by D. Moreover, D's interference might not be necessary, requested, wanted, or even known about by B. The justification for the automatic extinction of the original debt in this situation

[1283] "…there must be strong policy reasons to outweigh the loss of individual autonomy involved and adequate control devices to guard against unjust obtruding of unwanted benefits and officious intermeddling": L Macgregor and N Whitty "Payment of Another's Debt" at 86.

[1284] For instance, *Reid v Ruthven* 1917 2 SLT 238. It should be noted that, although not entirely clear, and perhaps mistakenly based on English law, there is some suggestion that a voluntary payment by a third party does not extinguish the original debt outwith *negotiorum gestio*. In *Esso Petroleum Co Ltd v Hall Russell Co Ltd* ([1989] AC 643 (HL)) Lord Goff stated that, as Esso made payment as "volunteers" to crofters in respect of an oil spill caused by Hall Russell, the underlying obligation of Hall Russell to the crofters in delict had not been discharged. However, Lord President Rodger did cast doubt on whether this was an accurate statement of Scots law, albeit while declining to explore the matter further: *Caledonian North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123 at 1144-45.

[1285] Justifying the payer's recovery under the principle of *quod nemo debet locupletari aliena jactura* (no person should gain from another's loss).

[1286] H L MacQueen "Payment of Another's Debt" in D Johnston and R Zimmermann (eds) *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 471. It is acknowledged here that an assignation of a debt generally involves a payment or other exchange in return, which is not the case with an indirect donation. See also Moveable Transactions (Scotland) Act 2023 ss 6 and 7.

[1287] This is predicated on the premise that a debtor's interest in the identity of their creditor is less important than the ability to assign debts: L Macgregor and N Whitty "Payment of Another's Debt" at 69.

becomes weaker, particularly when weighed against the principles of non-interference and *beneficium non obtruduntur*. Therefore, in an indirect donation where D pays T for a pre-existing debt of B, until B accepts (either tacitly or expressly), the original obligation should not be held to be extinguished by the payment.

10.33 As noted earlier, an indirect J2 can proceed upon a pre-existing J1 between D and B or D and T.[1288] If the preceding J1 is between D and B, no issues arise about possible rejection, as a completed J1 binds the donor to make the J2 transfer and the donee to accept it.[1289] If the J1 is between D and T, however, B is not necessarily involved so rejection can still occur, provided B has not previously indicated assent. Similarly, as D can make a spontaneous indirect donation not based on any preceding donative obligation,[1290] B would still have the power to reject the benefit in this instance.

10.34 Should B choose to reject the benefit, as the original obligation is not extinguished, B's position and liability to pay T is unchanged. Furthermore, B is not enriched by the failed donation. This means that the relevant act which is affected by B's rejection is the transfer between D and T. Yet, although B's rejection renders any obligation incurred by D void,[1291] and thus negates the *animus donandi*, it does not automatically reduce the conveyance due to the abstract system of property transfer in Scotland.[1292] However, D will gain a right of recovery in enrichment law against T.[1293]

<u>D undertakes to pay B's debt to T</u>

[1288] See above at paras 10.16-10.20.
[1289] As rejection is not possible after acceptance: see above para 7.41.
[1290] As was the case in *Greenshields v Carey* [2019] SC LIV 50.
[1291] Stair *Inst* I.10.4.
[1292] L van Vliet "The Transfer of Moveables in Scotland and England" (2008) 12 Edin LR 173-199.
[1293] Whitty "Unjustified Enrichment" para 281; Bankton *Inst* I.9.9 and I.9.17.

10.35 As per a pure donation, D would be bound to either T or B, or both, depending on whom the undertaking is made. If it is undertaken as a promise, it must be in writing, except in the course of business.[1294] However, unlike where actual payment is rendered, there is not the question of whether constitution of such a document automatically extinguishes the original debt. It does not, in part because, if it did, this would amount to delegation (the substitution of one debtor for another with regards to the same debt).[1295] With any instance of delegation, the creditor must assent, and thus there can be no such effect created unilaterally by D. Neither is T obliged to accept the undertaking.

10.36 According to the Scottish Law Commission, delegation would result in B being "thereby liberated from [the] obligation".[1296] However, because there is a strong presumption against delegation, T would be "presumed to have obtained an additional voucher or guarantor for his debt rather than to have surrendered the rights which he already held"[1297] unless the circumstances or normal practice indicated otherwise.[1298] As such, it can be concluded that the original debt subsists. This can be further justified where B is unaware of the undertaking and has not been given the opportunity to accept or reject, for the same reasons highlighted above.[1299]

10.37 The issues surrounding B's lack of involvement and the possibility of the original debt being automatically extinguished are exacerbated if B is unaware of the transaction and has not been given the opportunity to reject it.[1300] This is accentuated when there is no question of B's ability to fulfil the obligation towards

[1294] Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii).
[1295] MacQueen and Eassie *Gloag and Henderson* para 3.39.
[1296] Discussion Paper on *Recovery of Benefits Conferred Under Error of Law* (Scot Law Comm No 95, 1993) vol 2 p 161 para 2.169.
[1297] *Ibid; McIntosh v Ainslie* (1872) 10 M 344.
[1298] Authority as to how to determine the precise boundaries of the circumstances or "normal practice" that would infer the original obligation has been discharged is regrettably lacking in Scots law. This is possibly because most people do not normally object to someone else undertaking to pay their debts.
[1299] See paras 10.28-10.30.
[1300] Stair *Inst* I.8.2; Erskine *Inst* III.3.88. See generally: Chapter 5 "The non-acceptance rule: a common mistake?".

T.[1301] Therefore, it is likely best to assume that until such opportunity has arisen, the presumption against delegation should operate. Moreover, it is normally incumbent on T to expressly discharge the original debt before it is extinguished, and thus it will stand until this also occurs.[1302]

10.38 Should B choose to reject, D's undertaking would be extinguished.[1303] Stair held that the rejection of a promise "avoids it, and makes it return".[1304] Bankton similarly held that upon "renunciation the right would return to the granter".[1305] If B's rejection renders the obligation void, "it is treated in law as if it had never existed at all".[1306] Any legal effects resulting from the attempted constitution of an indirect donation by way of an undertaking would be undone with retroactive effect, including any (possible) extinction of the original debt. Thus, should B wish to reject the donation at this stage their relationship to T will be unchanged by the donor's act.

10.39 Should delegation occur, both D and T will be bound as this is contractual in nature,[1307] but T must still perform any outstanding obligations to B under the original contract. Furthermore, once T consents to the undertaking they become obliged to accept any following payment from D and can demand D's performance.

ii) Ongoing legal relationship between the third-party and donee

10.40 The paradigmatic example of this type of donation is D's undertaking to pay, or actual payment of, B's rent to T. In the first instance, D can be committing to pay one, some, or all of B's rent payments when they become due, in which case it

[1301] The situation may be slightly different where the debt is outstanding and currently demanded by T: Bell *Principles* § 557. In this instance, it may be the case that B cannot refuse the undertaking.
[1302] *Supra* n 1157; Erskine *Inst* III.4.8.
[1303] Stair *Inst* I.10.4.
[1304] Stair *Inst* I.10.4.
[1305] Bankton *Inst* I.9.9. Hope, Balfour, Erskine and Bell are silent on the effect of rejection upon the obligation.
[1306] R Black "Contract" in "Obligations" *Stair Memorial Encyclopaedia* vol 15 (1996) para 671.
[1307] See above para 10.35.

would create a binding obligation to perform at this time. This instance of indirect donation shares many similarities with the previous type of indirect donation, and so this part primarily discusses areas where the situations are distinguished. As above, D can make this form of indirect donation by contracting with or promising T, B, or both. Who can enforce this obligation will depend on the party to whom the undertaking is made.

