

Northern Lights:
Essays in Private Law in
Memory of
Professor David Carey Miller

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Edited by
Douglas Bain, Roderick R. M. Paisley,
Andrew R. C. Simpson and Nikola J. M. Tait

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Introduction

Andrew R. C. Simpson

It is an honour to introduce this volume of essays published in memory of Professor David Carey Miller. He is remembered by all who knew him as a great friend and scholar, who made highly significant contributions to the study of several fields of law, in particular property law and comparative law. Throughout his career, David enjoyed the respect and esteem of his mentors, friends, colleagues and students within the School of Law at Aberdeen University, and in the wider legal communities of Scotland and his native South Africa. This was reflected in the enthusiasm with which so many of them agreed to contribute to the present memorial volume.

It is not the intention to provide here an outline of David's life and career. Readers will learn much about both from the characteristically humble speech which David gave at the conference organised in his honour in March 2015, and also from the very fitting eulogy delivered at his funeral by Greg Gordon in March 2016. Both are printed immediately after this introduction. Rather, the focus here will be on the present volume, and the extent to which core themes emerge from it. The present editors decided not to ask contributors to engage with any particular theme at the outset. This was because David's interests were very wide, ranging from comparative law, to land reform in South Africa, to the law governing corporeal moveables in Scotland. The editors were aware that those who would want to pay tribute to David might wish to explore matters relating to some or all of these topics, and so it was decided that no artificial limitation should be placed on what they might write. Nonetheless, it will be suggested here that the authors, many of whom were taught by David, not only write about topics that would have interested him, but in fact reflect and sometimes critically engage with his views concerning how scholarship in private law ought to be conducted.

Articulating at least some of those views is one small way in which the present writer hopes to pay tribute to a man to whom he owes a great deal. David could always be trusted to greet with genuine enthusiasm, sound judgement

and thought-provoking questions the latest – sometimes outlandish – idea that the junior colleague writing this introduction had come up with. Indeed, David would very regularly fuel such conversations further over double espressos at Kilau, a café on campus at Aberdeen. The conversations are greatly missed, as is the friendship that underpinned them. Yet his kindness in sharing his time and scholarly insights with his colleagues and students remains as an example for those who hope to carry forward his legacy in the School of Law at Aberdeen University.

Themes of *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller*

The essays in this volume have been organised in broad terms according to a scheme that will be familiar to those who study Scots private law, and indeed civilian systems more generally. The first nine substantive essays are concerned with property law. The next four chapters focus on the law of obligations – one being concerned with delict, one with contract and one with unjustified enrichment. The final, and longest, chapter in the book considers a neglected aspect of the law of succession.

One core theme that emerges from the book is the value of comparative law in enriching our understanding of our own and other legal systems. Perhaps the clearest example of this can be found in John Lovett's article on the revindication of moveables. As Lovett notes, the belief that 'comparative law is [...] an illuminating endeavor [...] inspired Professor Carey Miller throughout his long and distinguished career', as did his long-standing interest in the law of corporeal moveable property. For both reasons, it was thought appropriate to introduce the volume with this essay. What Lovett's work throws into relief is how legal systems inspired by the civilian tradition, on the one hand, and the common law tradition, on the other, can approach 'the exact same set of facts' in contrasting ways. He provides an excellent example of how common law and civilian systems can take different approaches to how one should frame legal questions. He also shows that this may have practical consequences for litigants. As he puts it, this, in turn, 'illuminate[s] the contrasting values and priorities in the respective systems'. Lovett explores these matters with reference to the different ways courts in the United States analysed the attempts of a company to recover taped recordings of musical performances made by Henry Roeland Byrd, professionally known as 'Professor Longhair'. Judges trained in the law of Louisiana, in many ways influenced by the civil

law tradition, analysed the matter in terms of ‘when, if ever [...] satisfied the requirements for acquiring ownership of the tapes through acquisitive prescription’. By contrast, the common law courts in New York – which were also able to assert jurisdiction over the dispute – analysed the matter in terms of ‘when, if ever [...] claims for conversion and replevin began to accrue’ under a statute of limitations. The practical results were entirely different, giving ultimately different answers to the question of who should be able to retain the tapes that Byrd had recorded. This provides an excellent example of the point that the way in which a legal system conceptualises and classifies a claim can directly affect the chances of its success. As Lovett observes, this is the sort of lesson that the study of comparative law can reveal.

The second chapter, by George Gretton, at one point draws on similar comparative observations in reflecting on whether or not ‘the law of prescriptive title to land need[s] to be reformed’. A key issue he discusses relates to the need for ‘colour of title’ as a basis for acquisitive prescription (by ‘colour of title’ is meant ‘an ostensible title’, which, in the Scottish system, would have to be registered in the land register). Gretton argues that the requirement for ‘colour of title’ should be ‘abolished or restricted’, partly on the grounds that ‘the essential element’ of prescription is not ‘registration’ but rather ‘long-term possession’. Gretton points to a range of jurisdictions, including Spain, in which what is called ‘extraordinary’ prescription ‘takes 30 years and requires neither colour of title nor good faith’.

One critical test that Gretton uses for his argument is that the proposed reform should satisfy the publicity principle – that is to say, that rights in land should be sufficiently publicised so as to be discoverable by potential acquirers of the land in question. Here his argument encounters a difficulty. If one allows people to acquire ownership of land by acquisitive prescription through long possession and without registration, this will ultimately cause inaccuracies in the register. That is to say, the register will declare one party to be owner, while another may in fact be owner due to the operation of prescription. Yet Gretton does not treat this as an insuperable problem. First, he argues that the ‘situation would not crop up particularly often’. Second, he suggests that in cases where it does, the disappointed transferee should be protected by the warranty of title generally granted by the Keeper of the Land Register. Gretton’s use of the publicity principle as a test of his proposed reform here chimes in many ways with Carey Miller’s approach to the evaluation of legal reform. Like other Scottish academics working in the law of property over the

last few decades, he frequently sought to identify principles within the Scottish legal system that were both sufficiently attested by authority and also pervasive so that they could be used to test proposed reforms.¹ The dual concerns of the identification of legal principle, on the one hand, and its use as a test – sometimes a “controlling” test – of proposed reforms are explored in other contributions to the volume, as will be explained further below.

The next two chapters deal, to a greater or lesser extent, with attempts to identify such fundamental legal principles of property law, and the ways in which they are changing in light of altering political and social ideas of the nature of ‘ownership’ itself. In her contribution, Anne Pope explores the significant constitutional and statutory limitations placed on the owner’s common law remedy of the *rei vindicatio* in relation to property used as a home in South Africa. At the same time, she considers the broader issue of land reform in Carey Miller’s native country, a matter to which he devoted considerable scholarly attention.² As Pope explains, ‘the Constitution prohibits eviction from a home unless in terms of a court order that has considered all relevant circumstances’. Furthermore, the Constitution ‘also prohibits arbitrary deprivation of property’ and these ‘provisions form the backdrop to eviction from a home’. This ‘paradigm shift’ is in part designed

¹ Consider, for example, D. L. Carey Miller with D. Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), para.11.18 (which is discussed further below); there he states ‘It is important to recognise that problems arise when matters of policy and commercial utility clash with fundamental principles of private law. The better view is that while the system of property may need to adapt to accommodate the needs of commerce, for it to retain its structural integrity and coherence any development should come from within and show sufficient respect for, and consideration of, the traditions of the system.’ Consider also the following passage taken from D. L. Carey Miller, ‘Transfer of Ownership’, in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland Vol. 1: Introduction and Property* (Oxford, 2000), 269–304 at 301: ‘Lord Coulsfield, in his opinion in *Sharp v. Thomson*, observed that ‘although weight should be given to the arguments that the purity of Scots law, as a system based on the civil law, should be maintained and the unitary conception of ownership preserved, these arguments should not be overemphasised or treated as in themselves decisive. This dictum raises the question as to whether there are, or should be, matters which are so much seen as fundamental first principles as to be infrangible. The better view would appear to be that the structural dogmatics of the system of property – which happen, in Scots law, to be civilian – should remain controlling. Considerations of policy should be given effect to in a manner which allow the foundation principles of the law to remain paramount.’ One could indeed quote pages 301–4 of this article in support of the proposition made here about Carey Miller’s approach.

² Consider, for example, D. L. Carey Miller with A. Pope, *Land Title in South Africa* (Kenwyn, 2000).

to prevent homelessness in a context involving ‘very rapid urbanisation and intra-continental migration, the legacies of apartheid-era land use planning or lack thereof, and high levels of unemployment accompanied by relatively low levels of suitable work place skills’. Pope reflects on the ways in which these constitutional reforms have been implemented through the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE), and in particular she considers the ways in which the courts have interpreted this legislation to try to strike the balance between the interests of owners and occupiers of their lands, who might face homelessness on eviction. Among other matters, she explores the ways in which an attempt to establish a ‘just and equitable’ approach in balancing these interests has resulted in the need for the introduction of a ‘wide discretionary power to be exercised judicially’, which nonetheless seeks to preserve ‘predictability, reliability and certainty’. The attempt to discern what is just in all the circumstances is sometimes developed with reference to the African concept of ‘Ubuntu’, which roughly translates as ‘humaneness’ and combines ‘individual rights with a communitarian philosophy’. In consequence, owners may, for example, be expected ‘to exercise patience’ in attempting to evict so as to recover land ‘especially when large groups of people must be evicted from their property’. This is the sort of clarification that is beginning to emerge from the courts as they grapple with how to balance the rights of owners and potential evictees. Pope also reflects on how the courts are clarifying the responsibilities of municipal authorities to provide housing.

Malcolm Combe’s chapter also reflects on the ways in which traditional principles of ownership are being refined and developed in light of changing social and political expectations of the law. He focuses on the erosion of the owner’s right to exclude in Scots law. The right of an owner to exclude has always been seen as fundamental, albeit subject to certain limitations. One question Combe seeks to explore is the extent to which the limitations are beginning to expand in number. This leads him to reflect on the extent to which the concept of ownership itself may be shifting – albeit rather subtly. The article opens with a critical analysis of the literature concerning the owner’s right to exclude in the context of analyses of ownership more generally, notably the well-known idea that ownership can be described as a ‘bundle of rights’. Combe then considers the right to exclude itself in more detail, both in relation to land and also in relation to corporeal moveable property. Among other matters, he explores potential limitations to the right to exclude arising from the Land Reform (Scotland) Act 2003 and also from

the ECHR; one remarkable case he discusses in which both limitations were discussed is *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland*.³ He also explores new community rights to acquire land; while he notes that the link between this point and the erosion of an owner's right to exclude may seem 'contrived', nonetheless 'it comes into focus when it becomes clear that a landowner will no longer be able to simply exclude others from her land *and do nothing else* with impunity'. Drawing on this, and indeed the rest of his analysis, Combe makes the intriguing observation that 'the right to exclude is no longer the *sine qua non* [...] of land ownership...', because the right to continue as owner without challenge only exists if the landowner is also doing something productive and not resting on her exclusionary laurels'. He then argues that 'Scotland and South Africa are taking steps towards using land for the common good or as a national asset under an overt land reform banner'. In discussing corporeal moveable property, Combe notes Carey Miller's argument that 'the apposite criterion of ownership' is not the right to exclude – due to various limitations on that right – but rather 'an intact right of disposal'. Combe observes that this might potentially have application beyond the law of corporeal moveables; but the point remains that 'the role of exclusion theory should not be overstated in a modern system of property law'.

The themes of the identification of fundamental legal principle within the legal system, and the use of such principle to test proposed reform, continue to be illustrated in subsequent chapters. David Johnston considers the question of the extent to which it is actually necessary to state explicitly that *res merae facultatis* are imprescriptible, as Schedule 3 of the Prescription and Limitation (Scotland) Act 1973 currently does. Johnston draws on the fundamental point that a *res merae facultatis* 'connotes an action which is neither compelled nor forbidden', and argues that therefore 'it does not apply to an obligation, either legal or moral' or to 'rights' more generally. Rather, when exploring legal materials for '*res merae facultatis*' lawyers should be seeking 'neither rights nor obligations but powers or capacities'. In so doing, he draws on Carey Miller's observation, which Johnston paraphrases by saying that *res merae facultatis* are 'characterized by the absence of a correlative obligation'. For example, '[a] decision to plant a tree or dig a ditch or build a building is simply the exercise of one of the ordinary rights of ownership. It is not an assertion of right against a neighbour; conversely, although it may have an impact on

³ [2016] CSOH 65, 2016 S.L.T. 761; for related litigation, also discussed by Combe, see also [2016] CSOH 113, 2016 S.L.T. 862, affirmed [2016] CSIH 81.

the neighbour, in the ordinary case the neighbour will have no right to prevent or enjoin the activity'. Hence the activity may be classified as *res merae facultatis*. Johnston develops the analysis that here lawyers are dealing with 'powers or capacities' rather than 'rights' or 'obligations' by exploring potential objections to his view in light of existing authorities. Among other things, he discusses relevant texts of Roman law in light of their original historical meaning, and provides an extremely helpful clarification of the legal position in modern Scotland. His conclusion is simple; given that the 1973 Act is concerned with the prescription of rights and obligations, and given that *res merae facultatis* are concerned with 'powers or capacities', there is simply no need to preserve the statement that these are imprescriptible in any subsequent reform of the legislation.

The next article, by Nikola Tait, explores the so-called 'offside goals' rule of Scots property law, which arises in the following scenario. A seller (S) enters into a contract with a first purchaser (P1) to transfer property to him. Before the conveyance, S enters into another contract with a second purchaser (P2) to transfer the property to him. P2 is aware of the prior transaction – or ought to be so aware – and as a result is said to be in 'bad faith'. The conveyance to P2 is then completed. The offside goals rule states that the conveyance to P2 is valid, but voidable, and it can be reduced at the instance of P1. Tait seeks to explore the conceptual basis of the rule, which has attracted considerable discussion in the past. She argues that two explanations of the conceptual basis of the rule are particularly compelling. First, she defends the idea that the rule penalises P2 for partaking in the "fraud" (broadly understood) of S in relation to P1. Kenneth Reid has developed this argument. Second, she argues in favour of the view that the abstract system of transfer that operates in Scots property law can be used to explain the rule. In this, of course, she draws on the work of Carey Miller. To explain, within the abstract system of the transfer of ownership the validity of the act of conveyance depends upon the intention of the parties to receive and transfer ownership. So, Carey Miller asked, does P2 have the necessary *animus acquirendi* in the offside goals scenario? He proposed that while P2 has the necessary *animus acquirendi* for title to pass, that *animus* is defective because of his bad faith, giving rise to the conclusion that P2's title, while valid, is voidable.⁴ Tait defends both of these explanations for the

⁴ See, for example, D. L. Carey Miller, 'A Centenary Offering: The Double Sale Dilemma - Time to be Laid to Rest?' in M. Kidd and S. Hoctor (eds), *Stellar Iuris: Celebrating 100 years of the Teaching of Law in Pietermaritzburg* (Claremont, 2010), 96–114; see also Carey Miller with Irvine, *Corporeal Moveables*, para.8.31.

operation of the rule, and argues that in fact they are complimentary, with the ‘partaker in fraud’ analysis explaining the policy rationale for the rule – i.e. *why* we have the rule – and the ‘abstract’ analysis explaining its mechanics – i.e. *how* it is that bad faith on the part of P2 causes him to have a voidable title. Tait then goes on to defend and develop other views expressed by Carey Miller. In particular, she develops his arguments in relation to difficult *dicta* in the case of *Alex Bremster and Sons v Caughbey*, to the effect that these can be explained on the basis of the ‘abstract’ analysis of the offside goals rule. The case suggests that where P2 only discovers the prior transaction with P1 *after* entering into the contract with S but before conveyance to P2, then P2 is still to be treated as being in bad faith. Consequently, P2’s title is still reducible at the instance of P1. Some commentators saw this as an unjustifiable expansion of the scope of the original offside goals rule, which focused on the good or bad faith of P2 only at the moment of entering into the contract with S. Yet this can be explained with reference to the ‘abstract’ approach, whereby what matters is the validity of one’s *animus acquirendi* at the moment of conveyance, not contract. Consequently, the ‘abstract’ analysis itself suggests that any bad faith on the part of P2 that affects his intention to receive ownership can result in his acquiring only a voidable title, regardless of when that bad faith arises in the course of the transaction. This sort of argumentation, developed and defended by Tait, provides readers with an excellent example of the sort of method Carey Miller used in his work and fostered in his teaching to great effect.⁵ When presented with an apparent anomaly in the law, or with a proposition that was controversial, Carey Miller’s approach tended to be to try to study the issue in light of rigorous and thorough analysis of existing legal principle, to see if in fact the contradiction or problem was more illusory than real. In other words, his instincts were often conservative; he preferred to presume that the existing legal system might have the tools required to address new problems, and to test that view quite thoroughly before coming to the conclusion that more radical reform was needed. He had a very deep, albeit critical, respect for the existing authorities of Scots law, and this was nowhere clearer than in some of his last work in relation to the presumption that the possessor of a corporeal moveable is its owner.⁶

⁵ See, for example, the sources cited in footnote 1 above.

⁶ David L. Carey Miller, ‘The Presumption Arising from Possession of Corporeal Moveable Property: Questioning Received Wisdom’ in A. R. C. Simpson, S. C. Styles, E. West and A. L. M. Wilson (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (Aberdeen, 2016), 339–66.

The next chapter, by Cornelius van der Merwe, provides a masterly and scholarly study of *specificatio*, which deals with the situation where ‘raw matter is transformed into a new product as for example when grapes belonging to a third person are distilled into wine, when wool is knitted into a garment or when planks of wood are shaped into a ship’. In many legal systems, the ‘consequence is that the producer becomes the owner of the new product’, even if he did not own the raw materials, but often only where the producer acted in good faith and in his own name, and where the new thing is irreducible to its former parts. Van der Merwe focuses his attention on the underlying rationale for this rule, elements of which can be traced back to Roman law. He also challenges ‘the acceptance of *bona fides* as a requirement for *specificatio* on historical and legal policy grounds’. His rich article exposes the considerable confusion that has surrounded and continues to surround the question of whether or not *bona fides* should be required for *specificatio*; the literature cited is extensive. He comes to the conclusion that ‘[c]ommerce is promoted if the final product is allocated to the person who is in the closest relationship to the new product, namely the producer, irrespective of his *bona* or *mala fides*’. He continues with the important observation that ‘[t]he attribution of the consequence of production to the producer is based on the need of the law of property for legal certainty as to ownership and thus the immediate release of the *nova species* into commercial traffic’. Again, one sees here the identification of an underlying principle, that the law of property should promote certainty. One then sees it use to test the merits of a particular aspect of the law – the requirement of *bona fides* in *specificatio* – in light of rigorous research into juristic debates around that requirement.

The theme of the extent to which legal principle should engage with the dictates of commercial reality is explored in a different context in the next chapter, by Andrew Steven. Steven discusses the need for reform in relation to the law regarding security over moveables. As he explains, Scots law has long had difficulties in recognising non-possessory securities over moveables, and the use of the floating charge in practice has not been without its troubles. Steven takes the view that some change in the law is required, in part because the ‘unsatisfactory state of Scots common law was overcome to some extent by recourse to functional securities and, where possible, writing contracts under English law’. He also points to growing calls for reform from a range of business leaders in Scotland, and to the fact that several other jurisdictions have recently introduced legislation on the law governing securities over moveables. He notes the proposal in the Scottish Law Commission Discussion

Paper on the subject that there should be a new electronic register known as the Register of Moveable Transactions, which would allow registration of securities in corporeal and incorporeal moveables. That, in turn, would satisfy the requirement arising from the underlying publicity principle, that it should be possible to work out which real rights (here in security) affect particular things. Part of the point of the reform would also be that the new system would permit non-possessory securities in relation to moveables. Unlike floating charges, they would be available to everyone.

In the course of developing his view that such reform would be commercially useful, and so constitute a defensible change in the law, Steven notes Carey Miller's own views concerning the extent to which a system of property law should be responsive to commercial reality:

The better view is that while the system of property may need to adapt to accommodate the needs of commerce, for it to retain its structural integrity and coherence any development should come from within and show respect for, and consideration of, the traditions of the system.⁷

This is a very good example of Carey Miller's approach to the question of how proposed reforms in the law should be evaluated. Reform should, so far as possible, be consistent with the existing principles and structure of the surrounding legal system. Steven adopts a similar line of argument. The commercial need for a non-possessory security is given as a justification for its introduction. Nonetheless, Steven makes it clear that he hopes there will develop a system that depends on registration of securities, and so respects the underlying publicity principle recognised within Scots property law.

Carey Miller's critical approach, in which he tended to consider quite carefully the extent to which existing legal principle might be used to answer new questions before proposing more radical reform, chimes very well with the contribution written by Kenneth Reid. He considers the decision in *Holdich v Lothian Health Board*,⁸ in which sperm samples deposited by the pursuer prior to treatment for cancer were stored at the wrong temperature 'due to machine malfunction', which, on one view, made it likely that the samples had been damaged. The pursuer sued for 'distress, depression, and loss of the chance of fatherhood'. Two arguments were made for the pursuer; first, that the defenders were in breach of a contract of deposit in relation to the

⁷ Quoted from Carey Miller with Irvine, *Corporeal Moveables*, para.11.18.

⁸ [2013] CSOH 197, 2014 SLT 495.

pursuer's property – i.e. the sperm samples; and, second, that the defenders were liable in delict. Elspeth Reid considers the second point in her chapter, as is discussed below. In his chapter, Kenneth Reid explores part of the first issue, this being the claim that the sperm samples could – and should – be treated as property, and subject to the normal rules of property law.

Reid begins by establishing that a thing separated from the body must be a corporeal moveable, but then considers the deeper question of whether or not 'it can be the subject of private ownership'. Considering the traditional taxonomy of things susceptible and insusceptible to private ownership, Reid argues that 'the assumption must be that, like virtually everything else, [...things separated from the body...] are either owned or at least capable of private ownership' and that '[t]o decide otherwise would require strong justification'. In favour of the model that things separated from the body ought to be subject to private ownership, Reid argues that '[i]f body parts can be owned, then property law provides a ready-made set of rules for their use, preservation, defence, vindication, and transfer' while '[t]he alternative to property is endless improvisation against a background of disturbing legal uncertainty'. Reid also suggests that recognising the role of property law in this area would reflect the assumptions of practice. He mounts effective counterarguments against different approaches, such as those which would say that to use the 'label "property" diminishes the respect due to human parts'. On balance, Reid argues that making human body parts susceptible to private ownership would be consistent with 'a case for legal coherence' and '[i]n a jurisdiction like Scotland, with a civilian system of property law, the claims of coherence are likely to seem decisive'. Reid then proceeds to consider related questions, so as to deepen the analysis, exploring how and when body parts become susceptible to private ownership – bearing in mind the famous statement of Ulpian that '*Dominus membrorum suorum nemo videtur*' – that is to say 'no one is regarded as owner of his own body parts'. Having argued that body parts are 'capable of ownership once, but not before, they are separated from the human body', Reid then explores the question of how one may identify the first owner, and also how subsequent transmissions of the property may take place. In all this, he shows very clearly how the existing rules and principles of Scots property law are sufficiently adaptable to address this particular problem – and he also makes a compelling case to the effect that seeking to deal with the matter in any other way would be inefficient and result in uncertainty.

As was mentioned above, the next chapter considers the delictual aspect of *Holdich*. Elspeth Reid's chapter critically evaluates the arguments advanced to the effect that the pursuer had a valid claim based on, first, psychiatric injury; second, personal injury; and third, the infringement of personality rights and specifically reproductive autonomy. As regards the first ground, of psychiatric injury, Reid considers the authority of *Attia v British Gas Plc*,⁹ in which 'the Court of Appeal refused to strike out a claim for the shock suffered by the plaintiff on witnessing her house burn down as a result of negligence by central heating engineers'. Psychiatric injury caused as a result of damage to one's property was therefore actionable. Similarly – assuming that the sperm samples in *Holdich* were property and susceptible to private ownership – one could argue that where they were damaged and, as a consequence, their owner suffered psychiatric injury, then he would be able to sue for psychiatric injury. This was one line taken in *Holdich*, and Reid finds it persuasive. Additionally, she advances a persuasive argument in support of Lord Stewart's view to the effect that it would perhaps be wrong to treat the claimant in *Holdich* as a 'secondary' victim of psychiatric injury simply because he did not witness the destruction of the sperm samples. However, this analysis depends on the assumption that the pursuer in *Holdich* did own the samples; in the absence of that assumption, 'it is difficult to see how duty might be established in relation to a claim for "pure" psychiatric injury'. Likewise, Reid points out that it is doubtful that the pursuer in this case could have claimed for 'personal injury' given that this 'is normally taken to entail "disease and [...] impairment of a person's physical or mental condition'. She argues that '[t]his is difficult to square with the primary harm here, namely deprivation of the opportunity of procreation due to destruction of a substance stored remotely from the pursuer's person'. A different problem arises with a third possible basis for a delictual claim in this scenario, this being that the pursuer suffered loss of reproductive autonomy which constituted an infringement of a personality right. After a detailed discussion of the case-law concerning respect for reproductive autonomy, she shows that 'it is one thing [...] to recognise that autonomy is infringed by depriving parents of the opportunity *not* to procreate' – a matter with which most of the case-law is concerned – while 'it is another to find similar infringement where they have been deprived of the opportunity to attempt procreation by assisted reproduction'. Considered from first principles, Reid argues that the two cases, while perhaps *prima facie*

⁹ [1988] QB 304.

similar, are in fact quite different. Her contribution in this regard is extremely valuable in demonstrating how flexible the existing principles of Scots law concerning the protection of personality rights have been in responding to attempts to protect reproductive autonomy. Yet Reid's work also underlines the limits to such an approach in cases such as *Holdich*.

The next three contributions focus on the law of obligations. They consider the systematic structure and coherence of the law, a matter which was of great interest to Carey Miller. This last point is made in the introduction to Hector MacQueen's contribution to the present volume, where he cites several of Carey Miller's articles on the subject. MacQueen's work focuses on 'the development of the general concepts of obligations and contract in Scots law'. While noting that much of the law is to be found in judicial decisions, MacQueen commences with the argument that 'the law has been shaped most by the writings of jurists who themselves were usually borrowing their concepts and organisation of material from elsewhere – the European *ius commune* to begin with, later the English common law'. Those jurists 'have for the most part worked on the basis that there is a general law of obligations within which a general law of contract is to be placed at least for expository purposes'. MacQueen considers Stair's distinctive structure, in which he famously distinguished obligations into 'obediential' and 'conventional'. In the course of his work on 'conventional' obligations, MacQueen emphasises that Stair tried to explain what made an obligation an obligation, and what was distinctive about a contractual obligation within that theoretical framework. Stair also outlined what he saw as general principles of contract law, such as the rules governing who could and could not enter into contracts in general. Having considered specific contracts, he then considered accessory obligations and then finally 'Liberation from Obligations'. MacQueen shows that in these ways Stair stood out amongst his contemporaries and immediate successors in treating contract and the law of obligations more broadly in general terms; nothing similar can be found in the works of Sir George Mackenzie of Rosehaugh or Professor William Forbes of Glasgow University. Both followed traditional Romanist distinctions that categories obligations into obligations *ex contractu*, *quasi ex contractu*, *ex maleficio* and *quasi ex maleficio*. Yet others among Stair's successors were influenced by his approach, including the eighteenth-century jurists Andrew McDouall, Lord Bankton, and – to some extent – Professor John Erskine. However, there was a marked change in approach in the late-eighteenth century and in the early-nineteenth century; under Professor David Hume and Professor George Joseph Bell 'the idea of

a general law of obligations almost entirely disappears'. Having advanced a range of arguments to demonstrate this crucial shift, MacQueen then shows that there was a marked revival in interest in the general structure of the law of obligations in the twentieth century. MacQueen points out that broader work concerning the systematic structure and coherence of the law was promoted by Professor Sir Thomas Broun Smith, and by those who 'sought to follow in his footsteps'. He notes that the development of this particular movement, which has borne considerable fruit, must probably be attributed to 'the revival of legal literature sparked by the growth of academic law in the universities, especially after the creation of the full-time Honours law degree in 1961'. In this regard, MacQueen pays tribute to Carey Miller's 'remarkably active, wide-ranging, yet self-effacing role for over forty years'.

Erich Schanze considers the law of contract, its systematic coherence and the contracting process from a different perspective. The approach is wide-ranging, and it attempts to challenge traditional ways of thinking about the doctrinal structure of the law. For example, under the heading, 'The Dissolution of Contract Theory', he discusses 'a fundamental divide' that has emerged in the world of contracting – that between 'business contracts' and 'consumer contracts'. He argues that 'the classical contract doctrine has lost its significance in the field of consumption' but that 'it may still be valid for the area of commercial dealings'. However, he then goes on to suggest that the traditional prominence given to sale within this structure is increasingly out of line with legal and commercial reality. As he puts it, '[t]here are numerous important technical reasons why the modern highly sophisticated doctrines of the substantive law concerning sales [...] play only a marginal role in the practice of negotiated business transactions'. Indeed, throughout his paper he challenges the view that traditional doctrines of contract law are properly engaged with such realities; his core argument is summed up in his conclusion, where he states:

It may be a promising adventure for academia to follow the paths of international professional contract making, and also to study the risks and institutional mechanisms of the contracting phase in these contexts. The theoretical approach matching this empirical project would be the interdisciplinary theory of incentive compatible contracting which has shown its promise in many studies on institutional design.

In his chapter, Robin Evans-Jones considers different issues in relation

to doctrinal development in the law of obligations, relating to the law of unjustified enrichment. Developing views expressed by Niall Whitty, he considers, first, ‘the division of unjustified enrichment into groups of cases according to the *manner* in which the enrichment was acquired’. Second, he explores ‘the recognition, due to judicial activism, of a *general enrichment principle* that any benefit held by D at the expense of P *without a legal ground* is recoverable’. Third, he examines ‘briefly the debate concerning the recognition, or not, of what is commonly referred to as a general enrichment “action” in contemporary South African law that would mirror the new “general” cause of action in Scotland’. Evans-Jones begins by charting the historical development of this area of the law, considering how, in Scotland, there emerged a ‘concept’ of unjustified enrichment ‘that expresses the core requirements of a unitarily conceived body of law that now stands alongside e.g. ‘contract’ and ‘delict’, as a source of obligations’. In the process, he makes a range of thought-provoking observations. For example, he makes reference to the ‘transition from “actions” to “rights”’ in the long history of the tradition of ideas that informed Scots law, and reflects on the ‘puzzling dynamic’ that persists in relation to discussions around a ‘general enrichment “action”’. Again, when discussing the distinction drawn between claims in unjustified enrichment based on the *manner* in which the enrichment was acquired – for example, by ‘*deliberate conferral*’ or by ‘*interference*’ with the property of another – Evans-Jones explains the ‘substantive value’ of these classifications. He notes that in ‘most unjustified enrichment claims’ where P confers a benefit on D, there must be a ‘mirror “loss”’ on P’s part to D’s gain in order to establish liability. Yet this is not so in relation to the *interference* cases, ‘as where D knowingly used P’s property without right, at issue is the recovery by P of D’s unjustified *gain*’. Having explained the historical development of the law, Evans-Jones then discusses the general enrichment action at greater length. This provides that ‘a benefit which is retained by D at P’s expense *without a legal ground* is recoverable’. Evans-Jones explains the benefit of the recognition of this claim, for example noting that ‘[n]ew fact situations may arise which do not fit within the requirements of an established cause of action’ – such as the *condictio indebiti* – but ‘may nevertheless be recognised as generating a cause of action if they are expressive of the general principle’. Yet he also points out the limitations on the general enrichment action, arguing that it should remain strictly ‘subsidiary’ to the other recognised claims in unjustified enrichment. Evans-Jones gives a range of reasons for this, including the point that the general enrichment claim will mean different things in relation to each of

the groups of unjustified enrichment cases (e.g. deliberate conferral cases, imposition cases, interference cases, etc.).

The final contribution, by Roderick Paisley, pursues a similar method to that employed by Van der Merwe in his study of *specificatio*. A little-understood doctrine is illumined through a wealth of historical and comparative material, so as to equip Scottish readers with tools which, one may expect, will prove useful in the development of the law in the future. Paisley's study is of the law of partial ademption. The doctrine of ademption provides that where a legacy of a specific thing is 'alienated' or 'ceases to exist' 'after the date of the making of the legacy and before the testator's death' then the legacy lapses. In such circumstances, where 'there is partial destruction of the thing bequeathed or where the testator disposes of part of the subject matter of the legacy' then the ademption is said to be 'partial'. Paisley distinguishes two different rationales for ademption. The first is associated with civilian jurisdictions, and is based on the 'intention' theory – whereby the thing adeems by virtue of the *animus adimendi*, or 'intention to adeem'. The second is associated with common law jurisdictions, and is based on the 'identity' theory – whereby the fact that an item has ceased to be part of the testator's estate means that it adeems, regardless of his intention. With these rationales for the doctrine in mind, Paisley considers a very wide range of cases of ademption preserved in the literature, furnishing lawyers with a rich source of ideas concerning how Scots law might be developed in the future. For example, assuming one might wish to adopt the 'intention'-based rationale for ademption, Paisley explores the ways in which one might identify the intention of the testator in such cases. He notes that some of the civilian literature deals with problems arising where testators used collective nouns to describe their legacies; for example, where one testator left a flock of sheep, and the flock had been reduced to one sheep in the lifetime of the testator. Had the legacy adeemed, because in one sense there was no 'flock' anymore? The civilian answer was that the legacy had not adeemed, but rather that the flock continued to exist, albeit in one sheep only. Similarly, it was thought that if the complete works of Homer were left to a particular individual, and subsequently it turned out that the 'set [...was...] incomplete' then 'as many cantos as [...could...] be found [...would...] be due'. Yet it is thought that this conclusion would not follow where *any* collective noun is used; if a testator leaves a 'pair' of gloves, and only one can be found on his death, then in all likelihood the legacy of the 'pair' of gloves will adeem. As Paisley puts it, 'if only one item remains as at the death of the testator, one may conclude that either the testator made

a mistake as to completeness of his possessions or that one of the items has been destroyed or alienated'. Yet this approach depends on interpreting the scope of ademtion with reference to the 'intention' theory. Paisley also considers the common law approach based on 'identity' theory. Throughout, he makes careful reference to ideas and principles drawn from a very wide range of jurisdictions and legal traditions across the world. He concludes, in broad terms, that '[d]espite the divergence in theory in the Common Law and Civilian models of ademtion, much remains to be gleaned from the comparison provided herein'. In this, Paisley's approach chimes well with that of Lovett, which is found at the beginning of the book. It seems fitting to close the volume in memory of a great comparativist, as Carey Miller was, with such a rich study informed by ideas drawn from so many jurisdictions.

Thus the core themes that emerge from this volume reflect and engage critically with many of Carey Miller's own scholarly concerns. Some contributions emphasise the importance of comparative law in throwing into relief the distinctive ways in which different legal systems classify legal questions and problems. They also show how comparative materials can provide inspiration for how the law might be developed in an individual jurisdiction in the future. Others draw attention to the value of rigorous research into the core principles of a legal system, in part so as to understand the extent to which their application to solve legal problems may render those problems more illusory than real. Still other contributions develop such ideas, drawing attention to the importance of core principles in Scots property law, such as the promotion of legal certainty, the related publicity principle and the role of the abstract system of transfer. Several contributors show how such core principles can be of great utility in evaluating proposed changes and reforms to the law. Finally, some contributions look at the overall structure and coherence of the law. They consider the ways such structures have been – and continue to be – refined in light of both rigorous scholarship and also engagement with other factors, such as commercial reality. As has been explained, Carey Miller made highly significant contributions to all these discourses. It is entirely fitting that a volume in his honour should seek to do the same.

Acknowledgements

The editors wish to acknowledge with grateful thanks the help of the many friends and colleagues of David Carey Miller who made the publication of the present volume possible. First, Alexander Green of The Law Agency spon-

sored the keynote address given in David's honour by Roderick Paisley, which was delivered as the Eighth Law Agency Lecture. Alexander Green's great generosity in supporting legal scholarship at Aberdeen over many years is gratefully acknowledged. Second, the University of Aberdeen Development Trust provided additional financial support to cover the costs incurred by speakers who attended the conference from abroad. Third, the Research Committee of the School of Law, under the leadership of Paul Beaumont, not only underwrote additional costs associated with the conference, but also provided funding to employ a research assistant to help with the editing of the volume. The extensive and excellent contribution of that assistant, Nikola Tait, is recognised in the credit rightly given to her as a member of the editorial team. Fourth, the Edinburgh Legal Education Trust generously provided a significant subvention towards covering the costs of publishing this volume, for which the editors are deeply grateful. Fifth, the editors wish to acknowledge with gratitude the contribution which Elizabeth Cooke originally submitted for publication in the volume in David's memory. Unfortunately, due to the length of time it took for the editorial process to be completed, she and the editors agreed that her arguments had been so far overtaken by fast-moving developments in the law that the work could no longer be printed here. The editors regret this, but wish to record with thanks that Elizabeth Cooke had submitted work to pay tribute to David's memory in this book. Sixth, the then Head of the Law School, Anne-Michelle Slater, and the current Head of School, Greg Gordon, provided a range of encouragement and support in the preparation of this book for press, which latterly included funds to engage Kieran Buxton to prepare a select bibliography of David's published works. The editors wish to express their gratitude to Kieran for taking on this work at very short notice, and completing it rapidly and professionally. Finally, mention should be made of the fact that the original idea to hold a conference and publish a festschrift in honour of David came from Douglas Bain. It can only be hoped that the result is a fitting tribute to the memory of a real gentleman, whose erudition in the law, intelligent conversation and great kindness proved inspirational to so many of his students.¹⁰

Old Aberdeen

St Andrew's Day, 2017

¹⁰ I am grateful to Greg Gordon, Roderick Paisley, Malcolm Combe and Douglas Bain for their comments on this introduction. Any errors remain my own.

After Dinner Speech, 6 March 2015

David L. Carey Miller

Many thanks, Andrew. I hope my need for an epitaph won't come too soon but when it does it should be 'With a *lot* of help from his friends!' This splendid event only demonstrates how kind and generous people are. I am very grateful, especially to the organisers, Andrew, Roddy and Douglas. I would also like to express my warm thanks to the sponsors.

In my 44th year of working for the University of Aberdeen my overriding feeling is how quickly the time has passed and how agreeable it has been. Of course, I have worked part-time since 2007 with the luxury of pursuing my own teaching and research interests.

Starting in 1971, a lot could be said, but I don't want to lose friends this evening. So I will do my usual thing and be irrelevantly selective. I started on 1 December 1971. Professor Michael Meston, who was the primary mover in my coming to Aberdeen, told me that I would get an annual salary increment after only six months if I started before the end of the calendar year. If this was Aberdonian thinking, I was learning fast!

But I must start at the very beginning. A serious work on the mixed-systems of Scotland and South Africa – edited by distinguished scholars, Zimmermann, Visser and Reid – says that two young South African lawyers, Robert Leslie and David Carey Miller, were 'brought to Scotland by T. B. Smith'. I thought that my decision was a voluntary one but I have obviously been underestimating the capacity of T. B. Smith. Not only did he bring me to Scotland but he got me appointed in a University other than the one he worked for!

That said, my coming to Aberdeen seems to have been a matter of destiny from being at Edinburgh. T. B. Smith seemed to believe that I should work at Aberdeen. He urged me to visit Aberdeen. He took me to the Scottish Universities Law Faculties Conference at the Burn (Edzell) and introduced me to Michael Meston and Farquhar MacRitchie. On the Burn trip I was driver; David Sellar was also in the car; he will remember that TB called for a stop

at Brechin. There he bought 3 bottles of whisky, one each – after all we were staying overnight at the Burn!

At the Burn I first met Geoffrey MacCormack who was still in Glasgow at the time. More than 40 years on and we've not had a cross word. In Aberdeen Geoffrey and I took turns in being head of the Department of Jurisprudence. The only survivor of our respective regimes is Robin Evans-Jones. As head of department one had power to appoint part-time tutors. At the time I did not realise how potentially significant that was. In 1990 I appointed Edinburgh graduate Anne MacKenzie as a tutor in Jurisprudence. Some 25 years on I am only happy about that particular exercise of judgment. For any who may not know her, I am delighted to introduce my wife, Anne.

Demonstrating the naivety of youth, in Edinburgh I subconsciously resisted the master plan of my going to work in Aberdeen. By the summer of 1968 I had still not visited the Granite City. My mother came from South Africa and we went touring in my Morris 1000. After spending the night in Braemar we arrived at the junction near Balmoral where one can go east to Aberdeen or north to Granton and Inverness. I said that I did not think there was much to see or do in Aberdeen and we drove north!

Golf was a factor in TB's insistence that my future lay in Aberdeen. After all I played golf. Fortunately for me TB was not a golfer himself and not in a position to judge my potential. Paul Beaumont, my regular golf partner, will vouch for the fact that TB was mistaken; in REF terms my golfing impact has been consistently zero! My theory of the prominence of the golfing factor is borne out by the fact that on my first day, when Michael Meston showed me my new room in the Taylor Building, there was a set of papers on the otherwise bare desk. I assumed this was my contract of employment but, of course, it was an application form for the Royal Aberdeen Golf Club! 44 years later, I still have not seen a contract of employment!

Edinburgh not only set me on an Aberdeen career but gave me contact with other PGs working with TB who came to be lifelong friends. I am delighted that Dave Meyers and Erich Schanze have come to this conference. We plan to meet again in 2017 to celebrate the 50th anniversary of our first getting together in Edinburgh.

Soon after I came to Aberdeen Frank Lyall showed me round the Taylor Building. One unoccupied room we looked into had a huge pile of unopened post on the desk. Frank told me that the occupant was in Zambia on extended research leave. It crossed my mind that the academic life probably

had something to offer. Not long afterwards I was awarded a grant by the Davidson Trust to do research on contingent fees with Dave Meyers in the USA. Nice venues are conducive to good results and we carried out the research from Dave's home in the beautiful Napa Valley in California. A year or two later the Davidson Trust funded my taking a party of comparative law honours students to Germany and the Netherlands. Erich Schanze was our host in Frankfurt; Erich has a wicked sense of humour, he arranged our accommodation in the city's most notorious red light district.¹ This venue did not detract from the success of our study visit!

I am sure that I would be largely preaching to the converted tonight in saying that Stellenbosch is another lovely place to work in – the wineries match those of the Napa Valley and Stellenbosch has the added benefit of a university. Aberdeen once exported ministers to the Dutch Reformed Church in South Africa and they made a great contribution; some time later the *quid pro quo* was Cornie van der Merwe, South Africa's top professor of property law, who came to work in Aberdeen. It is great to have Cornie back with us for this occasion. Before we leave the southern hemisphere I want to say how very good it is to have Anne Pope participating in the conference. The South African land reform work with Anne was probably my most rewarding major research project, not least because Anne is also a cricket fan. This time the venue factor was Newlands cricket ground, very close to UCT.

In Aberdeen I have been most fortunate in having colleagues and students of great talent, many of whom came to be good friends. Two former students are at this table: Margaret Ross and Alex Green. As I said, I have had a lot of help from my friends.

Putting this conference in context, it is yet another academic gathering which Alex Green has played a major part in making possible. About 15 years ago Alex came to me with an idea and a generous offer. This is the 8th event in a series which, I think I can say, has been most successful. I would never have guessed that the class prize in the 1988 Comparative Law class could have had such a positive outcome!

The fact that for me the time has passed extremely quickly can only mean that I have been enjoying myself. This I ultimately owe to my undergraduate

¹ Note by Andrew Simpson – Professor Erich Schanze informs me that there was something of a running joke between him and David as regards which of them was actually responsible for the booking

students over the years. There is no better example than our conference organiser Andrew.

I will end with a reflection on how things have changed, at least in a certain respect. My first honours class in 1972 was all male – they asked for ashtrays; this year's class was all female – their demands were only reasonable ones. That, for me, seems just about full circle. But, as a reassuring reminder of a bigger circle, the seagulls still chap on the Taylor Building windows.

Aberdeen, Edinburgh, Smith and South Africa: Eulogy for David Carey Miller

Greg Gordon

Author's Note: The text below is that of the Eulogy given at King's College Chapel, Old Aberdeen, on 7 March 2016. The footnotes are subsequent additions.

A year and a day ago, in the Linklater Rooms which lie, as the crow flies, about 50 yards over my right shoulder, David Carey Miller stood to deliver the after-dinner speech marking the end of a conference held in his honour. He began by saying, "I hope my need for an epitaph won't come too soon but when it does it should be, 'With a *lot* of help from his friends!'" Well, sadly the need for an epitaph has come upon us far more quickly than any of us would have anticipated. The one that David jokingly selected has its attractions: it refers to friendship, which was so important in his life. But – just for once – David's wording is not quite right. It is modest; and that is characteristic of David. But it is *too* modest to stand as testament to this man and what he achieved.

In his speech, David expressed his gratitude to the conference organisers and sponsors: Douglas Bain, Andrew Simpson, Roddy Paisley and Alex Green. I think we owe them a debt of gratitude, too. There is a danger, when thinking of someone so fit and active as David, of imagining that one has all the time in the world to get round to honouring him. Recent events sadly highlight the flaw in that line of thinking.

The conference itself was friendly, sociable, and full of fun – classic David Carey Miller. It was also full of insight, intellectual rigour and original scholarship. And that was classic David Carey Miller, too.

I will have more to say about David as a scholar, but I should first speak about his role as a family man. David met his first wife, Anne Sutherland, in Edinburgh, and they married there in 1970. They lived first in South Africa, where their first child, Phoebe, was born, before returning permanently to Scotland, where the family expanded with the addition of Guy, Claude and Stephanie. David was very, very proud of his children and of their individual

personalities and accomplishments. Perhaps for reasons that we will come to later, he never tried to mould them in his image; although their careers and interests demonstrate a love of the natural world and of the outdoors, things that were a real passion of David's.¹ David was enormously fond, too, of his grandchildren, Logan, Lucas and Page, with whom he loved to spend time. Latterly, I had the office next door to David's in the Taylor Building. Although a smile never seemed to be terribly far from David's face, it was never broader than when he slung his back-pack over his shoulder and announced he was away on "grandfatherly duties". Although he used the language of obligation, it was very obvious that that these duties were a source of great pleasure.

Sadly, David's first marriage ended in the early 1990s. But he would again find happiness and fulfilment with his second wife, Anne MacKenzie. David initially met Anne when she came to tutor at the Law School. Their relationship gradually evolved from one of colleagues into friendship and then something more than friendship. They married in 2004, bringing into David's life four step-children and in time step-grandchildren, who David also loved. David and Anne's was a rich and rewarding relationship based on a deep mutual respect and admiration. They were good for each other and made each other very happy. And they were one of the most hospitable couples that one could wish to encounter. Their house at Kinmuck has been the scene of many a gathering for family, friends and colleagues. The name, of course, derives from its Quaker origins; but did anyone ever live at a more apt address than David Carey Miller at Friends' Cottage?

It is difficult to stand here and give this eulogy, but gratifying to see King's College Chapel so full of David's family, friends, colleagues and students; and gratifying, too, to know that if everyone whose life David touched had been able to attend, the Chapel would have been filled many times over. David's family and we at the Law School are very grateful for the messages of condolence that have been received from all over the world. Antarctica is, I think, the only continent that has been unrepresented – and I am slightly surprised to see that David's network did not extend to there.

The word network – at least, "networking" – has come to have a rather pejorative meaning, at least so far as I am concerned. It seems to involve rushing around a room and foisting business cards upon the maximum number of strangers in the shortest time possible. You tend to know when you've been networked, and to end up feeling rather sullied by the process.

¹ David's final resting place – an eco-friendly woodland burial ground at the foot of Bennachie – is testament to this fact.

Judged by those standards, David Carey Miller was a terrible networker; and yet his own personal network was vast. This is because David did it his way and his way was the right way. He knew how to connect with people in a way that mattered. He did it by taking a genuine interest: talking, of course, but, in particular, *listening* to what they had to say. He was a great listener. And, as he was also excellent at his job, he found that people wanted to work with him, and having done so, wanted to do it again.

Respected by his peers throughout Scotland and in his native South Africa, David was one of the prime movers in the establishment of the Scottish Association of Comparative Law and a regular attendee at the Society of Legal Scholars conference. He was in regular contact with colleagues and former students in Sri Lanka and Singapore,² and with David Daube's family in America: Jonathan Daube has asked me to communicate the family's gratitude for all that David did to help celebrate the centenary of his father's birth.³ Another American connection was the joint Universities of Baltimore and Maryland summer school for comparative law, which will this year celebrate its 30th anniversary, and which David coordinated for more than two decades.⁴ Once all the preparatory work had been done in collaboration with an administrative colleague – latterly, Carol Lawie – David's approach to the coordination role was as simple as it was effective. He turned up, every day without fail, at coffee time. He listened. He heard about things that maybe needed fixing and quietly fixed them. Asked by students or visiting staff for recommendations on things to do within his beloved Aberdeenshire, he would give them, and then turn up at the same time the next day with something that might help: a bus timetable; a guidebook; or, on notable occasions, a set of golf clubs or a bicycle. This of course took time, a precious commodity that David somehow seemed to have more of than everyone else; getting up at 5.30 may have helped. We have been inundated with messages from colleagues involved in the programme. From Baltimore, Donald Stone, formerly the US-side administrator and a three-time

² He had friends in many other countries. For instance, after David's death, I learned from a Malaysian PhD supervisee that he came to Aberdeen on the recommendation of one of the Professors at his alma mater, a recommendation given because that Professor had been supervised by David.

³ An account of the event has been published on The Edinburgh Legal History Blog: <http://www.elhblog.law.ed.ac.uk/2009/03/02/david-daube-100-years/>, accessed 19 May 2017. Some of the papers given at the event were collected and published as E. Metzger (ed.), *David Daube: A Centenary Celebration* (Glasgow, 2010). See also the review of that volume by John W. Cairns, *Edinburgh Law Review*, 15 (3) (2011), 502–3.

⁴ The first Aberdeen coordinator was Jessica Burns, then a Senior Lecturer, latterly a Regional Tribunal Judge.

traveller to Scotland under the programme, described David as one of the kindest, sweetest individuals he ever met. Jana Singer from Maryland wrote fondly of David's beaming smile, intellectual curiosity, and extraordinary enthusiasm, both for the programme itself and for "the nooks and crannies of Scots law".

I first encountered David 26 years ago, when he lectured me on the Roman law of property; lectures that I greatly enjoyed and which gave me my first intimation of David's mastery of property law. But it was his lectures on Applied Jurisprudence that made the greater impression on me. Apartheid was still with us, although coming to an end,⁵ and it occurred to me then, sitting in Aberdeen, listening to this tall, gentle South African discuss the extent to which a judge within an unjust legal system is obliged to resign,⁶ that this man probably had a very interesting life story. When I returned to the University as a member of staff a decade later, I was to learn that I was right.

David was born on 26th June 1941 in East London, South Africa, the only child of Lancelot Carey Miller and Ivy Gwendolen Reid. His father was an attorney in the black homeland of Transkei; his mother was a trained teacher, but devoted herself to the running of Lance's legal firm. In his early years, David hardly knew his father, who was fighting in the war in North Africa; and with his mother exceptionally busy in his father's absence, David was largely raised by black servants, who he viewed almost as surrogate parents. He retained a smattering of Xhosa throughout his life. His early childhood was a happy one and he roamed more or less at will. Later in life he would join the South African Liberal party and write, in 1986, that apartheid was a bad system that would inevitably fall.⁷ He always felt that his political views had been informed by his childhood experiences.

At the age of 12, the family moved to Richmond in what is now KwaZulu Natal, and David went to St Charles boarding school. He did not enjoy the loss of freedom, and suffered a further blow when he was struck down with

⁵ David lectured me on Applied Jurisprudence in the spring of 1992.

⁶ David's lectures were largely based around the debate on this point between Professors Wacks and Dugard: see e.g. Raymond Wacks, 'Judges and Injustice', 101 *South African Law Journal* (1984), 266–85; John Dugard, 'Should Judges Resign? A Reply to Professor Wacks', 101 *South African Law Journal* (1984), 286–94; Raymond Wacks, 'Judging Judges: A Brief Rejoinder to Professor Dugard', 101 *South African Law Journal* (1984), 295–300.

⁷ David L. Carey Miller, *The Acquisition and Protection of Ownership*, (Cape Town and Johannesburg, 1986), para.10.2.4.3(b). He listed having done so in a short account of his career highlights submitted as part of his biographical information in advance of the 50 year reunion of the class of 1958.

rheumatic fever, which caused him to miss almost a year of school. He was treated, and perhaps saved, by one of the earliest prescriptions of antibiotics in South Africa. The illness precluded him from being as involved as he would have liked in rugby and cricket, two sports that he remained fanatical about throughout his life, and in relation to which this son of South Africa, long resident in Scotland, supported England, in view of his family ancestry. I have seen from his year-book that his school-friends' nicknames included "Eagle", "Slogger" and "The Lebanese Lion". Showing scant regard for the requirements of future obituarists, David's contemporaries dubbed him "Dave"; a disappointingly prosaic effort. But then again, the yearbook would suggest that young Dave had managed to successfully repress the fact that his middle name was "Lancelot".

David was an avid photographer at school.⁸ He remained so throughout his life, as anyone who has seen the beautiful blown-up pictures that adorn the walls at Friends' Cottage will know. He would go on to act as unofficial Law School photographer. For the last photograph that David took of me it was appropriate to have the Stair Memorial Encyclopaedia of Scots Law in the background. This, however, presented a logistical problem. I kept the Encyclopaedia on a bookshelf much taller than me. We initially thought to remove all the books and papers from a lower shelf and then move the Encyclopaedia into place volume by volume. But then David suggested that this tiresome task could be avoided if I elevated myself to book height by standing on a pile of chairs while he, his camera and his tripod balanced precariously upon my desk. Neither of us having been blessed with a great sense of balance, this could have ended very badly indeed; but in the event, it produced one usable photograph, and a gale of laughter.

As a boy, so keen was David on photography that he wished to make a career as a photo-journalist. Given the path that South Africa was to tread over the remainder of David's life – the horrors and triumphs that it was to know – we can only wonder what David would have seen through his lens had he gone down that path. His parents, however, insisted on a career in law; and so he obtained a BA in Political Science and took articles while studying for his LLB on a part-time basis. This would not be the last part-time degree he would obtain; later, his PhD was attained on this basis, alongside his work at the University of Aberdeen. His doctorate was on the topic of the 'Advocate's

⁸ The school yearbook describes him and his camera as "ubiquitous threats to one and all."

Duty of Justice’.⁹ Although David is now associated primarily with his work on property law, in his earlier years he produced excellent scholarship on a broad range of private law subjects.¹⁰

David practised in his father’s firm before embarking on the journey that was to change the direction of his life, when he travelled to Edinburgh to undertake a research Masters. While there, he met his class-mates Dave Meyers, Erich Schanze, Jeroen Chorus and Bob Leslie, as well as David Sellar, then at the beginning of his academic career. David would remain friends with them for all his life.

At this time, David also met and studied under T. B. Smith, who would go on to be one of the most significant figures in his academic life. David did not always agree with the fine detail of T. B.’s analysis, but there is no doubting that he greatly admired Smith for his intellectual vigour and the leadership he showed at a crucial juncture for Scots law, and David always spoke of Smith with great fondness. One story that he enjoyed telling was of the examination undertaken by him and that his fellow LLM students. It was held not in Old College but at Smith’s home. There, T. B. ushered the candidates into his library and commenced the exam with the words, “Take as long as you like; use any of the books you wish; and we shall break at noon for lunch and wine.”

David loved T. B.’s style. But there was substance in their relationship, too. T. B. Smith showed a real belief in David’s abilities. In signing up to become a student, David had not anticipated he would be asked to teach, but Smith insisted, and when the opportunity came, he relished it. Years later, David showed a similar level of trust in the abilities of his own research students and junior colleagues. When he returned to South Africa at the end of his studies, he practiced as an advocate, but also undertook part-time teaching at Pietermaritzburg. Within a couple of years, he was back in Scotland, having accepted Mike Meston’s invitation to join the staff at Aberdeen, where his colleagues included Geoffrey MacCormack, Frank Lyall and, before long, Angus Campbell.

⁹ Sometime after this eulogy was delivered I looked through David’s copy of his PhD and discovered that kept with it was a letter from Alan Rodger (later to become Lord Rodger of Earlsferry) conferring his thanks and those of Kemp Davidson (later to become Lord Davidson) for having made the PhD available to them while they were writing the title on ‘Advocates’ in the *Stair Memorial Encyclopaedia*.

¹⁰ For instance, the first piece of David’s that I can recall reading was a commentary on the *Animals (Scotland) Act 1987*: David L. Carey Miller, ‘Liability for Animals’, 1987 *SLT* 229–33. This was an area of long-standing interest, David’s 1969 LLM Thesis having been entitled, ‘Liability for animals causing injury to persons or property.’

David would go on to honour T. B. Smith in many ways: he edited a collection of essays as a tribute in 1992,¹¹ and arranged for T. B. Smith to be the subject of a CMS Cameron McKenna lecture delivered by Kenneth Reid and accompanying conference, the proceedings of which were later published.¹² Fittingly, David's last completed article was a piece tracing the origin of T. B. Smith's comparative law connection with South Africa.¹³ I am told by Martin Hogg¹⁴ that David provided the final set of revisions only the day before he passed away. It is fitting, too, that while working on that paper David discovered that a research student in Edinburgh was interested in another aspect of T. B.'s life, his connections with comparative lawyers in America.¹⁵ Naturally, David made contact, which turned out to be mutually beneficial. One last act of academic friendship in a life packed full of them.

David of course had interests beyond his family and the law. He loved golf, although it must be said that golf did not always love him back. The annual Aberdeen–Glasgow Senate Golf Match was a highlight in David's social calendar. David suffered from a chequered record in the match, unlike me. I am a proud one hundred percent – played three, lost three. I do not think that David was the most fiercely competitive Captain to skipper Aberdeen, but there was no prouder historian of the event, and he loved the challenge of the day's golf and in particular the camaraderie of the post-match dinner. He recognised the silliness inherent in the attendant song and rituals, and revelled in it. He revelled, too, in his ownership of a vintage open-top Morgan sports car, and in his enjoyment of fine Scotch whisky, although happily he did not indulge those two passions simultaneously. I was startled, however, to read within papers received from Anne over the weekend, the confession that he had driven his Morgan with the top down at 95 miles per hour in order to escape from the violent thunderstorm which had broken shortly after Anne had insisted that there was no need to stop and raise the hood, as it was definitely not going to rain.

¹¹ David L. Carey Miller and David W. Meyers, (eds), *Comparative and historical essays in Scots law: a tribute to Professor Sir Thomas Smith QC* (Edinburgh, 1992).

¹² Elspeth Reid and David L. Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh, 2005).

¹³ David Carey Miller, 'Sibling Mixed Systems: Reviewing Scottish and South African Comparative Law', *Edinburgh Law Review*, 20(3) (2016), 257–84.

¹⁴ The then editor of the *Edinburgh Law Review*.

¹⁵ See Alasdair D. J. MacPherson, 'T B Smith and Max Rheinstein: Letters from America', *Edinburgh Law Review*, 20(1) (2016) 42–65.

I fear I may have spoken for too long. The truth is that I or any one of us could speak about David for hours. I hope that we do so, over the weeks and years ahead. As we do, we will have the comfort of being able to reflect on a life well lived.

To conclude, I must return to the question of David's epitaph. There are perhaps two possibilities that are worth discussing. One is drawn from a course evaluation form compiled by an anonymous student on the Baltimore/Maryland Summer School Programme. Very few of us, I think, would choose to enter the course evaluation bear-pit for such a purpose. But then again, very few of us have ever received student feedback like this: "I want David Carey Miller to adopt me as his grand-daughter." There is, however, a stronger contender, provided by David himself. In a document written for the 50 Year Reunion of his school class of 1958, David outlined, with characteristic understatement, the achievements of his career, including his election as a Fellow of the Royal Society of Edinburgh and his appointment as Senior Visiting Research Fellow at the Institute of Advanced Legal Studies.¹⁶ Right at the end of the document, under the heading "Legacy", he quoted Justinian¹⁷ in offering this recommendation:

"Live honestly, hurt no-one and give to everyone his due."

That was the David Carey Miller that I knew.

¹⁶ Other highlights picked out include his time as Deputy Head of School and his year as Head.

¹⁷ *Institutes*, 1.3.

Professor Longhair's Legacy: A Comparative Perspective on Revendicating Moveables

John A. Lovett

Lawyers and law professors alike often say that bad facts make bad law. But sometimes the opposite is true. Compelling facts can enable a legal system to visualise the need for a change in its law. A third possibility also exists. Sometimes a compelling set of facts allows a legal system to recognise the value of a previously underappreciated legal rule. Finally, on occasion, the exact same set of facts can confront courts in different legal systems and illuminate the contrasting values and priorities in the respective systems.

The story that lies at the heart of this essay in honour of David Carey Miller illustrates the last two possibilities. Not only does it involve the 'revendication' of corporeal moveables,¹ a subject near and dear to Professor Carey Miller, but it also reminds us why comparative law is such an illuminating endeavor – one that inspired Professor Carey Miller throughout his long and distinguished career.

Protecting Ownership Rights in Moveables under the Louisiana Civil Code

In 1979, in the midst of its bold project of revising and updating the entirety of its Civil Code, Louisiana enacted a new chapter of that code entitled 'Protection of Ownership'.² Two of the chapter's seven articles articulate rules governing the assertion of ownership with respect to immoveable property.³ Three other articles address restitution owed to good and bad faith possessors when they are evicted from an immoveable by a true owner.⁴ Only two of

¹ I use the most common Louisiana spelling of the term in this chapter, aware that many jurists in other jurisdictions and some jurists in Louisiana use 'revindication'.

² See La Acts 1979, No. 180, eff. 1 January 1980.

³ La Civ. Code arts 531 and 532 (1979).

⁴ Ibid., arts 527–529.

the chapter's articles address moveables. Article 530 states two long familiar presumptions – the 'possessor of a corporeal movable is presumed to be its owner' and the 'previous possessor of a corporeal movable is presumed to have been its owner during the period of possession' – while acknowledging that neither presumption 'prevail[s] against a previous possessor who was dispossessed as a result of loss or theft'.⁵

For present purposes, the crucial article in the revised Civil Code's chapter on protection of ownership is Article 526:

Art. 526. Recognition of ownership; recovery of the thing

The owner of a thing is entitled to recover it from anyone who possesses or detains it without right and to obtain judgment recognizing his ownership and ordering delivery of the thing to him.

We know from the new chapter's *Exposé des Motifs* and the revision comments to Article 526 that prior versions of the Louisiana Civil Code did not contain any provision directly resembling the new article.⁶ However, these same explanatory sources also report that Article 526 did not change Louisiana law. This claim is generally supported by the evidence. As the revision comments acknowledge, Article 526 expresses principles inherent 'in all civil law systems',⁷ and these principles were alluded to in the 1870 Civil Code.⁸ The principles appeared most clearly in statutory form in the Louisiana Code of Practice of 1825.⁹ While some pre-revision case law supports the claim that Article 526

⁵ Ibid.

⁶ *Exposé des Motifs of the Louisiana Civil Code, Title II: Ownership, vol. 3* (West, 1980), 214, La Civ. Code art. 526. rev. cmt (b) (1979).

⁷ La Civ. Code art. 526. rev. cmt (b) (1979) (citing '1 Planiol, Civil Law Treatise, Part 2, s. 2445 et seq. [...] Greek Civil Code Arts 1094 and 1095, and BGB ss 985 and 986').

⁸ Despite the claim of La Civ. Code art. 526. rev. cmt (a) (1979), the references to revendication in the 1870 Civil Code are, in fact, rather slim. Articles 1517 and 1518 of the 1870 Civil Code used the term solely in the context of an 'action of reduction or revendication' brought by a forced heir seeking to reclaim his forced portion against third persons holding immovable property alienated by a donee. La Civ. Code arts 1517–1518 (1870).

⁹ Article 60 of the 1825 Code of Practice stated that '[p]ossessory actions cannot be maintained for personal property; the *action in revendication* for that species of property, having nothing in common with the extraordinary privileges secured to the owners of real estate, or of real rights, when they are disturbed in their possession'. La Civ. Code art. 60 (1867) (emphasis added). The implication here is that even though a possessor of a movable could not bring an action to protect his 'possession' per say, the true owner could still bring 'an action in revendication' against another possessor

expressed a recognised rule in the Louisiana jurisprudence,¹⁰ other decisions, however, cast doubt on that claim.¹¹

In any event, a critical question for this essay is whether a revendicatory action to recover a moveable is subject to any form of prescription. Can the right to bring a revendicatory action—a right inherent in ownership itself—be extinguished by liberative prescription—what a Scottish lawyer would call ‘negative’ prescription? Or can the right to revendicate only be lost if another possessor succeeds in establishing acquisitive prescription—what a Scot would call ‘positive’ prescription?

Although the text of Article 526 does not comment on this subject, Article 481 of the revised Civil Code, which was enacted in the same revision package as Article 526,¹² provides a clue:

Art. 481. Ownership and possession distinguished

The ownership and possession of a thing are distinct.

Ownership exists independently of any exercise of it and may not be lost by nonuse. Ownership is lost when acquisitive prescription accrues in favor of an adverse possessor.¹³

By stating that ownership can only be lost when acquisitive prescription runs in favor of an adverse possessor, Article 481 seems to imply that liberative prescription, ‘a mode of barring of actions as the result of inaction for a

without right.

¹⁰ Revision comment (b) to Article 526 cites a curious nineteenth century Louisiana Supreme Court decision, *Bouchard v Parker* 32 La Ann. 535, 536 (1880), in which the plaintiff sued to recover the proceeds of 572 bales of cotton that had been invested in US bonds after the bales of cotton had been seized by US forces during the Civil War and sold at a public auction. Concluding that the plaintiff’s suit was not a personal action for the recovery of money, but one ‘for the recovery of this fund, or these bonds representing it, and which are presumed to be easy of identification’, the court, quoting Pothier, labeled the plaintiff’s suit ‘an action of revendication’, that is, a ‘species of action closely allied’ to the real action for the recovery of land or real rights. *Bouchard*, 537.

¹¹ In one frequently cited case, *Moreland v Rucker Pharmacal Co.* 59 FRD 537 (WD La 1973), Dawkins J, a then well-known federal district court judge, citing Professor Yiannopoulos’ 1966 property law treatise, observed a state of confusion in the law and held, at least for purposes of that dispute, that ‘there is no real action in Louisiana to determine ownership or interest in movables’. *Moreland*, 541 (citing A. N. Yiannopoulos, *Civil Law of Property* (St Paul, Minn., 1966), § 142 et seq.).

¹² La Acts 1979, No. 180, s. 1, eff. 1 January 1980.

¹³ La Civ. Code art. 481 (1979).

period of time', might be inapplicable to revendicatory actions.¹⁴ But Article 481 is not decisive. Perhaps its main point is to distinguish between acquisitive prescription and *prescription of non-use*, a 'mode of extinction of a real right other than ownership as a result of a failure to exercise the right for a period of time', a mode of prescription, which, the article points out, cannot bring ownership to an end.¹⁵ Moreover, the fact that the Louisiana Code of Civil Procedure offers a carefully structured, two-stage process for the protection of possession and ownership of immovables and real rights through the possessory¹⁶ and petitory action,¹⁷ but does not provide a similar nominate procedural regime for the protection of possession and ownership of moveables, creates some uncertainty as to whether a revendicatory action can be subject to liberative prescription.¹⁸

As one might expect from reading Article 481, a possessor in Louisiana has long been able to acquire ownership of both immovable and moveable things through acquisitive prescription.¹⁹ Rules for acquisitive prescription of moveables first appeared in Louisiana – albeit in primitive and somewhat awkward form – in the Digest of 1808.²⁰ In addition to providing a distinction between good faith and bad faith acquisitive prescription of moveables, the Civil Code of 1825 provided a more elegant statement of the applicable rules.²¹

¹⁴ La Civ. Code art. 3447 (1982).

¹⁵ La Civ. Code art. 3448 (1982).

¹⁶ La Code Civ. Proc. art. 3655 (1960, amended 1981).

¹⁷ Ibid., art. 3651.

¹⁸ In Louisiana, there is a kind of liberative prescription that applies to petitory actions. A court may order the losing defendant in a possessory action to assert his ownership or real rights in the immovable property within sixty days after the judgment in the possessory action becomes final. La Code Civ. Proc. art. 3662(A)(2) (1981). Because Louisiana law does not provide a nominate procedural mechanism for a possessor of a movable to protect his possession, one could argue that the only means available to a possessor of a movable to terminate a 'true owner's' right to bring a revendicatory action is to assert the acquisition of ownership by acquisitive prescription or some other mode through a declaratory judgment action. That said, both the Civil Code and Code of Civil Procedure are silent as to whether a revendicatory action is subject to liberative prescription.

¹⁹ La Civ. Code arts 3473, 3486 and 3489 (1982).

²⁰ See La Civ. Code art. 75, 488 (1808) ('If a man has had a public and notorious possession of a movable thing, during three years, in the presence of the person who claims the property of the thing, said person being a resident within the territory, is presumed to have known the circumstances of the possession and the property becomes vested in the possessor, unless the thing has been stolen').

²¹ See La Civ. Code. arts 3472 and 3475 (1825) (distinguishing between three year acquisitive prescription for possessors of movables with good faith and just title and ten

That distinction was carried forward in the 1870 Civil Code.²² Under the revised Civil Code, a possessor can now acquire ownership of a moveable by three years of uninterrupted possession, provided the possessor commenced his possession in good faith and with an act sufficient to transfer ownership,²³ and by ten years of uninterrupted possession, without good faith or title.²⁴

The Civil Code's requirement that a possessor must possess 'as owner' is central to acquisitive prescription with respect to both immoveables and moveables. With respect to an *immoveable*, the Civil Code expressly instructs that acquisitive prescription does not run in favour of a 'precarious possessor or his universal successor'.²⁵ Because the general provisions on possession also define 'precarious possession' as 'the exercise of possession over a thing with the permission of or on behalf of the owner or possessor',²⁶ one can reasonably deduce that a precarious possessor or his universal successor cannot acquire ownership of a *moveable* by acquisitive prescription either. In short, a precarious possessor cannot be an adverse possessor with respect to either an immoveable or a moveable.

The Civil Code provides several means by which precarious possession can end so that a precarious possessor or his universal successor can begin to possess as owner and thus qualify for the benefits of possession, including the commencement of acquisitive prescription. First, a co-owner or his universal successor can demonstrate his intent to possess as owner by 'overt and unambiguous acts sufficient to give notice to his co-owner'.²⁷ For purposes of acquisitive prescription of immoveables, 'the acquisition and recordation of a title from a person other than a co-owner' may be one of the overt and unambiguous acts that could launch the commencement of acquisitive prescription.²⁸ Crucially for our purposes, though, any other precarious possessor, or his universal successor, can commence to possess for himself as

year acquisitive prescription for possessors of movables in bad faith and without a title). The 1808 Digest did not distinguish between good and bad faith acquisitive prescription for movables, though it did do so with respect to immovables. La Civ. Code arts 66–67, 486–488 (1808).

²² La Civ. Code arts 3506 and 3509 (1870).

²³ La Civ. Code art 3490 (1982).

²⁴ *Ibid.*, 3491.

²⁵ *Ibid.*, 3477.

²⁶ *Ibid.*, 3437. For a detailed discussion of the problem of precarious possession in Louisiana law, see J Lovett, 'Precarious Possession,' *Louisiana Law Review*, 77 (2017) 617.

²⁷ La Civ. Code art 3439 (1982).

²⁸ *Ibid.*, 3478.

owner only ‘when he gives *actual notice* of this intent to the person on whose behalf he is possessing’.²⁹ Similarly, when precarious possessors other than co-owners seek to commence *acquisitive prescription of immoveables*, the same requirement of actual notice applies.³⁰

These background rules are commonplace in Louisiana. As the following story reveals, however, they have sometimes proved elusive to Louisiana jurists, especially when revendicatory claims are asserted by a true owner long after another person takes possession of a moveable and defendants assert that such claims should be subjected to the relatively short liberative prescription periods for delictual or quasi-contractual causes of action. As we will also see, even though American common law jurisdictions could employ a similar conceptual framework through the law of adverse possession, leading cases have focused on when a statute of limitation—negative prescription—begins to run against a true owner seeking to recover a chattel—often an art object—from a possessor or good faith purchaser.³¹

Professor Longhair and the Strange Journey of the Baton Rouge Master Recordings

The objects at the heart of this story are four ‘eight track’ tapes produced at a Baton Rouge, Louisiana recording studio in the second half of 1971.³² The featured musician on these tapes is New Orleans rhythm-and-blues pianist, Henry Roeland Byrd, professionally known as Professor Longhair.³³

²⁹ Ibid., 3439 (emphasis added).

³⁰ Ibid., 3478. Precarious possession can also terminate when a precarious possessor, such as a lessee or depositary, conveys his possession to a particular successor by an act translatif of ownership. Ibid., 3479. Acquisitive prescription then runs in favor of the particular successor from the moment he commences possession, but without the benefit of tacking to the precarious possessor. Idem rev. cmt (c).

³¹ See generally David A. Thomas, ‘Adverse Possession: Acquiring Title to Stolen Personal Property’, *Prob. and Prop.*, 10(2) (1996), 12.

³² *SongByrd, Inc. v. Bearsville Records, Inc.* 104 F.3d 773, 774 (5th Cir. 1997) (*‘SongByrd P’*).

³³ ‘Rhythm-and-blues’ has been defined as ‘a fusion of the blues idiom with a variety of other forms—gospel, jazz, swing, Afro-Cubano, hillbilly’. Jason Berry, Jonathan Foote, and Tad Jones, *Up From the Cradle of Jazz: New Orleans Music Since World War II* (New York, 1992), 19–20. In 1949, the category of ‘rhythm-and-blues’ replaced ‘race recordings’ in Billboard magazine. Idem, 19. By the 1950s, the term referred to many forms of black music other than jazz. Idem, 20.

Born in Bogalusa, Louisiana in 1918, Byrd was brought to New Orleans by his mother early in his childhood. His initial exposure to the dynamic music world of early twentieth century New Orleans was through church, his mother, who taught him guitar and piano, and the clubs on Rampart Street, just on the edge of the French Quarter, where Byrd both tap danced on stages and listened to keyboard artists such as Sullivan Rock and Isidore 'Tuts' Washington who were playing a barrelhouse style that came to be known as 'boogie-woogie'. Byrd began to play piano professionally in the late 1940s, performing at clubs on Rampart Street. Byrd acquired his stage name performing at the Caldonia Inn in 1947.³⁴

In 1949, Byrd began to record some of his music with various labels (including Mercury and Atlantic Records). His first and only commercial hit during his lifetime was 'Bald Head', released in 1950. That same year, Byrd recorded 'Go to the Mardi Gras', a song that later became the de facto anthem to carnival season in New Orleans. In 1953, Byrd released 'Tipitina', a song that eventually became a New Orleans classic and Byrd's signature composition. In 1964, Byrd released 'Big Chief', another well-known song composed by Earl King.³⁵

As the 1960s progressed, Byrd's musical career gradually declined, and Byrd turned to odd-jobs to eke out a living. In 1970, however, Byrd's fortunes suddenly improved. That year an admiring British blues journalist, Mike Leadbitter, travelled to New Orleans and found Byrd sweeping floors at a record store on South Rampart Street. At the same time, Quint Davis, the son of a famous New Orleans architect, was looking for local talent to feature at the New Orleans Jazz and Heritage Festival ('Jazz Fest'), which had just been founded by a local group of hotel-motel owners. Working with Allison Minor Kaslow, Davis also discovered Byrd working in the record store and suffering from various physical ailments. In 1971, Davis arranged for Byrd to play at the second annual Jazz Fest. Byrd dazzled the audience. Promoted by Davis, Byrd soon became a regular featured performer at Jazz Fest.³⁶

³⁴ Ibid., 18–19. The name was given by the Italian proprietor of the Caldonia Inn because Byrd and his fellow band members had especially long hair. 'I'm going to keep this band. We'll call you Professor Longhair and the Four Hairs Combo', the proprietor exclaimed, according to Byrd. Ibid., 19.

³⁵ Ibid., 18–20.

³⁶ Ibid., 21. For details on the history of Jazz Fest, see Wikipedia, 'New Orleans Jazz and Heritage Festival', [wikipedia.org](https://en.wikipedia.org/wiki/New_Orleans_Jazz_%26_Heritage_Festival), https://en.wikipedia.org/wiki/New_Orleans_Jazz_%26_Heritage_Festival, accessed 7 March 2015.

In the following years, Byrd began to tour widely and record once again. In 1973, he appeared at the Newport Jazz Festival and the Montreux Jazz Festival. In 1976, he recorded a live album with the help of Paul McCartney. In 1977, Byrd became part-owner of the music club 'Tipitina's' which became his home base in New Orleans. In May 1979, Byrd appeared live on NBC's national news program 'The Today Show'.³⁷ Tragically, on 30 January 1980, just as a polished new album featuring Dr John was being released and his concerts were drawing large, enthusiastic audiences across the country, Byrd died of pulmonary emphysema, chronic bronchitis and advanced cirrhosis of the liver.³⁸

The recording session in Baton Rouge, at which the master recordings that eventually became the subject of this tale were made, was arranged by Byrd's promoter, Quint Davis, and Parker Dinkins, an attorney and accomplished sound engineer,³⁹ soon after Byrd's initial appearance at Jazz Fest. Several other prominent New Orleans musicians travelled to Baton Rouge with Byrd for the session. Among them were guitarist Snooks Eaglin, one of the initial performers at Jazz Fest, and drummer Joseph 'Zigaboo' Modeliste, who became part of the influential New Orleans funk band 'the Meters'.⁴⁰ The master recordings consisted of four reels of eight-track tape that could be mixed to produce either 'demonstration tapes' or final recordings suitable for production.⁴¹

What happened next is subject to some dispute. According to Byrd's associates, several demonstration tapes produced from the Baton Rouge master recordings were sent to Bearsville Records, Inc., a recording studio and record company located in Woodstock, New York, operated by Albert Grossman. Admiring the tapes, Grossman arranged for Byrd, several other New Orleans musicians, and Davis and Dinkins to travel to Woodstock for a recording session. Although the recording session at Bearsville proved to be unsatisfactory for reasons that are unclear, Davis and Dinkins believed that Grossman should have access to the complete set of Baton Rouge master recordings. Davis and Dinkins thus caused all four eight-track master

³⁷ Berry, Foose and Jones, *Cradle of Jazz*, 21.

³⁸ *Ibid.*, 22–4.

³⁹ *SongByrd I*, 774. Interview with Justin Zitler, Attorney (New Orleans, LA, 20 May 2015).

⁴⁰ For details on the careers of Eaglin and Modeliste, see Berry, Foose and Jones, *Cradle of Jazz*, 117, 122, 124 (Eaglin), 194–200 (Modeliste and the Meters).

⁴¹ *SongByrd I*, 774.

recording tapes to be delivered to Grossman in New York.⁴² According to Davis and Dinkins, the tapes were sent to Grossman 'as demonstration tapes only, without any intent for either Grossman or Bearsville Record, Inc. to possess [the tapes] as owner'.⁴³ According to Davis and Dinkins' affidavits, Grossman did nothing with the tapes.⁴⁴

In 1975, Dinkins, acting on behalf of both Bryd and Davis, wrote two letters to Bearsville (the second addressed to Grossman himself), requesting the return of the master tapes. There is no evidence that Bearsville or Grossman replied to these letters. Apparently, Dinkins did not make any further demands for the return of the tapes.⁴⁵

Albert Grossman – Rock' n' roll's Citizen Kane

At this point, it is worth saying a few words about the person who now possessed the master tapes. Albert Grossman was not your typical music producer. Born in 1927 to immigrant parents, Grossman grew up and was educated in Chicago, where he earned a master's degree in economics. In 1957, he opened a folk music club in Chicago called 'the Gate of Horn' which became a launching pad for artists like Odetta and Bob Gibson.⁴⁶

In 1959, Grossman moved to New York and met George Wein, who later was the first producer of the New Orleans Jazz and Heritage Festival. That same year Grossman helped Wein launch the first Newport Folk Festival. Attracted by the burgeoning folk music scene in Greenwich Village in the early 1960s, Grossman finally left his club business in Chicago behind and began managing folk artists in New York full time. One of his first artists was Peter Yarrow, who Grossman encouraged to form the group that came to be known as 'Peter, Paul and Mary'. Around this time Grossman met another emerging folk artist named Bob Dylan performing in small basement clubs in Greenwich Village. Grossman and Dylan soon embarked on a lengthy and often difficult business relationship. When Peter, Paul and Mary scored a major commercial hit with their release of Dylan's song 'Blowin' in the Wind', even

⁴² Ibid., 774–5.

⁴³ Ibid., 775.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ The source of biographical details regarding Grossman and his epitaph as rock' n' roll's 'Citizen Kane' is Rory O'Conner, 'Albert Grossman's Ghost', *Musician Magazine* (June 1987), 5–7.

before Dylan released the song on his own 1963 album, *The Freewheelin' Bob Dylan*, it was clear that Grossman had begun to transform American popular music.⁴⁷

Just as all of this was taking place, Grossman had also begun to buy real estate in Bearsville, New York, next door to Woodstock, a small arts colony about one hundred miles north of New York City. Eventually, Peter Yarrow bought a house in the area and Bob Dylan began spending time there as well. In time Grossman's list of influential folk and rock 'n roll artists grew to include Gordon Lightfoot, Paul Butterfield, The Band, and even Janis Joplin. Eventually, though, Grossman became overwhelmed with his many acts, began to delegate responsibilities, and then sadly developed a bitter dispute with Dylan over the publishing rights to the latter's music. According to Yarrow, Grossman's oldest friend in the music world, by the end of the 1970s Albert Grossman was 'burnt out and heartbroken'.⁴⁸

Coincidentally, but perhaps fortuitously for Grossman, just at this moment of apparent depression, Quint Davis, the young New Orleans promoter who had helped George Wein launch the New Orleans Jazz and Heritage Festival a year earlier, sent Grossman the demonstration tapes made by Byrd and then helped to arrange for Byrd and the other New Orleans musicians to travel to Bearsville for a recording session. Peter Yarrow later observed that Grossman was 'concerned first and foremost with *authenticity*'.⁴⁹ Given this commitment, one can easily imagine that Byrd's music, with its idiosyncratic blend of Afro-Cuban, boogie-woogie and rhythm and blues elements, would have made an impression on Grossman.

Sadly, though, not unlike Byrd, Grossman died unexpectedly while on board a flight from New York to London in late January 1986.⁵⁰ The reasons for his death are unknown. But a strange story about the circumstances of his death surfaced in later years. According to affidavits of Sally Grossman, Albert Grossman's widow and business partner in Bearsville, when she took possession of Grossman's body in Heathrow Airport after his death, she found Byrd's 1971 master recordings clutched in her husband's arms.⁵¹

⁴⁷ Ibid. According to O'Conner, Grossman managed Dylan from 1962 to 1971. Ibid., 7.

⁴⁸ Ibid., 8–9.

⁴⁹ Ibid., 7.

⁵⁰ Ibid., 1.

⁵¹ *SongByrd, Inc. v Estate of Grossman*, 206 F.3d 172, 175, n. 3 (2d Cir. 2000) ('*SongByrd II*').

Bearsville's Exploitation of the Tapes and the Filing of SongByrd I

After Grossman's death, Bearsville Records, Inc. was dissolved. Grossman's estate, however, continued to do business as 'Bearsville Records'. Though it no longer produced records of its own, Bearsville Records licensed recordings and leased the Bearsville studio for use by other musicians.⁵²

At some point in 1986, Grossman's estate, doing business as Bearsville Records, licensed a number of tracks from the 1971 Baton Rouge master recordings to Rounder Records Corporation of Cambridge, Massachusetts for an advance against royalties. In 1987, Rounder released an album titled 'House Party New Orleans Style: The Lost Sessions 1971–72'. Eleven of the songs on this album were derived from the 1971 Baton Rouge master recordings. (The remaining handful of songs on the album were derived from other recordings by Byrd.) Although the album was not a significant commercial success, it did receive critical acclaim. In 1987, in fact, it garnered the Grammy Award for Best Traditional Blues Album.⁵³

Several years later, Grossman's estate again licensed some of the Baton Rouge master recordings to another record company, Rhino Records. In 1991, Rhino released an album entitled 'Professor Longhair: Mardi Gras in Baton Rouge', featuring seven tracks from the Baton Rouge master recordings.⁵⁴ In 1993, an attorney in New Orleans named Justin Zitler formed a corporation, SongByrd, Inc., as the successor in interest to the intellectual property rights of Byrd and his widow in community, Alice Watson Bryd.⁵⁵

Unavailability of Copyright Protection for the Master Recordings

Before proceeding further with an analysis of SongByrd's attempt to recover the master recordings under Louisiana property law, the reader will likely wonder why SongByrd could not have sought relief against Bearsville or Grossman's Estate in Louisiana or New York under federal or state copyright law. The short answer is that oddities of copyright law in the United States denied Byrd's estate any effective copyright remedies to protect its interests in

⁵² *SongByrd I*, 775; *SongByrd II*, 175.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

the recordings themselves and required SongByrd to acquire some evidence of its ownership interest in the master tapes.

The first problem for SongByrd was that at the time the Baton Rouge master recordings were made the Copyright Act of 1909 did not provide copyright protection for sound recordings. Although the Copyright Act was amended in 1971 to do so, the effective date of that amendment was 15 February 1972. Thus, only sound recordings made *after* that date were eligible for protection from infringement in the form of unauthorised reproduction. Because the Baton Rouge recording sessions were apparently made *during* 1971, they were not protected under the Copyright Act of 1909.⁵⁶ Put differently, to obtain federal copyright protection under the 1909 Act, copies of any work had to be published ‘with proper copyright notice’ or copies of an unpublished work had to be registered and deposited with the United States Copyright Office.⁵⁷ Unfortunately for SongByrd, the master recordings were not even subject to sound recording protection under the Copyright Act.

Byrd’s catalogue of original musical compositions, 32 songs in all, including classics such as ‘Go to the Mardi Gras’ and ‘Tipitina’, was capable of copyright protection.⁵⁸ The ‘publisher’s share’ of the composer’s interest in those compositions had been assigned to the publishing divisions of various record companies at the time those compositions were originally recorded. While the ‘writer’s share’ had remained with Byrd and then with his successor in interest, SongByrd, the modest revenue attributable to the writer’s share was held in trust by the record companies. Eventually the Copyright Act of 1976 allowed composers like Byrd (and their successors) to recapture their publisher’s share of their copyright interests as long as 28 years had elapsed from the date that the copyright in the compositions subsisted. In the early 1990s, Zitler and SongByrd went to lengths to recapture those publishing rights and to track down the sums attributable to Byrd’s ‘writer’s share’ in his

⁵⁶ Michael D. Landau, “Publication”, Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years’, *Vanderbilt Journal of Entertainment & Technology Law*, 2(1) (2000), 29–51, 31 (citing Copyright Act of 1909, 17 USC §§ 10, 12 (1909)). See also *Capitol Records, Inc. v Naxos of America, Inc.* 830 N.E.2d 250, 262 (NY 2005) (*‘Capitol Records’*) (responding to certified questions from the United States Court of Appeals for the Second Circuit).

⁵⁷ Landau, ‘Publication’, 31. For a particularly lucid account of the tortured history of copyright protection of sound recordings, see Craig Joyce and others, *Copyright Law* (9th edn, Durham, NC, 2013), 203–7, 474–7, 544–5, 574–80.

⁵⁸ See Landau, ‘Publication’, 42 (citing 17 USC § 303(b) (current through 2014)); Interview with Zitler.

catalogue. But, again, because a sound recording of a musical composition was not considered to be a 'copy' of that composition prior to 1972, and was, therefore, not publishable for copyright purposes or capable of being registered,⁵⁹ SongByrd could not assert any protected interest in the master recordings against Bearsville based on federal copyright law at the time.⁶⁰ However, if SongByrd could obtain possession of the master tapes again or even obtain a judgment declaring it to be the owner of the master tapes, there was a reasonable chance that it could assert interests in the sound recordings in the wake of the 1976 amendments to the Copyright Act – particularly if other interested parties – film companies, TV production companies, other record companies – wanted a license to use the master recordings in a film, TV show or new album featuring classic recordings of Professor Longhair. Further, and quite significantly, a judgment declaring SongByrd owner of the sound recordings would allow it to recapture the licensing revenue that Bearsville had derived from *its* licensing agreement with Rounder and Rhino, regardless of the basis of that agreement.⁶¹

Finally, it is worth noting that Professor Longhair also did not enjoy any 'common law' copyright protection to the sound recordings under either Louisiana or New York law at the time. In 1974, a Louisiana appellate court denied an artist 'common law' copyright protection for his sketches and designs under Louisiana law, holding that 'the common law of copyright has not been received in Louisiana, a civil law jurisdiction', and instead relegated that plaintiff to actions for unjust enrichment or the general law of delict in Louisiana.⁶² Although New York eventually did recognise a form of common law copyright protection for pre-1972 sound recordings in 2005, at the time SongByrd was seeking to vindicate rights in the master recordings such protections were still unknown.⁶³ Given the holes in federal and state copyright protection for sound recordings made prior to 1972, one can appreciate why

⁵⁹ Landau, 'Publication', 31, 42; cf. *La Cienega v Z.Z. Top Music Co.* 53 F.3d 950 (9th Cir. 1995), *superseded by statute*, 17 USC § 303(b).

⁶⁰ Interview with Zitler.

⁶¹ *Ibid.*

⁶² *Eager v Coles* 303 So. 2d 864, 866 (La App. 1 Cir. 1974).

⁶³ Michael Smith, 'Gotta Fight for Your Right to Perform: Scope of New York Common Law Copyright for Pre-1972 Sound Recordings Post-Naxos', *Loy. L.A. Ent. L. Rev.*, 30 (2010), 589–99, 590–1 (citations omitted); see also *Capitol Records*, 265 (recognizing that common law copyright protection exists for pre-1972 sound recordings until federal preemption in 2007). But even after 2005, the scope of the common law copyright for sound recordings in New York remains undefined. Smith, 594–9.

state property law with respect to corporeal things was so critical to the comparative law drama that was about to unfold.

SongByrd I: The Louisiana Litigation

In 1995, SongByrd filed a lawsuit in state court in New Orleans against Grossman's estate, doing business as Bearsville Records (hereafter 'Bearsville'). Carefully styled as a 'Petition in Revendication', and specifically citing Article 526 of the Louisiana Civil Code as authority, SongByrd's suit sought three different forms of relief: (1) recognition of its ownership of the master tapes; (2) return of the tapes; and (3) damages, particularly any fees or proceeds that Bearsville had derived from its licensing of the master recordings to Rounder and Rhino.⁶⁴ SongByrd's petition acknowledged that Bearsville possessed the tapes but asserted that it only possessed them precariously with the permission of Byrd and his successor-in-interest, SongByrd.⁶⁵

Pleading diversity of citizenship, Bearsville removed the suit to federal district court in New Orleans and then filed a motion to dismiss the suit on two grounds: (a) lack of personal jurisdiction over Grossman's estate and (b) failure to state a cause of action because SongByrd's claims were barred by *liberative* prescription under Louisiana law.⁶⁶ Pretermitted the question of personal jurisdiction, the federal district court, G. Thomas Porteous, Jr presiding, dismissed the suit as barred by liberative prescription and rejected SongByrd's assertion that Bearsville had only been a precarious possessor of the master tapes.⁶⁷

SongByrd next filed an appeal to the United States Court of Appeals for the Fifth Circuit. Fortunately for SongByrd, the appeal was assigned to a three judge panel consisting of two Louisiana judges steeped in Louisiana's civil law tradition: W. Eugene Davis and Jacques L. Wiener, Jr.⁶⁸ Although the three-judge panel did not hold an oral argument, in a unanimous decision authored by Judge Wiener, the court of appeal reversed the trial court decision holding that (1) SongByrd's claim was a 'revindicatory', i.e., real, action, not subject to

⁶⁴ *SongByrd I*, 775.

⁶⁵ *SongByrd I*, 776.

⁶⁶ *SongByrd I*, 775.

⁶⁷ *SongByrd I*, 775 –6.

⁶⁸ The third member of the panel was Patrick Higginbotham, a federal court of appeals judge from Texas. *SongByrd I*, 774.

liberative prescription, and (2) Bearsville had yet to plead or prove facts that would warrant a finding that acquisitive prescription had run in its favor.⁶⁹

Judge Wiener's opinion for the Fifth Circuit opened with a careful meditation on considerations a federal court sitting in diversity jurisdiction must weigh when applying Louisiana substantive law. Wiener clarified that the common law doctrine of *stare decisis* would be inapplicable. Instead, the court must apply the civilian doctrine of *jurisprudence constante*.⁷⁰ Turning to the words of a distinguished former Louisiana jurist and federal judge, Alvin Rubin, to express the obligation of any judge deciding a case under Louisiana's civil law principle of *jurisprudence constant*, Wiener observed:

each judge, trial and appellate, may consult the civil code and draw anew from its principles. Interpretation of the code and other sources of law is appropriate for each judge. The judge is guided much more by doctrine, as expounded in legal treatises by legal scholars, than by the decisions of colleagues.⁷¹

Wiener then drew on previous federal Fifth Circuit decisions to drive home this point. Though 'invaluable as previous interpretation', Wiener wrote for the court, case law remains only 'secondary information'.⁷²

Approaching the merits of the dispute, Wiener framed the fundamental issue as one of classification: was the applicable prescriptive period liberative, as the trial court held, or acquisitive, as SongByrd claimed? Relying on Article 526 of the Civil Code, Professor Yiannopolous' Louisiana property law treatise,⁷³ and common sense, Wiener held that SongByrd's action was a real action, not a personal action, because it sought recognition of ownership and the enforcement of ownership rights in property.⁷⁴ Because SongByrd's action sought to vindicate ownership rights in a moveable (the master tapes), the otherwise '*innominate real action*' remained 'revendicatory' in nature.⁷⁵ Therefore, just like the petitory action for asserting and protecting ownership

⁶⁹ *SongByrd I*, 777–81.

⁷⁰ *Ibid.*, 776.

⁷¹ *Ibid.* (quoting Alvin R. Rubin, 'Hazards of a Civilian Venturer in a Federal Court: Travel and Travail on the Erie Railroad', *La L. Rev.*, 48(6) (1988), 1369–81, 1372).

⁷² *Ibid.*, 777 (quoting *Green v Walker* 910 F.2d 291, 294 (5 Cir. 1990)).

⁷³ See A. N. Yiannopoulos, *Louisiana Civil Law Treatise*, vol. 2 (3rd edn, St Paul, Minn., 1991), §§ 241–242, 249, 358.

⁷⁴ *SongByrd I*, 777–8.

⁷⁵ *Ibid.*

rights in immoveables, SongByrd's action was also not subject to any liberative prescription period, regardless of the fact that SongByrd had also made an incidental demand for damages.⁷⁶

Having reached a sound conclusion relying on the Civil Code and doctrinal sources, Wiener then turned to case law. Because a number of older Louisiana Supreme Court decisions had on occasion characterised actions seeking recovery for illegally or fraudulently appropriated moveables as either delictual⁷⁷ or quasi-contractual⁷⁸ in nature, Wiener needed a jurisprudential trump card. He found it in a 1947 Louisiana Supreme Court decision, *Faison v Patout*.⁷⁹ In that case, a woman had manually donated her jewellery to her two daughters. After she died, one of her sons advised his sisters that it would be safer if they allowed him to keep the jewellery in *his* bank safety deposit box. They complied. When the brother died twelve years later, his widow removed the jewellery from the safety deposit box and refused to give it to the sisters. In the ensuing litigation, all the courts agreed that the sisters were the true owners of the jewellery and, most important, that their action to recover the jewellery was not personal in nature and thus not subject to liberative prescription.⁸⁰ The only kind of prescription that was potentially applicable, the Louisiana Supreme Court observed in *Faison*, was acquisitive prescription, and only if the deceased brother had possessed the property for himself and possessed it adversely to the sisters.⁸¹ Indeed, the court noted that acquisitive prescription could only be said to have begun to run when the defendant (the widow) first denied the sisters' request to deliver the jewellery six months prior to the filing

⁷⁶ Ibid. On this last point, Wiener relied explicitly on Yiannopoulos, *Civil Law Treatise*, § 242.

⁷⁷ See e.g., *McGuire v Monroe Scrap Material Co.* 180 So. 413, 414 (La 1938) (action to recover value of allegedly misappropriated movable deemed delictual); *Carter-Allen Jewelry Co. v Overstreet* 116 So. 222, 223 (La 1928) (action by jeweler alleging that salesman stole or allowed someone else to steal a customer's ring characterised as one for 'either an offense or a quasi-offense').

⁷⁸ *Kramer v Freeman* 3 So.2d 609, 611 (La 1941) (action to recover wrongfully taken jewellery and cash complained of an offense and gave rise to claim for damages and asserted 'an implied contractual obligation' to return the jewellery and cash and thus a right to proceed 'in an action *ex contractu*' to compel the defendants to return the movables); *Smith v Phillips* 143 So. 47, 48 (La 1932) (action by former homeowner to recover portion of proceeds of sheriff's sale subject to homestead exemption characterised as quasi-contractual).

⁷⁹ *Faison v Patout* 31 So.2d 416 (La 1947).

⁸⁰ Ibid., 418–9.

⁸¹ Ibid.

of their suit, not nearly enough time for acquisitive prescription to ripen into ownership.⁸² Extolling the virtues of the Louisiana Supreme Court's classic civilian analysis in *Faison*, which he characterised as 'the most recent Louisiana Supreme Court pronouncement on point', Judge Wiener declared his court 'Erie-bound' to follow the 'plain wording and indisputable structure of the Louisiana Civil Code and Professor Yiannopoulos' analysis'.⁸³

The final branch of Wiener's analysis concerned SongByrd's assertion that Grossman and Bearsville had always been mere precarious possessors of the master tapes. Judge Wiener acknowledged that Bearsville could assert a defense of acquisitive prescription to SongByrd's revendicatory action but noted that such a defense had not yet been raised.⁸⁴ If Bearsville were to assert such a defense, Judge Wiener explained, it would have to allege and prove facts sufficient to show that either (a) Grossman had never been a precarious possessor of the tapes in the first place, or (b) Grossman or Bearsville had terminated the precarious possession allegedly initiated in 1971 when Quint Davis and George Dinkins sent the tapes to Grossman for demonstration purposes only. Because Grossman had never been and was not a co-owner of the tapes, Bearsville would have to prove, pursuant to Article 3439 of the Civil Code, that Grossman or Bearsville had given 'actual notice' of its intent to possess the tapes as owner to Byrd or his successor in interest, SongByrd.⁸⁵

Here, Judge Wiener addressed the speculative factual defense which Bearsville might have alleged and which the federal district court had mistakenly addressed under the guise of liberative prescription – namely that Grossman and Bearsville's failure to respond to George Dinkins' letters requesting return of the tapes in 1975 and the eventual licensing of the tapes to Rounder and Rhino amounted to 'actual notice' sufficient to terminate its precarious possession. Wiener's judicial craftsmanship is worth noting here. He characterised Bearsville's purported defense as standing for:

[T]he novel proposition that alone either (1) a minimal apparently clandestine action – such as entering into a contractual agreement with a third party to enjoy the fruits of a movable without directly informing the owner of the movable of that agreement – or (2) mere inaction in the face of a request for a return of the movable to its owner,

⁸² Ibid.

⁸³ *SongByrd I*, 779.

⁸⁴ Ibid., 780.

⁸⁵ Ibid.

can somehow constitute ‘actual notice’ for purposes of terminating precarious possession of the movable of a non-co-owner.⁸⁶

Wiener then parsed the relevant case law, pointing out that, on one hand, decisions in which silence or passivity were deemed relevant involved assertions of the interruption of liberative prescription under the doctrine of *contra non valentem* and thus were inapposite,⁸⁷ and, on the other hand, decisions finding termination of precarious possession tended to require unequivocal manifestations of the intent to possess as owner that were not only sufficient to inform the public but also were directly communicated to the original owners.⁸⁸

Thus the Fifth Circuit reversed the trial court’s dismissal of SongByrd’s revendicatory action on the ground of liberative prescription and remanded the case for further proceedings consistent with its opinion. Unfortunately for SongByrd, however, the court of appeal expressly noted that on remand the trial court could address the question of personal jurisdiction, which it had pretermitted earlier.⁸⁹

SongByrd II: The New York Litigation

(1) Preliminaries

With the case now back before the same federal district court, the tide turned against SongByrd once again. Judge Porteous soon ruled that the district court lacked personal jurisdiction over Grossman’s estate and, moreover, reached this conclusion without offering SongByrd the opportunity for an evidentiary hearing at which Dinkins and Davis could have testified about their contacts with Grossman.⁹⁰ At this point, Porteous could have simply dismissed the suit, which would have enabled SongByrd to appeal the district court’s personal jurisdiction determination to the Fifth Circuit. But perhaps fearful of being reversed again, Porteous, *acting on his own motion*, transferred the case to the

⁸⁶ Ibid., 781.

⁸⁷ Ibid., note 30 (citing *Cyr v Louisiana Intrastate Gas Corp.* 273 So.2d 694 (La Ct App. 1 Cir. 1973), and *Colley v Canal Bank and Trust Co.* 159 F.2d 153 (5 Cir. 1947)).

⁸⁸ Ibid., 781 (quoting *Hammond v Averett* 415 So.2d 226, 227 (La Ct App. 2 Cir. 1982) and citing numerous other decisions at 781, note 31).

⁸⁹ Ibid., 781–2.

⁹⁰ Interview with Zitler.

United States District Court for the Northern District of New York.⁹¹ As the United States Court of Appeal for the Second Circuit later found, a transfer order from one federal district court to another is technically subject to appeal through a writ of mandamus, but such writs are rarely granted in the Fifth Circuit.⁹² As a result, Judge Porteous effectively prevented SongByrd from seeking an immediate review in the United States Court of Appeal for the Fifth Circuit of his second dismissal of SongByrd's suit.⁹³

In September 1998, United States Magistrate Judge David R. Homer, sitting as the United States District Court for the Northern District of New York, first determined that New York substantive law applied to SongByrd's claims because, even though the law of the transferor forum usually applies in cases where venue is transferred, here the transfer of venue was made on the ground that the transferor court lacked personal jurisdiction over Bearsville.⁹⁴ Next, Magistrate Homer ruled that SongByrd's action was subject to New York's three year statute of limitations for conversion and recovery of chattels.⁹⁵ Finally, Homer concluded that SongByrd's action was time-barred as it had begun to accrue no later than August 1986 when Bearsville licensed the master recordings to Rounder.⁹⁶ We will return to the details of this final branch of the federal district court's analysis in the next subsection.

In March 2000, in a decision authored by Chief Judge Jon O. Newman, the United States Court of Appeals for the Second Circuit affirmed the New York district court's dismissal.⁹⁷ An unsuccessful writ application to the United States Supreme Court followed, at which point SongByrd's litigation odyssey came to an end.⁹⁸ A good portion of the Second Circuit's decision concerned the numerous procedural and jurisdictional issues raised in the case, including

⁹¹ *SongByrd II*, 175.

⁹² *Ibid.*, 176.

⁹³ Judge Porteous' judicial career eventually ended in ruin. In 2010, Porteous became only the eighth federal judge in the history of the United States to be impeached by the United States Senate. The articles of impeachment concerned bribes Porteous accepted from lawyers with matters before him, use of a false name to elude creditors, and intentional misleading of the Senate during his confirmation hearings. Jennifer Steinhauer, 'Senate, for Just the 8th Time, Votes to Oust a Federal Judge', *The New York Times* (8 December 2010).

⁹⁴ *SongByrd Inc. v Estate of Grossman*, 23 F.Supp.2d 219, 221 (ND NY 1998) ('*SongByrd 1.5*'). Neither the parties nor the Second Circuit Court of Appeal questioned this ruling on appeal. *SongByrd II*, 181.

⁹⁵ *SongByrd 1.5*, 222 (citing NY CPLR 214(3)).

⁹⁶ *Ibid.*, 222–3. See also *SongByrd II*, 176.

⁹⁷ *SongByrd II*, 174.

⁹⁸ *SongByrd, Inc. v Estate of Grossman* 531 US 824 (2000) (denying *certiorari*).

its crucial determination that Grossman's contacts in Louisiana were too 'scant' to justify assertion of personal jurisdiction over his estate in Louisiana.⁹⁹

(2) Grossman's Statute of Limitations Defense under New York Law

Turning to the merits of case at last, the Second Circuit, like the New York federal district court, framed the fundamental issue, not in terms of whether Grossman's estate had satisfied the positive requirements for acquisition of ownership through adverse possession or prescription, but rather as when exactly SongByrd's action to recover the master tapes began to accrue. Did it begin to accrue, as Grossman's estate contended and the district court found, at the time of the conversion, i.e., in August 1986 when the master recordings were licensed to Rounder? Did it accrue in 1987 when the Rounder album was released and won a Grammy Award? Or did it only accrue, as SongByrd contended in New York, when SongByrd actually demanded return of the master recordings and Bearsville refused that demand?¹⁰⁰

The leading New York authority lending support to the position of Grossman's estate was *Sporn v MCA Records, Inc.*¹⁰¹ In that case, the New York Court of Appeal held that a cause of action for conversion of another master recording (of the song 'Get a Job', recorded in 1957 by the group *the Silhouettes*) accrued when the defendant 'first began using plaintiff's property as its own' and, in particular, when the defendant began 'commercially exploiting' the master recording.¹⁰² In *Sporn*, the New York court focused on classifying the plaintiff's claim in the context of the defendant's alleged wrongful conduct. If a plaintiff asserts that 'the defendant merely interfered with the plaintiff's property', the court observed in *Sporn*, then the complaint will be characterised

⁹⁹ *SongByrd II*, 176–81. The Second Circuit's conclusion that the federal district court in Louisiana lacked personal jurisdiction over Grossman's estate enabled it to decline SongByrd's request to reverse Porteous' transfer order and send the case back to Louisiana. It also justified application of New York law to the dispute in the court's view. *SongByrd II*, 181. In support of its personal jurisdiction ruling, the Second Circuit noted that Grossman never travelled to Louisiana, Grossman listened to the demonstration tapes in New York, Grossman invited Professor Longhair and the other musicians to New York to make new recordings, and the master recordings were later sent to New York by Professor Longhair's managers on their own initiative. *SongByrd II*, 180–1. As noted above, however, these findings by the Second Circuit were made without the benefit of an evidentiary hearing because Judge Porteous had denied SongByrd the opportunity to prevent testimony by Davis or Dinkins regarding their contacts with Grossman.

¹⁰⁰ *Ibid.*, 181. See also *SongByrd I*, 5, 222.

¹⁰¹ *Sporn v MCA Records, Inc.* 448 N.E.2d 1324 (NY 1983).

¹⁰² *Ibid.*, 1327.

as 'an action to recover for trespass'.¹⁰³ If, on the other hand, the allegedly wrongful conduct 'amounts to a destruction or taking of the property', then the action will be classified as 'one for conversion'.¹⁰⁴ The consequence of this trespass-conversion characterization is significant for statute of limitations purposes because if a complaint alleges a *continuing* interference with the plaintiff's property, i.e., a 'continuing trespass', a new cause of action accrues each time the defendant allegedly interferes with what the plaintiff claims as his property.¹⁰⁵ But if the complaint alleges an actual conversion, that is, 'a denial of the plaintiff's right to the property', the cause of action accrues immediately at the moment of the conversion.¹⁰⁶

Applying this distinction, the court in *Sporn* concluded that the plaintiff's cause of action there was one 'for conversion and not, for trespass' because the plaintiff alleged that ever since 1965 the defendant had been 'using the master recording as his own by manufacturing, distributing and selling records and otherwise commercially exploiting the master recording' which the plaintiff claimed as his property.¹⁰⁷ As the court put it, the defendant's alleged wrongful actions 'amount to more than mere interference' and, in fact, represented 'a denial of both the plaintiff's right to the master recording and a total usurping of the plaintiff's right to possess the master recording'.¹⁰⁸

Two common law decisions, however, supported SongByrd's argument that its cause of action was not time-barred under New York law. First, SongByrd claimed authority in the New York Court of Appeal's famous decision in *Solomon R. Guggenheim Foundation v Lubell*.¹⁰⁹ In that case, a New York museum sought to recover a stolen Chagall gouache from an apparent good faith purchaser. Rejecting a statute of limitations defense asserted by the defendant, the court held that 'a cause of action for replevin against the good faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it'.¹¹⁰ Further, the court in *Lubell* held that a plaintiff's alleged lack of

¹⁰³ Ibid., 1326.

¹⁰⁴ Ibid., 1326–7.

¹⁰⁵ Ibid., 1326.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid., 1327.

¹⁰⁸ Ibid.

¹⁰⁹ *Solomon R. Guggenheim Foundation v Lubell* 569 N.E.2d 623 (NY 1991).

¹¹⁰ Ibid., 429.

reasonable diligence in pursuing a replevin action in this context can only be considered in the context of an equitable laches defense.¹¹¹

The other decision potentially supporting SongByrd's argument was *Hoelzer v City of Samford*.¹¹² In that case, the Second Circuit itself considered a claim by a Connecticut city to recover valuable murals that were originally affixed to the walls of a local high school but then had been accidentally removed in a 1970 renovation project and later ended up in the possession of a professional art restorer in New York named Hoelzer who performed some initial restoration work on the murals and stored them for fifteen years. When the city finally demanded that Hoelzer return the murals, he refused claiming them as his own.¹¹³

Applying New York law, including the recent decision in *Lubell*, the Second Circuit in *Hoelzer* held that the city's cause of action to recover the murals did not accrue until 1986 when it actually demanded the return of the murals and Hoelzer refused to return them.¹¹⁴ Because the city asserted its rights to recover the murals as a counterclaim in a suit brought by Hoelzer less than three years later, the city's claim to recover the murals was not time-barred and the court affirmed a trial court order recognizing the city as the owner of the murals.¹¹⁵ Furthermore, the Second Circuit observed that even though Hoelzer did not assert an equity based laches defense, the city's delay in seeking to recover the murals could not have been considered prejudicial to Hoelzer given that the city only became aware Hoelzer possessed the murals in 1980 and was then led to believe that Hoelzer possessed them only as a custodian or bailee.¹¹⁶ In this situation, the court observed, awarding ownership of the murals to Hoelzer, a mere custodian or bailee, would have been inequitable in that he would have realised an unjustified windfall.¹¹⁷

So why did the federal district court in New York and the Second Circuit both look to *Sporn* and its 'commercial exploitation' rule rather than to the demand and refusal rule used in *Lubell* and *Hoelzer* or to the equitable considerations taken into account in *Hoelzer*? First, the federal district court in

¹¹¹ *Ibid.*, 431.

¹¹² *Hoelzer v City of Samford* 933 F.2d 1131 (2nd Cir. 1991).

¹¹³ *Ibid.*, 1133–5.

¹¹⁴ *Ibid.*, 1137.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, 1134, 1136 and 1138.

¹¹⁷ The court did acknowledge that Hoelzer might be entitled to some compensation on a theory of *quantum meruit* for any expenses he incurred in storing the murals and his initial work to preserve and restore them. *Ibid.*, 1133, 1139.

New York limited *Lubell* to claims brought by a true owner to recover stolen art from a good faith purchaser.¹¹⁸ Unlike in *Lubell*, as the district court observed:

Here the chattel at issue has remained in the hands of Bearsville, the party alleged to have committed the wrongful taking. There was no evidence that Bearsville was a bona fide purchaser for value. Thus the statute of limitations here began to run at the time Bearsville converted the master recordings. [...] Thus, *Guggenheim [Lubell]* is limited to circumstances involving a bona fide purchaser's possession of a chattel.¹¹⁹

Having fenced off *Lubell*'s demand and refusal rule and characterised SongByrd's action as one for conversion, the district court then simply asked when the master recordings were allegedly converted, that is, when Grossman or Bearsville exercised 'dominion or control' over the recordings in a manner that was inconsistent with SongByrd's interests.¹²⁰ The district court's answer was that the act of licensing the recordings to Rounder in August 1986 constituted the act of conversion, regardless of whether SongByrd had knowledge of this act.¹²¹ The district court showed no interest in the fact that the 1987 Rounder release made little or no mention of Bearsville's role in the production of the recordings, that SongByrd, Inc. was not even formed until 1993, and that Byrd himself had died in 1980. The court's fundamental assumption seems to have been that Byrd's estate should have been able to discover the 1986 license granted by Bearsville to Rounder and should have acted within three years of this private contractual arrangement to protect the estate's right in the master recordings.

With relatively little further analysis, the Second Circuit likewise concluded that *Sporn* barred SongByrd's claim.¹²² Judge Newman observed that, like the possessor-defendant in *Sporn*, Grossman's estate began using the master recordings as its own when it licensed them to Rounder in 1986 and thus SongByrd's conversion action began to accrue at that time.¹²³ Furthermore, the Second Circuit found that the demand and refusal rule applied in both *Lubell* and *Hoelzer* was inapplicable for two reasons. First, according to Judge

¹¹⁸ *SongByrd I*, 5, 222.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

¹²² *SongByrd II*, 182.

¹²³ *Ibid.*

Newman, that rule was merely designed to provide ‘some benefit to the good-faith purchaser by precipitating its awareness that continued possession will be regarded as wrongful by the true owner’.¹²⁴ Second, Judge Newman determined that New York did not require application of the demand and refusal rule to the ‘the accrual of a conversion claim against a possessor who openly deals with the property as its own’.¹²⁵

The Second Circuit’s reasoning leads to some odd results. As applied by Judge Newman in *SongByrd*, New York law protects a thief or actual converter of a chattel with a limitations period that is immediately triggered at the moment of the theft or conversion without any inquiry into the plaintiff’s ability or opportunity to determine the identity of the thief or converter or appreciate the basis for his claim. Paradoxically, the court’s reasoning subjects a good faith purchaser for value to a potentially much longer limitations period that will not begin to accrue until the true owner makes demand on the good faith purchaser and is refused. Thus a good faith purchaser remains at risk of losing control of the chattel for a potentially indefinite period of time whereas the thief or converter’s liability is subject to a finite limitations period triggered by his own act of theft or conversion. Furthermore, neither the New York district court nor the Second Circuit seriously attempted to reconcile *Hoelzer* to their holdings, even though *Hoelzer* involved possession of a chattel by a person other than a good faith purchaser that commenced in a depositary or bailee relationship—the exact same context in which Grossman’s possession of the master tapes commenced in *SongByrd*.

Perhaps the Second Circuit revealed its real objections to *SongByrd*’s suit in the penultimate paragraph of its analysis. Even if a demand and refusal had been required by *Lubell*, Judge Newman wrote for the court, *SongByrd* still delayed bringing its action to such a degree that a court could not award it a judgment under the equitable doctrine of laches. First, it appears that Judge Newman faulted Byrd and his agents for failing to seek return of the master tapes in the mid-to-late 1970s when Dinkins’ 1975 letters went unanswered.¹²⁶ Unfortunately for *SongByrd*, Judge Newman did not take into account – or could not have done so given the slim evidentiary record presented in light of Judge Porteous’ *sua sponte* transfer of the case – that there was no practical need to recover the master tapes at that time because Byrd was still alive, still performing, and still capable of creating even better recordings as his

¹²⁴ *Ibid.*, 183.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

career began to flourish and the music industry began to appreciate his talents again. In addition, Judge Newman apparently could not excuse the failure of Byrd's estate to make a demand in 1987 'after the licensing of the master tapes became well known in the music world as a result of the Grammy Award for the Rounder record'.¹²⁷ Here, however, Newman discounts the possibility that Bearsville's role in the licensing of the recordings for the Rounder release may not have been well known in the music world and ignores the fact, noted by Judge Wiener in *SongByrd I*, that the 'liner notes of the Rounder album make hardly any reference to Bearsville and no reference whatsoever to the contractual arrangement between Rounder and Bearsville'.¹²⁸

Perhaps signaling once more why it refused to consider a demand and refusal approach as used in *Hoelzer*, the Second Circuit, again citing *Sporn*, observed that Bearsville terminated any potential bailment relationship it had with Byrd's estate when it changed 'the character' of its possession by 'by treating the master tapes as its own'.¹²⁹ For the Second Circuit, then, *Sporn*, and no other relevant decision, provided the essential framework for resolving SongByrd's claims. It appears then that for the New York courts, Bearsville's 'commercial exploitation' of the master tapes – no matter how clandestine or remote from the attention of Byrd's circle – was too public, too hostile an action, for Byrd's estate or his successor in interest to ignore. This perception of inexcusable passivity of the part of SongByrd, combined with an analytical framework that focused on when SongByrd's causes of action for replevin and conversion accrued, rather than on whether Grossman had satisfied any elements of positive prescription, sealed the fate of SongByrd's suit.

SongByrd's Louisiana Progeny

Although the US Fifth Circuit Court of Appeals decision in *SongByrd I* did not enable SongByrd to recover the master tapes, the decision has proven to be an important statement of Louisiana law on revendication of moveables. In two subsequent decisions, Louisiana appellate courts directly applied and extended the principles articulated in *SongByrd I* to other factual contexts. In a number of other decisions, Louisiana state courts and federal courts applying Louisiana law have recognised the holding in *SongByrd I* that revendicatory actions

¹²⁷ Ibid.

¹²⁸ *SongByrd I*, 775.

¹²⁹ *SongByrd II*, 183.

are not subject to liberative prescription but distinguished the decision on factual grounds. Taken together, these decisions illustrate the extent to which *SongByrd I* clarified and ordered Louisiana law pertaining to the revendication of moveables.

In *Johnson v Hardy*, the Louisiana Fourth Circuit Court of Appeal applied *SongByrd I* to sort out numerous claims asserted by a woman against her deceased husband's mother and others to recover possession of various moveables.¹³⁰ There, the court held that the wife's revendicatory claims against her mother-in-law and a man who had acquired ownership of the former matrimonial domicile were not subject to liberative prescription because both defendants presumably still possessed the particular moveables she sought to recover.¹³¹ Conversely, her claim against another defendant to recover a vehicle was held to have prescribed because the vehicle had been delivered to a salvage yard and thus the plaintiff's revendicatory action had abated and been transformed into a conversion action.¹³²

In an even more complex family dispute, *Trust for Melba Schwegmann v Schwegmann*, the Louisiana Fifth Circuit Court of Appeal used *SongByrd I* to find that a trust beneficiary's declaratory judgment action seeking an accounting and return of trust assets against a trustee who diverted over \$5 million held in trust could be classified, not solely as an action for conversion, but also as an imprescriptible revindicatory action under Article 526.¹³³ Consequently, the action could not be dismissed on the ground that the one year liberative prescription period for a delictual cause of action under Louisiana Civil Code Article 3492 had run.¹³⁴ In a separate concurring opinion, Judge Veronica Wicker emphasised that even though the plaintiff's claims sounding in conversion may have prescribed, her other claims – especially her revendicatory claims under Article 526 – had not. Citing *SongByrd I* and its progeny, Judge Wicker declared that 'a revindicatory action for the recovery of movable property is imprescriptible'.¹³⁵ Wicker also noted that 'revendication claims are subject to acquisitive prescription', but observed, just as in *SongByrd I*, that no evidence

¹³⁰ *Johnson v Hardy* 756 So.2d 328 (La App. 1 Cir. 1999).

¹³¹ *Ibid.*, 333–4.

¹³² *Ibid.*

¹³³ 51 So.3d 737 (La App. 5 Cir. 2010).

¹³⁴ *Ibid.*, 739–43.

¹³⁵ *Ibid.*, 750.

had been introduced as to whether good or bad faith acquisitive prescription had begun to run.¹³⁶

The cases in which courts have acknowledged but distinguished *SongByrd I* have arisen in a rich array of factual settings. In one decision, the United States Fifth Circuit held that several musicians from a famous musical family in New Orleans did not have an imprescriptible revendicatory action against a singer and his recording company who digitally sampled a portion of one of the plaintiffs' songs and used it in another recording because there was no evidence the defendants physically possessed the plaintiffs' master recordings.¹³⁷ In another case, the Fifth Circuit again distinguished *SongByrd I* holding that a licensee that owned commercial sale rights for the transmission of a boxing broadcast could not allege a revendicatory action against an establishment that intercepted the broadcast and exhibited it in its lounge/restaurant because the licensee was not suing to recover the broadcast and the defendants were not 'in possession' of the broadcast.¹³⁸

The Louisiana Fourth Circuit Court of Appeal also held that an ex-husband could not use *SongByrd I* to avoid an exception of prescription in his suit for damages and wrongful conversion against his ex-wife and others.¹³⁹ The plaintiff's suit was not an imprescriptible revendicatory action under *SongByrd I*, the court explained, because the items at issue – a gold ring, a camera, a Rolex watch, a vehicle – were no longer in the defendants' possession and because they were seized pursuant to a valid writ of *feri facias* to satisfy a spousal support judgment for which the plaintiff was given a credit in subsequent proceedings.¹⁴⁰

Finally, in a 2012 decision, *Aertker v Placid Holding Co.*, a federal district court held that landowners could not characterise a claim to recover the fair rental value of their land as revendicatory when they alleged a violation of their rights of accession regarding a pipeline that had been placed on the land without the permission of their predecessor in title.¹⁴¹ Agreeing with a defendant oil and gas company that had constructed and operated the pipeline for almost twenty years pursuant to a right of way agreement granted by a timber lessee rather than the actual landowner, the district court held that the

¹³⁶ Ibid., 751.

¹³⁷ *Batiste v Island Records, Inc.* 179 F.3d 217, 226 (5th Cir. 1999).

¹³⁸ *Prostar v Massachi* 239 F.3d 669, 675 note 43 (5th Cir. 2001).

¹³⁹ *Boykins v Boykins* 984 So.2d 181 (La App. 4 Cir. 2008).

¹⁴⁰ Ibid., 185.

¹⁴¹ *Aertker v Placid Holding Co.* 874 F.Supp. 2d (MD La 2012) (Barbier J.).

plaintiffs' first cause of action – which it labeled a 'cause of action for lost rent produced by something owned by accession' – was barred by liberative prescription.¹⁴² Although it discussed *SongByrd I* and its progeny at length, the court concluded that *SongByrd I* was inapplicable because the landowners did not seek to be recognised as owners of the pipeline but rather only sought damages for an alleged violation of their accessionary rights, which the court characterised as 'an incident of their prior ownership of the pipeline prior to the grant of a conventional servitude' to a successor of the defendant.¹⁴³ Further, even if the plaintiffs' claims were initially characterised as revendicatory in nature, the court held that they would have abated because the defendant had transferred its interests in the pipeline to another company and that company had reached an agreement to establish another pipeline servitude with the plaintiffs.¹⁴⁴ Although the decision in *Aertker* ultimately distinguishes *SongByrd I*, this decision, like the other decisions described above, evidences the extent to which Judge Wiener's opinion for the Fifth Circuit has become firmly entrenched as the definitive statement of the contours of the revendicatory action in Louisiana jurisprudence. Moreover, it demonstrates one of the crucial limits of the revendicatory action – namely that the action will only provide a remedy against a defendant still in possession of the moveable at issue.

***SongByrd* IPs Common Law Progeny**

Judge Newman's opinion for the Second Circuit in *SongByrd II* has created a common law legacy of its own. It has frequently been cited by other federal courts in the Second Circuit when owners have sought to vindicate rights in personal property – often valuable art objects – against subsequent possessors and sometimes good faith purchasers. Most of these decisions cite *SongByrd II* for the proposition that a cause of action for conversion or replevin accrues when the defendant begins commercially exploiting the plaintiff's property as its own or at least openly possessing the property to the exclusion of the true owner.

In one case, the court applied *SongByrd II* to hold that a conversion claim brought by the holder of a copyright on a software program and database

¹⁴² Ibid., 590.

¹⁴³ Ibid.

¹⁴⁴ Ibid., 590–1. In this case, the court did find that other causes of action, including a claim for continuing trespass, had not prescribed. Ibid., 592–9.

against defendants who allegedly refused upon demand to return the licensed software and database and continued to use them for purposes of reengineering the program after the licensing agreement had terminated would accrue when the defendants were found to have commercially exploited the software as their own.¹⁴⁵ In another case, the court quoted *SongByrd II* in holding that an action for conversion and negligence brought against alleged conspirators in a criminal scheme to purchase cemeteries using trust funds that had been established for the purpose of providing for the care and upkeep of graves, headstones, monuments and mausoleums in perpetuity accrued when the defendants actually misappropriated the trust funds for their own purposes rather than when they began backdating trust fund statements.¹⁴⁶

In a noteworthy art case, a federal district court in Connecticut used *SongByrd II* to resolve a conversion claim asserted by the publisher of the *Saturday Evening Post* against the magazine's former art director regarding three original oil paintings created by Norman Rockwell for the magazine's cover in the late 1940s and early 1950s.¹⁴⁷ The court held that the publishing company's conversion claim was barred by Connecticut's applicable three year statute of limitation because the art director had declared himself owner of the disputed artwork in publications since the 1960s and had actually communicated his claim to own the paintings in a 1986 letter written by his attorney to the publishing company.¹⁴⁸ As the court put it, eschewing a demand and refusal rule and citing *SongByrd II*, the publishing company's claim for conversion was time-barred because the statute of limitations 'begins to run when a party, publicly or outwardly, exhibits wrongful use or unauthorized dominion over the property'.¹⁴⁹

While most common law decisions outside Louisiana cite *SongByrd II* for the rule that a cause of action for conversion accrues when a defendant begins commercially exploiting the disputed property as his own or openly communicates his claim to the plaintiff, other cases cite *SongByrd II* for its statement that even if a demand-and-refusal approach is warranted, a plaintiff

¹⁴⁵ *CSFB HOLT v Collins Stewart Ltd* 02 CIV. 3069 (LBS), 2004 WL 1794499 at 9 (SDNY Aug. 10, 2004). In *CSFB Holt*, the court refused to grant summary judgment to the defendants because the allegations cited by the defendants did not clearly establish that the plaintiff's claim was time-barred. *Idem* at 10.

¹⁴⁶ *Midwest Mem'l Grp v Int'l Fund Serrs* 10 CIV. 8660 PAC, 2011 WL 4916407, 3–4 (SDNY Oct. 17, 2011).

¹⁴⁷ *Stuart & Sons v Curtis Publishing Co.* 456 F. Supp. 2d 336 (D. Conn. 2006).

¹⁴⁸ *Ibid.*, 344–6.

¹⁴⁹ *Ibid.*, 344 (citing *SongByrd II*, 183).

still cannot unreasonably delay in making a demand for return of personal property when the plaintiff becomes aware that the defendant is using the property in some way that is hostile to the plaintiff's ownership interests. For instance, in a 2001 decision, a federal court initially distinguished *SongByrd II* and applied the demand and refusal rule by finding that a 'bailment of "infinite" duration with no specified date of retrieval' existed.¹⁵⁰ Here, the plaintiff asked the defendant, owner of an art gallery, to hold her painting created by a fifteenth century Italian master, for an unspecified period of time. The defendant, however, then used the painting as collateral to secure a debt she owed to another gallery, and eventually sold the painting to repay that debt. Although the court declined to apply the commercial exploitation rule from *SongByrd II*, which would have meant the statute of limitations had begun to run as soon as the defendant used the painting as her own, the court nevertheless held that the plaintiff's conversion claim was time-barred because her fourteen year delay in making demand for the painting was simply 'unreasonable' even in the context of a bailment of infinite duration.¹⁵¹ In effect, the court applied the Second Circuit's rationale in *SongByrd II* that even if a demand and refusal approach applies because of an apparent bailment situation, the owner 'may not unreasonably delay in making a demand [upon the bailee] for property whose location is known'.¹⁵²

In another case decided the same year, the same federal court again noted that the demand-and-refusal rule was technically applicable to a conversion claim brought by the owner of a valuable pipe organ against the owner of a storage facility where the organ had been stored.¹⁵³ Citing *SongByrd II*, the court held that the property owner's conversion claim was time-barred because an owner asserting conversion who knows the location of his property must make a demand for the property's return within a reasonable time and the five years it took the plaintiff to demand return of the damaged organ was unreasonable.¹⁵⁴ In several other cases, federal courts have similarly cited *SongByrd II* while observing that whether a plaintiff has unreasonably delayed

¹⁵⁰ *Paglia v Del Re* 99 CIV. 9030 DLC, 2001 WL 220013 at 6 (SDNY Mar. 7, 2001).

¹⁵¹ *Ibid.*, at 6.

¹⁵² *SongByrd II*, 183.

¹⁵³ *Herrington v Verrilli* 151 F. Supp. 2d 449, 461 (SDNY 2001). In this case, the equities were, indeed, ambiguous as the plaintiff was seeking to recover for allegedly irreparable damage the pipe organ suffered as a result of the defendant moving it after the plaintiff failed to pay rent for several months.

¹⁵⁴ *Ibid.*, 458–61. The court also noted that it was immaterial whether the contractual relationship between the parties was actually a lease rather than a bailment. *Ibid.*, 461.

making a demand for property whose location is known is a factual question for the trial court to decide in resolving a laches defense to an action seeking the return of allegedly stolen or misappropriated artwork.¹⁵⁵

In most of these cases, and especially in the commercial exploitation cases, just as in the *SongByrd II* decisions themselves, the focus tends to be on whether the true owner has waited too long to assert its conversion or replevin claim. To the extent these courts focus on the actions of the possessor-defendant, it is simply to ask whether the possessor has taken a sufficiently public action to alert the true-owner of the existence of a claim, not whether the possessor *deserves* to become owner by means of adverse possession.

***SongByrd* in the Casebooks**

Not only has the struggle between Byrd's estate and Grossman's estate attracted the attention of courts and litigants but it has also captured the imagination of numerous property scholars in the United States. Not surprisingly, soon after the Fifth Circuit decision in *SongByrd I* appeared, Professor A. N. Yiannopoulos featured it in numerous editions of his widely used *Civil Law Property Coursebook*.¹⁵⁶ The same decision is also featured in a new Louisiana property law case book.¹⁵⁷ As a result, the Fifth Circuit's decision in *SongByrd I* has become well known to a generation of Louisiana law school graduates.

Perhaps more surprisingly, the opinion authored by Magistrate Judge David Homer of the United States District Court for the Northern District of New York dismissing *SongByrd*'s claims has also appeared in several American Common Law Property case books. The first to feature the opinion was *Property Law and the Public Interest*, authored by J. Gordon Hylton, David L.

¹⁵⁵ *Marchig v Christie's Inc.* 430 Fed. App'x 22, 26 (2 Cir. 2011) (holding that a conversion claim to recover the frame that housed a recently rediscovered Leonardo de Vinci painting could not be dismissed on its face because it may not have been clear to the plaintiffs that the painting was sold by the auction house in a different frame until soon before the suit was filed and thus plaintiffs may not have unreasonably delayed making their demand); *Kamat v Kurtha* 05 CIV. 10618 KMW THK, 2008 WL 5505880 at 5 (SDNY Apr. 14, 2008); *Bakalar v Vavra* 500 Fed App'x 6, 8 (2 Cir. 2012).

¹⁵⁶ See e.g., A. N. Yiannopoulos, *Civil Law Property Coursebook* (8th edn, Baton Rouge, 2003), 604–11.

¹⁵⁷ John A. Lovett, Markus G. Puder and Evelyn L. Wilson, *Louisiana Property Law: The Civil Code, Cases and Commentary* (Durham, NC, 2014), 508–17. Professor Puder took the lead in preparing the note material in the cited pages.

Callies, Daniel R. Mandelker, and Paula A. Franzese.¹⁵⁸ A successor casebook prepared by most of the same authors has also featured Magistrate Homer's opinion.¹⁵⁹ In 2007, two more especially prominent American property law scholars, Thomas Merrill of Columbia Law School and Henry Smith of Harvard Law School, again offered Magistrate Homer's opinion in their highly influential case book, *Property: Principles and Policies*.¹⁶⁰

In each of these case books, the authors offer interesting comments. Merrill and Smith, in particular, note the anomalous inversion of equitable expectations that results from New York law on adverse possession of moveables. Although one might reasonably expect true owners would be given 'more time to recover property taken by a person in bad faith, like a thief, and less time to recover property taken by someone who has acted in good faith, like a good faith purchaser', true owners, they note, actually face the opposite situation.¹⁶¹ When true owners seek to recover a moveable from a bad faith possessor, the statute of limitations clock starts running quite quickly; but it may be delayed significantly if the chattel is in the hands of a good faith purchaser.¹⁶² Although several of the case book authors also quote from the Fifth Circuit opinion to highlight Byrd's musical career,¹⁶³ none of the case books explore the civil law approach illustrated by Judge Wiener's opinion in *SongByrd I* and its more intensive focus on whether the possessor defendant has taken sufficient action to begin to possess for itself as owner and whether its actions justify awarding ownership through acquisitive prescription.

Comparative Law Lessons

Several conclusions emerge from this comparative law story. First, while the Fifth Circuit's decision in *SongByrd I* did not, strictly speaking, make any new

¹⁵⁸ J. Gordon Hylton and others, *Property and the Public Interest* (2nd edn, Newark, NJ, 2003), 210–4.

¹⁵⁹ David L. Callies and others, *Concise Introduction to Property Law* (NY, 2011), 56–9.

¹⁶⁰ Thomas W. Merrill and Henry E. Smith, *Property, Principles and Policies* (1st edn, St Paul, Minn., 2007), 214–20; idem, (2nd edn, St Paul, Minn., 2012), 215–20.

¹⁶¹ Merrill and Smith, *Property, Principles and Policies* (2012), 219 (emphasis added).

¹⁶² Ibid.

¹⁶³ See e.g., David L. Callies and others, *Concise Introduction to Property Law*, 59; Merrill and Smith, *Property, Principles and Policies* (2012), 218–9. See also Joseph William Singer, *Property Law: Rules, Policies and Practices* (5th edn, Netherlands, 2010), 330 (citing *SongByrd II* for the general rule on accrual of statute of limitations for conversion).

law in Louisiana, it certainly crystallised, to a much greater extent than ever before, the advantages and scope of a revendicatory action in Louisiana law. For one thing, *SongByrd I* made it abundantly clear that a property owner's right to bring a revendicatory action to recover a moveable (and, importantly, any incidental damages related to the loss of possession), is imprescriptible in the sense that liberative prescription cannot be raised as a defense. *SongByrd I* also demonstrated powerfully that although acquisitive prescription can be raised as a defense to a revendicatory action, Louisiana courts should demand strict proof of a precarious possessor's 'actual notice' of his intent to terminate precarious possession. Indeed, other Louisiana decisions have repeatedly emphasised the difficulty of converting precarious possession into acquisitive prescription in contexts involving immoveable property as well.¹⁶⁴ Finally, as numerous decisions relying on *SongByrd I* have shown, a revendicatory action can be used creatively in other factual settings, but it can only be used to recover a moveable from a defendant in possession of the moveable. Otherwise, the revendicatory action will be found to have abated.

SongByrd II, on the other hand, shows how common law courts confront this common problem in a fundamentally different way. Rather than underscore the imprescriptible rights of a property owner to recover his property, the federal courts in New York focused on fitting *SongByrd's* claims into the traditional common law causes of action – replevin and conversion – and then, following the doctrine of *stare decisis*, applied the rule drawn from another case involving sound recordings (*Sporn*) to terminate *SongByrd's* lawsuit on the ground that a cause of action for conversion accrues the moment that a defendant 'commercially exploits' the plaintiff's property. The common law courts in New York also claimed allegiance to equitable considerations and could not understand *SongByrd's* 'unreasonable delay' in asserting its claims to the master tapes. Sadly, though, these courts' concern with equity did not lead them to reflect more deeply on the practical reasons that Professor Longhair

¹⁶⁴ See e.g., *Memorial Hall Museum, Inc. v University of New Orleans Foundation* 847 So.2d 625 (La App. 4 Cir. 2003) (finding that museum organization did not provide 'actual notice' for purposes of terminating precarious possession vis-à-vis another museum organization when it denied the other's claim because there was no evidence that the resolution to this effect was communicated to the other organization and there was no evidence of a change in the routine use of the property); *Boudreaux v Cummings* 167 So.3d 599 (La 2015) (finding no evidence that plaintiff gave actual notice sufficient to terminate his precarious possession for purposes of commencing acquisitive prescription to acquire praedial servitude). For more on *Boudreaux* and its potential impact on the law of acquisitive prescription in Louisiana, see J Lovett, 'Precarious Possession.'

and his estate might not have known or appreciated what Albert Grossman's estate had done with the master tapes or question the lack of an evidentiary hearing on the crucial question of personal jurisdiction.

Another crucial difference revealed by an examination of the two *SongByrd* decisions is that the New York federal district court and the Second Circuit framed the key issue as when, if ever, SongByrd's claims for conversion and replevin began to accrue, while the Fifth Circuit court framed the key issue as when, if ever, Grossman or Bearsville satisfied the requirements for acquiring ownership of the tapes through acquisitive prescription. In a famous debate among American property scholars, R. H. Helmholz argued that American courts would be embarrassed to address a dispute involving adverse possession of real property in terms of accrual of the statute of limitations and almost always focused on whether the possessor-claimant satisfied the positive elements of adverse possession.¹⁶⁵ Roger Cunningham defended the relevance of the accrual approach on the ground that the positive requirements for establishing adverse possession are nothing more than 'judicial criteria developed to determine whether the adverse claimant's conduct gave the true owner of the land a cause of action for recovery of possession that continued for the full statutory period of limitation before the true owner began such an action'.¹⁶⁶ In the SongByrd-Grossman dispute over Professor Longhair's master tapes, we see common law courts following the approach discredited by Helmholz, whereas the Fifth Circuit, applying Louisiana's civil law, adheres to what Scots lawyers will recognise as the positive prescription approach.

The dueling opinions of the appellate courts in this controversy also reveal fundamentally different approaches to the problem of what Louisiana lawyers call precarious possession. In Louisiana a precarious possessor other than a co-owner must actually confront the true owner of moveable or immoveable property and directly communicate his intention to possess as owner.¹⁶⁷ In common law states, or at least those that follow the Second Circuit's approach in *SongByrd II*, a precarious possessor like Albert Grossman or Bearsville can apparently commence to possess for itself – and start the statute of limitations

¹⁶⁵ Richard H. Helmholz, 'Adverse Possession and Subjective Intent', *Washington University Law Quarterly*, 61(2) (1983), 331–58, 334–6.

¹⁶⁶ Roger Cunningham, 'Adverse Possession and Subjective Intent: A Reply to Professor Helmholz', *Washington University Law Quarterly*, 64(1) (1986), 1–64, 4.

¹⁶⁷ Whether a claimant is classified as a 'precarious' or 'adverse' possessor is itself a complex question and has become more so in light of recent decisions. J Lovett, 'Precarious Possession.'

for conversion and replevin running – by comporting itself like the owner in the eyes of other contracting parties, but without necessarily communicating its intent to the true owner. In other words, in the common law, at least as represented by *SongByrd II* and its New York progeny, the reliance interests of an adverse possessor seem to outweigh the moral interests of the original owner who entrusted an object to someone else.

At last, this comparative law story reveals that the civil law approach to the revendication of moveables offers some normative advantages. Although concerns about economic efficiency and staleness of claims arguably support the New York courts' approach to disputes of this nature,¹⁶⁸ concerns about promoting ultimate fairness and preventing windfall gains by opportunistic precarious possessors justify the civil law approach deployed so skillfully by the United States Fifth Circuit Court of Appeals in *SongByrd I*. In the end, perhaps this comparative law story will hearten property law reform advocates in Scotland who no doubt drew inspiration from Professor David Carey Miller over the years and who may soon witness the enactment of landmark legislation that will enshrine in Scots law its own carefully tailored rules of positive prescription for corporeal moveables.¹⁶⁹¹⁷⁰

¹⁶⁸ For an example of an economic analysis of the problem of determining when claims for the recovery of movables should begin to accrue against good faith purchasers, see Alan Schwartz and Robert E. Scott, 'Rethinking the Laws of Good Faith Purchase', *Columbia Law Review*, 111 (2011), 1322–84. But see Deborah A. Demott, 'Artful Good Faith: An Essay on Law, Custom and Intermediaries in Art Markets', *Duke Law Journal*, 62(3) (2012), 607–43 (arguing that the role of transactional intermediaries and the operation of customary practices among museums and other intermediaries is solving many problems in this area without a need for any change in the law).

¹⁶⁹ See The Scottish Government, 'Prescription and Title to Moveable Property (Scotland) Bill', Consultation Report, *gov.scot*, 1 July 2015, <http://www.gov.scot/Publications/2015/07/8416>, paras 2.04, 2.24 (seeking consultation on Scottish Law Commission's proposed rules of positive prescription for acquisition of ownership of corporeal movables by persons possessing in good faith and who do not act in a negligent manner and for acquisition of ownership by holders of corporeal movable property lent or deposited with the holders when the property has been held for at least 50 years and the original owner (or successor) is untraceable).

¹⁷⁰ I would like to thank Aimee Chalin for her valuable research assistance on this project and all of the participants in the David Carey Miller Festschrift Conference at the University of Aberdeen Law School who gave me valuable feedback.

Reforming the Law of Prescriptive Title to Land

George Gretton

Introduction

Among David's many notable contributions to the law of property can be found work on the subject of positive (or acquisitive) prescription.¹ It is an important subject and an appropriate one in a volume in honour of such a distinguished property law scholar.

Does the law of prescriptive title to land need to be reformed?² The purpose of this paper is to suggest that it does. The law, which was established in 1617³ and which has not changed much since then, apart from reduction in the period,⁴ worked well enough until fairly recently, but no longer works well, not because of changes to the law of prescription itself, but because of changes in what the Keeper is prepared to accept for registration, the result being that it is now too difficult to establish prescriptive title.

¹ As well as his treatment of the subject in D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005) there is D. L. Carey Miller, D. W. Meyers and A. Cowe, 'Restitution of Art and Cultural Objects: a Reassessment of the Role of Limitation', *Art Antiquity and Law*, 6(1) (2001), 1–17, and D. L. Carey Miller, 'Positive Prescription of Corporeal Moveables?', *Edinburgh Law Review*, 15(3) (2011), 452–6.

² This paper is about prescriptive title to land – that is to say, ownership of land. It is not about positive prescription in relation to subordinate real rights.

³ Registration Act 1617. This, with some amendments, remained in force until replaced by the Prescription and Limitation (Scotland) Act 1973, but there is a continuity of the law. Caselaw decided under the 1617 Act remains authoritative. For the position before 1617, see Colin M. Campbell, *Positive Prescription of Landownership in Scots Law* (Ph.D thesis, University of Edinburgh, 2015). See also Andrew R. C. Simpson, 'Legal Learning and the Prescription of Rights in Scotland' in H. Dondorp, D. Ibbetson and E. Schrage (eds), *Prescription and Limitation* (Berlin, forthcoming).

⁴ The period fixed by the 1617 Act was 40 years. This was halved to 20 years by the Conveyancing (Scotland) Act 1874 s. 34. It was halved again, to 10 years, by the Conveyancing and Feudal Reform (Scotland) Act 1970 s. 8.

But, it may be asked, has the subject not been the subject of official reviews? The answer is: yes, but only to a limited extent. The only general review that I am aware of since the modern system was introduced, which is to say since 1617, was conducted in 1968/1970 by the Scottish Law Commission, which led to the Prescription and Limitation (Scotland) Act 1973.⁵ That was before the introduction of the Land Register, the legislation for which dates to 1979.⁶ Moreover, the review was not extensive. The most important issue considered was whether good faith should become a requirement. That was rejected, and thus the old law, which is that good faith is not relevant, has continued. Comparative study of positive prescription was not included in the project.⁷

Have there been other reviews? A recent review, though very limited in scope, was part of the Scottish Law Commission project on land registration, culminating in the Land Registration etc. (Scotland) Act 2012.⁸ That project could not, for reasons of scope, look at positive prescription in general. It did however make three recommendations on specific matters relevant to a coherent land registration system, and these may be noted briefly here. One concerned a drafting error in the Land Registration (Scotland) Act 1979, whereby prescription could run only on unwarranted titles.⁹ The recommendation was that it should make no difference whether a title was warranted or not, a recommendation adopted by the 2012 Act. A second recommendation, also adopted in the 2012 Act, was to define the phrase ‘exempt from challenge’, so as to provide that someone with a prescriptive title to land really is the owner,

⁵ Scottish Law Commission, *Reform of the Law Relating to Prescription and Limitation of Actions* (Scot. Law Com. No. 15, 1970), preceded by *Memorandum on Prescription and Limitation of Actions* (Scot. Law Com. DP No. 9, 1968).

⁶ Land Registration (Scotland) Act 1979.

⁷ The review did not cover prescriptive title to moveables. The SLC did that as a separate project, in which it *did* include comparative material: *Corporeal Moveables – Usucapion or Acquisitive Prescription* (Scot. Law Com. DP No. 30, 1976). The present paper is not concerned with moveables, but to complete the story the latter project was abandoned, until revived more than 30 years later: Scottish Law Commission, *Discussion Paper on Prescription and Title to Moveable Property* (Scot. Law Com. DP No. 144, 2010); *idem*, *Report on Prescription and Title to Moveable Property* (Scot. Law Com. No. 228, 2012).

⁸ The project was comprised of: Scottish Law Commission, *Discussion Paper on Void and Voidable Titles* (Scot. Law Com. DP No. 125, 2004); *idem*, *Discussion Paper on Registration, Rectification and Indemnity* (Scot. Law Com. DP No. 128, 2005); *idem*, *Discussion Paper on Miscellaneous Issues* (Scot. Law Com. DP No. 130, 2005); *idem*, *Report on Land Registration* (Scot. Law Com. No. 222, 2010).

⁹ For background see Scottish Law Commission, *Void and Voidable Titles*, Part 3. (A small terminological point: ‘warranted’ and ‘unwarranted’ are terms that relate to the 2012 Act. Under the 1979 Act one spoke of ‘indemnified’ and ‘unindemnified’ titles.)

and not merely a non-owner whose lack of title cannot be asserted.¹⁰ In other words, positive prescription works as acquisitive prescription.¹¹ Whether that was the law before the 2012 Act is open to debate. Those who think that it was already the law will regard the change made by the 2012 Act as merely a clarification. Those who think that under the previous law positive prescription was not acquisitive prescription will interpret the 2012 Act as changing the law, i.e. as introducing acquisitive prescription for the first time.¹² Be that as it may, even if the 2012 Act did change the law, the effect was more nominal than substantive. The third recommendation was about *a non domino* applications.

A non domino applications

Ever since 1617 the law has been that a prescriptive title requires not only possession, but also an ostensible title, or what in the US would be called, in an expression that will be adopted here, ‘color of title’, i.e. a title in the Register of Sasines (or, later, the Land Register). One can possess land for a thousand years without obtaining a prescriptive title, unless there is colour of title. If the Keeper is presented with a disposition, and does not realise that it is *a non domino*, then of course it is accepted, and prescription can run.¹³ If the Keeper does realise that, what then?

There was no statutory provision, for the Register of Sasines, about when the Keeper was entitled to reject applications. In fact, up to the 1990s dispositions that were *a non domino* and known to be such by the Keeper were usually accepted for recording. One reason was that a void deed remained a void deed even after recording in the Register of Sasines, so that if X owned Blackmains and there was a recorded *a non domino* disposition by Y to Z, X still owned Blackmains, i.e. the disposition, of itself, changed nothing. But after about 1990 a surge of ‘speculative’ *a non domino* dispositions meant that the practice of the Keeper began to change. The new practice was for the Keeper to reject ‘speculative’ applications but to continue to accept ‘non-speculative’

¹⁰ Land Registration etc. (Scotland) Act 2012 Sch. 5 para. 18(4) inserting the new s. 5(1A) into the 1973 Act.

¹¹ To this there is a qualification: positive prescription can cure not only nullity but also voidability. Where this happens ‘positive’ prescription is in fact a negative prescription. This odd fact cannot be discussed further here.

¹² David Johnston takes this view in his *Prescription and Limitation* (2nd edn, Edinburgh, 2012).

¹³ Assuming that the deed was valid in other respects, e.g. properly executed.

ones.¹⁴ The distinction was rough-and-ready. For the Land Register, which was gradually replacing the Register of Sasines, the acceptance of an *a non domino* disposition had greater consequences, and the Keeper developed a restrictive policy.¹⁵ But here too there was no legislative underpinning for the accept/reject decision.¹⁶ The Land Registration (Scotland) Act 1979 had no definite rules for accepting applications, whether based on valid or on invalid deeds.¹⁷

The Scottish Law Commission recommended clear rules for the accept/reject decision in the Land Register, including rules for cases of dispositions whose *a non domino* nature was known to the Keeper.¹⁸ The 2012 Act adopted the recommendations in general, but not in respect of the *a non domino* cases. The rules for such cases set out in the 2012 Act are very strict indeed, to the point where the registration of a disposition known by the Keeper to be *a non domino* is now almost impossible. Why? Because the 2012 Act says that the owner has to be alerted, with predictable consequences. This is what may be called the ‘waking sleeping dogs’ issue. It might be thought that in at least many cases the owner would be untraceable. But where an owner cannot be identified, or can be identified but is dead with no traceable heirs, or is a juristic person that no longer exists, the property will normally fall to the Crown,¹⁹ so that there is always a dog (albeit royal²⁰) to be woken up.

That does not mean that positive prescription of titles to land is now generally excluded. Where the Keeper is unaware that a disposition is *a non domino* the application will be accepted and so prescription can run.²¹

¹⁴ For the change see A. M. Falconer and R. Rennie, ‘The Sasine Register and Dispositions a Non Domino’, *Journal of the Law Society of Scotland*, 42(2) (1997), 72–4.

¹⁵ Summarised in Scottish Law Commission, *Report on Land Registration*, para. 16.8.

¹⁶ That is to say, under the Land Registration (Scotland) Act 1979.

¹⁷ Section 4 of the 1979 Act had vague provisions which could be summarised, with only minor imprecision, as being that ‘the acceptability of applications is for the Keeper’s discretion’.

¹⁸ As for the issue of *a non domino* dispositions in the Register of Sasines, that was not dealt with in the 2012 Act, nor was it dealt with in the SLC project. The reason is simple. No disposition of any kind can now be recorded in the Register of Sasines, as from the entry into force of the new legislation.

¹⁹ In some cases under the doctrine of *ultimus haeres* and in others under the doctrine of *bona vacantia*. For companies the rule is statutory (currently Companies Act 2006 s. 1012ff.) but there is, it is thought, a general common law rule whereby the property of dissolved juristic persons falls to the Crown.

²⁰ Such cases are handled on behalf of Her Majesty (but in economic reality on behalf of the Scottish Government) by the Queen’s and Lord Treasurer’s Remembrancer.

²¹ In 2014 the Keeper adopted a policy of reduced scrutiny of incoming applications so that there is now the temptation to get an *a non domino* disposition on to the Land Register by not disclosing the facts. This issue cannot be explored here. (For the new

Misunderstanding of the law

There is a widespread misunderstanding of how the law works. There are countless people who think that you can somehow acquire land by registering a deed of a type called into mysterious being by the cunning sorcerers of old, called – for all good sorcery must cast its spells of power in the *lingua latina aeterna* – an *a non domino* disposition. This belief is shared both by the unscrupulous who see it as a way of grabbing land, and by the scrupulous who think that Scots law allows land to be grabbed, and who engage in public campaigns for the abolition of *a non domino* conveyances. The possession requirement is not understood. Instead of the real question, ‘should long-term unchallenged possession eventually ripen into ownership?’, a rather difficult question to answer, the question has become ‘should people be able to grab land by registering a worthless piece of paper?’, an easy question to answer.

Should long-term unchallenged possession eventually ripen into ownership?

Is positive prescription to titles to land right or wrong? Views differ. Of course, one should not really present it as a single question. Much depends on the length of time. One year? A hundred years? Something depends on whether the person losing the property should be compensated. (In no legal system does that happen.) Is good faith relevant? Is it relevant whether the possessor has spent money maintaining or improving the property? The view that the owner should be alerted was introduced in the 2012 Act.²² A common view is that positive prescription can be justified – if at all – only as a means of proving title,²³ so that once a modern system of title registration exists, positive prescription becomes an anachronism, a relic of more primitive land law.

Modern views tend to be hostile: positive prescription is seen as being near akin to theft. Something of that attitude can be seen in the parliamentary

policy see Kenneth G. C. Reid, “‘Tell Me, Don’t Show Me’ and the Fall and Rise of the Conveyancer” in Frankie McCarthy, James Chalmers and Stephen Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Cambridge, 2015), 15–33.)

²² 2012 Act s. 45. In England it was introduced in the Land Registration Act 2002. Sch. 6 of that Act has a set of rules as to when positive prescription should be allowed and when not.

²³ To circumvent the *probatio diabolica*.

proceedings of 2011/2012.²⁴ Nowhere can it be seen more clearly than in the two of the stages of the long-drawn-out *Pye* case, namely *J A Pye (Oxford) Ltd v Graham* in the House of Lords,²⁵ and *Pye v United Kingdom* in the ECtHR, at any rate in the Chamber,²⁶ for the Chamber's decision was later reversed by the Grand Chamber.²⁷ But while judges tend to be hostile, conveyancers tend to see things differently. I know no conveyancer who does not consider positive prescription to be a good thing. I am tempted to conclude that those who have hands-on knowledge of land rights may have a deeper understanding than those, such as judges,²⁸ who do not.

Whilst references are often made to *the* rationale of positive prescription, that being the rationale described above, which might be called the 'avoidance of the *probatio diabolica*' rationale, that is in fact not the only rationale. There are at least two others: fairness and economic efficiency.

The question of positive prescription arises where there has been a separation of ownership *de facto* from ownership *de jure*. One person, Alan, is the non-owning possessor, but someone else, Beth, is the non-possessing owner.²⁹ She can recover the property at any time, because it is hers, but she does nothing, year after year. There is no difficulty in identifying where the property is; land does not move. She can hardly think that she possesses when she does not.³⁰ Alan almost certainly spends money maintaining the property,

²⁴ SP Bill 6 Passage of the Land Registration etc. (Scotland) Bill [as introduced] Session 4 (2011).

²⁵ [2003] 1 AC 419.

²⁶ (2006) 43 EHRR.

²⁷ (2008) 46 EHRR 45. Both the Chamber judgment and the Grand Chamber judgment seem to me unsatisfactory. I cannot discuss the case here, but offer just one thought. The core of the case in *Pye* was that the expropriated owner was not entitled to compensation. (The law on this is the same everywhere.) Had the decision of the Chamber prevailed, any country could readily have circumvented it by enacting that there would be a right to compensation, but subject to a short negative prescription. No one seems to suggest that negative prescription violates human rights. This thought seems not to have occurred to the 'positive prescription is wrong' advocates.

²⁸ Or, to be precise, virtually all judges.

²⁹ She possesses neither directly nor indirectly. An example of the latter is the landlord who possesses indirectly through the tenant. Thus for prescription to run Alan must (unlike a tenant) possess *animo domini*. Much as I like Latin, this phrase always strikes me as awkward, and I could wish we had a suitable English term. 'Proprietary possession' has sometimes been used, but perhaps suggests possession based on ownership, which of course would be the wrong implication. There is a neat German term, '*Eigenbesitz*'.

³⁰ Unless she is out of possession the question of someone else prescribing a title cannot arise. What counts as sufficient possession is a question that cannot be discussed

and may spend money improving it. Is it fair that her right to recover the property should exist, quite literally, *for ever*? I do not think that people will ever agree on the answer to that, but at all events my moral perceptions seem to differ from those of (at least) many judges, for it seems to me that far from being unfair, positive prescription is fair: what would be *unfair* would be its *absence*. And this ‘positive prescription is right’ argument is *independent* of the question of what type of property registration system exists.

The other argument concerns economic efficiency. Positive prescription, by reuniting title with possession, ensures that land will, eventually, be marketable and investable. Without it, the separation of possession and title has a sterilising effect. Land is a limited resource and this sterilising effect is economically harmful.

Of course, much depends on the details.³¹ As with so much in the law, a balance is needed. If positive prescription is too difficult, unfairness and inefficiency are the result. If it is too easy, precisely the same consequences ensue. A full discussion of details would take far more space than I have available. But I want to suggest that in our law positive prescription has long been too difficult, and is now far too difficult. We need to make it easier, and the key change needed is to do away with the colour of title rule, a rule which has now become close to being an absolute barrier, and allow positive prescription to run on simple possession. In arguing for this, I will touch on, but no more than touch on, two other key issues: good faith, and the length of the prescriptive period. The next section indicates why reform is needed. The issue is about *regularising irregular titles*.

Four stories

Here are four stories, all (with only unimportant changes) true.

here, though there are some interesting recent reflections by Lord Hope, suggesting, though not asserting, that *Hamilton v McIntosh Donald Ltd* 1994 SC 30 (IH) might have been wrongly decided: Lord Hope of Craighead, ‘A Puzzling Case about Possession’ in McCarthy, Chalmers and Bogle (eds), *Essays in Conveyancing and Property Law*, 35–45.

³¹ Such as whether good faith should be a requirement, whether expenditure by the possessor be a requirement, and so on. While I cannot discuss details here, it is worth noting that in the great majority of cases there is good faith and there is expenditure, so making these factors a requirement for prescription to run would complicate the law with only limited benefit (if any benefit).

(1) Janet and her Edinburgh flat

Janet arranged with a law firm Messrs X & Co to buy a flat in south Edinburgh. She paid the price and moved in. This was in the 1960s. Many years later (about 1979) she died, and her will left the flat to her son. But a problem then emerged. Nothing had been registered in the GRS, so that from the face of the register the owner was the person who had sold the flat to her. Messrs X & Co were no longer in business. Their records had for the most part disappeared. Probably missives had indeed been concluded. But either no disposition had ever been granted, or, if one had been granted, it had certainly never been recorded and no trace of it survived.³² What was the son to do?³³ Damages against the law firm would have been an option but the law firm no longer existed. There would be the possibility of a claim against the firm's insurance company, but that would not be easy, especially because of the lack of documentation.

(2) The wee hoose amang the heather

In the Highlands and Islands people do not always do things the same way that they do in Edinburgh, and observation of conveyancing requirements is often less than strict. Property is sometimes bought and sold, or swapped, on a handshake. The result is that the position as it appears on the ground, and the position as it appears in the registers in Edinburgh, are often different – sometimes wildly different. Anyone who has ever been involved in conveyancing in the Highlands and Islands knows this. I have come across more examples than I can recount. For instance, two neighbours adjusted their boundary, by a mutual swap of ground. That is an everyday event, but this was in Ross-shire and there was nothing in writing. Twenty or thirty years later the widow of one of the owners wanted to sell her land, but it at once became obvious that the property on the ground was very different from the property in the GRS. The problem could be solved if the neighbour was willing to sign a corrective disposition, but the neighbour proved to be difficult.³⁴

(3) Old Macdonald had a farm

The Macdonald farm was in Aberdeenshire or Moray: I cannot now recall which. James Macdonald, the farmer, wished to grant a standard security.

³² What about an action of proving the tenor? That would be possible but only if sufficient evidence (e.g. photocopy) could be possible, which tends not to be the position in cases of this sort.

³³ Even if the missives could have been found, the question of whether they had been extinguished by negative prescription would arise. But the topic of the negative prescription of missives is complex and cannot be discussed here.

³⁴ Whether the neighbour was the original party, or a successor, I cannot now recall.

The title? He could produce nothing. A search of the Register of Sasines showed that the most recent entry was a disposition in the late 19th century in favour of James Macdonald. Evidently not the same person. How could the current Macdonald establish a title? The farm had stayed in the family over the generations, but there had been no *inter vivos* conveyances and no proceedings on death, and there was indeed some uncertainty as to exactly which family member had been the original donee.

(4) *The mistaken boundary*

The fourth example is the commonest type. Land is developed and sold off in units. The developer grants the buyers dispositions with plans attached. The plans, alas, do not perfectly match the units as actually developed. The plans show a boundary fence in one place, but the fence as erected is a metre or two metres away. Occasionally houses themselves may be so different, as built, from what appears in the plans that a house may even stand partly on another plot. If you look at the land as developed it looks fine: neat and clear boundaries. If you look at the land in the Register of Sasines or the Land Register, everything looks fine: neat and clear boundaries. But what if you compare that with what is on the ground? Disaster. You may say that this should never happen, for instance that the buyer's lawyers should spot the problem. But this is not as easy as it sounds. The plan presented by the developer looks perfect, and if you take it to the site it matches the site as developed perfectly, at least to the naked eye.

The basic problem: the colour of title requirement

The traditional method of regularising irregular titles of this sort was to record/register an *a non domino* disposition, and keep your fingers crossed for ten years. But that began to be difficult in the 1990s and today it is almost impossible. In principle it would be possible to make the registration of *a non domino* dispositions easier, but that would be to attempt to reverse the policy adopted in the 2012 Act. The prospects of that happening are minimal. What is more or less unacceptable to politicians and others is the idea of registering a non-owner as owner.

So if positive prescription is to survive, the question of colour of title needs to be revisited. It is true that the requirement has existed since 1617, and it is true that it has never been questioned. But if long possession should be able to ripen into ownership, it is arguable that colour of title is an

unnecessary obstacle, and has in recent years become a virtually insuperable obstacle.³⁵ It is difficult to see what purpose it serves. Moreover, it engenders misunderstanding – the idea that the essential element is the registration, whereas in truth the essential element is long-term possession. So what I suggest that the requirement of colour of title be abolished or restricted.

Some comparative law

Comparative literature of positive prescription is scant.³⁶ If our law is to be reformed, one thing that would be desirable would be comparative study. But even a cursory view shows that colour of title is not a requirement in all systems. Late Roman law had two sets of rules. Ordinary prescription of land (*praescriptio*³⁷ *ordinaria*) took ten years³⁸ and required both good faith (*bona fides*) and colour of title (*titulus*³⁹), whilst extraordinary prescription (*praescriptio*⁴⁰ *extraordinaria*)⁴¹ required good faith but not colour of title, and took 30 years.

A similar approach can be found in many modern systems. (Though nowadays the tendency is to say that, for extraordinary prescription, not only is colour of title not needed, but good faith is not needed either.) Spain is an example. The ordinary prescriptive period is ten years, and requires colour of title and good faith. Extraordinary prescription takes 30 years and requires neither colour of title nor good faith.⁴² One finds a similar approach in a

³⁵ In cases where the Keeper knows the deed to be a *non domino*.

³⁶ The only significant text that I am aware of is the report prepared for the UK Government by the British Institute of International and Comparative Law, to assist with the appeal to the Grand Chamber in the *Pye* case: British Institute of International and Comparative Law, 'Adverse Possession' (Report for Her Majesty's Court Service, September 2006). The systems examined were Australia (all states), Canada (selected provinces), France, Germany, Hungary, Netherlands, New Zealand, Poland, Spain (including Catalonia), Sweden, and the USA (Alaska, Connecticut, Massachusetts).

³⁷ Or *usucapio*.

³⁸ If the owner was in a different province the period was 20 years, a distinction retained in some modern systems.

³⁹ The equivalence of colour of title and *titulus* is in fact an oversimplification, or, rather, 'colour of title' is a concept that can bear more than one meaning, as indeed can *titulus*. There are some real distinctions here, but for the purposes of the present paper they need not be pursued.

⁴⁰ Or *usucapio*.

⁴¹ As far as I can see the terms *ordinaria* and *extraordinaria* in this context do not appear in the *Corpus Juris Civilis* itself, but seem to have originated in the later civilian tradition.

⁴² '*Se prescriben también el dominio y demás derechos reales sobre los bienes inmuebles por su posesión no interrumpida durante treinta años, sin necesidad de título ni de buena fe, y sin distinción entre*

number of other countries, such as France.⁴³ Germany differs. There must be colour of title (but not good faith) and the period is 30 years.⁴⁴ There does exist in German law an alternative, that does not require colour of title, but the conditions are very restrictive, and my impression is that it is seldom applied in practice.⁴⁵ In the USA, the law varies, of course, from state to state, and I will not attempt any generalisation. But take what its inhabitants call the great state of Texas. Here there is not just one period (as in Scotland and Germany), not two (as in France), but four periods, of three,⁴⁶ five,⁴⁷ ten⁴⁸ and 25⁴⁹ years, according to the circumstances of the case. The first of these requires colour of title, but it is also possible to acquire property by simple possession by one of the three longer periods of possession. (Details vary between them.) Comparable approaches can be found in several other states.⁵⁰ In others, there is a single possessory period but no colour of title is required (e.g. Massachusetts, where the period is 20 years.)

Possibilities

My suggestion is that positive prescription should be competent without colour of title, but that, following the distinction between *praescriptio ordinaria* and *praescriptio extraordinaria*, in the absence of colour of title the prescriptive period should be longer, and inevitably there would have to be rules to make it fit in with the modern land registration system.⁵¹

presentes y ausentes, Art. 1959 of the Spanish Civil Code. The preceding provisions deal with ordinary acquisitive prescription.

⁴³ ‘*Le délai de prescription requis pour acquérir la propriété immobilière est de trente ans. Toutefois, celui qui acquiert de bonne foi et par juste titre un immeuble en prescrit la propriété par dix ans.*’, Art. 2272 of the French Civil Code.

⁴⁴ ‘*Wer als Eigentümer eines Grundstücks im Grundbuch eingetragen ist, ohne dass er das Eigentum erlangt hat, erwirbt das Eigentum, wenn die Eintragung 30 Jahre bestanden und er während dieser Zeit das Grundstück im Eigenbesitz gehabt hat*’, § 900 of the German Civil Code.

⁴⁵ § 927.

⁴⁶ Civil Practice and Remedies Code § 16.024.

⁴⁷ Ibid., § 16.025.

⁴⁸ Ibid., § 16.026

⁴⁹ Ibid., §§ 16.027 and 16.028.

⁵⁰ For Louisiana see John Lovett, ‘Tacking in a Mixed Jurisdiction’, in A.J.M. Steven, R.G. Anderson and J. MacLeod (eds), *Nothing So Practical as Good Theory: Festschrift for George L. Gretton* (2017).