10.41 In the case where the original obligation is to make periodical payments when they become due, for instance rent, T must continue to perform in exchange for D's undertaking. Given the requirement of T's agreement and continuing performance, this type of indirect J1 is contractual in nature and bilateral. This could possibly mean that writing is not essential for the constitution of a J1, at least where the undertaking is made by D towards T.[1308] However, the obligation is unilateral in respect of lack of reciprocal performance towards D, either from T or B. To avoid any doubt or confusion, writing should probably be employed so as not to fall foul of the Requirements of Writing (Scotland) Act 1995.[1309] Similarly, B will also be bound by any other obligations under the continuing agreement with T outwith the payment or performance being donated by D, such as maintenance of the property or restrictions on sub-letting.

10.42 There should be a distinction drawn between this situation and other undertakings which, although being similar in many ways, do not fall under the same banner, for instance cautionary obligations. Both a cautionary obligation and an indirect donation may be undertakings to pay another person's debt should it become due by the original debtor. Yet the differences are important. A cautionary obligation may or may not be gratuitous.[1310] A donation always is.[1311] Regardless of

[1308] This would depend on whether the contract is considered a "unilateral gratuitous obligation" in terms of the Requirements of Writing (Scotland) Act 1995 s 1(2)(a)(ii). There are exceptions where the undertaking is in respect of a lease of over a year, in which case writing will be required: Requirements of Writing (Scotland) Act 1995 s 1(7) and s 1(2)(b).
[1309] Requirements of Writing (Scotland) Act s 1(2)(a)(ii).
[1310] Gratuitousness has a bearing on whether a cautionary obligation may be set aside in certain circumstances: *Royal Bank of Scotland v Wilson* 2004 SC 153 per Lord Gill at 159.
[1311] See paras 2.21-2.40 above.

gratuitousness, a cautioner, unlike a donor, is automatically entitled to a right of relief against the principal debtor upon payment.[1312] Cautionary obligations are ancillary, or secondary, obligations,[1313] and a safeguard for the creditor.[1314] In contrast, an undertaking made as an indirect donation is independently binding upon the donor and must be followed by a payment when it becomes due regardless of the donee's performance (or lack thereof).

10.43 That said, the similarities between cautionary obligations or guarantees and an indirect donation mean that certain principles can be transposed from one to the other. For example, it may be that the debt between T and B is anticipated although not yet constituted at the time of the undertaking.[1315] The gratuitous nature and construction of the undertaking may also affect the assignability of the J1, particularly if the J1 specifically names the parties.[1316] Additionally, it is possible that, like a cautioner in a cautionary obligation, the gratuitous nature of the J1 means that any interpretation of terms should be read in a light favourable to D.[1317]

10.44 Should B reject the donation, the effect will be the same as for either an undertaking or payment made by D in relation to an individual pre-existing debt between T and B.[1318] This is unless (a) the payment is being made pursuant to a continuing indirect donative obligation undertaken by D in relation to the contract between T and B, and (b) B had previously accepted the benefit derived from earlier payment or performance by D based on D's continuing obligation.[1319] This is because B has accepted the donative undertaking (J1 form of the indirect donation) and is bound to subsequently receive the benefit.[1320]

[1312] *Smithy's Place Ltd v Blackadder & McMonagle* 1991 SLT 790.
[1313] Gloag and Henderson para 16.01.
[1314] *Ibid* at para 16.03.
[1315] *Fortune v Young* 1918 SC 1.
[1316] *Promontoria (RAM) v Moore* 2018 SCLR 299 at 310.
[1317] W M Gloag and J M Irvine *Law of Rights in Security* (1897) Ch 22.
[1318] See above para 10.38.
[1319] *Smith v Campbell* (1873) 11 M 639; *White's Trustees v. Whyte* (1877) 4 R 786; *Chrystal's Trustees v Haldane* 1960 SC 127. See also above at para 3.31.
[1320] See above para 7.47.

iii) The indirect donation creates a new right in favour of B

10.45 The main example of this type of donation is a contract of life insurance between D and T nominating B as the beneficiary. The law surrounding insurance is largely governed by legislation[1321] which clearly establishes the requirements for formation of insurance policies, and the rights and duties of the parties to, and beneficiaries of, such policies. As such, not much detail regarding these elements is needed. However, there are some points to note in terms of the law of donation.

10.46 This form of indirect donation is particular in that it is constitutive: there is no pre-existing right or obligation to which the donation either relates or is transferred to B through the donation. As per all donations, B gains a power through the contract of insurance, which becomes an enforceable right (in the true sense) when B accepts it.[1322] B's acceptance might be by making a claim when the right becomes prestable or by an earlier indication to either D or T.

10.47 Should B reject the donation before it becomes prestable, it is possible that this will not avoid the contract between D and T, just any right B might gain under it. This is because it could be considered that the subject of the contract is insurance, rather than the donation *per se*.[1323] If so, then D will still be bound to make any premium payments due under the policy. That said, if the general rule is that a rejected donation renders the donation void, it may be that this amounts to frustration of the contract's purpose.[1324] If so, D might be entitled to repayment of any

[1321] For instance, the Insurance Act 2015 and Consumer Insurance (Disclosure and Representations) Act 2012.
[1322] See para 7.27 above.
[1323] As a contract, per general contract law so long as there is *consensus in idem* regarding the contracting parties (D and T), the subject of the contract (life insurance policy), and the price (premium payments) there will be a contract: *Muirhead and Turnbull v Dickson* (1905) 7 F 686; *Star Fire and Burglary Insurance Co Ltd v Davidson & Sons Ltd* (1902) 5 F 83.
[1324] Although the courts are reluctant to reduce contacts based on frustration of purpose (*Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683) and in general the doctrine of frustration is not to be readily applied (*Robert Purvis Plant Hire Ltd v Brewster* 2009 Hous LR 34), it may be that they are more willing to where one of the parties to the contract is acting gratuitously. This will be based on equitable considerations as to which party should bear the loss: Lord Cooper "Frustration of Contract in Scots Law" (1946) 28 *Journal of Comparative Legislation and International Law* p 2. However, this position has been brought into question by the courts

premiums already paid[1325] based on the *condictio causa data causa non secuta*,[1326] subject to the terms of the insurance policy.

10.48 If B rejects the donation after it becomes prestable (i.e. after D's death), then, depending on the terms of the policy, any benefits accrued will fall to the deceased's estate to be distributed in accordance with either the terms of a will or intestacy law.

iv) Transfer of a right directly from T to B

10.49 There are two main examples of this type of donation: the waiving of a right D has against T in B's favour, and the purchase of the donum by D from T to be delivered directly to B.[1327]

Waiving of a right D has against T in B's favour

10.50 The primary example of this is the waiver of an inheritance right.[1328] Alexander leaves Barbara £10,000 in his will, failing whom to Caroline. Alexander names Delia as his executor. When Alexander dies, the legacy vests in Barbara.[1329] Barbara, however, renounces her legacy in favour of Caroline.

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who, since Lord Cooper's time, have claimed that the law in Scotland is the same as that in England: *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696; *Robert Purvis Plant Hire Ltd v Brewster* 2009 Hous LR 34 per Lord Hodge at para [12].

[1325] A D M Forte "Insurance" *Stair Memorial Encyclopaedia* (vol 12, 1991) para 835.

[1326] *Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* 1923 SC (HL) 105.

[1327] This must be distinguished from a situation where D purchases goods from a seller and takes possession in order to give them to B personally. Such a donation would be a pure donation rather than indirect as there is no interaction between the seller and the donee.

[1328] Arguably, the establishment of a trust could also be seen as a similar form of indirect donation. However, this element of the Scots law of trusts has already been the subject of scholarship and, as such, is not repeated here: P J Follan *Trust Beneficiaries and Third Parties* (2024).

[1329] R Candlish Henderson *The Law of Vesting* 2nd edn (1938) p2. This is the "beneficial interest" rather than the title to the money: M C Meston "Wills and Succession" *Stair Memorial Encyclopaedia* (vol 25, 1987) para 1059.

10.51 In this example, Barbara is the donor and Caroline the donee. Delia is the third-party, as she has the responsibility of distributing the estate.[1330] Barbara's renunciation amounts to two simultaneous acts. The first is a rejection of the legacy,[1331] the second is the indirect donation, due to Barbara's donative intent. The effect of the rejection is that the legacy falls to be distributed according to the terms of the will by Delia.[1332] Caroline is vested with the beneficial interest to the money and will receive the subsequent transfer.

10.52 This type of indirect donation is distinct in that the donor does not have an independent choice regarding the donee. They are limited by the testator's original directions with regard to destinations-over,[1333] any general or residual legacies,[1334] or the law of intestacy.[1335] This is because the rejection (waiver) required in order to constitute the donation extinguishes any beneficial right[1336] D may have in the donum and thus any say in its disposition.[1337] As a result, should Caroline also choose to reject the £10,000, the right does not reinvest in Barbara.[1338] In this way, such an indirect donation can also be distinguished from other types of donative act.

[1330] Once she obtains confirmation: Meston *Ibid*.

[1331] Which is not a "right" in the strict sense. Instead, it is a "power" in the same way that a donee in a pure donation has a power prior to acceptance: see para 7.25 above. For example, where T is a trustor or trustee and D is a beneficiary, D is vested with a power to enforce their entitlement under the trust's terms, but until they accept the benefit this power forms no part of their alienable patrimony. However, vesting of the power does not create a firm patrimonial right. This is accentuated by the fact that vesting can specifically be made subject to defeasance: Gloag and Henderson para 39.36. As such, the donum which is being surrendered is a potential, rather than actual, patrimonial right.

[1332] *Ford v Ford's Trustees* 1961 SC 122. Should there have been no alternative destination under the terms of Alexander's will, this would have fallen to be distributed according to intestate succession rules.

[1333] *Ibid*.

[1334] Provided prior legacies and other expenses to the estate have been paid*: Inland Revenue Comrs v Matthew's Executors* 1984 SLT 414. Of course, the donor must have the intent to benefit the donee in order to qualify as a donation and therefore know of the result of their renunciation for this to qualify as an indirect donation.

[1335] *Jamieson's Exrs v Fyvie* 1982 SC 1. Should the donor wish to have full control over the identity of the donee, they would need to accept the legacy, becoming owner, then transfer it on. This would be a pure, rather than indirect, donation.

[1336] Or "*ius disponendi*": Henderson *Vesting* p 2. See also above para 7.41 regarding the extinction of a donee's right after rejection.

[1337] The renunciation serves as a legal fiction that the original legatee has pre-deceased the testator: Report on *Succession* (SLC Comm No 215, 2009) para 2.50.

[1338] As she will also be treated as having pre-deceased the original testator: *ibid*.

Purchase from D to T to be delivered directly to B

10.53 This form of indirect donation, although common for some time, is becoming more prevalent with the rise of internet shopping,[1339] where the donor can direct delivery to be made to the donee's address. For instance, Melanie purchases flowers online from Nancy to be delivered directly to Oliver. Aside from distance selling regulations, the key issue in this situation is who owns the flowers at each point, particularly if Oliver wishes to reject the gift. Similar to the waiver of a right outlined above, in this instance of donation the donor does not become owner of the property, and thus is not involved at any point in the transfer of the actual donum.[1340]

10.54 Aside from a contract of sale between D and T, this form of indirect donation can also be made through a promise to purchase made by D to T or B. If it is a promise to purchase, then the constitution and effects will be similar to those of a donative undertaking made in regards of an ongoing legal relationship between B and T. The principal difference is that T cannot be compelled to perform until a contract is formed pursuant to the promise,[1341] as they have not yet undertaken any voluntary obligations. D will still be bound to fulfil the obligation if called upon by either B or T, depending to whom the undertaking is made. If the J1 takes the form of a contract of sale between D and T, then the starting point for ascertaining the law is the Sale of Goods Act 1979 ("the 1979 Act"). That said, it is unclear whether the Act would apply to an indirect donation.

10.55 Under s 1, the 1979 Act applies to "contracts of sale of goods"[1342] which are further defined in s 2 as contracts "by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration".[1343] The reason the 1979 Act might not apply with an indirect donation is that the agreement is not to transfer the property to the buyer (D). D at no point has the *animus acquirendi*

[1339] In 2022, 78% of UK Christmas purchases were made online: https://www.statista.com/topics/3157/uk-christmas-shopping/#topicOverview. Presumably, a number of these would be delivered directly to the donee rather than the donor.
[1340] See below para 10.57.
[1341] T B Smith *Studies Critical and Comparative* (1962) pp 168–182.
[1342] Sale of Goods Act 1979 s 1(1).
[1343] Sale of Goods Act 1979 s 2(1).

necessary to become owner.[1344] It is made to transfer the property to B, who is not party to the contract of sale. Thus, a strict reading of the legislation would appear to preclude the possibility of its application[1345] and the common law would apply.[1346]

10.56 It could be argued that, in order for the 1979 Act to apply, the contract of sale is for T to transfer ownership to D, with a further condition that T arranges delivery to B on D's behalf. If this is the case, then the 1979 Act can determine when B becomes owner. Under the legislation, this is when the contracting parties intend,[1347] which will be taken to be when the contract is concluded if the donum is ascertained[1348] and in a deliverable state.[1349] However, imputing intention onto D to become owner in this situation would be to employ a certain degree of inappropriate legal contortionism simply in order to enable the legislation to apply. This seems unnecessary, given that the common law has rules that may govern the situation.