⁵¹ In a legal system that has title registration one can usually identify *praescriptio ordinaria* as *praescriptio secundum tabulas*, i.e. prescription fortifying the registered title, and

As for length of period, I have no particular views: 20 years would be an obvious possibility for the longer period. There would be no point in saying that good faith would not be required, because our law does not require good faith anyway. Possibly the issue of good faith should be reviewed, but that is a large subject that I will here leave well alone.

The main issue needing exploration would be the land registration dimension. The simplest approach would be to say that on completing the period of possession, ownership would be acquired, without any entry in the Land Register. This would not be the only type of case in which the Land Register says that one person owns Blackmains when in fact another person is the owner. Where that happens, the register is said to be inaccurate, and can be rectified, so the idea of off-register prescriptive acquisition would not be some mind-bending innovation. The Keeper would insert the prescriptive acquirer's name in the title sheet, on being satisfied that prescriptive acquisition had in fact taken place: in practice one would imagine that the Keeper would require to see a decree of declarator. (Such an action would be raised *after* the completion of prescription, so that the 'waking sleeping dogs' issue would not arise.)

The trickiest issue would concern third parties who relied on the register before it was changed, while it still showed the previous owner as owner. Two points. The first is that that situation would not crop up particularly often. In the types of case I have described, those named in the Land Register as owner would not be in possession, and would usually not think of themselves as being owners of the land in question, with the result that in the typical case they would not grant any deed affecting the land. Still, it could happen. One simple approach to such cases would be to say that the grantee, if in good faith, would be protected by the Keeper's warranty of title. (And the Keeper, if obliged to pay compensation, could recover from the granter.) An opposite approach would be to say that someone who had prescribed a title should obtain registration, and, if not having done so, would bear the risk. Yet another approach would be what was the English law before the Land Registration Act 2002 and say that on the completion of the prescriptive period the paper

praescriptio extraordinaria as *praescriptio contra tabulas*, i.e. prescription running in favour of X though the register says the owner is Y. Oddly, in our law the 2012 Act muddies the waters by saying that prescription runs on the registered *deed*. (Section 1(1) of the 1973 Act as amended by Sch. 5 para. 18(2) of the 2012 Act.) But this is an issue that cannot be pursued here. See K. G. C. Reid and G. L. Gretton, *Land Registration* (Edinburgh, 2017), chapter 17.

owner would become bare trustee for the other party. All such approaches would be workable, though of course details would have to be settled.

If positive prescription is to be a real part of the future of Scottish land law, reform broadly along these lines – however the points of details may be determined – seems a necessity.

A Tricky Balancing Act: reflections on recent South African eviction jurisprudence

Anne Pope

Introduction

Nearly twenty-five years into our democracy, the quest for a roof over one's head still frequently lies at the heart of our constitutional, legal, political and economic discourse on how to bring about social justice within a stable constitutional democracy.¹

The quest for a roof over one's head may seem an unlikely basis for an analysis of recent eviction jurisprudence, but South Africa finds itself in what may be described as a perfect storm. Its elements include the unpredictable and chaotic effects of very rapid urbanisation² and intra-continental migration, the legacies of apartheid-era land use planning or lack thereof,³ and high levels of unemployment accompanied by relatively low levels of suitable work place

¹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) (*Blue Moonlight*), para. 2.

² '...Gauteng and Western Cape received the highest number of migrants for all periods. The Eastern Cape and Gauteng experienced the largest number of outflow of migrants. Due to its relatively larger population size, Gauteng achieves the highest number of in and out flows. Gauteng, Mpumalanga, Northern Cape, North West and Western Cape provinces received positive net migration over all 3 periods. For all periods the number of international migrants entering the provinces was highest in Gauteng, with Western Cape ranking second.' Midyear population estimates 2017; estimated migration streams 2016-2021 show that the Western Cape should expect a net in-migration of 309 729 people, having received 292 372 for the period 2011-2016. <http://www.statssa.gov.za/publications/P0302/P03022017.pdf> [accessed 15 August 2017]. The implication is a steady continuing increase in the number of people who will seek housing in the Western Cape, with most hoping for state subsidized accommodation which is for the account of local governments.

³ For a detailed exposition, see D. L. Carey Miller with Anne Pope, *Land Title in South Africa* (Cape Town, 2000), 29-42. See also *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights and Evictions & Ano Amici Curiae)* 2010 (3) SA 454 (CC) (*Joe Slovo*), para. 150 that refers to the policies of the apartheid era that deliberately refrained from providing housing for Africans in Cape Town.

skills.⁴ In addition, extensive urban decay⁵ as well as significant capacity deficits in the civil service, especially at local government level, complicates the mix.⁶

Over the past decade or so, eviction jurisprudence has reflected what might be called a ‘settling-in period’. The Supreme Court of Appeal and the Constitutional Court have been concerned in several instances by challenges about how to interpret the eviction legislation. Litigants have sought clarification on issues that include the appropriate locus of responsibility for financing and providing access to emergency accommodation, the owner’s position in the eviction context, as well as how to balance the interests of all parties in accordance with constitutional values. A previous contribution pointed out that the eviction legislation is ‘deceptively simple: it requires a fair process that examines the facts supporting the position of both unlawful occupiers and landowners’.⁷ However, as is evidenced by the challenges, implementation of the legislation has been complicated and sometimes controversial.

This contribution examines a selection of judgments of the Constitutional Court and the Supreme Court of Appeal. The goal is to illustrate some of the challenges that have been raised and to determine whether crystallised views on how to interpret the eviction legislation have emerged. The paper has three main themes: the locus and scope of responsibility for providing access to adequate housing including emergency temporary accommodation; the nature of an owner’s position in the eviction context; and balancing of interests to determine the justice and equity of granting an eviction order. Tentative conclusions are that some consensus is emerging but practical difficulties

⁴ Unemployment rate was 27.2% for Q2 2017 <https://tradingeconomics.com/south-africa/unemployment-rate> [accessed 15 August 2017].

⁵ ‘[A]round 67000 people [live] in the inner city of Johannesburg in unsafe and unhealthy buildings’, *Occupiers of 51 Olivia Road, Berea Township & 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) (‘51 Olivia Road’), para. 19.

⁶ ‘One in three municipalities is dysfunctional, according to a study conducted nationwide, Co-operative Governance and Traditional Affairs Minister Pravin Gordhan [was] quoted as saying in a report on the Fin24 site. Gordhan said the Back to Basics Programme based this finding on four criteria – economic, tax and financial viability, and dependence on inter-government transfers. The factors that led to dysfunction included political instability and problems with service delivery and institutional management. Gordhan told MPs a number of strategies had been devised to address the situation, including direct interventions where municipalities had broken the law, strengthening district municipalities, and merging some municipalities.’ Legalbrief Today, ‘Gordhan cracks the whip’, 4 March 2015, Juta electronic news service: legalbrief@legalbrief.co.za.

⁷ Anne Pope ‘The alternative accommodation conundrum: trends and patterns in eviction jurisprudence’, *Speculum Juris*, 25(1) (2011), 134–47, 134.

remain a problem in many situations, especially regarding the functionality of local authorities.⁸ In what follows, an outline of the constitutional and legal framework for eviction is provided first. Then a brief analysis of pertinent parts of the eviction statute, focussing on the relationship between s. 4 and s. 6, follows.

The constitutional and legal framework for eviction from a home

The elements of the framework governing statutory evictions comprise of the Constitution,⁹ the Prevention of Illegal Evictions and Unlawful Occupation of Land Act¹⁰ as well as the Local Government: Municipal Systems Act,¹¹ the Housing Act¹² and the National Housing Code¹³ and other related legislation.

The paradigm shift of the constitutional era is that the common law no longer applies to eviction from a home. The Constitution prohibits eviction from a home unless in terms of a court order that has considered all relevant circumstances.¹⁴ It also prohibits arbitrary deprivation of property.¹⁵ These two constitutional provisions form the backdrop to eviction from a home. In other words, the well understood owner's remedy of asserting the *rei vindicatio* is insufficient. Instead, the only remedy for eviction from a home is statutory. The *rei vindicatio* is still available to evict from commercial or other premises that are not a home.

Most eviction cases require:

a consideration of rights enshrined in [the] Constitution, which may compete in circumstances where homelessness is a likely result of eviction, as well as constitutional allocation of powers and functions to municipalities and the other spheres of government. Policy has been

⁸ The terms 'local government', 'local authority' and 'municipality' are used interchangeably to indicate the same level of government. See ss 151–2 of the Constitution of the Republic of South Africa, 1996.

⁹ The Constitution of the Republic of South Africa, 1996 ('the Constitution').

¹⁰ Act 19 of 1998.

¹¹ Act 32 of 2000.

¹² Act 107 of 1997.

¹³ Enacted in terms of s. 4 of the Housing Act.

¹⁴ The Constitution s. 26(3).

¹⁵ Ibid., s. 25(1).

formulated and statutes enacted to create a scheme for the protection and realisation of these rights.¹⁶

The quotation points to two issues that have taxed the courts: the likelihood of homelessness upon eviction and municipality challenges concerning their understanding of their allocated powers and functions in the context of eviction.

The Prevention of Illegal Eviction and Unlawful Occupation of Land Act¹⁷ (known as PIE) was enacted to give effect to both s. 26(3) of the Constitution, which protects against eviction from a home, and s. 25(1), which protects against arbitrary deprivation of property. The eviction statute explicitly protects the interests of both unlawful occupiers and owners.¹⁸ The Act provides a ‘defined and carefully calibrated constitutional matrix’ to ensure that the values of human dignity, equality and freedom are explicitly part of eviction proceedings.¹⁹ Given that, historically, evictions were strongly associated with injustice, the Act also stipulates requirements to ensure justice in eviction proceedings. Procedural justice is evident in the procedures to ensure fairness and transparency in bringing a matter before a court, while substantive justice is promoted by the requirement that courts must deliberate on the factual evidence of the specific case. A mechanistic legalistic approach is no longer acceptable.

As the Constitutional Court has commented, ‘rights relating to property not previously recognised by the common law’ are protected by PIE.²⁰ Thus, ‘a new [statutory] right not arbitrarily to be deprived of a home’ without a court order gives the occupier a constitutionally protected right not previously recognized.²¹ Owners’ rights, on the other hand, derive from the common law. However, the Roman pattern of ranking property rights plays no part. In the words of the Supreme Court of Appeal:

¹⁶ *Blue Moonlight*, para. 16.

¹⁷ Act 19 of 1998.

¹⁸ The Preamble to the Act repeats the two constitutional provisions, making it abundantly clear that both the right to access adequate housing and the right not to be deprived arbitrarily of property are protected.

¹⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (‘*PE Municipality*’), para. 14.

²⁰ *Ibid.*, para. 23.

²¹ See s. 26(3) of the Constitution; *PE Municipality*, para. 23.

The judicial function is not to establish a hierarchical arrangement between the different interests involved in an abstract and mechanical way. Instead the court must balance and reconcile opposed claims in a just manner.²²

Justice and equity require that ‘everyone is to be treated as an individual bearer of rights entitled to respect for his or her dignity’.²³

PIE is not the only statute that deals with removal of persons from buildings or land, but it is the only one applicable to eviction from a home.²⁴ The National Building Regulations and Building Standards Act²⁵ and the Disaster Management Act²⁶ also authorise removal of persons from buildings or land for health and safety reasons. But neither Act may override the constitutional requirements for eviction from a home: a court order based on a consideration of all relevant circumstances is required before a lawful eviction can occur. Of note, though, is that a distinction is drawn between ‘evacuation’ and ‘eviction’ – in case of emergencies ‘evacuation’ without a court order is possible. The implication of ‘evacuation’ is that the persons are free to return to their homes when the emergency is over.²⁷

The next section examines the structure of PIE and the scope and function of particular statutory provisions.

Focus on PIE

PIE is structured to illustrate, firstly, the route for bringing a matter to court and, secondly, the substantive issues that must be addressed by the court. The procedural requirements are designed to ensure consistency, transparency and fairness in bringing the matter to court.²⁸ Thus, notice must be given to the unlawful occupier that an eviction order will be sought and a court must give permission for summons to be issued. The local authority must be

²² *PE Municipality*, para. 23.

²³ *Ibid.*, para. 41.

²⁴ In the case of farm workers on rural land, the Extension of Security of Tenure Act 62 of 1997 (ESTA) is applicable, while labour tenants are governed by the Land Reform (Labour Tenants) Act 3 of 1996.

²⁵ Act 103 of 1977 (‘the National Building Regulations Act’); see *51 Olivia Road*.

²⁶ Act 57 of 2002; see *Pheko v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC).

²⁷ See *Pheko v Ekurhuleni Metropolitan Municipality*, paras 38–40.

²⁸ See ss 4(2)–4(5) of PIE.

notified, but is not always joined to proceedings.²⁹ The decision of whether to join a municipality to litigation depends in part on whether its obligation to provide emergency or other accommodation is likely to be triggered.³⁰ These procedural requirements are mostly uncontroversial these days and they are not examined further here.

Statutory authorisation to act in terms of PIE is provided by s. 4(1) which authorises the owner of the property concerned to begin proceedings to obtain an eviction order.³¹ ‘Owner’ is defined as the ‘registered owner including an organ of state’. Section 6(1) also authorises an organ of State to seek to evict from land within its jurisdiction when it is responsible for the land or building or when it is in the public interest to act.³² In other words, s. 4(1) and s. 6(1) indicate that the State may act in its capacity as a registered owner of property or it may act in its public capacity on behalf of the general public. Section 4 provides guidance on substantive matters that are discussed below. Section 6 outlines what appears to be a parallel process for the State to follow in eviction proceedings.

*PE Municipality v Various Occupiers*³³ states that PIE requires the State to follow a different process from that followed by a private owner when seeking an eviction order.³⁴ In this matter, the State acted in its public capacity. Appropriately, thus, the judgment deals with s. 6 as the pertinent PIE provision for the context but, disconcertingly, discusses only the first three subsections of s. 6. These three subsections support the view that a separate process exists for the State acting in its public capacity. However, s. 6(6) states that ‘the procedures set out in section 4 apply, with the necessary changes, to any proceedings in terms of subsection (1)’. The Court fails to discuss the meaning of this subsection, which, on the face of it, seems to mean that the requirements of s. 4 apply also to evictions initiated by the State.

If the purpose of s. 6 is to provide statutory authority for the State to act in its public capacity, arguably, this should not necessitate a separate process as

²⁹ Ibid., s. 4(2).

³⁰ *Blue Moonlight*, paras 44–45; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) (*‘Changing Tides’*), paras 37–8.

³¹ Or person in charge; in other words, someone who would have *locus standi* to bring proceedings. The definitions are in s. 1.

³² This provision allows private owners to enlist the assistance of the municipality in instituting proceedings on their behalf. ‘Public interest’ is explicitly inclusive of health and safety interests.

³³ 2005 (1) SA 217 (CC).

³⁴ Ibid., para. 24; see also *Joe Slovo*, para. 89ff. where the Court discusses s. 6(6) but without explaining its meaning or significance.

well. A parallel process is undesirable for its potential ambiguity. No obvious reason supports having two processes in the context where determining the justice and equity of granting an eviction order requires consideration of all relevant circumstances. Whether the State or a private owner seeks the eviction is a relevant circumstance, but is not determinative of the justice and equity of the decision.

Substantive justice in eviction proceedings is promoted by consideration of contextual factual information. Section 4 describes two time periods of occupation for which particular considerations are prescribed. Section 4(6) deals with occupation for less than six months, and s. 4(7) deals with periods of more than six months. These two subsections emphasise that particular vulnerability of unlawful occupiers must receive specific attention. Thus, ‘the rights and needs of the elderly, children, disabled persons and households headed by women’ are emphasised. Further, a court must consider whether alternative accommodation is available. Section 6(3) requires the circumstances in which the unlawful occupation occurred, the length of occupation, and the availability of alternative accommodation to be considered.

However, the wording of s. 6 ostensibly merely repeats what is already stated in s. 4, making its inclusion ambiguous and questionable. Section 6(4) reiterates the procedural requirements of s. 4(2), while ss 6(3)(a)–(c) outline the considerations to be taken into account, which appear also in s. 4(6) and 4(7). Arguably, a proper construction of s. 6 is that it authorises the state to obtain an eviction order, even when it is not the owner of the land.³⁵ Further, it makes clear that the requirements of s. 4 apply to the proceedings.³⁶ The repetition in the rest of s. 6 should be seen as superfluous.

A longer period of occupation may imply a higher degree of distress and upheaval that would result from eviction. However, the courts have said that the period of occupation cannot be decisive: the justice and equity of a decision to evict depends on a consideration of *all* relevant circumstances, of which the period of occupation is merely one factor.³⁷ The Constitutional Court has stated that ‘there is no set formula connecting time to stability of occupation; time is an element of fairness’.³⁸

In each case, PIE requires a court to consider whether it is just and equitable to order eviction, after considering ‘all relevant circumstances, including the

³⁵ s. 6(1).

³⁶ s. 6(6).

³⁷ *Occupiers of Mooiplaats v Golden Thread Ltd* 2012 (2) SA 337 (CC), para. 16.

³⁸ *PE Municipality*, para. 27.

rights and needs of the elderly, children, disabled persons and households headed by women'.³⁹ Where more than six months' occupation is involved, additional considerations are stipulated, including whether land or alternative accommodation is available at the hands of 'the municipality, another State organ or another land owner'.⁴⁰ However, in line with the view that 'time is an element of fairness', the possibility of homelessness has become an intrinsic part of the justice and equity enquiry.⁴¹ Consequently, the differing occupancy period formulations in s. 4(6) and s. 4(7) are often ignored by the courts, in favour of focussing on whether the anticipated outcome of an eviction order includes homelessness.⁴² This approach is consistent with the Constitutional Court's views expressed in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*, that:

an eviction order in circumstances where no alternative accommodation is provided is far less likely to be just and equitable than one that makes careful provision for alternative housing.⁴³

However, neither PIE nor s. 26 of the Constitution authorises an absolute entitlement to accommodation.

Section 4(8) of PIE provides that, if all other requirements of s. 4 are met and no valid defence has been raised, the court must order eviction and must determine a just and equitable date when the occupiers must vacate as well as a date on which the Sheriff may execute the order, if the occupiers fail to vacate. The importance of this provision, especially for private owners, lies in the phrase '*must* order eviction'. This means that a court is not at liberty to refuse an eviction order unless a valid defence is raised.

In summary, thus, the statute describes a process for eviction from a home that explicitly considers the interests of both owners and occupiers. The statutory requirements authorise owners or the State to proceed against

³⁹ PIE s. 4(6).

⁴⁰ *Ibid.*, s. 4(7).

⁴¹ This approach is consistent with the UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art. 11. 1): forced evictions*, 20 May 1997, E/1998/22, that states at para. 7 that 'evictions should not result in homelessness'. (Cited in *Joe Slovo*, para. 232.)

⁴² See Socio-Economics Rights Institute of South Africa (SERI), 'Evictions and Alternative Accommodation in South Africa: an analysis of the jurisprudence and implications for local government' (South Africa, November 2013), 29–30.

⁴³ 2010 (3) SA 454 (CC), para. 313.

unlawful occupiers to obtain an eviction order. Whether the court grants the eviction order, depends on whether it is just and equitable to do so. The justice and equity enquiry must consider all relevant circumstances, including but not limited to the specific factors stipulated in the Act. If, on balance, it is just and equitable and no valid defence is raised, the court must grant the eviction order. A second justice and equity enquiry requires consideration of a date for eviction that is just and equitable for all parties.

Common cause aspects

Certain issues contested earlier have been clarified and appear now to be common cause. For the sake of completeness, a brief description of some is provided.

First, the eviction statute PIE governs *all* evictions from a home, regardless of the fact that other legislation may appear applicable.⁴⁴ Further, a court order is necessary for eviction from a home to be lawful. Whether it is just and equitable to grant the order depends on all the relevant circumstances. This position was reiterated in 2014 by the Constitutional Court in *Zulu v Etbekwini Municipality*:

Eviction is governed by the provisions of PIE, which aim to ensure that the most vulnerable among us are protected. Its rules and requirements are not optional.⁴⁵

Secondly, the *locus standi* of parties has been challenged, which required clarification of its essential elements. Recently, in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*, the Supreme Court of Appeal confirmed that a ‘direct and sufficient interest’ in the outcome of litigation gives a party *locus standi*.⁴⁶

Thirdly, private owners are not expected to house the homeless.⁴⁷ The State is obliged to facilitate access to adequate housing and to provide emergency accommodation in the face of potential homelessness.⁴⁸ Owners may have to

⁴⁴ See above (n. 24) and (n. 25).

⁴⁵ 2014 (4) SA 590 (CC), para. 44; see also *Motswagae v Rustenburg Local Municipality* 2013 (2) SA 613 (CC).

⁴⁶ 2012 (6) SA 294 (SCA), para. 37 and the cases cited there; see also *Zulu v Etbekwini Municipality* 2014 (4) SA 590 (CC).

⁴⁷ *Blue Moonlight*, para. 31.

⁴⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (*‘Grootboom’*);

exercise patience, however, when anticipating the return of their property.⁴⁹ A court may consider the date for eviction to be just and equitable only if it occurs some time in the future. This would impose a delay on regaining vacant possession while alternative accommodation arrangements are made for the occupiers.

Fourth, PIE is not expropriation legislation.⁵⁰ Constitutional protection of property interests includes the requirement of compensation in the event of expropriation.⁵¹ Consequently, an owner may not be deprived permanently of her land without compensation.⁵²

These examples of previous challenges that have been resolved give an indication of the nature of the climate in which eviction from a home has been considered. In what follows next, the discussion examines the expectations on local authorities in the eviction context.

The role of municipalities in eviction

The State's obligations are well defined and articulated in a combination of the Constitution, legislation and judgments. Nevertheless, in several instances, municipalities have elected to challenge the nature and scope of their obligations.

The Constitution and various statutes describe a municipality's role in housing matters.⁵³ The functions and powers of local government are set out in Chapter 7⁵⁴ of the Constitution, which requires prioritising of basic needs of communities and promotion of social and economic development.⁵⁵

The Housing Act⁵⁶ expects municipalities to take all reasonable and necessary steps within the policy and legislative framework to give effect to

PE Municipality; Blue Moonlight; Changing Tides, para. 39.

⁴⁹ *Blue Moonlight*.

⁵⁰ *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA), paras 17–8; *Changing Tides*, para. 16; *Blue Moonlight*, para. 31. See also A. J. van der Walt, 'The State's duty to protect property owners v the State's duty to provide housing: thoughts on the Modderklip case', 21(1) *South African Journal of Human Rights* (2005), 144–61.

⁵¹ The Constitution s. 25(2).

⁵² *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), para. 42.

⁵³ See *Blue Moonlight*, paras 16–29.

⁵⁴ The Constitution ss 151–64.

⁵⁵ *Ibid.*, s. 153.

⁵⁶ Act 107 of 1997.

the right of access to adequate housing.⁵⁷ The Local Government: Municipal Systems Act describes the functions and responsibilities of municipalities including provision of 'basic municipal services'.⁵⁸ The National Housing Code contains the national housing policy that must also provide emergency accommodation.⁵⁹ Imminent eviction and consequent homelessness more often than not count as an emergency circumstance. As long ago as 2001, the Constitutional Court was clear about the responsibility of local authorities to provide emergency housing for the most vulnerable who find themselves in dire circumstances beyond their control.⁶⁰ The definition of an emergency in the Housing Code includes eviction or threat of eviction from land or unsafe buildings.⁶¹

In *PE Municipality*, the Constitutional Court pointed out that:

Municipalities represent all people in their areas of jurisdiction [...] They have to organise and administer their affairs in accordance with the broader interests of all inhabitants.⁶²

One might be forgiven for wondering, thus, why a municipality finds it useful to challenge its role in the face of this clear picture of its obligations. Furthermore, thus far, the challenges by municipalities have been largely unsuccessful, leading to what may seem to be a waste of taxpayers' money.⁶³ This use of funds is especially anomalous in light of claims by municipalities that they are under-resourced and short of funds and thus are constrained in what they can achieve.⁶⁴

Although the inevitable delays occasioned by the litigation have caused frustration and anguish for the parties concerned, the cases have clarified the nature and scope of the State's obligations as well as the manner in which they are expected to be carried out. Two aspects in particular have been highlighted,

⁵⁷ s. 9 of the Housing Act, 107 of 1997.

⁵⁸ Act 32 of 2000.

⁵⁹ Enacted in terms of s. 4 of the Housing Act. Chapter 12 was introduced after *Grootboom*.

⁶⁰ *Grootboom*, para. 52. The National Housing Code was amended to include this injunction to provide emergency accommodation.

⁶¹ See *Blue Moonlight*, para. 47.

⁶² 2005 (1) SA 217 (CC), para. 26.

⁶³ *Grootboom*; *PE Municipality*; *51 Olivia Road*; *Joe Slovo*; *Blue Moonlight*; *Changing Tides*.

⁶⁴ See *Blue Moonlight*, para. 68ff.; also SERI, 'Evictions and Alternative Accommodation', 46.

viz the need for good planning and co-ordination,⁶⁵ and the expectation of engagement with the local constituencies served by the State.⁶⁶

Thus in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg*, the Court pointed out that the Johannesburg Inner City Regeneration Strategy should have included structures and personnel directed to engage with people likely to face eviction.⁶⁷

The obligation to provide accommodation was contested several times, usually when the State itself sought to evict and asserted that it was unable to provide alternative accommodation.⁶⁸ *PE Municipality* explained there is no unqualified duty on municipalities to provide alternative accommodation,⁶⁹ since the impossible cannot be expected i.e. if there really were no accommodation, then requiring a municipality to provide it would be futile.⁷⁰ But the information about accommodation availability supplied to the court must be factually correct and must address the circumstances of the occupiers before the court,⁷¹ especially in relation to the need for temporary emergency accommodation.⁷² A generalised and vague report of a housing programme is insufficient.⁷³ The court must determine on the facts whether it is just and equitable to evict. To do so with integrity, the court needs accurate and comprehensive information. Imminent homelessness and the capacity of the local authority to manage it are relevant, especially when people have been reasonably settled. Some form of accommodation is preferable even if only temporary.⁷⁴

The risk of homelessness and availability of alternative accommodation have featured in many cases where eviction from public land and at the

⁶⁵ See *Blue Moonlight*, para. 63 where the Court comments that even emergency situations are to some extent foreseeable – it is possible for the municipality to know how many ‘bad’ buildings exist within its jurisdiction that may need occupiers to vacate at short notice.

⁶⁶ See s. 152 of the Constitution; *51 Olivia Road*, paras 18–19; *Joe Slovo*, paras 239ff. and 338.

⁶⁷ 2008 (3) SA 208 (CC), paras 18–19.

⁶⁸ See e.g. *Grootboom*; *PE Municipality*; *51 Olivia Road*; *Joe Slovo*; *Blue Moonlight*; *Changing Tides*.

⁶⁹ *PE Municipality*, para. 28.

⁷⁰ *Ibid.*, para. 29; *Changing Tides*, para. 40.

⁷¹ *PE Municipality*, para. 29; *Occupiers of Mooiplaats v Golden Thread Ltd* 2012 (2) SA 337 (CC): no submissions from municipality despite its constitutional obligations to some 170 families to be evicted.

⁷² *Changing Tides*, paras 46–8.

⁷³ *Ibid.*, para. 40.

⁷⁴ *PE Municipality*, paras 27–8.

instance of public entities were involved.⁷⁵ As might be expected, the focus in those cases was on the constitutional obligations of the State to give effect to housing needs. The distilled outcomes of the cases reveal that accurate factual information is needed, meaningful and good faith engagement between occupiers and local authorities is required to facilitate finding workable solutions to practical difficulties, and that usually practical compromise solutions are possible. Municipalities are authorised to appoint mediators if appropriate to facilitate engagement efforts.⁷⁶

The Supreme Court of Appeal has pointed out that the obligations arising from s. 26 (the access to housing right) are separate from the enquiry into whether it is just and equitable to evict in a given situation; and that the obligation to provide emergency and basic shelter is triggered ‘in relation to persons in crisis with no access to land, no roof over their heads and living in intolerable conditions’.⁷⁷

Municipalities seem to compound their difficulties through poor co-ordination and lack of foresight in planning. Thus, a municipality will order a private owner to meet statutory health and safety requirements in ‘bad’ buildings, apparently without appreciating the implications of such orders for its own resources.⁷⁸ To comply with such orders usually involves the owner having to evict the occupiers, which necessarily involves the local authority, as will be explained.

Private owners and emergency accommodation

It appears that while the State has accepted its responsibility towards people that it evicts, it still challenges the notion that it owes this responsibility to people who are evicted by private owners.

In *Blue Moonlight*, the City’s housing policy differentiated between occupiers it evicted from ‘bad buildings’ and persons evicted by private owners. In its view,

⁷⁵ *Grootboom; Baartman v Port Elizabeth Municipality* 2004 (1) SA 560 (SCA) and on appeal from it *PE Municipality; 51 Olivia Road; Joe Slovo*.

⁷⁶ In terms of s. 7 of PIE.

⁷⁷ *Changing Tides*, paras 14 and 22; see also *Joe Slovo*, paras 115–6; *Occupiers of Erf 101, 102, 104 & 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* 2010 (4) BCLR 354 (SCA).

⁷⁸ *Changing Tides*, para. 2. An explanation for the municipality requiring an owner to clean up its building rather than addressing the squalid and unsafe conditions directly may be found at para. 54.

it owed no obligation to the latter occupiers and defended the constitutionality of its housing policy that so differentiated. The deteriorating condition of a 'bad building' had led the City to issue notices requiring the owner to remedy 'the fire safety and the health and sanitation conditions on the property'. When the owner applied successfully for an eviction order so as to carry out its obligations in terms of the notices, the Court found the discriminatory housing policy of the City to be unconstitutional and required the City to provide 'temporary emergency accommodation'. The City objected, asserting that it 'cannot be held responsible for providing accommodation to all people who are evicted by private landowners'.⁷⁹

The Court explained⁸⁰ that the duty to provide access to housing rests on all three tiers of government, which are obliged to co-operate.⁸¹ The City argued that its role is secondary to that of the other tiers and limited in light of Chapter 12 of the Housing Code. It asserted that its application to the provincial government for funding for emergency housing was refused, which thus relieved it of further obligation in this regard. It asserted that, in light of *Grootboom*, the responsibility to fund emergency housing does not lie with local government, which is supposed to act only as a point of delivery of services including emergency housing.

The Constitutional Court rejected these arguments, explaining that the constitutional obligations⁸² of a municipality include the obligation to 'give priority to the basic needs of the community, and to promote the social and economic development of the community'.⁸³ In addition, the Local Government: Municipal Systems Act both authorises and empowers local government to carry out its obligations,⁸⁴ which includes provision for housing emergencies beyond the control of those in need of assistance.⁸⁵ Consequently, there is no basis to categorise persons who face homelessness as a result of imminent eviction and thus the City's emergency housing policy was unconstitutional to the extent that it failed to provide for persons evicted by private owners.

⁷⁹ Ibid., para. 32.

⁸⁰ Ibid., para. 42.

⁸¹ See s. 40 of the Constitution.

⁸² In terms of s. 152 of the Constitution.

⁸³ *Blue Moonlight*, paras 22 and 53.

⁸⁴ Ibid., paras 26 and 53.

⁸⁵ Chapter 12 of the National Housing Code, inserted after the *Grootboom* decision in 2001.

A similar state of affairs prevailed in *City of Johannesburg v Changing Tides 74 (Pty) Ltd*, where the owner was also ordered by the City to comply with public health bylaws and building standards by fixing its dilapidated building.⁸⁶ The owner sought and was granted an eviction order, which stipulated, amongst other things, that the City was to accommodate the occupiers, to which it objected.

The SCA considered the relationship between s. 4(7)⁸⁷ and s. 4(8) in PIE, pointing out that two enquiries are required:⁸⁸ first is whether it is just and equitable to evict, having considered all relevant circumstances. The availability of alternative accommodation and the rights and needs of the occupiers, especially the particularly vulnerable, are relevant factors. Compliance with the service of process formalities of s. 4 is also relevant to the determination. The justice and equity determination applies to all parties, not just the occupiers. Having concluded this enquiry, the second requires the court to determine a just and equitable date for the eviction and whether conditions should be added to the order.⁸⁹

When, however, a private owner seeks to evict, the availability of alternative accommodation is not determinative of the justice and equity of granting an eviction order; rather it is significant for the justice and equity enquiry into an appropriate date for the eviction.⁹⁰ Given that a private owner has no constitutional obligation to provide housing,⁹¹ the municipality must be joined in the matter when homelessness of occupiers is implicated.⁹² The justice

⁸⁶ In terms of the National Building Regulations Act 103 of 1977.

⁸⁷ Or s. 4(6), as the case may be: s. 4(6) 'If an unlawful occupier has occupied the land in question for less than six months at the time when the proceeding are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women; s. 4(7) If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women'.

⁸⁸ *Changing Tides*, para. 12.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, para. 20.

⁹¹ *Ibid.*, para. 18.

⁹² *Ibid.*, para. 37.

and equity of the date of eviction must be considered to deal with managing the possibility of homelessness and arranging emergency housing at the very least.⁹³

The locus of responsibility for giving effect to the s. 26 right to access adequate housing clearly lies with the State at all three levels of government. The obligation to provide emergency housing to persons who face homelessness rests on municipalities, which are expected to have appropriate programmes in place. It is also clear that private owners bear no constitutional duty to house the homeless and are entitled to possession of their property, but the nature of the owner's position requires some elucidation. The next section examines the owner's position in the eviction context. A full treatment of landownership since 1994 is not attempted here, it being well described elsewhere.⁹⁴

Nature of the owner's position

The eviction context highlights the tension between two constitutional rights: the protection of property rights⁹⁵ and the right to have access to adequate housing.⁹⁶ PIE 'acknowledges [the] quest for homes, while recognising that no one may be deprived arbitrarily of property'.⁹⁷ Unlawful occupation results in an arbitrary deprivation of property for the owner, which if not remedied, would amount to an unlawful expropriation.⁹⁸ Consequently, when it is just and equitable in the circumstances, lawful eviction is permitted.⁹⁹

PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern.¹⁰⁰

⁹³ Ibid., paras 21–24.

⁹⁴ See e.g. J. M. Pienaar, *Land Reform* (Cape Town, 2014) and A. J. van der Walt, *Constitutional Property Law* (3rd edn, Cape Town, 2011) especially 521ff., and publications listed therein.

⁹⁵ The Constitution s. 25.

⁹⁶ Ibid., s. 26.

⁹⁷ *Blue Moonlight*, para. 36.

⁹⁸ Ibid., para. 37.

⁹⁹ Ibid.

¹⁰⁰ *PE Municipality*, para. 37.

This vision is sometimes explained through the notion of Ubuntu, which translates as ‘humaneness’.¹⁰¹ The concept envelops the values of ‘group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity [...] [denoting] humanity and morality. [It marks] a shift from confrontation to conciliation’.¹⁰² Sachs J explains Ubuntu as combining ‘individual rights with a communitarian philosophy [...] which [...] [expresses] the need for human interdependence, respect and concern’.¹⁰³ The social and historical context of property and related rights in South Africa is explicitly acknowledged in the constitutional order. Thus:

protection against arbitrary deprivation of property in s. 25 [...] is balanced by the right of access to adequate housing in s. 26(1) and the right not to be evicted arbitrarily from one’s home in s. 26(3).¹⁰⁴

The usual ownership rights of possession, use and occupation are tempered by ‘a new and equally relevant right not arbitrarily to be deprived of a home’.¹⁰⁵ In other words, ownership must be understood to be qualified by this constitutional right.¹⁰⁶

Prior to 1994, an owner could institute proceedings for ejectment using the *rei vindicatio*, which required her to assert her ownership, to provide prima facie proof thereof, and to allege that the respondent was in unlawful occupation.¹⁰⁷ As was pointed out earlier, the common law remedy is no longer available to eject unlawful occupiers from their homes, no matter how rudimentary these homes may be.¹⁰⁸ In bringing an application in terms of PIE, an owner asserts her ownership, signals her need for possession, demonstrates sufficiently that no valid defence exists and that it is just and equitable to evict.¹⁰⁹ But:

¹⁰¹ *Blue Moonlight*, para. 38; *PE Municipality*, para. 37.

¹⁰² Mokgoro J in *S v Makwanyane* 1995 (3) SA 391 (CC) cited in *PE Municipality*, para. 37.

¹⁰³ *PE Municipality*, para. 37.

¹⁰⁴ See *Blue Moonlight*, para. 34.

¹⁰⁵ *PE Municipality*, para. 23.

¹⁰⁶ See SERI, ‘Evictions and Alternative Accommodation’, 36; also *Blue Moonlight*; *Occupiers of Mooiplaats v Golden Thread Ltd* 2012 (2) SA 337 (CC); *Occupiers of Skurweplaas 335JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC).

¹⁰⁷ *Chetty v Naidoo* 1974 (3) SA 13 (A).

¹⁰⁸ See e.g. *Fischer v Persons Unknown* 2014 (3) SA 291 (WCC), para. 78 where ‘an intention [...] to take up residency’ in a structure was sufficient to protect the structure from demolition without a court order.

¹⁰⁹ See *Ndlorvu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA); *Modderfontein Squatters, Greater*

one cannot simply transpose the former rules governing onus to a situation that is no longer governed only by the common law but has statutory expression.¹¹⁰

Apart from the service of process formalities required by PIE,¹¹¹ the owner must provide substantive information to comply with the other provisions of s. 4.¹¹² *Changing Tides* indicates that the enquiry into the justice and equity of the decision is a value judgment based on an assessment of all the relevant facts.¹¹³ The onus on the owner is to provide sufficient factual information to the court so that, failing any challenge from the respondents, it has enough on which to base the determination that it is just and equitable to evict. However, the owner cannot supply information that she does not have. Consequently, courts may request further evidence and, as stated in *PE Municipality*, they:

are called upon to go beyond [their] normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process.¹¹⁴

While strict compliance with the formalities of onus may be inappropriate in the eviction context, courts may not go ‘beyond the proper bounds of judicial conduct’.¹¹⁵ Judges may not step down into the arena or indulge in private investigations. This means that if particular and relevant information is within the owner’s knowledge or is reasonably ascertainable by the owner, she must provide it to the court. However, occupiers are also expected to supply information that is peculiarly within their knowledge e.g. relating to their factual circumstances including special needs and vulnerabilities.¹¹⁶ This expectation is consistent with the obligation on the court to make a determination on the justice and equity of granting an eviction order in light of an assessment of all relevant circumstances.

Benoni City Council v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA); *51 Olivia Road, City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA); and *Blue Moonlight*.

¹¹⁰ *Changing Tides*, para. 30.

¹¹¹ s. 4(1)-(5).

¹¹² The owner should establish facts to address the requirements of s. 4(6) or (7) and (8).

¹¹³ *Changing Tides*, para. 29.

¹¹⁴ *Ibid.*, para. 26.

¹¹⁵ *Ibid.*, para. 27.

¹¹⁶ *Ibid.*, para. 31.

The effect of these expectations on an owner's rights is significant but less dire than many people anticipate. It will be recalled that s. 4(8) of PIE requires a court to grant an eviction order if it is just and equitable and if no valid defence is raised. This means that an owner cannot be permanently deprived of her property. Instead she can be required to endure a restriction on the right to possession in the interests of justice and equity.¹¹⁷ A delay in implementing an eviction order would allow the local authority to make appropriate emergency housing arrangements. In this way, the interests of both occupiers and owner are served.¹¹⁸

A related matter is whether an owner is required to protect her property actively against unlawful occupation.¹¹⁹ It bears mentioning that owners are seldom in occupation simultaneously with unlawful occupiers. This means that owners may not know their property is being unlawfully occupied. In turn, this means that the conceptual tension between the owner's obligation to protect her property actively, on the one hand, and the rights that occupiers without consent acquire in light of the constitutional protection, on the other, is easy to overlook. On the face of it, the right to vacant possession should be protected actively to forestall an inference of consent to the occupation. However, an absence of simultaneous occupation allows the inference that a delay in implementing an eviction order is unlikely to cause hardship for an owner. Where hardship is likely, the justice and equity determination would take this into account, e.g. in a situation where an erstwhile mortgagor fails to vacate notwithstanding the proper sale and transfer of the property to a new owner who wishes to take occupation immediately.¹²⁰

One instance of simultaneous occupation is illustrated in *Fischer v Persons Unknown* where unlawful occupiers occupied a part of the land on which the owner resided.¹²¹ But the simultaneous occupation of the property was not actually a practical problem in the circumstances. Sufficient physical space was available to the occupiers without impinging, in a practical sense, on the continued ability of the owner to occupy her property. The 2.7-hectare

¹¹⁷ *Blue Moonlight*, para. 40.

¹¹⁸ *Occupiers of Skurweplaas 335JR v PPC Aggregate Quarries (Pty) Ltd* 2012 (4) BCLR 382 (CC).

¹¹⁹ See *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government & Housing Gauteng* 2005 (1) SA 530 (CC), para. 59 where primary responsibility for protecting private property is affirmed to be that of the owner.

¹²⁰ See *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA).

¹²¹ 2014 (3) SA 291 (WCC), paras 4–6.

property was unfenced and the shacks were erected where ‘the surroundings [...] are covered with bush and scrub typical of the sort of vegetation that one encounters on the Cape Flats’.¹²²

Balancing interests to determine ‘just and equitable’

Interestingly, the meaning of ‘just and equitable’ is said to ‘elude easy description’.¹²³ Familiar in the context of company liquidations, the phrase indicates ‘a conclusion of law [...] derived from facts placed before the Court’.¹²⁴ Reaching a conclusion requires exercise of a wide discretionary power to be exercised judicially with regard for the competing interests concerned. An objective standard is sought in keeping with the characteristics of the rule of law, viz predictability, reliability and certainty, whilst keeping in mind the case-specific individual interests and needs.¹²⁵ The interests of good governance and smooth administration of justice are also relevant.

In *Blue Moonlight*, the Constitutional Court listed five aspects it needed to address in its determination of ‘just and equitable’ in the circumstances: ‘the rights of the owner, the obligation of the City to provide accommodation, the sufficiency of the City’s resources, the constitutionality of the City’s emergency housing policy, and an appropriate order to facilitate justice and equity in light of conclusions reached’.¹²⁶ A combination of factual and legal analysis together with value judgments is needed. The first four aspects listed have been addressed; this section examines briefly the task of crafting an appropriate order.

Section 38 of the Constitution authorises a court to grant appropriate relief in response to an allegation that a right in the Bill of Rights has been violated. This means that the usual common law remedies might be modified or made applicable in factual situations not previously recognized. For example, in *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*, the SCA discussed whether the common law of spoliation should be developed or whether a remedy based on ‘vindication of the Constitution’ would be more

¹²² Ibid., para. 5; the Cape Flats form part of the City of Cape Town Metropolitan Municipality.

¹²³ *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers Newtown Urban Village* 2013 (1) SA 583 (GSJ).

¹²⁴ Ibid., para. 40, citing Innes CJ in *Hull v Turf Mines* 1906 TS 68, 75.

¹²⁵ Ibid.

¹²⁶ *Blue Moonlight*, para. 32. See also *Changing Tides*, paras 21–4.

appropriate.¹²⁷ On the facts, the spoliation order could not remedy the situation without being stretched beyond its traditional boundaries, which effect was undesirable, in the Court's view. In order to vindicate the Constitution and to deter further (similar) violations, the Court ordered constitutional relief in the form of the return of the dwellings, despite their destruction.

As is well known, destruction of the spoliated property bars the spoliation order. In *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality*, the Constitutional Court explained the nature of appropriate relief under s. 38, stating that its determination:

calls for [...] balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief.¹²⁸

Given that apartheid legislation and policies systematically undermined the right of access to adequate housing and the right to property for the majority of the population, s. 25 not only prohibits arbitrary deprivation of property but also mandates redress of the grossly unequal social conditions.¹²⁹ In *PE Municipality*, the Constitutional Court drew attention to the transformative vision of s. 26, especially the constitutional regard for a home, in light of the violence wrought by apartheid policies and actions.¹³⁰

The Court went on to explain the 'three salient features of the [...] interrelationship between land hunger, homelessness and respect for property rights'.¹³¹ First, nobody has an unqualified immediately self-enforcing right to housing or property. Instead orderly land reform and progressive realisation of constitutional rights are envisaged. In particular, transfer of title by constitutional fiat or arbitrary seizure of land is not part of the constitutional order. Secondly, eviction may take place even though it results in loss of a home. And thirdly, concrete and case-specific solutions are required. The

¹²⁷ 2007 (6) SA 511 (SCA).

¹²⁸ 2013 (1) SA 323 (CC), para. 33, citing *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

¹²⁹ *Blue Moonlight*, para. 35.

¹³⁰ *PE Municipality*, paras 17-18.

¹³¹ *Ibid.*, para. 20.

judicial function, thus, is to balance and reconcile opposing claims as justly as possible in light of the specific circumstances and interests involved.

Conclusions

The goal has been to examine whether crystallised views about how to interpret the eviction statute have become evident in recent jurisprudence. Against an introductory contextualised backdrop, the discussion focused on the role and responsibilities of municipalities in providing accommodation to occupiers who face eviction. Thereafter, an examination of the position and expectations of private owners followed. Finally, the justice and equity enquiries that must perform a delicate balancing act were probed.

While there are still capacity and other practical aspects that will continue to confound eviction cases, clarity about the responsibilities and expectations of local authorities has emerged. In particular, local authorities are expected to operate efficiently, professionally and effectively if they are to meet their constitutional obligations. Thus, prevarication about their responsibilities including whether they are responsible for providing emergency temporary accommodation is unlikely to be entertained further.

The position of private owners has also been made clearer. In principle, no private owner is constitutionally obligated to provide accommodation for persons seeking housing. However, where large numbers of occupiers face eviction, especially from a 'bad building', owners, occupiers and municipalities are expected to attempt to find practical solutions to the implications of an eviction. The responsibilities of owners include ensuring that their property complies with basic health and safety laws. Owners are also expected to demonstrate respect for the dignity of others by being willing to exercise patience especially when large groups of people must be evicted from their property. This expectation flows from the fact that municipalities must be permitted to carry out their obligations. On the other hand, local authorities are expected to have contingency arrangements in place so that unnecessary delays are not inevitable.

Probing the assessment of the justice and equity of eviction in a variety of scenarios reveals that a court can perform this delicate task only if it has accurate real time information to hand. The obligation to provide the information rests on all the parties i.e. the owner, the occupiers and the municipality. They are

all expected to engage with integrity so that justice and equity principles are served and so that respect for dignity and Ubuntu is evident in the processes.

Overall, the conclusions are that eviction proceedings will never be easy; they cannot be formulaic; they always require accurate factual information, about the personal circumstances of occupiers and owners as well as about accommodation options from municipalities; but provided all the parties conduct themselves with integrity, just and equitable evictions are possible.

Exclusion Erosion – Scots property law and the right to exclude

Malcolm M. Combe

This is my first contribution to a festschrift. Although new to this branch of literature, I have gleaned there are loose rules applicable to essays written in honour of someone.¹ Essays should somehow relate to the person celebrated. In turn, the focus, and indeed the topic, of an essay should generally veer away from an autobiographical discourse of the person doing the celebrating. In writing this note, I have found my first rule is relatively easy to follow. My second rule is trickier to adhere to. The simple fact of this contribution to his festschrift shows I might have insights or anecdotes that explain a bit more about the exceptional scholarship, and more importantly the fine man, represented by the honouree.

Fortunately, I have been able to look to the work of Professor Carey Miller to confirm I should not worry about eschewing autobiography entirely, as he demonstrated in a contribution to a recent festschrift.² As such, before explaining the topic of this essay and its relevance to the honouree, I will take a moment to set out some of the occasions where David and I worked together.

Despite our shared connections to Aberdeen, I first met David at the University of Strathclyde, when it played host to the 2005 Society of Legal Scholars conference, just after I finished my law degree there. On the basis that I was about to move to the University of Aberdeen to study the Diploma in Legal Practice (as the professional training phase of legal education in Scotland was then known), I was able to speak to David and strike up the beginnings of a relationship that resulted in me being both a research student and a tutor for the School of Law whilst working towards my qualification. Some of my research work was independent,³ but the most significant works

¹ Advice is available. See David Schleicher, 'From Here All-the-Way-down, or How to Write a Festschrift Piece', *Tulsa Law Review*, 48 (2012–2013), 401–25.

² David L. Carey Miller, 'Lawyer for all Time' in Andrew Burrows, David Johnston and Reinhard Zimmermann, *Judge and Jurist: Essays in honour of the late Lord Rodger of Earlsferry* (Oxford, 2013), 383–97.

³ One output from this period was a note about the community right to buy introduced by Part 2 of the Land Reform (Scotland) Act 2003: Malcolm M. Combe, 'No place

were produced in partnership with David. This collaboration came to fruition in the form of two pieces of work: one on the boundaries of property law;⁴ and another on one of David's specialist subjects, corporeal moveable property.⁵

After completing my diploma, I retained some links to the School of Law, delivering a seminar to LLB students and participating in the Baltimore/Maryland Summer School, both at the David's invitation.⁶ I then re-joined the School of Law as a lecturer in 2011, working with David on a range of matters: teaching for the undergraduate property law course; submitting a response to the Scottish Law Commission on the reform of security for corporeal moveables;⁷ and presenting to a delegation of Norwegian judges about aspects of Scottish land law. With the latter, David presented on the access provisions contained in the Land Reform (Scotland) Act 2003 (asp 2). He returned to this topic at a conference in his native South Africa, resulting in a paper for the Potchefstroom Electronic Law Journal.⁸

I am aware my work with David only represents the tip of the iceberg as regards his scholarship, but that tip reveals something that is worthy of further study. Much has been written about Scotland's new access regime, including David's valuable contribution, but a dedicated, modern Scottish analysis of the extent of an owner's entitlement to exclude others from property remains lacking. This essay will explore that, and specifically consider the shift away from a strong mandate to regulate access to private property, set against the body of literature about the so-called right to exclude. As we shall see, it is

like *Holme*. Community Expectations and the Right to Buy', *Edinburgh Law Review*, 11(1) (2007) 109–16. It was based on a paper I presented to a conference in 2006, in a session chaired by Professor Carey Miller. I was able to register my thanks to him for his (and Professor Roderick R. M. Paisley's) support in a printed acknowledgement.

⁴ David L. Carey Miller and Malcolm M. Combe, 'The Boundaries of Property Rights in Scots Law', *European Journal of Comparative Law*, 10(3) (2006), <http://www.ejcl.org/103/art103-4.pdf>, accessed 4 December 2016.

⁵ David L. Carey Miller, Malcolm M. Combe, Andrew J. M. Steven and Scott Wortley, 'National Report on the Transfer of Movables in Scotland' in Wolfgang Faber and Brigitta Lurger (eds), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus*, (Munich, 2009), 297–470.

⁶ David's contribution to the success of this Summer School cannot be understated, not least for his ability to attract one slightly more prestigious speaker than me on an annual basis, namely the late Lord Rodger: Carey Miller, 'Lawyer for all Time', 384.

⁷ Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot Law Com DP No 151, 2011). See Andrew J. M. Steven, 'Reform of Security over Moveables: Still a Longstanding Reform Agenda in Scots Law', in this volume.

⁸ David L. Carey Miller, 'Public Access to Private Land in Scotland', *Potchefstroom Electronic Law Journal*, 15(2) (2012), 119–47 <http://dx.doi.org/10.4314/pelj.v15i2.6>, accessed 4 December 2016.

difficult for any legal system to completely align with the paradigm of a full exclusionary entitlement. However, it is not redundant to analyse how Scots law measures against that paradigm. This exercise gives a prime example of how much erosion there can be to a system associated with a strong exclusionary right whilst a recognisable system of property law remains.

The right to exclude – in theory and in literature

What is meant by the right to exclude? It is one of the rights in the ‘bundle of rights’ found in property law.

Instantly, there is a conceptual problem for a Scots lawyer. I do not recall paying much attention to bundles of rights in the undergraduate property law course I studied. No criticism of my *alma mater* is intended: I do not espouse the bundle of rights theory to undergraduates now that I lecture in Scots private law. Perhaps it does not hold a special value to Scots law scholars.⁹ (The ‘befogging metaphor’¹⁰ does not always hold a special value to non-Scots either.) That is not to say I am unaware of the theory, and its use to separate out institutions of property law with physical property itself: ‘the right to convey, the right to devise, the right to use, and, top of the pile, the right to exclude.’¹¹

That quote comes from an article by Professor Anderson on the educational benefits of using the right to exclude in teaching – perhaps I have missed a trick in my teaching practice to date – before noting an immersion in ‘Blackstonian absolutism’¹² can lead students to struggle to appreciate how rights might be

⁹ In a leading student textbook on Scots property law, Gretton and Steven do not introduce the bundle of rights theory, although they do mention the expression ‘dis-memberments of ownership’ in the context of encumbering ownership: George L. Gretton and Andrew J. M. Steven, *Property, Trusts and Succession* (3rd edn, Haywards Heath, 2017), para. 2.5. Instead, the preference for analysis in terms of the civil law constituent rights of use (*usus*), fruits (*fructus*) and consumption or disposal (*abusus*) prevails. See also Hector L. MacQueen and Rt. Hon. Lord Eassie (eds), *Glog and Henderson: The Law of Scotland* (14th edn, Edinburgh, 2017) para. 30.01.

¹⁰ Thomas W. Merrill, ‘Property and the Right to Exclude’, *Nebraska Law Review*, 77(4) (1998), 730–55, 755.

¹¹ Jerry L. Anderson, ‘Comparative Perspectives on Property Rights: The Right to Exclude’, *Journal of Legal Education*, 56(4) (2006), 539–50.

¹² *Ibid.*, 539, before quoting Blackstone’s characterisation of ownership as the ‘sole and despotic dominion’ over a thing, to the ‘total exclusion of the right of any other individual in the universe.’ William Blackstone, *Commentaries on the Laws of England, Book the Second* (Albany, N.Y., 1899), 2.

relational and may vary depending on who is on the other side of a particular dialectic. Anderson subsequently explains how the strong right to exclude that pervades the jurisprudence of the United States of America¹³ can be best set in context – and challenged – by comparative law analysis, before considering the situations in Laos, Norway, Sweden and ‘Britain’ (although, slightly disappointingly, the analysis of Britain Anderson describes is restricted to England and Wales).¹⁴

Before proceeding any further, it seems prudent to do some fundamental groundwork. Where does that ‘bundle of rights’ – perhaps a ‘tartan weave of rights’ would be a more appropriate Scottish analogy – originate?¹⁵ The starting point is ownership, or *dominium*: the main real right;¹⁶ the ‘greatest possible interest in a thing which a mature system of law recognizes’.¹⁷

It can take quite a logical step to get to the idea of ownership as a legal concept in the first place, but for the moment the starting point of *dominium* will be taken as a given.¹⁸ What does ownership entail? Scotland does not have a neat civil code that says what ownership is,¹⁹ but that is unlikely to cause its property lawyers to panic. The triplet of *usus*, *fructus* and *abusus* is well known. Autonomy abounds for the owner, who has the right to use the

¹³ Except, Anderson muses, in South Dakota: *ibid.*, 545. Cf the discussion in Eric T. Freyfogle, ‘Property law in a time of transformation: the record of the United States’, 131(4) (2014), *South African Law Journal*, 883–921 and Eric T. Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (Boston, 2007), chapter 2, entitled ‘The Lost Right to Roam’.

¹⁴ Anderson repeats this approach in a slightly later article: Anderson, ‘Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks’, *Georgetown International Environmental Law Review*, 19(3) (2006–2007), 375–435. That article gives a slightly unconvincing explanation. He states studies of Scotland (and Northern Ireland) are ‘not relevant to my purpose and would unnecessarily complicate the article’, when in fact a study of Scotland’s liberal access laws could have fortified the thrust of his article.

¹⁵ On the origin more generally, see Jane Ball, ‘The Boundaries of Property Rights in English Law’, *European Journal of Comparative Law*, 10.3 (2006) <http://www.ejcl.org/103/art103-1.pdf>, accessed 4 December 2016, 4–5.

¹⁶ See Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996) paras 4 and 5, drawing on Stair, *Institutions*, II.1.28.

¹⁷ A. M. Honoré, ‘Ownership’ in A. G. Guest, *Oxford Essays in Jurisprudence* (Oxford, 1961), 106–47.

¹⁸ Consider Jonathan B. Wiener, ‘What Begat Property’, *History of Political Economy*, 43:2 (2011) 353–60.

¹⁹ Although there have been occasional moves towards codification of aspects of it: David L. Carey Miller, ‘Scottish Property: a system of Civilian principle. But could it be codified?’, in Hector L. MacQueen, Antoni Vaquer and Santiago Espiau Espiau (eds), *Regional Private Laws and Codification in Europe* (Cambridge, 2003), 118–135.

property subject to ‘law or paction’, as Erskine would put it, before noting that ownership ‘necessarily excludes every other person but the proprietor’.²⁰

Is it worthwhile to try to demarcate what that autonomy entails? In his influential essay, Honoré begins with a detailed disclaimer which concludes that it is not ‘worthless to try to delineate the incidents [of ownership] in the ordinary, uncomplicated case’.²¹ He then lists eleven incidents.²² How that mix coalesces to form ownership might vary from situation to situation. It is clear from Honoré’s analysis that not all the listed incidents are individually necessary for someone to be designated owner.²³ Most importantly for this analysis, he rejects the idea of one criterion being the difference between ownership and lesser interests.²⁴

That said, Honoré observes that the right to possess – that is to say, to have exclusive physical control of a thing, or to have such control as the nature of the thing admits – is ‘the foundation on which the whole superstructure of ownership rests’.²⁵ ‘From an English law perspective’, Cooke asks, ‘is there a core to the ownership bundle, one essential ingredient?’²⁶ She observes ‘[o]ne suggestion is inalienability’, before continuing ‘[a] more truly core concept is the power to exclude others’.²⁷ Returning to Honoré’s analysis, in the context of land he notes ‘a general licence...to enter on the “property” of others would put an end to the institution of landowning as we now know it’.²⁸

²⁰ Erskine, *An Institute of the Law of Scotland*, first edition (Edinburgh, 1773; reprinted as *Old Studies in Scots Law*, vol. 5, Edinburgh, 2014), II.1.1. See also Reid, *The Law of Property in Scotland*, para. 5.

²¹ Compare the comments of Gordon, which are analysed further in the discussion about corporeal moveables below: William M. Gordon, in Reid, *The Law of Property in Scotland*, para. 533.

²² Honoré, ‘Ownership’ 113–128. These are: the right to possess; the right to use; the right to manage; the right to income; the right to capital; the right to security; the incident of transmissibility; the incident of absence of term; the prohibition of harmful use; liability to execution; and the incident of residuary.

²³ *Ibid.*, 112–3.

²⁴ *Ibid.*, 125–6.

²⁵ *Ibid.*, 113.

²⁶ Elizabeth Cooke, *Land Law* (Oxford, 2012), 3.

²⁷ *Ibid.*, 3–4. Cooke further continues, ‘My piano is mine, and therefore I am entitled to stop you playing it; my land is mine, and so I can keep you out.’ Understandably, she then follows those examples with a counter-example, of a police officer exercising power legitimately.

²⁸ *Ibid.*, 114. The full quote is instructive: ‘It is of the essence of the right to possess that it is *in rem* in the sense of availing against persons generally. This does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property. We happily speak of ownership of land, yet a largish number of officials have the right

Anderson's comments above make clear there are other rights that co-exist, but it is also clear that he places much import on the right to exclude (as a teaching aid and more generally). Further theoretical contributions have been made by American scholars, perhaps most famously by Merrill,²⁹ with other analysis from Alexander and Peñalver,³⁰ Sawers³¹ and (with a convenient, for present purposes, Scottish slant) Lovett,³² amongst others.³³ Merrill's [in] famous article has been something of a poster boy of a movement that the right to exclude is the *sine qua non* of ownership,³⁴ to the extent that he was moved to refine some of his observations in a subsequent paper,³⁵ but even there it is clear that the right to exclude has a certain primacy.

There is a wider debate as to whether exclusion is the single variable essential that makes ownership what it is or whether it is part of a multiple variable mix,³⁶ and there are alternative viewpoints to the primacy of the right to exclude.³⁷ Honoré's exhortation that you should not prioritise one over any

of entering on private land without the owner's consent, for some limited period and purpose. On the other hand, a general licence so to enter on the "property" of others would put an end to the institution of landowning as we now know it.' As shall be discussed later, there are now a number of contexts where a largish number of *non*-officials are allowed on private land in Scotland without the owner's consent.

²⁹ Merrill, 'Property and the Right to Exclude'.

³⁰ Gregory S. Alexander and Eduardo M. Peñalver, *An Introduction to Property Theory*, (Cambridge, 2012), 149–55. Consider also Gregory S. Alexander, 'The Social-Obligation Norm in American Property Law', *Cornell Law Review*, 94(4) (2009), 745–819, 801–10.

³¹ Brian Sawers, 'The Right to Exclude from Unimproved Land', *Temple Law Review*, 83(3) (2010–2011) 665–96.

³² John A. Lovett, 'Progressive property in action: the Land Reform (Scotland) Act 2003', *Nebraska Law Review*, 89(4) (2011), 739–818, particularly 743–50.

³³ David L. Callies and J. David Breemer, 'The Right to Exclude Others From Private Property: A Fundamental Constitutional Right', *Washington University Journal of Law and Policy*, 3 (2000), 39–59. (That particular issue of the journal was entitled 'Evolving Voices in Land Use Law: A Festschrift in Honour of Daniel R Mandelker').

³⁴ Cf Henry E. Smith, 'The Thing About Exclusion', *Property Rights Conference Journal* 3 (2014) 95–123. This article opens with the subtle variation that, 'The right to exclude is a *sine qua non* of debates over property', before concluding, 'The right to exclude is an important feature of property, albeit not a *sine qua non*' 122. Instead of the right to exclude, Smith homes in on the thing that there might be a right to exclude from as the heart of property law.

³⁵ Thomas W. Merrill, 'Property and the Right to Exclude II', *Property Rights Conference Journal*, 3 (2014), 1–25.

³⁶ Merrill, 'Property and the Right to Exclude', 734

³⁷ The important contribution of A. J. van der Walt in 'The Modest Systemic Status of Property Rights', *Journal of Law, Property, and Society*, 1 (2014), 15–106 is acknowledged, but not analysed at this stage. His work will be returned to below.

other has already been noted. There has been scholarship about the priority of the incident of use³⁸ or the importance of the owner's role as agenda setter.³⁹ Some argue any property rights should be linked to notions of 'human flourishing'⁴⁰ and the 'social obligation norm'.⁴¹

All of this could be explored in more detail, but even with those alternative perspectives on ownership it is clear exclusion theory has a special place in property theory, in terms of legal scholarship⁴² and beyond.⁴³ Whilst aspects

³⁸ See the discussions in Merrill, 'Property and the Right to Exclude II', 4–5, Susan Pascoe, 'Social obligation norm and the erosion of land ownership?' *The Conveyancer and Property Lawyer* 76(6) (2012) 484–97, 485–7 and Lovett, 'Progressive property in action', 743–53. Consider also Rahmatian, who notes in his analysis of the treatment of property by Lord Kames that 'there is an external and an internal aspect which can be regarded as two sides of the same coin: the rights to exclude or the external aspect, and the rights to use or the internal aspect of property rights.' Andreas Rahmatian, *Lord Kames: Legal and Social Theorist* (Edinburgh, 2015), 227. Here he refers to J. E. Penner, *The Idea of Property in Law* (Oxford, 1997). In turn, at the beginning of his chapter 4 (entitled 'The Right to Property, the Exclusion Thesis'), Penner notes exclusion and use are 'intertwined'. See also Jonnette Watson Hamilton and Nigel Banks, 'Different views of the cathedral: the literature on property law theory Property and the Law in Energy and Natural Resources' in Aileen McHarg, Barry Barton, Adrian Bradbrook and Lee Godden, *Property and the Law in Energy and Natural Resources* (Oxford 2010), 19–59, 27.

³⁹ Larissa Katz, 'Exclusion and Exclusivity in Property Law', *University of Toronto Law Journal*, 58(3) (2008), 275–315.

⁴⁰ Consider Eric T. Freyfogle, 'Private Ownership and Human Flourishing: An Exploratory Overview', *Stellenbosch Law Review*, 24(3) (2013), 430–54, drawing: on Hanri Mostert and Thomas W Bennett (eds), *Pluralism and Development* (Cape Town, 2012); and A. J. van der Walt, *Property in the Margins* (2009, Oxford). In relation to the exclusionary focus of this chapter, see Alexander and Peñalver, *An Introduction to Property Theory*, 149–55.

⁴¹ Alexander, 'The Social-Obligation Norm in American Property Law'. See also Pascoe, 'Social obligation norm and the erosion of land ownership?'.

⁴² A. J. van der Walt, 'The Modest Systemic Status of Property Rights', especially 17–23, and see now Jonathan Klick and Gideon Parchomovsky, 'The Value of the Right to Exclude: An Empirical Assessment', *University of Pennsylvania Law Review*, 165(4) (2016–2017), 917–66, 923–35. Cf Freyfogle, *On Private Property*, xvi.

⁴³ For example, Garret Hardin's critique of a common approach to resources is well known: 'The Tragedy of the Commons', *Science* 162 (1968) 1243–8, but cf Avital Margalit, 'Commons and Legality' in Gregory S. Alexander and Eduardo M. Peñalver, *Property and Community* (Oxford, 2010) 141–63. Meanwhile, Harold Demsetz highlights the economic case for exclusion in 'Toward a Theory of Property Rights', *The American Economic Review*, 57(2) (1967), 347–59, for example at 356 by noting (in the context of a comparison between communal and individual ownership) 'an owner, by virtue of his power to exclude others, can generally count on realizing the rewards associated with husbanding the game and increasing the fertility of his land. This concentration of benefits and costs on owners creates incentives to utilize resources

of exclusion theory can also be found in diverse areas such as criminal law,⁴⁴ invasion of privacy,⁴⁵ international law and state sovereignty,⁴⁶ and intellectual property (if that is to be classed as separate to property law as a whole),⁴⁷ the right to exclude has acquired a particular property law resonance in many legal systems. It threads into emerging comparative⁴⁸ and international treatments

more efficiently.’ See also Gregory S. Alexander, *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (Chicago and London, 2006) 5 and particularly footnote 20 there, and Laura S. Underkuffler-Freund, ‘Property, a Special Right’ *Notre Dame Law Review*, 71(5) (1996), 1033–58, 1038.

⁴⁴ And relatedly, the integrity of the human body regarding consent to medical treatment. Consider *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, about the importance of a patient’s autonomy when it comes to making informed consent about a medical option.

⁴⁵ Hector L. MacQueen, ‘A Hitchhikers Guide to Personality Rights in Scots Law, Mainly with Regard to Privacy’ in Niall R. Whitty and Reinhard Zimmermann, *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee, 2009), 549–88. See also Jace C. Gatewood, ‘The Evolution of the Right to Exclude – More than a Property Right, a Privacy Right’, *Mississippi College Law Review*, 32(3) (2014), 447–65.

⁴⁶ This strong, non-interventionist view of sovereignty can be seen in Article 2(7) of the UN Charter. It is strongly associated with Hersch Lauterpacht, and indeed an analogy he makes between property law and international law is discussed in John G. Sprankling, ‘The Global Right to Property’, *Columbia Journal of Transnational Law*, 52(2) (2013–2014), 464–505, 467. Consider also Aaron Schwabach, ‘Diverting the Danube: The Gabčíkovo-Nagymaros Dispute and International Freshwater Law’, *Berkeley Journal of International Law*, 14(2) (1996), 290–343, 325–36. One recent example of a typical property law encroachment actually involving an international element (as the encroachment crossed the Czech-Austrian border) can be found on the Radio Praha website, 22 June 2006 ‘Exasperated hotel owner saws off own roof to resolve border dispute’ <http://www.radio.cz/en/section/curaffrs/exasperated-hotel-owner-saws-off-own-roof-to-resolve-border-dispute>, accessed 4 December 2016.

⁴⁷ Perhaps the prime example of an exclusionary right is the patent, governed in the UK by the Patents Act 1977, but exclusionary ideas are also evident in other IP areas like copyright and trade marks. The social obligation theory aspects of intellectual property are touched on in relation to copyright and patent in Alexander, ‘The Social-Obligation Norm in American Property Law’, 810–5. See more generally Charlotte Waelde, Abbe Brown, Smita Kheria and Jane Cornwell, *Contemporary Intellectual Property: Law and Policy*, fourth edition (Oxford, 2016), 1.33–1.35. See also Gillian Black, ‘Exclusive Privilege: Adam Smith, John Millar, and the Creation of a New Right?’ in Ross G. Anderson, James Chalmers and John MacLeod (eds), *Glasgow Tercentenary Essays: 300 Years of the School of Law* (Edinburgh, 2014), 20–52.

⁴⁸ See the Draft Common Frame of Reference, which defines ownership as the most comprehensive right a person, the owner, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property: Christian von Bar, Eric Clive, Hans Schulte-Nölke et al (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Munich, 2009) VIII-1:202.

of property law,⁴⁹ not to mention human rights insofar as they relate to property.⁵⁰

Of course, we do not live in a world where the owner of a thing can completely exclude all others from that thing in all circumstances.⁵¹ It is difficult to imagine a legal system where a hermit could cocoon himself and all of his patrimony from all other people. To give an example, state authorities can enter premises for law enforcement purposes with appropriate authorisation.⁵²

⁴⁹ John G. Sprankling, 'The Emergence of International Property Law', *North Carolina Law Review*, 90(2) (2012), 461–509; Sprankling, *The International Law of Property*, chapter 13 (entitled 'The Right to Exclude'), touching on diverse matters like the "generally unfettered" right to eject (citing *Appleby v United Kingdom* 37 EHRR 38 para 22) and also looking at Chinese, Vietnamese, American, Japanese and Shari'a rules about interfering or encroaching on another's property (at 311); and Sprankling, 'The Global Right to Property'.

⁵⁰ Theo R. G. van Banning, *The Human Right to Property* (Antwerpen, 2002), 1.2.2 and 2.2.2 (particularly pages 90–2). This coverage touches on Article 1 of the First Protocol to the European Convention on Human Rights and the entitlement to peaceful enjoyment of possessions, but the clearest characterisation of the right to exclude analysed there relates to the home, in terms of Article 8 (considered in *Niemietz v. Germany*, judgment of 16 December 1992, Series A no.251-B). See also the discussion at 2.2.4. Perhaps not too much should be made of this for the present analysis, because rights to a home and property rights should not be conflated: as Carey Miller reminds us, 'Property and housing are associated matters but, of course, involve entirely distinct rights.' David L. Carey Miller, 'The Great Trek to Human Rights: The Role of Comparative Law in the Development of Human Rights in Post-Reform South Africa' in E. Öricü (ed.), *Judicial Comparativism in Human Rights Cases* (Birmingham, 2003), 201–27, 214. Of more relevance to this exclusion analysis is Article 17 of the Universal Declaration of Human Rights, which recognises the right to own property and that there should not be arbitrary deprivations. Cf Laura Dehaibi, 'The Case for an Inclusive Human Right to Property: Social Importance and Individual Self-Realization', *Western Journal of Legal Studies* 6(1) (2015) 5, at <http://ir.lib.uwo.ca/uwojls/vol6/iss1/5>, accessed 4 December 2016.

⁵¹ Alexander and Peñalver, *An Introduction to Property Theory*, chapter 7 (entitled 'The Right to Exclude and Its Limits').

⁵² See Sprankling, *The International Law of Property*, where he considers that the home is safeguarded from arbitrary interference (with reference to the International Covenant of Civil and Political Rights, Article 17, the European Convention on Human Rights, Article 8, and American Convention on Human Rights, Article 11 (313)). Scottish situations of necessity and state authorisation are discussed at MacQueen and Eassie, *Gloag and Henderson*, (eds) 34.15, with the examples of extinguishing a fire, pursuit of a criminal, a constable ascertaining whether a crime is being committed, and statutory conferrals of a right to enter such as under the Health and Safety at Work etc. Act 1974, section 20. To this can be added rights of entry to land under the High Hedges (Scotland) Act 2013 (asp 6) to deal with offending foliage and Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), s 47 (powers of entry and seizure of equipment used to make noise unlawfully).

Meanwhile, someone benevolently intervening to avert a dangerous situation or of necessity escaping a peril in a manner that involves a temporary incursion onto another's property would not normally be expected to obtain prior consent.⁵³ With that backdrop, not to mention Honoré's observation that no aspect of ownership trumps the others, can any legal system, never mind Scotland, be expected to ever fully meet the paradigm most associated with Merrill: "Deny someone the exclusion right and they do not have property?"⁵⁴ If not, what is the point of comparing any system to that paradigm?

It is submitted that it is not a hollow exercise to do so. In fact, Scotland showcases how much erosion there can be to a system associated with a strong exclusionary right whilst retaining a recognisable system of property law.

Whilst this study will bring its own insight, I appreciate I am following in the footsteps of a giant. This is because Scots law is not the only legal system embarking on a journey of reform or reconceptualisation. Professor Carey Miller considered the South African system's remarkable journey alongside Scotland's in the article referred to in my introduction. As he explains:⁵⁵

The South African Constitution sets out a controlling agenda for land reform with major implications for the protection of property in terms of the position of the common law. As part of that development the landowner's power to evict has been redefined but without recognition of any general notion of public access to private property. However, as Professor André van der Walt has shown, post-apartheid case law does reflect certain moves to restrict a landowner's general right to exclude.⁵⁶ But a limit on the power to exclude persons, on the basis of their behaviour, from private premises open to the public⁵⁷ is different in kind from a general right of public access for recreational and educational purposes.

⁵³ George Joseph Bell, *Principles of the Law of Scotland*, fourth edition (Edinburgh, 1839; reprinted as Old Studies in Scots Law, vol. 1, Edinburgh, 2010), § 956–958. Consider also Kames, *Principles of Equity* § 134. Consider also Sprankling, *The International Law of Property*, 320–2.

⁵⁴ Merrill, 'Property and the Right to Exclude', 730.

⁵⁵ Carey Miller, 'Public Access to Private Land in Scotland', 143.

⁵⁶ Here, Carey Miller cites van der Walt, *Property in the Margins*, 195.

⁵⁷ Here, Carey Miller cites *Victoria & Albert Waterfront (Pty) Ltd v Police Commissioner, Western Cape* 2004 4 SA 444 (C).

This extract provides at least two topics for analysis, namely public access to private land and eviction. Those will be considered here, alongside certain other exclusionary aspects of Scots law. To keep the scope of that analysis in check, again Professor Carey Miller provides some guidance. He restricted one of his studies to matters of corporeal property as ‘the most important part of any system of property law’.⁵⁸ Similarly, this paper will focus on Scotland’s treatment of such tangible things against the exclusion paradigm.⁵⁹ Land will be an important part of the coverage, but it would be remiss not to cover corporeal moveables, especially when one considers Carey Miller’s huge contribution in that area of scholarship.⁶⁰ Another restriction which will keep this analysis in check is a focus on situations where there is no particular relationship between a landowner and the person they are seeking to exclude. There will be no consideration of, for example, matrimonial homes legislation⁶¹ and servitudes.⁶² Analysis of circumstances where an otherwise landlocked

⁵⁸ Carey Miller, ‘Scottish Property: a system of Civilian principle. But could it be codified?’, 118. Admittedly, his statement was about derivative acquisition in the context of voluntary transfer of corporeal goods, so the ‘most important part’ statement Carey Miller made also included transfer rules within its purview, whereas here I am looking only at physical property and not wondering why, how or when someone became the owner of that property. That is not to say the rules of original and derivative acquisition are not important, it is simply to recognise the limitations of this piece.

⁵⁹ Intellectual property is therefore excluded from this particular exclusion analysis, but as already noted that is not to say it cannot be subject to exclusion analysis as well. In fact, Merrill considers IP is a prime candidate for exclusion analysis: ‘The law with respect to intangible rights in intellectual property is, if anything, even more striking in the degree to which the property right and the right to exclude go hand-in-hand. Copyrights, patents, trademarks, and trade secrets are all recognized as intangible forms of property. In each case, the core of the property right is the right to exclude others from interfering with or using the right in specified ways’. Merrill, *Property and the Right to Exclude*, 749.

⁶⁰ D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005).

⁶¹ Section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, confers a right of occupancy, which can have effect even after an owner deals with the property in terms of s.6. Equivalent rules for (same sex) civil-partners are found in the Civil Partnership Act 2004. Occupancy rights can also apply in relation to co-habiting couples, allowing a non-owner on application to court to gain occupancy for up to six months: s.18.

⁶² In this regard, it can be noted that despite expounding a strong exclusionary approach at the beginning of Book II of *An Institute of the Law of Scotland*, Erskine noted ‘it is most consistent with this rule that the right of property may be in one person, while that of servitude, impignoration, or other inferior right in the subject, is vested in another.’ Erskine, *Institute*, II.1.1. The ‘rule’ that is referred to is ‘that two different

proprietor can be afforded access to an area of land even where there is no agreement⁶³ and the constitution of rights by positive prescription⁶⁴ will also be eschewed. This approach will highlight relevant examples of erosion of the proprietor's right to exclude, before concluding that those erosions of the exclusion paradigm have not damaged the solidity of Scots property law.

Conceptions of the right to exclude – land law

(1) General

You do not need to look far to find a trend towards exclusivity in Scottish land law.⁶⁵ Rankine's text on Landownership has a chapter headed 'Exclusive Use, Trespass and Game'.⁶⁶ Erskine's formulation about exclusivity has already been noted, while Bell notes that, 'The proprietor of land has the exclusive right to the use and occupation, not merely of the surface, but of what is

persons cannot have, each of them, full property of the same thing at the same time'. Tangentially, it can be noted that certain servitude rights – such as the right to lead a pipe over or under land (Title Conditions (Scotland) Act 2003, s.77. Cf the now obsolete Bell, *Principles of the Law of Scotland*, § 942) or position a septic tank or park a car on land (*Moncrieff v Jamieson* [2007] UKHL 42) are less transient than others.

⁶³ As was the case in *Bowers v Kennedy* 2000 S.C. 555. As there is no role for agreement here this exclusion from my exclusion analysis is more challenging to justify, but two reasons can be offered. First, Sprankling, *The International Law of Property*, chapter 13 characterises this doctrine as an attenuated example of necessity, a doctrine that will be mentioned below. Second, in these situations the access is provided for as a result of particular proximate ownership arrangements, so there is a particularity to this exception to the right to exclude that would not stop the encumbered landowner from excluding other uninvited parties.

⁶⁴ Under the Prescription and Limitation (Scotland) Act 1973. See further George L. Gretton, 'Reforming the Law of Prescriptive Title to Land', in this volume. In relation to prescription for corporeal moveables, this is a matter David Carey Miller and Andrew Simpson analysed in a recent consultation exercise by the Scottish Government: see https://consult.scotland.gov.uk/family-and-property-law/prescription_and_title_to_moveable_property/consultation/view_respondent?uuId=412089906 accessed 4 December 2016. Further, positive prescription represents a situation where an owner has had a chance to exclude another but has not done so, and thereafter loses the right to do so.

⁶⁵ On the topic in general, see William M. Gordon and Scott Wortley, *Scottish Land Law* (3rd edn, vol. 1, Edinburgh, 2009), and particularly at 3.02 where it is noted that the owner can 'resist any unlawful interference with the land by temporary or permanent encroachment on the surface of the land, on the air-space above it and on the ground beneath the surface'.

⁶⁶ John Rankine, *The Law of Land-Ownership in Scotland*, fourth edition (Edinburgh, 1909). Also page 134: 'it is the nature of property to be exclusive'.

below, and what is above the surface, ‘*a coelo usque ad centrum*’.⁶⁷ These positions, and more, are analysed in detail by Lovett.⁶⁸

A landowner can take steps to prevent a crane jib swinging over his property⁶⁹ and by analogy take similar legal steps in relation to a drone flying over his property (but not in relation to civil aviation flights).⁷⁰ As for less temporary exclusions, on an *a fortiori* analysis encroachments by way of building can be prevented or (should it be too late to prevent such intrusion) removed.⁷¹ The right to remove is however subject to ‘an equitable power of the court, in exceptional circumstances, to refuse enforcement of the proprietor’s right’, as set out in the case of *Anderson v Brattisani*⁷², which related to a flue leading from a ground floor property up the wall. As explained by Professors Reid and Gretton, in a useful analysis of that leading authority and recent case law on similar issues, the flue had been installed with the consent of the upper neighbours, but the successor in title to one of those neighbours later sought removal of the apparatus from the property he had acquired. The court refused to do so, but on such narrow grounds to make clear this compassion would not be conferred lightly.⁷³

⁶⁷ Bell, *Principles of the Law of Scotland*, § 940.

⁶⁸ Lovett, ‘Progressive Property in Action’, 760–2.

⁶⁹ *Brown v Lee Constructions Ltd* 1977 SLT (Notes) 61. Anyone wishing to lawfully periodically encroach in this manner would require an oversail agreement with the proprietor. Reid, *The Law of Property in Scotland*, para. 198.

⁷⁰ A landowner’s right to exclude domestic flights from her airspace is restricted by the Civil Aviation Act 1982.

⁷¹ This principle applies equally to a cornice protruding from a building sited on neighbouring land as it does to a structure that touches the ground owned by someone else: *Milne v Mudie* (1828) 6 S. 967; *Hazle v Turner* (1840) 2 D. 886. Cf *William Tracey Ltd v SP Transmission PLC* [2016] CSOH 14, 2016 SLT 678, discussed in Kenneth G. C. Reid and George L. Gretton, *Conveyancing 2016* (Edinburgh, 2017), 10–2.

⁷² 1978 SLT (Notes) 43.

⁷³ This case, and two modern related cases (with reference to South African scholarship) are discussed in Kenneth G. C. Reid and George L. Gretton, *Conveyancing 2015* (Edinburgh, 2016), 158–61. They number three aspects from the court’s reasoning in *Anderson v Brattisani*’s (at page 43), namely ‘the court will have to be satisfied [1] that the encroachment must in the belief that it was unobjectionable, [2] that it is inconsiderable and does not materially impair the proprietor in the enjoyment of his property, and [3] that its removal would cause the encroacher a loss wholly disproportionate to the advantage which it would confer upon the proprietor.’ The two modern cases are *McLellan v J & D Pierce* [2015] CSIH 80, 2015 GWD 37-594, where removal was ordered after an encroachment where building works continued and were completed despite a request to stop by the encroached upon landowner’s solicitor, and *Munro v Finlayson* 2015 SLT (Sh Ct) 123, a case about a driveway where the encroached upon landowner did not seek removal of the drive, but rather sought (successfully) an order

That deals with encroachments from the *solum* up. What about subterranean intrusion? Bell wrote that the exclusive right extends downwards and there is ample case law in line with that analysis.⁷⁴ Modern technology and the related regulatory and indeed judicial response is challenging that, most notably in relation to extraction of the unconventional resource of shale gas.⁷⁵ Whilst environmental concerns and politics have intervened to the effect that fracking is not proceeding in Scotland for the moment, developments in England and Wales are instructive. First, the Infrastructure Act 2015 removes the equivalent chance to object to operations below the surface.⁷⁶ It is open to Scottish legislators to follow. Second, the following observations of Lord Hope (a Scottish judge, sitting in an English appeal to the UK Supreme Court) suggest the centre of the Earth might not be an appropriate terminus of ownership after all.⁷⁷ He noted:

There must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. But the wells that are at issue in this case, extending from about 800 feet to 2,800 feet below the surface, are far from being so deep as to reach the point of absurdity. Indeed the fact that the strata can be worked upon at those depths points to the opposite conclusion.