10.57 Under the common law, for the contract of sale there must be agreement between the parties,[1350] an offer,[1351] and acceptance.[1352] Acceptance must be by the person to whom the offer is addressed,[1353] in this instance T. Furthermore, and most importantly, if the 1979 Act does not apply, the contract will have no effect on the transfer of ownership of the goods.[1354] It will, however, give B a third-party right to insist on transfer of the goods to them,[1355] which can be characterised as a *ius ad*

[1344] See above para 5.72.
[1345] This anomaly was noted by the Scottish Law Commission (Memorandum on *Corporeal Moveables: Passing of Risk and Ownership* (Scot Law Comm CM no 25, 1976) para 52) regarding the equivalent provision in the Sale of Goods Act 1893 (s 1(1)) which preceded the current legislation. Despite this recognition that the (then) legislation may not have applied where the intended transferee is a third party to the contract, the wording was transposed unaltered. Therefore, the same defect appears has been inherited by the 1979 Act.
[1346] Sale of Goods Act 1979 s 61. See below paras 10.57-10.58.
[1347] Sale of Goods Act 1979 s 17.
[1348] Sale of Goods Act 1979 s 16.
[1349] Sale of Goods Act 1979 s 18 *Rule 1*.
[1350] Black "Contract" para 619.
[1351] *Dawson International plc v Coats Paton plc* 1993 SLT 80.
[1352] *J M Smith Ltd v Colquhoun's Trustee* (1901) 3 F 981.
[1353] *Greer v Downs Supply Co* [1927] 2 KB 28.
[1354] Bell *Comm* I, 181.
[1355] Contract (Third Party Rights) (Scotland) Act 2017 s 1(2).

rem. As a result, unlike contracts of sale covered by the 1979 Act, ownership will remain with the seller until delivery.[1356]

10.58 Due to this, B's subsequent rejection at any point before delivery is attempted will prevent ownership from passing. As such, B's position will be unchanged apart from releasing D from any preceding obligation towards B to perform. However, this does not affect the relationship between D and T: the purpose of the contract was sale. D intended, and agreed, to purchase goods from T for an agreed price. D's intended recipient of that sale, apart from determining the applicable law, is not an essential part of the contract. That said, provided D and T have not attempted to perform their obligations under the contract, neither would be disadvantaged should this be reduced. Thus, both should be released from their reciprocal duties.

10.59 However, where T has attempted to perform their part of the contract and B rejects the donation there is a potential loss for either D or T. The question then becomes "who should shoulder the loss"? Fairness would suggest that it should be D, particularly where the donum consists of perishable or personalised goods (such as flowers) which might not be re-saleable. On the other hand, T has D's money and retains ownership of the goods, which would suggest they have been unjustly enriched at D's expense.

10.60 Yet, the mutual intention to contract between D and T is separate from D's *animus donandi*. Particularly in a commercial arrangement, where T is a provider of credit, services, or goods, it is not clear why T should potentially lose out from a third party's (B's) rejection. The *animus donandi* might have provided D with the motive to contract but this does not impact either D or T's intention to contract with each other.[1357]

[1356] Of course, the parties could attempt to contract for ownership to pass to B upon completion, however this would be attempting to bypass the necessity for a donee's *animus acquirendi* and thus invalid.
[1357] Similar to contracts of insurance: see above para 10.46.

10.61 Additionally, when considering who should bear the loss, the fact D is attempting to make a donation, which would voluntarily diminish D's patrimony, makes it equitable for D to bear the loss. However, this voluntary diminishment is intended to benefit B. Since this is no longer possible, the *causa* for D's act falls away. As such, the justification for D's impoverishment as opposed to T's is reduced. Additionally, as T remains owner and possessor of the donum, T is in the position to resell it. T does not lose anything. For T to retain any price paid would result in T's material gain. Given the presumption against donation, it should not be assumed that D intends to benefit a third-party seller.[1358] Thus, in the spirit of equity it would be just to require T to refund any property transferred by D to return D to their original position.

10.62 That said, if T as a third-party seller in good faith would be significantly disadvantaged by refunding D, then it may not be so easily brought to an end. For example, if the donum consists of perishable goods such as flowers, it may not be possible for T to resell them. Alternatively, if the donum is made to a personal specification, for instance a bespoke item engraved with B's name, this too could prove difficult to resell. In this situation it would be equitable for T to retain any property transferred by D under the contract of sale as T cannot recoup costs expended on creating the unwanted gift. Therefore, although it is not possible to conclude in general terms whether rejection by B will result in frustration, or warrant restitution, the law is weighed more in favour of the contract continuing and D bearing any loss. Nonetheless, any dispute should be decided on the specific facts of the case, and the possibility of returning the parties to their original position.

4) CONCLUDING REMARKS

[1358] This is despite the dicta in *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151 which only applies to payments made in error. Here, the payment is not made in error but instead is made for a purpose that fails. Thus, the unjustified enrichment claim would be based on either *condictio sine causa* or *condictio donandi causa*: Whitty "Unjustified Enrichment" para 2.

10.63 Indirect donations are a curious and complex type of donation. The interaction between existing rules governing three-party situations and the gratuitous nature of the donation give a certain amount of guidance as to the effects on each party but also adds some confusion, particularly when assessing consequences of the donee's rejection. This is compounded by the lack of case law in this area and this topic could prove fertile ground for future research. In particular, the interaction between a failed indirect donation and unjustified enrichment warrants its own treatment.

CHAPTER 11:

CONCLUSION

11.1 The overall objective of this thesis has been to give a comprehensive account of the modern Scots law of donation reframed around social and legal aspects which have hitherto not been considered. One of the main consequences of this has been an increased recognition of a donee's role. Until now the donee has been seen predominantly as a passive actor in a donation, not requiring any special legal protections. It has been argued that this position fails to take into account the ways in which donations can be used to wield "soft" power over an individual and also undermines a donee's autonomy. Considering a donee an equal participant in a donation brings to the fore some latent inconsistencies within the law, for instance: the conflict between the conventional position that donations do not need to be accepted in Scots law and the principles of *beneficia non obtruduntur* and the need for a donee's *animus acquirendi* in a donative transfer.

11.2 As some of the apparent contradictions in the law have stemmed from a previous conflation between obligational and proprietary conceptions of donation, these have been fully separated and recognised as two, independent, juridical acts. Each has been given individual treatment to ascertain what the law of donation is from an observational view of the various instances in which gift-giving occurs. Although this thesis is not the first place it has been noted that donation can have both an obligatory and a proprietary interpretation, it is the first occasion in which donation has been fully analysed from each juridical perspective. As such, it is hoped the analysis herein will go some way to reconciling the confusion that has surrounded the subject to date.

11.3 As this thesis has approached the subject from an observational perspective, looking at donations from the viewpoint of where they occur in day-to-day life, the second significant contribution this thesis gives to the wider body of knowledge is an updated taxonomical categorisation of donation types. The categories of donations *inter virum et uxorem* and *mortis causa* have been replaced with conditional and indirect donations. In doing so, while this thesis may not have reinvented the wheel, it has replaced the axle upon which it sits so it can run more smoothly upon contemporary legal roads.

11.4 There is a danger that, in attempting to reconceptualise the law from a different perspective, more confusion is inadvertently created and doctrine from other areas of private law undermined. However, mindful of this potential hazard, this thesis has been cautious in its approach, particularly in relation to the institution of unilateral promise in Scots law. Although it has been concluded that the non-acceptance rule in donation is mistaken, close consideration of a gift's execution from a Hohfeldian point of view manages to uphold the doctrine of promise while providing a cogent analysis of the legal effects of a unilateral juridical act. By concluding that a person can be bound in law unilaterally, but that this only vests the other person with a "power" rather than right in the strict sense, resolves any potential difficulties arising from the contention that donations must be accepted before a donee can gain a patrimonial right.

11.5 While this thesis has attempted to be as thorough as possible, practical constraints mean that venturing into every far-flung corner of the law has not been feasible. There are still many areas within this general field that would benefit from further research. Some have been highlighted throughout the thesis, for example the interaction between conditional donations and unjustified enrichment. Other topics could include the relationship between lifetime and testamentary gifts, or how the presumption against donation reflects or denies the implementation of a donor's *animus donandi*. In truth, there is no shortage of research possibilities – in this, donation law "is the gift that keeps on giving".

BIBLIOGRAPHY

BOOKS

Roman and Historical

P Birks (ed) *New Perspectives in the Roman Law of Property* (1989).

S Bogle *Contract Before the Enlightenment: The Ideas of James Dalrymple, Viscount Stair*, *1619-1695* (2023).

W W Buckland *A Textbook on Roman Law* (1963).

F Carla and M Gori *Gift Giving and the 'Embedded' Economy in the Ancient World* (2014).

M T Cicero *De Officiis* (translated by W Miller, 1913).

F Dumont *Les Donations Entre Époux en Droit Romain* (1928).

P du Plessis *Borkowski's Textbook on Roman Law* 5th edn (2015).

P du Plessis (ed) *New Frontiers: Law and Society in the Roman World* (2013).

R Evans-Jones (ed) *The Civil Law Tradition in Scotland* (1995).

W M Gordon *Roman Law, Scots Law, and Legal History* (2013).

W M Gordon *Studies in the Transfer of Property by Traditio* (1970).

P Gouldesborough and G Donaldson *Formulary of Old Scots Legal Documents* (Stair Soc vol 36, 1985).

H Grotius *On the Law of War and Peace* (ed. S Neff, 2012).

Homer *The Odyssey* (Book XVII 77-83) (translated by S Butler, 2017).

N Jolowicz and B Nicholas *Historical Introduction to the Study of Roman Law* 3rd edn, (1972).

Justinian's Institutes (translated by P Birks and G McLeod, 1987).

L Kjaer *The Medieval Gift and the Classical Tradition* (2019).

R W Lee *The Elements of Roman Law* 4th edn (1956).

L S Michal (ed) *The Gift in Antiquity* (2013).

L A Seneca *On Benefits* (translated by M Griffen and B Inwood, 2011).

J B Thayer *Lex Aquilia* (Digest IX, 2, *Ad legem aquiliam*), On Gifts Between Husband and Wife (Digest XXIV,1, *De donationibus inter virum et uxorem*): Text and Commentary (2014).

A Watson (ed) *The Digest of Justinian* (2011).

R Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996).

Comparative and General Law

R Bramwell *Taxation of Companies and Company Reconstruction* (2023).

A Burrows, D Johnston, and R Zimmermann (eds) *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013).

D L Carey Miller *The Acquisition and Protection of Ownership* (1986).

J P Dawson *Gifts and Promises* (1980).

S Demeyere *Real Obligations at the Edge of Contract and Property* (2020).

E Descheemaeker *The Consequences of Possession* (2014).

L DiMatteo and M Hogg (eds) *Comparative Contract Law: British and American Perspectives* (2015).

M A Eisenberg *Foundational Principles of Contract Law* (2018).

A-M Farrell, E S Dove, G T Laurie, J K Mason *Mason and McCall Smith's Medical Ethics* 12th edn (2023).

D Fox *Property Rights in Money* (2008).

C Fried, *Contract as Promise* (1981).

J Godbout and A Caille *World of the Gift* (1998).

A S Gold and P B Miller (eds) *Philosophical Foundations of Fiduciary Law* (2014).

J Gordley *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (2006).

J Herring *Medical Law and Ethics* (2022).

W Hohfeld, W Cook (ed) *Fundamental Legal Conceptions as Applied in Legal Reasoning: and Other Legal Essays* (1919).

A-S Hulin and R Leckey (eds) *L'Abnégation en Droit Civil* (2017).

R Hyland *Gifts: A Study in Comparative Law* (2009).

P-G Jobin and N Vézina *Baudoin et Jobin "Les Obligations"* 7th edn (2013).

D Johnston and R Zimmermann *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002).

L Josserand *Les Mobiles dans les actes juridiques du droit privé* (1928).

C Laske *Law, Language, and Change: A Diachronic Semantic Analysis of Consideration in the Common Law* (2020).

B Lurger and W Faber *Acquisition and Loss of Ownership of Goods* (2011).

N MacCormick *Institutions of Law: An Essay on Legal Theory* (2007).

N MacCormick *Legal Right and Social Democracy* (1982).

P Malaurie and C Brenner *Droit des Successions et des Libéralités* 7th edn (2016).

J E Penner *The Idea of Property in Law* (1997).

M Planiol and G Ripert *Traité Pratique de Droit Civil Français: Vol V – Donations et Testaments* 2nd edn (1957).

J Smits (ed) *Elgar Encyclopaedia of Comparative Law* 2nd edn (2012).

C von Bar and E Clive (eds) *Principles, Definitions, and Model Rules of European Private Law, The Draft Common Frame of Reference (DCFR) Full Edition* Vol 3 (2009).

A T Von Mehren and J Gordley *The Civil Law System: An Introduction to the Comparative Study of Law* (1977).

A B Weiner *Inalienable Possessions* (1992).

S Wilkin and K Ghaly *The Law of Waiver, Variation, and Estoppel* (2012).

Y Yan *The Gift and Gift Economy* 2nd edn (2012).

Scots Law

C Anderson *Possession of Corporeal Moveables* (2015).

J Anderson *(ed) The Protocol Book of Sir Alex Gaw 1540-1558* (1910).

W Angus *(ed) The Protocol Book of Gilbert Grote 1552-1573* (1914).

D Bain, R R M Paisley, A R C Simpson and N J M Tait (eds) *Northern Lights: Essays in Private Law in Honour of David Carey Miller* (2016).

A M Bell *Lectures on Conveyancing* 3rd edn (1882).

D L Carey Miller *Corporeal Moveables in Scots Law* (1991).

D L Carey Miller with D Irvine *Corporeal Moveables in Scots Law* 2nd edn (2005).

D Carr *Ideas of Equity* (2017).

W G Dickson *A Treatise on the Law of Evidence in Scotland* 3rd edn (1887).

R Evans-Jones *Unjustified Enrichment* vol 1 (2003).

R Evans-Jones *Unjustified Enrichment* vol 2 (2013).

P J Follan *Trust Beneficiaries and Third Parties* (2024).

A D M Forte (ed) *Good Faith in Contract and Property* (1999).

A J Gamble (ed) *Obligations in Context: Essays in Honour of Professor D M Walker* (1990).

W M Gloag *The Law of Contract* 2nd edn (1929).

G L Gretton and K G C Reid *Conveyancing* 5th edn (2018).

G L Gretton and A J M Steven *Property, Trusts, and Succession* (4th edn, 2021).