Notwithstanding that conceptual challenge from a Scottish judge to a similar English rule and the comparator of English legislation that superseded that rule, Scots law still offers a strong right to exclude for temporary and not so temporary intrusions below, on and above land. The only category (if it is

removing the neighbours, and as such excluding the encroaching neighbour from the use of his property.

⁷⁴ Erskine, *Institute*, II, 6, 1; Bell, *Principles of the Law of Scotland*, § 737–740, 940; *Whyte v Lee* (1879) 6 R. 699. This general rule does not prevent separate ownership rights in separate horizontal strata: Gordon and Wortley, *Scottish Land Law*, chapter 5 (entitled ‘Horizontal Subdivision of Land, Minerals and Support’).

⁷⁵ This encompasses ‘fracking’ in particular, as hydraulic fracturing is commonly known. See generally Tina Hunter (ed.), *Handbook of Shale Gas Law and Policy: Economics, Access, Law and Regulation in Key Jurisdictions* (Cambridge, 2016).

⁷⁶ Section 43 provides ‘A person has the right to use deep-level land in any way for the purposes of exploiting petroleum or deep geothermal energy.’ ‘Deep level land’ (per subsection (4)) is any land at a depth of at least 300 metres below surface level.

⁷⁷ *Bocardo S.A v Star Energy UK Onshore Ltd* [2010] UKSC 35, para. 27. See also Jill Morgan, ‘Subsurface ownership and hydraulic fracturing in the UK: (probably) under my backyard’, *Journal of Business Law*, 8 (2015), 634–48.

a category) that remains is that of a wandering animate object. Owners are entitled to remove straying animals from their land (and damage caused by them renders the keeper of those animals liable under the Animals (Scotland) Act 1987). Straying humans are dealt with below.

From this brief analysis, it is clear ownership is a powerful starting position. But that is also not the full story. As noted in a leading Scots law textbook, ‘the comprehensiveness of the right of ownership means that it is open to extensive fragmentation’.⁷⁸ That is to say, the wide range of application is acknowledged as something that lends itself to erosion. Even beyond the recognised subordinate real rights (most of which will have been derived from the owner or a predecessor in title, and as such are not looked at here), there can also be other controls because ‘the law, for policy reasons, from time to time, creates new forms of fragmentation by the recognition of rights which have the character of real rights in terms of their implications for the relevant core right of ownership.’ Examples are then given relating to matrimonial homes and access to land under Part 1 of the Land Reform (Scotland) Act 2003 and (perhaps not so usefully for the present discussion) the rights of community acquisition in Parts 2 and 3 of the 2003 Act. Those rights of community acquisition will be skimmed over here, as they are about reallocating rather than reconfiguring ownership and thus are not directly in point for this discussion.⁷⁹ As already noted, matrimonial homes will not be discussed here. The focus of this paper will now move to the issue of public access to private land.

(2) Access to private land by those without prior consent

Perhaps the simplest scenario of the owner’s right to exclude being put to the test is an uninvited individual accessing that person’s property. There are essentially three situations where Scots property law explicitly allows this: a public right of way; a public right in relation to the foreshore or a tidal river;⁸⁰ or a right of responsible access under the 2003 Act.

Access to land in Scotland is much discussed and often misunderstood. A

⁷⁸ MacQueen and Eassie (eds), *Gloag and Henderson*, 30.01.

⁷⁹ That said, the wider land reform agenda in Scotland is moving towards recognising community rights of acquisition in situations where a landowner might previously have been entitled to do nothing with an asset whilst simply excluding others for any reason or none. This will be returned to below.

⁸⁰ These are part of the ‘Regalia’, as discussed in Gloag and Henderson, *The Law of Scotland*, 34.06–34.07, citing *Hope v Bennewith* (1904) 6 F. 1004, *Mather v Alexander* 1926 S.C. 139 and *Burnet v Barclay* 1955 J.C. 34.

commonly expressed sentiment is that there is no law of trespass in Scotland.⁸¹ That is not quite right, but from the other end of the spectrum a landowner putting up a sign saying ‘TRESPASSERS WILL BE PROSECUTED’ is likely to be disappointed if it comes to an attempt to do so.⁸² As is often the case, the truth is somewhere between the two, although recent reforms have slightly repositioned the truth into friendlier terrain for access advocates.

Before considering those recent reforms, it is necessary to set out the old ways that afforded access. Like many countries, Scotland is covered by an invisible network of traditional routes, many of which remain public rights of way. Contemporary rights of way may have begun as old routes to take livestock to markets, or they may have been formed in living memory after twenty years of unbroken use by members of the public travelling from one public place to another.⁸³ Ways are not necessarily sign-posted, nor is it necessary for them to appear on maps (in contrast to, for example, England and Wales). Where they exist they can and regularly do traverse parcels of land in separate ownership. Affected landowners cannot block the route or otherwise interfere with someone taking access along the route.⁸⁴ The right to exclude is restricted accordingly.

Rights of way work well for anyone travelling from point to point. What is the situation if someone wants to take a diversion away from a public right of way, or perhaps pitch a tent for the night when on a recreational outing? Absent any agreement or quiet tolerance by the owner of the land where a diversion or dalliance is planned or taking place, the traditional Scots law position is that a landowner can take steps to retain or regain exclusive possession. Considering practicalities, a landowner is sometimes restricted in terms of remedies against a one-time, bare trespasser. This can be demonstrated by the fact that someone

⁸¹ The line of argument has most recently been associated with the late Alan Blackshaw: see ‘Implied permission and the traditions of customary access’, *Edinburgh Law Review*, 3(3) (1999), 368 and ‘An historical approach to the new outdoor access legislation’, *Scottish Affairs*, 62 (2008), 1. Cf Jeremy Rowan-Robinson and Andrea Ross, ‘The freedom to roam and implied permission’, *Edinburgh Law Review*, 2(2) (1998), 225.

⁸² At one level, a landowner would be disappointed because it is the norm for prosecutions in Scotland to be instigated at the behest of a public prosecutor, a step that is not triggered by signage erected by private individuals. A landowner may also be disappointed to learn this sign could fall foul of the 2003 Act, s 14 if it is positioned in a place where access rights can be enjoyed, as it could be characterised as a baseless attempt to dissuade access taking.

⁸³ Prescription and Limitation (Scotland) Act 1973 s.3(3).

⁸⁴ See further Douglas J. Cusine and Roderick R. M. Paisley, *Servitudes and Rights of Way* (Edinburgh, 1998) and Roderick R. M. Paisley, *Access Rights and Rights of Way* (Edinburgh, 2006).

taking unauthorised access to land is only liable to a landowner (or indeed criminally liable⁸⁵) for actual damage caused.⁸⁶ Furthermore, for a prohibition of access relative to a specific individual to carry force of law, a court action must be raised against that individual.

Issues of enforcement and a custom of tolerance have undoubtedly contributed to the perception that there is no law of trespass in Scotland. However, the balance of scholarly and (more importantly) judicial authority tends towards the position that Scotland traditionally allows a landowner to exert a significant amount of control over access to his land,⁸⁷ albeit there are time, money and other practical implications relating to enforcement. Both the principle and surrounding practicalities have recently been confirmed by the Court of Session.⁸⁸ That case will be analysed further below:⁸⁹ for now it

⁸⁵ There are some specific statutory offences that might be characterised as having connotations of trespass, such as s.56 of the Civic Government (Scotland) Act 1982 (which relates to the setting of fires in a public place) or the Trespass (Scotland) Act 1865 (as amended by the 2003 Act, which makes it an offence to occupy or encamp on any private land without prior permission or to encamp or light a fire on or near any road or enclosed or cultivated land without consent, unless such activities are properly recreational and within the Land Reform (Scotland) Act 2003, which will be discussed below). Reference can also be made to general criminal law and targeted legislation relating to public order, such as the Criminal Justice and Public Order Act 1994, s. 61. That allows police holding the reasonable belief that two or more persons are trespassing on land with the common purpose of residing there for any period to ask them to leave and take appropriate action if they do not.

⁸⁶ Another contrast with England and Wales is apparent. In this situation, Scots law can take solidarity from the similar approach in South Africa, as explained by Carey Miller in a passage written in 1986 (drawing on the case *Hefer v Van Greuning* 1979 (4) SA 952 (A)): 'Roman-Dutch law does not know any specialized action for the recovery of damages in respect of the wrongful possession, use or occupation of property. There is nothing akin to the tort of trespass of English law and the question is simply whether liability arises on the application of the ordinary principles of delict.' David L. Carey Miller, *Acquisition and Protection of Ownership*, (Cape Town, 1986), para. 13.1/ page 333.

⁸⁷ Consider Lovett, 'Progressive property in action', 760 and Lord Trayner's oft-quoted maxim that it is 'loose and inaccurate' that there is no law of trespass in Scotland (*Wood v North British Railway* (1899) 2 F. 1 at 2). That case is cited by Paisley, *Access Rights and Rights of Way*, where he also highlights the compelling inference that, 'Public rights of way would hardly have been required if there had been no law of trespass' (at 40).

⁸⁸ *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, affirmed [2016] CSIH 81. Lord Trayner's quote in *Wood* was referred to uncritically by the Outer House (see particularly paras 31–33) then approved by the Inner House of the Court of Session.

⁸⁹ See also Malcolm M. Combe, 'The Indycamp: Demonstrating Access to Land and Access to Justice', *Edinburgh Law Review*, (2017) 21(2), 228–33.

will suffice to say that political campaigners who had occupied land near the Scottish Parliament were not able to fall within the terms of the Land Reform (Scotland) Act 2003. How that legislation works will now be considered.

(a) Access to land for passage, recreation, education, and (some) commerce
Part 1 of the 2003 Act blankets the whole of Scotland, subject to limited exceptions,⁹⁰ with access rights that allow people, perhaps accompanied by an animal or using a non-motorised vehicle, to be on or to cross land in a responsible manner. They are rights for everyone. No prior bargain or even acquiescence by a landowner or manager is required for *ad hoc* use, nor is prior conduct needed to evidence the rights. This marks something of a challenge to those favouring a strong model of exclusion. How do they work without challenging property law as a whole?

The new regime is set out in Part 1 of the 2003 Act,⁹¹ as supplemented by the Scottish Outdoor Access Code. The Access Code is a freely available document produced by Scottish Natural Heritage – and approved by the Scottish Parliament – which gives guidance on how access rights and corresponding responsibilities work in practice.⁹²

In terms of the mechanics of the legislation, only a brief overview is possible here.⁹³ Section 1 begins by stating ‘Everyone has the statutory rights established by this Part of this Act’.⁹⁴ It then elaborates what that entails, namely the right to be ‘above and below (as well as on)’⁹⁵ land⁹⁶ for recreational

⁹⁰ Contained in s.6. The legal framework is set out below.

⁹¹ The remaining Parts of the legislation relate to the community right to buy (Part 2) and the crofting community right to buy (Part 3): see Malcolm M. Combe, ‘Parts 2 and 3 of the Land Reform (Scotland) Act 2003: a definitive answer to the Scottish Land Question?’ *Juridical Review*, 2006 195–227. The Community Empowerment (Scotland) Act 2015 has added a new Part 3A and a further community right to buy certain land. On that and other recent reforms, see Malcolm M. Combe, ‘The Land Reform (Scotland) Act 2016: another answer to the Scottish Land Question?’ *Juridical Review*, 2016 297–31.

⁹² The Access Code is provided for by s.10. See <http://www.outdooraccess-scotland.com/>, accessed 18 November 2016. The full Access Code is accessible there.

⁹³ Access rights have triggered a great deal of analysis. A flavour can be found in: Paisley, *Access Rights and Rights of Way*; Lovett, ‘Progressive property in action’; Carey Miller, ‘Public Access to Private Land in Scotland’; Combe, ‘Get off that land: non-owner regulation of access to land’; and Tom Guthrie, ‘Access Rights’ in Robert Rennie (ed.), *Property Law Reform: The Promised Land* (Edinburgh, 2008), 125–46.

⁹⁴ s.1(1).

⁹⁵ s.1(6). Thus, (non-motorised) airborne and speleological pursuits can be as acceptable (if not quite as common) as walking.

⁹⁶ s.32 defines ‘land’ as including bridges, inland waters, canals and the foreshore. As

purposes, relevant educational activities (such activities being defined as those which further someone's understanding of natural and cultural heritage)⁹⁷ and commercial purposes, provided that the money-making activity can also be undertaken 'otherwise than commercially or for profit'.⁹⁸ Recreation is not defined, but the Access Code suggests that this includes activities such as walking, cycling, orienteering, climbing and wild camping.⁹⁹ There is also a stand-alone right to cross land.¹⁰⁰

Section 2(1) acts as a check to section 1, providing that access rights must be exercised responsibly. The centrality of responsible access to the operation of the legislative scheme is immediately apparent, hence a means of determining what is 'responsible' is provided. Section 2(2) first sets out: a presumption of responsible access where a person exercises access rights without causing 'unreasonable interference with any of the rights of any other person';¹⁰¹ but notwithstanding that presumption, a person cannot be taken as exercising access rights responsibly when acting: i) in contravention of section 9; ii) in contravention of any byelaws made under section 12(1)(a)(i);¹⁰² or iii) in a manner that undermines any work undertaken by the statutory body Scottish Natural Heritage (in connection with its role to protect natural heritage).

Of the three exclusions, section 9 has the greatest practical effect. It contains a *numerus clausus* of seven conduct-based exceptions, such as crossing

regards the foreshore, as noted above there are overlapping public rights of use and access as part of the Regalia, which are important in relation to the foreshore and tidal rivers. The co-existence of these rights with access rights is acknowledged in s.5(4).

⁹⁷ s.2(5).

⁹⁸ s.1(2)(a); s.1(3). The classic example of an outdoor activity that can be undertaken 'otherwise than commercially or for profit' is hillwalking. Thus, a paid mountain guide can enjoy access rights as much as a keen amateur hillwalker.

⁹⁹ For a contemporary twist on what might be acceptable recreational access, see Malcolm M. Combe, 'Gotta Catch 'Em All: Access to Land and #PokemonGo', University of Aberdeen School of Law Blog, 22 July 2016, <https://abderdeenunilaw.wordpress.com/2016/07/22/gotta-catch-em-all-but-what-about-the-law-access-to-land-and-pokemongo/> accessed 4 December 2016.

¹⁰⁰ s.1(2)(b). By the operation of s. 9(g), this is the only right that applies in relation to golf courses.

¹⁰¹ Rights could be associated with the ownership of land, access rights under the 2003 Act, or any other rights. In terms of when access takers should defer to other parties (including other access takers under the 2003 Act), see Combe, 'Get Off That Land: Non-Owner Regulation of Access to Land', 296.

¹⁰² This has been a particular issue in relation to camping near Loch Lomond, where byelaws have been introduced. See <http://www.lochlomond-trossachs.org/images/stories/Visiting/PDF/LochLomondCampByHighRes.pdf> accessed 4 December 2016.

land in a motorised vehicle where that vehicle is not being used to provide mobility for a person with a disability,¹⁰³ any activity that is an offence or breaches a court order,¹⁰⁴ or ‘hunting, shooting or fishing.’¹⁰⁵ In relation to the last of those exceptions, Scotland contrasts with the continental legal systems where a landowner cannot exclude someone from land for hunting: as explained by Watkin, provided the access taker does no damage or there is no particularly sensitive activity going on, this means ‘across continental Europe the somewhat odd principle holds that one may only enter upon a neighbour’s land uninvited if one is armed with a gun.’¹⁰⁶

If an access taker’s conduct is not caught by section 9, the question of whether that conduct is responsible will turn on an analysis of the circumstances of the case at hand. That analysis is to have regard to whether an access taker has been following the guidance on responsible conduct in the Access Code¹⁰⁷ and with reference to four aspects relevant to responsibility found in section 2(3) (lawfulness, reasonableness, proper account of the interests of others, and the features of the land in question).

The biggest test for responsible access to date occurred when the owners of a forested area in the Highlands traversed by a number of paths, who were on record as being generally in favour of public access to their land,

¹⁰³ s.9(f). The prohibition seems clear enough, but it actually leaves some room for dubiety, with one potential issue being power-assisted bicycles. Automobiles are clearly excluded, but car parking is mentioned in the Access Code notwithstanding (at page 76), under explanation that motorised activities are not covered by access rights and, as such, special consideration should be taken when leaving your car anywhere (and see also para. 3.58). On a landowner’s ability to charge someone for parking on land more generally, this has proven to be a problematic area (in Scots contract law terms) until fairly recently. The matter has now been clarified by the UK Supreme Court in *ParkingEye v Beavis* [2015] UKSC 67, and see now *Vehicle Control Services v Mackie* SC Dun [2017] SC DUN 24, analysed in Malcolm Combe, ‘Fine to Park Here?’, *Journal of the Law Society of Scotland*, 62(6) (2017), 26–7. It can also be noted that in a recent case that touched on camping and access to land, Lord Turnbull was particularly critical of cars being taken onto a site: *The Sovereign Indigenous Peoples of Scotland (No.2)* [2016] CSOH 113, paras 58–59.

¹⁰⁴ s.9(a) and s.9(b).

¹⁰⁵ s.9(c).

¹⁰⁶ He refers to the position in France and Spain, whilst making the observation that non-hunting activities like walking, picnicking and rambling would not be permitted. The Scottish position would be the opposite. Thomas Glyn Watkin, ‘Stewardship of Land’ in Paul Beaumont (ed.), *Christian Perspectives on the Limits of the Law* (Carlisle, 2002) 118–49, 132.

¹⁰⁷ s.2(2)(b)(i). See also s.2(2)(b)(ii), which provides a further tie-in with the natural and cultural heritage role of Scottish Natural Heritage under s.29.

decided to close one path to equine access. They did this for the (legitimate) reason of preventing damage to the path by the action of multiple horses' hooves. Eventually, the Court of Session agreed that the landowners were able to internally zone their land (and steer riders to another path): allowing for a (slight) reassertion of the right to exclude.¹⁰⁸

It can be seen that the manner of purported access is crucial to ensure an access taker remains under the auspices of the 2003 Act. Those who engage with a proscribed activity or do not meet the required standards of non-interference with the rights of others fall back to the traditional Scots law position and can be excluded from the land by an owner.¹⁰⁹ The place of purported access is also important: access rights are potentially exercisable on all of Scotland's terrain, except for land that is excluded under section 6¹¹⁰ or subject to a temporary exclusion that has been sought and obtained by the relevant local authority under section 11.

Section 6 is the more important provision in terms of dictating the geography of access, given its automatic and open-ended effect. The language of that section is interesting, not least because of its use of the English word 'exclude' that chimes with much of the English language scholarship. Where it operates, the owner has a right to exclude a purported access taker even if she behaves impeccably.

Within section 6 there are different types of exclusion evident. The exclusion may operate automatically, owing to the characteristics of the land, or it may operate from time to time, when land is being used for a purpose it has been landscaped for.¹¹¹ It might also be noted an owner's right to exclude someone from a particular area on a cadastral map might reassert itself. For example, access rights may operate one year, but not the next, because access rights are no longer compatible with certain features on or of the newly excluded land

¹⁰⁸ *Tuley v The Highland Council* 2007 S.L.T. (Sh Ct) 97, rev 2009 S.L.T. 616. Consider also *Forbes v Fife Council* 2009 S.L.T. (Sh Ct) 71. Both these cases are analysed in Malcolm M. Combe, 'Access to Land and to Landownership', *Edinburgh Law Review*, 14(1) (2010), 106–13. See also Lovett, 'Progressive Property in Action', 809–14.

¹⁰⁹ As to what non-owners can do in this situation, see Combe, 'Get off that land: non-owner regulation of access to land'.

¹¹⁰ s.1(7).

¹¹¹ Consider s.7(7)(a), which relates to sports pitches or playing fields when they are in use (but compare s.7(7)(b) and (c) which are absolute exclusions (relating to sensitive sporting areas like golf greens and synthetic surfaces)). Consider also certain (perhaps temporary) uses by the owner which can promote open land to excluded land (an active quarry is restricted, a non-active quarry is not: s.6(1)(h)).

(perhaps through the erection of a building).¹¹² Those permutations aside, if there is clarity that land is excluded, access rights cannot be exercised there.

A recurring point of contention in court has been the extent to which ground around a private residence is excluded, under s.6(1)(b)(iv). That provision provides a dwelling should have ‘sufficient adjacent land to enable persons living there to have reasonable measures of privacy’ and ‘to ensure that their enjoyment of that house or place is not unreasonably disturbed.’¹¹³ It was tested in the ‘tycoon cases’ of *Gloag*¹¹⁴ and *Snowie*,¹¹⁵ both of which led to a sheriff ruling that certain areas around the expansive residences near Perth and Stirling respectively were ‘not land in respect of which access rights are exercisable.’¹¹⁶

It can be seen that there has been some litigation involving landowners and access takers, particularly in relation to land around a dwelling and how much of an area should be afforded for privacy and the interaction of access takers with legitimate land management activities.¹¹⁷ There have also been occasional issues of competition between access takers.¹¹⁸ That said, the general indications

¹¹² On this point, consider Sawers, ‘The Right to Exclude from Unimproved Land’. Tangentially, it seems the recent occupation of land near the Scottish Parliament has led to a consideration of suitable sculpting of the landscape: The Herald, 11 November 2016 ‘Holyrood bosses to take action to avoid indycamp repeat’, at http://www.heraldsotland.com/news/14881040.Holyrood_bosses_to_take_action_to_avoid_indycamp_repeat/ (accessed 4 December 2016). On the possibility of a garden being creatively landscaped to engender a need for privacy considerations to relate to a wider area of land, see Malcolm M. Combe, ‘No Place Like Home: Access Rights over Gardens’, *Edinburgh Law Review*, 12(3) (2008), 463–8, 467.

¹¹³ The provision is supplemented by s.7(5): ‘There are included among the factors which go to determine what extent of land is sufficient for the purposes mentioned in s.6(1)(b)(iv) above, the location and other characteristics of the house or other place.’ Cf the position in England and Wales, where a fixed distance of 20 metres from a dwelling is excluded, in terms of the equivalent but less radical Countryside and Rights of Way Act 2000. This aspect is discussed by Lovett, ‘Progressive property in action’, 784–5.

¹¹⁴ *Gloag v Perth and Kinross Council* 2007 SCLR 530.

¹¹⁵ *Snowie v Stirling Council* 2008 S.L.T. (Sh Ct) 61.

¹¹⁶ s.28. For further discussion, see Combe, ‘No place like home: access rights over “gardens.”’

¹¹⁷ *Tuley v The Highland Council* 2007 S.L.T. (Sh Ct) 97, rev 2009 S.L.T. 616. It can be noted that land managers must also act responsibly in relation to land where access can be taken, in accordance with section 3 of the 2003 Act. See further *Loch Lomond and Trossachs National Park Authority v Anstalt* [2017] SAC (Civ) 11; 2017 S.L.T. (Sh Ct) 138, discussed in Malcolm M. Combe, ‘Access to land: responsible landowner conduct under the Land Reform (Scotland) Act 2003’, 2017 S.L.T. (News) 201.

¹¹⁸ Malcolm M. Combe, ‘Get off that land: non-owner regulation of access to land’, *Juridical Review*, 2014 287–317.

are that the new access rights are operating in a coherent way.¹¹⁹ To those, the simplistic indication that the new legislation has not been profoundly revisited since it came into force can be added.¹²⁰ The issue of access to land did return to the Scottish Parliament though, in a somewhat unexpected way.

(b) Access rights come back to the Scottish Parliament

The most recent court case to feature access rights brings aspects of the foregoing discussion together in an illustrative manner.¹²¹ It has already been noted that wild camping is treated as a recreational activity in the Access Code. It has also been noted above that campaigners recently occupied land near the Scottish Parliament. The political activists hoped to remain there until Scotland obtained independence from the rest of the UK. This ‘Indycamp’,¹²² as it came to be known, attracted much press attention in what proved to be an eleven-month stay in Edinburgh. Much of that coverage related to the equally colourful court proceedings.¹²³ One report in *The Herald* newspaper headlined that ‘Holyrood campers may be permanent thanks to law passed by Scottish Parliament’,¹²⁴ and quoted me in the report. I explained the campers

¹¹⁹ See the observations in the Final Report of the Land Reform Review Group, *The Land of Scotland and the Common Good* (Edinburgh, 2014), Section 29 ‘Public Access’, available at <http://www.scotland.gov.uk/Publications/2014/05/2852> (accessed 4 December 2016), and Calum Macleod, Tim Braunholtz-Speight, Issie Macphail, Derek Flynn, Sarah Allen and Davie Macleod, ‘Post Legislative Scrutiny of the Land Reform (Scotland) Act 2003’, at <http://archive.scottish.parliament.uk/s3/committees/rae/documents/Inquiryplanningsheet.pdf> (accessed 4 December 2016).

¹²⁰ Part 1 itself came into force on 9 February 2005 (SSI 2005/17). It has been amended slightly (by the Land Reform (Scotland) Act 2003 (Modification) Order 2005/65, the Land Reform (Scotland) Act 2003 (Modification) Order 2013/356), and Part 9 of the Land Reform (Scotland) Act 2016 (asp 18). The fundamentals of the scheme are unaffected by these measures.

¹²¹ More detailed analysis is available in Combe, ‘The Indycamp: Demonstrating Access to Land and Access to Justice’.

¹²² The term ‘Indycamp’ was used by the press: see BBC News, 4 November 2016, ‘IndyCamp group evicted from Scottish Parliament site’ <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37871442>, accessed 4 December 2016. ‘Indy’ has developed into an accepted contraction of ‘independence’ since around the time of the Scottish independence referendum on 18 September 2014.

¹²³ *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, 2016 S.L.T. 761; *The Sovereign Indigenous Peoples of Scotland (No.2)* [2016] CSOH 113, 2016 S.L.T. 862; affirmed [2016] CSIH 81.

¹²⁴ *The Herald*, 5 December 2015 www.heraldsotland.com/news/14125964.Holyrood_campers_may_be_permanent_thanks_to_law_passed_by_Scottish_Parliament, accessed 4 December 2016. The headline was not mine.

could not camp indefinitely right next to a building,¹²⁵ but if they maintained a safe distance and behaved responsibly in line with the Access Code, they might be able to remain there, whilst noting there might be civil rights issues to consider as well.

This argument can colloquially be described as flying a kite. It was by no means guaranteed to succeed. In any event the Indycampers did not help themselves by bringing motor vehicles and a caravan onto the land, neither of which are allowed in terms of the 2003 Act. As it transpired, when the matter became litigious the non-professionally represented campers did not initially run the argument in court, allowing Lord Turnbull to quickly note the following:¹²⁶

Given that no direct reliance was placed on the 2003 Act, it will be sufficient to note that the right of access given by section 1 is a right to be on land for limited purposes, as defined within that section, none of which are present in the circumstances of the occupation by the Camp.

On appeal, that analysis notwithstanding, the Indycampers decided to develop the point after all. It was argued that their activities included recreational elements and also that the activities of the camp served an educational purpose. As regards the vehicles and caravan, it was submitted that the majority of campers should not be punished because of a minority bringing these items to the site, and actually that the legislation prohibited invasion of the space around a caravan, and so protected the campers' occupation. The second strand of that argument was optimistic.¹²⁷ For the landowners, a detailed counter-argument explained that the primary purpose of the campers was political, and political activities are not inherently recreational or educational. Also addressed was the limited duration of the right to be on land: 'The Act only allows someone to remain on the premises while the specified purpose is carried out. They must then leave.'¹²⁸

¹²⁵ Buildings, and the curtilages thereof, are excluded from the scope of access rights: s 6(1)(a)(i) and 6(1)(b)(i).

¹²⁶ Para. 58, [2016] CSOH 65.

¹²⁷ Whilst the legislation does indeed exclude "a caravan, tent or other place affording a person privacy or shelter" and land in the immediate vicinity of such places from the scope of access rights, (under s.6(1)(a)(ii) and s.6(1)(b)(iv)), it seems a stretch to imagine that such a restriction can stop a landowner taking enforcement action against someone in a place affording privacy or shelter on any other basis.

¹²⁸ Para. 26.

The Lord Justice Clerk, Lady Dorrian, rejected the argument of the Indycampers, simply stating ‘we are satisfied that there is nothing in the Act which justifies the reclaimers’ occupation of the property.’¹²⁹

With that in mind, it is clear such political campers cannot rely on the 2003 Act in future; not only that, the criminal law provisions of the Trespass (Scotland) Act 1865 (which regulate occupations, encampments or fires that are not classed as responsible access under the 2003 Act) could be deployed against them. There may be other considerations to allow such camps (which will be analysed below), but the scope of 2003 Act rights are clearly limited in this context.¹³⁰ The question of what these new access rights mean for the right to exclude in light of all of this will now be considered.

(c) Rights of responsible access and the right to exclude

Lovett has highlighted that the interaction of the underlying Scots law and the 2003 Act shows that a legal system which started with a theoretically strong right to exclude can adapt to a more porous system, whilst still protecting certain important aspects of the right.¹³¹ A less considered reform could have flirted with human rights concerns, such as the right to private and family life under Article 8 of the ECHR (which is catered for by the exclusion around a dwelling),¹³² and the right to peaceful enjoyment of possessions under Article 1 of the First Protocol to the ECHR. Regarding the latter, there is case law that suggests measures that require owners to allow private actors to enter their lands on a frequent basis – thereby unduly infringing the right to exclude – can be an interference with the right to property.¹³³ How do the Scottish reforms measure up?

¹²⁹ Para. 32.

¹³⁰ Another limitation, not mentioned so far in this analysis, is that the operation of access rights can be temporarily suspended by a local authority acting under s.11, to allow for events such as a music festival or an outdoor tournament. Such a suspension would remove any chance to even run an argument about responsible access and any purported access takers would not be entitled to take access in that time period.

¹³¹ On this, Lovett’s contribution is particularly valuable: ‘the primary purpose of this Article has been to show that it is practically possible for a modern, democratic nation committed to the rule of law, the protection of private property, and open markets to create, if it wants, a property regime that to a considerable extent replaces the ex ante presumption in favor of the right to exclude that has come to be taken for granted in the United States with an equally robust, but rebuttable, ex ante presumption in favor of access.’ Lovett, ‘Progressive property in action’, 816–7.

¹³² This is considered in the *Gloag* case and analysed in Carey Miller, ‘Public Access to Private Land in Scotland’, 139.

¹³³ In one case, a requirement to allow the public to use roads privately owned by

Access to land is an area of scholarship that has lent itself to much comparative study,¹³⁴ and it is that comparative scholarship that provides two useful insights. First, when considering the lesser rights of access contained in the Countryside and Rights of Way Act 2000 (which opened a comparatively smaller proportion of England and Wales to access and did so on narrower terms than Scotland),¹³⁵ the American commentator Anderson noted these (non-compensated) reforms would almost certainly have been struck down by American courts as an unconstitutional taking.¹³⁶ *A fortiori*, the stronger Scots reforms would have been similarly struck down.¹³⁷ That is of academic interest: how does contemporary Scots law fare against the human rights regime that actually applies to it? A scholarly dialogue between two South

individuals ‘significantly reduced in practice effective exercise of their ownership’: *Bugajny v Poland* App no 22531/05 ECtHR 6 November 2007, para. 59. Consider also *Chassagnon and others v France* (2000) 29 EHRR 615 and *Herrmann v Germany* (2013) 56 EHRR 7, the former being an imposition of forced collectivisation of hunting rights that did fall foul of the human rights law, the latter being a similar situation where the correct balance was struck.

¹³⁴ The writing of Anderson, Lovett, Carey Miller and Combe has already been referred to. For two legal systems not yet mentioned, see Richard Campion and Janet Stephenson, ‘The “right to roam”: Lessons for New Zealand from Sweden’s allemansrätt’, *Journal of Policy Research in Tourism, Leisure and Events*, 6(1) (2014), 52–65.

¹³⁵ In England and Wales, the Countryside and Rights of Way Act 2000 applies to mapped open access land, which includes mountains, moor, heath and down, and registered commons (making a much smaller proportion of the country available for access when contrasted with Scotland, in the region of 865,000 acres). That legislation confers the right to enter and remain on land for the purposes of open-air recreation, but that right is restricted by twenty exceptions listed in a schedule to the statute, the overall effect of which would allow someone to walk on land, accompanied by a dog (but no other animal) and stop for a picnic, but not use a metal detector, camp or bathe in non-tidal water (making for a more limited range of activities than Scotland). There is also access to coastal areas by virtue of the Marine and Coastal Access Act 2009.

¹³⁶ Anderson, ‘Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks’, 426. In terms of how much monetary effect the English reforms had, see Klick and Parchomovsky, ‘The Value of the Right to Exclude: An Empirical Assessment’. No equivalent Scottish analysis exists.

¹³⁷ Cf Lovett, ‘Progressive Property in Action’, 815–6 who briefly notes (with prospective reference to Sawers’ article that was later published in the *Temple Law Review*), there might be a way it ‘could survive a constitutional attack because it would “create an average reciprocity of advantage”’, before noting ‘this is not the place to work out these constitutional subtleties.’ This is not the place either, but see now Sawers, ‘The Right to Exclude from Unimproved Land’, 670.

Africans provides an answer (again in the context of a comparison of English and Scots law), where Carey Miller noted the following:¹³⁸

case law has come to recognise that the detail of a controlling requirement of balancing is appropriately dealt with in the statute. The Scottish access legislation does this and, to this extent, is probably proof against constitutional challenge. It is submitted that the comments of Professor André van der Walt relating to the English access provision apply equally to the Scottish legislation.

Finally, another aspect in the general acceptance of the rights of responsible access flows from the particular history and culture in Scotland, which has been analysed at length by Alexander.¹³⁹ This has been coupled with, or indeed manifested by, a general tradition of tolerance of access to mountains (over and above any difficulties of enforcement for a landowner against a one-time bare trespasser).

From this, it is clear that Part 1 of the Land Reform (Scotland) Act 2003 provides a working model for rights of public access to private land, in a way that reconceptualises the right to exclude rather than makes it redundant. That being the case, any observers who think it might be a successful export to another jurisdiction should have careful regard to any historic, cultural or human rights considerations to ensure such a scheme would be properly received.

¹³⁸ Carey Miller, 'Public Access to Private Land in Scotland', 138.

¹³⁹ Gregory S. Alexander, 'The Sporting Life: Democratic Culture and the Historical Origins of the Scottish Right to Roam', *University of Illinois Law Review*, (2016) 321–70. On the importance of history and 'a society's collective historical consciousness' to the acceptance of such reforms, see also Lovett, 'Progressive property in action', 817. A keen sense of history, particularly in the Highlands and Islands of Scotland, means the Highland Clearances cast a long shadow: consider James Hunter, *A Millennial History of the Highlands and Islands of Scotland* (Edinburgh, 2000) and his more recent and geographically targeted *Set Adrift Upon the World: The Sutherland Clearances* (Edinburgh, 2015), and see also Michael Fry, *Wild Scots: Four Hundred Years of Highland History* (London, 2005). (The significance of Fry's text will be returned to below.) On the popularity of mountaineering even in the absence of any formal right to do so, see Carey Miller, 'Public Access to Private Land in Scotland', 121–2, the preface by George Menzies (the then Chairman of the Scottish Rights of Way and Access Society) in Paisley, *Access Rights and Rights of Way*, 5–6, and the comments in Carey Miller and Combe, 'The Boundaries of Property Rights in Scots Law', 22.

(d) Access to land without a property foundation

The above discussion explains the strong position a landowner is in when there is no underlying right of access or permission. Does this mean that a landowner can remove anyone taking access in other circumstances? To phrase it as it was put in the ECHR case of *Appleby*, is the ability to eject ‘generally unfettered’, with no test for reasonableness?¹⁴⁰

The recent decision about the Indycamp confirms that vacant possession can be recovered although there are other considerations that come into play when there is a public-sector landowner.¹⁴¹ The analysis of van der Walt is helpful here, who positioned such other considerations under a heading that pitted property against ‘privileged statutory non-property rights’.¹⁴² For the Indycamp case, those rights are found in Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association) of the ECHR. In the first of his two opinions, Lord Turnbull noted that he had to consider ‘whether the interference with the [Indycampers’] rights entailed in granting an order [for possession] would be lawful, necessary and proportionate’.¹⁴³ He asked to hear evidence of whether and how the Indycampers constituted an interference with the rights of others to access the grounds of the Scottish Parliament, which he then weighed in a proportionality assessment in which he decided that the landowner’s steps were proportionate.¹⁴⁴ He observed that, ‘In essence the [indycampers’] position seems to be that their rights under articles 10 and 11 should trump both the petitioner’s right to possession and the rights of others to enjoy undisturbed use of the grounds’, then noted that this approach was ‘selfish or even arrogant’, illustrating that with their approach to hosting

¹⁴⁰ *Appleby v United Kingdom* (2003) 37 EHRR 38 para 22, Consider also *Pruneyard Shopping Center v. Robins* 447 U.S. 74 (1980), discussed in David L. Callies and J. David Breemer, ‘The Right to Exclude Others From Private Property: A Fundamental Constitutional Right’. In the one partly dissenting opinion in *Appleby*, Judge Maruste noted, ‘The old traditional rule that the private owner has an unfettered right to eject people from his land and premises without giving any justification and without any test of reasonableness being applied is no longer fully adapted to contemporary conditions and society.’ This chimes with the contributions of van der Walt, discussed below. See also Kevin Gray and Susan Francis Gray, ‘Civil Rights, Civil Wrongs and Quasi-Public Space’, *European Human Rights Law Review*, 4(1) (1999), 46–102.

¹⁴¹ This is an abridged version of the analysis in Combe, ‘The Indycamp: Demonstrating Access to Land and Access to Justice’.

¹⁴² van der Walt, ‘The Modest Systemic Status of Property Rights’, 3.4.

¹⁴³ *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, 2016 S.L.T. 761, para. 64.

¹⁴⁴ *The Sovereign Indigenous Peoples of Scotland (No.2)* [2016] CSOH 113, 2016 S.L.T. 862, paras 49–57.

barbecues and parking motor vehicles on the (grass) land despite nearby parking provision,¹⁴⁵ and noting that the recovery of possession sought did not impair the ability to protest at the grounds of the Scottish Parliament and any interference with the Indycampers' article 10 and 11 rights would be targeted, limited and not deprive them of the essence of their rights.¹⁴⁶

The Inner House of the Court of Session adhered to this analysis. That result notwithstanding, the saga shows that other factors can and do weigh against the right to exclude. In South Africa, this has occurred in relation to burial rights¹⁴⁷ and labour rights.¹⁴⁸ Van der Walt also highlights a pertinent German case, at Frankfurt Airport,¹⁴⁹ before going on to consider matters which might even fall short of a privileged right. He does this with reference to a South African case where – in sharp contrast to *Appleby* – an attempt to completely deny access to premises was unsuccessful, owing to matters like the area's importance to the community and the need for free movement.¹⁵⁰

Access rights can be classed as one such limitation, as can the considerations discussed here that might not feature in a traditional property law analysis.

¹⁴⁵ Ibid., para. 58.

¹⁴⁶ Ibid., paras 63–64.

¹⁴⁷ On burial rights and indeed other rights, consider Carey Miller, 'The Great Trek to Human Rights:' particularly 212–3.

¹⁴⁸ van der Walt, 'The Modest Systemic Status of Property Rights', 71–8.

¹⁴⁹ 1 BvR 699/06 – 78–84. In discussing that case, van der Walt observes: 'When property rights clash with civic, political or social rights that are protected by dedicated legislation, it seems, protecting property rights will tend, at least in some instances, to be a modest systemic objective to the extent that the protection of property rights is restricted to the space that remains once the non-property right identified and regulated in the dedicated legislation had been secured. In instances where the presumptive power does not shift so clearly or inevitably to the non-property right, protecting property rights might still be a modest systemic objective to the extent that non-property rights are allowed to impose reasonably easily justifiable limitations on property owners' right to exclude non-owners.'

¹⁵⁰ This is dealt with under the heading 'Other Free Speech and Demonstration Cases', the case in question being the one referred to be Carey Miller in: *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape*. In a similar vein, Dhliwayo introduces her PhD thesis (which was supervised by van der Walt) by noting 'that limitations on the right to exclude are normal in a legal and constitutional system within which property functions and of which limitations are part. Case law and examples dealing with the conflict between exclusion and access rights indicate that exclusion of non-owners is not always the preferred outcome and that it is not prioritised abstractly. This suggests that the right to exclude is relative and contextual in nature.' Privilege Dhliwayo, 'A constitutional analysis of access rights that limit landowners' right to exclude' (Ph.D. thesis, Stellenbosch University, 2015) available at <http://hdl.handle.net/10019.1/97933>, accessed 4 December 2016.

This is as it should be, in a dynamic system of law that seeks to adapt to modern circumstances. The final matter covered in this section might be seen as another move away from traditional land law. In actual fact it reflects a wider shift towards land reform in the treatment of private property.

(3) Modern considerations for exclusion from land

In his study of the English right to roam, Anderson notes the following:

The example teaches us that the composition of the bundle is not necessarily immutable, and that changes may be desirable to better reflect contemporary society's needs and values. Of course, the relative stability of property rights is extremely valuable, because it honors settled expectations and therefore promotes economic transactions and furthers our desire for fairness. But property rights must evolve and the right to roam reminds us that, in the end, the recognition of the private owners' rights involves a trade-off with public interests that should not be ignored.¹⁵¹

That property rights must evolve is a valid point. The enforcement powers that allow entry to be taken to remove high hedges or noise-making equipment have already been referred to. All of these evolutions challenge the right to exclude.¹⁵²

Another relevant situation, where an entirely different type of relationship fails to function as both parties envisaged, is that of a lease when the tenant holds over at the end of the term and stays in possession (with or without the continued offer of rent). Alternatively, a tenant may simply stop paying rent. Landlords can be expected to wish to recover possession in such circumstances, but (particularly with regard to residential tenancies) there are rules to prevent that happening summarily¹⁵³ and, in South Africa, in a way that overly prejudices the tenant.¹⁵⁴ Again, the right to exclude is regulated.

¹⁵¹ Anderson, 'Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks', 430.

¹⁵² High Hedges (Scotland) Act 2013 (asp 6); Antisocial Behaviour etc. (Scotland) Act 2004 (asp 8), s 47. Consider also The Matrimonial Homes (Family Protection) (Scotland) Act 1981, although as noted previously that hyper-specific aspect of family law will not be analysed here.

¹⁵³ In the Rent (Scotland) Act 1984.

¹⁵⁴ See Anne Pope, 'A Tricky Balancing Act: reflections on recent South African eviction jurisprudence' (in this volume).

That South African measure can be placed within a much wider movement for land reform in that country.¹⁵⁵ Scotland might not have an exact equivalent to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.¹⁵⁶ Nevertheless, Scotland has taken a number of steps of its own in relation to land reform.¹⁵⁷ It was noted in 2004 that a comparison of the policy-oriented land law reform measures in the two jurisdictions demonstrated ‘difference and not similarity’.¹⁵⁸ Whilst that remains largely true,¹⁵⁹ the passage of the Community Empowerment (Scotland) Act 2015 (asp 6) and the Land Reform (Scotland) Act 2016 (asp 18) demonstrates that

¹⁵⁵ See H. Mostert, ‘Land as a “national asset” under the Constitution: the system change envisaged by the 2011 Green Paper on land policy and what this means for property law under the Constitution’, *Potchefstroom Electronic Law Journal*, 17(2) (2014), 760–96 at <http://dx.doi.org/10.4314/pelj.v17i2.06> (accessed 4 December 2016); J. M. Pienaar, *Land Reform* (Cape Town, 2014); D. L. Carey Miller with Anne Pope, *Land Title in South Africa* (Cape Town, 2000), particularly chapters 6 and 10; D. L. Carey Miller, ‘A New Property’, *South African Law Journal*, 116(4) (1999), 749–59; Carey Miller, ‘The Great Trek to Human Rights’, particularly 209–16; and Alexander, *The Global Debate over Constitutional Property*, chapter four, entitled ‘From Social Obligation to Social Transformation? South Africa’s Experience with Constitutional Property’.

¹⁵⁶ At least, not in terms of private residential leasing. There is specific legislation to deal with the problem of homelessness, which places an obligation on local authorities. A slight analogy might also be made about the rules which prevent instant enforcement of securities over residential premises in the Conveyancing and Feudal Reform (Scotland) Act 1970 (following its amendment by the Home Owner and Debtor Protection (Scotland) Act 2010 (asp 6)), which requires a sheriff to consider matters like alternative housing provision before allowing enforcement by a secured creditor. For the purposes of this discussion the analogy is inexact, as a secured creditor is not technically the owner, so any regulation of enforcement is not actually a restriction on the proprietor’s right to exclude.

¹⁵⁷ See Malcolm M. Combe, ‘The Environmental Implications of Redistributive Land Reform’, *Environmental Law Review*, 18(2) (2016), 104–25 and Combe, ‘The Land Reform (Scotland) Act 2016: Another Answer to the Scottish Land Question?’.

¹⁵⁸ Kenneth Reid and C. G. van der Merwe, ‘Property Law: Some Themes and Variations’ in Reinhard Zimmerman, Daniel Visser and Kenneth Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford 2004), 637–71, 670.

¹⁵⁹ Consider, for example, Richard Cramer and Hanri Mostert, ‘“Home” and Unlawful Occupation: The Horns of Local Government’s Dilemma: Fischer and Another v Persons Unknown 2014 3 SA 291 (WCC)’ *Stellenbosch Law Review*, 26(3) (2015), 583–611, on the difficult situation authorities in South Africa find themselves in when trying to combat the issues of homelessness and illegal land occupation, which is not exactly mirrored in contemporary Scotland. (Although Scotland has had some experience of similar unlawful occupation as recently as the previous century: see, for example, Ben Buxton, *The Vatersay Raiders* (Edinburgh, 2008).)

Scotland is continuing on something of a land reform journey.¹⁶⁰ At first glance, neither of these measures seem a direct challenge to a landowner's right to exclude. On further consideration the new community right to buy land that has been wholly or mainly neglected or abandoned land is in point. This right, when the new Part 3A of the 2003 Act is brought into force, will allow properly constituted community bodies to force the sale of land to them. The relevance to the right to exclude may seem contrived, but it comes into focus when it becomes clear that a landowner will no longer be able to simply exclude others from her land *and do nothing else* with impunity.¹⁶¹ That is to say, for the landowner to avoid a potential taking event (albeit with compensation), some kind of activity that shows the land is being used will be required.¹⁶² In a contorted way, the right to exclude is no longer the *sine qua non*, because the right to continue as owner without challenge only exists if the landowner is also doing something productive and not resting on her exclusionary laurels.¹⁶³ Whilst this is not a direct erosion of proprietor's right to exclude, it means that any proprietor who simply excludes others from land and does nothing else can be faced with a land reform reallocation. Meanwhile, another strand of the Scottish land reform programme encourages landowners to engage with communities whenever they make decisions about land that will affect them: this means a landowner who is moved to act to avoid a potential buyout should then consider the interests of a local community when it comes to any given action.¹⁶⁴

All of this might be seen as a more general trend towards social usage of land. Scotland and South Africa are taking steps towards using land for the common good or as a national asset under an overt land reform banner, but

¹⁶⁰ And it is still not over, both in terms of implementing those statutes and also in terms of the measures which were proposed in the Final Report of the Land Reform Review Group, *The Land of Scotland and the Common Good*, which have not yet found their way into legislation but might yet do so.

¹⁶¹ Consider Hanri Mostert, 'No right to neglect? Exploratory observations on how policy choices challenge basic principles of property' in Susan Scott and Jeannie van Wyk, *Property Law Under Scrutiny* (Claremont, 2015), 11–30.

¹⁶² This could lead to some interesting questions in the future, perhaps where a landowner has made a conscious decision to do nothing with land for conservation or re-wilding purposes.

¹⁶³ It should be acknowledged that there is a certain crossover between the point made about prescription above, which represents a situation where an owner has had a chance to exclude another but has not done so, and the situation under discussion. Both might be thought of as not automatically susceptible to analysis in terms of the right to exclude.

¹⁶⁴ Land Reform (Scotland) Act 2016, Part 4.

moves towards more social usage of land do not need to be branded as such. For example, Pascoe notes that England and Wales is moving to a situation of property relativism which ‘signifies that the landowner is not entitled to exploit¹⁶⁵ land resources irrespective of community need and represents a more outward-looking orientation,’ citing the fiscal treatment of empty property, rules about hunting, and access to land in her analysis.¹⁶⁶ To a greater or lesser extent, those three examples also relate to the right to exclude (the first example by using taxation to incentivise use, which again penalises an owner who excludes and does nothing else, and the latter examples more directly).

There is much for proponents of a strong right to exclude to think about when considering land, and Scotland, especially in light of contemporary conceptualisations of land as having some kind of role for the common good.¹⁶⁷ Scotland has witnessed both a direct and an indirect erosion of a landowner’s entitlement to decide who to exclude from land. As a result, more people have a say in matters relating to land in a way that remains sensitive to the landowner.

The final part of this chapter will now step away from land. It will consider a field of property law where a move towards more social usage has not been so readily apparent, namely corporeal moveable property.

The right to exclude – corporeal moveables in Scots law¹⁶⁸

The standard Scottish definition of ownership – that of the institutional writer

¹⁶⁵ Or not exploit, as the case may be.

¹⁶⁶ Pascoe, ‘Social obligation norm and the erosion of land ownership?’, 496. On empty property, consider the ‘Fill ‘Em Up’ campaign of The Big Issue magazine (a publication which aims to tackle homelessness in the UK): ‘How to Rescue an Empty House’, *The Big Issue* 23–29 November 2015, 1068, 18–9. That report included details of the UK Government’s Empty Homes Programme, which has since closed. There are also options available at a municipal level, with local authorities having the ability to remove any empty property discount or set a council tax increase in relation to long term unoccupied homes (but not second homes): see <http://www.gov.scot/Topics/Government/local-government/17999/counciltax/Secondhomes> (accessed 4 December 2016).

¹⁶⁷ The next step in this direction for Scotland will be the new land rights and responsibilities statement, provided for by the Land Reform (Scotland) Act 2016, s.1.

¹⁶⁸ This analysis draws on the content of D. L. Carey Miller, M. M. Combe, A. J. M. Steven and S. Wortley, ‘National Report on the Transfer of Movables in Scotland’ in W. Faber and B. Lurger (eds), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Munich, 2009), 297, particularly 1.2.

Erskine – has already been alluded to.¹⁶⁹ According to Erskine, ownership may be either limited by law or agreement. This applies to both moveable and immoveable property. Meanwhile, Bell offers a definition of ownership specifically in relation to moveables, emphasising exclusivity but also stressing the restrictions that can apply, as follows:¹⁷⁰

Ownership in moveables is a right of exclusive and absolute use and enjoyment, with uncontrollable powers of disposal, provided no use be made of the subject and no alienation attempted, which for purposes of public policy, convenience, or justice, are, by the general disposition of the common law or by special enactments of the Legislature, forbidden; or from which, by obligation or contract, the owner has bound himself to abstain.

What does this mean in terms of the rights of the owner of a corporeal moveable? Writing in that context, Professor Gordon commented that ‘It is not profitable to attempt to enumerate the rights of an owner – it is simpler to say that he has any right to deal with property of which he is not deprived by law or by his own contract’.¹⁷¹ This is a valid point (although it jars somewhat against Honoré’s claim that it is not worthless to seek to delineate aspects of ownership),¹⁷² but it is clear that the right to recover a moveable from a third party is a key manifestation of ownership¹⁷³ and in turn the right to exclude.¹⁷⁴

169 Erskine, *Institute*, II.1.1: ‘the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction’.

170 Bell, *Principles* § 1284

171 Gordon, in Reid, *The Law of Property in Scotland*, para. 533.

172 Honoré, ‘Ownership’, 111.

173 This is, in turn, linked to the fact that ownership gives a right to exclusive possession. In the (less common) situations of a dispute between non-owner parties where the right of ownership is not at play, those with another right (such as possession or detention) can similarly recover and exclude: see Malcolm M. Combe, ‘Communist ideas and Scots property law: Canning v Glasgow Caledonian University’, *Scots Law Times (News)*, 2016, 34–6 (with the case commented on reported at 2016 S.L.T. (Sh Ct) 56) and Craig Anderson, ‘Recovery of goods by a non-owner’, *Scots Law Times (News)*, 2016, 22, 117–21. See generally Craig Anderson, *Possession of Corporeal Moveables* (Edinburgh, 2015), Carey Miller, *Corporeal Moveables*, 10.24–10.31 (on the wrong and remedy of spuilzie) and John Townsend, ‘Raising Lazarus: Why Spuilzie Should Be Resurrected’ *Aberdeen Student Law Review*, 2 (2011), 22–51.

174 It is acknowledged that the right to use the property, which for many moveables will instantly imply an exclusivity, although it is also acknowledged that there is an element of conflation between exclusion and use here. This seems unavoidable: consider the references to Rahmatian, *Lord Kames: Legal and Social Theorist* and Penner, *The Idea of*

To put it another way, and to borrow the words of Carey Miller (writing in 1986), ‘the right to vindicate [is] synonymous with ownership’.¹⁷⁵ That work – which specifically focusses on ownership rather than the incidents of it, draws on Grotius, with Carey Miller characterising his treatment thus: ‘the right to recover lost possession is the quintessence of ownership’.¹⁷⁶ Putting this in a Scots context, Carey Miller (writing in 2005) explains,¹⁷⁷ ‘An owner who can show that he lost possession involuntarily can,¹⁷⁸ in principle, recover the thing from even an innocent onerous possessor.’¹⁷⁹ Statute might regulate recovery of possession in idiosyncratic situations: for example, the Consumer Credit Act 1974, section 90, regulates the recovery of possession of certain goods where a debtor is in breach of a hire-purchase or regulated conditional sale agreement relating to those goods but has paid more than a third of the price. That section is not mentioned by Carey Miller, but it is perhaps situations like that which led his more recent (2005) treatment to move away from the recovery of possession aspect as key to ownership when he expressed:

Although in theory ownership is an absolute right, in practice it is often constrained and controlled to the point that hardly more than a collection of residual rights remain: one accordingly tends to think of the apposite criterion of ownership as an intact right of disposal.¹⁸⁰

That observation seems to fillet any attempt to characterise the right to exclude as the key consideration for corporeal moveable property. Is Carey Miller (writing in 2005) correct that the apposite criterion is an intact right of disposal? It is submitted that Carey Miller (writing in 1986) also made an important point that remains valid. Furthermore, an intact right of disposal for a thing that is so constrained and controlled as to prevent recovery could

Property. See also Merrill, ‘The Right to Exclude: II’, 4–5.

¹⁷⁵ Carey Miller, *Acquisition and Protection of Ownership*, 11.1.1

¹⁷⁶ Carey Miller, *Acquisition and Protection of Ownership*, 11.1.1.

¹⁷⁷ Carey Miller, *Corporeal Moveables*, 1.19.

¹⁷⁸ Here, Carey Miller refers to Stair, *Institutions*, III.2.7. In Scots law there is a presumption of ownership that flows from being in possession, but this can be rebutted where the owner can show possession was lost in a manner that was inconsistent with a transfer of ownership.

¹⁷⁹ Carey Miller, *Corporeal Moveables*, para 1.12.

¹⁸⁰ Carey Miller, *Corporeal Moveables*, para 1.12, with reference to Stair, *Institutions*, II.I.pr. Similar wording to this extract appears in MacQueen and Eassie (eds), *Gloag and Henderson*, at 30.01, although it is explained in a footnote (9) that Bell ‘links exclusivity with the power of disposal’.

legitimately be described as (economically) worthless. Whilst the right to exclude is perhaps not as crucial in relation to moveable property scholarship as it seems to be for land, it does still have a role. That being said, an entitlement to exclude others from using a corporeal moveable can be regulated when society deems it necessary (much like it could be with land), as can be seen in relation to goods bought on credit by consumers and other examples relating to potentially harmful items.

Conclusion

Carey Miller's observation that an intact right of disposal is the apposite criterion of ownership for a corporeal moveable contributes to a wider discussion which shows that the role of exclusion theory should not be overstated in a modern system of property law. A more fundamental point about the right to exclude has been added by van der Walt, who notes that an analysis founded on 'the modest systemic status of property rights in a particular context' is appropriate.¹⁸¹ Both points are valid but, standing those critiques, it is clear that exclusion is a huge part of property law analysis in Scotland and beyond.

In a Scottish context, this is all too evident in the remarks of Lord Turnbull in the recent case about the Indycamp at the Scottish Parliament. In an eminently quotable passage, he stated 'the general law of land ownership in Scotland entitles the petitioner to have exclusive use of its property, to resist encroachment upon it and to otherwise regulate the use of its property.'¹⁸² But the remainder of his careful judicial consideration, not to mention the points covered in the unsuccessful appeal against that, shows the situation is more nuanced than that attractively simple proposition (the Inner House's approval of Lord Turnbull's reasoning notwithstanding).

¹⁸¹ He notes the following: 'instead of just emphasising limitations or exceptions that restrict the owner's right to exclude, I also argue that progressive property theory should focus on the systemically modest role that property rights play, and should play, in the broader systemic context of at least certain legal disputes. Analysing property disputes from the perspective of the modest systemic status of property rights in a particular context supports the progressive property approach even when the discussion starts out from limitations on or exceptions to the right of exclusion, since the limitations and exceptions are not presented as counterpoint rules but as examples of a broader principle regarding the systemic status of property rights.' van der Walt, 'The Modest Systemic Status of Property Rights', 30–1.

¹⁸² *Scottish Parliamentary Corporate Body v The Sovereign Indigenous Peoples of Scotland* [2016] CSOH 65, 2016 S.L.T. 761, para. 35.

Some would point out that the right to exclude has never been absolute anyway.¹⁸³ Others might take up Carey Miller's point that disposal is the apposite criterion of ownership, or offer alternative critiques to the primacy of the right to exclude.¹⁸⁴ Others still would argue now is the time to be moving away from traditional ideas of ownership that focus on aspects like exclusion.¹⁸⁵ Be that as it may, this analysis provides an original counterpoint to the continuing narrative about the exclusionary influence that has threaded through Scots property law analyses, particularly with regard to the ongoing reform of land law in Scotland. This will prove useful to those trying to explain what exactly ownership is or does. Concurrently, it demonstrates that a recognisable system of property law can subsist despite an active programme of land reform and a certain amount of exclusion erosion.

That concludes the targeted analysis in this paper. I pray your indulgence for some closing observations about David Carey Miller. First, a passing comment on his legal analysis, and how it troubled me. Not in a negative way, I should stress. Rather, I confess that his above quoted observation about disposal being the nub of ownership (in the context of corporeal moveables) presented me with a challenge when trying to conclude this chapter which I had formed around exclusion. This was not his first challenge to me. I can recall various discussions where I confidently offered my analysis, to which he often nonchalantly (but never arrogantly) offered his somewhat more developed thoughts, which forced me to reconsider matters. It seemed fitting to give him something of a final word here.

Finally, some personal insights, which I hope offer more insight into him as a man.¹⁸⁶ On 20 August 2013 the summer diet of exams at the University

¹⁸³ Alexander, 'The Social-Obligation Norm in American Property Law', 801; Gretton and Steven, *Property, Trusts and Succession*, 3.3.

¹⁸⁴ Freyfogle, *On Private Property*, 57-60, where he highlights the related but nonetheless distinct right to halt interferences in place of a bald right to exclude. It is noteworthy that this non-interference conceptualisation resonates with the test for responsible access in the 2003 Act.

¹⁸⁵ See P.J. Badenhorst, Juanita M. Pienaar and Hanri Mostert, *Silberberg and Schoeman's The Law of Property* 5th edition (Durban, 2006), 93. There, after listing the usual entitlements associated with property, they note 'it is obvious that changing social, economic and political conditions cannot justify a concept of ownership unchanged in content and function since Roman and Roman-Dutch times.' See also the detailed discussion in Gray and Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space'.

¹⁸⁶ This insight, and others, have been incorporated into a blog post: Malcolm M. Combe, 'David Carey Miller: A Tribute', University of Aberdeen School of Law Blog, 29 February 2016, <https://aberdeenunilaw.wordpress.com/2016/02/29/david-carey-miller-a-tribute/> accessed 4 December 2016.

of Aberdeen was underway. Some students were tackling the Law of Property paper that David, other colleagues, and I had set. With apologies to those students, any exam travails faced are not important to this anecdote. The more noteworthy travails were mine. To put it mildly, I was not at my best that day. I was finding the simple task of exam invigilation to be a struggle: for context, I was no longer able to walk the relatively short distance from my home to the university, my breathlessness and groin strain being attributed to a recently diagnosed hernia. David had kindly volunteered to help with invigilation that day, but the main thing he witnessed – with some concern – was me hirpling around the exam hall. He accompanied me back to the School of Law after the exam, carrying more than his fair share of exam scripts on my behalf. Clearly something was wrong with me, and the next day I was admitted to Aberdeen Royal Infirmary after blood tests showed a concern that was decidedly not a hernia. The next again day I was diagnosed with stage 4 testicular cancer: this went some way to explaining my breathlessness and other travails.

It goes without saying this was not a great time for me, but I was lucky enough to have colleagues who launched into action to help. Special mention must go to the Law of Property team of Roddy Paisley, Andrew Simpson, Douglas Bain and Abbe Brown, but extra special mention goes to David. Not only did he step up to replace me as class coordinator of that course for the impending term, he also furnished me with copious supplies of books, butteries and best wishes when he visited me in the hospital at the first possible opportunity. (Fry's book on the Highlands, which I refer to above, was one such book.) He was then considerate enough to keep me involved where appropriate. When I was well enough to participate in academic tasks, he let me do so. When I was not, I was able to rely on him to coordinate a course in my absence.

Fast forward to February 2016 and I offer one further anecdote. My last communication with David was an email attaching a case commentary note.¹⁸⁷ The draft note related to a dispute about corporeal moveable property. He sent me some helpful points for consideration. I replied to thank him, offered him some counter-analysis, and also noted that I was actually on annual leave that day (albeit I was replying to emails). David then sent me some further thoughts and source material, whilst simultaneously imploring that I did not reply to his correspondence on my day off. I followed his order. I am strangely

¹⁸⁷ Combe, 'Communist ideas and Scots property law: *Canning v Glasgow Caledonian University*'.

gutted that I did. I did not get to finish that last conversation with him, as his sudden death intervened. That being said, even that abrupt ending to that correspondence, at his behest, tells something of the man: not only was he keen to help in that specific instance, he was also looking out for my best interests as a whole.

I have already dedicated that case note to David. I am happy to be able to add this chapter to this collection in his memory.

Res merae facultatis: the decent obscurity of a learned language?

David Johnston

What is a *res merae facultatis*? To ask the question seems appropriate in an essay in memory of David Carey Miller. Alongside his many works on property law and Roman law, he has himself done much to illuminate the issue. But he would no doubt have been the first to say that he had not said the last word on the subject. That is the justification for the few pages that follow.

The expression *res merae facultatis* appears in Schedule 3(c) to the Prescription and Limitation (Scotland) Act 1973. The schedule contains a list of rights and obligations which are not affected by prescription. So it is extremely important to know what *res merae facultatis* means. But that is surprisingly elusive. In 1999 I described it as ‘deeply obscure’,¹ while Professor Carey Miller employed the expressions ‘mysterious’ and ‘misunderstood’.²

This short paper is concerned with two points. First, to see if it is possible to add anything to our understanding of *res merae facultatis*. Second, to see what role it plays in the prescription legislation and whether it is really needed at all.

Res merae facultatis: what does it mean?

If time were no object, it might be productive to carry out an exhaustive trawl of the legal, historical and literary sources in order to divine the meaning of *res merae facultatis*. In reality, it must suffice to cite two references, to indicate at the broadest level the sort of thing we might expect *res merae facultatis* to signify.

¹ David Johnston, *Prescription and Limitation* (Edinburgh, 1999), para. 3.07. (‘Deeply obscure’ was a favourite phrase of that great common lawyer, Professor A. W. B. Simpson; the decent obscurity of the title of this paper is due to Edward Gibbon.)

² D. L. Carey Miller, ‘*Res merae facultatis*: mysterious or misunderstood?’, *Edinburgh Law Review*, 12(3) (2008), 451–4.

First, the core meaning of the word *facultas* according to the Oxford Latin Dictionary is ‘ability, power, capacity, skill, faculty’.³ The main point to take from this is that the dictionary does not use the word ‘right’.

Second, in his *Metaphysics of Morals*, Kant states that ‘An action that is neither commanded nor prohibited is merely permitted, since there is no law limiting one’s freedom (power) with regard to it and so too no duty. Such an action is called morally indifferent (*indifferens, adiaphoron, res merae facultatis*)’.⁴ While Kant uses the expression in a context somewhat different from the one with which lawyers are familiar, the essential notion is that it connotes an action which is neither compelled nor forbidden. Lawyers will at once appreciate that, among other things, that means it does not apply to an obligation, either legal or moral.

These two references may help to sharpen our antennae to detect what we should be looking for in the legal materials – neither rights nor obligations but powers or capacities. Now we may turn to *res merae facultatis* in the 1973 Act.

(1) The background to Schedule 3(c) to the 1973 Act

In a paper published in 2009, Professor Paisley pointed out that it is rare for a UK statute to make use of an expression in Latin; that *res merae facultatis* was adopted in order to preserve the common law; and that this was ‘probably for no reason other than no-one was certain what it entailed’.⁵ It turns out that he is absolutely right. At an early stage parliamentary counsel included in the Prescription and Limitation Bill an expression which was intended to define *res merae facultatis* and to exclude them from the operation of prescription. This is what it said: ‘any obligation falling to be implemented only when the corresponding right is asserted by the creditor’.⁶

This was evidently excluding, or attempting to exclude, from the operation of prescription the case where an obligation falls to be implemented only when a right correlative to it is asserted. It is quite close to, although less precisely

³ *Oxford Latin Dictionary* (Oxford, 1982), s.v. ‘*facultas*’ 1, 2.

⁴ Immanuel Kant, *Die Metaphysik der Sitten* [*Metaphysics of Morals*] (Königsberg, 1797), 6, 223: ‘Eine Handlung die weder geboten noch verboten ist, ist bloss erlaubt, weil es in Ansehung ihrer gar kein die Freiheit (Befugnis) einschränkendes Gesetz und also auch keine Pflicht giebt. Eine solche Handlung heisst sittlich gleichgültig (*indifferens, adiaphoron, res merae facultatis*).’

⁵ Roderick R. M. Paisley, ‘Extinction of servitudes by non-use’ in Vernon Valentine Palmer and Elspeth Christie Reid (eds), *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (Edinburgh, 2009), 67–103, 77.

⁶ L29/216, 29 September 1970 (this and subsequent references in this form refer to the files created in the Scottish Law Commission in the course of preparation of what became the 1973 Act, following upon the Commission’s report no. 15 of 1970).

framed than, Professor Carey Miller's own analysis of *res merae facultatis* as characterized by the absence of a correlative obligation.⁷

A little reflection shows that there are some problems with the drafting. Here are a few:

- (1) It is expressed only in terms of the debtor's obligation rather than the debtor's right. Why should this be?
- (2) The drafting seems too wide, since it appears to cover any contractual obligation, so long as it is enforceable only on demand by the creditor. That would cover repayment of an overdraft.
- (3) There is no reference to the creditor having an unconstrained power to do or not to do something. Is that not an important ingredient of this kind of right?

It is of course easy to criticize an early version of parliamentary draftsmanship. That is not the intention here; instead it is to show a degree of sympathy for the task facing parliamentary counsel. Between them the Scottish Law Commission and parliamentary counsel agonized for some time over the best formulation. In one of the more extensive notes on the subject, Professor J. M. Halliday (then a law commissioner) observed that the nearest he could come to a definition was 'an obligation which was intended to be implemented only on the occasion when the corresponding right is asserted by the creditor'. That definition also suffers from some of the deficiencies just mentioned, and it evidently did not satisfy Professor Halliday himself, since he went on to say, first, that *res merae facultatis* 'is hideously difficult to formulate' and then: 'Would it be awful draftsmanship just to refer to *res merae facultatis*?'⁸

That suggestion bore fruit. After a short incarnation in the form 'any obligation enforceable by the obligor *mera facultate*',⁹ it took final form as we see it today in Schedule 3(c).

The drafting now complete, the next chronological item comes from the Notes on Clauses. They say:

Res merae facultatis are rights which the party invested in them may assert or not as he pleases, without losing the right by failure to assert it. These include, for example, the right to exercise the ordinary uses of property, a contractual right to open a door on to a common stair, and the right of a superior to feu duties.

⁷ Carey Miller, 'Res merae facultatis: mysterious or misunderstood?', 454.

⁸ L29/216, 21 December 1970.

⁹ L29/216, 29 January 1971.

The author of the notes identifies the core concept as being that of a right which the holder may exercise or not as he wishes; whether he does so or not does not affect its subsistence. We can agree with that, while perhaps keeping in reserve a question mark over the sense in which these things are properly described as ‘rights’.

It is worth examining more closely the three rather different examples of *res merae facultatis* given in this quotation.

(a) The right to exercise the ordinary uses of property

Examples given by various institutional or otherwise respected authors under this heading include ‘the right inherent in every proprietor, of building or using any other act of property on his ground [...] though a neighbouring landholder should suffer ever so much by the exercise of it’;¹⁰ and ‘choosing a spot for a kitchen garden, planting a tree, or building a house at my march’.¹¹ These are just the ordinary incidents of ownership, and it is easy to see why they should not be subject to prescription. A decision to plant a tree or dig a ditch or build a building is simply the exercise of one of the ordinary rights of ownership. It is not an assertion of right against a neighbour; conversely, although it may have an impact on the neighbour, in the ordinary case the neighbour will have no right to prevent or enjoin the activity. The position would be different if a servitude were in issue (see below).

In general, this kind of right relates to what the owner of property does on his or her own land. But there is at least one instance where it goes further, namely the right of the property owner to obtain access to the land. That right of access can never be lost, because it is inherent in the right of ownership. As Bankton puts it, this right is not a servitude ‘but only the natural result of property, viz. liberty to enjoy it’.¹² The subsistence of the right is therefore unaffected by the question whether it has actually been used. And, while its exercise necessarily affects any landowners over whose land the access requires to be taken, it is construed not as an assertion of a right over their land (as a servitude, such a right could prescribe) but simply as a right inherent in

¹⁰ John Erskine, *An Institute of the Law of Scotland* (8th edn, Edinburgh, 1871), 3.7.10.

¹¹ Henry Home (Lord Kames), *Elucidations on the Common and Statute Law of Scotland* (Edinburgh, 1800), 248.

¹² Andrew McDouall (Lord Bankton), *An Institute of the Laws of Scotland* (Edinburgh, 1752), 2.3.163; cf. *Bowers v Kennedy* 2000 SC 555 paras 12–16 citing the various institutional writers, including Bankton at para. 14.

ownership. Since such a right cannot prescribe, it may be described as *res merae facultatis*.¹³

(b) A contractual right to open a door on to a common stair

This example no doubt derives from the strange case of *Smith v Stewart*.¹⁴ There the question was the proper construction of the grant of a right to take access. The access could only be taken once a wall had been demolished; so the question was how prescription applied to a right of access which had been created at one date but could not in fact be exercised at all until the later date on which the wall was demolished. Lord President Inglis held that the right was *merae facultatis*, ‘a right which is to be used in the future when occasion arises’.¹⁵

There are obvious difficulties in regarding this as a *res merae facultatis*. The first is that, given that the right was conferred by the owner of not just the access route but also the wall, it was a right over the property of a person other than the one on whom it was conferred. And demolition of another person’s wall does not fit very convincingly into the category of natural or inherent incidents of ownership. The second is that the very description of the right as a contractual right indicates that it is one that involves a correlative right or obligation in another party. Of course one would reach the same conclusion – that there is some correlativity present – purely from the first point, that these are rights over someone else’s property. This example therefore does not fit the core notion of a *res merae facultatis*.

(c) The right of a superior to feu duties

This third case appears to be similar to the first. The owner of the *dominium directum* had the right to receive feu duty from the vassal as an inherent element of the feudal relationship. That right was not extinguished if the superior failed to demand feu duties for the prescriptive period (although it would be possible for claims for feu duties for long-distant years to be extinguished).

¹³ It seems to me that this is also the explanation for various examples (such as a right to enter a neighbour’s land for the purpose of repairing one’s own property) given in Douglas J. Cusine, ‘*Res merae facultatis*: through a glass darkly’ in Frankie McCarthy, James Chalmers and Stephen Bogle (eds), *Essays in Property Law in Honour of Professor Robert Rennie* (Cambridge, 2015), 185–202, 196. In short: analytically, they appear to be treated not as rights exercised over another’s property but rights intrinsic in one’s own property.

¹⁴ (1884) 11 R. 921.

¹⁵ *Ibid.*, 925.

While this is similar to the first case, it is not identical. The difference seems to be this: here there are absolutely no circumstances in which the right to feu duty will prescribe. That is because it is an integral part of the feudal relationship. Such a right can never be lost by non-use. By contrast, in the first case (ordinary uses of property), it is possible to construct situations – notably involving servitudes – in which what one person does on his or her own land in the exercise of ordinary rights of ownership does affect the legal rights of a neighbour. Where that is so, the right of the first person may be lost by non-use. On particular facts we might no longer be in the territory of a right that a holder may exercise or not as he or she wishes without any impact on whether the right continues to subsist.

(2) Servitudes

A difficult and important issue for this general theme is to try to understand how *res merae facultatis* relate to servitudes. Where is the dividing line?

In an essay comparing the law of Scotland and Louisiana in relation to extinction of servitudes by non-use, Professor Paisley makes a number of points that bear on the present issue.¹⁶ Strikingly, he identifies that in Scots law the notion of *res merae facultatis* has occasionally surfaced within the law of servitudes. To a Romanist, the suggestion is enough to induce shock.

An example is found in *Bridges v Saltoun*, where the dominant proprietor wished to abandon his use of a servitude of *aquaehaustus*.¹⁷ Doing so would cause damage to the servient tenement unless certain engineering work was carried out. The Lord Ordinary (Gifford) pointed out that '[a] servitude is a burden on the servient tenement, and a right *merae facultatis* in the dominant. There is no instance in any of the known servitudes [...] of compelling the dominant tenement to exercise a right which it wishes to relinquish'.¹⁸ He therefore concluded that the dominant proprietor was under no obligation to carry out extensive engineering works when he proposed to discontinue use of the servitude right. The First Division disagreed and held that he was.

Here it is unnecessary to consider the extent to which a proprietor can be required to carry out engineering work.¹⁹ The more general question is: how,

¹⁶ Paisley, 'Extinction of servitudes by non-use'.

¹⁷ (1873) 11 M. 588.

¹⁸ *Ibid.*, 594.

¹⁹ The essence is that the dominant owner must restore the *status quo* on the servient tenement at the time of creation of the servitude: Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996), para. 466.

analytically, does the characterization of the dominant proprietor's right as *res merae facultatis* help? My answer is that it does not.

First, it indicates that a dominant proprietor is under no obligation to use a servitude. But that does not tell us anything very interesting.

Second, it implies that the servitude right is imprescriptible. But that of course is not the case. Servitudes are capable of prescribing, as first the Roman jurists and more recently the institutional writers have told us.²⁰ A positive servitude is extinguished by non-use for the prescriptive period. A negative servitude is extinguished if contravention of the servitude has gone unchallenged for the prescriptive period. To say that the dominant proprietor's right under a servitude is *res merae facultatis* serves only to induce puzzlement as to why the servitude right should prescribe at all.

The proper relationship between these various concepts can be seen in discussions such as those of Johannes Voet. In his *Commentary on the Digest*, Voet summarizes the position like this: if A has not exercised his right for a long time, for example, by building to a great height, and his neighbour B has had the benefit of that, this does not give rise to a servitude by operation of prescription, even if A desisted from building at the request of B. It would be different if A had desisted as a result of a prohibition by B.²¹ Voet describes the right to build (and similar rights) as *res merae facultatis*.

Voet's analysis says all that is needed about servitudes and *res merae facultatis*. It can be summarized in these propositions:

- (1) As owner, A is entitled to use his own property and the ordinary incidents of ownership of that property (such as building on it).
- (2) A's omission to make use of ordinary incidents of ownership (such as building on his property) does not create any right in his neighbour B to the continuing absence of a building on A's land.
- (3) This is all it means to say that A's right is *res merae facultatis*: he can use it when he wants to use it and he does not lose it by not using it.
- (4) The position is different if B has a servitude *altius non tollendi* in relation to A's land (or otherwise obtains an order that building should not proceed).

²⁰ See e.g. *Digest*, 8.6; Erskine, *Institute*, 2.9.37; Reid, *Law of Property*, para. 471.

²¹ *Commentarius ad Pandectas* (Leiden, 1698), 8.4.5: '*cum altius exstruere in suo, et similia facere, res merae facultatis sint, quarum intuitu praescriptio probata non est; sed omni tempore libertas salva*'; the references cited are *Code*, 3.34.8, 9 (AD 293); *Digest*, 8.2.9, 15, 32; *Digest*, 8.5.10; *Digest*, 39.2.26.

- (5) Why? Because the ordinary incidents of A's ownership are then qualified and curtailed to the extent of the negative servitude which B has over A's land.

It may be that the views expressed here are shaped too much by Roman law and too little by what has happened since. But the suggestion here is that, even so far as Scots law is concerned, to introduce the notion of *res merae facultatis* into the area of servitudes, when one prescribes and the other does not, serves no analytical purpose and does only harm rather than good.

(3) *Pearl v Legge*

We can bring the discussion up to date by looking at another strange case, *Pearl v Legge*.²² In that case the parties were neighbours. Their respective titles provided the defender with a right of access over the pursuer's property. The facts were remarkably similar to *Smith v Stewart*, since in order to use the right of access the defender would need to breach a wall, and the grant included the right to do that. The wall had in fact not been breached. Was this simply an ordinary servitude, which would be capable of prescribing after a period of twenty years? Or did the fact that the wall had first to be breached mean that it was *res merae facultatis* and so imprescriptible?

The court concluded that there was nothing in the terms of the grant to indicate that the right was intended to subsist indefinitely, regardless whether it was exercised. It was therefore not *res merae facultatis*. It went on to say this:

The true scope of the category encompasses any right the inherent nature of which is that it is intended to continue to subsist whether its possessor chooses to exercise it or not. The ordinary incidents of ownership are an example of that category. Their nature, as rights intended to subsist whether exercised or not, derives from the general law of property. Another example of the category can be found, however, in rights which acquire their nature not from the general law, but from the terms of the instrument by which they are constituted.²³

It seems to me that, while the court was right to hold that this was not a *res merae facultatis*, it was wrong in the wider (*obiter*) comments it made about the

²² 2008 SC 93.

²³ *Ibid.*

characteristics of such a right. Many of the reasons for saying so have been noted already by Professors Carey Miller and Paisley.²⁴

What then is the right – if it is a right – in this case? There appear to be three possibilities:

- (1) a servitude subject to a suspensive condition, so that the right of way comes into being only when the hole is knocked in the wall;
- (2) a *res merae facultatis*, such that no right is asserted against the neighbour until the hole is knocked in the wall;
- (3) a contractual right.

(a) A conditional servitude?

Is it possible that the right way to analyse a case such as this is as giving rise to a suspensively conditional servitude? There appears to be no hint of anything of the kind in the institutional writings. But, as ever, it is instructive to go back to Roman law. In his *libri quaestionum* Papinian wrote:

Servitudes as a matter of law cannot be constituted from a future date or until a certain date or under a suspensive condition or under a resolutive condition (such as “for as long as I like”). But if these provisions are included, a person vindicating the servitude contrary to what has been agreed can be met with the *exceptio doli* or *exceptio pacti conventi*. Cassius reports that that was Sabinus’s view and that it is also his own.²⁵

The basic position was therefore that servitudes could not be created conditionally or subject to other modalities. Nonetheless, as early as Sabinus in the early to mid first century AD, some jurists accepted that effect could be given to conditions, if one landowner sued the other in breach of what had been agreed. The defence would be either that the action was brought in breach of their agreement (*exceptio pacti conventi*) or raised in bad faith (*exceptio doli*). But it is clear that these defences would not succeed against anyone other than the person who had made the agreement: certainly only he or she could be affected by the *exceptio pacti conventi*; and it is difficult to see why a singular

²⁴ See the references in (n. 2) and (n. 5) above.

²⁵ Papinian 7 *quaestionum*, Digest, 8.1.4 pr.: ‘*Servitudes ipso quidem iure neque ex tempore neque ad tempus neque sub condicione neque ad certam condicionem (verbi gratia “quamdiu volam”) constitui possunt: sed tamen si haec adiciantur, pacti vel per doli exceptionem occurreret contra placita servitutem vindicanti: idque et Sabinum respondisse Cassius rettulit et sibi placere*’.

successor should be affected by *dolus* either. In short, it looks as if this was a right that was good only against the granter. It was therefore not a servitude.

(b) A *res merae facultatis*?

The reasons why (it is argued) this kind of right cannot be regarded as *res merae facultatis* have been set out already. This is not a case of an owner exercising the ordinary incidents of ownership. Instead, it is a right which relates to – and indeed involves damaging or destroying – the property of some other person. That inevitably means that there is some correlativity involved. And that takes it out of the core notion of a *res merae facultatis*. In short: it is not an issue about power or capacity. It is an issue about rights and obligations.

(c) A contractual right?

Here again it is instructive to begin with Roman law:

I sell part of my land and include a term entitling me to run a water-course through that land to the part I retain. If the prescriptive period has passed before I construct the water course, my right is unaffected because there was no course for the water and my right remains entire; whereas if I had constructed the water course and not used it I would lose the right to do so.²⁶

On the face of it, this text appears to conflict with Papinian's text. In fact, it does not. What it is drawing is a distinction between rights *in rem*, which are affected by prescription or *usucapio* (in the case of servitudes, *usucapio libertatis*) and rights *in personam*, which are not. Classical Roman law – perhaps oddly to our eyes – did not have a general doctrine of prescription of obligations or limitation of actions. A general law of limitation of actions in Roman law began only with a constitution of Theodosius II in AD 424.²⁷ For the first

²⁶ Pomponius 32 ad Sab. *Digest*, 8.6.19 pr.: 'Si partem fundi vendendo lege caverim, uti per eam partem in reliquum fundum meum aquam ducere, et statutum tempus intercesserit, antequam rivum facerem nihil iuris amitto, quia nullum iter aquae fuerit, sed manet mihi ius integrum: quod si fecissem iter neque usus essem, amittam.'

²⁷ CTh 4.14.1 (also transmitted as *Code*, 7.39.3, although the text is abbreviated and interpolated). For the detail, the present discussion being merely a paraphrase, see esp. M. Amelotti, *La prescrizione delle azioni in diritto romano* (Milan, 1958), 211–60; Max Kaser, *Das römische Privatrecht*, vol. 2 (Munich, 1975), 71–2; David Johnston, 'Limitation of actions: the curious case of classical Roman law' in Troy L. Harris (ed.), *Studies in Canon Law and Common Law in Honor of R. H. Helmholz* (Berkeley, 2015), 1–14.

time it imposed on all *actiones perpetuae* (that is, all those which were not already subject to a time limit) a period of limitation of 30 years.²⁸ But in classical law there was no notion that a contractual obligation prescribed a certain number of years after it was created or became enforceable.

When we take account of this, what the text actually appears to be saying is that an obligation to create a servitude does not prescribe. That is because it is purely contractual, as Pomponius' reference to a *lex (venditionis)* or contractual term makes clear. On the other hand, where the servitude right has already been created, that real right can be lost by non-use.

What does this tell us for purposes of attempting to understand *Peart v Legge*? Surely this: that the right there is best understood as a contractual right, which does not affect singular successors and which cannot in any sense be regarded as imprescriptible. And for the reasons already mentioned, it does not appear to involve the sort of unfettered power or capacity that the words *res merae facultatis* describe.

***Res merae facultatis*: does it need to be in the 1973 Act?**

Against this background, it is possible to give a very brief answer to the second question raised at the outset, whether we need *res merae facultatis* in the 1973 Act. The answer must be 'no'.

First, the 1973 Act is concerned with the prescription of rights and obligations.²⁹ There is no reason why it should apply to powers and capacities, which involve no claim or assertion of right against any other person. And it does not purport to do so.

Second, the Act already renders ownership of land imprescriptible. That ought properly to be understood as applying to ownership of land with all the

²⁸ There were some exceptions: e.g. actions subject to a forty or one-hundred year period and some which were imprescriptible: see Amelotti, *La prescrizione*, 231–2.

²⁹ It is interesting to note that in the context of positive (but not negative) prescription, the French civil code provides that 'facultative' acts cannot found prescription: Code civil art. 2262: '*Les actes de pure faculté et ceux de simple tolérance ne peuvent fonder ni possession ni prescription.*' I have not carried out an exhaustive review of continental civil codes, but the general impression is that they do not include provisions excluding the prescription of *res merae facultatis*. To that extent they are consistent with the argument advanced here in relation to Scots law, namely that such an exclusion is unnecessary because formulating the prescriptive regimes in the Act in terms of rights and obligations itself achieves that exclusion.

normal incidents of ownership, so far as they have not been diminished by the grant of such things as servitudes.

Finally, provided we understand correctly the scope of both the imprescriptible right of ownership and the limitation already built into the 1973 Act – that it is only rights and obligations that prescribe – there is no need for anything more.³⁰

³⁰ My thanks to those who commented on this paper when it was presented in Aberdeen in March 2015 and to George Gretton in particular for further discussion.

The Offside Goals Rule: A Discussion of Basis and Scope

Nikola J. M. Tait

Introductory Remarks¹

Mention the ‘Offside Goals Rule’ to a veteran property scholar and you may receive a sigh of exasperation in return. Most will be familiar with this exceptional doctrine whereby the basic concept is that of someone ‘jumping the queue’ and this being a reason to favour the party who has been overtaken.² Though the principle itself is well-established, with a history stretching back some four hundred years, it was not until the comparatively recent case of *Rodger (Builders) Ltd v Fawdry* that the actions of the ‘queue-jumper’ were equated to an offside goal in football.³ The appropriateness of such a metaphor has since been doubted.⁴ However, given the near-universal use of the term in the

¹ I am especially grateful to Professor David Carey Miller for the guidance he gave throughout this work. It was a seminar delivered by Carey Miller that inspired the topic, and it was his attentive tutoring that went on to shape the text into the piece now presented. Gratitude is extended also to Dr Douglas Bain and Scott Wortley for their comments on the initial draft. All views expressed and errors made remain my own.

² For an overview of the doctrine see Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996), para. 695.

³ 1950 SC 483 (*‘Rodger (Builders)’*) per Lord Justice Clerk Thomson, para. 50. This case built upon the foundations set by *Marshall v Hynd* (1828) 6 S 384, *Petrie v Forsyth* (1874) 2 R 214 and *Stodart v Dalzell* (1876) 4 R 236; on the history of the rule see David A. Brand, Andrew J. M. Steven and Scott Wortley, *Professor McDonald’s Conveyancing Manual* (7th edn, Edinburgh, 2004), para. 32.52; the remarks of Lord Kinloch in *Morrison v Somerville* (1860) 22 D 1082, note 2; the earliest decision of *Stirling v White and Drummond* (1582) Mor 1689; and Reid, *Law of Property*, para. 695. However, it should be noted that Ross Gilbert Anderson, “‘Offside Goals’ before *Rodger Builders*”, *Juridical Review*, 3 (2005), 277–92 questions whether the rule is as deeply ingrained in our legal history as has generally been accepted. Whilst such a discussion is of great interest, the following will proceed on the basis of the position as set out by Reid.

⁴ See, for instance, A. Steven, ‘Keeping the Goalposts in Sight: An Analysis of *Optical Express (Gyle) Limited v Marks and Spencers plc*’, 2000 SLT (News), 143–6, 145–6; Scott Wortley, ‘Double Sales and the Offside Trap: Some Thoughts on the Rule Penalising Private Knowledge of a Prior Right’, *Juridical Review*, 6 (2000), 291–316, 293; John MacLeod, ‘The Offside Goals Rule and Fraud on Creditors’ in Frankie McCarthy,

literature, this work will proceed with the recognisable ‘offside goals’ tag. What is more contentious and, frankly, quite remarkable is that despite the doctrine’s longevity and relative prominence there is a high degree of uncertainty as to the proper conceptual basis of the rule and, subsequently, its parameters of application. This overwhelming ambiguity has often been seized on by counsel for it enables practitioners to argue the rule where there is no obvious authority.⁵ Owing to such ill-informed popularity, the doctrine has ‘gradually been extended in both scope and importance’.⁶

This discussion will seek to determine whether this development is appropriate or whether the rule has instead ‘been extended beyond sensible boundaries’.⁷ Yet, what one views as legitimate in scope depends on how one rationalises the rule. Before this work may proceed to comment upon the doctrine’s true limits, there must first be an understanding of the principles which underpin it. On this matter, however, there is a distinct lack of judicial and academic consensus. The problem therefore becomes something of a self-fulfilling prophecy: the absence of a clear conceptual grounding allows flexibility in the rule’s scope, and the more scenarios it grows to encompass, the more difficult it becomes to identify a coherent underlying theme. If one hopes to make progress in taming this increasingly unruly doctrine then the initial step must be an analysis of its most plausible conceptual bases; only then may we attempt to delineate the rule’s proper application and restrict its scope.

In pursuit of the above, this work will comment on the discussion in academic literature and will examine several key judicial developments. It will seek to offer new perspectives on the mainstream theories and a novel way of applying the ideas contended for by those esteemed authors. In addition, some reference will be made to the South African equivalent of the rule: the ‘doctrine of notice’.⁸ Owing to a common heritage shared by these concepts, lessons

James Chalmers and Stephen Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (Cambridge, 2015), 115–40, 155; and Anderson, ‘Before Rodger Builders’, note 2.

⁵ It is this which causes Anderson to characterise the rule as an example of ‘litigator’s law’. For more on this practical viewpoint, see Ross G. Anderson, ‘The Offside Goals Rule in Practice’, *Royal Faculty of Procurators in Glasgow Conveyancing Conference*, 9 June 2010, <http://ssrn.com/abstract=1630342>, accessed 22 November 2014.

⁶ Reid, *Law of Property*, para. 695.

⁷ Ross Gilbert Anderson, ‘Fraud on Transfer and on Insolvency: ta... ta... tantum et tale?’, *Edinburgh Law Review*, 11(2) (2007), 187–207, 202.

⁸ For an overview, see R. G. McKerron, ‘Purchaser with Notice’, *South African Law Times* (1935), 178–82; C. G. van der Merwe, ‘Things’ in W. A. Joubert and J. A. Faris

learned in either system can be of great transferable value.⁹ However, with a view to restricting the length of this piece, only a limited investigation will be made of the South African materials and the emphasis will remain on the Scottish context. Following the survey of theoretical justifications undertaken in the opening sections of this text, the author will look to apply the principles established therein and observe how they might dictate the proper parameters of the rule. This will include tentative suggestions as to the correct ‘length’ of the rule’s scope – that is, at what stage in the transfer process the rule applies and where the ‘cut off’ point might be – along with proposals for the true ‘width’ of the rule, considering whether it ought to extend to situations beyond the classic double sales scenario. Ultimately, the present author hopes to contribute to the offside goals debate and, in particular, defend the rule’s place within the Scottish property law system.

The Not So Exceptional Exception

(1) The Paradigm

The doctrine applies equally to heritable, moveable, corporeal and incorporeal property.¹⁰ Under the Sale of Goods Act 1979, the general rule where goods are sold by a non-owner is that the eventual purchaser does not gain good title. Because land is subject to the requirement of registration, however, the Sale of Goods Act 1979 does not apply and there is greater scope for ‘offside’ circumstances to arise. For instance, the rule is at its most orthodox in the heritable double sales scenario. This traditional application is the benchmark against which apparent developments may be measured. The seller (henceforth, ‘S’) contracts to grant a real right, such as through the sale of heritable property,

(eds), *The Law of South Africa*, vol. 27 (Durban, 2002), 3-195; and Gerhard Lubbe, ‘A Doctrine in Search of a Theory: Reflections on the so-called Doctrine of Notice in South African law’, *Acta Juridica* (1997), 246–72.

⁹ Both the Scottish and South African systems are derived primarily from Roman-Dutch sources and the treatment of successive sales under the ‘doctrine of notice’ is virtually identical to that under the offside rule. For further discussion of the similarities between the systems, see D. L. Carey Miller, ‘Good Faith in Scots Property Law’ in A. D. M. Forte (ed.), *Good Faith in Contract and Property* (Oxford, 1999), 103–27, 108 et seq; D. L. Carey Miller, ‘A Centenary Offering: the Double Sale Dilemma – Time to be Laid to Rest?’ in M. Kidd and S. Hoctor (eds), *Stella Iuris: Celebrating 100 years of Teaching Law in Pietermaritzburg* (Claremont, 2010), 96–114, 96 et seq; and Wortley, ‘Double Sales’, 300–11.

¹⁰ Reid, *Law of Property*, para. 695.

to a first purchaser (henceforth, 'P1'). Before P1 can complete the real right, S contracts to grant that same right to a second purchaser (henceforth, 'P2'). P2 is aware of the prior contract between S and P1 and is therefore said to be in 'bad faith'.¹¹ When P2 proceeds to register the property and acquire the real right, application of the offside goals rule will render that title voidable and reducible at the instance of P1.¹² Professor Kenneth Reid, in his authoritative text on the subject, observes three crucial components in play: an antecedent contract or obligation affecting the grantor which impliedly or expressly places them under an obligation not to make the later grant,¹³ a breach of that obligation,¹⁴ and a *mala fide* second purchaser with knowledge of these prior elements.¹⁵ Although, it should be noted that bad faith is not the doctrine's sole trigger mechanism; it will equally apply where the grant made was not for value.¹⁶ Leading thought on the matter suggests that this is owed more to policy than some conceptual basis in common with the bad faith ground.¹⁷ As such, this mode of operation will be excluded from the current analysis.

¹¹ *Petrie v Forsyth*, 222 per Lord Ormindaile held that in order to demonstrate bad faith the pursuer need only prove that the second purchaser had such knowledge as ought to have put him on his inquiry. Precisely what might trigger this 'duty of inquiry', and what is involved in fulfilling said duty, is a matter beyond the current discussion. For more on the topic, see Ross Gilbert Anderson and John MacLeod, 'Offside Goals and Interfering with Play', 2009 SLT (News), 93–7, 94–5; and Anderson, 'Offside Goals Rule in Practice', 6–7. For our purposes the key question is not what constitutes bad faith, but the consequence of that bad faith should it be found to exist.

¹² Previously, completion required the recording of a deed in the General Register of Sasines, or else registration in the Land Register under the Land Registration (Scotland) Act 1979 s. 2, having the effect provided for in s. 3(1)(a). One must now comply with the process set out in Part 2 of the Land Registration etc. (Scotland) Act 2012.

¹³ Reid, *Law of Property*, para. 696.

¹⁴ *Ibid.*, paras 696–7. This requirement looks solely for a breach of the prior obligation. It is, for instance, irrelevant that the later grant may nevertheless be compatible with the prior grant, as established in *Trade Development Bank v Crittal Windows Ltd* 1983 SLT 510.

¹⁵ P2 will be in bad faith if he or she knew of, or wilfully closed their eyes to the existence of, the prior obligation between S and P1. See Brand, Steven and Wortley, *McDonald's Conveyancing Manual*, para. 32.54. The question of when bad faith becomes relevant will be considered in the fourth section of this article.

¹⁶ See D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), para. 8.32; Carey Miller, 'Good Faith', 110; G. Campbell H. Paton (ed.), *Baron Hume's Lectures 1786–1822, vol. IV (The Stair Society, 17, Edinburgh, 1952)*, 317–18; Reid, *Law of Property*, para. 699; and *Anderson v Lows* (1863) 2 M 100.

¹⁷ Carey Miller, 'Good Faith', 109; *idem*, 'Centenary Offering', 114. Note, however, the criticism of this approach in MacLeod, 'Fraud on Creditors', 119. Whilst a full examination of the latter cannot be given here due to considerations of length and relevance, the author would advance a view which aligns more with that of Carey

(2) The Controversy

The voidable nature of P2's acquired title does not represent the default position governing successive sales.¹⁸ In theory, P2 ought to have acquired an absolutely good real right by his or her registration of title and thus P1 ought to be left with a mere personal right to pursue S for breach of contract. Rejection of the expected outcome breeds controversy and results in the offside goals rule being 'widely seen as a paradox, difficult to explain on the basis of accepted principles of property law'.¹⁹ This has put many property lawyers on the defensive; declarations to the effect that the 'rule does not sit easily with Scots law' are not uncommon.²⁰ In this way the *prima facie* incompatible nature of the rule may impact upon the question of basis and scope: if commentators are already wary of the doctrine then they may be more inclined to provide an overly-strict interpretation in an attempt to limit its impact. The present author would respectfully suggest that not only is such a perspective superficial but that the rule is not as incongruous as has often been claimed. The main allegations in this regard are considered briefly below so as to allow us to approach the discussion of basis unburdened by excessive caution.

(3) Certainty

Our law of property puts great emphasis on the value of certainty and tends to prefer mechanisms which allow for clarity and objectivity.²¹ In contrast, the offside goals rule is dogged by confusion and debate such that 'against the backdrop of the rugged certainties of Scots law, [it] feels like a bog'.²² On this basis, it is no wonder that some commentators wish to minimise the doctrine's application or resign it entirely.²³ Yet, the apparent disarray of this rule is

Miller's.

¹⁸ It should be emphasised that a voidable title is, of course, 'perfectly good unless or until the deed on which it is based is set aside by reduction', as stated in Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Scot. Law Com. DP No. 125, 2004), para. 6.2; P1 will also have a right of interdict against P2 to prevent registration.

¹⁹ Carey Miller, 'Centenary Offering', 98.

²⁰ Ross Gilbert Anderson, *Assignment* (Edinburgh, 2008), para. 11.30.

²¹ See, for example, the discussion in the Scottish Law Commission, *Discussion Paper on Sharp v Thomson* (Scot. Law Com. DP No. 114, 2001), para. 2.7, which finds that 'in property law, certainty is prized above all other virtues'.

²² Anderson and MacLeod, 'Interfering with Play', 93.

²³ See the discussion in Scottish Law Commission, *Report on Land Registration Volume One* (Scot. Law Com. No. 222, 2010), para. 14.61.

a direct result of its undefined basis and consequently variable scope. The ambiguity is not inherent in the rule itself but is instead owed to the failure of practitioners and adjudicators to apply it in a coherent and consistent fashion. The remaining sections of this text will seek to demonstrate that where the rule is applied with reference to a clear basis, and if the parameters are set by the same, it need not be a source of uncertainty but can instead be a doctrine with a defined and functional purpose.

(4) The Real and Personal Distinction

One of the most common criticisms of the rule focuses on its apparent undermining of the distinction between real and personal rights.²⁴ Students of property law are versed in the mantra that real rights, enforceable against the world, are ‘stronger’ or more preferable than personal rights, enforceable against a particular individual or group of individuals.²⁵ The offside goals rule seems to contradict this hierarchy. Having obtained a real right, P2 ought to be in the favourable position for their title is enforceable against all – including P1. On the other hand, the rights which arise between S and P1 are merely personal. Hence, when P1 relies on his or her right for reducing P2’s title, some commentators have inferred that the ‘private personal right trumps the real right publicly notified’.²⁶ This perversion of the fundamental character of real and personal rights has equally been puzzled over in the South African context: Professor Gerhard Lubbe comments that the rule seems to give the personal right a characteristic ‘which is regarded as the hallmark of a real right’.²⁷ Yet, despite the frequency with which this assessment features in the literature, it is somewhat misleading. We must recall that the second purchaser’s title is voidable. Acknowledging its defective nature raises a subtle but crucial point: the personal right does not defeat an absolutely good real right purely on the strength of the former. Instead, the weakness of the latter invariably leaves that title open to reduction. Hence, Professor David Carey Miller’s suggestion that the local division dictum of *Harley v Upward Spiral* was wrong to ‘put emphasis upon the quality of the first purchaser’s right rather

²⁴ Peter Webster, ‘*Gibson v Royal Bank of Scotland Plc*. Options for the Offside Goals Rule’, *Edinburgh Law Review*, 13(3) (2009), 524–8, 526; MacLeod, ‘Fraud on Creditors’, 116; Wortley, ‘Double Sales’, 292–6; the point is also recognised, though later disputed, by Carey Miller in his ‘Centenary Offering’, 113.

²⁵ Brand, Steven and Wortley, *McDonald’s Conveyancing Manual*, para. 31.51.

²⁶ Wortley, ‘Double Sales’, 294; for more on the seemingly anomalous nature of this point, see van der Merwe, ‘Things’, 264.

²⁷ Lubbe, ‘Doctrine in Search of a Theory’, 249.

than [give] an acknowledgement of the second purchaser's defective right'.²⁸ The doctrine does not provide some unheard of status to the personal right by allowing it to strike down a perfectly valid real right, but instead targets the fundamental flaw in the voidable title. The real question, and the one that forms the main focus of this text, is why that title is rendered voidable in the first place. Additionally, it is argued in the closing parts of this work that the personal right relied upon must be one which is capable of being made real. If agreeable, this would further distance the doctrine from the comparatively radical idea that a purely personal right, without any proprietary interest whatsoever, could defeat an absolutely good real right.

(5) *Prior tempore* and the Race to Register

Dr Ross Anderson and Scott Wortley criticise the rule further for appearing to run contrary to the maxim *prior tempore potior iure est* and, consequently, the 'race to register'.²⁹ These principles provide that parties in competition ought to seek to register first as the real right first created will be preferred over a competing right. However, application of the offside doctrine means that P1, having 'lost' the race, can nonetheless reduce P2's 'winning' title. Because awareness of one's competitor will attract *mala fides* and engage the doctrine, then it seems that there 'can only ever be a blind man's race: one in which neither party knows who else might be running'.³⁰ The rule therefore appears to subvert the 'race to register' concept. However, 'race to register' is a loose term, without agreed or technical meaning. In fact, it is possible to limit the race to one 'against the possibility of the seller's solvency intervening'.³¹ This race of *Burnett's Trustee v Grainger* is what George Gretton and Reid have defined as the true 'race to register' – not the double sales scenario.³² South

²⁸ Carey Miller, 'Centenary Offering', 100, citing *Harley v Upward Spiral 1196 CC and Others 2006* (4) SA 597 (D) per Levinsohn J, para. 22. See also 104–5 for a criticism of Wortley's 'trumping' perspective.

²⁹ Wortley, 'Double Sales', 293; Anderson, 'Offside Goals Rule in Practice', 5.

³⁰ Anderson, 'Offside Goals Rule in Practice', 5.

³¹ Carey Miller, 'Centenary Offering', 109.

³² 2004 SC (HL) 19; George L. Gretton and Kenneth G. C. Reid, *Conveyancing* (2nd edn, Edinburgh, 2011), cited in Carey Miller, 'Centenary Offering', 110, note 77. Equally, however, insolvency could be viewed as merely another scenario lending itself to the doctrine's standard application: in *Mackay (Fortune's Trustee) v Medwin Investments Limited* [2015] CSOH 139, Lord Jones found that 'there is no legal or practical difference between the position of a disponee who takes title knowing that the property disposed is the subject of a prior contract for sale, and that of a disponee who takes title knowing that the property has vested in a trustee in sequestration' (para. 33).

African judicial treatment arguably confirms this analysis: the Supreme Court of Appeal held that knowledge by a trustee on insolvency did not engage the doctrine, thereby preventing the genuine ‘race to register’ from being undermined.³³ Separately, Professor George Henry goes so far as to state that it is an ‘illusion nurtured in some quarters that there may be such a thing as a race to the Register House’.³⁴ Ultimately, without a standard definition of the ‘race to register’, this criticism is a moot point and certainly ought not to be considered just reason for restricting the doctrine’s scope.

(6) The Exception

Having doubted claims as to the doctrine’s conflicting nature, it must be remembered that the rule nevertheless remains an exception. The principle which it *does* contradict is this: ‘personal obligations owed by a predecessor in title do not generally encumber their successor’ and, as such, a ‘transferee is not concerned with the personal obligations of his author’.³⁵ The doctrine is exceptional in allowing the prior contract between S and P1 to have implications for P2, despite the fact that P2 was not privy to that contract. As will be shown, however, this exception exists for good reasons. The rule is therefore far less contentious than it is often presented as being and so, when we consider basis and scope, we must treat it as such. It should not be artificially restricted owing to some unwarranted fear that it is ‘inevitably unworkable and dangerous for the established and principled institutions of Scots property law’.³⁶ The following will propose that not only is the rule more compatible with the Scottish model than it first appears, but that it may even be a product of that very system.

The Conceptual Basis

(1) The Debate

The basic operation of the rule is well known and the doctrine is (arguably) less controversial than it first appears. The reader could easily be deceived by the impression of clarity and coherence presented through such a statement.

³³ *Dream Supreme Properties 11CC v Nedcor Bank Ltd and Others* 2007 (4) SA 380 (SCA).

³⁴ G. L. F. Henry, ‘Personal Rights’, *Conveyancing Review*, vol. 2, 7 (1961), 193–7, 193.

³⁵ Wortley, ‘Double Sales’, 293; Anderson, ‘Before Rodger Builders’, 277; see also John Rankine, *A Treatise on the Law of Personal Bar in Scotland* (Edinburgh, 1921), 39.

³⁶ Lu Xu, ‘The Offside Goals Rule and English Equity’, *Juridical Review*, (2014), 53–67, 66.

The difficulty is, however, that whilst ‘the law itself may now be stated with reasonable confidence, there is less confidence about the reasons for the law and the principles underlying it’.³⁷ This lack of consensus as to conceptual basis is troubling and its significance is not limited to a purely academic discussion. Without knowing the principles which dictate the rule’s application one cannot predict where it may be applied in the future. In the absence of a clear line of development, practitioners are left on the back foot, ‘unsure what to expect next from the court’.³⁸ Hoping to remedy this problem, a number of commentators from both the Scottish and South African systems have proffered suggestions as to what the basis might be. It would be impractical to explore the relative merit of each one of these theories in the current text.³⁹ This discussion will therefore omit those proposals which have already been doubted by well-reasoned commentary, including approaches founding on personal bar,⁴⁰ delict⁴¹ and ‘relative real rights’.⁴² The following will consider the remaining active mainstream theories. First, the strength of those proposals as conceptual groundings for the traditional *Rodger (Builders)* scenario will be

³⁷ Reid, *Law of Property*, para. 695.

³⁸ Xu, ‘Offside Goals Rule’, 54.

³⁹ Though if one were to seek such an attempt, Wortley provides an invaluable commentary on a range of proposed bases in his ‘Double Sales’.

⁴⁰ Lord Gifford characterised the rule as a species of personal bar in *Petrie v Forsyth*, 223, as discussed in H. L. MacQueen and others (eds), *Gloag and Henderson: The Law of Scotland* (13th edn, Edinburgh, 2012), para. 3.12; and Rankine, *A Treatise*, 38–9. However it has since been persuasively countered by J. W. G. Blackie, ‘Good Faith and the Doctrine of Personal Bar’ in A. D. M. Forte (ed.), *Good Faith in Contract and Property* (Oxford, 1999), 129–56, 147–50 that this is not the case. Personal bar as a basis has now been firmly rejected in Elspeth C. Reid and John W. G. Blackie, *Personal Bar* (Edinburgh, 2006), para. 2.08. See also MacLeod, ‘Fraud on Creditors’, 117.

⁴¹ N. J. van der Merwe, ‘Die Aard en Grondslag van die Sogenaamde kennisleer in die Suid-Afrikaanse Privaatreg’, *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 24 (1962), 155–79, 172 proposed that the remedy available is based on the delict against interfering with contractual relations. This has been criticised by a range of commentators. See, for instance, Lubbe, ‘Doctrine in Search of a Theory’, 258–64; and Wortley, ‘Double Sales’, 308–9.

⁴² J. D. van der Vyver, ‘The doctrine of private-law rights’ in W. A. Joubert and A. A. Strauss, *Huldigingsbundel Vir W.A. Joubert Aan Hom Aangebied by Geleentheid Van Sy Sewentigste Verjaarsdag Op 27 Oktober 1988* (Durban, 1988), 201–46, 238–9 argued that the first purchaser acquires a ‘relative real right’, which would entitle P1 to take priority in competition with P2, but not in competition with other parties. This is considered and ultimately rejected in Wortley, ‘Double Sales’, 311. This dismissal is supported by van der Merwe, ‘Things’, 270; and Lubbe, ‘Doctrine in Search of a Theory’, 262, which notes that ‘the response in legal academic discourse to [both van der Vyver’s relative real right theory and van der Merwe’s delictual theory] has been mixed, and on the whole negative’.

assessed. Then, in the following section, their credibility and relationship with scope in light of the controversial case of *Alex Brewster and Sons Ltd v Caughbey* will be examined.⁴³

(2) Equity

Perhaps the underlying justification requires no complex analysis and is instead a simple matter of fairness. Indeed, the doctrine is often referred to as an 'equitable solution' in that it addresses the injustice inflicted on P1 by P2's queue-jump.⁴⁴ This line of thought leads Professor Robert Rennie to conclude that 'the rule against offside goals is plainly based on equity or fairness'.⁴⁵ When considering this notion of equity, one must be careful to distinguish the Scottish view of an 'equitable approach' from the more precise English body of 'Equity' law.⁴⁶ Whilst some commentators appear to have been influenced by the latter,⁴⁷ given the vast overall differences between the two property systems and the isolated growth of their concepts, English equity will not inform the present discussion.⁴⁸ Nonetheless, the author's immediate concern, even with the broader Scottish concept, is that our law of property is typically little interested in fairness. It generally operates on an objective basis, seeking to make clear who has what rights – not who ought to have those rights according to subjective principles.⁴⁹ For this reason, 'it is often said that Scots law, as a civilian system, honours certainty above fairness'.⁵⁰ This is supported by recent case law which has shown judges to have 'preferred certainty [...]

⁴³ 2002 GWD 15-506 (*Alex Brewster*).

⁴⁴ Reid, *Law of Property*, para. 695.

⁴⁵ Robert Rennie, 'Marching Towards Equity – Blindfolded', 2009 SLT (News), 187–92, 187.

⁴⁶ Roderick Paisley, *Land Law* (Edinburgh, 2000), para. 3.30, distinguishes the Scottish term from the English sense of a trumping equitable right. See also Rennie, *ibid.*, 192.

⁴⁷ Xu, 'Offside Goals Rule', goes so far as to equate the Scottish doctrine with English equity, arguing that we ought to proceed in light of the English form.

⁴⁸ David L. Carey Miller and Malcolm M. Combe, 'The Boundaries of Property Rights in Scots Law', *Electronic Journal of Comparative Law*, 10(3) (2006), 3, <http://www.ejcl.org/103/art103-4.pdf>, accessed 15 November 2014: 'the general Scots law of property is radically different to its English equivalent'; Anderson, *Assignment*, para. 11.31: 'it is incontrovertible that the offside goals rule is distinct from the English doctrine of notice'.

⁴⁹ For example, the doctrine of accession is one of the most evidently objective mechanisms. It applies regardless of fairness and can even run contrary to contract or the will of the parties, as demonstrated in *Shetland Islands Council v BP Petroleum Development Ltd* 1990 SLT 82.

⁵⁰ Rennie, 'Marching Towards Equity', 187.

over what might be regarded as individual fairness or equity'.⁵¹ The idea that Scots law would interfere with the default position merely because not to do so would be 'unfair' to one party does not sit easily with those indoctrinated into the classic objectivity of the system.⁵²

Furthermore, to consider fairness in this way is to focus on P1. The rule does not operate in this manner: it is P2's knowledge which triggers the rule, not the injustice suffered by P1. This is evident in the fact that, were it not for his or her bad faith, P2 would receive a perfectly good title. This would be so despite the fact that P1 suffers the same wrong in both scenarios. The harm inflicted upon P1 is therefore irrelevant with regard to actually activating the offside rule – it is merely a necessary prerequisite. The proper conceptual basis must therefore explain not why P1 should be protected, but why P2 should be penalised. After all, 'the rule is itself part of a wider underlying principle of our law, which penalises third parties acting in bad faith'.⁵³ Moreover, equity as a solution relies greatly on the *Rodger (Builders)* application. When set against the alternative *Alex Brewster* scenario in the following section, notions of fairness become complex, muddled and ultimately unworkable.

(3) The Publicity Principle

One of the most recent efforts to identify the true conceptual basis can be found in Wortley's commendable study of the offside doctrine.⁵⁴ Wortley centres his theory around a cornerstone of property law: the publicity principle.⁵⁵ The Sasine and Land Registers embody this principle by allowing prospective purchasers to access publicly available records. One derives from this the ability to 'rely on the Register'; to trust that it represents the status of rights in the land.⁵⁶ Wortley would argue that not only can this principle

⁵¹ Ibid., remarking on the Lords' commentary in *Burnett's Trs v Grainger* 2004 SC (HL) 19 and their criticisms of *Sharp v Thomson* 1997 SC (HL) 66.

⁵² In addition, it is argued in Carey Miller, 'Centenary Offering', 114, that 'to suggest that the double sale solution is a concession to "equity" [...] seems to miss the point of an act of defective acquisition, good only until reduced by judicial order following proof of the defect'.

⁵³ Kenneth G. C. Reid, 'Standard Conditions in Standard Securities', 1983 SLT (News), 169–73 and 189–91, 189.

⁵⁴ Wortley, 'Double Sales', 313–5.

⁵⁵ This is the notion that the 'creation of real rights should be attended with due publicity', as stated in Scottish Law Commission, *Discussion Paper on Registration of Rights in Security by Companies* (Scot. Law Com. DP No. 121, 2002), para. 1.3.

⁵⁶ See *ibid.*, para. 1.20 on the 'Integrity Principle' and *idem*, *Discussion Paper on Sharp v Thomson*, para. 3.7 for faith on the register generally.

benefit and protect parties but that, ‘in certain circumstances, it can also be used to penalise them’.⁵⁷ He suggests that if ‘a third party knows that the publicly ascertainable position on the Register is not all that it seems [...] it can hardly be said that the third party is transacting on the faith of the Register, and consequently relying on the publicity principle’.⁵⁸ Because P2’s reliance on the Register is tainted by bad faith, so the argument goes, he or she is deprived of protection and their title is rendered voidable.

This approach has initial appeal to the author, for it would find the doctrine to be attached to a core principle of Scots law and would therefore support the assertion that the rule has a rightful place in our system. However, Wortley attributes the voidable nature of P2’s title to his knowledge that the ‘position on the Register is not all that it seems’.⁵⁹ He appears to imply that although the Register correctly shows S as the owner (prior to P2 registering), this is not the whole story because P1 has a right to *become* the owner. In knowing that there are more rights in play than is reflected by the Register, P2 gains only a voidable title. It seems to the author, however, that although P1 has a personal right, the position on the register is nonetheless precisely as it seems. The mere existence of P1’s right to the effect that S *should*, in the future, transfer ownership to P1, does not mean that P1 has a proprietary claim or that S is anything less than full owner. The seller, as an ‘undivested owner, must necessarily be in a position to [...] transfer his or her right regardless of a personal obligation’.⁶⁰ P2’s knowledge of P1’s personal right therefore does not equate to knowledge that the Register is somehow misrepresenting the situation because, quite simply, the Register is entirely accurate. Dr John MacLeod would appear to support the author’s thinking. He states that the act of publicity ‘is not merely a mechanism for making a transfer known [but] is constitutive of transfer [and so] the first buyer has no proprietary interest of which third parties could have notice’.⁶¹ Indeed, one could even argue that P2 has transacted with perfect faith on the Register insofar as their knowledge is that S is capable of transferring a real right and that nobody else has yet received that right. A personal right to acquire the title in the future does not

⁵⁷ Wortley, ‘Double Sales’, 314.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ D. L. Carey Miller, ‘Mala Fide Transferees in Scotland: The Case of a Registered “Offside Goal”’, *Stellenbosch Law Review*, 16(3) (2005), 318–35, 323. For more on this point see idem with Irvine, *Corporeal Moveables*, 180.

⁶¹ MacLeod, ‘Fraud on Creditors’, 117.

alter the objective proprietary position and knowledge of this right cannot be equated to knowledge that the Register is ‘not all that it seems’.

Furthermore, Wortley goes on to write that ‘the first purchaser who did rely on the position in the Register at the time of their transaction is then deemed to be protected as against the second purchaser’.⁶² This strays uncomfortably close to depicting the rule as protecting or favouring P1 instead of focusing on the question of P2’s penalty. The flaws in such an outlook have been discussed above. Moreover, this ‘publicity principle’ theory is linked to the notion of ‘faith on the records’.⁶³ Indeed, weight was given to the latter in *Gibson v RBS* wherein Lord Emslie characterised the doctrine as ‘an exception to the general rule that a party transacting with heritable property is generally entitled to do so on the faith of the public records’.⁶⁴ Yet, as Anderson and MacLeod convincingly argued in response, ‘the law on the point has nothing to do with the public records’.⁶⁵ As stated, the principle that the offside doctrine operates as an exception to is not faith on the Register, but that a successor ought to take free from their author’s obligations. Ultimately Wortley’s analysis, though intriguing, is not exempt from questioning.

(4) Fraud

In the absence of a convincing modern explanation, one might turn instead to the history of the doctrine. Early Scottish authorities attributed the rule to fraud⁶⁶ and this is equally true of the South African origins.⁶⁷ However,

⁶² Wortley, ‘Double Sales’, 314.

⁶³ Ibid.; see also Scottish Law Commission, *Discussion Paper on Registration of Rights*, para. 1.3 and idem, *Discussion Paper on Sharp v Thomson*, para. 3.7.

⁶⁴ 2009 SLT 444, para. 34.

⁶⁵ Anderson and MacLeod, ‘Interfering with Play’, 94.

⁶⁶ See, for example, *Seatoun v Copburnes* (1549) reported in *Sinclair’s Practicks*, note 459; *Morrison v Somerville* (1860) 22 D 1082, 1089 per Lord Kinloch; Stair, *Institutions*, I.14.5; and the discussion of authorities in Reid, *Law of Property*, para. 695; Carey Miller, ‘Good Faith’, 109; and MacLeod, ‘Fraud on Creditors’, 120.

⁶⁷ *Reynders v Rand Bank Ltd* 1978 (1) SA 630 (T), 637A defined the doctrine as a ‘species of fraud’. This is something which Lubbe, ‘Doctrine in Search of a Theory’, 249, indicates as representative of the ‘traditional judicial characterisation of the doctrine’, supported by *Coben v Shires*, *McHattie and King* (1882) 1 SAR 41 per Kotze CJ; *De Jager v Sisana* 1930 AD 71 84 per Wessels JA at 74; *Ridler v Gartner* 1920 TPD 249, 259–60; and *Kazazis v Georgiades* 1979 (3) SA 886 (T), 893. See also, Justice F. D. J. Brand SC, ‘Knowledge and Wrongfulness as Elements of the Doctrine of Notice’ in H. Mostert and M. J. de Waal (eds), *Essays in Honour of C. G. van der Merwe* (Durban, 2011), 21–36, 21: ‘for many years our courts have consistently advanced fraud or *mala fides* on the part of the acquirer of a real right as inherent justification for the doctrine of notice’.

doubts grew over whether this fraud theory remained applicable. The seemingly fatal flaw in the fraud analysis is that what amounts to bad faith, and thereby provokes the doctrine, need not be as extensive as a fraudulent act. As observed by MacLeod, Lord Gifford in *Petrie v Forsyth* contended that what is needed is such knowledge as is sufficient to put P2 under a duty to investigate and contact P1, and this requirement falls short of fraud.⁶⁸ Even in the foundational case of *Rodger (Builders)*, Lord Jamieson found that ‘fraud in the sense of moral delinquency does not enter into the matter. It is sufficient if the intending purchaser fails to make the inquiry which he is bound to do’.⁶⁹ Such statements align with the modern view of what constitutes bad faith, requiring only that P2 be under a duty to inquire as to the status of the prior right and that they either undertook this inquiry, thereby acquiring knowledge, or failed to inquire.⁷⁰ In fact, the courts will penalise not only willful blindness, but even naivety or ignorance.⁷¹ As such, the doctrine can apply in the total absence of a deliberate or fraudulent act. It is on this basis that several Scottish and South African treatments have concluded that if ‘it is not necessary to put the case against the second purchaser as high as fraud’, the unavoidable implication is that fraud cannot form the conceptual foundation.⁷²

However, let us set these criticisms aside for a moment and look to untangle the elements involved. As a first step, we may consider where fraud might arise in the offside scenario. Discussion on this point is arguably predicated

⁶⁸ (1874) 2 R 214, 223 cited in MacLeod, ‘Fraud on Creditors’, 122.

⁶⁹ *Rodger (Builders)*, 499.

⁷⁰ Precisely what will incur this duty is still somewhat unclear. See Anderson and MacLeod, ‘Interfering with Play’, 95; and Brand, Steven and Wortley, *McDonald’s Conveyancing Manual*, para. 32.56.

⁷¹ Brand, Steven and Wortley, *McDonald’s Conveyancing Manual*, para. 32.56. See also Reid, *Law of Property*, para. 699, where it is stated that a grantee is deemed to know the content of relevant deeds or entries in the Sasine or Land Register. Indeed, ‘*mala fides* can be fixed even in cases where the second purchaser is unaware of the prior right, provided that he knows enough to put him on his inquiry and then fails to properly investigate. Thus the rule can apply where a naïve second purchaser honestly thought that there was no problem’, as stated in MacLeod, ‘Fraud on Creditors’, 127.

⁷² Henry, ‘Personal Rights’, 194. Admittedly, in *The Advice Centre For Mortgages v Mcnicoll* 2006 SLT 591, para. 44, it was said that ‘the origins of the principle seem to lie in the concept of fraud in its older sense’. Yet, as the above text goes on to narrate, any merit in this largely depends upon how one defines the historic notion of ‘fraud’. In any event, the statement in *Advice Centre* was immediately followed by a finding that the ‘law has moved away from the concept of fraud’. On the South African rejection see, for instance, *Manganesse Corporation Ltd v SA Manganesse* 1964 (2) SA 185 (W), 193; and *Grant v Stonestreet* 1968 (4) SA 1 (A); and, for an overview, Brand, ‘Knowledge and Wrongfulness’, 21–32.

on an unclear definition of 'fraud'. One's initial reaction to this term may call to mind, for instance, a specific or technical wrong. This can largely be attributed to a narrowing of the concept in recent times.⁷³ However, 'before the rigid construction of the term "fraud" to conform to the English tort of deceit, "fraud" was used in Scotland [...] as a general term to imply lack of *bona fides*, and comprised a variety of situations in which one party had taken unfair advantage of the other'.⁷⁴ Having shed the confines of the more technical modern outlook, we may now look to the actions of the seller. Stair wrote of the 'fraud of [the] author, who thereby becomes a granter of double rights'.⁷⁵ The inference is that the seller acts fraudulently by contracting with the second purchaser and Reid's analysis would support this by defining fraud in this context as 'a breach by the granter of an antecedent obligation which is binding upon him'.⁷⁶ Arguably, then, when we talk about fraud in the offside goals scenario, what we mean is the presence of a double grant by the seller and the subsequent breach and frustration of the first purchaser's prior right.

However, even if one were to consider the *seller's* actions to be fraudulent in this broader sense of the word, the fraud analysis must still explain why the end result is a penalty for P2. An answer can be found in the notion put forth by Stair that 'the acquirer is *partaker* of the fraud of his author'.⁷⁷ The seller commits a fraudulent act and the conduct of P2 which is then penalised is their choice to participate in that act. This analysis has been supported by Carey Miller, who finds that the offside doctrine 'is simply another instance of a "partaker" in a fraudulent act'.⁷⁸ Additionally, Hume spoke of the second purchaser as being a 'participant in [the] wrong', and this idea is further endorsed by Reid.⁷⁹ The partaker theory has even seen support from case law, as illustrated by the remarks of Lord Kinloch in *Morrison v Somerville*: 'in granting a second right, the seller is guilty of fraud on the first purchaser [and] in taking the second right in the knowledge of the first, the second disponee becomes an accomplice in the fraud'.⁸⁰

⁷³ Macleod, 'Fraud on Creditors', 123, finds that modern development 'is thought to have limited fraud to deceit'. See *Derry v Peek* (1189) 14 App Cas 337; and Reid, *Law of Property*, para. 695, note 10.

⁷⁴ T. B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962), 838–9.

⁷⁵ *Institutions*, I.14.5.

⁷⁶ Reid, *Law of Property*, para. 695.

⁷⁷ *Institutions*, I.14.5, the emphasis is my own.

⁷⁸ Carey Miller with Irvine, *Corporeal Moveables*, 179. See also Carey Miller, 'Mala Fide Transferees', 324; and idem, 'Good Faith', 109–10.

⁷⁹ Paton, *Hume's Lectures*, 283; Reid, *Law of Property*, para. 695.

⁸⁰ (1860) 22 D 1082, 1089.

The crucial element to recognise in each of these treatments is that the second purchaser is penalised because they are aware of the seller's fraud and, in choosing to register regardless, are complicit in that fraud. Adherence to this analysis means that it is off-point to talk about, for instance, knowledge falling short of fraud. To do so is to confuse the elements involved. Knowledge need not *consist* of a fraudulent act, for the knowledge *itself* is what invokes the fraudulent association. The criticisms set out above base their search for a fraudulent aspect solely within the question of what constitutes bad faith. However, for our purposes, it matters not in what way P2 has come to acquire *mala fides*, but only that they are now treated as having knowledge of the fraud and they proceed nonetheless. The confusion is arguably attributable to the blurring of two separate issues. On the one hand, there is the question of what constitutes bad faith – and this can indeed lack any sort of identifiable act of typical fraud. On the other hand, however, there is the result of meeting this bad faith test and being found to have knowledge, however so constituted. Once P2 has this status and continues with the transaction, they partake in fraud. The *composition* of P2's bad faith should not be confused with the *consequence* of that bad faith. As summarised by MacLeod, 'the fraud is still there: the seller knows of the prior right and sells anyway. *Mala fides* is not watered-down fraud; *mala fides* is knowing that the fraud is happening'.⁸¹ To this extent, then, the author would submit that Reid is justified in finding that 'the original analysis based on fraud remains correct'.⁸²

Nonetheless, this 'partaker' analysis is not without challenge. The authors of *Professor McDonald's Conveyancing Manual* question Reid's belief that 'the second purchaser is penalised because he [...] is a participant in the seller's attempt to defraud the first purchaser'.⁸³ The apparent focus on the seller's fraudulent actions is interpreted by the critics as a suggestion 'that the application of the doctrine is based on the conduct of the seller'.⁸⁴ Were this indeed what the partaker analysis proposed, such a theory would surely be flawed. The seller's conduct cannot form the basis of the rule, for if P2 were in good faith then the acquired title would be valid, despite the seller acting in the same fraudulent manner in both circumstances. A basis which places the seller at its centre cannot be correct and such a notion was expressly

⁸¹ MacLeod, 'Fraud on Creditors', 127.

⁸² Reid, *Law of Property*, para. 695.

⁸³ Brand, Steven and Wortley, *McDonald's Conveyancing Manual*, para. 32.53.

⁸⁴ *Ibid.*, para. 32.52.

rejected in *Petrie v Forsyth*.⁸⁵ However, the quarrel that *McDonald's* text has with Reid derives from confusion over a matter of emphasis. What is at the heart of the partaker analysis is not the independent act of the seller's fraud, but the second purchaser's participation in it. The seller is guilty of fraud, in the broader sense, whenever he or she makes a double grant. However, it is only when P2 knows of this and chooses to partake that the offside doctrine can be applied. The partaker analysis therefore hinges entirely upon P2 and it is the conduct of this party on which the conceptual basis would found.

This theory not only stands up against existing criticism but, in the author's opinion, has further merit. That we penalise P2 for their participation arguably goes some way to indicate the motivation behind the rule; what mischief it sought to quell. The notion of deterrence may factor in here: if would-be second purchasers were aware of the offside goals rule then, on discovering a prior right, they will know that after expending energy and expense their title will nonetheless be subject to reduction. In finding that they are unlikely to benefit, they may be discouraged from participating and this could reduce the prevalence of fraudulent double sales. Perhaps this is something of a policy-based approach, for it informs us more of *why* we have the rule than *how* it operates in principle. More will be said on this distinction later.

Ultimately, fraud is one of the most persuasive of the proposed conceptual bases and accommodates easily the *Rodger (Builders)* scenario. Moreover, because fraud is thought to have constituted the original basis of the rule, then to find that the doctrine could still be justified by the partaker analysis is to find it to have derived from principles of an historical and ingrained nature. Such a conclusion would adhere to the author's argument that this is not some alien doctrine to be avoided and relegated, but that it is instead at home in our system. Having said this, however, it should be noted that a potential weakness is exposed when one goes on to apply fraud to the *Alex Brewster* scenario below.

(5) Fraud on Creditors

At this point, acknowledgment ought to be given to a variation of the fraud concept: 'fraud on creditors'.⁸⁶ This is the most recent of the modern concepts and is contended for by MacLeod in his valuable contribution to the offside goals debate. He proposes that the doctrine shares a base in common with the

⁸⁵ (1874) 2 R 214.

⁸⁶ MacLeod, 'Fraud on Creditors', 123 et seq.

actio Pauliana, thus expanding upon the link observed by Bankton.⁸⁷ MacLeod demonstrates persuasively that the situations are, in many ways, analogous.⁸⁸ However, whilst his theory cannot be given the full treatment it deserves within the confines of the current text, this discussion would respectfully depart from such a proposition. Firstly, the ‘fraud on creditors’ alternative is offered in response to the problematic nature of the ‘fraud as deceit’ proposal. Yet, as discussed, fraud as deceit is entirely competent – if by ‘deceit’ one means the author acting to deprive P1, and P2 participating in that act. Secondly, whilst it is admitted that there are similarities shared by the offside and insolvency doctrines, this is arguably more likely to be an example of convergence, rather than divergence. It seems to the author that although the doctrines may now present similar features, this is not *de facto* evidence that they evolved from a common ancestor. Granted, the prevailing principle is largely the same insofar as the central concern is that someone is being deprived of something to which they had a prior entitlement. However, that is a broad principle and some overlap between those mechanisms which uphold it is not wholly unexpected. In contrast to the width of such a principle, the offside goals rule and the *actio Pauliana* are two very specific and niche functions. Whilst MacLeod looks to dismiss the discrepancies between these concepts as being owed merely to a difference in context, it seems to the author that, in these circumstances, context is everything: each tool has evolved to deal with its unique situation and it is this which has sculpted their operation.⁸⁹ Although there may be lessons to be learned from the insolvency aspect, the author would be hesitant to go so far as to say that this is the principle which has been underpinning the offside doctrine all along.

(6) The Abstract Approach

The final theory to be considered in this work is the ‘abstract approach’ conceived by Carey Miller.⁹⁰ This premise draws upon certain fundamental principles in the derivative acquisition process. It highlights the two-stage

⁸⁷ Bankton, *Institute*, I.259.65; I.264.84–5; I.265.90, cited in Anderson, *Assignment*, para. 11.17.

⁸⁸ For instance, ‘both rules involve actions by a debtor which render him incapable of fulfilling his obligation and thus frustrate the creditor’s hopes of recovery’, as stated in MacLeod, ‘Fraud on Creditors’, 124.

⁸⁹ These discrepancies were first noted in Anderson, *Assignment*, para. 11.17.

⁹⁰ This label was coined in Wortley, ‘Double Sales’, 310. The theory itself was first put forward in Carey Miller, ‘Good Faith’; developed in *idem* with Irvine, *Corporeal Moveables*, para. 8.31; and expanded on in *idem*, ‘Centenary Offering’.

model which underpins the Scots law system of transfer, featuring both a preliminary contractual stage and subsequent delivery stage.⁹¹ The latter is most commonly associated with ‘some positive act’ such as registration.⁹² The abstract approach, however, would direct our attention towards the counterpart element of intention. In order for transfer to take place the transferor must intend to be divested and the transferee must intend to be invested. Hence, in the absence of the requisite *animus*, there can be no derivative acquisition – even where the act of delivery itself has been completed.⁹³ Therefore, the ‘starting point must surely be recognition that the fundamental controlling aspect is intention’.⁹⁴ This perspective is endorsed in South African commentary, where great emphasis has been placed on the role of intention in the abstract model.⁹⁵ The implication for the offside goals context is that P2’s act of registration is not, in itself, indicative of the character of the acquired title. On this basis, Carey Miller doubted the quality of P2’s *animus acquirendi*, arguing that bad faith gives rise to a defect owing to insufficient intention to acquire a perfect title. Crucially, the abstract approach does not dispute that title has passed. The careful distinction made is that the intention, though sufficient for transfer, is lacking full integrity and P2 is therefore capable of receiving only a voidable title.

Where fraud presents something of a policy approach, then, the abstract theory is a matter of pure principle. It demonstrates the technical operation of the rule, relying on fundamental principles of the Scottish transfer system. To identify the offside goals rule as founding on this basis would be to view it as inextricably woven into the core of our property model. One might even go so far as to state that if the rule is underpinned by these principles then it does not undermine our system, but functions *because* of it. In addition, it

⁹¹ The distinction between these stages is also emphasised in the South African system, as discussed in van der Merwe, ‘Things’, 252; and further detailed in van der Merwe and Jacques E. du Plessis (eds), *Introduction to the Law of South Africa* (The Hague, 2004), 214.

⁹² Reid, *Law of Property*, para. 613.

⁹³ Ibid.

⁹⁴ Carey Miller, ‘Centenary Offering’, 114.

⁹⁵ Van der Merwe, ‘Things’, 273 notes that *Prophitius and Another v Campbell and Others* 2008 (3) SA 552 (D) explained the doctrine in terms of the abstract system of transfer by focusing on the real agreement required for transfer, and this decision was upheld in *Du Plessis v Prophitius and Another* [2009] 4 All SA 302 (SCA). Attention is also given to the abstract nature in *Mvusi v Mvusi NO and Others* 1995 (3) SA 994 (Tk); *Legator McKenna Inc and Another v Shea and Others* [2009] 2 All SA 45 (SCA), particularly per Brand JA, para. 22. See also Carey Miller, ‘Centenary Offering’, 101–2.

seems entirely reasonable to the present writer that a rule which is predicated on a party's knowledge would have a consequently detrimental impact on that party's intention; both being connected mental elements.

However, Wortley argues that this thinking 'cannot explain the positive right [of interdict] given to the first purchaser prior to completion of the second purchaser's title'.⁹⁶ If P1 has the ability to reduce P2's title only because of the latter's inadequate intention upon transfer then this seems incapable of explaining a right that exists before that transfer has even taken place. Carey Miller, however, defended that since 'title passes where the parties so intend, [this] involves potential prejudice to the first purchaser'.⁹⁷ The second sale to P2 means that the potential harm to P1 will come to fruition if no interdict is granted. This entitles P1 to take preventative measures; the law does not require that he or she sits idle whilst awaiting the injury. The interdict can therefore be explained simply as an 'anticipatory remedy'.⁹⁸

The challenges do not cease there, however, and MacLeod has recently branded Carey Miller's understanding of intention 'unusual'.⁹⁹ He argues that 'both seller and second buyer wish the transfer to take place and, on a conventional view of intention, that would be enough'.¹⁰⁰ MacLeod implies that there is sufficient intention to permit transfer of a fully valid title. Such a stance is based on his belief that knowledge of a wrong does not affect intention in such a way as to render it defective.¹⁰¹ Seeking to demonstrate this, MacLeod provides the example of a poacher, who has 'sufficient *animus acquirendi*, although he knows that he is committing a crime'.¹⁰² However, that which would provide the poacher with a valid title is the same thing that undermines MacLeod's premise: the poacher acquires through original acquisition. He gains ownership over something *res nullius* through *occupatio*. This is not a comparable situation to derivative acquisition. If the party took something which was not unowned, but belonged to another, he would no longer be a poacher, but a thief. His title would be void and the owner would have the right to recover the property.

Analogy aside, MacLeod's basic concern still stands. If the abstract approach is to remain a viable candidate then it must demonstrate that

⁹⁶ Wortley, 'Double Sales', 313.

⁹⁷ Carey Miller with Irvine, *Corporeal Moveables*, 181.

⁹⁸ *Ibid.*

⁹⁹ MacLeod, 'Fraud on Creditors', 118.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

intention and bad faith can interact in the proposed way. Because ‘a transfer of ownership involves acts of intention by both parties, [this] necessarily means that the transaction can be affected by bad faith’.¹⁰³ If we understand this intention as forming a ‘real agreement’ that property should pass then that agreement is subject to knowledge.¹⁰⁴ This line of thought would oppose MacLeod’s assertion that the mere wish of seller and buyer for the transfer to take place would be sufficient to give rise to a valid title. Indeed, there are known circumstances wherein parties possess sufficient intention to pass title and yet the title received by the transferee is a defective one. Let us consider acquisition arising from a voidable title.¹⁰⁵ The first purchaser, B, obtains fraudulently from the first seller, A, through misrepresentation and acquires a subsequently voidable title. B then moves to sell the property and pass title to the next purchaser, C. If C knows of the fraudulent inducement and is thereby aware of the defective title then C will acquire subject to that same defect. Hence, whilst there may be *prima facie* intention to give and receive, this will not necessarily result in a valid title. Carey Miller would propose that C’s knowledge of the wrong means that he or she has insufficient intention to acquire an unimpeachable title.¹⁰⁶

Nonetheless, one might counter this and argue that the voidable title received by C is unrelated to intention but is instead a straightforward application of the *nemo plus* principle: C cannot receive a valid title because B did not have one to give. The offside goals situation would stand in contrast to this, for the transferor’s title is not defective. Instead, the seller has the controlling right of disposal and an absolutely valid title to pass. If it is solely the *nemo plus* doctrine that governs the voidable result in the misrepresentation instance then the double sales scenario is not comparable. However, there seems to be more to it than this. If C were in good faith when taking transfer of the voidable title then he or she would receive a valid title – regardless of *nemo plus*.¹⁰⁷ The factor that determines the status of the acquired title is therefore knowledge. Bad

¹⁰³ Carey Miller with Irvine, *Corporeal Moveables*, 173.

¹⁰⁴ This ‘real agreement’ notion is explained in greater depth by Carey Miller, *ibid.*, and in *idem*, ‘Centenary Offering’, 114. For more on the ‘*realvertag*’ concept, see van der Merwe and du Plessis, *Introduction to the Law of South Africa*, 215; and van der Merwe, ‘Things’, 261–3.

¹⁰⁵ Carey Miller, ‘Good Faith’, 106.

¹⁰⁶ *Ibid.*, 106–7.

¹⁰⁷ Reid, *Law of Property*, para. 616: ‘if the property has been passed to a third party before the transfer is set aside it cannot be recovered except where the third party has notice’.

faith acts as the controlling principle. The point of distinction is merely the focus of the knowledge, and 'both [scenarios] are concerned with receiving delivery subject to knowledge which is taken to affect the right to acquire'.¹⁰⁸ In each instance there is sufficient *animus* for title to pass, but knowledge of the wrong renders that intention flawed and thereby prevents the acquirer from taking a perfect title.¹⁰⁹

It seems, then, that there is evidence that an abstract view may be capable of explaining the basis of P2's voidable title. Carey Miller's approach therefore constitutes one of two theories which remain persuasive and provide valuable insights into the foundations of the offside rule. Fraud presents a policy-based doctrine that has developed in our system over many centuries, whilst the abstract approach depicts a principled rule, intertwined with the central principle of separation of contract and conveyance. Both analyses show the rule as a doctrine rooted in Scots property law; not as something which would seek to destroy its most cherished principles. As this work goes on to consider the bases in light of the apparent extension of the rule, one is careful to assess the question of scope based solely on the criteria set by these credible concepts, and not according to the unjustified concern that the rule 'has no safe place to operate in Scots property law'.¹¹⁰

Alex Brewster and the 'Length' of Scope

(1) The Expansion

The true conceptual foundation of the offside doctrine is difficult to ascertain even in the orthodox *Rodger (Builders)* scenario. This is exacerbated when the facts are altered somewhat, as in *Alex Brewster and Sons v Caughbey*.¹¹¹ This case questioned at what point in the transfer process bad faith was required. Prior to this, it had been assumed that bad faith would engage the offside goals rule only if it were present at the time of P2's contracting. *Alex Brewster*, however, asked whether knowledge arising subsequent to the contract, but prior to conveyance, may also suffice. Whilst the second purchaser in *Alex Brewster* was ultimately found to be in bad faith at the time of contract, Lord Eassie

¹⁰⁸ Carey Miller, 'Good Faith', 109.

¹⁰⁹ Carey Miller, 'Centenary Offering', 114: 'the latent prerequisite of intention is flawed by reason of knowledge of the prior entitlement of another to the thing concerned'.

¹¹⁰ Xu, 'Offside Goals Rule', 67.

¹¹¹ 2002 GWD 15-506.

nonetheless went on to consider the plausible outcome had this not been the case. He claimed that *Rodger (Builders)* was ‘clear authority’ for the fact that bad faith arising any time prior to registration would allow reduction by P1.¹¹² If correct, this might be viewed as an expansion to the rule’s scope, for it would provide a longer period in which P2 could fall victim to the doctrine. Consequently, Lord Eassie’s remarks have proved highly controversial and have reinvigorated the debate over the doctrine’s appropriate boundaries. It has been said that such an application would be ‘inconsistent with principle and prior case law’, and that the implications are ‘frankly, undesirable’.¹¹³ Yet, despite the almost unequivocal rejection of Lord Eassie’s musings, the present author cautions against dismissing them so hurriedly. Whether the criticisms of the *Alex Brewster* application are substantiated depends on what one considers to be the underlying rationale of the rule. Let us consider the conclusions that would be arrived at via the theories introduced in the last section of this article above.

(2) The Equity and Publicity Bases

In the traditional context an approach based on equity would hold that P1 ought to be protected against the injustice caused by P2. The marked difference between this *Rodger (Builders)* application and the *Alex Brewster* scenario, however, is that to favour P1 would potentially be just as inequitable to P2. Where the second party contracts in the same good faith as P1, how could they be any more undeserving than the first party?¹¹⁴ Moreover, P2 may suffer additional disadvantages in the *Alex Brewster* situation: whilst P1 remains at the preliminary contractual stage, P2 may have taken further steps in the run-up to delivery, perhaps selling their own property, and may have done so in good faith. Hence, on something of a utilitarian approach, depriving P2 of title could inflict greater inequity than that caused to P1. *Alex Brewster* equally conflicts with Wortley’s approach, for P2 contracts in just as much ‘faith on the register’ and with equal adherence to the publicity principle as P1. If one subscribed to either of these conceptual theories, then, the conclusion

¹¹² Ibid., para. 73 per Lord Eassie. Though Lord Eassie presents these remarks as a clear consequence of the Inner House *Rodger (Builders)* decision, there is a question as to whether the comments relied upon were themselves obiter, and whether the matter was therefore open to argument. See Wortley, ‘Double Sales’, 296.

¹¹³ Anderson and MacLeod, ‘Interfering with Play’, 95; Rennie, ‘Marching Towards Equity’, 192. For further criticism see also Xu, ‘Offside Goals Rule’, 58–9; and Anderson, *Assig nation*, para. 11.30.

¹¹⁴ Wortley, ‘Double Sales’, 307.

might be that *Alex Brenster's* incompatibility indicates an unjustified extension of scope. Indeed, Rennie would argue that, taking into account fairness, 'the decision in *Alex Brenster* [...] is wrong and that the critical time at which good faith must be judged is the date of conclusion of the second contract'.¹¹⁵ Equally, Wortley would advise that 'the obiter remarks of Lord Eassie [...] are too broadly expressed and should not be followed in future decisions'.¹¹⁶

However, this discussion would, with respect, take a contrary stance. It is admitted that one ought not to discount these theories solely because of their friction with *Alex Brenster*. After all, the scope should fit the basis, not the other way around. Yet, even whilst avoiding any such 'reverse-engineering', two problems arise for denying *Alex Brenster* on these grounds. Firstly, both bases are flawed even in relation to the traditional scope, as set out above. Secondly, there is evidence that *Alex Brenster* is in fact appropriate, as will be discussed further below. The weaknesses of equity and publicity as concepts, combined with the strengths of the alternative arguments allowing for *Alex Brenster*, lead the author to conclude that limiting the scope on these notions would be misguided.

(3) Fraud

Whilst the aforementioned theories were already deemed somewhat unsound in the author's determination, fraud remains a strong contender. Nonetheless, as identified by Carey Miller, *Alex Brenster* poses a problem for the fraud-partaker analysis: if P2 acquires bad faith only shortly before registering, then this does not seem to 'amount to participation in the fraud in any meaningful sense'.¹¹⁷ Hence, there may be a question over whether it is ethical to penalise P2 for participation, where that participation is so minimal. However, one should not be too hasty in doling out their sympathies to P2. It must be remembered that the *Alex Brenster* second purchaser still makes the choice to partake insofar as they know of the prior right and proceed to register regardless. Granted, this is done with less ill intent than if they had schemed with the seller since the point of contracting, but bad faith is not about such malice – despite what its '*mala fides*' tag may suggest.¹¹⁸ Simply stated, bad faith is knowledge of the prior right.¹¹⁹ The second purchaser either has knowledge,

¹¹⁵ Rennie, 'Marching Towards Equity', 187.

¹¹⁶ Wortley, 'Double Sales', 315.

¹¹⁷ Carey Miller, 'Good Faith', 109.

¹¹⁸ It is no longer necessary for there to be 'an element of deceit or chicanery', as provided for by *Ridler v Gartner* 1920 TPD 249, 259–60.

¹¹⁹ Or even less than actual knowledge, as outlined previously.

or they do not; they are either in bad faith, or they are not. There are no varying degrees of ‘badness’. If they are in bad faith, they then choose whether or not to partake in the fraud. Fraud, as insisted by Reid, requires only the breach of a prior obligation and thus does not depend upon a sense of longevity or holistic participation. To talk about someone partaking in a ‘meaningful sense’ is arguably to imply, incorrectly, that P2 must be part of some overall event. Instead, we ought simply to assess in principle whether someone does or does not, before they register, know that they are jumping the queue and choose to do so anyway. If they do, this is sufficient to mark them as a partaker. South African commentators Professor Exton Burchell and Jacob Scholtens would likely agree with such an approach, for their belief is that ‘any purchaser who takes transfer while knowing of the previous sale is *particeps fraudis* with the seller’.¹²⁰ Perhaps, then, fraud may provide sufficient justification for *Alex Brenster* and would accommodate these supposedly wider limits. Nevertheless, it remains the author’s concern that whilst this concept may tell us *why* we penalise P2, it tells us little of *how* this is actually given effect. Whilst we may say that, as a matter of policy, those who partake in fraud are only to receive a voidable title, there is an omission here in terms of the principles that would cause this to manifest. Though attractive in many regards, the fraud analysis falls somewhat short of a comprehensive explanation.

(4) The Abstract Approach

Despite the apparent difficulties in embracing *Alex Brenster*, the question of its appropriateness is arguably a remarkably simple one. The solution requires little more than an acknowledgment of our two-stage system of transfer. Because it is only at the stage of delivery that the legal act of transfer takes place (*traditionibus non nudis pactis dominia transferuntur*) this ‘necessarily leaves open the possibility that a second purchaser [...] will learn of the first purchaser’s priority at some point before acquisition’.¹²¹ In other words, the inevitable result of having a defined conveyance stage is that there is a period before completion during which it is entirely possible that P2 will acquire bad faith.

¹²⁰ E. M. Burchell, ‘Successive Sales’ in Ellison Kahn (eds), *Select South African Legal Problems: Essays in Memory of R G McKerron* (Cape Town, 1974), 40–6, 45, affirming J. E. Scholtens, ‘Double Sales’, *South African Law Journal*, 70(1) (1953), 22–34, 33.

¹²¹ Carey Miller, ‘Centenary Offering’, 109. Roman law influence has resulted in an emphasis on delivery as a prerequisite for the transfer of ownership in both the Scottish and South African systems. On the latter, see *idem*, 109; and van der Merwe and du Plessis, *Introduction to the Law of South Africa*, 201.

Knowledge obtained after the transfer stage is not relevant.¹²² Because this ‘cut-off’ point exists naturally in our law we need not artificially make it the contractual stage. This perspective calls into question whether *Alex Brewster* is in fact an expansion at all. Given that the delivery stage sets the limit on the relevance of bad faith, then knowledge arising any time prior is arguably within the orthodox ambit of the doctrine. The contrast between this conclusion and the belief of alternative commentators that *Alex Brewster* is not justified at all demonstrates how dramatically one’s view of scope can be influenced by their rationalisation of the rule. Carey Miller’s ‘abstract approach’ is to be given further credit on the basis that it is consistent with Lord Eassie’s remarks.¹²³ His lordship’s observations come from within a significant and recent case, and legal analysis arguably ought to fit with authority to as great an extent as possible. The majority of South African commentators would likely support Carey Miller’s conclusion, for in that domain it has been ‘accepted that knowledge at the time of transfer is sufficient for the application of the doctrine’.¹²⁴

(5) The Dual Approach

If the abstract theory provides clearly those principles on which the ‘length’ of scope is set, perhaps we ought to cast aside fraud and concentrate solely on this approach. However, for an author with somewhat legal-historical learnings, dismissing the roots of the rule so glibly does not sit well. If there is evidence that the rule emerged from fraud, can we say that it has now mutated so greatly as to be unrecognisable and no longer related to this origin? It does not seem so, and indeed recent case law has made the connection back to

¹²² Reid, *Law of Property*, para. 699; *Institutions*, 14.40.21: ‘supervenient knowledge will not prejudice them’.

¹²³ The compatibility of Carey Miller’s argument is noted also in Anderson, *Assignment*, para. 11.24, note 78, though Anderson would disagree with the theory itself.

¹²⁴ Van der Merwe, ‘Things’, 264. That knowledge acquired any time prior to the contract would be sufficient to engage the rule has been argued in McKerron, ‘Purchaser with Notice’; Scholtens, ‘Double Sales’; idem, ‘Difficiles Nugae – Once Again Double Sales’, *South African Law Journal*, 71(1) (1954), 71–86; and D. G. Kleyn and A. Boraine, *Silberberg and Schoeman’s The Law of Property* (3rd edn, Durban, 1993). However, G. A. Mulligan, ‘Double Sales and Frustrated Options’, *South African Law Journal*, 65(4) (1948), 564–77; and idem, ‘Double Sales – a Rejoinder’, *South African Law Journal*, 70(1) (1953), 299–307, countered that bad faith was relevant only at the time of contracting. Nonetheless, Burchell, ‘Successive Sales’, 45, concludes that the ‘McKerron-Scholtens view is preferable to that of Mulligan’.

fraud.¹²⁵ Moreover, the fraud concept does fit with the traditional scenario and, as suggested above, may even comply with *Alex Brewster*. If this analysis is retained alongside the abstract approach then we are presented with two highly credible theories – one based on the birth and growth of the rule, and the other emphasising the nature of the system it exists within. The intuitive next step may be to pit these concepts against each other and determine which we ought to favour. However, what the present author would ask is: must we champion only one?

The two bases are natural allies. Carey Miller spoke highly of Reid's work throughout his own discussion, even making use of the 'partaker' aspect.¹²⁶ Arguably, each theory bolsters the other, representing two sides of the same coin. In isolation, both lack an element: fraud gives us the origin of the rule and the policy notions behind it, but is less clear on its actual mechanism. The abstract approach is excellent on the technical, principled aspects and demonstrates how the rule works, but tells us little of why this ought to be so or what the rule seeks to achieve. Combined, this 'dual approach' can inform us both of why we have the rule and how it is put into operation. Moreover, these concepts arise out of native principles and thus further the author's insistence that the offside goals rule is not something incongruous with our property law, but is born from and shaped by that very model. It is humbly suggested, then, that the rule can be explained as a policy-driven tool for penalising partakers of fraud, where the scope for doing so is set by the principles of our abstract system.

Gibson and the 'Width' of Scope

(1) Options and Rights of Preemption

Having set out proposals for the appropriate 'length' of the rule's scope, what can be said of its 'width'? The doctrine has been found to apply in situations beyond the classic double sales scenario. Of these alternatives, debate centres mostly around options to purchase and personal rights of preemption.¹²⁷ The former requires the seller to give the agreed party an 'option to purchase

¹²⁵ *Burnett's Trs v Grainger* 2004 SC (HL) 19, para. 142 per Lord Rodger.

¹²⁶ Carey Miller, 'Good Faith', 109; and idem, 'Mala Fide Transferees', 322–3.

¹²⁷ For options see *Davidson v Zani* 1992 SCLR 1001; and for preemptions, *Matheson v Tinney* 1989 SLT 535 and *Roebuck v Edmunds* 1992 SLT 1055.

the house in advance of resale to a third party',¹²⁸ whilst the similar right of preemption confers a 'right to buy back property at a time when the current owner comes to sell'.¹²⁹ These rights were brought to the forefront of academic thought by the decision in *Gibson v RBS*.¹³⁰ Here, the pursuer exercised an option to purchase but, prior to completion, the seller granted a standard security to the defender. It was argued that because the defender knew of the option, they were in bad faith and the offside goals rule applied.

The dispute over whether the doctrine ought to extend to an option or preemption scenario emanates from what will here be termed the 'Wallace requirement'. Since the case of *Wallace v Simmers* it had been taken for granted that in order for the rule to be engaged, P1's prior right had to be one which was capable of being made real.¹³¹ So fundamental was this need for a *jus ad rem acquirenda*, that it had once formed a fourth leg of Reid's requirements.¹³² However, *Gibson* questioned whether such a limitation remained relevant and, indeed, whether it had ever truly been a substantive requirement at all.¹³³ Before considering the relationship between this *Wallace* requirement and rights of option and preemption, we ought to distinguish exercised options and asserted preemptions from their unexercised counterparts. Lord Emslie was arguably correct to state that it is 'hard to differentiate [between] an

¹²⁸ *Stair Memorial Encyclopaedia*, Reissue, 'Housing', para. 78.

¹²⁹ *Stair Memorial Encyclopaedia*, vol. 18, 'Property Part I – General Law', para. 698. Xu, 'Offside Goals Rule', 64–5, considers the different types of preemption rights; Rennie, 'Marching Towards Equity', 190–1 discusses the 'real burden' right of preemption. The following discussion considers only the personal right of preemption.

¹³⁰ 2009 SLT 444.

¹³¹ 1960 SC 255. See, in particular, 259 per Lord President Clyde: 'it is clear that the exception only operates where the right asserted against the later purchaser is capable of being made into a real right'. On the general acceptance of this as a requirement, see Rennie, 'Marching Towards Equity', 188; Brand, Steven and Wortley, *McDonald's Conveyancing Manual*, para. 32.55; and Anderson and MacLeod, 'Interfering with Play', generally.

¹³² Reid omitted this requirement from his work in *The Stair Memorial Encyclopaedia* in order to incorporate *Trade Development Bank v Warriner and Mason (Scotland) Ltd* 1980 SC 74. Note, however, the earlier text of Reid, 'Standard Conditions', 191, wherein it is stated that '*Warriner and Mason* is of doubtful authority and should not be relied upon'. See also Brand, Steven and Wortley, *McDonald's Conveyancing Manual*, para. 32.55, where it is suggested that the *Warriner* case stands alone and is not a true illustration of the doctrine.

¹³³ There is a suggestion by Lord Emslie in *Gibson* at 45 that the test was merely a response by the judges to the particular facts of *Wallace* and was not intended as a requirement of universal application. However, Anderson and MacLeod, 'Interfering with Play', 95, would 'suspect that this interpretation might have surprised the court in *Wallace*'.

exercised [...] option to purchase heritable subjects, or an asserted right of preemption for that matter, from completed missives of sale'.¹³⁴ Anderson and MacLeod would agree that where the option-holder has exercised the right, and is therefore effectively standing in the traditional P1's shoes, the rule ought to apply as normal.¹³⁵ The outcome is far less clear, however, where these rights remain unexercised. The current discussion will consider this less explored and more uncertain question. The Lord Ordinary seemed 'to suggest that even an unexercised option or preemption would be enough to bring the offside goals rule into play'.¹³⁶ Based on the principles which form the 'dual approach', would it be appropriate for the scope to extend in this way?

The main argument against the inclusion of an unexercised option is that it is one step removed from the paradigm, being only an option to get into the classic P1 position.¹³⁷ Because these unexercised rights are 'two stages back from a real right', they do not come within the *Wallace* requirement.¹³⁸ However, it would be entirely superficial to cease our discussion here and conclude that unexercised options ought to be excluded. This is because although such rights admittedly do not satisfy *Wallace*, one must consider whether there is anything in the conceptual basis which necessitates this *Wallace* limitation in the first place. Nevertheless, in the present author's opinion there are strong reasons both in policy and in principle for maintaining the *Wallace* requirement and thereby rejecting unexercised options and preemptions. From an overarching perspective, there is the desire to maintain certainty and clarity in our system, as previously discussed. If the scope is left too wide or is too loosely defined then this will contradict these policy goals and 'result only in commercial uncertainty'.¹³⁹ The reasoning employed by Lord Emslie in *Gibson* was vague and he concluded simply that 'the bad faith exception may be applied in a wide

¹³⁴ *Gibson*, para. 36.

¹³⁵ Anderson and MacLeod, 'Interfering with Play', 97.

¹³⁶ Rennie, 'Marching Towards Equity', 191.

¹³⁷ Webster, '*Gibson v RBS*', 527. Note also the proposition in Andrew J. M. Steven, 'Options to Purchase and Successor Landlords', *Edinburgh Law Review*, 10(3) (2006), 432–7, 436, that the doctrine may not be applicable because an unexercised option is more of a power than a right. However, the exact characteristics of an option are as yet undetermined and to begin an exploration of how they should be defined would risk straying too far from our current focus. As such, let us presume the more difficult scenario: that options are indeed personal rights, not mere powers, and that they cannot be excluded from the scope of the offside goals rule so readily.

¹³⁸ Rennie, 'Marching Towards Equity', 189.

¹³⁹ Anderson and MacLeod, 'Interfering with Play', 95.

range of different circumstances'.¹⁴⁰ In presenting no particular formulation of his own, he 'created considerable uncertainty regarding the personal rights protected by the rule [and] potential purchasers [...] need certainty'.¹⁴¹ Furthermore, this ambiguity as to scope attracts a great deal of criticism to the rule as a whole, thereby tarnishing what could otherwise be a sophisticated and valuable mechanism. Maintaining the *Wallace* requirement would provide much-needed structure to the doctrine and allow it to harmonise with a system that 'favours bright line rules'.¹⁴² Nonetheless, is the desire for narrowness for certainty's sake all that can be put forth in favour of *Wallace*? Whilst it may be that a limit is craved, to draw the line at this particular point for no other reason would be arbitrary. We must therefore look beyond policy considerations and ask whether there is anything in the underlying principles of the rule which might establish the inappropriateness of a broad width.

When employing the 'dual approach' it is the abstract component which provides the operative principles for determining the rule's application. Thus, if the 'length' of the rule is determined by the nature of our transfer system, then its 'width' ought to be defined by the same. The focal point is therefore the fundamentals of the two-stage derivative acquisition model. A personal right capable of being made real is tethered to this system. Its holder is operating within this realm, in that they are involved in the transfer process – even if at that moment they are only at the preliminary contractual stage. A right that is not capable of being made real, that is purely personal, is detached from this process. Yet it is that very transfer model which defines the rule's scope and is at the core of its conceptual basis. Why should the holder of an unexercised option or preemption benefit from a doctrine tied so greatly into this system, when they themselves are operating outside of it? Furthermore, one ought to recall that P2 is capable of being penalised for bad faith arising only moments before registration and that this is owed to a strict application of the two-stage mechanism and the limits inherent in its set-up.¹⁴³ It seems unjustifiable that P2 should participate in the transfer process, and even be potentially subject to a harsh penalty because of that system, and then be subject to a claim from

¹⁴⁰ *Gibson*, para. 49.

¹⁴¹ Anderson and MacLeod, 'Interfering with Play', 96.

¹⁴² Rennie, 'Marching Towards Equity', 187.

¹⁴³ Although the author continues to use the second purchaser 'P2' label in this context, it is to be remembered that there is no first purchaser here, as such – only the holder of an unexercised option or preemption. Nonetheless, the 'P2' tag will continue to be used so that clear comparisons may be made between P2 under the accepted scope of the doctrine and the would-be position of this party in the proposed scenarios.

someone who is entirely uninvolved in that process. Additionally, there is a wealth of support in the literature for maintaining the *Wallace* requirement. The *Conveyancing Manual* notes that the qualification ‘is now well established [...] and indeed in *Optical Express (Gyle) Ltd v Marks and Spencer plc* – one of the recent cases on the doctrine – the approach in *Wallace v Simmers* seems to be endorsed’.¹⁴⁴ This appears to be supported by South African judicial treatment, where it has been found that the first party must have ‘if not a real right at least a right *in personam* to acquire a real right’.¹⁴⁵

Nonetheless, critics may argue that, regardless of the finer details, this is nonetheless a *prima facie* ‘queue-jump’ scenario and the offside goals rule ought to be used to remedy it. Yet, even when taking principles at their most basic, the author would query such a response. How could the actions of P2 amount to ‘jumping the queue’, if the option-holder is not in the queue to begin with? Rights of option and preemption give only an opportunity to join the queue and so, as long as they remain latent, the holder is not progressing through the stages of transfer and is therefore not in line to receive the real right. In fact, the holder of such rights may not intend on ever joining the queue: as is implicit in the nature of an option, it may be declined. To allow such a disassociated right to trigger a rule which is based on a strict association with the transfer model would be nonsensical. If the holder chooses to exercise the option and step in line behind the owner, S, then the rule will apply should a bad faith second party interfere. What it does not do, however, is allow the option-holder to mill around, beyond the queue, where the second party’s knowledge is that the option-holder *could* join the queue, but *has not*. The uncompetitive nature of the unexercised option equally has implications for the second party’s *animus acquirendi*. The conceptual basis provides that P2’s title is voidable because they have insufficient intention to receive a perfect title. Where the prior right does not meet *Wallace*, it does not seem that the second party’s awareness of that right could taint their intention in the same way. This would amount only to knowledge that nobody else was in the process of acquiring the property and that, if anything, the purchaser ought to hurry in their endeavours to ensure that it remains unencumbered. Support for this is to be found in judicial comment, with Lord Low remarking that, ‘assuming [P2] knew of

¹⁴⁴ Brand, Steven and Wortley, *McDonald’s Conveyancing Manual*, 667.

¹⁴⁵ *De Jager v Sisana* 1930 AD 71, 74 per Curlewis JA; although, as will be seen, a South African commentator would not necessarily come to the same ultimate conclusion as the present author does.

the obligation, [he] knew also that it did not affect the lands'.¹⁴⁶ Equally, the literature has provided that 'whether or not [P2] knew of the personal right he can deliberately ignore it'.¹⁴⁷ It would therefore be inappropriate for the offside goals rule to extend to unexercised options and rights of preemptions.

However, this outcome is to be contrasted with the South African line of thought. Whilst the southern system has largely supported the author's earlier analysis, it would depart here. Case law on the counterpart has applied the doctrine of notice to unexercised options and rights of pre-emption.¹⁴⁸ This followed a debate over whether frustration of an unexercised option, such as through alienation of the property, was to be considered a breach of a prior obligation. This question has been a source of contention in both jurisdictions and the Scottish conclusion remains unreached. Whilst *Davidson v Zani* held that an option was binding on its grantor, the later case of the *Advice Centre for Mortgages Ltd v McNicoll* criticised such an approach.¹⁴⁹ However, Webster would argue in favour of *Davidson*, observing that 'the grantor of an option is not generally free to transfer the property to another'.¹⁵⁰ South African analysis would concur that 'the grantor of the option is obliged [...] to refrain from doing anything to frustrate the creation or effective operation of the [option]'.¹⁵¹ On the basis that alienation of the property by S to P2 is a breach of P1's unexercised option, and where P2 knew of this breach, the doctrine is seen to apply as per normal. This seems to undermine the author's current argument. Yet this discussion would both agree with this breach conclusion and simultaneously retain the above stance. For, whilst frustration of the unexercised option may indeed be a breach, the offside goals rule is not 'a rule for visiting the consequences of one person's breach of contract on another'.¹⁵²

¹⁴⁶ *Morier v Brownlie and Watson* (1895) 23 R 67, 74, cited in MacLeod, 'Fraud on Creditors', note 15.

¹⁴⁷ Henry, 'Personal Rights', 197.

¹⁴⁸ See, for example, *Le Roux v Odendaal* 1954 (4) SA 432 and the discussion in Dale Hutchinson and B. J. van Heerden, 'Remedies for Breach of an Option', *South African Law Journal*, 105(3) (1988), 547–52; as well as the examples noted in Burchell, 'Successive Sales', 46; Lubbe, 'Doctrine in Search of a Theory', note 74; and Webster, '*Gibson v RBS*', note 32.

¹⁴⁹ 1992 SCLR 1001; 2006 SLT 591 (OH), para. 47 per Lord Drummond Young; for a discussion of these cases see Webster, '*Gibson v RBS*', 527–28; and Steven, 'Options to Purchase', 436.

¹⁵⁰ Webster, '*Gibson v RBS*', 528. In addition, it is proposed in Steven, 'Options to Purchase', 437, that alienation could be seen as an 'anticipatory breach' of the unexercised option.

¹⁵¹ Hutchinson and van Heerden, 'Remedies', 548.

¹⁵² Webster, '*Gibson v RBS*', 527.

It is not a delictual or contractual doctrine which seeks to remedy all breaches, but is instead confined to its proprietary application. Whilst a right may indeed have been breached, the disassociated nature of that right, as outlined above, means that its contravention nevertheless does not bring it within the ambit of the rule. In other words, the rule does not fail to apply because of Reid's second requirement, for breach, but instead at the first requirement, for a prior right, because of the characteristics of that right.