J M Halliday *Conveyancing Law and Practice* vol 2 (2nd edn,1997).

R Candlish Henderson *Law of Vesting* (2nd edn, 1938).

M Hogg *Obligations* 2nd edn (2006).

M Hogg *Obligations: Law and Language* (2017).

M Hogg *Promises and Contract Law*: *Comparative Perspectives* (2011).

D Johnston Prescription and Limitation 2nd edn (2012).

J Kessler and W Grant *Drafting Trusts and Will Trusts in Scotland* 2nd edn (2017).

K Macfarlane *Thomson on Family Law* (8th edn, 2022).

L J MacFarlane *Privity of Contract and its Exceptions* (2021).

L Macgregor *The Law of Agency in Scotland* (2013).

L Macgregor, D Garrity, J Hardman, A MacPherson, L Richardson, F Davidson *Commercial Law in Scotland* 6th edn (2020).

J MacLeod *Fraud and Voidable Transfer* (2020).

H L MacQueen and Rt Hon Ld Eassie (eds) *Gloag and Henderson: The Law of Scotland* 15th edn (2022).

H L MacQueen and J Thomson *Contract Law in Scotland*, 5th edn (2020).

W W McBryde *The Law of Contract in Scotland* 3rd edn (2007).

F McCarthy, J Chalmers, and S Bogle (eds) *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015).

K Norrie *The Law Relating to Parent and Child in Scotland* 3rd edn (2013).

E C Reid *The Law of Delict in Scotland* (2022)

E C Reid and J W G Blackie *Personal Bar* (2006).

K G C Reid *The Law of Property in Scotland* (1996).

K G C Reid and G L Gretton *Land Registration* (2017).

K G C Reid and R Zimmermann (eds) *A History of Private Law in Scotland* vol 2 (2000).

T B Smith, *A Short Commentary on the Law of Scotland* (1962).

T B Smith *Studies Critical and Comparative* (1962).

A J M Steven, R G Anderson, and J MacLeod (eds) *Nothing So Practical as a Good Theory: Festschrift for George L Gretton* (2017).

J Thomson *Delictual Liability* 5th edn (2015).

D Walker *Principles of Scottish Private Law* 4th edn (1988).

A B Wilkinson and K McK Norrie *The Law Relating to Parent and Child in Scotland* 3rd edn (2013).

Institutional Writers and other historical Scottish jurists

J Balfour *The Practicks of Sir James Balfour of Pittendreich* (P G B McNeill (ed), Stair Society vols 21-22, 1962–1963).

A M Bell *Lectures on Conveyancing* 3rd edn, (1882).

G J Bell *Principles of Scots Law* 4th edn, (1843, reprinted Edinburgh Legal Education Trust, 2010).

G J Bell *Commentaries on some detached branches of the law of Scotland* (1828).

G J Bell *Commentaries on the laws of Scotland: and on the principles of mercantile jurisprudence* 3rd edn (1810).

G J Bell *Commentaries on the laws of Scotland: and on the principles of mercantile jurisprudence* 5th edn (1826).

G J Bell *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (J McLaren ed) 7th edn (1870, repr Butterworths 1990).

R Bell *Bell's Dictionary and Digest of the Law of Scotland* (G Watson ed, 7th edn 1890, repr Edinburgh Legal Education Trust 2012).

T Craig *Jus Feudale, With an Appendix Containing the Books of the Feus* (translated by J A Clyde, 1934).

J Dalrymple, Viscount Stair *The Institutions of the Laws of Scotland* 2nd edn (1693, on-demand reprint from original, 2020).

J Erskine *An Institute of the Law of Scotland* (1773, reprinted Edinburgh Legal Education Trust, 2014).

J Erskine *An Institute of the Law of Scotland* 3rd edn, (1795).

J Erskine *An Institute of the Law of Scotland* 4th edn (J Gillon ed, 1805).

J Erskine *An Institute of the Law of Scotland* 6th edn (J Ivory ed, 1828).

W Forbes *The Institutes of the Law of Scotland* (1722 and 1730, reprinted Edinburgh Legal Education Trust 2012).

T Hope *Hope's Major Practicks* 1608–1633 (J A Clyde ed, Stair Society vols 3 and 4, 1937–1938)

T Hope *Practical Observations Upon Divers Titles of the Law of Scotland, Commonly Called Hope's Minor Practicks* (1734).

D Hume *Lectures* vol III (G C H Paton (ed), Stair Society vol 15, 1952).

Lord Kames *Principles of Equity* 3rd edn (1778, reprinted Edinburgh Legal Education Trust, 2013).

Lord Kames *Principles of Equity* 5th edn (1825).

G MacKenzie *Institutions on the Law of Scotland* 2nd edn (1688).

A M'Douall, Lord Bankton *An Institute of the Laws of Scotland in Civil Rights: With Observations upon the Agreement or Diversity Between Them and the Laws of England* (1751–1753, reprinted Stair Society vols 41–43, 1993–1995).

G Wallace *A System of the Principles of the Law of Scotland* vol 1 (1760).

Other Books

A S Curran *The Anatomy of Blackness: science and slavery in an age of Enlightenment* (2011).

M Bennett *Scottish Customs from the Cradle to the Grave* (1992)

D Cole and I Chaikin *An Iron Hand upon the People: The Law against the Potlatch on the Northwest Coast* (1990).

L Coser and B Rosenberg (eds) *Sociological Theory* (1965).

R Fisher *Contact and Conflict: Indian-European Relations in British Columbia, 1774–1890* (1977).

M Mauss *The Gift* (1925, translated by J Guyer, 2016).

N S J Seglow *Altruism* 2007.

R Titmuss *The Gift Relationship: From Human Blood to Social Policy* (Reissue, 2019).

K Wolff (ed) *The Sociability of Georg Simmel* (1950).

ARTICLES

Law and other academic articles

C Aboucaya “Les applications de la “donatio mortis causa” dans le pays de droit écrit et de coutumes du XVIe siècle aux ordonnances du Chancelier Daguesseau” (1967) 39 TvR 1.

Anon “On Donations” (1874) 18 J Jurisprudence 233.

A E Anton “The Effect of Marriage Upon Property in Scots Law” (1956) 19 Modern Law Review 653.

J B Baron “Do we believe in generosity: reflections on the relationship between gifts and exchanges” (1992) 44 Florida LR 355.

J Baron “Gifts, Bargains, and Form” (1988-89) 64 Indiana LJ 155.

L Becker “The Labor Theory of Property Acquisition” (1976) 18 Journal of Philosophy 653.

A Blackham “The Presumption of Advancement: A Lingering Shadow in UK Law?” (2015) 21 Trusts and Trustees 786.

F Boaz “The Indians of British Columbia” (March 1888) 32 Popular Science Monthly 636.

A Braun “Formal and Informal Testamentary Promises: A Historical and Comparative Perspective” (2012) 76 Rabel Journal of Comparative and International Private Law 994.

W H Byrnes IV “Ancient Roman Munificence: The Development of the Practice and Law of Charity” (2004) 57 Rutgers LR 1043.

L D Clark “Louisiana’s new law on capacity to make and receive donations: ‘unduly influenced’ by the common law?” (1992) 67 Tulane LR 183.