Nevertheless, even if one were to conclude that the scope ought to be curtailed by the *Wallace* limitation, a key problem remains. The difficulty of interpreting the 'right capable of being made real' requirement has led some commentators to find it 'unsatisfactory because it is unclear'.¹⁵³ The ambiguity of this test led the Royal Bank of Scotland in *Gibson* to claim that only rights capable of being *immediately* made real were relevant.¹⁵⁴ Such a proposal was problematic because it would neglect, for example, a contract of sale with a future date of entry.¹⁵⁵ In the author's view, this interpretation of *Wallace* focuses too greatly on immediacy in terms of *time*, and fails to consider it in terms of *stages*. It is instead suggested that the rule ought only to apply to rights capable of a 'one-stage conversion' into a real right. For instance, where one has a personal right under missives to acquire property, registration would act as a 'one stage conversion of a personal right to a real right'.¹⁵⁶ On the other hand, an option will require exercise before it can convert to a contract of sale, and only then might one proceed with registration.¹⁵⁷ This 'one-stage conversion' test would ensure that there was a limit on the rule and provide it with identifiable and definable parameters. This would equally combat the thinking of Lord Emslie, who suggested that a broad interpretation of *Wallace* may still allow for unexercised options: after all, the option holder could exercise the option, enter into missives, register a disposition, and thereby does hold a right which is eventually capable of being made real. However, 'eventually' is the operative word here. What the author's 'one-stage conversion' approach would do is counter this outlook of longevity and prevent the rule from possessing so great a width as to incorporate any right which could ultimately be turned into something real.

¹⁵³ Xu, 'Offside Goals Rule', 61.

¹⁵⁴ *Gibson*, para. 15.

¹⁵⁵ Webster, '*Gibson v RBS*', 526.

¹⁵⁶ Rennie, 'Marching Towards Equity', 188.

¹⁵⁷ *Ibid.*, 189, refers to unexercised options as a 'contract to enter another contract'.

(2) Prohibition Against Alienation

This 'one-stage conversion' requirement ensures that rights covered by the doctrine are directly related to the transfer system and hence that their inclusion is appropriate in light of the conceptual basis. This test can then be applied to determine whether other scenarios fall within the scope of the rule. Let us take, for instance, rights of prohibition against alienation.¹⁵⁸ A party concludes a contract with a grantor which specifically prohibits the grantor from alienating certain property. If the grantor disposes that property to a third party who has knowledge of the prohibition then, so the argument goes, the rule should apply. However, is an independent contractual prohibition against alienation capable of a 'one-stage conversion' into a real right?¹⁵⁹ One is inclined to agree with Rennie's finding that if a prohibition were to be taken as a *jus ad rem acquirenda* then 'we are in uncharted waters and property rights are considerably less certain'.¹⁶⁰ Reid acknowledges this, stating that the right 'confers no rights [...] beyond the bare right to enforce the prohibition' and therefore the beneficiary of the prohibition 'has no real right in the property, actual or prospective'.¹⁶¹ Given this admission it is evident that, in applying the 'one-stage conversion' and *Wallace* tests, it would be inappropriate for the rule to extend to such rights. Although, somewhat surprisingly, Reid concludes to the contrary, finding that 'it is conceivable that the prohibition would be enforceable against a grantee who took in bad faith'.¹⁶² Nonetheless, he reaches this decision having doubted the necessity of the *Wallace* limitation.¹⁶³ For the above reasons argued in support of such a requirement, this discussion would depart from Reid on this point.

(3) Rights of Reduction

As a final example, this commentary turns to rights of reduction.¹⁶⁴ It is

¹⁵⁸ Lord Emslie in *Gibson*, para. 50 made reference to such a right, arguing that 'breach of an explicit prohibition against alienation should be sufficient to satisfy any further legal requirement'. See also Reid, *Law of Property*, para. 698, which raises the question of whether a prohibition falls within the scope of the rule.

¹⁵⁹ This 'stand-alone' contractual prohibition is to be distinguished from a prohibition against alienation which arises as an implied or express component of a right of reduction, discussed below.

¹⁶⁰ Rennie, 'Marching Towards Equity', 189.

¹⁶¹ Reid, *Law of Property*, para. 698.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, which states that 'it is not clear that [*Wallace*] advances a proposition which is valid for all other cases'.

¹⁶⁴ *Ibid.*, paras 692 and 698. Whilst this will be the final example set out in this work, it

thought that P1's right of reduction against P2 contains an implied obligation that P2 cannot alienate the property.¹⁶⁵ If P2 transfers that property to a third party, 'P3', and P3 knows of the breach of this implied obligation, should the offside goals rule apply to render P3's title voidable?¹⁶⁶ A breach of the implied prohibition has the consequence of frustrating the right of reduction. This situation must therefore be distinguished from the purely contractual prohibition, discussed above, for it is the breach of the right of reduction which the rule would look to found upon. According to our new principles for testing the scope, we must consider whether exercise of a right of reduction could, in one stage, create a real right. Unfortunately, the answer to this has been obscured greatly by the practical difficulties of registering a decree of reduction in the Land Register.¹⁶⁷ Because the 1979 Act went so far to protect the rights reflected therein, there was generally a 'denial of direct access to reduction'.¹⁶⁸ Assuming that P2 was still in possession of the property, the only way to give effect to the decree would be to seek rectification of the register on the constrained grounds of section 9(3)(a) of the 1979 Act.¹⁶⁹ Yet, despite the hugely problematic reality of the situation, success would nonetheless cause the Keeper to rectify the title. At least in theory, then, a right of reduction is capable of a one-stage conversion into a real right and thus ought to be covered by the offside doctrine. Even if the practical truth of the matter may have caused one to question this conclusion, such problems ought no longer to arise: the newly in-force Land Registration etc. (Scotland)

is to be noted that there had also been a question over whether the offside goals rule ought to apply in relation to a trust. However, this has been ring-fenced by statute: the Trusts (Scotland) Act 1961 s. 2 provides that where a trustee transfers trust property to someone other than the beneficiary, in breach of the trust, the title acquired by the grantee, even if in bad faith, is unimpeachable. For an interesting discussion on how this may affect a purchaser with a trust clause in his disposition, see James Chalmers, 'In Defence of the Trusting Conveyancer', 2002 SLT (News), 231–5.

¹⁶⁵ Reid, *Law of Property*, para. 692.

¹⁶⁶ *Ibid.*, paras 692 and 698.

¹⁶⁷ On this difficulty see *ibid.*; Carey Miller, 'Mala Fide Transferees', 328–32; Wortley, 'Double Sales', 296–7; and the Scottish Law Commission, *Discussion Paper on Land Registration*, para. 6.10.

¹⁶⁸ Carey Miller, 'Mala Fide Transferees', 331.

¹⁶⁹ Land Registration (Scotland) Act 1979, which provides that inaccuracy caused by fraud or carelessness would allow the Keeper to rectify. However, whether the offside goals rule would come within this notion, and what in fact amounts to fraud or carelessness, is uncertain. For further discussion, see Scottish Law Commission, *Discussion Paper on Land Registration*, para. 6.9; Carey Miller, 'Mala Fide Transferees', 329–30; and Anderson, 'Offside Goals Rule in Practice', 8–10.

Act 2012 provides for registration of a decree of reduction and states that this will have the effect of creating a real right.¹⁷⁰

(4) The Width of Scope

Overall, the general consensus amongst commentators is that the *Wallace* requirement ‘continues to be the essence of the law’ and is ‘clearly necessary to limit the scope of the offside goals rule’.¹⁷¹ After all, this is a rule which ‘regulates competition of title in respect of the same property’, and how could it do so if nobody else is, at that moment, competing for title?¹⁷² The one-stage conversion test ensures that the party founding on the rule is justified in doing so according to the underlying conceptual principles. It allows for a clear consideration of the proper parameters of the rule and demonstrates that this need not be some chaotic area of property law.

Concluding Remarks

The ambiguity surrounding the basis of the rule along with the subsequent flexibility of its scope has attracted vast criticism. In appearing to be a ‘doctrine in search of a theory’, the rule has lacked clarity and consistency in its application.¹⁷³ The uncertainty caused by these undefined elements has led critics to characterise the offside goals rule as being ‘so unclear as to be barely workable’.¹⁷⁴ This has been exacerbated by mistrust of the rule, which ‘essentially, if not primarily, arises from concern that the solution is incompatible with [...] fundamental and controlling [principles]’.¹⁷⁵ Such disdain for the doctrine has even manifested in calls for its abolition, with prominent commentators such as Reid and Rennie concluding that ‘the principle is bad law and [...] certainly ought not to be law’.¹⁷⁶

¹⁷⁰ As found in s. 54. The 2012 Act came fully into force on the 8th of December 2014.

¹⁷¹ Webster, ‘*Gibson v RBS*’, 526; Xu, ‘Offside Goals Rule’, 61, respectively.

¹⁷² Webster, ‘*Gibson v RBS*’, 527.

¹⁷³ Lubbe, ‘Doctrine in Search of a Theory’, generally, for an account of the uncertainties in both scope and application of the doctrine of notice.

¹⁷⁴ Anderson, ‘Offside Goals Rule in Practice’, 14.

¹⁷⁵ Carey Miller, ‘Centenary Offering’, 113.

¹⁷⁶ Anderson, ‘Offside Goals Rule in Practice’, 1. Rennie and Reid would also support this notion, having argued to the Scottish Law Commission that the rule ought to be abolished. See Scottish Law Commission, *Report on Land Registration*, paras 14.61–14.62.

With respect, the author finds these views undesirable. This discussion has sought to offer, firstly, that the rule is not as incompatible with our system as has often been claimed; secondly, that its basis is rooted in that very system and; thirdly, that the principles implied therein dictate the appropriate scope of the rule. The ‘dual approach’ provides an alternative way of viewing two prominent theories, putting an emphasis on the compatibility of their principles with the nature of Scottish property law. This analysis suggests that the doctrine developed from notions of fraud where bad faith was penalised for sound policy reasons, and is then given effect in our transfer model through the ‘abstract approach’ principles. In turn, this allows us to identify clear and appropriate limits for the rule: its ‘length’ is dictated by the natural cut-off point inherent in our system and its ‘width’ requires that the founding party be operating within that same process. The introduction of a ‘one-stage conversion’ test ensures strong and direct links with the transfer model and thus with the theoretical foundation of the rule. In essence, this work has sought to offer that the rule does not exist in spite of our system, but operates because of it. This perspective has been subject to a significant lack of acknowledgment in both the Scottish and South African jurisdictions, where criticisms seem to be ‘a reaction to the problem of accommodating the [...] rule rather than any attempt to see it as having a place in the context of the derivative process’.¹⁷⁷

Nonetheless, this defence of the doctrine may have come too late. The Land Registration etc. (Scotland) Act 2012 has brought with it a system of ‘advance notices’ which protect a deed in the period between granting and registration.¹⁷⁸ The Scottish Law Commission believes that this ‘will remove many of the problems for heritable property that presently arise under the offside goals rule’.¹⁷⁹ However, the period of protection offered by these notices is limited.¹⁸⁰ The offside doctrine, on the other hand, is not so restricted and may still prove relevant in less timely circumstances. It appears, then, that the rule has not yet been ‘consigned to oblivion’ and, at least in the author’s view, rightly so.¹⁸¹

¹⁷⁷ Carey Miller, ‘Centenary Offering’, 99.

¹⁷⁸ See Registers of Scotland, ‘Advance Notices’, *ros.gov.uk*, <https://www.ros.gov.uk/services/registration/land-register/faqs/advance-notice>, accessed 26 November 2014; Scottish Law Commission, *Report on Land Registration*, para. 14.47.

¹⁷⁹ Scottish Law Commission, *Report on Land Registration*, para. 14.63.

¹⁸⁰ Duration of protection is 35 days, as set out in s. 58 of the 2012 Act.

¹⁸¹ Anderson, ‘Offside Goals Rule in Practice’, 14.

A Re-Assessment of the Requirements of *Specificatio*

C. G. van der Merwe

Introduction

In most civil law jurisdictions *specificatio* is recognised as an independent mode of acquisition of moveable property. It occurs when raw matter is transformed into a new product as for example when grapes belonging to a third person are distilled into wine, when wool is knitted into a garment or when planks of wood are shaped into a ship. The consequence is that the producer becomes the owner of the new product.

It is generally accepted that the requirements for *specificatio* are as follows:¹

- (a) A *nova species* must be produced.
- (b) The *nova species* must be irreducible to its former condition.
- (c) *Bona fides* is generally required on the part of the producer.
- (d) The producer must have acted in his own name (*suo nomine*) and not on behalf of another (*alieno nomine*).

I have already dealt extensively with the question of when a *nova species* is created.² Douglas Osler produced an erudite paper on how the principle of relative value had trumped the irreducibility requirement to such an extent that the relative value theory initiated by Connanus (1508–1581), has (with various different nuances) been accepted in most European codifications.³

This paper is in honour of my close friend and compatriot, David Carey Miller. It was an honour to work intimately with David, the brilliant scholar

¹ See for South Africa: C. G. van der Merwe, *Sakereg* (2nd edn, Durban, 1989), 258–62; P. J. Badenhorst, J. M. Pienaar and H. Mostert, *The Law of Property* (5th edn, Durban, 2006), 156–9; Scotland: Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996), 450–3; D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), 82–91.

² C. G. van der Merwe, ‘*Nova species*’, *Roman Legal Tradition*, 2 (2004), 96–114. This was expertly supplemented by E. Metzger, ‘Acquisition of living things by specification’, *Edinburgh Law Review*, 8(1) (2004), 115–8.

³ Douglas J. Osler, ‘*Specificatio* in Scots Law’ in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995), 100–27.

who produced splendid books on Scots and South African property law. David always made time to assist his colleagues and students and as a human being, he was the most selfless person I have come across in life. In this paper dedicated to David, I shall focus first on the rationale behind *specificatio*, namely the justification for making the artificer the owner of the new product. I shall then question the acceptance of *bona fides* as a requirement for *specificatio* on historical and legal policy grounds. I shall touch briefly on the position in Roman law, then discuss the position in the *ius commune* with special reference to Roman-Dutch authorities and Scots Institutional writers, with brief references to the position in modern South African and Scots law. The paper will be concluded with a review of the modern scope of *specificatio*, a reconsideration of the rationale for making the artificer the owner of the new product and a reassessment of the requirements of *specificatio*. While doing this the warning of De Groot will be kept in mind, that is to say, that hardly any other point of law has been so much controverted, or exposed to so many errors on the part of jurists.⁴

Rationale for allocation of ownership

(1) Roman law

The concept of *specificatio*, a neologism of the words *speciem facere*, was not known in Roman law.⁵ All we have are numerous examples of raw matter belonging to a third person being shaped into a new form (*speciem facere*). These include scenarios where wine is produced from grapes, oil from olives, a goblet from gold, a statue from metal, a garment from wool, a ship from

⁴ *De Iure Belli ac Pacis Libri Tres* (Editio novissima, Hagae comitis, 1860), 2.8.21: '*Vix autem ulla est tractatio iuris in qua tot discrepantes sint Iurisconsultorum sententiae, et errores*'. See also Schorer ad Grotium 2.8.2.

⁵ Osler, '*Specificatio*', 100; Van der Merwe, '*Nova species*', 98; T. Mayer-Maly, 'Spezifikation: Leitfälle, Begriffsbildung, Rechtsinstitut', *Zeitschrift der Savigny Stiftung für Rechtsgeschichte (rom. Abt.)*, 73 (1956), 120–54, 128; Anna Plisecka, '*Accessio and specificatio reconsidered*', *Tijdschrift voor Rechtsgeschiedenis*, 74(1–2) (2006), 45–60, 46–7: The term as well as the concept of *specificatio* is absent not only from the ancient legal texts, but also from the medieval Gloss. It appears for the first time, as a mode of acquisition of ownership, in a student manual of the twelfth century, the so-called *Corpus legum sive Brachylogus iuris civilis* 6: H. Fitting, *Über die sogenannte Turiner Institutionenglosse und den sogenannten Brachylogus* (Halle, 1870, reprint Amsterdam, 1967), 39.

cypress trees, ointment or plasters from plants or mead from the mixing of wine and honey.⁶

From this it follows that Roman sources do not recognise *specificatio* as an independent mode of acquisition of ownership⁷ with the result that Roman jurists had to accommodate *specificatio* under the existing modes of acquisition of ownership, namely *accessio* or *occupatio*.⁸ Every student is familiar with the School dispute between the Sabinians and the Proculians.⁹ The Sabinians favoured the owner of the matter while the Proculians favoured the artificer.¹⁰ Thus the Sabinians incorporated *speciem facere* under *accessio* on the ground that since the final product cannot exist without the matter,¹¹ the form must naturally accede to the matter as principal object.¹² The matter was regarded as the fundamental component or substance to which the form acceded and the new product could be vindicated without the need for any further proof being required.

By contrast the Proculians turned to *occupatio* to accommodate *speciem facere* on the ground that the new species became ownerless (a *res nullius*) which could be occupied by the first taker namely the *specificans* (producer).¹³ In the view of the Proculians the previous matter was totally destroyed with the result that

⁶ The basic texts on *specificatio* are *Gaius*, 2.79; *Digest*, 41.1.7.7 and Justinian, *Institutes*, 2.1.25. See in general Paul du Plessis, *Borkowski's Textbook on Roman law* (4th edn, Oxford, 2010), 197–9.

⁷ The Frisian Ulrich Huber (1636–1694) of the Dutch Elegant School and contemporary of Johannes Voet was the first jurist who did not classify *specificatio* under *accessio* but recognised *specificatio* as an independent manner of acquisition of ownership: *Praelectionum Iuris Civilis* (Franeker, 1698), 2.1.27 and *Heedendaegse Rechtsgeleertheit* (Leeuwarden, 1686), 2.7.1: ‘De derde manier van eygendom te verkrijgen is nieuw-maeksel, wanneer yemant uit een andermans stoffe eenig nieuw-maeksel toestelt’.

⁸ See in general Thomas Roberts, ‘A reassessment of historical Theories on *Specificatio* and the Requirement of Good Faith’, *Scottish Law & Practice Quarterly*, 7 (2002), 180–90.

⁹ See already the Dutch elegant jurist Gerardus Noodt (1647–1725), *Operum Omnium Tomus II* (2nd edn, Lugduni Batavorum, 1735), *Commentarius in Digesta*, 10.4: ‘Nemo ignorat de ea fuisse litem inter Proculianos et Sabinianos’.

¹⁰ Harald Elbert, *Die Entwicklung der Spezifikation im Humanismus, Naturrecht und Usus modernus* (Ph.D. thesis, University of Cologne, 1930), 56–7 regards the Sabinian view as the oldest, as the unsophisticated sense of justice of a nation involved in simple relationships probably favored the owner of the matter, whereas the form was probably only regarded as an accessory to the matter.

¹¹ *Digest*, 41.1.7.7: ‘sine materia nulla species effici potest’.

¹² *Digest*, 10.4.12.3: ‘quod ex re nostra fit [...] nostrum’.

¹³ *Digest*, 41.1.7.7 *Res cottidianae* (Gaius): ‘Nerva et Proculus putant hunc dominum esse, qui fecerit, quia, quod factum est, antea nullius fuerat’ which correlates with the text on *occupatio* *Digest*, 41.1.3 (Gaius): ‘quod enim nullius est, id ratione naturali occupanti conceditur’.

the new product belonged to no-one and could therefore be appropriated by the producer.¹⁴ The Proculian solution, which seems to have been more in line with the prevalent societal view in classical Roman law, recognised *specificatio* for the first time as an original (if not an independent manner) of acquisition of ownership.¹⁵

In late classical law, or perhaps more likely only in the time of Justinian,¹⁶ a compromise was reached between the Sabinian and Proculian views by the so-called *media sententia*, which introduced the reversibility or reducibility test. It was thought that if the matter could be reduced to its pristine form, the owner of the matter should remain the owner. Metals were generally considered a particular category of things which could easily change their form and then return to their previous state.¹⁷ Thus a ring shaped out of gold, silver or other metal, which can easily be melted down to a lump of gold or silver, would remain the property of the owner of the metal.¹⁸ If by contrast, the final product could not be reduced to the former material, vindication would not be possible and therefore the final product would become the property of the producer.¹⁹ This is true of wine made of grapes, and a statue shaped out of marble for example.

¹⁴ The owner of the matter was protected by a claim for compensation against the *specificans*: *Digest*, 47.2.46: ‘*Inter omnes constat, etiamsi extincta sit res furtiva, attamen furi remanere actionem adversus furem*’.

¹⁵ Elbert, ‘Die Entwicklung’, 60.

¹⁶ The basic *Digest* passage on *specificatio* is excerpted from a work of Gaius with the title *Res cottidianae*. This work records the views of the two schools together with the *media sententia* whereas the *Institutes* of Gaius, mentions only the two school views without mentioning the *media sententia*. According to Osler, ‘*Specificatio*’, 102 this discrepancy has led to speculation about whether the *media sententia* was really known to Gaius himself, or whether it might in fact be a later development tagged on to Gaius’s *Res cottidianae* by a subsequent editor, if not indeed by the Justinian compilers. Osler reports that the French Humanist Emundus Merillius (1579–1647), *Observationes Libri III* (Lutetiae Parisiorum, 1618), 4, Book I, 6 suggested that the *Digest* text purporting to be drawn from Gaius’s *Res Cottidianae* had in fact been tampered with by Tribonian and the other *Digest* compilers in order to take account of a doctrine which was in reality developed after Gaius’s time. Merillius suggest that the true originator of the *media sententia* was not Gaius but the later Roman jurist Paul.

¹⁷ See J. A. C. Thomas, ‘Form and substance in Roman law’, *Current Legal Problems*, 19(1) (1966), 145–67, 161 for the view that the material was dominant and that a change of form was usually considered irrelevant.

¹⁸ See texts cited by Anna Plisecka, ‘*Accessio* and *specificatio* reconsidered’, 48.

¹⁹ *Digest*, 41.1.7.7: ‘*Est tamen sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod Sabinus et Cassius censerunt, si non possit reverti, verius esse, quod Nerva et Proculus placuit*’. See also Pomponius: *Digest*, 41.1.27.1 and *Digest*, 6.1.5.1; Paulus: *Digest*, 41.1.24 and 26; *Digest*, 32.78.4 and *Digest*, 32.88.

Under the *media sententia* the Sabinians accepted that if the final product was reversible to the raw matter, the matter was still considered the principal thing to which the form acceded. In the case of irreversible new products, they had to concede that the form was the principal thing to which the matter acceded. On the other hand the Proculians had to concede that in the case of reversibility the raw materials were not extinguished and thus not susceptible to *occupatio*.²⁰

It should be noted that since the shaping of raw materials into new products was usually performed by slaves, manual labour was not glorified in the early days of Roman law as it was in later ages. Thus the modern labour theory that the producer must be rewarded for his labour and skill in producing the new product is not supported by Roman law sources.²¹ The only text which is adduced as proof for the application of the labour theory is a text of Justinian which deals with the exceptional case where the final product was produced partly from matter belonging to the *specificans*. In such a case, Justinian decided that the final product should belong to the owner of the matter because the maker contributed not only his labour but also part of the matter.²² No mention is, however, made of *opera* (labour) in the main texts on the *media sententia*. Thus all objects produced from reversible metal were allocated to the owner of the matter and not to the producer; little credence was given to the labour and artistic value added in the case of statues, tankards and jewellery.²³

(2) *Ius commune*

The contribution of the European Romanists lies in their efforts to find a satisfactory place for *specificatio* in the legal system. Since *specificatio* was not recognised as an independent manner of acquisition of ownership they also classified it either as a form of *occupatio* or of *accessio*. Proponents of

²⁰ The Proculians thus gave predominance to the material: M. Kaser, 'Die natürlichen Eigentumserwerbsarten im altrömischen Recht', *JZ*, 65 (1947), 219–60, 244–5; M. J. Schermaier, 'An eadem res sit, quaeritur, Änderungen der Sachidentität als Problem des römischen Rechts' in *Iuris Vincula, Studi in onore di Mario Talamanca, vol. VII* (Napoli, 2001), 310–3.

²¹ See in general Victor Storz, *Spezifikationslehre des römischen Rechts und des deutschen bürgerliche Gesetzbuchs* (Ph.D. thesis, University Tübingen, 1903), 10–9,

²² Justinian, *Institutes*, 2.1.25: 'Quodsi partim ex sua, partim ex aliena materia speciem aliquam fecerit quisque [...] dubitandum non est, hoc casu eum esse dominum, qui fecerit, cum non solum operam suam dedit, sed partem eiusdem materiam praestavit'.

²³ *Digest*, 41.1.12.1 Callistratus (*libro secundo Institutionum*): 'Si aere meo et argento tuo conflata aliqua species facta sit, non erit ea nostra communis, quia, cum diversae materiae aes atque argentum sit, ab artificibus separari et in pristinam materiam reduci solet'.

the occupation theory found support in the *media sententia*, which awarded ownership to the producer if the final product could not be restored to its pristine matter.²⁴ This view was further supported by the clear statement of Gaius to the effect that that which is produced previously belonged to no-one.²⁵ The weak points in the occupation theory are that the expiry of the matter worked upon is a fiction; that ‘newness’ does not *per se* turn an object into a *res nullius*;²⁶ and that in the case of the process of turning grapes into wine or olives into oil, there is no moment in time at which the final product becomes a *res nullius* to be occupied by the producer. The wine or olive oil automatically falls to the producer when the process is completed.²⁷

The European Romanists generally classified *specificatio* under the bracket of *accessio*. This view had a more ambiguous basis than *occupatio*. The main reference point was the fact that Gaius classified *specificatio* as a form of *accessio*

²⁴ Elbert, ‘Die Entwicklung’, 67, note 2 lists seven proponents of the occupation theory amongst others three French Humanists namely Hugo Donellus (1527–1591), *Commentariorum de iure civili Libri Viginti Octo* (Francofurti, 1596), Lib. IV Cap. XII: ‘*fit (eius qui fecit) eo iure, inquam, atque ea ratione naturalis, qua placet quod ante nullius est, occupant acquiri*’; Antonius Contius (1517–1586), *Opera Omnia* (Parisiis, 1616), Disp. Lib. I Cap. XIII: ‘*Specificatio enim & confusio ad generalem occupationis modum videntur referri posse [...] res per specificationem intereunt, & novam substantiam adquirunt, & tunc quasi a specificatore & artifice primitus occupatae, eius dominio cedunt*’ and Edmundus Merillius (1579–1647), *Observationum Libri VIII* (Neapoli, 1720), *Synopsis Institutionum*, Lib. II No. VIII: ‘*cum id quos factum esset, antea nullum foret, et materia per se ad agendum non esset idonea*’; one proponent of the Dutch Elegant School Arnoldus Vinnius (1588–1657), *In Quatuor Libros Institutionum Imperialium Commentarius Academicus & Forensis Editio Tertia* (Amstelædami, 1659), Lib. II Tit. I § 25 after rejecting accession: ‘*Quapropter hic modus potius occupationis quaedam species videri debet; cum id, quod factum est, ideo faciendo concedatur, quia ante nullius erat, & tanquam occupant, qui id fecit*’; one German Humanist Johannes Oldendorp (1488–1567), *Actionum forensium progymnasmata, interpretatio item* (Colonia, 1544), Cl. III Cap. De *Acquirendo Rerum Dominio*, No. V: ‘*Rationes [...] sic colligi possunt: nam [...] vere dici potest: quod factum est antea nullius fuerat. Ergo faciens debet censi dominus sicut argumentatur Nerva & Proculus*’; and one proponent of the *Usus Modernus Pandectarum*, Johannes Schneidewinus (1519–1568), *In Quatuor Institutionum Imperialium D Justiniani Libros, Commentarii* (Argentorati, 1632), Lib. II Tit. I § Cum ex aliena: ‘*Proculus & Nerva: Qui senserunt eam (rem) concedendam esse specificanti quasi primo occupant? (per regul. Inst., 2.1.12).*

²⁵ ‘*Quia quod factum est antea nullius fuerat*’.

²⁶ See already the proponents of the *Usus Modernus Pandectarum*, Reinardus Bachovius (1575–1640), *In Institutionum Iuris Libros Commentarii* (Francofurti, 1628), ad I 2.1.19: ‘*Specificatio, [...] qui sub occupationem nec veram nec fictam posse referri potest*’; and Johann Andreas Frommann (1626–1690), *Disputatio Inauguralis De Dominio Acquisito* (Suinfurto, 1679), thesis XLII: ‘*extincta vere dici nequeat materia, quae adhuc extat: tametsi ea pristinum statu reduci amplius haud possit*’.

²⁷ See also the Pandectist Alois Brinz, *Lehrbuch der Pandekten* (Erlangen, 1884), 578.

and not as *occupatio*.²⁸ Building on the Sabinian statement that one cannot produce a new species without matter,²⁹ the argument goes that nothing that is added to the original matter could have the strength to overrule the matter: thus the form follows or accedes to the matter.³⁰ Thus, starting with the glossator Placentinus (who died in 1192),³¹ *specificatio* was classified as a form of *accessio* throughout the reception of Roman law³² and even by some proponents of the Historical school.³³ But since *accessio* always requires a principal object and an accessory, the jurists had to decide whether the form accedes to the matter³⁴ or whether the matter accedes to the form.³⁵ The latter view was more compatible with the *media sententia* and therefore prevailed in the end.

²⁸ *Digest*, 41.1.7.7.

²⁹ ‘*Sine materia nulla specie effici potest*’.

³⁰ See already the German Humanist Johannes Harprechtus (1560–1639), *Commentarius in IV Libros Institutionum* (Editio Quarta, Lausanne, 1748), note 2 ad Lib. II Tit. I § *Cum ex alia*.25: ‘*accidens cedat substantiae, vel rei, sine qua esse nequeat*’.

³¹ *In Summam Institutionum sive Elementorum Justiniani Libri IIII* (Lugduni, 1536), II.1.

³² Elbert, ‘Die Entwicklung’, 70, note 1 cites the Commentators Baldus de Ubaldis (1327–1400), Alexander Imolensis (1423–1477), the Humanists Dionysius Gothofredus (1549–1622), Franciscus Connanus (1508–1551), Hubert Giphanius (1533–1604), Matthaeus Wesenbecius (1531–1586), Johan Gottlieb Heineccius (1681–1741) and Johannes Harprechtus and the proponents of the *Usus Modernus Pandectarum* Bachovius *Institutionum* and the natural law exponent Christian Thomasius (1655–1728), *Institutionum Jurisprudentiae Divinae Libri Tres* (Septima (ed.), Halae Magdeburgicae, 1720), Lib. II Cap. 10 §§ 212, 219.

³³ Elbert, ‘Die Entwicklung’, 70, note 2 mentions amongst others Herman, *Teutsches System Juris Civilis*, 41.1 No. 38 and Westphal, *System des römischen Rechts über die Arten der Sachen, Besitz, eigenthum und Verjährung* (Leipzig, 1788), § 425: ‘*Accession durch menschlichen Fleiß*’.

³⁴ See the Humanists Matthaeus Wesenbeck (1531–1586), *In Pandectas Juris Civili et Codicis Justiniani Lib. XII Commentarii* (Basileae 1593), Lib. XLI Tit. I § 8: ‘*Praestantior est materia, eamque ad se trahit*’; Heinnecius, *Recitationes In Elementa Iuris Civilis secundum Ordinem Institutionum* (Vratislaviae, 1773), II.I §§ 368–9: ‘*Nimirum fit hic accessio forma ad materiam*’.

³⁵ See the Humanist Dionysius Gothofredus (1549–1622), *Corpus Iuris Civilis cum D. Gothofredi et aliorum notis et studio Simonis van Leeuwen* (Amstelodami, 1663) in the case of a garment produced from wool: ‘*Potentior est enim forma, quam materia; praestantior est in veste formae natura, quam materia*’; Bachovius, *Institutionum*, 2.1.19: ‘*ubi dignior et praestantior est forma. Ut tum sit dominus, qui formam dedit*’; Westphal *System* § 425: ‘*accession durch menschlicher Fleiß*’ and later Kleinus, *Annotationes ad Johannis Joachimi Schöpferi Synopsis Juris Privati* (Rostochii et Lipsiae, 1706), Lib. XLI Tit. I, note 44: ‘*Recte enim est, in specificatione accedere operam rei*’; Grotius, *Inleidinge*, 2.8.1: ‘*t welke daer uit komt om dat de ghedaente meet doet tot de wegen van een saeck als de stoffe: zulcks dat de ghedaente zijnde verandert de zaecke werd iet anders als die te vooren war*’.

The weakness of the accession theory lay in the fact that the energy (labour) expended on producing the new form was also considered a *res* which could accede to a *res corporalis* (the *materia*). Although this was pointed out by the proponent of the Dutch Elegant School Vinnius (1588–1657),³⁶ and a proponent of the *Usus Modernus Pandectarum*, the Frisian Ulricus Huber (1636–1694),³⁷ the accession theory found a new impetus by virtue of the fact that specification was classified as *accessio industrialis* or *artificialis* to contrast it with *accessio naturalis* in the form of *coniunctio (adiunctio)*. This classification was presumably introduced by Johannes Althusius (1557–1638)³⁸ and later followed by the French and German Humanists in their new methodisation of the law.³⁹

It should be noted that the exceptional rationale for *specificatio*, found in the time of Justinian, and applicable to the scenario where the *specificans* uses part of his matter to produce the final product, was also recognised in the *ius commune*. Some of these authors readily accepted that in such a case the final product belongs to the *specificans* because he contributed his labour and his own materials to produce the final product.⁴⁰ The use of the word *opera* seems

³⁶ *Institutionum*, II.I.25, note 1: ‘Sunt qui hunc acquirendi modus ad accessionem referent: sed perperam. Non enim nova illa species vi et potestate rei nostrae nobis acquiritur; cum ex alieno material fiat; non ignorantibus nobis aut invitis: sed nostro ipsorum facto, qui rem alienam in aliam speciem transformavimus: adeoque inconcinnum est dicere, materiam accedere formae. Quoniam haec illam, non illa hanc praesupponit’. See also later Lüder Menkenius (around 1697), *Elementa Jurisprudentiae Privatae Romano-Germanico Secundum Lobethanii Ordinem Systematicum Conscripita* (Halaë Salicae, 1784), pars I Lib. I section I Membr I Cap. II Tit. II: ‘specificatio, si quod accredit, nudum hominis factum est’.

³⁷ Huber, *Praelectionum Juris Civilis Pars Prior, quae est secundum Institutiones justinianaeae* (Franequerae, 1698), II.I, note 43: ‘Quidam accessionem hanc artificialem vocant, sed male, cum hic una tantum res sit et accessiones duas, quarum una principalis, supponat’.

³⁸ Johannes Althusius (1557–1638), *Dicaelogicae Libri Tres* (Editio secunda, Francofurti, 1649), II.8 and 11: ‘Accessoria rei specificatio quid’ and Par Tertia Cap. 39, *De coniunctione rerum; Jurisprudentia Romana* (Editio altera, Herbomae, 1588), Cap. XV.

³⁹ For proponents, see Elbert, ‘Die Entwicklung’, 72–3.

⁴⁰ Elbert, ‘Die Entwicklung’, 64, note 1 cites eighteen authorities *inter alia*: François Hotomannus (1524–1590), *Operum Tomus I Partitiones Iuris Civilis Elementariae* (Genevae, 1599), n. ‘opera’: ‘Rei effectio: Nam species ex aliena re confecta, si ad pristinam formam revocari possit, eius est, cuius res erat, quasi materia extincta non sit, sin minus, aut ex utiusque materia confecta est, eius qui efficit’; Johann Oldendorp (1488–1567), *Actionum Classis tertia* Cap. de acquirendo dominium No. VI: ‘Quia is non solum operam suam impendit; sed et si partem eiusdem materiae praestitit. Ergo ratio naturalis, tam respectu formae, quam respectu materiae efficit eum dominum’; Bachovius, *Notae*, Vol. II Disp. XX Thesis VII Lit. A&B: ‘quo tamen casu aut necesse est corpus fieri, cum non solum operam, sed et partem materiae praestiterit’ (Inst., 2.1.25ff.), Capra, *In XLI Digestorum esu Pandectarum Justiniani sacratissimi Imperatoris Librum paraphrasia* (Basiliae, 1560) ad D XLI I VII VII: ‘non communicari sed eius est,

to underline the proposition that the rationale for the transfer of ownership in *specificatio* is different where the new thing emerges from the combination of one's own material with matter owned by a third party. However, it could also signify a concurrence of the accession and occupation theories, which bolsters the view that the producer should acquire ownership of the new object.⁴¹

Despite these efforts to pigeonhole *specificatio* into the category of either *occupatio* or *accessio*, *specificatio* was always recognised as an independent institution, possessing almost the same importance as *occupatio* and *accessio*. Already the *Brachylogus* dealt with *specificatio* after *occupatio* and before *accessio*, but only by referring to the main examples of *specificatio* and the *media sententia* without clearly distinguishing the other modes of acquisition. Thus the French Humanists François Duarenus (1509–1559) and Franciscus Hotomannus (1524–1590) devoted lengthy discussions to *specificatio* but still in the context of *occupatio*.⁴²

Each of the above theories and classifications of *specificatio* were closely connected to the institutions of Roman law and the Justinian solution. Nevertheless, some authors were determined to find a rationale for *specificatio* outside the Roman sources and found it in the so-called labour or reward theory. Thus Connanus may be considered a precursor to the labour theory. In his search for a new rationale for *specificatio*, Connanus departed from the Roman jurists by relying on the natural law concept of human reason.⁴³ He for the first time acknowledged that economic considerations play a vital role in the rationale for *specificatio*, and that the acquisition of ownership must be based

qui fecit'; the Humanist Joachim Mysinger (1514–1588), *Apotelesma: hoc est, Corpus Perfectum Scoliarum ad Institutiones Justinianeus pertinentium* (Genevae, 1633), Scolia b ad *Inst.*, 2.1 § *quod si partem*; the proponent of the *Usus Modernus Pandectarum*, Samuel Strykius (1640–1710), *Specimen usus moderni* (Halaë Magdeburgicae, 1729), Continuatio IV Lib. XLI Tit. 1 § XXIV.

⁴¹ Thus already the commentator Baldus de Ubaldis (1327–1400), *Commentaria ad quatuor Institutionum libros* (Lugduni, 1565), Liber II *de rerum divisione et qualitate* § *quod si partem*. 'Ex sua et aliena materia speciem conficiens bona fide, specie efficit dominus. Et accessorium sequitur principale'. See also Johannes Voet (1647–1713), *Commentarius ad Pandectas Tomus secundus* (Coloniae, 1734) Lib. XLI Tit. I No. 2 who uses a reasoning based on the preponderant participation of the producer; the proponent of the *Usus Modernus Pandectarum* Lüder Menkenius (around 1697), *Synopsis Theoriae et Praxeos Pandectarum ad Usus Imperii et Saxoniae Accommodata* (Lipsae, 1724), Lib. XLI Tit. I No. XXII: '*ob concurrentem operam et materiae propriae partem*'.

⁴² Duarenus (1509–1559), *Omnis Opera* (Lugduni, 1584), Lib. XLI Tit. I Cap. IV; Hotomannus *Operum* Tomus I, II Partitiones.

⁴³ Connanus, *Commentariorum*, Libri X Lib. II Cap. VI, note 6: '*Jurisconsultorum auctoritatem tantisper sequi decrevi, dum doctrinae suae rationem adferent*'.

on a consideration of whether the labour or skill expended on the production was more valuable than the material used.⁴⁴ If more valuable the final product belongs to the producer; if less valuable the final product would belong to the owner of the matter. However Connanus still considered *specificatio* as a form of *accessio*, together with *pictura* and *scriptura*.⁴⁵ To find a rationale within the rules of *accessio*, he argued that each of the labour (*opus*), the skill (*ars*), and the matter are all contributing factors which could be ranked, either as principal or accessory, in the final product. The accessory would become part of the principal object.⁴⁶ If the skill dedicated to the production of the final product is more valuable, then the *res transfiguratae* would rationally (*natura rerum*) be considered extinguished and no longer vindicable by the former owner, but only by the person who had authorised the production.⁴⁷

⁴⁴ *Commentariorum* Lib. III Cap. VI, note 2: ‘*Dicendum arbitror Sabini veriore esse sententiam, ut materiae dominus sibi habeat totius speciei dominium, nisi cum plus est in opere pretii quam in materia, ut si ex auro, argento, aut aere meo, vel alia qualibet materia, vas feceris, quod sit vulgaris, neque valde magni artificii, ego sim illius dominus; at si quod est elaborate operis superetque materiam, tum cedat materia artificio [...] Qua ratione ex uvis aut oleis meis expressum vinum, aut oleum, meum erit; similiter ex lacte meo formatus caseus aut coactum butyrum; quid enim habent ista artis?*’

⁴⁵ See Connanus, *Commentariorum*, Lib. III Cap. VI for the heading: ‘*quomodo res accessione quarantur specificatio pictura, scriptura*’.

⁴⁶ *Commentariorum*, Lib. 3 Cap. VI, note 3: ‘*Sic autem dicendum arbitraretur. Ut quae species priori materiae reddi nequeunt, maneat eius cuius est materia, cum plus habent naturae et materiae quam artis, ut sunt vinum, oleum, mulsum, unguentum, caseus, butyrum, et quae sunt eius generis; parum enim et fere nihil differunt a prima sua natura. Si vero multum habent ars, ut ipsa per se artificii sint magis quam materiae, tum fiant eius qui fecit, quia plus hic videtur de suo contulisse quam de prima materia manserit, ut lectus, navis, vestis, et quaecunque species lignee aut lapideae et similis non fusilis materiae; nam ista omnia sunt artis et, ut loquuntur physici, qualitatis, non substantiae aut materiae nomina; merito in his praecipuum sibi ius ars vendicat. Quod si restitui possunt priori naturae et materiae, ut quaecunque ex auro, argento, aere, plumbo et similibus metallis, tum attendatur an plus sit in arte quam in materia, quodque minus erit cedat majori: sic fiet, ut naturae ius conservetur, et minore utriusque damno utrique consulatur, materiae domino scilicet et artifice.*’

⁴⁷ 3.6.4: ‘*At hic Ulpianus quasi veritate compellente fateri cogitur, res transfiguratas quas appellat, tum abesse videri, quam plus est artis, quam materiae: alioqui non putantur abesse, et ideo vendicari possunt a domino materiae: sin fuerit majus, quod positum est artis, creduntur abesse a rerum natura, et tanquam desiderint esse, iam non vindicatur a priore domino, sed ab eo cuius mandato venit in artificium*’. Connanus found proof for this in Cicero’s *Oratio pro Q. Roscio* where Cicero argued that the slave Panargus did not belong to the owner Roscius to whom his body belongs but to Fannius who taught Panargus the art of mimicking which made him more valuable. Other probable precursors of the labour or reward theory are Lauterbach (1618–1678), *Collegium theoretico-practicum*, Tom. II Lib. XLI Tit. I § 84: ‘*Dicta tamen limitationem recipient, si forma sit praestantior, v. gr. ab insigni artifice ex auro vas conflatum sit, cuius pretium ex solo artificio aestimandum: tunc plus artificii, qui novam formam dedit, quam auri domino tribuendum*’. This is only by translating ‘*artificium*’ with ‘labour’ with no express mention of ‘*opera*’ and ‘*industria*’ and Strykius (1640–1710), *Thesaurus*

It was only the Pandectists (Historical School) that broke completely with the view that the rationale for *specificatio* must be sought in either *accessio* or *occupatio*. They unashamedly promoted the labour of reward theory. Supported by the glorification of labour in the works of Calvin and Locke,⁴⁸ Alois Brinz propounded: 'Labour, creation, craftsmanship is the rationale for the acquisition of ownership by *specificatio*'.⁴⁹ Josef Kohler even went so far as to declare: 'The person who has transformed matter has, with the vigour released from him, imbued the new product with part of his own vigour and being. Where my vigour and being is, there is my ownership.'⁵⁰ The main criticism against the labour theory had been that it was never adhered to in Roman law, because manual labour was mainly performed by slaves and serfs and thus never given an elevated status.⁵¹ However, this perception had been eclipsed by the glorification of labour by the time of the Pandectists.⁵²

(3) Roman-Dutch law

The proponent of the Dutch Elegant School, Arnoldus Vinnius (1588–1657), maintained that it was false to classify *specificatio* under *accessio*. This was because it was absurd to say that the matter accedes to the form, for the form presupposes the matter. He therefore opted for *occupatio* on the basis that the final product becomes *res nullius* and yields to the *specificans*, who therefore appropriates it.⁵³

Locorum Communium Jurisprudentiae (Editio tertia, Lipsiae, 1697), Axiom Lib. XVII Cap. XLVII 'Specificatio' II: '*Limita: nisi plus artis in confectionem speciei impensum, quam ipsa materiae aestimatio est.*' See Elbert, 'Die Entwicklung', 83–5.

⁴⁸ See Hans-Dietrich Müller, 'Wie verhält sich der §950 BGB zu dem Satz, dass jeder Arbeiter Eigentümer der Arbeitsproduktes werden soll?' in Hedemann (ed.), *Schriften des Instituts für Wirtschaftsrecht an der Universität Jena* (1930), 102.

⁴⁹ Otto Fischer, 'Das Problem der Identität und der Neuheit mit besondere Berücksichtigung der Spezifikation', *Festgabe für Jhering* (1892), 46; Brinz, *Lehrbuch der Pandekten*, § 149 (page 578): '*Die Arbeit, Schaffung, Schöpfung ist der Grund dieser Eigentumserwerb.*' See also Ludwig Arndts, *Lehrbuch der Pandekten*, § 155 Anm 1: '*eben eine neue Sache sei, welche der Thätigkeit des Verfertigers ihre Entstehung verdankt.*'; Dernburg, *Pandekten* (Berlin, 1900), Vol. 1 Pt 2, *Sachenrecht* § 204 page 85 speaks of '*schaffende Arbeit*' but refers in note 4 to adherents of the occupation theory. Müller, 'Wie verhält', 100 declares: '*Güterschöpfung begründet Eigentum.*' See also Elbert, 'Die Entwicklung', 1–2.

⁵⁰ Josef Kohler, 'Das Autorrecht', *Jherings Jahrbücher*, 18, 129, 227: '*Wer eine Sache erarbeitet, hat sie mit der von ihm ausgelösten Kraft, mit einem Teil seines Wesens erfüllt, in ihr eine Stätte geschaffen, in welcher die von ihm erzeugte Kraftfülle ihre dauernde Unterkunft finden. Wo meine Kraft, wo meine Wesen, da mein Recht.*'

⁵¹ Müller, 'Wie verhält', 101–2.

⁵² Ibid., 102 talks about the '*hohen Lied der Arbeit.*'

⁵³ Vinnius, *Institutionum*, 2.1.25: '*adeoque inconcinnum est, dicere materiae accedere formae; quoniam*

Having stated the Roman law position in his *De Iure Belli ac Pacis*, Hugo Grotius (1583–1645) referred to the theory of Connanus, namely that one must look at the relative value of the matter and the form and conclude that the component with the highest value (*praevalentia*) draws to it the component with the lower value.⁵⁴ He then referred to the mingling of fluids (*confusis materiis*) where co-ownership is introduced in proportion to each party's contribution as the only natural manner in which an adjustment could be made. Grotius' view was that in the case of *specificatio*, where the final product consists of the components of matter and form, and the matter belongs to one person and the form to another, it is a natural truth (*naturalem veritatem*) that the final product is acquired in co-ownership in proportion to the value that the form and the matter have. The form is in fact part of the substance of the final product, but not the whole substance.⁵⁵ It is to be noted that none of the words used by Grotius can be construed so as to render him a proponent of the labour theory. Again, Grotius' theory of co-ownership has never been countenanced in South African law, while Scots law seems prepared to give a certain degree of credence to it.

In his *Censura Forensis*, Simon van Leeuwen (1626–1682), begins by classifying *specificatio* as a form of industrial accession.⁵⁶ However, in his discussion of *specificatio* he seems to prefer *occupatio* as the rationale for the acquisition of ownership by the *specificans* where the matter cannot be reduced to its former existence.⁵⁷ He then expressly rejects the view of Grotius in *De Iure Belli ac Pacis* and the solution offered by Connanus.⁵⁸

In his search for a new construction for *specificatio*, Johannes Voet (1647–1713) found it difficult to reconcile *specificatio* with either *occupatio* or *accessio*. He

haec illam, non illa hanc praesupponit. Quapropter hic modus potius occupationis quaedam species videri debet; cum id quod factum est, ideo facienti concedatur, quia ante nullius erat, & tanquam occupant, qui suo id nomine fecit.

⁵⁴ *De Iure Belli ac Pacis*, 2.8.9 para. 1: 'et hoc unum videri vult, plusne sit in opera an in materia, ut quod plurius est id praevalentia sua quod minus est ad se trahat'. At 2.8.21 he continues: 'Ut vero rei maiori acquiratur res minor, quo fundamento Connanus nititur, naturali est facti non iuris: atque ideo qui fundi pro vicesima parte est dominus, tam manet dominus quam qui partes habet novemdecem. Quare quod de accessione ob praevalentiam, aut certis in casibus lex Romana constituit, aut in aliis etiam constitui potest id naturale non est, sed civile, ad commodius transigenda negotia; natura tamen non repugnante, quia lex dandi dominii ius habet'.

⁵⁵ 2.8.19 para. 2: 'ita cum res constent materia et specie, tanquam suis partibus, si alterius sit materia, alterius species, sequitur naturaliter rem commune fieri pro rate eius quanti unumquodque est. species enim pars est substantiae, non substantia tota'.

⁵⁶ *Censura Forensis* (Lugduni Batavorum, 1662), 1.2.5.1.

⁵⁷ *Ibid.*, 1.2.5.2.

⁵⁸ *Ibid.*, 1.2.5.3.

classified *specificatio* under *accessio industrialis*, but in his denial that *bona fides* was a requirement for *specificatio* accepted the occupation theory which proceeds from the destruction of the raw matter by the formation of a new object.⁵⁹

A contemporary of Johannes Voet, the Frisian Ulrich Huber (1636–1694), who was a proponent of the Dutch Elegant School, but also gave consideration to the *usus modernus*,⁶⁰ was the first jurist who recognised *specificatio* as an independent manner of acquisition of ownership.⁶¹ He concedes that on a correct interpretation of the texts, *specificatio* is closely connected with the occupation theory, but adds that the vigour and energy involved in the production process does not have to take account of *bona* or *mala fides*.⁶²

(4) Scots Institutional writers

The Scottish Institutional writers with the exception of Sir James Dalrymple, Viscount Stair, did not regard specification as an independent mode of acquisition of ownership and generally classified it under artificial or industrial accession. The clearest statement in this regard is found in John Erskine's (1695–1768) *Principles*:

Under accession is comprehended specification, by which is meant a person's making a new species or subject, from materials belonging to another. Where the new species can again be reduced to the matter of which it is made, the law considers the former mass as still existing; and therefore the new species, as an accessory to the former subject belongs to the proprietor of the subject: but where the thing cannot be so reduced, as in the case of wine, there is no place for the fictio iuris; and therefore the workmanship draws after it the property of the materials.⁶³

⁵⁹ Johannes Voet, *Commentarius*, 41.1.21: 'Nihil refert, utrum in bona (an mala) fide fuerit, putans materiam suam esse, an alienam esse sciverit, cum utroque casu novae speciei dominus efficiatur ex ratione, quod res ita mutata, ut ad priorem materiam reduci nequeat, pro extincta habeatur, neque bona vel male fides specificatoris efficere possit, ut magis aut minus res ipsa prior videatur superesse'.

⁶⁰ Gerd Kleinheyder and Jan Schröder (eds), *Deutsche und Europäische Juristen aus neun Jahrhunderten* (4th edn, Heidelberg, 1996), 204.

⁶¹ *Praelectionum*, 2.1.27 and *Heedendaegse Rechtsgeleertheit*, 2.7.1: 'De derde manier van eygendom te verkrijgen is nieuw-maeksel, wanneer yemant uit een andermans stoffe eenig nieuw-maeksel toestelt'.

⁶² *Praelectionum*, 2.1.27: 'Formationis et Specificationis ea vis est, quam mala fides non magis impedit, ac sprete domini prohibitio occupationem fereat' because: 'Forma extinguit materiam. Materia non est amplius. Ergo non in dominio est'.

⁶³ 2.1.8. See also idem: 'Under accession is comprehended specification'.

In addition Andrew McDouall, Lord Bankton (1685–1760)⁶⁴ and George, Joseph Bell (1770–1843)⁶⁵ classify specification as a form of industrial accession, while Sir George Mackenzie indicates that it must be classified either under accession or occupation.⁶⁶ As part of a very wide statement, Stair states in effect that Scots law may follow either the *media sententia*, Connanus or the view of Grotius in allocating ownership or co-ownership to the workman.⁶⁷ Having discussed various instances of *accessio* including *alluvio*, *confusio*, *commixtio*, *conjunctio*, contexture (including *pictura*) and *inaedificatio*,⁶⁸ he turned to *specificatio* as an independent manner of appropriation.⁶⁹

Bona fides

(1) Introduction

None of the components of *specificatio* were more controversial than the requirement of *bona fides*. The issue here is whether the *specificans* must act in good faith as the owner of the matter if he is to become the owner of the final product.

An insistence on the requirement of *bona fides* would contradict both the modern labour or reward theory and the occupation theory. If one decides to reward the manual or intellectual effort which accompanies the production of a new object, one may not make this subject to the *bona fides* on the part of the *specificans*. In the case of the *occupatio* theory, one cannot expect *bona fides* from the *occupans*, because this would leave open the possibility that the final product could become a *res nullius* with no subject.

(2) Roman law

It is generally accepted that Roman law did not require *bona fides* for the acquisition of ownership by the *specificans*.⁷⁰ The main texts that deal with *specificatio*, namely Gaius' and Justinian's *Institutes*⁷¹ and the *Res Cottidianae* (a

⁶⁴ *Institute*, 2.1.12.

⁶⁵ *Principles*, 1298. See also Erskine, *Institute*, 2.1.16.

⁶⁶ *Institutions of the Law of Scotland* (1684), 2.1.7.

⁶⁷ Stair, 2.1.41.

⁶⁸ *Ibid.*, 2.1.34 – 40.

⁶⁹ *Ibid.*, 2.1.41.

⁷⁰ Kaser, 'Die natürliche Eigentumserwerbsarten', 245, note 90; Mayer-Maly, 'Spezifikation', 147.

⁷¹ *Gaius*, 2.79 and *Institutes*, 2.1.25.

high classical work also attributed to Gaius), do not expressly mention the requirement of *bona fides*. This is particularly noteworthy in the case of the *Institutes* of Gaius and Justinian which were written as text books for students of the law.⁷²

Furthermore, positive proof that *bona fides* was not a requirement for *specificatio* can be found in *D*, 24.1.29.1 which deals with the scenario where a spouse had used the wool donated to her by her husband to produce garments.⁷³ Although the wife knew that the wool did not belong to her, due to the fact that donations between spouses were forbidden, she was nevertheless awarded ownership of the garments. The decision was made by Labeo, the father of the Proculians, and represents the Proculian view that *specificatio* was a form of *occupatio* for which *bona fides* was not required.

A text of Paul *D*, 10.4.12.3 is frequently quoted to support the requirement of *bona fides* in Roman law.⁷⁴ The text stipulates that if an individual makes mead from my grapes, oil from my olives or a garment from my wool, and he is conscious that the matter belongs to someone else (*cum sciret haec aliena esse*), he will be held liable in terms of the *actio ad exhibendum* due to the perception that that which had been produced from our matter belongs to us. The phrase used by Paul *cum sciret haec aliena esse* is, however, generally accepted as interpolated.⁷⁵ It is also argued that the text contains a contradiction. In this passage Paul allows the *actio ad exhibendum* for recovery of the final object on the ground of the Sabinian preference for *specificatio* as a form of *accessio*: '*Quia quod ex re nostra fit, nostrum esse verius est*'. The rest of the text deals exhaustively with examples where the previous *materia* (matter) was irreversible. The solution thus clearly contradicts the *media sententia* although Paul supported this solution in late classical Roman law.⁷⁶ From another angle it is pointed out that the function of the *actio ad exhibendum* in this instance is compensatory on account of the fraudulent transformation of the object. It is not an action for the return of the *nova species*.⁷⁷

⁷² By contrast a distinction between *mala* and *bona fides* is expressly dealt with in the treatment of *accessio* in *Institutes*, 2.1.30, 32 and 34 and *Digest*, 41.1.9.1 and 2. Elbert, 'Die Entwicklung', 138.

⁷³ Pomponius (libro XIV ad Sabinum): '*Si vir uxor lanam donavit et ex ea lana vestimenti sibi confecit, uxoris esse vestimenta Labeo ait*'.

⁷⁴ Paulus (libro 26 ad edictum): '*Si quis ex uvis meis mustum fecerit vel ex olivis oleum vel ex lana vestimenta, cum sciret haec aliena esse, utriusque nomine ad exhibendum actione tenebitur, quia quod ex re nostra fit nostrum esse verius est*'.

⁷⁵ Kaser, 'Die natürliche Eigentumsarten', 245, note 90.

⁷⁶ Elbert, 'Die Entwicklung', 139–40.

⁷⁷ Franz Wieacker, 'Spezifikation. Schulprobleme und Sachprobleme' *Festschrift Rabel*,

(3) *Ius commune*

The above concerns could not prevent the almost unanimous acceptance of *bona fides* as a requirement for *specificatio* in the *ius commune*. The Glossators already placed *bona fides* as the first of three requirements for *specificatio*⁷⁸ in order to complete the ‘incomplete’ Justinian, *Institutes*, 2.1.25.⁷⁹ This legal innovation of the *Gloss* had such an impact that it was later considered sufficient authority to refer simply to the *Gloss* without questioning its validity. Thus Commentators,⁸⁰ and French Humanists,⁸¹ and later Dutch⁸² proponents of the Elegant School, together with Italian⁸³ and German⁸⁴ jurists, followed the *Gloss* of Accursius

vol. 2 (1954), 263–92, 271. See also Voet, *Commentarius*, 41.1.21 *in fine* and note that Windscheid, *Lehrbuch des Pandektenrechts* (9th edn, Frankfurt, 1906), § 187, note 3 who supports the *bona fides* requirement for *specificatio*, concedes that the text does not give a clear result. See most recently Christina Kraft, ‘Bona Fides als Voraussetzung für den Eigentumserwerb durch *Specificatio*’, *Tijdschrift voor Rechtsgeschiedenis*, 74(3–4) (2006), 290–1.

⁷⁸ See e.g. the glossator Placentinus (died 1192), *In Summam Institutionum*, Lib. II Tit. I, 48: ‘*Tria sunt necessaria ut fiat specificantis. Bona fides [...]*’.

⁷⁹ *Gloss Digestum Novum sive Pandectarium Iuris Civilis Tomus Tertius Commentarius Accursii, et multorum insuper aliorum tam veterum quam neutericorum Jureconsultorum* (Lugduni, 1572), ad I 2.1.25 gloss *ab aliquo* and ad *Digest*, 41.1.7.7 gloss *suo nomine*. They solved the contradiction caused by the text of Paul 10.4.12.3 by asserting that the *mala fide specificans* should be at a disadvantage vis-à-vis the *bona fide specificans* by not being awarded ownership of the final product. Thus a *concordantia discordantium* was reached.

⁸⁰ Bartolus (1313–1357), *Omnia, quae extant, Opera* (Venetiis, 1603), Tom. V ad *Digest*, 41.1.7.3 *Cum quis ex aliena*; Baldus de Ulbalduis (1327–1400), *Commentarii ad quattuor Institutionum Iuris Civilis* (Lugduni, 1558), *Inst. Lib. II de rer. div. & qual § Cum ex aliena*; Paulus de Castro (1369–1441), *In Primam Digesti Veteris Partem Commentaria* (Augustae Taurinorum, 1576), at *Digest*, 6.1.5 § *Idem scribit*. Note that Alexander Imolensis, *In Digestum Novum Tomus Primus* (Lugduni 1552), ad *Digest*, 41.2.3.21 § *Genera* did not require *bona fides*.

⁸¹ Cujacius (1522–1590), *Opera Omnis* (Neapoli, 1722–1727), Tom. I No. 56 ad I 2.1.25; Hotomanus, *Operum Tomus I and II* (Genevae, 1599), ad *Inst. Lib. II Tit. I*; Duarenus (1509–1559), *Omnis Opera* (Lugduni, 1584), Tom. I Lib. XLI Tit. I Cap. VI; Dionysius Gothofredus (1549–1622), *Corpus Iuris cum D Gothofredi et aliorum notis, opera et studio Simonis van Leemwen* (Amstelodami, 1663), note 50 ad I 2.1.25; Franciscus Balduinus (1520–1573), *Catechesis Iuris Civilis in Jurisprudentia Romana et Attica, Tomus I in quo Francisci Balduini Opuscula Omnia* (Luduni Batavorum, 1738), *Catechesis III, De rebus* (page 697).

⁸² Hugo Grotius (1583–1645), *Inleidinge tot de Hollandsche rechtsgeleerdheit* (Arnhem, 1939), 2.8.2; Vinnius (1588–1657), *Institutionum*, note 2 ad I 2.1.25; Ortwin Westenberg, *Principia Iuris secundum ordinem Digestorum, seu Pandectarum* (Vindibonae, 1777), Tomus I *Digestorum Lib. XLI Tit. I § 25* No. 147; Everardus Otto, *Commentarius ad Justiniani Institutionum libros IV* (Francofurti et Lipsiae, 1743), Lib. II Tit. I § 25.

⁸³ Angelus Aretinus (died 1451), *In quattuor Institutionum Justiniani Libros Commentaria* (Venetiis, 1574), note 3 ad I 2.5.

⁸⁴ Oldendorp, *Methodica*, Secunda Pars Cap. XXXII; Schneidewinus, *In Quattuor*

blindly. The result was that Wolfgang Adam Lauterbach (1618–1678)⁸⁵ and Vinnius⁸⁶ described the acceptance of *bona fides* as a requirement for *specificatio* as the *communis doctorum opinio*.⁸⁷

However, the unclear connection that the Gloss established with the disputed Digest text did not satisfy everyone. The famous French Humanist Donellus (1527–1591) took the view that *bona fides* was required and had a ‘corrective’ effect. He found support not only from the disputed *D*, 10.4.12.³⁸⁸ but mainly from the main text on *specificatio* which contains the *suo nomine* reservation namely *D*, 41.1.7.7. According to Donellus, one who knows that the matter belongs to someone else cannot be said to have produced the final product *suo nomine* as required in *D*, 41.1.7. 7. Accordingly he must be taken to have donated his labour to the owner of the matter.⁸⁹ The doctrine of donation of the final product to the owner of the matter is based on an analogous application of *D*, 41.1.7.12, whereby those who consciously attach their materials to the land of another to erect a building are taken to have donated their materials to the landowner.⁹⁰ This analogy, as pointed out by F. G. Struvius (1671–1738),⁹¹ is not convincing. In particular, the thief would always produce *suo nomine*, and that does not change the fact that he acted in bad faith. Furthermore, the example of building on land is a genuine case of

Institutionum, Lib. II Tit. I, note 4; Wesenbecius, *In Pandectas Commentarii Pandectae*, XLI I, note 8; Althusius, *Dicaeologica*, Lib. II Pars III Cap. 39, note 13 and *Jurisprudentia Romana*, Cap. XV (the last-mentioned citations concerned only cases where the *bona fide* builder on the land of another and the writer on a tablet belonging to another could claim compensation for expenses by making use of the *exceptio doli*); G. A. Struvius, *Disputatio Inauguralis Juridica De Dominio* (Jenae, 1662), Th. XLIX. No. LIII; Samuel Strykius, *Thesaurus Locorum Communium jurisprudentiae* (Lipsiae, 1697), Axiom XVII Cap. XLVII No. 1; *Specimen usus moderni Continuuatio Tertia* (Halae Magdeburgicae, 1729), continuatio quart Lib. XLI Tit. I § XXIV.

⁸⁵ Lauterbach, *Collegium theoretico-practicum*, Tom. II Lib. XLI Tit. I §§ 84 and 87.

⁸⁶ Vinnius, *Institutionum*, note 2 ad I 2.1.25.

⁸⁷ For more authorities, see Elbert, ‘Die Entwicklung’, 141–2.

⁸⁸ *Digest*, 10.4.12.3: ‘If someone makes must from my grapes or olive oil from my olives or clothes from my wool in the knowledge that they do not belong to him, he is liable to an action for production in respect of both things, because the better view is that what is made from my property belongs to me’ (Watson translation).

⁸⁹ *Commentariorum*, Lib. IV Cap. XII: ‘Non difficile colligitur per interpretationem hoc ipso, quod in [...] *Digest*, 41.1.7.7 ...] species tribuitur ei, qui eam fecit suo nomine. Nam qui scivit materiam alienam esse, magis est, ut existimetur suo nomine non fecisse, sed eius cuius erat materia, eique potius operam suam donare voluisse’.

⁹⁰ ‘Sic hic dum materiam suam et operam in rem alienam sciens contulit, utrumque amittit: multo magis eum, qui contulit tantum operam sciens, hanc amittere oportet’.

⁹¹ F. G. Struvius, *Systema Jurisprudentiae Opificariae* (Lemgoviae, 1738), Lib. I Cap. II No. XV.

accessio which should not be used to prove that *bona fides* is a requirement of *specificatio*.⁹²

The German jurist Oldendorp (1488–1567), who is considered a precursor of the Natural Law School,⁹³ opted for the natural law principle of fairness as the basis for the requirement of good faith. This principle prohibits anyone, including the *specificans*, from acting in bad faith.⁹⁴ This justification was later accepted in practice by the French Humanists Joachim Mynsinger (1514–1588),⁹⁵ Petrus Müllerus,⁹⁶ and the *Usus Modernus* proponent Johann Berger (1657–1732).⁹⁷ The famous natural lawyer Samuel Puffendorf (1632–1728) based the requirement on natural reason (*ex ipsissima ratione naturali*). He found that the maker can only acquire ownership if he or she has a probable cause which simply does not exist in the case of *mala fides*. He argues that if a man with wilful intent and evil design shapes matter into a new form with the purpose of acquiring it, he acquires no right over the new product.⁹⁸ However, the indecisiveness of Grotius on the requirement of *bona fides* resulted in some debate amongst natural law writers over the question of whether *bona fides* was indeed a requirement for acquisition of ownership by *specificatio*.⁹⁹ The view

⁹² See also already Bachovius (1575–1634), *Notae Thesis*, VII Lit. A&B: ‘*Quia imo mala fides non impedit, quominus quis sibi ipsi et animo sibi habendi possideat*’ and again ad *Institutes*, 2.1.19: ‘*Nam et mala fide meo nomine facere possum: et praedo fundum alienum suo nomine possidet*’.

⁹³ Kleinheyer and Schröder (eds), 314.

⁹⁴ Oldendorp, *Actionum*, Cl. III Cap. De Acq. rer. dom. No. V: ‘*Porro, ius naturale nullum dat locum malae fidei*’.

⁹⁵ Joachim Mynsinger (1514–1588), *Apoletesma, hoc est, corpus perfectum scholiorum ad Institutiones Iustinianas pertinentium* (Genevae, 1633), *Scholia*, II Tit. I § *Cum ex aliena*, note 8.

⁹⁶ Müllerus in a comment on Struvius, *Syntagma Juris civilis Cum additionibus Petri Mülleri* (Francofurti et Lipsiae, 1738), Lib. XLI I No. XXXVII, note 3.

⁹⁷ Berger, *Oeconomia Juris ad Usum Hodiernum Accomodati* (2nd edn, Lipsiae, 1719) Lib. II Tit. II No. XVI, note 1: ‘*Quod cum Digest, 19.4.12.3 probatur, tum usu fori, aequitate suadente, receptum est*’.

⁹⁸ Puffendorf, *De Jure Naturae et Gentium Libri Octo* (Londini Scanorum, 1672), Lib. IV Cap. VII § 10: ‘*Omnino tamen inspiciendum, bona quis, an mala fide speciem alienae materiae induxerit. Nam qui in mala fide versatur, utut species pluris sit, quam materia, ac materia prior desisse videatur, aut ipse vehementer re indigeat; hanc quidquam rem magis ad se, quam ad dominum materiae pertinere praetendit. Ipsa quippe res major per se non attrahit minorem, sed accedde oportet etiam aliquam probabilem causam in domino rei majoris. Inde si quis sciens dolo malo materiae meae induxerit formam, ut eam hac ratione interverteret, is neque in materiam quid juris adquisivit [...]* Atque hoc non est ex legibus positivis, sed ex ipsissima ratione naturali; etsi alias natura poenas non determinat. Neque enim poena est, nequitiam suam praeis impendisse’.

⁹⁹ Elbert, ‘Die Entwicklung’, 155–9. At 158, note 1 he records the names of six lesser natural lawyers and writers being in favour and at 158, note 2 seven lesser natural

that the *ratio naturalis* and the rules of the *ius naturale* and the *ius gentium* compel acceptance of the requirement of *bona fides* was already rejected by Bachovius (1575–1634).¹⁰⁰

(4) Roman-Dutch law

In Roman-Dutch law, the justification for the requirement of *bona fides* given by Donellus was taken over by the proponent of the Dutch Elegant School, Arnoldus Vinnius (1588–1657) in his commentary on the *Institutes* of Justinian. He writes that the producer who knows that he is working on the matter of another must be taken to have acted in the name of the owner of the materials and thus to have donated his labour in the same manner as a person who knowingly builds with his own materials on the land of another.¹⁰¹ Donellus' and Vinnius' justification for the requirement of *bona fides* is also supported and explained at length by another representative of the Dutch Elegant School, Gerardus Noodt (1647–1725).¹⁰² Interestingly, he adds that the *mala fide* producer is not allowed to profit from his dishonesty (*improbitate sua*).¹⁰³

However, another proponent of the Dutch Elegant School who also dabbled with the *Usus Modernus*¹⁰⁴ and a contemporary of Noodt and Johannes Voet, the Frisian Ulrich Huber (1636–1694), differed from his predecessors. He was the first jurist who classified *specificatio* as an independent manner of acquisition of ownership, and not as part of *accessio*. He concedes that on a correct interpretation of the texts, *specificatio* is closely connected with

lawyers being against the requirement notably Menckenius, Heineccius and Westphal.

¹⁰⁰ *Institutiones*, ad I 2.1.19: 'Adquisitio domini iure gentium, de qua hic tractatur, ubi alias causa habilis est, per malum fidem non impeditur [...] Atque hoc malo quam ut cum Wesemb et aliis distinguam inter rationem naturalem et civilem: quasi ex hac non fiat dominus, qui est in mala fide: hic enim iuxta rationem iuris gentium tractant ICI?.'

¹⁰¹ *Institutionum*, 2.1.25, note 2: 'Nam qui scit materiam alienam esse, in eadem causa haberi debet, ac si nomine domini materiae speciem fecisse, cui etiam operam suam donasse intelligendus est, exemplo ejus, qui sciens in alieno solo aedificavit. Atque haec est communis quoque DD sententia?.'

¹⁰² *Commentarium*, ad Lib. X Tit. IV, *Ad exhibendum*, 247: 'nam si speciem fecit, cum sciret, haec aliena esse; ait Paulus, specie dominum esse qui materiae, id est, uvarum, olivarum, aut lanae dominus fuit: quin vero speciem fecit hanc non esse ejus dominum: qui intelligitur eam fecisse alieno nomine; ideoque domino uvarum, olivarum, et lana, id est, materiae, ex qua factum est mulsum, oleum, aut vestimentum, ad hac exhibenda teneri; sicut ei post exhibitionem, tenebitur rei vindicatione. Eum certe de improbitate sua lucrum facere, et accipere actionem quam non habuit, non oportet?.'

¹⁰³ See also the Jesuit Estavo Fagundez, *De Iustitia et contractibus et de acquisitione et translatione domini* (Lugduni, 1641), Lib. II Cap. XV who denied acquisition of ownership by prescription by a *mala fide* possessor on the following ground: 'Quoniam omne, quod non est ex fide, peccatum est, synodali iudicio definimus, ut nulla valeat absque bona fide praescriptio, tam canonica, quam civilis?.'

¹⁰⁴ Kleinheyder and Schröder (eds), 204.

the occupation theory, but adds that the vigour and energy involved in the production process does not have to take account of *bona* or *mala fides*.¹⁰⁵

By continuing the analogy of *occupatio*, Huber shows that *bona fides* is not required for the acquisition of ownership in any of the other connected cases, namely *accessio*, *confusio* or in the case of building with the materials on the ground of another. He therefore questioned why it should be required for *specificatio*, which was an equally strong ground for acquisition of ownership. He also pointed out that Gaius and Justinian would certainly have mentioned *bona fides* in their *Institutes* if it was a recognised requirement. Finally, he disposed of *D*, 10.4.12.3 by pointing out that the text deals with the *actio ad exhibendum* and that it was unsafe to extend the rationale for a certain decision beyond its scope.¹⁰⁶

The view of Huber was echoed by his famous contemporary Johannes Voet (1647–1713). In his search for a new doctrinal basis for *specificatio*, Voet found it difficult to settle for either the occupation or accession theory. Thus he classified *specificatio* under *accessio industrialis*, but with regard to the requirement of *bona fides* accepted the occupation theory, which proceeds from the destruction of the raw matter by the formation of a new object and which leaves no room for the requirement of *bona fides*. However, like Bachovius, Voet accepted *mala* or *bona fide* plays an important role in deciding the compensation that must be paid to the owner of the materials for his loss.¹⁰⁷ Voet regards the main text relied upon by the proponents of the *bona fides* requirement, *D*, 10.4.12.3, as a relic of the Sabinian opinion which was broadened by the acceptance of the *media sententia*. The internal contradiction of the text and the fact that the author Paul was the most important proponent of the *media sententia* was, in Voet's opinion, overlooked.¹⁰⁸

¹⁰⁵ Huber, *Praelectionum*, Lib. II I § 27: 'Formationis et Specificationis ea vis est, quam mala fides non magis impedit, ac spreta domini prohibitio occupationem ferue' because 'Forma extinguit materiam. Materia non est amplius. Ergo non in dominio est'.

¹⁰⁶ 'Rationem legis ultra decisionem extendere saepe minus tutum est'.

¹⁰⁷ Johannes Voet, *Commentarius*, 41.1.21: 'Nihil refert, utrum in bona (an mala) fide fuerit, putans materiam suam esse, an alienam esse sciverit, cum utroque casu novae specie dominus efficiatur ex ratione, quod res ita mutata, ut ad priorem materiam reduce nequeat, pro extincta habeatur, neque bona vel male fides specificatoris efficere possit, ut magis aut minus res ipsa prior videatur superesse: licet quantum ad actiones, quibus specificator respectu materiae alienae convenitur, illud intersit, quod, si bona fide fuerit, tantum actione in factum ex lege Aquilia conveniri possit, tanquam talis, qui sua culpa domino materiae damnum dedit [...] sin in male fide, etiam actione furti et conditione furtiva teneatur [...] quin et reivindicacione extrinsecus, tanquam talis, qui dolo possidere desiit'.

¹⁰⁸ 'Dum enim his plane similia sint, quae in [...] Digest, 6.1.12.3 ... tradatur et pro fundamento habeant, id omne, quod ex re mea factum est, meum esse; nulla potest superesse haesitatio. Quin illic quoque comprehensa fit Sabinianorum sententia, reprobata a Justiniano, non aliter admittente, id

Turning now to the most important Roman-Dutch authority, Hugo Grotius and the Roman-Dutch jurists that commented on his *Inleidinge*, the following picture emerges. In his *Inleidinge* (written in 1620) 2.8.2 Grotius still accepted *bona fides* as a requirement for *specificatio*. He wrote that ownership is acquired by *specificatio* if a person acting *bona fide* gives a new form to another's matter. For if the producer was aware that the whole or part of the matter was not his, the owner of the matter would retain his ownership and the producer workman would lose the value of his labour.¹⁰⁹

However, in his subsequent famous work, *De Iure Bellis ac Pacis* (1625), Grotius accepted that natural law provided that the *mala fide specificans* should acquire ownership. This was because the rule depriving the *mala fide specificans* of ownership on the grounds of his bad faith had a penal character. Grotius said that natural law did not lay down such specific punishments for wrongdoing (even though it provided that wrongdoers naturally deserved punishment). Consequently, on Grotius's analysis, natural law did not established the specific penalty that a *specificans mala fide* should not acquire ownership due to his bad faith..¹¹⁰

Gerlach Scheltinga (1708–1765) wrote in his *Dictata* on Grotius (1761) that Grotius erred when he initially accepted that *bona fides* was a requirement for specification in Roman law.¹¹¹ Additionally, Simon Groenewegen van der Made (1613–1652) did not mention it as a requirement for the law of his time.¹¹² Groenewegen in his commentary on Justinian's *Institutes*, 2.1.25 refers

meum esse. Quod ex re mea fit, quam si ad priorem et rudem materiam reduci possit.

¹⁰⁹ Grotius, *Inleidinge tot de Hollandsche Recht-geleerdheid* (1620), 2.8.2: 'Door bekomers daed werd de eigendom verworven, zoo wanneer iemand ter goede trouwe handelende aen eens andere stoffe een nieuwe ghedaente geeft; Want soo hij wiste de stoffe in 't geheel ofte deel eens anders te sijn, soo zoude den eigenaer van de stoffe sijn rect behouden, ende den gedaent-gever soude sijn arbeid ende stoffe verliesen'.

¹¹⁰ Grotius, *De Iure Belli ac Pacis Libri Tres*, II VIII § XX (1680): 'Ut autem qui mala fide materiam alienam attrahant speciem perdant, est quidem non inique constitutum, sed poenale, atque ideo non naturale. Natura enim poenas non determinat, nec ob delictum per se dominia aufert, quamquam naturaliter poena aliqua digni sunt qui delinquent'.

¹¹¹ See W. de Vos and G. G. Visagie, *Scheltinga se 'Dictata' oor De Groot se 'Inleiding tot de Hollandsche Rechtsgeleerdheid'* (Perskor, Johannesburg, 1986), XIV.

¹¹² Scheltinga, *Dictata ad Grotium*, 2.8.2: 'De Groot meenende, dat die stoffe dezynre was, dus wanneer hy zulcks ter goede trouwe doe ten dit zegt de Heer de Groot in die suppositie dat zulks in het RR zoo begrepen is, maar wy denken dat in het RR de goede trouw in die gedaantegeving (specificatio) niet ist gerequireerd geworden en wanneer men Groenewegen de § 30 Instit de Rerum Divis ad Inst., 2.1.30 inziet, zal men er dat ook niet in geleerd vinden'.

his readers to the appraisal of *Institutes*, 2.1.25 by Grotius, *De Iure Belli ac Pacis*, 2.8.19.¹¹³

Willem Schorer (1717–1800) in his notes on Grotius states that Wolff (1679–1754), working in the tradition of natural law, did not agree with Grotius' requirement of *bona fides*, and that even if the *specificans* knew that the matter belongs to another, he will still acquire a co-ownership share in the *nova species*.¹¹⁴ Schorer however preferred the opinion of the great natural lawyer Emir Vattel (1714–1767), who argued that one's property cannot without one's consent become the property of another, and that the owner of the matter is favoured in the case of *male fide* workmanship.¹¹⁵ He also refers to Puffendorf's disagreement with Grotius' view in *De Iure Belli ac Pacis* that it was against natural law to deprive a *mala fide specificans* of his ownership of the *nova species*. On the contrary, Schorer concluded that it would be grossly unreasonable (*alleronredelijkst*) to reward a person for his unlawful act.¹¹⁶

In his *Praelectiones* on Grotius, Dionysius Godefridus van der Keessel (1738–1818), accepted Grotius' view that a person who *mala fide* produces a new product from the matter of another is liable under the *actio ad exhibendum*, and if he does not become the owner of the final product he can at least be sued under the *actio ad exhibendum* as someone who has (fraudulently) ceased to possess.¹¹⁷ He then rejected Schorer's commentary on Grotius as inappropriate, in that it states the position in natural law and not the positive law position. He added that Grotius himself held different opinions when discussing the natural law position, on the one hand, and, on the other, the position in the positive law of Holland and Zeeland as it stood following the reception of Roman law.¹¹⁸

¹¹³ Groenewegen, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus* (1649), ad *Institutes*, 2.1.25.

¹¹⁴ Wolff, *Jus Naturae Methodo Scientifica Pertractum*, Pars II Cap. II § 341.

¹¹⁵ *Quaestiones de Droit Naturelle*, 77.

¹¹⁶ 'Integendeel zoude het alleronredelijkst zijn, eene ongeoorloofde daad te moete belonen.'

¹¹⁷ See the reference to *Digest*, 6.1.27.3: 'Anyone who before joinder of issue has fraudulently ceased to possess is liable in an *actio in rem*. This may be inferred from the statute which, as we have said, laid down that past fraud should be taken into account in the action for an inheritance' (Watson translation).

¹¹⁸ Van der Keessel, *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Jurisprudentiam Hollandicam*, 2.8.2: 'Qui mala fide ex aliena materia novam speciem facit, actione ad exhibendum tenetur et non acquirit, vel saltem conveniri potest tamquam talis, qui dolo possidere desiit': *Digest*, 10.4.12.2; 6.1.27.3; Vinnius, *Institutionum*, 2.1.25, note 2: 'Ceterum quae ad hunc § Amplissimus Schorer commentatus est, proprie non sunt huius loci, ubi non de iure naturali sed de iure civili agimus, et ideo ipse Grotius alia de specificatione tradit De Iure Belli ac Pacis 2.8.19, n 2 ubi ius naturae explicuit, alia hoc loco ubi refert id, quod ex subsidiario Iure Romano

In summary, the reasoning employed by Donellus, Vinnius and Noodt is not convincing. A thief can never be assumed to act for anyone other than himself when he produces a new product from stolen matter. Furthermore, the analogy of a person that builds on the land of another being deemed to have donated his material to the owner of the land is not directly in point. The insistence of Grotius on *bona fides* in his *Inleidinge* is marred by his rejection of the requirement in *De Iure Belli ac Pacis* and Schrassert's statement that *bona fides* was not a requirement in Roman law or the judicial practice of his time. Against this we have van der Keessel, who notes that the pronouncements of Grotius in his *De Iure Belli ac Pacis* were natural law pronouncements which did not reflect the law as applied in the judicial system of the day. Nevertheless, one should not forget the statements of Voet and Huber that argue against the requirement of *bona fides* in Roman-Dutch law. One can at least conclude that Roman-Dutch law is inconclusive on the issue whether *bona fides* was indeed a requirement for the acquisition of ownership by specification.

(5) Scottish Institutional writers

As part of a very wide statement, Stair dealt with the requirement of *bona fides*:

Positive law, or custom, may, without injustice, follow any of these ways (*media sententia*, Connanus or Grotius), reparation being always made to the party who loses his interest, unless the presumption be strong enough to infer, that the workmanship was performed *animo donandi*, by him who knew the material belonged to another.¹¹⁹

Stair states in effect that Scots law may follow the *media sententia*, Connanus or the view of Grotius in allocating ownership or co-ownership to the producer unless the producer can be deemed to have donated the final product to the owner of the matter when the producer acted *mala fide*. This statement is open to the criticism that someone who acts *mala fide* does not necessarily act *animo donandi* (i.e. with the intention of donating the final product to the owner of the matter).¹²⁰

Erskine, on the other hand, classified *specificatio* as a form of industrial accession. In his discussion of the various forms of industrial accession, he made the following remark with regard to the accession of buildings to land:

in Hollandia et Zelandia iuris est.