C Codrea “Legal Limitations of the Anthropological Notion of the Gift in Roman Law” (2014) 149 Procedia - Social and Behavioural Sciences 200.

M M Combe “Abandonment of Land and the *Scottish Coal* Case: Was it Unprecedented?” (2018) 22 Edin LR 301.

M M Combe “Title to Tissue” (2014) 59 (11) Journal of the Law Society of Scotland 4.

M Dagot “Des Donations non Solemnelles” (2000) 248 Semaine Juridique 1478.

D Daube “Derelictio, Occupatio, and Traditio: Romans and Rabbis” (1961) 77 LQR 382.

A Dauti “Contract for Donation in the Roman Law and its Development in the Positive Law in Kosovo” (2019) 15 Acta Universitatis Danubius Juridica 13.

N Davadros “A Louisiana Theory of Juridical Acts” (2020) 80 Louisiana LR 1120.
R Evans-Jones and P Hellwege: “Swaps, Error of Law and Unjustified Enrichment” (1995) 1 SLPQ 1.

S Farran and D Cabrelli “Exploring the Interfaces between Contract Law and Property Law: A UK Comparative Approach” (2006) 13 Maastricht Journal of European and Comparative Law 403.

J Glister “Lifetime Wealth Transfers and the Equitable Presumptions of Resulting Trust and Gift” (2018) 103 Iowa LR 1971.

J Godbout and A Caillé “The world of the gift” (2000) 107 Queen’s Quarterly 367-372.

R Grant and J Henderson “Do Your Debts Die With You?” (2015) The Gazette available at https://www.thegazette.co.uk/wills-and-probate/content/100384.

G L Gretton “Constructive Trusts: I” (1997) 1 Edin LR 281.

G L Gretton “The integrity of property law and the property registers” 2001 SLT (News) 35.

G L Gretton “Ownership and its objects” (2007) 71 Rabel Journal of Comparative and International Private Law 802.

A G Gulliver and C J Tilson “Classification of Gratuitous Transfers” (1941) 51 Yale LR 1.

M Guthrie “A comparative study of the law of *bona vacantia* and the English law of treasure” (2012) 17 Art, Antiquity and Law 307.

P Hellwege “Juridical Acts in the Draft Common Frame of Reference – A Model for Scotland?” (2014) 18 Edin LR 358.

R Hickey “The Problem of Divesting Abandonment” (2016) 1 The Conveyancer and Property Lawyer 28.

J Hill “The Role of a Donee’s Consent in the Law of Gift” (2001) 117 LQR 127.

M Hogg “Promise and Donation in Louisiana and Comparative Law” (2011) 26 Tulane European and Civil Law Forum 172.

M Hogg “A Few Tricky Problems Surrounding Unilateral Promises” 1998 SLT (News) 25.

M Hogg “Promise: The Neglected Obligation in European Private Law” (2010) 45 International and Comparative Law Quarterly 461.

P Hood “What is so special about being a fiduciary” (2000) 4 Edin LR 308.

D Horton “Indescendibility” (2014) 102 California LR 543.

R Hughes “The Exception is the Rule” (2003) 7 J South Pac Law 2.

R F Hunter “The Prerequisites of Donatio Mortis Causa” 2005 SLT (News) 71.

R E Jenkins, “Gifts, Donations and Donor Intent in the Canon Law of the Catholic Church” (2012) 72 Jurist 76.

A Kentish “Risk: Tick tock, stop (or start) the clock” (2023) 68 (10) Journal of the Law Society of Scotland 46.

R Kress Weisbord and P DeScioli, “The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving” (2009) 45 Gonzaga LR 225.

D Konstan: “The Joy of Giving: Seneca *De Beneficiis* 1.6.1” (2014) 40 Papers and Monographs from the Norwegian Institute at Athens 171.
R D Leslie “Negotiorum Gestio in Scots Law: The Claim of the Privileged Gestor” 1983 JR 12.

S Macdonald-Mulvihill “Any takers? An alternative interpretation to abandonment to facilitate the circular economy in Scots law” (13 June 2022) *Edinburgh Private Law Blog* available at: https://blogs.ed.ac.uk/private-law/2022/06/13/any-takers-an-alternative-interpretation-to-abandonment-to-facilitate-the-circular-economy-in-scots-law/.

S Macdonald-Mulvihill “Whose Pint is it Anyway?” *Edinburgh Private Law Blog* (January, 2024) available at: https://blogs.ed.ac.uk/private-law/2024/01/19/whose-pint-is-it-anyway/.

H McGregor “European Contract Code” (2004) 8 Edin LR Special Issue.

L J Macgregor and N R Whitty “Payment of Another’s Debt, Unjustified Enrichment, and Ad Hoc Agency” (2011) 15 Edin LR 57.

J MacLeod “Before Bell: The Roots of Error in the Scots Law of Contract” (2010) 14 Edin LR 385.

A Macpherson and D W McKenzie Skene “Gratuitous Alienations and the Implications of *MacDonald v Carnbroe Estates Ltd*” (2022) JR 59.

H L MacQueen “Promises, promises: be bloody, bold and resolute” (2007) 11 Edin LR 146.

H L MacQueen “’Regiam Majestatem’, Scots Law, and National Identity” (1995) 74 The Scottish Historical Review 1.

H L MacQueen “Signatures in Scots Law: Form, Effect, and Burden of Proof” 2015 JR 107.

H L MacQueen “Unilateral Promises: Scots Law Compared with the PECL and the DCFR” (2016) 24 European Review of Private Law 529.

H L MacQueen and M Hogg “Donation in Scots Law” 2012 JR 1.

W W McBryde “Promises in Scots Law” (1993) 42 Int’l & Comp LQ 48.

W W McBryde “Remedies for Breach of Contract” (1996) 1 Edin LR 43.

R R M Paisley “The succession rights of the unborn child” (2006) 10 Edin LR 28.

M L Pesante “Slaves, Servants, and Wage Earners: Free and Unfree Labour from Grotius to Blackburn” (2009) 35 History of European Ideas 289.

C Picou “Constraints on Donation in Louisiana” (1991) 18 Southern University LR 101.

E Posner “Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises” (1997) 3 Wisconsin LR 567.

M Pratt, “Promises, Contracts, and Voluntary Obligations” (2007) 26 Law and Philosophy 531.

A Rahmatian, “The Role of Institutional Writers in Scots Law” 2018 JR 42.

D Reid “Thomas Aquinas and Viscount Stair: the Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense” (2008) 29 Journal of Legal History 189.

K G C Reid and G L Gretton “All Sums Retention of Title” 1989 SLT (News) 185.

A Rodger “Molina, Stair and the Jus Quaesitum Tertio” 1969 JR 34.

M Romero “*Petrie v Michetti*, and the Indelible Nature of Donations *Inter Vivos*: Louisiana Civil Law” (2013) 6 J Civ L Stud 305.

C M Rose “Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges and (More Importantly) Vice Versa” (1992) 44 Florida LR 295.

B Schwartz “The Social Psychology of the Gift” (1967) 73 American Journal of Sociology 1.

S Serafin “Gifts and Contracts: A Comparison with Quebec Civil Law” (2021) 53 University BC LR 835.

A R C Simpson “The Better View? Johnston v R & J Leather (Scotland) Ltd” (2020) 24 Edin LR 411.