¹¹⁹ 2.1.41. My own insertion in brackets.

¹²⁰ See above.

This rule of accession is so strong that though I should build a house on my own property with materials which I knew to belong to another, the house and consequently all the materials of which it consists are mine notwithstanding my mala fides.¹²¹

Erskine then went on to say that “[u]nder accession may be included specification”.¹²² From this one may assume that in his view the same requirements would apply as those applied to accession and therefore that mala fides does not prevent the producer from acquiring ownership in the new object.

Having also classified specification under industrial accession, Bell in his *Principles* states:

if the materials, as a separate existence be destroyed in bona fide, the property is with the workman [...]¹²³

This statement is amplified by William Forbes (died 1745) in his *The Great Body of the Law of Scotland*:

but if he knew that the matter he was labouring belonged to another, the new species accrues to that other.¹²⁴

For this statement Forbes relies on *D*, 10.4.12.3, the spuriousness of which has been discussed above.

Conclusion

I would accept the first rule of the *Draft Common Frame of Reference* which states that the producer of new goods out of materials owned by another

¹²¹ *An Institute*, 2.1.15.

¹²² *An Institute* 2.1.16.

¹²³ *Principles*, 1298.1. Bell was cited by Lord President Clyde in *McDonald v Provan (of Scotland Street) Ltd* 1960 SLT 231, 232 as direct authority for the requirement of *bona fides*.

¹²⁴ At 495. See Osler, ‘Specificatio’, 121, note 57. William Forbes was a Professor of Law at Glasgow University (1714–1746). His work is kept in manuscript in Glasgow University Library.

becomes the owner of the new goods.¹²⁵ But I would stop there. I would not qualify this rule by taking account of the relative value of the materials and the workmanship involved or the *bona fides* of the parties.

I do not accept the reversibility test embodied in the *media sententia*, because this compromise solution is based on Greek philosophical ideas about the essence of matter and form. I also do not accept the relative value test initiated by Connanus which has been accepted in modern European codifications with variations on the role played by matter and workmanship.¹²⁶ My main criticism here is that these nuances force jurisdictions to select either the craftsman or the owner of the matter as the owner of the final product. As such selection can be difficult and disputed, this flies in the face of the purpose of the law of property to identify the holders of property rights in goods so as to promote certainty in commercial transactions.

With regard to the question of *bona fides* one has to conclude that the historical controversy surrounding this issue has left us with an uncertain outcome. However, there are strong arguments against such a requirement. First, the fact that *specificatio* is often classified as a form of industrial accession fortifies the view that, as in the case of *accessio*, *bona fides* is not required. Second, the remedies available to an owner who has lost his materials in circumstances where the *specificans* acted in bad faith, namely remedies based on theft and a delictual remedy for economic loss suffered, provide adequate compensation for the loss of the materials. Third, awarding the final product to the owner of the materials may yield unfair results. The classic example is the painting of a famous painter on a canvas of low quality. Fourth, the owner of the materials will not always desire ownership of the final product where it does not adequately compensate them for the loss of the initial matter – for instance where a kite is made of an expensive damask table cloth stolen from its owner. Finally, in the interests of legal certainty and clarity one has to allocate the *nova species* which has lost its former identity and is no longer recognised as an individualised object in commercial traffic to either the *specificans* or the owner of the materials, preferably without any legal process. It would create uncertainty and delay if one must first investigate the *bona*

¹²⁵ Christian Bar and Erich Clive (eds), *Principles, Definitions and Model Rules of European Private Law (DCFR)* (Munich, 2019), 5:059 VIII – 5:201(1).

¹²⁶ See Bell, *Commentaries*, I 276 7th edn I 295, note 1: ‘Neither the system of the Proculeriani, nor that of the Sabiniani, nor the middle opinion of Justinian’s lawyers, have been universally approved abroad. [...] It was not to be expected that a rule founded on this kind of subtlety should be tamely acquiesced in by modern nations, to whom the Roman law was rather a fountain than a code of law’. (The emphasis is my own.)

fides of the producer. Commerce is promoted if the final product is allocated to the person who is in the closest relationship to the new product, namely the producer, irrespective of his *bona* or *mala fides*.¹²⁷ The attribution of the consequence of production to the producer is based on the need of the law of property for legal certainty as to ownership and thus the immediate release of the *nova species* into commercial traffic.

As far as the rationale for awarding the final product to the *specificans* is concerned, changing modern circumstances have eclipsed the Pandectist labour theory. Today goods are seldom produced by single craftsmen. The distillation of grapes into wine is managed by major distilleries, while large-scale factories specialise in the mass production of bulk commodities. In assembly-line production the labour produced by humans is mostly an insignificant part of the production process, overshadowed by the role of machinery and the capital investment of the entrepreneur in establishing suitable conditions for the production process. The crucial question now is, who is the producer?

What about *suo nomine*?¹²⁸ It stands to reason that the tailor or seamstress who receives a piece work from a large factory to fashion cloth into garments would not acquire ownership in the garments they produce.¹²⁹ The same is true of the tailors or seamstresses who work in a large clothing factory. One could perhaps go so far as to say that even the tailor who steals materials from the factory and make his own garments would not acquire ownership of the final product on the ground that he would not be considered the producer in the light of the milieu in which the production was done. The *suo nomine* requirement could even supply an answer to the case where the parties addressed the question of ownership in the transaction giving rise to the production. A typical modern scenario is where the supplier of goods or materials (for example a saw mill or wine farmer) has contracted with the buyer (a furniture factory or a distillery) on the basis that, pending full payment

¹²⁷ This argument has been culled from the *Preparatory Materials* on the German Civi Code, *Motive* III 361 and *Protokolle* III 243 for relinquishing the requirement of *bona fides* in § 950 of the German Civil Code. Cf. Christina Kraft, 'Bona Fides', especially 310–7. The main criticism of the non-requirement of *bona fides* is that it has deprived the labour involved in specification of its moral character. See Elbert, 'Die Entwicklung', 137.

¹²⁸ The following *Digest* texts deal with *suo nomine*: *Digest*, 41.1.7.7 (Gaius); *Digest*, 12.1.31.1 (Pomponius) and *Digest*, 41.1.25 (Callistratus). For numerous references to *suo nomine* in the *ius commune* see Elbert, 'Die Entwicklung', 169–72. See also B. C. Stoop, 'Non solet locatio dominium mutare. Some remarks on specification in classical Roman law', *Tijdschrift voor Rechtsgeschiedenis*, 66(1-2) (1998), 3–24.

¹²⁹ J. C. Sonnekus, 'Opbou van motorwrakke, *accessio* en *specificatio*', *Tydskrif vir die Suid-Afrikaanse Reg*, (1991) 706–11.

of the purchase price, the seller's (saw mill or wine farmer's) title in the goods (timbers or grapes) will be retained in anything made or produced (furniture or wine) by the buyer.¹³⁰ Could one conclude that the factory or distillery was in fact producing not *suo nomine* but *alieno nomine* on behalf of the saw mill or the farmer?^{131 132}

¹³⁰ Carey Miller, *Corporeal Moveables*, 85–6. This question was raised in *Kinloch Dampb Ltd v Nordvik Salmon Farms Ltd* Outer House, Court of Session, 30 June 1999 unreported, commented on by E. Metzger, 'Acquisition of living things by specification', *Edinburgh Law Review*, 8(1) (2004), 115–8.

¹³¹ This would have serious repercussions if completed furniture or distilled wine is still on the site when the factory or the distillery goes bankrupt.

¹³² The author gratefully acknowledges the financial assistance of the South African National Research Foundation for my research projects. A special note of gratitude is also due to the Scottish MacCormick Fellowship programme and the German Alexander von Humboldt Foundation for making it possible for me to conduct research on original modes of acquisition of property at Edinburgh Law School and the Max Planck Institute for Comparative and Private International Law in Hamburg during the European summers of 2013 and 2014 respectively.

Reform of Security over Moveables: Still a Longstanding Reform Agenda in Scots Law

Andrew J. M. Steven

Introduction

David Carey Miller made an immense contribution to property law in Scotland and South Africa. His prolific scholarship was of the highest quality. But, for many years, I felt that David's inherent modesty meant that he did not receive the full recognition which he deserved. Thus, the subject of my essay is reform of security over moveables. If one thought of academic lawyers in Scotland with expertise on security rights, David perhaps did not immediately come to mind. Yet in his classic *Corporeal Moveables in Scots Law*¹ and other writings to which I will refer, David made a profound contribution to this area. What also stood out for me about David was his collegiality and his distinguished service to academic law. He will always have a special place in my career because he was the external examiner of my doctoral thesis.² It was therefore a great privilege to deliver the paper on which this essay is based at the conference in David's honour in 2015 and in his presence. I am sad that he did not live to see the final version but his memory lives on.

The title of my essay comes from an article which David co-wrote in 1997.³ It examined the difficulties with attempts to reform the law of security over moveables in Scotland and appeared shortly after the publication of a report prepared for the then Department of Trade and Industry in 1994 by a committee chaired by Professor John Murray. The article concluded: "There can be little doubt that Scots law requires urgent reform in the area of security

¹ D. L. Carey Miller with D. Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), chs 11 and 12.

² Subsequently published as A. J. M. Steven, *Pledge and Lien* (Edinburgh, 2008).

³ D. O'Donnell and D. L. Carey Miller, 'Security over Moveables: A Longstanding Reform Agenda in Scots Law', *Zeitschrift für Europäisches Privatrecht*, 3 (1997), 807–22.

over moveables'.⁴ This echoes a statement made by a previous generation exactly one hundred years before. In their *Law of Rights in Security*,⁵ William Murray Gloag, who probably does not require introduction,⁶ and James Mercer Irvine, a predecessor of David as a Professor of Law at the University of Aberdeen,⁷ wrote:

The law on the subject of security-rights over corporeal moveables is beset with difficulties; and is not, perhaps, in a very satisfactory state, as the result of its rules is often to deprive the owner of such property of the power to make use of it as a security for his debts. It is open to question whether the rigidity of the law of Scotland on this subject should not now be relaxed by the adoption of a system analogous to the English bill of sale.⁸

120 years after that statement, there has been little reform. The principal exception has been the rather unhappy introduction of the floating charge in 1961.⁹ This essay considers what therefore continues to be a longstanding reform agenda in Scots law. After this introduction, the second section provides an overview of the current law and the security rights which are currently available. The third section looks at past attempts at reform. The fourth section considers the Scottish Law Commission moveable transactions project and tests the proposed scheme against principles set out by David for reform of the law in this area. The final section is the conclusion.

⁴ Ibid., 819.

⁵ W. M. Gloag and J. M. Irvine, *Law of Rights in Security, Heritable and Moveable including Cautionary Obligations* (Edinburgh, 1897, reprinted 1987). See A. J. M. Steven, 'One Hundred Years of Gloag and Irvine', *Jur. Rev.*, (1997), 314–27.

⁶ But see J. Chalmers, 'Resorting to Crime' in R. G. Anderson, J. Chalmers and J. MacLeod (eds), *Glasgow Tercentenary Essays* (Edinburgh, 2014), 70–100, 83–4.

⁷ See M. C. Meston, 'The civilists of Aberdeen 1495–1995', *Jur. Rev.* (1995), 153–65, 164.

⁸ Gloag and Irvine, *Law of Rights in Security*, 187–8. The bills of sale legislation is still part of English law, but is generally regarded as unsatisfactory. Its abolition and replacement was recommended by the Law Commission for England and Wales. See *Report on Bills of Sale* (Law Com. No. 369, 2016). A Bill to implement the Report was announced in the 2017 Queen's Speech.

⁹ See the next section below, headed "Current Scots law of voluntary security over moveables", at (3).

Current Scots law of voluntary security over moveables

(1) General

Rights in security can be voluntary (express) or involuntary. Only the former are within the scope of this essay.¹⁰ The following voluntary securities are currently possible under Scots law.

(2) Pledge

At common law effectively the only express security right over corporeal moveable property is pledge,¹¹ a security which is recognised in most legal systems. In his *Corporeal Moveables in Scots Law*, David refers to my statement that the ‘modern law of pledge began in 1681 with the publication of Stair’s *Institutions of the Law of Scotland*. Indeed, it might be said that the law has hardly changed since 1681 in this area.’¹² Pledge requires the creditor to have possession of the asset. This publicises the security to third parties. While in principle a court order is required for pledge to be enforced, it is long-settled that the parties may agree on an extra-judicial power of sale.¹³ Consumer pledges to pawnbrokers are regulated by legislation and there is a statutory power of sale.¹⁴ Pledge is generally not a commercially practical security because businesses cannot afford to give up possession of their assets. It is only used in limited circumstances such as where assets are stored in a warehouse, or aboard a ship when the bill of lading is pledged. But such use relies on the belief that the decision of the Inner House of the Court of Session in *Hamilton v Western Bank* in 1856, which restricts pledge to actual delivery, would not be followed today.¹⁵

(3) Floating charge

The unduly restrictive nature of the common law was considered in a Report

¹⁰ The main examples of involuntary securities in Scotland are the possessory lien and the landlord’s hypothec. See further G. L. Gretton and A. J. M. Steven, *Property, Trusts and Succession* (3rd edn, Haywards Heath, 2017), paras 21.57–21.66.

¹¹ See, generally, Carey Miller with Irvine, *Corporeal Moveables*, paras 11.04–11.12 and 11.15–11.17, and Steven, *Pledge and Lien*, chs 2 to 8.

¹² A. J. M. Steven, ‘Rights in Security over Moveables’ in K. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland*, vol. 1 (Oxford, 2000), 333–62, 341. See also A. J. M. Steven, ‘Scottish Property Law 2017’, *Jur. Rev.* (2017), 21–31, 27.

¹³ *Murray of Philiphaugh v Cuninghame* (1668) 1 Br Sup 575.

¹⁴ Consumer Credit Act 1974 ss 114–22.

¹⁵ “(1856) 19 152.” See Carey Miller with Irvine, *Corporeal Moveables*, para. 11.07. The leading critique of *Hamilton* is A. F. Rodger, ‘Pledge of bills of lading in Scots law’, *Jur. Rev.* (1971), 193–213.

by the Law Reform Committee for Scotland in 1960.¹⁶ Its solution was to recommend the introduction of the floating charge. Yet less than ten years before, Lord President Cooper¹⁷ had famously said: ‘It is clear in principle and amply supported by authority that a floating charge is utterly repugnant to the principles of Scots law.’¹⁸ In 1961 the recommendation was implemented and the floating charge was introduced to Scotland by statute followed by the enforcement procedure of receivership in 1972.¹⁹

As David himself noted, the floating charge is of course a legal transplant from England.²⁰ Only certain legal persons can grant this type of security, principally companies and limited liability partnerships. Registration of the security in the Companies Register is required.²¹ While the floating charge has been welcomed by the banks,²² given the shortcomings of pledge, it has proved problematic. Floating charges are creatures of equity. Scots law does not recognise equity in the way that it is recognised in England.²³ It has therefore been hard to make the floating charge fit into a civilian legal framework.²⁴ For example, the charge only becomes a real right on crystallisation²⁵ and its nature before that is unclear. Efforts to make it fit threatened the conceptual foundations of Scottish property law in the case of *Sharp v Thomson*.²⁶ David

¹⁶ *Eighth Report of the Law Reform Committee for Scotland* (Cmnd 1017, 1960) para. 2.

¹⁷ On Lord Cooper, see H. L. MacQueen, ‘Two Toms and an Ideology for Scots Law: T B Smith and Lord Cooper of Culross’ in E. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh, 2005), 44–72.

¹⁸ *Carse v Coppen* 1951 SC 233, 239.

¹⁹ Companies (Floating Charges) (Scotland) Act 1961 and the Companies (Floating Charges and Receivers) (Scotland) Act 1972. The current legislation is the Companies Act 1985 ss 462–6 and the Insolvency Act 1986 ss 50–71.

²⁰ See D. L. Carey Miller, ‘Scots and South African Property: Problem Transplants’ in E. Cooke (ed.), *Modern Studies in Property Law Volume 1: Property 2000* (Oxford, 2001), 293–308, 303–4.

²¹ Within 21 days of its creation. See the Companies Act 2006 s. 859A.

²² See e.g. R. B. Jack, ‘The Coming of the Floating Charge to Scotland: an Account and an Assessment’ in D. J. Cusine (ed.), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (Edinburgh, 1987), 33–46.

²³ See, for example, D. J. Carr, ‘Equity Stalling?’, *Edinburgh Law Review*, 18(3) (2014), 388–95 and D. J. Carr, *Ideas of Equity* (Edinburgh, 2017).

²⁴ See Carey Miller, ‘Scots and South African Property’, 303–4. And see now also *MacMillan v T Leith Developments Ltd (in receivership and liquidation)* [2017] CSIH 23, para. 121 per Lord Drummond Young.

²⁵ *National Commercial Bank of Scotland Ltd v Liquidators of Telford Grier Mackay & Co. Ltd* 1969 SC 181.

²⁶ 1997 SC (HL) 66. But a later House of Lords undid much of the damage in *Burnett’s Trustee v Grainger* 2004 SC (HL) 19. In the meantime the matter had been referred

and others have called for the floating charge to be abolished and replaced,²⁷ but attempts at reform have so far not succeeded.²⁸

(4) Agricultural charges, aircraft mortgages and security over ships

It is possible by statute for an agricultural co-operative to grant a charge over its 'stocks of merchandise'.²⁹ This security is like a floating charge and in practice appears not to be used. Rather, agricultural co-operatives grant floating charges instead.

Scotland has much the same statutory regime for aircraft mortgages and ship mortgages as the rest of the United Kingdom.³⁰ These are non-possessory but require registration in order to have third party effect.

In relation to ships, in the interests of completeness, mention should also be made of bonds of bottomry and respondentia. These are hypothecs which can be granted by the captain over the ship and the cargo respectively.³¹ Nowadays due to the availability of modern communications they are obsolete.

(5) Functional securities

(a) *Introduction*

Given the limited range of true rights in security which are available over moveables, functional securities are widely used. What happens is that ownership of the asset is used for security purposes.³² Usually the creditor will hold the property, except in the case of the trust, where ownership is vested in the debtor and the creditor is a beneficiary under the trust. In a functional security, as contrasted with a true right in security, the creditor does not hold a subordinate real right in the encumbered property.

to the Scottish Law Commission. See Scottish Law Commission, *Report on Sharp v Thomson* (Scot. Law Com. No. 298, 2007).

²⁷ See O'Donnell and Carey Miller, 'Security over Moveables', 822; G. L. Gretton, 'Should floating charges and receivership be abolished?', *SLT (News)*, (1986), 325–8 and D. Cabrelli, 'The Case Against the Floating Charge in Scotland', *Edin. L. R.*, 9(3) (2005), 407–38.

²⁸ See below, in the section headed "Lack of Reform to Date".

²⁹ Agricultural Credits (Scotland) Act 1929.

³⁰ Merchant Shipping Act 1995 s. 16 and Sch. 1; Civil Aviation Act 1982 s. 86 and The Mortgage of Aircraft Order 1972, SI 1972/1268. The UK acceded to the Cape Town Convention on International Interests in Mobile Equipment in 2015. See The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, SI 2015/912.

³¹ Gloag and Irvine, *Rights in Security*, 297–302.

³² But the subject of ownership of incorporeals is controversial. See G. L. Gretton, 'Ownership and its Objects', *Rabels Zeitschrift*, 71(4) (2007), 802–51.

(b) *Transfer*

True security³³ does not seem possible under Scots law in relation to incorporeal moveable property such as receivables, company shares and intellectual property. Security is effected by transferring the property to the creditor, either by assignation in security, or by complying with the transfer rules which apply in special cases.³⁴ An assignation in security can either state expressly that the purpose of the transfer is security or it can bear to be an absolute assignation but be qualified by a separate agreement between the parties.³⁵

Where the asset that is being transferred is a claim, in other words the right to the performance of an obligation (typically payment of a monetary debt), an assignation is only completed by intimation to the obligant (the account debtor).³⁶ For example, Angela owes Barry £1000. Barry assigns his claim against Angela to Charles. The assignation must be intimated to Angela (in practice usually by the assignee, Charles) or it will be ineffective.

Transfer of company shares and registered intellectual property requires registration in the company's register of shareholders or the appropriate intellectual property register. Complex contractual arrangements must then be put in place to allow the provider of the security to continue to exercise rights which they would have but for the transfer, such as voting rights in the case of shares and licensing rights in the case of intellectual property. These difficulties arise because ownership is a greater right than a secured creditor actually needs.

Sale and leaseback arrangements are sometimes used for corporeal moveables. They make the delivery required in pledge unnecessary to 'secure' the purchaser/lessor, because under the Sale of Goods Act 1979 section 17, in contrast with the common law, delivery is not required to transfer ownership of the property. But this type of arrangement runs the risk of being struck down by another provision in the 1979 Act – section 62(4) – as a sham sale.³⁷

³³ Apart from the difficult case of the floating charge.

³⁴ Such as a transfer of shares in a company, which has to be registered in its register of members.

³⁵ Gloag and Irvine, *Law of Rights in Security*, 490–4.

³⁶ See e.g. R. G. Anderson, *Assignation* (Edinburgh, 2008), ch. 6.

³⁷ See Carey Miller with Irvine, *Corporeal Moveables*, para. 12.06. See also G. L. Gretton, 'The Concept of Security' in Cusine (ed.), *A Scots Conveyancing Miscellany*, 126–51 and S. C. Styles, 'Debtor-to-Creditor Sales and the Sale of Goods Act', *Jur. Ren.*, (1995), 365–76.

(c) *Retention of ownership*

Retention of title in the sale of goods is widely used.³⁸ Commercial sales contracts have clauses under which the seller retains ownership until the price is paid. Often, however, title is retained until all sums due to the seller are paid, thus giving the seller a high level of protection in the event of the buyer's insolvency.³⁹ While valid, these clauses can be defeated by sub-sales to third parties in good faith,⁴⁰ as well as by forms of original acquisition (e.g. accession, such as where bricks used to build a house become owned by the landowner⁴¹). Another important example of ownership retention, in a consumer context, is hire purchase under which ownership of vehicles or other goods is kept until the final instalment is paid by the hiree/purchaser. The downside of hire purchase is that it can only be used for acquisition finance. It is no good for someone who already owns the vehicle, where the only security available, given the doubtful validity of sale and leaseback, is pledge.

(d) *Trusts*

Creditors may also take security by using trusts. Trusts are a common feature of securitisations and other transactions in which sums of money require to be ring-fenced. Under Scots law, ownership of trust property is held by the trustees as a 'special patrimony' and thus separately from their private assets, which are in their 'ordinary patrimony'.⁴² Therefore, if a trustee becomes personally insolvent the trust assets cannot be touched by the trustee's personal creditors because they are ring-fenced in the special patrimony. The use of trusts for security purposes was condemned by the Inner House of the Court of Session in one case over thirty years ago.⁴³ Today, however, it seems unlikely that a similar approach would be taken given the considerable number of commercial transactions that are based on trust structures.⁴⁴

³⁸ See generally Carey Miller with Irvine, *Corporeal Moveables*, ch. 12.

³⁹ *Armour v Thyssen Edelstahlwerke AG* 1990 SLT 891.

⁴⁰ The leading provision is the Sale of Goods Act 1979 s. 25 but the Hire Purchase Act 1964 s. 27 has particular rules on motor vehicles.

⁴¹ See Carey Miller with Irvine, *Corporeal Moveables*, para. 12.14.

⁴² See G. Gretton, 'Trusts without Equity', *International & Comparative Law Quarterly*, 49(3) (2000), 599–620; K. G. C. Reid, 'Patrimony not equity: the trust in Scotland', *Eur. Rev. Private L.*, 8(3) (2000), 427–37. See also *Ted Jacob Engineering Group Inc. v Johnston-Marshall and Partners* [2014] CSIH 18, para. 90 per Lord Drummond Young and *Glasgow City Council v The Board of Managers of Springboig St John's School* [2014] CSOH 76, paras 16 and 17 per Lord Malcolm.

⁴³ *Clarke Taylor & Co. Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111.

⁴⁴ Scottish Law Commission, *Report on Trust Law* (Scot. Law Com. No. 239, 2014), para.

Lack of Reform to Date

(1) Previous reports

Over the last half century there have been several non-implemented (or only part-implemented) reports on reform of security over moveables. Some were written on a Scotland-only basis and others UK-wide.⁴⁵ The Crowther Report of 1971,⁴⁶ part of which was implemented by the Consumer Credit Act 1974, proposed a functional approach based on the notice-filing system under the Uniform Commercial Code article 9 of the USA.

In notice filing, as the name suggests, what is registered is not a security interest⁴⁷ itself but notice of a (possible) security interest.⁴⁸ The notice can be registered before any security interest is actually granted and the same notice can cover multiple interests. The functional approach, which is a hallmark of the system, is that any transaction for security purposes will not normally be ‘perfected’, in other words have third party effect unless a notice is registered by the secured creditor. Therefore, in the absence of registration, transactions such as retention of title or assignation in security will not be effective against third parties any more than a direct grant of a security over property in respect of which there is no registered notice. In such circumstances the security interest can nevertheless ‘attach’, that is to say be enforceable between the provider of the security and the secured creditor.⁴⁹ Moreover, where ownership is used for security purposes the transaction is ‘recharacterised’ so that the secured creditor is deemed to hold only a security interest. Thus, for example, the right of a seller who has retained title pending payment of the purchase price is regarded as only holding a security interest in the goods.

The Crowther Report recommended that its proposed notice filing scheme should apply in both England and Wales, and Scotland, but that the differences between the two legal systems made it advisable to have

3.16. See also *Tay Valley Joinery Ltd v CF Financial Services Ltd* 1987 SLT 207.

⁴⁵ See Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot. Law Com. DP No. 151, 2011), ch. 10. On unimplemented reports south of the border, see J. de Lacy, ‘The evolution and regulation of security interests over personal property in English law’ in idem (ed.), *The Reform of UK Personal Property Security Law* (Abingdon, 2010), 3–82.

⁴⁶ *Report of the Committee on Consumer Credit* (Cmnd 4596, 1971).

⁴⁷ A “security interest” equates broadly with a security right.

⁴⁸ See Scottish Law Commission, *Discussion Paper on Moveable Transactions*, ch. 13.

⁴⁹ The attachment/perfection distinction is alien to Scottish property where a real right either exists and is enforceable against everyone, or does not exist.

separate legislation.⁵⁰ The Government of the day was not convinced.⁵¹ A working party was later established under the auspices of the Scottish Law Commission to examine how a notice-filing scheme might work in Scotland. The chairman was Professor Jack Halliday and its report was published in 1986, but its recommendations were never implemented.⁵² The Diamond Report of 1989, which proposed notice filing for both north and south of the border, suffered a similar fate.⁵³

In 1994, the Department of Trade and Industry Report, mentioned at the start of this essay, was published.⁵⁴ It was restricted to Scotland only and, unlike the earlier reports, included a draft Bill. It rejected notice filing for several reasons, including the fact it ‘involved a radical departure from the current law, and [was] very complex’.⁵⁵ Instead it proposed a new fixed security over both corporeal and incorporeal moveable property which would be created by registration in a new ‘Register of Security Interests’ to be kept by the Registrar of Companies. Further, the floating charge was to be made available to non-company debtors but only for moveable property and not consumer goods. But once again the recommendations were not implemented.

The most recent case of non-implementation concerns the floating charge. The Scottish Law Commission was asked to consider this subject to see how the law could be improved. Its *Report on Registration of Rights in Security by Companies*⁵⁶ recommended a new legislative scheme, which included the establishment of a new Scottish Register of Floating Charges to be run by Registers of Scotland.⁵⁷ Floating charges over Scottish assets would require to be registered in that register and not in the Companies Register.

The recommendations were put into statute by Part 2 of the Bankruptcy and Diligence etc. (Scotland) Act 2007. After the legislation was passed,

⁵⁰ *Report of the Committee on Consumer Credit*, para. 5.2.21.

⁵¹ *Reform of the Law of Consumer Credit* (White Paper, Cmnd 5427, 1973).

⁵² Scottish Law Commission, *Report by Working Party on Security over Moveable Property* (1986) (the ‘Halliday Report’).

⁵³ A. L. Diamond, *A Review of Security Interests in Property* (Department of Trade and Industry, 1989).

⁵⁴ *Security over Moveable Property in Scotland: A Consultation Paper* (Department of Trade and Industry, 1994) (the ‘Murray Report’). See H. Patrick, ‘Reform of Security over Moveable Property: Some General Comments’, *SLT (News)*, (1995), 42–6 and A. J. M. Steven, ‘Reform of Security over Moveable Property: Some Further Thoughts’, *SLT (News)*, (1995), 120–2.

⁵⁵ *Security over Moveable Property in Scotland: A Consultation Paper*, para. 2.5.

⁵⁶ Scot. Law Com. No. 197, 2004.

⁵⁷ The department responsible in Scotland for various registers, including the Land Register.

however, the Committee of Scottish Clearing Bankers wrote to the Scottish Government objecting to the provisions being brought into force on the basis that they would result in increased cost to business.⁵⁸ The principal argument was that whereas a UK company with property in Scotland and England only has to register a floating charge once at Companies House under the current law, under Part 2 of the 2007 Act two registrations would be required. The Scottish Government then established a technical working group led by Registers of Scotland to consider the issue.⁵⁹ Its report proposed three options: (1) implement Part 2 without amendment; (2) implement with amendments; and (3) do not implement. Members of the group were divided as to the way forward. The Scottish Government carried out a consultation on the report in 2012, but has taken no further action. The legislation is now unlikely ever to be brought into force.⁶⁰

(2) Analysis

What conclusions can be drawn from this catalogue of lack of reform? This is what David had to say in an essay on real and personal security published in 2002:

While the perceived need to escape from the requirement of possession by the creditor has long been a spur for reform of the law relating to security over movables, the development of commercial law, facilitating the purchase of consumer goods on credit, has tended to leave traditional security devices in the lurch. That review of the law [...] is not perceived as a matter of high priority is demonstrated by the succession of official proposals for reform which have come to nothing.⁶¹

Clearly it is true to say that the existence of functional security options, together with the floating charge, has reduced the pressure for reform. But then David, in 2005, in the second edition of his *Corporeal Moveables*, somewhat recanted

⁵⁸ See Register of Floating Charges Technical Working Group, *Report to Scottish Government* (2011) Appendix 3, available online at <http://www.scotland.gov.uk/resource/doc/254430/0121799.pdf>.

⁵⁹ *Ibid.*

⁶⁰ For criticism, see K. G. C. Reid and G. L. Gretton, *Conveyancing 2013* (Edinburgh, 2014), 178.

⁶¹ D. L. Carey Miller, 'Present and Future of Real and Personal Security: Scotland' in J. Bell (ed.), *Studies in UK Law* (London, 2002), 123–37, 136.

from his earlier view, mentioned at the start of this essay and expressed in 1997, that there was an “urgent” need for reform:

[D]espite the numerous reviews, it is questionable whether there is actually a need for legislative reform in this area. Despite the existence of a widespread perception that the law causes problems in practice, research commissioned to investigate this perception concluded that neither the ability of unincorporated businesses to grant a floating charge nor their inability to grant a fixed non-possessory security over moveable property was significantly impairing their ability to access finance. It would therefore seem that legislation to implement any of the suggested reforms is unlikely, at least in the foreseeable future.⁶²

The research to which he refers is a report published by the Scottish Executive Central Research Unit in 2002.⁶³ It will not come as a surprise that I take the view that there is a need for legislative reform. This can be justified on several grounds.

In the first place, the 2002 Report noted that in practice the unsatisfactory state of Scots common law was overcome to some extent by recourse to functional securities and, where possible, writing contracts under English law.⁶⁴ Thus, metaphorically speaking, the back door is having to be used by parties to secured transactions because the front door is too narrow.⁶⁵ This is unsatisfactory. A parallel can be drawn with parties contracting under English law because of the doubts about the competence of execution in counterpart, something which the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 remedies.⁶⁶ In the second place, it is unclear that what was true in 2002 is true to the same extent today. As we shall see shortly, the calls for the Scottish Law Commission to look at this area subsequent to 2002 have been strong. In the third place, the last twenty years have seen numerous other jurisdictions introduce significant legislation on security over moveable

⁶² Carey Miller with Irvine, *Corporeal Moveables*, para. 11.18.

⁶³ *Report on Business Finance and Security over Moveable Property* (Scottish Executive Central Research Unit, Edinburgh, 2002).

⁶⁴ *Ibid.*, 10 and 66–8.

⁶⁵ In the words of the Scottish Law Commission, *Discussion Paper on Moveable Transactions*, para. 12.14.

⁶⁶ This followed on from Scottish Law Commission, *Report on Formation of Contract: Execution in Counterpart* (Scot. Law Com. No. 231, 2013).

property.⁶⁷ Mention can be made of New Zealand,⁶⁸ Louisiana,⁶⁹ France,⁷⁰ Australia,⁷¹ Papua New Guinea,⁷² Jersey,⁷³ Belgium,⁷⁴ and Malawi.⁷⁵ Further, in 2009 the Draft Common Frame of Reference was published.⁷⁶ Book IX of that work provides an important new reform model.⁷⁷ And in 2016 the UNCITRAL Model Law on Secured Transactions was released.⁷⁸ The degree to which there have been developments elsewhere such as these highlight the extent to which Scots law requires reform. This is the task of the Scottish Law Commission.

Scottish Law Commission Project on Moveable Transactions

(1) General

As is relatively well-known, the Scottish Law Commission primarily carries out its work under ongoing programmes of law reform, which are agreed with the Scottish Government.⁷⁹ The present practice is for a new programme

⁶⁷ See further the website of the Secured Transactions Law Reform Project, <http://securedtransactionslawreformproject.org/>.

⁶⁸ Personal Property Securities Act 1999. See M. Gedye, R. C. C. Cuming and R. J. Wood, *Personal Property Securities in New Zealand* (Wellington, 2002).

⁶⁹ 2001 La Acts No. 128. See J. A. Stuckey, 'Louisiana's Non-Uniform Variations in UCC Chapter 9', *Louisiana Law Review*, 62(3) (2002), 793–878.

⁷⁰ *Ordonnance n° 2006-346 du 23 mars 2006 relative aux sûretés*. See M. Renaudin, 'The Modernisation of French Secured Credit Law: Law as a Competitive Tool in Global Markets', *International Company and Commercial Law Review*, 24(11) (2013), 385–92.

⁷¹ Personal Property Securities Act 2009. See J. Harris and N. Mirzai, *Annotated Personal Property Securities Act 2009 (Cth)* (Sydney, 2011).

⁷² Personal Property Securities Act 2011.

⁷³ Security Interests (Jersey) Law 2012.

⁷⁴ Pledge Act of 11 July 2013. See E. Dirix, 'The New Belgian Act on Security Interests in Movable Property', *International Insolvency Review*, 23(3) (2014), 171–80.

⁷⁵ Personal Property Security Act 2013. See M. Dubovec and C. Kambili, 'Using the UNCITRAL Legislative Guide as a tool for a secured transaction reform in Sub-Saharan Africa: the case of Malawi', *Arizona Journal of International and Comparative Law*, 30(2) (2013), 163–86.

⁷⁶ See C. von Bar and E. Clive (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference* (Oxford, 2009).

⁷⁷ See U. Drobnig and O. Böger, *Proprietary Security in Movable Assets* (Oxford, 2015).

⁷⁸ See http://www.uncitral.org/uncitral/en/uncitral_texts/security/2016Model_secured.html.

⁷⁹ For discussion in a property law context, see A. J. M. Steven, 'A Golden Era? The Impact of the Scottish Law Commission on Property Law' in W. Barr (ed.), *Modern Studies in Property Law*, vol. 8 (Oxford, 2015), 13–30.

to be agreed every few years, following wide-ranging consultation by the Commission as to the areas that it should examine, using the criteria of importance, suitability and resources.⁸⁰

When the Commission published its *Seventh Programme of Law Reform* in 2005 it announced its intention 'to review the law of assignation of, and security over, incorporeal moveables.'⁸¹ The project had originally been suggested by the Law Society of Scotland and had the support of a number of other legal bodies.⁸² There were several justifications for the project, in particular the importance of incorporeal moveables as a source of wealth and potential source of security for credit, and the fact that the current Scottish rules generally date back to before the industrial revolution and are not fit for modern commerce.⁸³ The requirement of intimation (notification) to the account debtor for there to be an assignation is cumbersome. As there is no equivalent to the English fixed charge, the only way to use incorporeal moveable property for security purposes is to assign it.⁸⁴

While the Seventh Programme ran from 2005 to 2009 limited progress was made by the Commission due to its work on land registration.⁸⁵ When it published its *Eighth Programme of Law Reform* in 2010 it set out its decision to widen the project to include security over corporeal moveable property on the basis that that area of law was also 'outmoded'.⁸⁶ This had the support of a number of consultees to the Eighth Programme. Lord Hamilton, who was then the Lord President of the Court of Session, stated that the topic 'appears to be in urgent need of consideration'.⁸⁷ The Society of Writers to Her Majesty's Signet said that this should be the first priority for the Commission in its Eighth Programme as there is 'no workable fixed security in Scots law'.⁸⁸

⁸⁰ See Scottish Law Commission, 'Law Reform Projects', <http://www.scotlawcom.gov.uk/law-reform-projects/ninth-programme-of-law-reform/>. See e.g. Scottish Law Commission, *Ninth Programme of Law Reform* (Scot. Law Com. No. 242, 2015).

⁸¹ Scottish Law Commission, *Seventh Programme of Law Reform* (Scot. Law Com. No. 198, 2005), para. 2.31.

⁸² *Ibid.*, para. 2.32.

⁸³ *Ibid.*, paras 2.33–2.34.

⁸⁴ *Ibid.*, paras 2.31–2.38.

⁸⁵ This project led to Scottish Law Commission, *Report on Land Registration* (Scot. Law Com. No. 222, 2010), which was implemented by the Land Registration etc. (Scotland) Act 2012.

⁸⁶ Scottish Law Commission, *Eighth Programme of Law Reform* (Scot. Law Com. No. 220, 2010), para. 2.5.

⁸⁷ Submission of Lord Hamilton to the *Eighth Programme of Law Reform* (on file at Scottish Law Commission).

⁸⁸ Submission of WS Society to the *Eighth Programme of Law Reform* (on file at Scottish

There was also support from the Committee of Scottish Clearing Bankers, CBI Scotland and the Law Society of Scotland. Thus began the moveable transactions project,⁸⁹ comprising three strands: (a) assignation (transfer) of incorporeal moveable property; (b) security over incorporeal moveable property; and (c) security over corporeal moveable property.

There is a missing fourth strand: transfer of corporeal moveable property is excluded. The reason for this is that most cases of transfer of this type of property are governed by the Sale of Goods Act 1979.⁹⁰ This is a UK-wide statute and therefore consideration of the subject on a Scotland-only basis would not be sensible.

(2) Discussion Paper

The Commission published a lengthy Discussion Paper in relation to the project in May 2011.⁹¹ The paper's principal author was my predecessor, Professor George Gretton. There followed consultation.⁹² A seminar was held on the security aspects of the project at the University of Edinburgh in October 2011.⁹³

The scheme proposed in the Discussion Paper was as follows. There would be a new electronic register, to be known as the Register of Moveable Transactions (RMT) and administered by Registers of Scotland. A new security over both corporeal and incorporeal moveable property would be introduced, which would be created by registration in the RMT. In relation to corporeal moveables there would be no requirement for the creditor to have possession. As regards incorporeal moveables, such as intellectual property, because the new security would be a true security, the property would not be transferred to the creditor. It would therefore be possible for more than one new security to be granted over the same property. The new security could be granted by any person and not just companies and certain other bodies. Thus private individuals could use it, for example, to raise finance against

Law Commission).

⁸⁹ The project was continued into the Ninth Programme of Law Reform. See Scottish Law Commission, *Ninth Programme of Law Reform*, paras 2.4–2.5.

⁹⁰ On which see Carey Miller, 'Scots and South African Property', 293.

⁹¹ Scottish Law Commission, *Discussion Paper on Moveable Transactions*.

⁹² Forty consultation responses were eventually received. One of these was from the Centre for Property Law of the University of Aberdeen, written by David Carey Miller and Malcolm Combe.

⁹³ The papers are published at *Edinburgh Law Review*, 16(2) (2012), 261–82. The speakers were Professor Gretton, Dr Hamish Patrick, Dr Ross Anderson and Professor Hugh Beale.

their motor vehicle. Secured loans may well incur lower interest rates than unsecured loans.⁹⁴ However, there would be special protections for consumer granters. Floating charges would be retained, at least for the foreseeable future.

Assignations of claims (including assignations in security) would be registrable as an alternative to intimation to the account debtor. Bulk assignations of claims under Scots law would be made far more commercially practical as there would only need to be the one simple registration rather than multiple individual intimations.

(3) The way forward

The scheme proposed in the Discussion Paper was generally supported by consultees. At the time of writing, the Commission is working on a report and draft Bill, the content of which is yet to be finally approved by Commissioners. In due course, the draft Bill could, if the Scottish Government chose to implement the report, then form the basis of a Bill to be considered by the Scottish Parliament, as rights in security is an area of devolved law.⁹⁵

In the course of this work it has been helpful for me to test what is being proposed against two benchmarks set down by David in his writings. First, the new security would be created by registration. In his 1997 article David argued that the ‘requirement of registration to create a real right should be essential in whatever system of security over moveable property is eventually arrived at.’⁹⁶ The logic is clear. Third parties require to be alerted to the fact that a security right is in place and react accordingly. This is the publicity principle of property law.⁹⁷

Secondly, the new scheme would address the shortcomings in the current law which hinder commerce, but would fit so far as possible with the underlying principles of Scots law. The difficulties caused by the incompatibility of the floating charge with Scots law have been recognised and the experience would not be repeated. In his aforementioned 2002 essay, on real and personal security, David wrote:

⁹⁴ See e.g. D. J. Y. Hamwijk, *Publicity in Secured Transactions Law* (Amsterdam, 2014), 103.

⁹⁵ But some aspects of the scheme, e.g. any provisions relating specifically to companies, may require legislation from Westminster as the law of business associations is currently a reserved matter.

⁹⁶ O'Donnell and Carey Miller, ‘Security over Moveables’, 822.

⁹⁷ See e.g. D. L. Carey Miller and others, ‘National Report on the Transfer of Movables in Scotland’ in W. Faber and B. Lurger (eds), *National Reports on the Transfer of Movables in Europe Volume 2: England and Wales, Ireland, Scotland, Cyprus* (Munich, 2009), 297–470, 315.

[T]here is a continuing tension between, on the one hand, a reform agenda driven by commercial utility, and, on the other, pressure to adhere to fundamental principles of private law. In this regard, the priority should be a legal regime which best serves the relevant interests of Scotland, achieved by reform which is functionally compatible with Scots law.⁹⁸

He expressed the same idea in a slightly different way in *Corporeal Moveables*:

The better view is that while the system of property may need to adapt to accommodate the needs of commerce, for it to retain its structural integrity and coherence any development should come from within and show sufficient respect for, and consideration of, the traditions of the system.⁹⁹

With regard to accommodating the needs of commerce, it is notable that while the scheme, if implemented, would amount to the most significant statutory reform of security over moveables in Scotland ever, it is not particularly radical. The plan would not be to introduce the functional notice-filing approach to security exemplified by the Uniform Commercial Code article 9 in the USA and now also the Personal Property Securities Acts in Canada, Australia and New Zealand. As was seen earlier in this essay previous attempts to introduce such a scheme in Scotland failed. One of the main reasons for not attempting to take such an approach now is the desire for commercial law north and south of the border to be broadly similar.¹⁰⁰ The Law Commission for England and Wales, in papers published in 2002¹⁰¹ and 2004,¹⁰² proposed wholesale reform of personal property security law based on a functional notice-filing approach. In a subsequent report of 2005, after significant opposition from

⁹⁸ Carey Miller, 'Present and Future of Real and Personal Security: Scotland', 137.

⁹⁹ Carey Miller with Irvine, *Corporeal Moveables*, para. 11.18. In a similar vein, see Lord Hodge, 'Does Scotland need its own Commercial Law?', *Edinburgh Law Review*, 19(3) (2015), 299–310, 307.

¹⁰⁰ Several areas of law which are relevant to the moveable transactions project, including consumer credit law, corporate insolvency law and intellectual property law operate currently on a UK-wide basis and are reserved to the Westminster Parliament.

¹⁰¹ Law Commission, *Registration of Security Interests: Company Charges and Property other than Land* (Law Com. CP No. 164, 2002).

¹⁰² Law Commission, *Company Security Interests: A Consultative Report* (Law Com. CP No. 176, 2004).

stakeholders, it recommended a significantly more limited set of proposals.¹⁰³ But even these were largely not implemented.¹⁰⁴ While that Commission's work was on security rights granted by companies, whereas the moveable transactions project is not so restricted, the English experience remains highly relevant to north of the border. Banks and other financial institutions would not accept a functionalist approach in Scotland requiring retention of title clauses, hire purchase, trusts and the like to be registered when there was no such requirement in the rest of the United Kingdom.

At some point in the future England and Wales may yet embrace notice filing. It has long been supported by the doyen of English commercial law, Professor Sir Roy Goode.¹⁰⁵ The Secured Transactions Law Reform Project, currently chaired by Lord Savile and under the executive directorship of Professor Louise Gullifer of the University of Oxford, is working on a possible notice-filing scheme.¹⁰⁶ But the City of London Law Society, an influential interest group in this area, favours far more limited reforms.¹⁰⁷ There are strong arguments for taking a functional approach to security rights. As the late Professor William Gordon pointed out, Scots law is incoherent in taking an ultra-strict approach by not allowing a true security right over corporeal moveables without the creditor having possession (pledge) but admitting functional security without possession in the cases of hire purchase and retention of title.¹⁰⁸ The subject remains deeply controversial.¹⁰⁹ Realistically, English law, which also presently takes a formal rather than functional approach, would have to move first.

¹⁰³ Law Commission, *Company Security Interests* (Law Com. No. 296, 2005).

¹⁰⁴ See H. Beale, 'The exportability of North American chattel security regimes: the fate of the English Law Commission's proposals', *Canadian Business L. J.*, 43(2) (2006), 177–99.

¹⁰⁵ See e.g. R. M. Goode, 'Insularity or leadership? The role of the United Kingdom in the harmonisation of commercial law', *International & Comparative Law Quarterly*, 50(4) (2001), 751–65, 759–60.

¹⁰⁶ See the project website: Secured Transactions Law Reform Project, <http://securedtransactionslawreformproject.org/>. See also L. Gullifer and O. Akseli (eds), *Secured Transactions Law Reform* (Oxford, 2016). Some of the material in this essay draws on my chapter with Hamish Patrick on Scotland in that volume.

¹⁰⁷ See A. J. M. Steven, 'Secured Transactions Reform', *Edinburgh Law Review*, 17(2) (2013), 251–6.

¹⁰⁸ See W. M. Gordon, 'Roman Influence on the Scots Law of Real Security' in R. Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Edinburgh, 1995), 157–75, 167–75.

¹⁰⁹ For trenchant criticism of functionalism, see J. MacLeod, 'Thirty Years After: The Concept of Security Revisited' in A. J. M. Steven, R. G. Anderson and J. MacLeod (eds), *Nothing So Practical as a Good Theory: Festschrift for George L. Gretton* (Edinburgh, 2017), 177–93.

Whether a functional system would meet David's test of showing respect for the traditions of our property law is debateable, but that debate is for the future. The priority for the present is to effect the level of change that stakeholders in the area will support.

Conclusion

Twenty years after David's important article, reform of security over moveables remains a longstanding reform agenda in Scotland. It is clearer than ever that the shortcomings in this area of our law need to be addressed. The project by the Scottish Law Commission on moveable transactions provides the impetus for action. The recommendations which the Commission eventually makes should be tested against the principles set out by David. Hopefully, there should then not be too long to wait for reform to be finally achieved.¹¹⁰

¹¹⁰ This essay was revised and updated some months before the Scottish Law Commission, *Report on Moveable Transactions* (Scot. Law Com. No. 249, 2017) was published on 19 December 2017. For an overview of the Report see A. J. M. Steven, 'Asset Finance: Time for Reform', *Journal of the Law Society of Scotland* (January 2018), 22–3.

Body Parts and Property

Kenneth G. C. Reid

Introduction

In *Holdich v Lothian Health Board* a Scottish court entertained the possibility that a person might own parts or matter which had come to be separated from the person's own body.¹ Among the authorities cited to and by the court was David Carey Miller's ground-breaking book on *Corporeal Moveables in Scots Law* – a reminder and reaffirmation of the importance of David's scholarship in the field of property law.² In this contribution in David's memory it seems appropriate, therefore, to explore a topic which, or so it will be argued, is properly classified as part of the law of corporeal moveables.

The facts of *Holdich* were averred to be these. In 1992, faced with fertility-threatening treatment for testicular cancer, the pursuer deposited three sperm samples in a cryogenic storage facility operated by Lothian Health Board. He was twenty-two at the time. Almost a decade later, and now married, he sought to use the stored sperm for *in vitro* fertilisation. Unfortunately, it turned out that, due to machine malfunction, there had been a period during which the storage temperature had risen from minus 190 degrees centigrade to minus 53 degrees. The effect on the sperm was unclear and the advice to the pursuer on the point conflicting, but on one view there was increased danger of chromosomal abnormalities, miscarriage, and birth defects. In the event, the pursuer decided not to take the risk and did not proceed with IVF. In this action he sought compensation from the Health Board for distress, depression, and loss of the chance of fatherhood.

Two main legal bases were advanced for this claim.³ In allowing the sperm to deteriorate, the defenders were in breach of the contract of deposit

¹ [2013] CSOH 197, 2014 SLT 495 (*'Holdich'*).

² Cited at para. 48. The reference is to para. 1.12 of D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005).

³ A third, though only faintly argued, was that sperm was *sui generis* (i.e. neither property

which they were said to have entered into with the pursuer in relation to the pursuer's property. Alternatively, the defenders were liable to the pursuer in delict. The case in delict is analysed in another chapter of this book and will not be discussed further here.⁴ The case in contract was a Scottish adaptation of an argument which had recently succeeded before the Court of Appeal in England, in similar factual circumstances, in *Yearworth v North Bristol NHS Trust*.⁵ And that argument depended in turn on the propositions that sperm was property, and the property moreover of the person who had produced it. These propositions lay at the very heart of the pursuer's case in *Holdich*.

In the event, the decision in *Holdich* fell short of endorsing the proprietary status of what we may, for convenience, call 'body parts'. Following a procedure roll debate, the Lord Ordinary (Lord Stewart) accepted that the argument was not so obviously bound to fail that it should be denied the benefit of a proof before answer.⁶ Even this lukewarm support, however, was only a matter of 'expediency'; as the pursuer's delict case was sufficiently strong to warrant proof on its own account, the pursuer might as well be given the opportunity to run the argument based on property and contract.⁷ It was the contract aspect, however, which was thought to be especially weak,⁸ and the judgment contains some support for a property analysis. Lord Stewart's lengthy opinion is both learned and illuminating.

Can Body Parts be Owned?

Can separated body parts be owned? Are blood, limbs, organs, hair, human

nor part of a person), and as such gave rise to a novel claim for damages. Brief mention of this argument is made below in subsection (4) of the section headed "Can Body Parts be Owned?"

⁴ See Elspeth Reid's contribution to this volume.

⁵ [2009] EWCA Civ 37, [2010] QB 1 (*Yearworth*). In *Holdich*, para. 15, Lord Stewart prefaced his discussion of the argument with the heading, 'Can you put a kilt on *Yearworth*?' *Yearworth* has also encouraged the recognition of proprietary rights in sperm in other jurisdictions: see below in subsection (4) of the section headed "Can Body Parts be Owned?"

⁶ In the event, the action was settled and the proof did not take place.

⁷ Paras 5 and 76.

⁸ In Lord Stewart's view (i) it was unlikely that the storage arrangements for the sperm were the product of a contract between the parties (paras 53–68); (ii) even if a contract did exist, it might not be one of gratuitous deposit, as the pursuer claimed (paras 69–74); and (iii) without additional terms, a contract of deposit would not impose liability for the deterioration of perishable things (para. 70).

waste, gametes, and so on corporeal moveable property of the kind dealt with in David Carey Miller's book? Without quite saying so, David seems to imply that the answer might be 'yes', for in his very first page he explains that his book 'does not deal, in any specific way, with corporeal moveable property in particular specialised contexts, such as "art law" or human body parts, even though concepts central to the work may have application in these specialised areas'.⁹ In seeking to answer the question I look first at the authorities, such as they are, and then at the policy arguments which have been advanced on both sides. Finally, I say something about the boundary between the law of persons and the law of things. Although comparable issues arise in respect of body parts taken from the dead, my analysis, like that in *Holdich*, is confined to body parts from the living. My suspicion, however, is that, some differences in law and practice notwithstanding,¹⁰ the proprietary status of both is the same.¹¹

(1) The authorities

No Scottish case before *Holdich* raised the issue of the status of separated body parts; nor are they the subject of express statutory provision. From the institutional writers, however, it is possible to derive, if not an answer to the question, at any rate a framework for an answer. An obvious starting-point – and the starting-point, as it happens, of the pursuer in *Holdich*¹² – is with the definition of corporeal moveable property given in Bell's *Principles*. Corporeal

⁹ Carey Miller with Irvine, *Corporeal Moveables*, para. 1.02.

¹⁰ An obvious complication with conferring proprietary status on body parts taken from the dead is that the part is then part of the deceased's estate with the result (i) that at least in theory, the executor should include the part in the inventory for the purposes of confirmation or, if confirmation was obtained before separation, obtain an eik; (ii) that the part must be valued for the purposes of inheritance tax; (iii) that it is subject to the provisions of the deceased's will or, failing a will, to the rules of intestate succession; and (iv) that it is subject to the claims of the deceased's spouse and children in respect of legal rights (which are exigible only from corporeal moveables). On the other hand, the complication equally arises for parts taken from a living person if the person dies without having disposed of the part. I return to this subject briefly below in subsection (4) of the section headed "Can Body Parts be Owned?"

¹¹ I am thus in sympathy with the view expressed by Kenyon Mason and Graeme Laurie that it is not 'meaningful or coherent to treat human material taken from the dead differently from that taken from the living': see Kenyon Mason and Graeme Laurie, 'Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey', *Modern Law Review*, 64(5) (2001), 710–29, 724.

¹² *Holdich*, para. 29. The argument which follows, however, is not found in *Holdich*. Quite properly, the pursuer was taken to task by Lord Stewart (para. 69) for using the 10th edition of the *Principles* (1899), with its many editorial additions, rather than the authoritative final edition prepared by the author, which was the 4th of 1839.

moveables, writes Bell, comprise ‘all things which, being themselves capable of motion or of being moved, may be perceived by the senses, seen, touched, taken possession of’.¹³ As examples, he mentions ‘ships; household furniture; goods and effects of all kinds; farm-stock and implements; horses, cattle, and other animals; corn, money, jewellery, wearing apparel’.¹⁴ Separated body parts can be perceived by the senses and are capable of being moved.¹⁵ They therefore fall squarely within Bell’s definition.

That, however, is only the first of two steps. For the fact that something is property – is in other words a ‘thing’ – does not guarantee that it can be the subject of private ownership. The classificatory framework here is provided by the so-called ‘division of things’ set out in book II title 1 of Justinian’s *Institute* and copied and adapted in Scotland, as in many other countries.¹⁶ Of the institutional writers, both Bankton and Erskine offer particularly full (if slightly different) accounts of the classification as it applies to Scots law.

Bankton provides a four-part taxonomy. Once an object is acknowledged as a thing, it must be ‘either [i] common, [ii] publick, [iii] belonging to particular persons, or [iv] to no persons’.¹⁷ The distinction between the first of these classes and the other three is capacity for appropriation,¹⁸ common things (the Roman *res communes*) being ‘those which, from their nature and situation, belong in property to none, but whereof the use is common to all, as the light, air, running water, the seas, and thereby the shores’.¹⁹ Public things (the Roman *res publicae*), although capable of ownership, are reserved to the State in view of their importance and utility. Navigable rivers, public highways, and

¹³ George Joseph Bell, *Principles of the Law of Scotland* (4th edn, Edinburgh, 1839; reprinted as *Old Studies in Scots Law*, vol. 1, Edinburgh, 2010), § 1285.

¹⁴ *Ibid.*

¹⁵ Of the five senses (sound, sight, touch, smell and taste), the pursuer in *Holdich* argued (at para. 29) that four were applicable to sperm.

¹⁶ For the position in Scotland, see Jill Robbie, *Private Water Rights* (Studies in Scots Law, vol. 4, Edinburgh, 2015), ch. 2.

¹⁷ Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights* (Edinburgh, 1751–3; reprinted as *Stair Society*, vols 41–3, Edinburgh, 1993–5), I.3.1. The numbering has been added.

¹⁸ Thus it is that the first level of Erskine’s classification divides things into those which are capable of appropriation and those which are not: see Erskine, *An Institute of the Law of Scotland* (1st edn, Edinburgh, 1773; reprinted as *Old Studies in Scots Law*, vol. 5, Edinburgh, 2014), II.2.5 and 8.

¹⁹ Bankton, *Institute*, I.3.2. Stair thought that *res communes* were not only used by everyone but also owned by them: see James Dalrymple, Viscount Stair, *The Institutions of the Law of Scotland* (6th edn, Edinburgh and Glasgow, 1981), II.1.5.

harbours are examples.²⁰ Next comes the ‘normal’ class of property capable of private ownership. And finally there is property which is ownerless (the Roman *res nullius*) either because, like wild animals, it has not yet been acquired by someone or because, like sacred or religious things (the Roman *res sacrae*), it is ‘dedicated to divine service’ and so withdrawn from private ownership altogether.²¹

How do separated body parts fit into this four-part classification? Evidently, they are not common things (class (i)). Nor, despite the therapeutic and research potential of tissue and organs, can they easily be classified as public things and the property of the State (class (ii)).²² Either, therefore, they are privately owned (class (iii)) or ownerless (class (iv)); and if the latter, they are still *capable* of private ownership, by taking possession (*occupatio*), unless they are excluded from commerce.²³ In Bankton’s classification, only sacred and religious things such as churches and communion cups are so excluded, on account of being ‘set apart for the service of God’.²⁴

Body parts, of course, would not have been within the sights of eighteenth-century jurists. Nonetheless, the assumption must be that, like virtually everything else, they are either owned or at least capable of private ownership. To decide otherwise would require strong justification. Whether such a justification might exist is considered in the next section.

(2) The policy arguments

‘Academics may be irritated’, wrote Lord Stewart in *Holdich*, ‘by the opinion’s apparently narrow knowledge base and by my failure to address the philosophical, ethical and policy considerations; but court judgments are about particular disputes and have to be based on the arguments and material presented. There are time constraints and funding constraints.’²⁵

²⁰ Bankton, *Institute*, 1.3.4.

²¹ *Ibid.*, 1.3.11 and 12.

²² Donna Dickenson has, however, argued for a ‘commons’ approach for biobanks, for example through the use of charitable trusts: see ‘Alternatives to a Corporate Commons: Biobanking, Genetics and Property in the Body’ in Imogen Goold and others (eds), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Oxford and Portland, Oregon, 2014), 177–95.

²³ Bankton, *Institute*, 1.3.11. By excluded from commerce is meant that the thing ‘cannot be applied to the uses of private property’: see Erskine, *Institute*, II.1.8.

²⁴ The phrase is Erskine’s: see Erskine, *Institute*, II.1.8.

²⁵ *Holdich*, para. 5. Lord Stewart continued by complimenting counsel ‘on the assistance they have given within these constraints’. Although no disclaimer is given, the same is true of the decision in *Yearworth*: see Shawn H. E. Harmon and Graeme T. Laurie,

Understandable as this approach may be, it is also to be regretted for, under the institutional classification just described, an exemption from private ownership turns on policy considerations. And while the relevant literature in the common-law world is certainly copious and continuing to grow,²⁶ the key arguments can be summarised in fairly short compass.

There is broad agreement that, in the regulation of body parts and products, an accommodation must be reached between the rights of the individual and the needs of the community – between preserving the autonomy and privacy of the source or ‘originator’ of the parts and promoting the good health of the community as a whole through therapeutic applications and medical research.²⁷ Originators need some control over parts taken from their bodies, not least because even a single cell contains a person’s entire genome;²⁸ yet the practice and development of medical science requires that biological materials be in plentiful supply. Whatever accommodations are thought desirable between these two positions, it is widely, though not universally, accepted that they could be achieved as a matter of technical law both by a model which recognises ownership of body parts and by one which, withholding such ownership, relies instead on *ad hoc* statutory provisions.²⁹ At this point,

‘*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms’, *Cambridge Law Journal*, 69(3) (2010), 476–93, 484–7, commenting that ‘we are left to wonder at the foundation and appropriateness of the Court’s conclusion that the claimants rightly have a *property* interest in their body products or parts. How is the finding of property conceptually defended? On what moral foundations is the finding of property based?’

²⁶ A representative sample of post-*Yearworth* views can be found in the excellent set of papers collected in Goold and others (eds), *Persons, Parts and Property*. This, however, was published after the decision in *Holdich* and so was not available to counsel or the court.

²⁷ See e.g. Imogen Goold and Muireann Quigley, ‘Human Biomaterials: The Case for a Property Approach’ in Goold and others (eds), *Persons, Parts and Property*, 231–61, 245. This can be traced back to the first significant case on body parts, *Moore v Regents of the University of California* (1990) 51 Cal 3d 120, 143 (Panelli, J.).

²⁸ Cameron Stewart and others, ‘The Problems of Biobanking and the Law of Gifts’ in Goold and others (eds), *Persons, Parts and Property*, 25–37, 28.

²⁹ For the view that only a statutory approach offers ‘a starting point of unbiased scales’, see Jonathan Herring, ‘Why We Need a Statute Regime to Regulate Bodily Material’ in Goold and others (eds), *Persons, Parts and Property*, 215–29, 215. Others have argued that a consideration of policy issues is assisted by a principled set of property-law rules. See David Johnston, ‘The Renewal of the Old’, *Cambridge Law Journal*, 56(1) (1997), 80–95, 89–94; Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Oxford and Portland, Oregon, 2007), 204.

however, agreement breaks down. For some commentators the superiority of a property model is self-evident; for others its dangers are all too apparent.

The arguments in favour of a property model turn mainly on simplicity, certainty, and coherence.³⁰ If body parts can be owned, then property law provides a ready-made set of rules for their use, preservation, defence, vindication, and transfer. Such rules are as necessary for biobanks and researchers as they are for the originators of the materials.³¹ And, crucially, the rights and remedies to which they give rise are enforceable against all challengers and not, as with contractual arrangements, against only a single person or group of persons. The alternative to property is endless improvisation against a background of disturbing legal uncertainty. A property model, moreover, corresponds with prosaic reality. In practice, body parts are often treated as if they are owned. They are donated, preserved, worked on, and abandoned. The very language used to describe these activities is the language of property law. The law should be in alignment with the practice.³²

Opponents of a property model stress the unique nature of body parts as well as their emotional and relational value.³³ To this complex picture the response of property law is clumsy and inflexible. It ‘objectifies’ by treating body parts in the same way as a bag of sugar or a bottle of wine, and it ‘commodifies’ by reducing them to a cash equivalent, or in other words to something which can be exchanged for money. In short, property law commingles the sacred with the profane.³⁴ The very label ‘property’ diminishes the respect due to

³⁰ For some other arguments, see Paul Matthews, ‘The Man of Property’, *Medical L. Rev.*, 3(3) (1995), 251–74, 258.

³¹ As was shown in the American case of *Washington University v Catalona* 490 F 3d 667 (2007) where a university’s rights to biomedical material was under challenge.

³² In the decision of the Supreme Court of Queensland in *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118, para. 33 (White, J), the conclusion that sperm was property was justified both by ‘law and common sense’.

³³ For a general account, see Kate Greasley, ‘Property Rights in the Human Body: Commodification and Objectification’ in Goold and others (eds), *Persons, Parts and Property*, 67–87. On relational value, see Jesse Wall, ‘The Boundaries of Property Law’ in Goold and others (eds), *Persons, Parts and Property*, 109–24.

³⁴ This emotive language comes from a concurring judgment in the celebrated American case of *Moore v Regents of the University of California* (1990) 51 Cal 3d 120, 148 (Arabian, J) which sets out ‘the moral issue’. The full quotation is: ‘Plaintiff has asked us to recognize and enforce a right to sell one’s own body tissue *for profit*. He entreats us to regard the human vessel – the single most venerated and protected subject in any civilized society – as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.’

human parts,³⁵ while its substantive content is an affront to human dignity and an attack on human flourishing. There is also a more practical objection. If some body parts are uniquely precious to their originators, many others are worthless to them or to anyone else. To reify them is pointless and risks absurd results so that ‘the dandruff you leave at a restaurant could result in a phone call asking you to remove your property’.³⁶

Some of the arguments against a property model seem exaggerated or even implausible. 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.³⁷ Further, although all property can, in principle, be sold, there is nothing in the nature of ownership to prevent the imposition of restrictions on sale.³⁸ Indeed this has already been done in respect of body parts supplied for transplantation.³⁹ If further restrictions were thought necessary, property law would not stand in their way. The extent to which the market in biomaterials should be curbed is a policy question on which property law takes no sides.⁴⁰ The further argument about reifying the worthless is hard to take seriously. If a thing is worthless, it is of no importance whether it is property or not. There is no novelty in valueless property. And if diners must fear a phone call about their dandruff, they must be no less apprehensive that they will be called to account for the vegetables left on the plate or the crumbs languishing on the floor.

The case for a property model can, in turn, be over-stated. Even if the rules of property law are generally clear, the manner in which these rules might apply to body parts is often uncertain, as we will see. Nor are the results

³⁵ Lyria Bennett Moses, ‘The Problem with Alternatives: The Importance of Property Law in Regulating Excised Human Tissue and *In Vitro* Human Embryos’ in Gool and others (eds), *Persons, Parts and Property*, 197–214, 212.

³⁶ Herring, ‘Why We Need a Statute Regime’, 224.

³⁷ Gool and Quigley, ‘The Case for a Property Approach’, 260.

³⁸ Guns and prescription medicines are the standard examples usually given of moveable property which is subject to restrictions on sale.

³⁹ Human Tissue (Scotland) Act 2006 s. 20. This does not remove the power to transfer on sale but imposes a criminal penalty where a person gives or receives a ‘reward’ for the supply of any part of a human body for transplantation. ‘Reward’ is defined in s. 17(10).

⁴⁰ See e.g. Muireann Quigley, ‘Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials’, *Modern Law Review*, 77(5) (2014), 677–702. As is acknowledged in G. T. Laurie, S. H. E. Harmon and G. Porter, *Mason & McCall Smith’s Law and Medical Ethics* (10th edn, Oxford, 2016), para. 14.06, trading in bodily materials inside and outside the NHS is widespread, and there has been a proliferation of tissue banks in both the public and the private sectors.

always those which would be wished. It is unlikely that these matters can be fixed without legislative intervention. Yet property law will always be better than no-law. In its absence there is a vacuum which the rest of private law will struggle to fill. This would be private law operating at half-cock. Admittedly, statutory regulation, urged by some commentators, could do something to make amends.⁴¹ But no statute, however detailed and prescient, can provide for the unexpected and unanticipated as well as a set of general rules.⁴² The case for property is thus in part a case for efficiency of outcomes. Above all, however, it is a case for legal coherence. In a jurisdiction like Scotland with a civilian system of property law, the claims of coherence are likely to seem decisive.

(3) Counting the sticks: an argument by arithmetic

Rather than arguments based on policy, however, the court in *Holdich* was faced with an argument of a different kind; and, as so often in *Holdich*, it had its origins in the earlier English case of *Yearworth*. One issue in *Yearworth* was whether treating sperm as property was compatible with the regime for gametes put in place by the Human Fertilisation and Embryology Act 1990 (a UK statute) which restricted the storage and subsequent use of sperm to those holding a public licence.⁴³ ‘The concept of ownership’, the court explained, ‘is no more than a convenient global description of different collections of rights held by persons over physical and other things’.⁴⁴ The ‘sticks’ in this ‘bundle of rights’ comprised or included the eleven ‘standard incidents’ of ownership listed by Tony Honoré in an influential paper from 1961.⁴⁵ If too many were missing, that might be a reason for concluding that the claimants were not owners of the sperm.⁴⁶ A similar argument was pressed for the defenders in *Holdich*. Even without the 1990 Act it was difficult to see what incidents of ownership the pursuer enjoyed in respect of stored sperm.⁴⁷ But the 1990 Act regime was ‘incompatible with the normal indiciae of ownership: it cannot be said that the pursuer has “the right of using and disposing of” the samples

⁴¹ See e.g. Herring, ‘Why We Need a Statute Regime’.

⁴² These points are developed more fully in e.g. Bennett Moses, ‘The Problem with Alternatives to Property’, 199–202.

⁴³ Human Fertilisation and Embryology Act 1990 ss 3 and 4.

⁴⁴ *Yearworth*, para. 28.

⁴⁵ A. M. Honoré, ‘Ownership’ in A. G. Guest (ed.), *Oxford Essays in Jurisprudence (First Series)* (Oxford, 1961), 107–47.

⁴⁶ *Yearworth*, paras 41–44.

⁴⁷ *Holdich*, para. 34.

of his own sperm or that he has “the right of use, enjoyment and abuse” of the samples’.⁴⁸

The two courts reacted differently to the argument. In the 1990 Act’s requirement of informed consent the court in *Yearworth* found sufficient sticks for the claimants to be treated as owners, at least for the purposes of their claim in negligence.⁴⁹ In *Holdich* Lord Stewart toyed with the ‘possible conclusion that the postulated property right of gamete providers is so attenuated that it is a distortion to describe it as a right of property at all’.⁵⁰

Whether Honoré intended his list to be used in this kind of way is open to question, although it is possible to find passages in his paper which point in that direction.⁵¹ Be that as it may, the logic seems back to front. For rather than the presence of the ‘standard incidents’ creating ownership, as the argument supposes, it is ownership that creates the ‘standard incidents’.⁵² In other words, the right to use and enjoy a thing is a *consequence* of ownership, not its cause. To suppose otherwise is to lapse into the circularity of: (i) A has the right to use and enjoy the thing; (ii) therefore A is the owner of the thing; (iii) therefore A has the right to use and enjoy the thing. As Kevin Gray has written in a slightly different context, ‘property status and proprietary consequence confuse each other in a deadening embrace of cause and effect’.⁵³ The false step is the word ‘therefore’ at the start of (ii); without it, (i) falls away leaving only (ii) and (iii), at which point the circle is broken. What, after all, was the source of such rights over the sperm as the claimants/pursuer in *Yearworth* and *Holdich* were taken to have? A right of informed consent was built into the 1990 Act, as already mentioned.⁵⁴ But unless they owned the sperm they would have had no other rights.⁵⁵ Admittedly, any ownership was subject to restrictions, as

⁴⁸ Ibid., para. 32. The words in quotation marks are traditional descriptions of the content of ownership in Scots law (the first being taken from Erskine, *Institute*, II.1.1).

⁴⁹ *Yearworth*, paras 44, 45(f). Lawyers from civilian systems of property law will be puzzled by the suggestion that a person can be owner only for a particular purpose.

⁵⁰ *Holdich*, para. 48.

⁵¹ Honoré, ‘Ownership’, 112–3: ‘the listed ingredients are not individually necessary, though they may be together sufficient, conditions for the person of inheritance to be designated “owner” of a particular thing’.

⁵² This simplifies the position for the sake of clarity of exposition. Lesser property rights may also satisfy one or more of the incidents of ownership, a point noted by Honoré, ‘Ownership’, 111.

⁵³ Kevin Gray, ‘Property in Thin Air’, *Cambridge Law Journal*, 50(2) (1991), 252–307, 293.

⁵⁴ Human Fertilisation and Embryology Act 1990 Sch. 3.

⁵⁵ At least in the circumstances of this case. Of course, it is possible to have lesser rights, both real and personal, in respect of moveable property.

ownership usually is;⁵⁶ but a person remains owner of a thing, however severe the restrictions, unless the title to the thing has been formally terminated. It is for that reason that restrictions are a feature of standard definitions of ownership, Honoré's included.⁵⁷

The mode of reasoning under attack is in part a product of the view, traceable back to Hohfeld and beyond,⁵⁸ of ownership as a bundle of sticks; for if the right is thus elided with its contents, it is easy to imagine that it is the contents that create the right. Whether a bundle of sticks captures the essence of common-law ownership is not for me to say, although criticism appears to be growing.⁵⁹ In the civil-law world to which Scotland belongs, however, ownership is an idea quite distinct from its contents.⁶⁰ There were no sticks for the parties in *Holdich* to count.

(4) Persons and things

Enough has been said to suggest that separated body parts in Scotland are held in private ownership. Both the institutional taxonomy of things and the policy arguments used to supplement it point towards that conclusion. Niall

⁵⁶ In *Yearworth*, para. 45(f)(ii) the court acknowledges that 'there are numerous statutes which limit a person's ability to use his property'. In addition, subordinate real rights may drastically curtail an owner's rights.

⁵⁷ Erskine, *Institute*, II.1.1 ('the right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction'); Honoré, 'Ownership', 123 ('the prohibition of harmful use'). The idea is a very old one: Erskine's formulation can be traced back as far as Bartolus: see E. J. H. Schrage, 'Property from Bartolus to the New Dutch Civil Code' in G. E. van Maanen and A. J. van der Walt (eds), *Property Law on the Threshold of the 21st Century* (Antwerp and Apeldoorn, 1996), 43–6.

⁵⁸ W. N. Hohfeld, 'Some Fundamental Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, 23(1) (1913), 16–59, and idem, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal*, 26(8) (1917), 710–70. Hohfeld does not, however, use the term.

⁵⁹ See e.g. Henry E. Smith, 'Property as the Law of Things', *Harvard Law Review*, 125(7) (2011–12), 1691–1726.

⁶⁰ George Gretton's account of the difference has never been bettered: 'In the Common Law tradition the seller of Blackacre starts off in chapter 1 with a bundle, and by the last chapter all the sticks in the bundle have passed [...] In the Civil Law tradition, by contrast, ownership is one particular kind of right, and is unitary. Of course, rights can be derived from it, the *jura in re aliena*, nowadays usually as the limited, or subordinate, real rights. But – and this is central to the Civilian idea – what is left is still ownership. You can cut a branch from the tree, and what is left is still the same in kind. Sticks come from the tree, but the Civilian tree is not a bundle of sticks.' See George L. Gretton, 'Ownership and Insolvency: *Burnett's Trustee v Grainger*', *Edinburgh Law Review*, 8 (2004), 389–95, 389.

Whitty's pioneering analysis of a decade ago comes out in favour of property.⁶¹ So too, albeit more hesitantly, does Lord Stewart in *Holdich*⁶² although, as we will see shortly, he would prefer to exclude stored sperm of the kind at issue in the litigation.⁶³ Quite a number of other countries have reached or are in the process of reaching the same conclusion. Civil-law countries such as Germany⁶⁴ and the Netherlands⁶⁵ accept private ownership of body parts. In England and Wales, *Yearworth* has been hailed as 'the next step in the slow creep of the property paradigm',⁶⁶ although there are dissenting voices.⁶⁷ Other common-law countries are moving in the same direction,⁶⁸ sometimes under the influence of *Yearworth*, including Australia,⁶⁹ Canada,⁷⁰ and the United States.⁷¹ Interestingly, the recent decisions all concern sperm.

If body parts are accepted as things that can be owned, the next issue to

⁶¹ Niall R. Whitty, 'Rights of Personality, Property Rights and the Human Body in Scots Law', *Edinburgh Law Review*, 9(2) (2005), 194–237, 219–27. See also Murray Earle and Niall R. Whitty, *Stair Memorial Encyclopaedia Reissue: Medical Law* (Edinburgh, 2006), paras 337ff., parts of which are based on Whitty's earlier article. The same view is expressed in W. M. Gordon, *Stair Memorial Encyclopaedia Reissue: Donation* (Edinburgh, 2011), para. 16. There are no contrary voices.

⁶² *Holdich*, para. 49: 'I do not say that biomatter cannot be property'.

⁶³ But not stored sperm which was donated by a third party: see para. 49.

⁶⁴ *Bundesgerichtshof*, 9 November 1993, *Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ), 124, 52.

⁶⁵ Jos V. M. Welie and Henk A. M. J. Ten Have, 'Ownership of the Human Body: the Dutch Context' in Ten Have and Welie (eds), *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Dordrecht, Boston and London, 1998), 99–114, 108–9.

⁶⁶ Harmon and Laurie, '*Yearworth*', 483.

⁶⁷ E.g., James Lee, '*Yearworth v North Bristol NHS Trust* [2009]: Instrumentalism and Fictions in Property Law' in Simon Douglas, Robin Hickey and Emma Waring (eds), *Landmark Cases in Property Law* (Oxford and Portland, Oregon, 2015), 25–48. Lee sees the decision as being merely 'property-ish'.

⁶⁸ For a summary of the position, see Loane Skene, 'The human body as property: the current approach of the courts', *Journal of Medical Ethics*, 40(1) (2014), 10–13.

⁶⁹ *Bazley v Wesley Monash IVF* [2010] QSC 118. For analysis, see Loane Skene, 'Proprietary Interests in Human Bodily Material: *Yearworth*, Recent Australian Cases on Stored Semen and Their Implications', *Medical Law Review*, 20(2) (2012), 227–45.

⁷⁰ *JCM v ANA* [2012] BCSC 584; *Lam v University of British Columbia* [2013] BCSC 2094. These cases were not cited to the court in *Holdich* although the former was noticed by Lord Stewart (paras 42 and 49). The facts of the latter are similar to *Holdich*. The Supreme Court of British Columbia held that stored sperm were the property of their progenitors, and that as such they were 'goods' within the Warehouse Receipt Act, RSBC 1996 c. 481.

⁷¹ *Hecht v Superior Court of the State of California* (1993) 20 Cal Rptr 2d 275. The import of this decision was subject to rather different assessments in *Yearworth*, para. 40, and *Holdich*, paras 42–46.

consider is when their ‘thingness’ begins. A part can certainly be regarded as a thing once it is severed from the living body. But is it also a thing *before* severance? When I talk of ‘my’ body, or ‘my’ legs or hair, does this signify that I own those items which I assert to be mine? Where, in other words, does the boundary lie between persons and things, the first two elements in the tripartite Gaian division of private law?⁷² A table will assist our thinking:

	Persons	Things	Neither
Unseparated body parts	1	2	3
Separated body parts	4	5	6

Each of the six boxes in the table is numbered and each, at the moment, is empty. Our task is to fill them in.

Whatever else they might be, unseparated body parts are certainly the corporeal manifestation of persons, protected by such personality rights as the right to physical integrity.⁷³ Thus in box 1 we may enter ‘yes’, from which it follows that in box 3 we must enter ‘no’. But what of box 2? Can an arm or a kidney – can the human body itself – be a thing as well as a person? Is it possible to have property rights as well as personality rights in respect of one’s own body? Plainly, a living body cannot be the property of *someone else*, for that would be slavery. But *self*-ownership remains a possibility, even if that ownership cannot be transferred to another person.⁷⁴ Nor is the idea incoherent for, as the example of personality rights shows, a person can be the object of rights in respect of which he or she is also the subject.⁷⁵

⁷² Gaius, *Institutes*, 1.8: ‘Omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones’ [The whole of the law observed by us relates either to persons or to things or to actions].

⁷³ Elspeth Christie Reid, *Personality, Confidentiality and Privacy in Scots Law* (Edinburgh, 2010), ch. 1.

⁷⁴ James Penner, *The Idea of Property in Law* (Oxford, 1997), 121–2 argues for ownership by anticipation, i.e. that a body part can be the property of the person of whose body it forms part if that person regards the part as separable (subject, however, to social convention and safe separability).

⁷⁵ *Ibid.*, 125, arguing against self-ownership, writes that it is ‘no different from the impossibility of holding a debt against oneself’. In fact it is quite different, because ownership is a right against *others*. See also Muireann Quigley, ‘Property in Human Biomaterials – Separating Persons and Things?’, *Oxford J. Legal Stud.*, 32 (2012),

There is no direct authority in Scotland on self-ownership.⁷⁶ The position in Roman law was encapsulated in a passage in the *Digest* by Ulpian, '*Dominus membrorum suorum nemo videtur*': no one is regarded as owner of his own body parts;⁷⁷ and this maxim has resurfaced from time to time in the Scottish sources. It was, for example, relied on by Bankton for the view that, while man has power over his person and actions, 'this natural liberty does not give one power over his own life, or members of his body, for still it is under the control of the laws of God and nature, whereby self-preservation is not only a privilege, but an indispensable duty'.⁷⁸ This thoroughly Roman idea⁷⁹ of man as the custodian of his body rather than its owner was also the basis of the criminalisation of suicide, attributed expressly by Mackenzie to Ulpian's maxim.⁸⁰ In the absence of contrary authority, therefore, we may agree with Neil MacCormick's view in the *Stair Memorial Encyclopaedia* that, to qualify as a thing, an object must exist 'separately from and independently of persons' and that accordingly 'bodily parts and organs can become things in law only on being severed from a living body'.⁸¹ In box 2 we must enter 'no'. Many other

659–83.

⁷⁶ Whitty, 'Rights of Personality', 222 places more weight on a passage from Bankton, *Institute*, II.1.1 ('A Right is termed *Real*, because it affects things; and persons only as possessors of them') than it can perhaps bear. The reference to not (generally) affecting persons seems intended to contrast with his definition of personal right, in I.4.1, as 'a legal tie, by which one is bound to pay or perform something to another'. The first passage seems neutral on the question of whether a person can also be a 'thing'; probably it did not occur to Bankton.

⁷⁷ *Digest*, 9.2.13 pr. The context was the *lex Aquilia*: owing to non-ownership, a free man has no direct action under the *lex* for a physical injury.

⁷⁸ Bankton, *Institute*, 1.2.67. Bankton thus preferred Roman law to Locke's Enlightenment view that 'every man has a property in his own person': see John Locke, *Two Treatises of Government*, *Second Treatise* (London, 1690), 245 (para. 27).

⁷⁹ Diego Gracia, 'Ownership of the Human Body: Some Historical Remarks' in Ten Have and Welie (eds), *Ownership of the Human Body*, 67–80, 68–9. Gracia's essay provides a historical guide to different philosophical positions on the topic.

⁸⁰ Sir George Mackenzie, *The Laws and Customs of Scotland in Matters Criminal* (Olivia F. Robinson (ed.) *Stair Society*, vol. 59, Edinburgh, 2012, based on the edition of 1699), 13.1: 'for he who kills himself, kills God's subject, and therefore *nemo est dominus suorum membrorum*'. Compare David Hume, *Commentaries on the Law of Scotland respecting Crimes* (3rd edn, 2 vols, Edinburgh, 1829), I, 300. The maxim was also used, *arguendo*, in *Liddel v Rutherford* (1678) Fountainhall, I.15.16: 'None can validly consent to their own torture, for *nemo est dominus suorum membrorum*'.