T B Smith “Law, Professional Ethics, and the Human Body” 1959 SLT (News) 245.

M Sobczyk “Donation in Contemplation of Death as an example of *Datio ob Rem* in Roman Law” (2018) 23 Stadia Iuridica Toruniensia 291.

P Stein “Lex Cincia” (1985) 63 Athaneum (1985) 145.

A Todd and R Oliphant “No Guarantees?” (2010) 55 The Journal of the Law Society of Scotland 54

L Van Vliet “The Transfer of Moveables in Scotland and England” (2008) 12 Edin LR 173.

E West “The Parent Trap: constitution of contracts in writing and unjustified enrichment” 2015 JR 245.

N R Whitty “The ‘No Profit From Another’s Fraud Rule’ and ‘Knowing Receipt’ Muddle” (2013) 17 Edin LR 37.

N R Whitty “*Transco plc v Glasgow City Council*: Developing Enrichment Law after *Shilliday*” (2006) 10 Edin LR 113.

Media and other sources

M Banner “Mutual Benefits of Charitable Giving” (Aug 2011) Money Management available at: https://www.proquest.com/trade-journals/mutual-benefits-charitable-giving/docview/880747526/se-2.

D Cellitti “Pay it Forward and Random Acts of Kindness” Morgan Stanley available at: https://advisor.morganstanley.com/dominic.cellitti/documents/field/d/do/dominic-cellitti/PhilanthopyPart8_v3.pdf.

J-P Clark “Cops hunt Lord Nelson Painting after thieves swipe ‘five figure’ masterpiece from Edinburgh home” (14 October 2023) Daily Record available at: https://www.dailyrecord.co.uk/news/scottish-news/cops-hunt-lord-nelson-painting-31189389.

"Downing Street refurbishment: what is the row over Boris Johnson's flat?" available at https://www.bbc.co.uk/news/uk-politics-56878663 (*author not named*).

S Murphy "Robert Jenrick says he regrets dining with donor before planning decision" (22 July 2021) The Guardian.

The Newsroom "5 Old Wedding Customs of Scotland" (14 Feb 2018) *The Scotsman.* (author not named).

L Williamson "Les Gilets Jaunes" (2018) BBC News Website available at: https://www.bbc.co.uk/news/resources/idt-sh/yellow_vests.

"Wrapping up the year: Gifts and the law" (01 Dec 2016) *University Wire* available at: https://www.proquest.com/wire-feeds/wrapping-up-year-gifts-law/docview/1910339964/se-2. (*author not named*)

OTHER MATERIALS

Encyclopaedia and reference entries

R Black "Obligations" *Stair Memorial Encyclopaedia* (vol 15, 1995).

T Burns "Bankruptcy" *Stair Memorial Encyclopaedia* (reissue, 1998).

M Earle and N Whitty "Medical Law" *Stair Memorial Encyclopaedia* (reissue, 2006).
W C H Ervine "Loan" *Stair Memorial Encyclopaedia* (reissue, 2013).

T D Fergus and G Maher "Sources of Law (General and Historical)" *Stair Memorial Encyclopaedia* (vol 22, 1986).

A D M Forte "Insurance" *Stair Memorial Encyclopaedia* (vol 12, 1991).

D Friedman and N Cohen "Payment of Another's Debt" *International Encyclopaedia of Comparative Law* (1991).

W Gordon "Donation" *Stair Memorial Encyclopaedia* (reissue, 2011).

J Law (ed) "Advancement" *Oxford Dictionary of Law* (9th edn, 2018).

Lord Mackay of Clashfern (ed) "Gifts" *Halsbury's Laws of England* (vol 52, 2020).

M Meston "Wills and Succession" *Stair Memorial Encyclopaedia* (vol 25, 1988).

Oxford English Dictionary (online edition) available at www.oed.com.

C Waterson and A Shearer *Biographical Index of Former Fellows of the Royal Society of Edinburgh 1783-2002* (2006).

E West “Cautionary Obligations” *Stair Memorial Encyclopaedia* (reissue, 2019).

N Whitty “Unjustified Enrichment” *Stair Memorial Encyclopaedia* (reissue, 2022).

Theses

J P Assis *The Law of Donation and the Marketplace* (2017) (PhD thesis, University of Glasgow).

P Follan *Trust Beneficiaries and Third Parties* (2021) (PhD Thesis, University of Edinburgh).

B M Holligan *Protection of Ownership and Transfer of Moveables by a Non-Owner in Scots Law* (2014) (PhD Thesis, University of Edinburgh).

I Kotylar *Influence of the Ius Commune on the Scots Law of Succession to Moveables: 1560-1700* (2017) (PhD Thesis, University of Edinburgh).

A Krzanich *Female Domestic Servants and the Law* (2022) (PhD Thesis, University of Edinburgh).

D Reid *Fraud in Scots Law* (2012) (PhD Thesis, University of Edinburgh).

C Van Der Merwe *The Roman Law of Occupatio* (1966) (LLB Thesis, University of The Orange Free State).

Reports

Consultative Memorandum on *Constitution and Proof of Voluntary Obligations* (Scot Law Com Con Memo No 35, 1977).

Discussion Paper on *Nature and Constitution of Trusts* (Scot Law Com DP No 133, 2006).

Discussion Paper on *Third Party Rights in Contract* (Scot Law Com DP No 157, 2014).

Constitution and Proof of Voluntary Obligations: Unilateral Promises (Scot Law Com Consultative Memo No 35, 1977).

Corporeal Moveables: Passing of Risk and Ownership (Scot Law Com Consultative Memo No 25, 1976).

Report on *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods* (Scot Law Com No 144, 1993).

Report on *Land Registration* (Scot Law Comm No 222, 2010).

Report on *Legal Capacity and Responsibility for Minors and Pupils* (Scot Law Com No 110,1987).

Report on *Lost and Abandoned Property* (Scot Law Com No 57, 1980).

Report on *Prescription and Title to Moveable Property* (Scot Law Com No 228, 2012).

Report on *Succession* (Scot Law Com No 215, 2009).

Miscellaneous

Explanatory Notes to the Succession (Scotland) Act 2016.

"Gifts, Hospitality, and Rewards Policy" *Scottish Courts and Tribunals Service* available at: https://www.scotcourts.gov.uk/docs/default-source/default-document-library/scts-gifts-hospitality-rewards-policy.pdf?sfvrsn=0.

"Guidance on the Code of Conduct for Members of the Scottish Parliament" Scottish Parliament (2021) available at https://www.parliament.scot/msps/-/media/170abc776e82429986b01fe00219ef0d.ashx.

"List of Registrable Deeds" Registers of Scotland (2019) available at: https://kb.ros.gov.uk/land-and-property-registration/pre-registration/registrable-deeds/list-of-registrable-deeds

Lord Reed "Triremes and Steamships: Scholars, Judges, and the Use of the Past" *The Scrymgeor Lecture, University of Dundee* (30 October 2015).

P Smith "UK Christmas shopping – Statistics and Facts" Statista (2023) available at: https://www.statista.com/topics/3157/uk-christmas-shopping/#topicOverview.

"The Guide to the Rules relating to the Conduct of Members" (HC 1083, February 2023).