⁸¹ Neil MacCormick, *Stair Memorial Encyclopaedia Reissue: General Legal Concepts* (Edinburgh, 2008), paras 98 and 101. See also idem, *Institutions of Law: An Essay in Legal Theory* (Oxford, 2007), 136–8; Whitty, 'Rights of Personality', 222–3.

countries take the same view.⁸² And just as the living body cannot be owned in Scotland, so the same appears to be true of a dead body, some contrary authority notwithstanding.⁸³ The result seems satisfactory enough.⁸⁴ For living bodies, personality rights are likely to provide sufficient protection.

We now move to the second line of the table and to parts which have been separated from the human body. The possibility that stored sperm might be neither persons nor things but *sui generis* was raised by both sides in *Holdich* but not pressed.⁸⁵ Box 6 can therefore be completed with a 'no' and box 5, in view of the earlier discussion, with a 'yes'. That leaves only box 4. Separated body parts are property, but might they not also be persons?⁸⁶ Alternatively, if the categories are thought to be mutually exclusive, might *some* body parts be property and others be persons? This last idea was one which appealed to Lord Stewart. To explain why, it is necessary to make a brief excursion into German law.

In 1993 the Federal Supreme Court of Germany decided a case which anticipated both *Holdich* and *Yearworth*.⁸⁷ Sperm stored for the claimant by the defendants having been accidentally destroyed, the claimant sued for damages in delict for pain and suffering. The claim was allowed, but on the basis that the sperm was part of the claimant's body. It was true, the court said, that

⁸² See e.g. *R v Bentham* [2005] UKHL 18, [2005] 1 WLR 1057 (England and Wales; Ulpian's maxim is quoted by Lord Rodger); Anne Fagot-Largeault, 'Ownership of the Human Body: Judicial and Legislative Responses in France' in Ten Have and Welie (eds), *Ownership of the Human Body*, 115–41, 137 (France); Welie and Ten Have, 'Ownership of the Human Body: the Dutch Context', 101–07 (the Netherlands); C. G. van der Merwe, 'Things' in *The Law of South Africa*, vol. 27 (2nd edn, Durban, 2014), para. 20 (South Africa).

⁸³ Whitty, 'Rights of Personality', 228–31.

⁸⁴ If bodies could be owned, they would in principle form part of the deceased's estate and be distributed according to the terms of the will or the rules of intestate succession. This would be avoided if ownership was extended to living bodies alone since, at the moment of death, the body would cease to be property.

⁸⁵ *Holdich*, para. 52. Support for this approach can be found in Eric H. Reiter, 'Rethinking Civil-Law Taxonomy: Persons, Things, and the Problem of Domat's Monster', *Journal of Civil Law Studies*, 1(1) (2008), 189–213.

⁸⁶ Lord Stewart may come close to supporting this position in the case of stored sperm when he suggests that it would be advantageous to have both personality and property remedies – although he thinks, without explaining why, that this would result from a *sui generis* finding. See *Holdich*, para. 52.

⁸⁷ BGHZ 124, 52. A translation into English is available from The University of Texas at Austin, TexasLaw, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=830>, accessed 22 July 2015. For discussion, see Friedrich Heubel, 'Defining the Functional Body and its Parts: a Review of German Law' in Ten Have and Welie (eds), *Ownership of the Human Body*, 27–37.

separated body parts must normally be treated as property and not as persons. But something which was removed with the intention of being re-united with the same person's body – skin for skin grafts, for example, or eggs for *in vitro* fertilisation – continued, during the period of separation, to form a functional unity with that body and so was considered to be part of it. And while it was true that the claimant's sperm had been destined for *another* body, namely that of his wife, it would be wrong to treat male gametes differently from female gametes.

The German decision formed the basis of the claimants' principal argument in *Yearworth*, but so firm was its dismissal by the Court of Appeal that no attempt was made to revive it in *Holdich*.⁸⁸ Lord Stewart, however, regretted the omission.⁸⁹ He 'did not have the same difficulty with the idea of functional unity as the Court of Appeal'.⁹⁰ In his view, 'Arguably separation from the body takes place not on ejaculation or harvesting but on renunciation by the gamete provider of his or her reproductive interest by simple abandonment, by sale or by donation and, if not previously, on death, if no continuing reproductive intention can be inferred'.⁹¹ Only on separation in this legal sense did gametes, or (presumably) other body parts, become things capable of ownership.⁹² But for as long as the provider intended to use sperm or eggs for personal procreation – or, for that matter, for as long as a person intended to use his separated skin for a skin graft on his own body – legal separation had not been achieved, and the part remained, in law if not in fact, united with the body.

Under German law as it was in 1993, damages could not be awarded for pain and suffering in respect of injury to property.⁹³ Hence unless the sperm were classified as part of the claimant's person, no recovery would have been possible. Doubtless this was an important reason for an approach which was described in *Yearworth* as no more than a fiction.⁹⁴ Such a limitation is not thought to apply in Scotland.⁹⁵ And assuming that to be correct, it is hard to

⁸⁸ *Yearworth*, paras 18–23.

⁸⁹ *Holdich*, paras 6–9.

⁹⁰ *Ibid.*, para. 9.

⁹¹ *Ibid.*, para. 50.

⁹² For this reason Lord Stewart could 'see no private law objection' to the Canadian decision of *JCM v ANA* [2012] BCSC 584, where donated sperm were divided up between a same-sex female couple who were separating. See *Holdich*, para. 49.

⁹³ § 847 BGB. The point was noted by the Court of Appeal in *Yearworth*, para. 22.

⁹⁴ *Yearworth*, para. 23.

⁹⁵ Although clear authority is lacking; see Elspeth Reid's contribution to this volume. Lord Stewart had doubts on this point: see *Holdich*, paras 50 and 51. Nonetheless, this

see any advantage in classifying parts which have, as it were, an *animus revertendi* in a different manner from body parts which do not. Indeed there is likely to be disadvantage in treating the physically separate as if it were still part of the living body.⁹⁶ If, for example, the part came to be damaged or destroyed, the person responsible might be guilty of criminal assault; and if the part came to be stolen, it could not be recovered by vindication.

Of course, gametes are different from other body parts (including skin for grafting) in that they contain within them the possibility of human reproduction. It is important that the providers should be able to control their use (or non-use). Here the property model might appear to fail. For if stored sperm is property, it can be attached by the provider-owner's creditors, unlikely as such a thing might be in practice. More significantly, if the provider died before the sperm could be used or disposed of, it would form part of his estate and, in principle, would be distributed to the beneficiaries under his will or to his heirs in intestacy.⁹⁷ The resulting difficulties exercised Lord Stewart.⁹⁸ Yet they cannot be avoided by the theory that he advances unless, improbably, living sperm can be in 'functional unity' with (and hence part of) a corpse.⁹⁹ Nor, importantly, is the problem confined to gametes. Many of those providing body parts for research or other purposes would like to retain a measure of control over their future use. This is an issue to which we must return.¹⁰⁰ For the moment it seems only necessary to say that the best protection for gamete-providers lies, not in the artifice of personality, but in special legislative rules.¹⁰¹

We now return for the last time to the table. With 'no' entered into box 4 the completed version looks like this:

would seem to be the best argument available to the pursuer.

⁹⁶ *Yearworth*, para. 23.

⁹⁷ As in *Hecht v Superior Court of the State of California* (1993) 20 Cal Rptr 2d 275 and *Bazley v Wesley Monash IVF* [2010] QSC 118. In *Holdich*, however, the claimant's senior counsel conceded (on what basis is not clear) that gametes cannot be transferred *mortis causa*: see para. 41. Schedule 3, para. 2(2) of the Human Fertilisation and Embryology Act 1990 provides that, in consenting to the storage of gametes, a person must usually state what is to be done with them on the person's death.

⁹⁸ *Holdich*, paras 42–46.

⁹⁹ That, however, may be Lord Stewart's view: see *Holdich*, para. 50, and compare *Yearworth*, para. 23.

¹⁰⁰ See subsection (4) of the section headed "Subsequent Transmissions" below.

¹⁰¹ Human Fertilisation and Embryology Act 1990, especially Sch. 3.

	Persons	Things	Neither
Unseparated body parts	Yes	No	No
Separated body parts	No	Yes	No

Who is the First Owner?

Body parts, then, are things capable of ownership once, but not before, they are separated from the human body. The next issue is to identify the first owner. Logically, only two possibilities exist: on separation occurring, either (i) the part is the property of someone, or (ii) it is the property of no one and hence *res nullius*.¹⁰² In the first case, the only plausible candidate for ownership is the person from whom the part was taken (i.e. the ‘originator’); in the second, the owner is the first person to possess the thing in a manner sufficient for the purposes of *occupatio*. The court in *Yearworth* endorsed the first position.¹⁰³ The court in *Holdich* rejected the second,¹⁰⁴ which had been the argument of the pursuer,¹⁰⁵ and must therefore also be taken to have endorsed the first.

The arguments against the *res nullius/occupatio* approach are indeed formidable. Take the case of body tissue removed by a surgeon in the course of an operation. The surgeon is the first to possess, no doubt, but does he or she do so with the intention of becoming owner, as *occupatio* requires?¹⁰⁶ And do surgeons act on their own account, or on behalf of the authority which operates the hospital or of the university by which the surgeon is employed in a research capacity or indeed on behalf of the patient from whom the tissue is taken? In short, whether *occupatio* operates and who becomes owner if it does would both be uncertain.¹⁰⁷

¹⁰² This is *res nullius* in the second of the two senses identified by Bankton, I.13.11–14. See subsection (1) in the section headed “Can Body Parts be Owned?” above.

¹⁰³ *Yearworth*, para. 45(f)(i) and (ii). The argument seems to have been that the claimants (a) ejaculated the sperm and (b) did not then abandon it.

¹⁰⁴ *Holdich*, paras 36–38.

¹⁰⁵ *Ibid.*, para. 29.

¹⁰⁶ Bell, *Principles*, § 1287. For *occupatio* in general, see Carey Miller with Irvine, *Corporeal Moveables*, ch. 2.

¹⁰⁷ As we will see in the section headed “Subsequent Transmissions” below, however, a degree of uncertainty also affects the other approach, although only in relation to subsequent transmissions.

There are other objections as well. First, the approach ignores the provenance of the body part, forcing originators to compete for ownership with the rest of the world. Sometimes – and this is the second objection – this would lead to the ‘wrong’ result, for it cannot be assumed that patients will always wish to relinquish control over tissue removed as part of a surgical procedure. Skin taken for a skin graft is one example where continuing ownership is intended, and needed. Thirdly, the approach is inconsistent with the principle of patient consent and autonomy which is found both at common law¹⁰⁸ and in legislation;¹⁰⁹ for if, contrary to law, a procedure were to be carried out without consent, it would seem odd to award the excised tissue to the person carrying out the unlawful act.¹¹⁰ Finally, the *res nullius/occupatio* approach makes an unprincipled distinction between self-excision and excision by others. Typically, originators would own those body parts which they had separated for themselves – hair or finger nails, for example – but not those which had been separated by others. As Lord Stewart pointed out in *Holdich*, it would mean that originators could own male gametes but not female gametes, for the latter can only be removed with medical assistance.¹¹¹

Fortunately, the *res nullius/occupatio* approach does not appear to be the law. On the contrary, as soon as a part is separated from a human body, it becomes the property of the person from whom it was taken.¹¹² This is a form of original acquisition¹¹³ because the part, like the body as a whole, was previously unowned. And from the point of view of the new (and first) owner, the former personality rights have been transformed into a right of property.

Subsequent Transmissions

In the first owner lies the key to future owners; for once the former is identified,

¹⁰⁸ Reid, *Personality, Confidentiality and Privacy*, paras 3.06ff.

¹⁰⁹ E.g. Human Tissue (Scotland) Act 2006 s. 18; Human Organ and Tissue Live Transplants (Scotland) Regulations 2006, SSI 2006/390.

¹¹⁰ Hardcastle, *Law and the Human Body*, 146–8.

¹¹¹ *Holdich*, paras 37 and 38. Lord Stewart adds that sperm is sometimes taken from a dead person by electro-ejaculation.

¹¹² Even before *Holdich*, that had been the preferred view of Whitty, ‘Rights of Personality’, 223–5. This is also the position in German and Dutch law and, no doubt, in the law of other countries as well. See *Bundesgerichtshof*, 9 November 1993, *Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ) 124, 52; Welie and Ten Have, ‘Ownership of the Human Body: the Dutch Context’, 108–9.

¹¹³ As opposed to derivative acquisition.

the identity of the latter is determined by ordinary principles of property law. Sometimes this will be straightforward. Thus it may be obvious that donation to a particular person or organisation was intended, as in the case of blood or organ donation, or donation (for example to a biobank) for the purposes of research. Equally, it may be obvious that ownership was to be retained by the originator, as where (as in *Holdich*) sperm is consigned for storage. Between these clear cases, however, there is considerable scope for uncertainty. Take the most common case of all, where body tissue is removed as part of a medical procedure. We know that the tissue is the property of the patient at the moment of separation. But what then? The tissue may come to be thrown away, or destroyed, or preserved, or utilised for research. Does it remain the patient's property, or does ownership pass, whether to the hospital authority or research institution or to someone else? The applicable law itself is perfectly clear. But what are often unclear are the facts to which the law must be applied. In particular, the patient's intentions may only be discernible, if indeed they are discernible at all, by means of inference or speculation. A number of questions arise in this situation. Is ownership retained or relinquished by the patient? If it is relinquished, is this a result of donation or of abandonment? And what role, if any, is there for *specificatio*? Finally, something needs to be said about the imposition of conditions on the future use of the tissue.

(1) Retention or relinquishment?

Tissue removed in the course of a medical procedure is, in the first instance, the property of the patient from whom it was removed. If that is then to change – if the tissue is to be donated or abandoned – the patient must intend that this be so. Absent intention, the patient's ownership remains undisturbed. An additional factor in favour of the *status quo* is the well-established presumption against donation.¹¹⁴

The difficulty, of course, is the lack of evidence as to intention; for, while the patient will normally have consented to the procedure in question, either orally or in writing, such consent will rarely cover disposal of removed tissue. Sometimes it may be evident that the patient wishes to retain particular body parts. This might be suggested by its nature (placenta, for example, or an extracted tooth)¹¹⁵ or by the patient's behaviour or express wish (perhaps in

¹¹⁴ See e.g. Stair, *Institutions*, I.8.2: 'It is a rule in law, *donatio non praesumitur*, and, therefore, whatsoever is done, if it can receive any other construction than donation, it is constructed accordingly'.

¹¹⁵ Imogen Goold, 'Abandonment and Human Tissue' in Goold and others (eds), *Persons*,

response to a question). But, much more commonly, no indication is given one way or another and, if dispositive intention is to be found, it must be found in the general circumstances which surround medical procedures.

Although empirical data are, so far as I know, lacking it might seem reasonable to suppose that a person who consents to a medical procedure usually consents also to the disposal by the hospital of any tissue which, as a result of that procedure, comes to be separated from his or her body. There is, however, neither statute nor case law in Scotland to support this intuitive view. In one American case it was held, in the context of bodily waste, that it is 'all but universal human custom and human experience that such things are discarded – in a legal sense, abandoned – by the person from whom they emanate'.¹¹⁶ And while it is a long way from bed pans to surgically-removed tissue, it is arguable that the governing principle may yet be the same. Policy considerations strengthen the argument. On the one hand, patients will rarely have a use for, or any interest in, tissue removed from their bodies. On the other hand, hospitals are faced with an immediate and practical problem. Detached tissue cannot simply be left where it drops. Nor, usually, can it be put in a plastic bag and handed straight back to the patient. Something needs to be done with it, and done without delay. To the extent that the tissue might be useful for therapeutic purposes, teaching or research, the law should seek to accommodate such uses, in the public interest.¹¹⁷ Otherwise the hospital should be able to dispose of or destroy material which is of no value to anyone. Of course, where patients indicate a wish to retain excised tissue, whether expressly or by reasonable implication, this wish must be respected so far as consistent with patient safety; to express the matter doctrinally, ownership necessarily remains with the patient where dispositive intention is lacking. But in the absence of indications of this kind, there is much to be said for finding in the general circumstances of medical procedures an intention to relinquish ownership of excised tissue.¹¹⁸

Parts and Property, 125–56, 151–2.

¹¹⁶ *Venner v State of Maryland* (1976) 30 Md App 599, 627 (Powers, J). In this case it was held to be lawful to use balloons of hashish oil found amongst a patient's excrement in a hospital bedpan as evidence in a criminal prosecution of the patient. He was convicted. The fact that this was a criminal case was emphasised in *Moore v Regents of the University of California* (1990) 51 Cal 3d 120, 138, note 28 (Panelli, J) as a means of down-playing the decision ('this slender reed[...]').

¹¹⁷ For an account of excised tissue and its potential uses, see e.g. Nuffield Council on Bioethics, *Human Tissue: Ethical and Legal Issues* (London, 1995), chs 4 and 5.

¹¹⁸ This approach was favoured in *ibid.*, para. 9.14. The test proposed in *Venner v State of Maryland* at 627 (Powers, J) was that 'when a person does nothing and says nothing to

(2) Donation or abandonment?

Assuming that patients generally relinquish their ownership of excised tissue, the next question to consider is how that is done. There are only two possible methods: either the property is transferred or it is discarded without seeking a successor. In other words, the choice is between donation (in practice usually to the hospital authority responsible for the medical procedure) and abandonment. There is a presumption against donation, as already mentioned, but as it is directed mainly in favour of retention of the property by the putative donor, it tells us little as to the choice between different methods of disposal. In fact there are two grounds for preferring donation to abandonment, one doctrinal, the other based on legal policy.¹¹⁹

The doctrinal ground concerns the circumstances of the relinquishment. Where property is abandoned, it is generally discarded without thought for who might pick it up. That was why, in the English case of *Williams v Phillips*,¹²⁰ the filling of refuse sacks for collection by municipal dust-carts was held to be donation, not abandonment. 'If I put refuse in my dustbin outside my house', the Lord Chief Justice explained, 'I am not abandoning it in the sense that I am leaving it for *anybody* to take it away. I am putting it out so that it may be collected and taken away by the local authority.'¹²¹ By the same token, patients relinquish their tissue to the hospital authority, not to the public at large, and this too is donation, not abandonment.

The policy reason concerns the consequences of abandonment. In Scotland, unlike in England, a thing which is abandoned becomes the property of the Crown and cannot be acquired by the first possessor.¹²² Thus, to say that patients abandon their body tissue is to give the tissue to the 'wrong' person. No doubt the Queen's and Lord Treasurer's Remembrancer is not in the habit of claiming the body parts to which, on this theory, he would be

indicate an intent to assert his right of ownership, possession, or control over [bodily] material, the only rational inference is that he intends to abandon the material'.

¹¹⁹ Imogen Goold reaches the same conclusion for English law, not least because of the difficulty of showing abandonment: see Goold, 'Abandonment and Human Tissue', 145. Whether the same difficulty arises in Scotland is not possible to say in the current, undeveloped state of the law of abandonment.

¹²⁰ (1957) 41 Cr App 5.

¹²¹ *Ibid.*, 8 (Lord Goddard, LCJ), my emphasis. The decision is accepted as good law for Scotland by William M. Gordon, 'Corporeal Moveable Property' in *Stair Memorial Encyclopaedia*, vol. 18 (Edinburgh, 1993), para. 568. See also *R. (Rickets) v Basildon Magistrates' Court* [2010] EWHC 2358 (Admin), [2011] 1 Cr App R 15.

¹²² The maxim is *quod nullius est fit domini regis*. For details, see e.g. Carey Miller with Irvine, *Corporeal Moveables*, para. 2.02.

entitled; yet the denial of ownership to the hospital authority is unsatisfactory. The problem would disappear if the Prescription and Title to Moveable Property Bill prepared by the Scottish Law Commission were to be enacted, for in terms of the Bill property abandoned in the course of surgery would be available for *occupatio*.¹²³ Under the law as it stands at present, however, abandonment is an unattractive explanation.

Body tissue, then, becomes the property of the patient at the moment of separation, after which (absent indicators to the contrary) it is transferred to the hospital authority by donation. Assuming that to be correct, it is worth pausing to consider how and when the transfer is effected. To transfer corporeal moveables by donation two things are required: there must be delivery from donor to donee, and both parties must intend a transfer to take place.¹²⁴ It is thought that intention can precede delivery. But unless accretion is to be invoked,¹²⁵ the delivery itself must take place after the patient has become owner, and hence after the initial separation which brought that ownership about.¹²⁶ As by that time the hospital authority is already in possession, any delivery would have been merely notional – what in Roman law was referred to as *traditio brevi manu*.¹²⁷ And there seems no reason why that *traditio* should not be regarded as taking place at once, so that the initial ownership of the patient is no more than momentary.

(3) *Specificatio*

In a rule dating back to the Australian case of *Doodenward v Spence* more than a hundred years ago,¹²⁸ English law awards ownership of body parts to a person

¹²³ Draft Prescription and Title to Moveable Property Bill s. 7(1). This forms Appendix A of the Scottish Law Commission, *Report on Prescription and Title to Moveable Property* (Scot. Law Com. No. 228, 2012). Where a thing is ‘found’ (i.e. is taken into possession without the owner’s permission), *occupatio* is not available and the find must be reported to the police under s. 67 of the Civic Government (Scotland) Act 1982, who may then award ownership to the finder: see s. 7(2) of the Bill. But this awkward rule would not apply to tissue excised with the permission of the patient.

¹²⁴ See generally Carey Miller with Irvine, *Corporeal Moveables*, ch. 8.

¹²⁵ Although accretion is likely to apply to corporeal moveables, direct authority is lacking. See Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996) para. 678; Carey Miller with Irvine, *Corporeal Moveables*, para. 8.33.

¹²⁶ The position in English law seems to be the same: see Gerald Dworkin and Ian Kennedy, ‘Human Tissue: Rights in the Body and its Parts’, *Medical L. Rev.*, 1(3) (1993), 291–319, 302–3.

¹²⁷ *Traditio brevi manu* is recognised in Scots law: see Carey Miller with Irvine, *Corporeal Moveables*, para. 8.21.

¹²⁸ (1908) 6 CLR 406 (HCA).

who, by the application of work or skill (such as dissection or preservation), has caused the part to acquire different attributes.¹²⁹ The equivalent doctrine in Scotland, though it has yet to be applied to body parts, is *specificatio*, by which a person making a new thing from materials belonging to another becomes owner of the thing.¹³⁰ But just as *Yearworth*, by conferring ownership of sperm on the originator, has gone far to dispense with the work or skill rule,¹³¹ so too *Holdich* has made recourse to *specificatio* largely unnecessary. For, if the argument of this chapter is correct, those who use body parts for research, teaching, or therapeutic purposes will usually be owners already and have no need of a title conferred by *specificatio*. Indeed in this very security of title lies an important justification of a property-based model.¹³² As it happens, *specificatio* provides a rather frail basis for acquiring ownership in the context of body parts. Many routine processes, such as dissection or preservation, are likely to fail the threshold requirement of creating a thing which is of a different species from its constituent materials.¹³³ In addition, those handling the materials may lack the good faith which, on one view of the law, is needed for *specificatio*.¹³⁴ More fundamentally, it has even been suggested that *specificatio* is inapplicable to living organisms.¹³⁵

¹²⁹ *Dobson v North Tyneside Health Authority* [1997] 1 W.L.R. 596 (CA); *R v Kelly* [1999] QB (CA) 621. For discussion, see e.g. Hardcastle, *Law and the Human Body*, 28–40.

¹³⁰ For *specificatio*, see e.g. Carey Miller with Irvine, *Corporeal Moveables*, ch. 4. Hardcastle, *Law and the Human Body*, 143 sees the work or skill exception as ‘a misguided application of the specification doctrine’.

¹³¹ *Yearworth*, para. 45. Its ancestry was said not to commend it as a solid foundation. In addition, ‘a distinction between the capacity to own body parts or products which have, and which have not, been subject to the exercise of work or skill is not entirely logical’.

¹³² See subsection (2) in the section headed “Can Body Parts be Owned?” above.

¹³³ See the detailed examples in Hardcastle, *Law and the Human Body*, 169–71. The threshold for the work or skill rule is much lower. Thus the court in *Yearworth* (para. 45(c)) had ‘no difficulty’ in regarding the storage of sperm at low temperatures as ‘work or skill which conferred on it a substantially different attribute, namely the arrest of its swift perishability’.

¹³⁴ Carey Miller with Irvine, *Corporeal Moveables*, para. 4.06. There is also uncertainty as to what good faith means in this context. Researchers who were not confident as to their title might be considered to be in bad faith.

¹³⁵ *Kinloch Damph Ltd v Nordvik Salmon Farms Ltd*, Court of Session Outer House, 30 June 1999, unreported. For, generally critical, commentary on this aspect of the decision, see Ernest Metzger, ‘Acquisition of Living Things by Specification’, *Edinburgh Law Review*, 8 (2004), 115–8; C. G. van der Merwe, ‘Nova Species’, *Roman Legal Tradition*, 2 (2004), 96–114; Ernest Metzger, ‘Postscript on Nova Species and *Kinloch Damph Ltd v Nordvik Salmon Farms Ltd*’, *Roman Legal Tradition*, 2 (2004), 115–21; Hardcastle, *Law and the Human Body*, 165–9.

(4) Donations subject to conditions

In the storage and use of human tissue, researchers are subject to ethical and professional constraints and sometimes also to constraints imposed by statute.¹³⁶ But in principle they are free from control by those who supplied the tissue in the first place, for it is the researchers and not the donors who are now the owners. Donors wishing to retain a measure of control must make an agreement to that effect at the time of donation. That would be unusual in the casual donation which accompanies routine medical procedures, but more common where tissue is given to a particular researcher for a particular project. In the American case of *Washington University v Catalona*,¹³⁷ for example, those giving blood and tissue for a series of studies did so under a set of standard conditions which included the right to withdraw tissue at will and have it destroyed. Other topics which conditions might usefully cover include the type of research which is to be undertaken, the parties who are to undertake it, and even a right to participate in profits.¹³⁸ Nonetheless, the donors' position is relatively weak. Matters not covered in the conditions are beyond their control;¹³⁹ and, being contractual in nature, the conditions would not bind any third party to whom the tissue came to be transferred, even if the third party knew of them.¹⁴⁰ No doubt some kind of workaround could be devised for this last point, such as a 'chain' arrangement by which consecutive owners were taken bound to impose like conditions on their successors. But, with subordinate real rights being largely unavailable for corporeal moveables,

¹³⁶ Dworkin and Kennedy, 'Human Tissue', 304.

¹³⁷ 490 F.3d 667 (8th Cir.(Mo.), 2007).

¹³⁸ The right to the profits was at issue in the celebrated case of *Moore v Regents of the University of California* (1990) 51 Cal 3d 120, where cells from a patient's body were used to make a cell-line which, following patenting, was likely to engender enormous profits. The patient failed in his action for conversion of his property. An unusual feature of the case is that profits were being made from the bio-material of just one, identifiable person.

¹³⁹ For example, the right to withdraw tissue in *Washington University v Catalona* was held not to include the right to transfer the tissue to a different university.

¹⁴⁰ For an apparent exception to this principle, see William Murray Gloag, *The Law of Contract* (2nd edn, Edinburgh, 1929), 268–9. In fact the cases he discusses are best classified under the heading of breach of confidence: see Reid, *Personality, Confidentiality and Privacy*, paras 12.19–12.22.

it is not possible to do more.¹⁴¹ Once ownership is ceded,¹⁴² therefore, it is the researchers who are in control and not those from whom the tissue was taken. In most cases that is likely to seem a satisfactory arrangement.

Concluding Remarks

The argument of this chapter is that separated body parts are (and ought to be) capable of private ownership, and that on severance from the body they become the property of the person from whose body they are taken. It is further argued that, where patients consent to a medical procedure, they will normally be taken to have donated to the hospital authority any tissue removed in the course of that procedure. The decision in *Holdich* is consistent with both parts of the argument as well as giving some positive support to the first.¹⁴³

¹⁴¹ A right in security (pledge) can be granted over corporeal moveables but its possessory nature makes it unsuitable for present purposes. There is no equivalent for moveables to real burdens in respect of land. In the case of English law, it has been suggested that the originator might retain equitable rights: see Nils Hoppe, *Bioequity – Property and the Human Body* (Farnham, Surrey, 2009), ch. 12.

¹⁴² It would, of course, be open to the originator to cede possession but not ownership, in which case it would be the originator who was in control. But that does not seem to be what happens in the normal case: see subsection (1) of the section headed “Subsequent Transmissions” above.

¹⁴³ The research for this chapter was carried out at the Max-Planck-Institut für ausländisches und internationales Privatrecht in Hamburg, and at the Stellenbosch Institute for Advanced Study (STIAS), Wallenberg Research Centre at Stellenbosch University, where the author is a Fellow. I am grateful to both institutions for providing ideal conditions for the pursuit of scholarship. Writing was completed in July 2015.

Delictual Liability in *Holdich v Lothian Health Board*

Elsbeth Reid

Introduction

David Carey Miller's contribution to the legal academic communities of Scotland and South Africa cannot adequately be measured by conventional means. Searches in library catalogues or legal databases do not give proper indication of the generosity of spirit and good humour which went into the organisation of countless conferences and seminars, tireless support for younger (and older) colleagues, and – quite simply – David's talent for making things happen. That said, the legal databases do of course reveal a wealth of citations, not just in his 'home' jurisdictions but as far away as New Zealand¹ and Guyana.² This chapter returns to Scotland and the recent decision in *Holdich v Lothian Health Board*, in which *Corporeal Moveables in Scots Law* is again mentioned.³ This intriguing case forces reconsideration of first principles in terms of both property law and delict. Another of the contributions in this volume⁴ has commented on the property implications of *Holdich*; the treatment below will concentrate on the issues of delictual liability raised there.

Holdich and the Shadow of *Yearworth*

While still in his early twenties Mr Holdich had deposited sperm samples in a cryogenic storage facility prior to receiving treatment for testicular cancer. He recovered from the cancer, but the treatment left him infertile. When nearly a decade later he sought to retrieve the samples in order that he and his wife could attempt to conceive a child by *in vitro* fertilisation he was advised of the possibility that a malfunction in the storage vessel had damaged the samples

¹ *Gazley v Lord Cooke of Thorndon and Others* [1999] 2 NZLR 668.

² *Bisnauth v Shenprashad* (2009) 79 WIR 339.

³ 2014 SLT 495 ('Holdich'), para. 48 (Lord Stewart), citing D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), para.1.12.

⁴ See Kenneth Reid's contribution to the present volume.

and that they were unsafe to use. In consequence, the couple did not proceed with IVF. Mr Holdich raised an action against the Health Board as provider of the storage facility, claiming compensation for distress, depression and loss of the chance of fatherhood. His claim was presented primarily as one for mental injury consequential on property damage in breach of contract. *Et separatim*, he argued that he had suffered ‘pure’ mental injury for which delictual damages were due, or alternatively that the damage to the samples gave rise to a ‘*sui generis*’ type of claim based upon common-law fault for which damages were payable.⁵ The case came before Lord Stewart for debate on whether the pleadings disclosed a relevant cause of action. Although proof before answer was allowed this has not in the end proceeded.

The shadow of an analogous English case hung close over the pleadings in *Holdich*. In *Yearworth v North Bristol NHS Trust* six cancer patients had similarly taken up the offer to store sperm samples prior to receiving chemotherapy, but the samples perished due to the defendants’ failure to maintain a sufficiently low temperature in the storage vessels.⁶ When the patients claimed damages for the mental distress and psychiatric injury suffered in consequence, the health authority admitted negligence but disputed liability, arguing that the damage to the samples was neither damage to the claimants’ property, nor was it a personal injury. The claim was rejected at first instance but upheld in the Court of Appeal. The main basis for the latter decision was that the claimants were to be regarded as the owners of the samples, and therefore compensation could be claimed for the destruction of the material in the defendants’ storage facility in breach of bailment.⁷ It was not therefore necessary to give extended scrutiny to the claimants’ arguments drawn from the law of tort. Following on from this decision, the parties in *Holdich* appeared to have concentrated upon the property-law, rather than the delictual, aspects of the case. Lord Stewart took the view that, while bailment was not a contract as such, and therefore not directly comparable with the Scots contract of deposit, the availability

⁵ *Holdich*, para. 4, as narrated by Lord Stewart.

⁶ [2010] QB 1 (*Yearworth*). For discussion see N. Priaulx, ‘Managing novel reproductive injuries in the law of tort: the curious case of destroyed sperm’, *European Journal of Health Law*, 17(1) (2010), 81–95; S. Harmon and G. Laurie, ‘*Yearworth v North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms’, *Cambridge Law Journal*, 69(3) (2010), 476–93.

⁷ *Yearworth*, para. 45 (Lord Judge, CJ). The concept of ownership over sperm samples was recognised in two subsequent Australian cases: *Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Re Edwards* [2011] NSWSC 478. See also *Lam v University of British Columbia* 2013 BCSC 2094.

of this remedy in English law was ‘at least mildly persuasive’ in the question of whether the property-contract case should be allowed to go to proof. Moreover, since the delictual case was to be permitted to proceed there was ‘an argument in expediency’ in the property-contract case going forward also, but he signalled that he found the former more persuasive than the latter.⁸

Detailed examination elsewhere of the property arguments suggests that these present a convincing basis for taking proceedings forward.⁹ Following on from this, the next section will assess the case for imposing delictual liability in relation to psychiatric injury deriving from damage to the sperm when regarded as the patient’s property. At the same time, this chapter will point to the problems inherent in presenting the loss suffered as a personal injury (a possibility put forward by Lord Stewart), or as an invasion of the patient’s autonomy.

Psychiatric Injury Deriving from Damage to Property

The plaintiffs in *Yearworth* had argued that if they were regarded as owners of the samples, they were entitled to compensation for psychiatric injury triggered by learning of their destruction. The authority relied upon was *Attia v British Gas plc*, in which the Court of Appeal refused to strike out a claim for the shock suffered by the plaintiff on witnessing her house burn down as a result of negligence by central heating engineers.¹⁰ The Court of Appeal in *Yearworth* did not venture a final judgment on this point, since a remedy would lie in any event for breach of bailment. However, it cast doubt on the relevance of *Attia*, noting that the *Yearworth* claimants had been informed at second hand of the spoiling of the samples but, unlike Mrs Attia at the fire scene, had not witnessed it themselves. Although this distinction was ‘controversial’, the court seemed to regard it as valid because it ‘replicated’ that which was ‘drawn in relation to the so-called secondary victim who foreseeably suffers psychiatric injury as a result of *personal* injury which the primary victim suffers [...] as a result of the defendant’s negligence’.¹¹ Reference was made to *Alcock v Chief Constable of South Yorkshire Police*, which post-dated *Attia* but provides

⁸ *Holdich*, para. 76.

⁹ See Kenneth Reid’s contribution to the present volume.

¹⁰ [1988] QB 304 (on the basis that causation and reasonable foreseeability would require to be established).

¹¹ *Yearworth*, para. 55 (Lord Judge, CJ).

the modern framework for psychiatric injury claims, setting out the control mechanisms that limit duty of care in respect of 'secondary', as distinct from 'primary', victims.¹²

In *Holdich*, Lord Stewart took up *Yearworth's* limited discussion on this point, but queried whether it had been appropriate to distinguish *Attia* in such a way as to bracket the owners of the samples with the secondary victims in *Alcock*. His Lordship's misgivings on this question seem entirely justified. In this connection it should be noted that the Court of Appeal has itself expressed doubts as to whether the distinction between primary and secondary victims is helpful in contexts other than road accidents and other sudden trauma to the person,¹³ and one commentator has queried whether it is 'intelligible at all' in the context of property damage.¹⁴ The primary/secondary victim categorisation is relevant only where the immediate casualty of the defender's negligence is the interests of a person other than the pursuer; it has no bearing where the alleged wrong has been done directly to the pursuer's own interests. In other words, the claim of the owner of damaged property cannot be denied in the same terms as that of a witness of another's physical injury. As Mullany and Handford commented upon *Attia*, 'The plaintiff in this case cannot possibly be regarded as a secondary victim (unless the house be regarded as the primary victim, which would be sheer nonsense)'.¹⁵ If the claimants in *Yearworth* were acknowledged as the owners of the samples, the *Alcock* criteria, required of 'secondary victims' witnessing injury to others, were not in point, and it is therefore hard to see any justification for 'replicating' the requirement that shock should be suffered by direct perception of the consequences of the defender's negligence. In *Holdich*, similarly, if the pursuer was regarded as the owner of the samples, the Health Board's liability to compensate him for psychiatric harm suffered on their destruction turned not upon the *Alcock* criteria but upon whether such harm was foreseeable and whether causation is established.¹⁶

The discussion so far has assumed the pursuer's ownership of the samples. If, however, it were ultimately to be determined that the pursuer did *not* own them (and that the physical damage to them did not constitute personal

¹² [1992] 1 AC 310.

¹³ *Leach v Chief Constable of Gloucestershire* [1999] 1 WLR 1421, 1429 (Pill, LJ).

¹⁴ Harvey Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford, 2009), 125, note 184.

¹⁵ Nicholas J. Mullany and Peter R. Handford, *Tort Liability for Psychiatric Damage* (2nd edn, Sydney, 2006), para. 5.600.

¹⁶ *Attia v British Gas plc* [1988] QB 304.

injury to Mr Holdich¹⁷), it is difficult to see how duty might be established in relation to a claim for ‘pure’ psychiatric injury. Perhaps rather surprisingly, Lord Stewart indicated that authority of sorts might be drawn from *Goorkani v Tayside Health Board*, but the circumstances of that case were not directly comparable.¹⁸ In *Goorkani*, the pursuer had become infertile after treatment for an eye condition. Infertility was a known side-effect of the particular drug prescribed to him and there was no allegation of negligence in the way that treatment had been administered; nor was it established that the pursuer would *not* have gone ahead with the treatment had he known of the risk. Instead, the pursuer claimed, and the court accepted, that the doctor failed to exercise due care in providing information about the treatment, so that, some time after the treatment, the patient experienced shock and anger on discovering the reason why he and his wife had not conceived a child. In other words, the negligence in that case lay not in any act which caused infertility but in the mode of communicating, or failing to communicate, the likelihood of infertility. Unlike *Holdich*, therefore, *Goorkani* could not fairly be said to be a case of ‘negligently caused sterility’.¹⁹

Personal Injury?

The Court of Appeal in *Yearworth* categorically rejected the claimants’ argument that damage to a substance generated by a person’s body could constitute a personal injury to him. For the court ‘personal injury’ meant a specific ‘impairment’ to the person’s physical or mental condition.²⁰ The notion that damage to biomatter taken from the claimants might satisfy this traditional requirement for ‘demonstrable physical injury’²¹ was therefore a ‘fiction’ that would ‘generate paradoxes, and yield ramifications, productive of substantial

¹⁷ See section headed “Personal Injury” below.

¹⁸ 1991 SLT 94.

¹⁹ As Lord Stewart seemed to suggest in *Holdich*, para. 100. Further English authorities supporting, if rather tenuously, the existence of a duty of care in relation to the provision of information, were noted in *Holdich*, but appear not to have been directly in point where what was at issue was the negligence of the Health Board in storing the sample, not in informing him of the consequences of its spoilage (*AB v Tameside and Glossop Health Authority* [1997] 8 Med LR 91; *Farrell v Avon Health Authority* [2001] Lloyd’s Rep Med 458; *W v Essex County Council* [2001] 2 AC 592).

²⁰ Para. 18 (Lord Judge, CJ), looking in particular at its definition in the English Limitation Act 1980 s. 38(1).

²¹ *Rothwell v Chemical & Insulating Co. Ltd* [2008] 1 AC 281, para. 47 (Lord Hope).

uncertainty, expensive debate and nice distinctions.²² Perhaps because of the clear steer given on this point by the English court, the pursuer in *Holdich* conceded that in Scots law also the destruction of sperm samples did not constitute a personal injury. But Lord Stewart was less sure and pondered whether these issues merited fuller consideration than had been accorded to them in *Yearworth*:

Would it be unreasonable to extend the concept of injury to damage to viable biomatter produced or removed for the purpose of the living subject's own reproduction or medical treatment? Clearly there is such a thing as out of body treatment, for example high dose radiation of cancerous organs removed to protect surrounding tissue. Thinking of autologous grafts, transplants and transfusions, would it be far fetched to deal with viable biomatter outside the body as part of the subject's person? Would it do violence to the law? Would it run counter to current norms of medical practice? Would it be inconsistent with the regulatory regimes? Would it offend morality?²³

In both *Holdich* and in *Yearworth*, German authority was briefly considered in this connection, in the form of a decision of the *Bundesgerichtshof* in 1993,²⁴ to the effect that the negligent storage of sperm samples caused a personal injury to the patient in terms of § 823(1) of the German Civil Code. The German approach was that the sperm samples formed a 'functional unity' with the patient's body so that their destruction could be considered as a personal injury to him.²⁵ By the same token (if biomatter also included ovarian

²² *Yearworth*, para. 23 (Lord Judge, CJ).

²³ *Holdich*, para. 6.

²⁴ *Bundesgerichtshof*, 9 November 1993, *Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen* (BGHZ), 124, 52. English translation available at http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=830

²⁵ As noted in *Yearworth* and in *Holdich*, the German court's characterisation of sperm damage as personal injury may well have been driven by the fact that at that time 'intangible damage' ('*immaterielle Schaden*') was recoverable only as a delictual claim (in terms of § 847 (now repealed), part of the section of the German Civil Code on delictual liability). This created difficulties in relation to medical malpractice suits, which are often argued as breach of contract under German law. Revisions to the German Civil Code in 2002 opened up liability in relation to other heads of liability, with a new § 253 in the Code's general section on the law of obligations. This means that immaterial damage can in principle now be claimed in relation to *contractual* medical negligence claims. Consequently it is now unnecessary to categorise such damage as personal injury, as there is no longer any absolute necessity to frame the claim

tissue intended for reimplantation in assisted reproduction), Lord Stewart thought it 'plausible' to treat gametes, male or female, as part of the subject's body, although the pursuer's concession on this point meant that it was not developed further.²⁶

German authority aside, however, the objection to a claim framed under this head is that the gist of personal injury is normally taken to entail 'disease and [...] impairment of a person's physical or mental condition'.²⁷ This is difficult to square with the primary harm here, namely deprivation of the opportunity of procreation due to destruction of a substance stored remotely from the pursuer's person. If separately-held biomatter is to be recognised as part of the person and thus susceptible of injury, the potentially open-ended possibilities for delictual liability would require to be circumscribed. Without such restriction, there is no obvious answer to the anomalies which the court in *Yearworth* thought would follow from treating sperm damage as personal injury:

(a) had one of the men died prior to the loss of the sperm, the suggested personal injury would have been inflicted upon all of the men save him; (b) had the loss of the sperm occurred after the men, to their knowledge, had recovered their natural fertility and so had no further interest in its preservation, the suggested personal injury would nevertheless have been inflicted on all of them albeit that, as damage would be absent, it would not have been actionable; and (c) had the loss of the sperm occurred by intentional destruction following preservation for ten years as required by law, the suggested personal injury would again have been inflicted on all of them, albeit that, again, it would not have been actionable.²⁸

To the extent that there is an 'impairment' here, it is not to the pursuer's person as such but to his future prospects of procreation. However, it is by no means obvious that the case for compensation can be more cogently argued in relation to injury characterised as loss of reproductive autonomy.

within the law of delict.

²⁶ *Holdich*, para. 7.

²⁷ See, e.g., Prescription and Limitation (Scotland) Act 1973 s. 22(1).

²⁸ *Yearworth*, para. 23 (Lord Judge, CJ) (leaving aside the potential for criminal liability, and the non-availability of the property remedy of vindication: See Kenneth Reid's contribution to the present volume).

Loss of Autonomy as Infringement of a Personality Right?

In *Holdich* the claim based upon loss of autonomy was permitted to go forward to proof, on the basis that autonomy in this context ‘seemed’ to be a ‘personality right’.²⁹ Lord Stewart was not, however, entirely persuaded that it would succeed as thus framed. In particular, he expressed concern that there was little authority to support loss of autonomy as an independent head of damages. But while it is no doubt correct that the law of negligence has in the past normally protected autonomy only as ancillary to other forms of harm, this is certainly not the first time that the question of appropriate recognition for loss of autonomy has come to the fore.³⁰

(1) Reproductive autonomy as a personality right: the developing jurisprudence Although the European Convention on Human Rights makes no express provision in this regard,³¹ a concern for patient autonomy, as the ‘cornerstone of modern medical jurisprudence in the United Kingdom’,³² has more and more informed not only the legal textbooks but the ethics guidance for the medical profession itself.³³ It is now uncontroversial that medical personnel are under a duty to give due protection to their patients’ ‘right of autonomy’ by providing appropriate information prior to treatment, and that reparation is due for harm suffered in procedures to which the patient has not given this level of informed consent.³⁴

²⁹ *Holdich*, para. 102.

³⁰ See Donal Nolan, ‘New forms of damage in negligence’, *Modern Law Review*, 70(1) (2007), 59–88, 87.

³¹ At the same time, the jurisprudence of the European Court of Human Rights has shifted in recent years towards recognition of patient rights. See *Pretty v United Kingdom* (2002) 35 EHRR 1, para. 61: ‘the concept of ‘private life’ is a broad term not susceptible to exhaustive definition [...] Though no previous case has established as such any right to self-determination as being contained in Article 8 of the [ECHR], the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.’

³² J. K. Mason and G. T. Laurie, *Mason and McCall Smith’s Law and Medical Ethics* (10th edn, Oxford, 2016), para. 9.02.

³³ See e.g. General Medical Council, ‘Good Medical Practice (2013)’, gmc-uk.org, http://www.gmc-uk.org/guidance/good_medical_practice.asp

³⁴ See *Montgomery v Lanarkshire Health Board* 2015 SLT 189, para. 68 (Lord Kerr and Lord Reed), para. 108 (Baroness Hale). See also *Chester v Afshar* [2005] 1 AC 134, para. 24 (Lord Steyn), para. 92 (Lord Walker), in which a ‘modest departure from traditional causation principles’ was permitted so as to compensate harm sustained in a procedure to which this level of consent had not been given. See also Elspeth C. Reid, *Personality, Confidentiality and Privacy in Scots Law* (Edinburgh, 2010), paras 3.10–3.21.

The more specific concept of ‘reproductive autonomy’ has recently come into focus, arising in the context of choices on fertility, initially in regard to abortion³⁵ but thereafter in relation to access to contraception and appropriate pre-natal testing for foetal abnormality and discontinuation of pregnancy. As medical science has evolved, reproductive autonomy is now talked of also in regard to assisted reproduction.³⁶ But although the rhetoric of ‘autonomy’ has increasingly been found attractive, the courts have struggled to determine what this actually entails, and to translate the correlative obligations into the law of delict or tort.

(2) Reproductive autonomy and assertion of the right *not* to have a child

(a) The reasoning in *McFarlane v Tayside Health Board*

Holdich was not unique, even in Scotland, in considering appropriate legal recognition for ‘reproductive’ autonomy, but the case law so far has largely concerned assertion of the right not to have a child, in relation to ‘wrongful pregnancy’ (where the defenders have allegedly been negligent in the provision of contraceptive or sterilisation services) or ‘wrongful birth’ (where the defenders have negligently failed to advise the parents appropriately of the risk that a child would be born with a congenital abnormality). The starting point for this line of cases was the troubled decision in *McFarlane v Tayside Health Board*,³⁷ in which the defenders negligently misadvised a married couple that the husband’s vasectomy had been successful, with the result that a healthy child – their fifth – was born shortly afterwards. In that case the mother’s claim for the physical discomfort of pregnancy and childbirth, and both parents’ claim for the financial costs of bringing up the child, were dismissed at first instance, then unanimously allowed on appeal to the Inner House. On further appeal, the House of Lords allowed recovery for physical discomfort but not for the child’s maintenance costs. The reasoning of the Inner House is worth revisiting, however, since it attempted to plot the claim on the map of ‘well established principles of the law relating to reparation’.³⁸ The court reasoned

³⁵ John A. Robertson, ‘Procreative liberty and the control of conception, pregnancy, and childbirth’, *Virginia Law Review*, 69(3) (1983), 405–62.

³⁶ Erin Nelson, *Law, Policy and Reproductive Autonomy* (Oxford, 2013), 5; see also Priaulx, ‘Managing novel reproductive injuries’.

³⁷ 2000 SC (HL) 1 (*McFarlane*). For background see Kenneth McK. Norrie, ‘Bringing up Catherine: *McFarlane v Tayside Health Board*’ in John P. Grant and Elaine E. Sutherland (eds), *Scots Law Tales* (Dundee, 2010), 65–82.

³⁸ 1998 SC 389, 393 (LJC Cullen). See also *Allan v Greater Glasgow Health Board* 1998 SLT 580 in which negligence was not proved, but which accepted that a relevant claim

that the provision of erroneous advice was a wrongdoing that constituted an *iniuria*, causing the pursuers to suffer a *damnum* when the child was conceived. The concept of *damnum* ‘does not require injury in the ordinary sense of physical or personal injury; all that it requires is a material prejudice to an interest (whether it is of a patrimonial character or not) which the law allows a person to vindicate.’³⁹ And ‘when there is concurrence of *iniuria* and *damnum* the person whose legal right has been invaded with resultant loss to him has a right to seek to recover money reparation for that loss from the wrongdoer.’⁴⁰

The right materially prejudiced here was the couple’s right ‘not to have a child at a time and in circumstances when they had made a deliberate choice not to have a child’.⁴¹ Since this was a right which the court deemed worthy of protection, reparation was due for the two forms of loss deriving directly from that *damnum*: i) the invasion of Mrs McFarlane’s bodily integrity entailed in pregnancy and childbirth; and ii) the impact upon the pecuniary interests of both parties in maintaining the child.⁴²

On appeal, the majority in the House of Lords acknowledged that the Inner House’s judgment reflected the ‘traditional view of delictual liability’ but felt constrained by considerations of fairness, justice and reasonableness to set this textbook reasoning aside.⁴³ The speeches reached this conclusion by varying routes, so that Lord Steyn, for example, directed himself to the requirements of ‘distributive justice’, concluding with a rather surprising reference to the criterion of how ‘commuters on the Underground’ would respond if asked if the McFarlanes should receive compensation. In the absence of empirical evidence as to the likely outcome of this improbable opinion poll, his Lordship’s own ‘firm’ expectation of a negative response

might otherwise have been made for the physical pain of pregnancy and birth, as well as the costs incurred as a result of the birth, according to the ‘ordinary principles of law in Scotland pertaining to assessment of damages’, at 585 (Lord Cameron).

³⁹ 1998 SC 389, 402 (Lord McCluskey).

⁴⁰ *Ibid.*, 398 (Lord McCluskey).

⁴¹ *Ibid.*, 399 (Lord McCluskey), speaking also of the father’s ‘right not to receive advice that [...] was materially inaccurate and misleading’, which was ‘very closely bound up with his related right not to impregnate his wife if he chose not to do so’, and of the mother’s ‘right not to be made pregnant by her husband without her knowing consent’.

⁴² *Ibid.*, 393 (LJC Cullen).

⁴³ *McFarlane*, 19 (Lord Hope). To this effect see also *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, para. 4 (Lord Bingham), commenting that ‘orthodox application of familiar and conventional principles of the law of tort [sic] would ordinarily have permitted recovery of the costs of maintaining the *McFarlane* child; J. M. Thomson, ‘Abandoning the law of delict?’, *SLT (News)*, 6 (2000), 43–5.

was conclusive.⁴⁴ A common thread running through the speeches, however, was concern for the dignity of the unborn child if a value were to be placed upon her non-existence, and for the disproportionality of the full costs of maintaining the child in relation to the defenders' negligence. As it happens, their Lordships made extensive reference to an article written by Lord Stewart while he was still at the Bar, providing a comparative survey of case law on damages for the birth of a child.⁴⁵ The article concluded that wrongful birth/pregnancy cases in reality comprised 'two claims – one for personal injury and one for economic loss', although this had hitherto been 'but dimly perceived by the courts'.⁴⁶ It also argued for application of the 'limited damages' rule as found in certain US states, whereby damages might be awarded for the discomfort suffered in pregnancy and childbirth, but not for the costs of maintaining the child. Taking up these suggestions, the House of Lords in *McFarlane* departed from 'traditional' reasoning to conclude that, although a single *damnum* occurred at conception, two separate claims were presented by this case.⁴⁷ The first, concerning the physical consequences of conception in terms of the pain of childbirth, was allowable; the second, concerning the economic consequences of conception in terms of child maintenance costs, was classified as pure economic loss and therefore rejected.⁴⁸ For the majority in the House of Lords, therefore, the personal injury suffered by Mrs McFarlane was the only form of compensable harm. Only Lord Millett made the suggestion, rejected by the majority, that denial of autonomy was in itself reparable:

⁴⁴ *McFarlane*, 16.

⁴⁵ A. Stewart, 'Damages for the Birth of a Child', *Journal of the Law Society of Scotland*, 40 (1995), 298–302.

⁴⁶ *Ibid.*, 301.

⁴⁷ Although Lord Clyde pointed out at 33–4 that, 'Once the obligation to make reparation for some loss is predicated, it seems to me difficult to analyse the claim for maintenance of the child as a particular, and so separate, obligation.' However, he too rejected the maintenance cost element of the McFarlanes' claim as exceeding the requirement for reasonable restitution (at 37).

⁴⁸ Contrast on this point the approach of the South African Supreme Court of Appeal in *Mukheiber v Raath* 1999 3 SA 1065 (SCA) in which a gynaecologist misinformed a couple that he had sterilised the wife. The SCA considered that a 'special duty' had been assumed by the doctor providing advice upon which his patients had relied, so that the economic costs of raising the child born thereafter were therefore recoverable (although the issue of nonpatrimonial loss was not raised). This notion of assumption of responsibility for economic loss was rejected in *McFarlane* without citation of *Mukheiber*, although the South African judgment had been issued only a few months previously.

[The parents] have suffered both injury and loss. They have lost the freedom to limit the size of their family. They have been denied an important aspect of their personal autonomy. Their decision to have no more children is one the law should respect and protect. They are entitled to general damages to reflect the true nature of the wrong done to them.⁴⁹

(b) After *McFarlane*

The reasoning applied in *McFarlane* has been subjected to detailed critique elsewhere and will not be considered further here.⁵⁰ It was not ‘easy to assign to the traditional categories of duty, breach and damage, given that all agreed that there was some duty in the case and that, if that duty had been broken, some recoverable damage had resulted.’⁵¹ Nonetheless, *McFarlane* remains the leading authority in wrongful pregnancy and wrongful birth cases, although its innovation on first principle has sometimes left the courts – in Scotland and in England – with an uncertain foundation for dealing with more complex fact patterns. This was demonstrated a short while later in *Parkinson v St James and Seacroft University Hospital NHS Trust*, brought by a mother whose sterilisation procedure had failed and who had subsequently given birth to a disabled child.⁵² Under reference to *McFarlane*, the Court of Appeal denied recovery of the basic costs of maintenance that would also have applied in relation to a healthy child, but nonetheless awarded compensation for the extra costs of providing for the child’s special needs deriving from the disability. This was said to be justified by ‘distributive justice’, and because ‘ordinary people would consider that it would be fair for the law to make an award in such a case, provided that it is limited to the extra expenses associated with the child’s disability’.⁵³ In effect, therefore, reference to imagined popular consensus

⁴⁹ *McFarlane*, 44–5.

⁵⁰ See in particular J. Kenyon Mason, *The Troubled Pregnancy: Legal Wrongs and Rights in Reproduction* (Cambridge, 2006), 113ff. See also *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, para. 6 (Lord Bingham), noting the ‘different approaches’ and ‘different reasons’ of all judges in *McFarlane*.

⁵¹ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, para. 79 (Lady Justice Hale).

⁵² [2002] QB 266. For commentary see J. K. Mason, ‘Wrongful pregnancy, wrongful birth and wrongful terminology’, *Edinburgh Law Review*, 6(1) (2002), 46–66; Mason, *The Troubled Pregnancy*, 153–63.

⁵³ [2002] QB 266, para. 50 (Brooke, LJ), although, as a matter of principle, or indeed of perceptions of ‘fairness’, it is not clear why the ‘disabled’ element of the claim should be regarded stemming from the infringement of a legally recognised right, but

justified further modification of traditional principle, not only to partition the claims relating to the non-patrimonial and patrimonial elements, but also to subdivide the latter.

McFarlane has never been overruled, and the costs of maintaining a healthy child remain irrecoverable, but subsequent case law has seen a partial return to the Inner House's 'traditional view of delictual liability' and its analysis of *damnum*. The effect of disability upon the *McFarlane* reasoning came under further scrutiny in *Rees v Darlington Memorial Hospital NHS Trust*, in which the mother, not the child, was disabled and had requested sterilisation.⁵⁴ That procedure was negligently performed, but the child born thereafter was unimpaired. On the basis of *McFarlane*, it was uncontroversial that the mother should be compensated for the pain of pregnancy and childbirth, but not for the ordinary costs of maintaining the child. However, in an apparent return to basics, it was also conceded that 'the parent of a child born following a negligently performed vasectomy or sterilisation, or negligent advice on the effect of such a procedure, is the victim of a legal wrong',⁵⁵ and that the 'real loss suffered' was where 'a parent, particularly (even today) the mother, has been denied, through the negligence of another, the opportunity to live her life in the way that she wished and planned'; compensation only for the pregnancy and birth did not give 'adequate recognition of or [do] justice to that loss'.⁵⁶ An additional amount was therefore awarded to Ms Rees, which was intended, not as 'compensatory', but as a 'measure of recognition of the wrong done'.⁵⁷ Payment of a 'modest' conventional sum⁵⁸ acknowledged this

not the 'non-disabled'. As van Heerden J. A. remarked in the South African case of *Administrator of Natal v Edouard* 1990 3 SA 581 (A), 590, "The doctor who negligently or in breach of contract performed an unsuccessful sterilization operation may be blamed for causing the birth of an unwanted child, but hardly for the fact that the child was born with some abnormality."

⁵⁴ [2004] 1 AC 309 (*Rees*).

⁵⁵ *Ibid.*, para. 8 (Lord Bingham).

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*, para. 8 (Lord Bingham), para. 17 (Lord Nicholls).

⁵⁸ £15,000 was the figure apparently plucked from the air for this purpose. Lord Hope pointed out, at paras 72–73, that this was equivalent to the non-patrimonial 'loss of society' award made to the relatives of a deceased person under the Damages (Scotland) Act 1976 s. 1(4) (now superseded by the Damages (Scotland) Act 2011 s. 4(3)(b)). (Although he had not dissented in *McFarlane* on that basis, he also pointed out the flaw inherent in reasoning since *McFarlane*: "The splitting up of a claim of damages into these two parts in order to allow recovery of one part and deny recovery of the other part is a novel concept and it seems to me, with respect, to be contrary to principle.")

loss of opportunity – or as Lord Millett expressed it, denial of her ‘personal autonomy’ – and thus vindicated ‘an important aspect of human dignity’.⁵⁹ Lord Bingham indicated that this conventional award should be made in all such cases, not only those in which the mother was disabled.⁶⁰

Admittedly, the only Scottish judge in *Rees*, Lord Hope, thought that the court was travelling into ‘uncharted waters’, and found little ‘coherent’ basis for the conventional award proposed.⁶¹ Moreover, in supporting the conventional award to Ms Rees the majority⁶² relied upon doubtful authority in invoking Lord Millett’s statement in *McFarlane* on the importance of personal autonomy⁶³ (given that the majority in *McFarlane* had disagreed with him on this point). Nevertheless, the recognition of the importance of personal autonomy in these terms has been acknowledged as achieving a ‘fair solution to an intense moral and legal dilemma’.⁶⁴ In doing so it recalls the reasoning of the Inner House in *McFarlane*, and its analysis that the *damnum* in such cases was an invasion of the couple’s right ‘not to have a child at a time and in circumstances when they had made a deliberate choice not to have a child’.⁶⁵ Moreover, such recognition is consistent with the modern development of protection for personality rights.

(c) Reproductive autonomy as an aspect of protection for liberty

For obvious reasons, protection for autonomy in this sense has not hitherto figured in traditional accounts, but it can be accommodated without distortion in the law of delict’s fundamental rights-based framework. As is well-known, the personality rights enjoyed by the individual, infringement of which triggers delictual liability, are the right to life, limb and health, liberty, fame, reputation and honour.⁶⁶ That listing of personality rights has its origins in Institutional writings⁶⁷ and has in its essentials been replicated many times over the years in Scots,⁶⁸ and indeed comparative,⁶⁹ sources. But nothing, of

⁵⁹ *Rees*, para. 123 (Lord Millett).

⁶⁰ *Ibid.*, para. 8.

⁶¹ *Ibid.*, paras 74–75 (dissenting).

⁶² Lord Bingham at para. 8, and Lord Millett himself at paras 123–124.

⁶³ See text accompanying (n. 49).

⁶⁴ Mason and Laurie, *Mason and McCall Smith’s Law and Medical Ethics*, para. 10.37.

⁶⁵ See text accompanying (n. 41).

⁶⁶ See Reid, *Personality, Confidentiality and Privacy in Scots Law*, ch. 1.

⁶⁷ Stair, *Institutions*, 1.9.4.

⁶⁸ E.g., Bell, *Principles* §§ 2027–2057; J. Guthrie Smith, *The Law of Reparation* (Edinburgh, 1864), 2.

⁶⁹ E.g., see German Civil Code § 823 (general clause on liability in damages in delict)

course, remains entirely the same. Protection of these ‘absolute rights of the individual’,⁷⁰ previously thought of chiefly as the preserve of the intentional wrongs, has gradually been ceded to the law of negligence.⁷¹ More to the point, the scope of the traditional non-patrimonial rights in protecting *corpus*, *fama* and *dignitas* has progressively required adjustment.⁷² Thus the absence of discussion of autonomy from traditional accounts of the law of delict, and from more modern listings of the personality rights thereby protected, does not necessarily preclude its recognition.

The suppression of informed choice in regard to conception or the continuation of pregnancy cannot readily be bracketed with the right to physical integrity as traditionally conceptualised.⁷³ Frustration of the option not to have a child does not easily square with infliction of physical injury or disease,⁷⁴ nor with cases of physical constraint on movement. At the same time, it is argued that personal liberty must now be regarded as extending beyond the straightforward ‘right to free motion and locomotion’⁷⁵ and as including ‘autonomy’ in the sense of the right ‘to make one’s own choices about what

listing life, body, health, freedom, and property, as well as ‘other rights’; European Group on Tort Law, *Principles of European Tort Law* (Vienna, 2005), Art. 2:102 (Protected Interests). See also R. Pound, ‘Interests of personality’, *Harvard Law Review*, 28 (1915), 343–65.

⁷⁰ Bell, *Principles*, § 2028.

⁷¹ As noted by Tony Weir in his famous piece, ‘The staggering march of negligence’ in P. Cane and J. Stapleton (eds), *The Law of Obligations* (Oxford, 1998), 97–140, although the ‘encroachment’ of negligence on other torts, and upon the intentional wrongs in particular, was observed decades earlier by Maurice Millner, *Negligence in Modern Law* (London, 1967), 169–226.

⁷² The right to reputation for example, previously thought of largely in terms of protection from false information and insults, has been reconfigured to deal with misuse of private information in the modern media and communications environment. As another example, with changing sexual mores the notion that seduction of the unmarried infringes their reputation and honour has lost its force (the last reported case citing the delict of seduction was *Macleod v MacAskill* 1920 SC 72), but at the same time the age-old concern to protect the vulnerable against exploitation in sexual relationships has led to recognition of ‘new’ delicts including that of ‘child abuse’ (*EA v GN* [2013] CSOH 161; 2014 SCLR 225) and ‘sexual grooming’ of children (*Walsh v Byrne* [2015] IEHC 414).

⁷³ In other words, in terms of the right not to be subjected to bodily injury or harm and the right to bodily freedom: see, e.g. J. Neethling, J. M. Potgieter and P. J. Visser, *Neethling’s Law of Personality* (2nd edn, Durban, 2005), paras 3.3.1–3.3.2.

⁷⁴ As noted by van Heerden J. A. in *Administrator of Natal v Edonard* 1990 3 SA 581 (A), para. 46: ‘it is not self-evident that neglect leading to conception and a consequent birth can be equated with the infliction of a bodily injury.’

⁷⁵ Pound, ‘Interests of personality’, 355.

will happen to one's own body'.⁷⁶ In other words, if reproductive autonomy merits effective recognition as a 'cornerstone'⁷⁷ of medical jurisprudence in this context, it should be given substance as a further dimension of the right to corpus.⁷⁸

(2) Reproductive autonomy and damage to sperm samples

It is one thing, however, to recognise that autonomy is infringed by depriving parents of the opportunity *not* to procreate; it is another to find similar infringement where they have been deprived of the opportunity to attempt procreation by assisted reproduction. Admittedly, analysis of the latter scenario is not coloured by moral objections to recovery for the 'blessing' of a healthy child, nor by the difficulty of calculating its cost. Moreover, support for the notion that what was at stake here was a 'personality right'⁷⁹ can be drawn from the German decision already cited above.⁸⁰ The German court did not only focus upon destruction of the sperm samples as injury to physical matter but also took expressly into consideration the impact of the loss of the sample on the patient's 'field of being and self-determination'.⁸¹ Indeed a further source that is precisely relevant, but unnoticed in *Holdich*, is the commentary on Article VI.–2:201 of the *Draft Common Frame of Reference*.⁸² This Article provides that that loss, whether economic or non-economic, is 'legally relevant damage' if it: (i) comes within a traditional category (such as personal injury etc); (ii) 'results from a violation of a right otherwise conferred by the law';

⁷⁶ *Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266, para. 56 (Lady Justice Hale); see also Robert Stevens, *Torts and Rights* (Oxford, 2007), 78.

⁷⁷ See text accompanying (n. 32).

⁷⁸ On the argument in German law that thwarting the intention not to procreate is an injury to a personality right and therefore within the ambit of delictual liability under German Civil Code § 823(1), see Marc Stauch, *The Law of Medical Negligence in England and Germany* (Oxford, 2008), 19–20. It may further be argued that violation of this right, as certain other personality rights, in itself merits vindication, even in the absence of loss or damage of other types. Such a development is not without precedent. A growing readiness to compensate non-patrimonial loss has been observed in European legal systems, bringing with it reconsideration of those personal interests which may be the subjects of claims per se: see C. von Bar, 'Damage without loss' in William Swadling and Gareth H. Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, 1999), 23–43, 35.

⁷⁹ *Holdich*, para. 102 (Lord Stewart).

⁸⁰ (n. 24).

⁸¹ 'das Seins- und Bestimmungsfeld der Persönlichkeit'.

⁸² Christian von Bar and others (eds), *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) vol. 4* (Oxford, 2009), 3144.

or (iii) 'results from a violation of an interest worthy of legal protection'. The commentary takes the *Holdich* fact pattern as an example and concedes that destruction of a sperm sample is not personal injury in the normal sense, nor an infringement of dignity, liberty and privacy, but states that it comes within the third residual category – violation of an interest worthy of legal protection. On that basis the facts of *Holdich* would trigger delictual liability, since, according to the commentary, infringement of this protected interest is in itself 'legally relevant damage' in terms of the DCFR.⁸³

The DCFR commentary, however, offers no explanation as to why the loss of sperm samples constitutes infringement of a protected interest in this sense.⁸⁴ A case can be made, as above, for reading the absolute and inalienable right to *corpus* as including the right to make informed choices about what will happen to one's own body, as in questions of contraception or termination of a problem pregnancy. It is far from clear, however, that such a right is at stake in issues of access to assisted reproduction. Many variables will affect the viability of that process, and, even assuming that it goes to plan, the success rate for couples in their early 30s is still well short of 50%.⁸⁵ It is therefore problematic to cast the rights of patients for whom sperm samples have been stored in terms of an absolute entitlement; there can be no unqualified 'right' to make a baby, nor even to gain access to assisted reproduction.

Even if the spoilage of the samples is somehow recognised as infringing a personality right, questions of causation arise, as briefly noted in *Yearworth* and in *Holdich*.⁸⁶ In cases of wrongful pregnancy or wrongful birth the litigants can argue that, but for the defenders' negligence, they would have exercised their choice not to conceive or not to continue a problem pregnancy, and in most cases there is likely to have been no impediment to that choice being fulfilled; in other words, there is a direct causal link between the *iniuria* (the doctor's negligence), and the *damnum* (conception, or birth of the damaged child).

⁸³ It must be conceded, however, that the commentary gives little detail on why the aspiration to preserve the possibility of procreation is considered to be an 'interest worthy of legal protection' as an aspect of patient autonomy, aside from the rather bland assertion that category (iii) 'makes space' for the further development of the law.

⁸⁴ The formulation in the DCFR is perhaps influenced by the wording of the German Civil Code § 823 in providing for injury to 'injures the life, body, health, freedom, property or another right'.

⁸⁵ The figures provided by the Human Fertilisation and Embryology Authority suggest that at best the success rate for IVF, even where the partner is still in her early 30s, is 32% (see Human Fertilisation and Embryology Authority, 'IVF – chance of success', [hfea.gov.uk](http://www.hfea.gov.uk), <http://www.hfea.gov.uk/ivf-success-rate.html>).

⁸⁶ *Holdich*, para. 104 (Lord Stewart).

Where sperm samples have been spoiled, the pursuer might argue that the *iniuria* was constituted by the defenders' negligent storage of the samples. He might also argue that loss of potential for procreation constituted a *damnum*, in the sense of the 'material prejudice to an interest [...] which the law allows [him] to vindicate.'⁸⁷ But even if the defenders had not been negligent, he might well have been visited with this *damnum* in any event. There are many further factors which might have had a decisive impact upon the successful use of the samples in a programme of IVF treatment.⁸⁸ At best the loss suffered is the loss of an opportunity, and it is doubtful whether the pursuer could show that he would have had more than a 50% chance of fathering a child had the samples not been spoiled by the defenders' negligence. It is difficult to see therefore how the pursuer could circumvent the well-established rule that the lost opportunity of a favourable medical outcome is generally only actionable if the pursuer can show that, but for the defender's negligence, there had been at least a 50% chance of a favourable outcome.⁸⁹

Conclusion

The possible grounds for a delictual claim against the operators of the storage facility present varying degrees of difficulty. If the samples are found to have been owned by Mr Holdich, and if he can establish that he suffered psychiatric injury as a result of their spoilage, a strong argument can be made for compensation. The restrictions which limit recovery for such injury in the case of 'secondary' victims have no relevance to a claim framed in this way. On the other hand, there is no obvious answer to the serious objections made against characterising damage to the samples as a personal injury in itself. Similarly, while the traditional framework of delictual protection for personality rights must now be regarded as capable of accommodating the right to patient autonomy, and even reproductive autonomy, as a further dimension of bodily integrity, the spoiling of the opportunity to use a sperm sample in IVF cannot readily be classified in equivalent terms.⁹⁰

⁸⁷ Recalling *McFarlane* 1998 SC 389, 402 (Lord McCluskey).

⁸⁸ See (n. 85).

⁸⁹ *Gregg v Scott* [2005] 2 AC 176.

⁹⁰ The writing of this chapter was completed in August 2015.

General Concepts of Obligations and Contract in Scots Law: From Stair to Now

Hector MacQueen

Introduction¹

David Carey Miller always took a serious interest in the systematics of Scots law. Although he gave most attention to the topic of corporeal moveable property, he often discussed other areas of the law and engaged in the debate about the nature of the Civilian influence in Scotland.² I therefore hope that he would have seen a discussion of the development of the general concepts of obligations and contract in Scots law as an appropriate way of honouring him and his remarkable contribution over many years of scholarship and only a little less of friendship.

¹ The following frequently cited works are usually referenced in their most recent edition or reprint (square bracketing shows form of subsequent citation): James Dalrymple Viscount [Stair, *Institutions*] of the Law of Scotland (6th edition, Edinburgh, 1981); John [Erskine, *Institute*] of the Law of Scotland (8th edition, 1871; Edinburgh, 1989); George Joseph [Bell, *Commentaries*] on the Law of Scotland and on the Principles of Mercantile Jurisprudence (7th edition, 1870; Edinburgh, 1990); George Joseph [Bell, *Principles*] of the Law of Scotland (4th edition, 1839; Edinburgh, 2010). This is generally because the edition or reprint in question reproduces the text in the form last given to it by the author. The first edition of Erskine, *Institute* (1773) was reprinted in Edinburgh in 2014 with an introduction by K. G. C. Reid. Baron David Hume's *Lectures 1786–1822*, cited below as 'Hume, *Lectures*', were edited by G. C. H. Paton and published in Edinburgh by the Stair Society in six volumes between 1939 and 1958.

² A notable example being D. L. Carey Miller, 'The use of Roman law in Scotland; a reply' *Juridical Review* 20 (1975) 64–9 (responding to A. F. Rodger, 'Report of the Scottish Law Commission on antenatal injury', *Juridical Review* 19 (1974) 83–90). See also idem, 'Systems of Property: Grotius and Stair', in idem and D. W. Meyers (eds), *Comparative and Historical Essays in Scots Law: A Tribute to Professor Sir Thomas Smith QC* (Edinburgh, 1992), 13–31; D. L. Carey Miller, 'Stair's Property: A Romanist System?', *Juridical Review* (1995) 70–81; idem, 'A Scottish Celebration of the European Legal Tradition', in idem and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots Law* (Berlin, 1997) 19–51; D. L. Carey Miller, 'T B Smith's Property', in Elspeth Reid and David L. Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh, 2005), 173–98.

Discussing the structure of the law is problematic for a non-codal system such as Scots law. The Scots law of obligations is essentially non-statutory, that is, according to conventional understanding within the system, to be found in the decisions of the courts and so judge-made. The truth of the matter historically, however, is that the law has been shaped most by the writings of jurists who themselves were usually borrowing their concepts and organisation of material from elsewhere – the European *ius commune* to begin with, later the English common law – even if they sometimes put upon that material their own spin, whether drawn from domestic sources of law or their own original reasoning. It is very rare indeed to find a case in which a court deploys taxonomic considerations or invents altogether novel doctrine in this field. Normally the focus of the case is upon the dispute before it and the rules of law with which that dispute is to be resolved. These rules are usually seen as already in existence, justified by reference to relevant authority within the system, and seldom needing to be considered against a wider background of the structure of the law of obligations or, for that matter, the whole of private and commercial law. Indeed, when a court is asked today to develop what would be new doctrine, it will usually say that the question is one to be answered by the legislature, possibly with advice from the Scottish Law Commission.³

Scots lawyers generally begin to think about issues of structure, or taxonomy, when writing about or teaching the law. There is a long-standing tradition in Scots private law of books that cover the whole of the law in a structured and systematic way, much of it reflecting another tradition in university law teaching, namely the coverage of private law in a long course entitled Scots Law or The Law of Scotland.⁴ This discussion of the position

³ See e.g. *Lloyds TSB Foundation v Lloyds Banking Group* [2011] CSIH 87, 2012 S.C. 259, reversed (but without changing the law) [2013] UKSC 3, 2013 S.C. (U.K.S.C.) 13.

⁴ See John W. Cairns and Hector L. MacQueen, *Learning and the Law: A Short History of the Edinburgh Law School* (Edinburgh 2000) 3–15, 20–3; David M. Walker, *A History of the School of Law, The University of Glasgow* (Glasgow 1990) 26, 39, 40, 55, 87. For Aberdeen, Professor Cairns tells me that a regular course of lectures in Scots law began in 1819, when the Minutes of Marischal College show the Society of Advocates in Aberdeen applying to the College to appoint as Lecturer or Professor one Andrew Robertson, Esq., whom the Society has appointed as their Lecturer in Scotch Law and Conveyancing. There are corresponding entries in the Advocates' sederunt books. Robertson was appointed Lecturer in Scotch Law and Conveyancing in the College, and was succeeded by Alexander Thomson in 1821. In 1828 Thomson was replaced by James Edmond. Lectures were given in alternate years on Scotch Law and Conveyancing. From 1843 the lectures were given by George Grub, with modernisation following the 1891 appointment to the Chair of Scots and Roman Law of

of the law of obligations in Scotland will be based upon a mainly historical analysis of these books, which will confirm and further develop conclusions already drawn by Professor Martin Hogg, that there is indeed a strong, if not universal, Scottish perception of a law of obligations of which a general law of contract forms part, along with rules on particular contracts and on other forms of obligation, most notably the laws of delict and unjustified enrichment.⁵

The most significant of the books are the so-called Institutional writings of the seventeenth and eighteenth centuries, the massive tomes produced by James Dalrymple Viscount Stair in 1681 (2nd edition 1693), Andrew McDouall Lord Bankton in 1751–53, and John Erskine (Professor of Scots Law at Edinburgh University 1737–65) in 1773. These works, entitled either *Institutions* or *Institutes* of the law of Scotland, were typically structured around the Roman law concepts of Persons, Things and Actions, although not uncritically so. At the beginning of the nineteenth century George Joseph Bell, a successor of Erskine in the Edinburgh chair of Scots Law between 1822 and 1839, first published between 1800 and 1804 what became known as his *Commentaries on Mercantile Jurisprudence*, which examined the law through the highly practical lens provided by debt enforcement procedures and bankruptcy. Despite this departure from the institutional tradition, the book is usually classed amongst the Institutional writings as one of the formal sources of Scots law where statute and precedent are silent. All the Institutional writings apart from Bankton enjoyed numerous editions well into the nineteenth century and exercised significant influence in the development of the law.

As university professors, Erskine and Bell each taught a Scots Law course; and each produced from this experience a book entitled *Principles of the Law of Scotland*: Erskine first in 1754, Bell in 1829. These books were shorter and more concise than their major works mentioned above, but otherwise broadly followed an institutional structure. Each book had a long life: the tenth and

John Dove Wilson. See further M.C. Meston, 'The Civilists of Aberdeen: 1495–1995', *Juridical Review* (1995) 153–65, 163; Stephen D. Girvin, 'Professor John Dove Wilson of Aberdeen', *Juridical Review* (1992) 60–73, 64–6.

⁵ Martin Hogg, 'Perspectives on Contract Theory from a Mixed Legal System', *Oxford Journal of Legal Studies* 29(4) (2009) 643–73. The material is set in a much wider historical-comparative context in Martin Hogg, *Promises and Contract Law* (Cambridge 2011), 109–66, and is also an important component of the same author's much more analytical *Obligations: Law and Language* (Cambridge 2017). It may be said that the teaching tradition which produced this perception is today under threat because processes of 'semesterisation' and 'modularisation' in universities lead to balkanisation of private law studies.

last edition of Bell's *Principles* appeared in 1899, while the twenty-first and final edition of Erskine's *Principles* appeared as late as 1911. The latter remained the leading teaching text, while Bell's *Principles* became more of a practitioner's *vade mecum*. Also influential were the lectures on Scots law delivered by David Hume, Professor of Scots Law at Edinburgh from 1786 to 1822. They were not published in his lifetime, or indeed until the mid-twentieth century; but copies long circulated in manuscript and they helped to shape contemporary understanding of the law beside the published works of his fellow professors. Erskine's *Principles* was eventually replaced as the leading student text by William Murray Gloag and Robert Candlish Henderson's *Introduction to the Law of Scotland*, first published in 1927 and now in its fourteenth edition, published in 2017.⁶ It was therefore not displaced by either the *Short Commentary on the Law of Scotland* by T. B. Smith, published in 1962, or David M. Walker's multi-volume *Principles of Scottish Private Law* (first published 1970), despite the latter running to four editions, the last of which appeared in 1988.⁷

The tradition of multi-volume encyclopaedias of Scots law, which began in the late nineteenth century, should also be noted. It is now represented by the Stair Memorial Encyclopaedia, of which T. B. Smith was the founding General Editor.⁸ While the alphabetically ordered treatment of different legal topics does not lend itself to systematic analysis of the law's taxonomy in general, Smith made strenuous efforts to minimise its impact on private law by arranging for the provision of two volume-length articles on Property and Obligations. The latter has a significant bearing upon the present contribution. The influential *History of Private Law* in Scotland, published in 2000, had two volumes respectively devoted to Property and Obligations. But while the former contained a discussion of the general concept of property as well as more specific doctrines, the Obligations volume had only chapters on various aspects of contract, delict and unjustified enrichment.⁹

⁶ William Gloag was Regius Professor of Law at Glasgow 1905–1934, while Robert Candlish Henderson held the Edinburgh chair of Scots Law 1922–1947. David Carey Miller became a contributing editor of *Gloag & Henderson* in the 12th edition (2007) and until his untimely death continued in the role in the planning of the 14th edition intended for publication in 2017.

⁷ In 1962 Thomas Broun Smith was Professor of Civil Law at Edinburgh, while in 1970 David M. Walker held the Glasgow Regius chair.

⁸ T. B. Smith and others (eds), *The Laws of Scotland: Stair Memorial Encyclopaedia* (1988–, henceforth *SME*).

⁹ Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2 vols, Oxford, 2000).

General Contract Law in a General Law of Obligations

In this section I will show that writers and teachers of Scots law have for the most part worked on the basis that there is a general law of obligations within which a general law of contract is to be placed at least for expository purposes.

(1) Stair

The beginning of the modern Scottish approach, and perhaps the only serious attempt at its philosophical justification, is to be found in Stair's *Institutions*. This is not the place for an elaborate treatment of the theory of law underpinning Stair's extraordinary work.¹⁰ He was a Calvinist natural lawyer who saw positive law as flowing from equity, albeit only imperfectly. Law was 'a rational discipline, having principles from whence its conclusions may be deduced'.¹¹ The principles of equity, which were the efficient cause of rights and laws, were man's obedience to God; the freedom of man otherwise; which, however, being in his power, man might constrain by voluntary engagement with others. The three principles of positive law, which were the final causes or ends for which laws were made and rights established, were society, property and commerce. The principle of obedience produced those positive law obligations not resulting from voluntary engagement, i.e. what we would now call the law of delict and the law of unjustified enrichment, as well as much of family law. Freedom led to personal liberty of action outside these obediential obligations, and also to the right of what Stair called 'dominion' over other things and creatures, i.e. Property; while voluntary engagement produced the law of promises and contracts, which Stair termed 'conventional obligations'.

'The formal and proper object of law,' Stair continued, 'are the rights of men.'¹² Stair built his work around this central idea of rights, beginning with the constitution and nature of rights; then their transfer from one person to

¹⁰ A luminous analysis is by D. Neil MacCormick, 'Stair and the Natural Law Tradition: Still Relevant?', in Hector L. MacQueen (ed.), *Miscellany VI*, Stair Society, Vol. 54 (Edinburgh, 2009), 1–10. Hogg, 'Perspectives', 648–53, and Hogg, *Promises*, 134–42, focus on the application of Stair's thought to obligations and contract. See further Stephen Bogle's invaluable thesis, 'The Emergence of the Will Theory in Scots Contract Law, 1661–1761' (Ph.D. thesis, University of Edinburgh, 2016), and Hector L. MacQueen and Stephen Bogle, 'Private Autonomy and the Protection of the Weaker Party: Historical', in S Vogenauer and S Wetherill (eds) *General Principles of Law: European and Comparative Perspectives* (Oxford, 2017), ch 16.

¹¹ Stair, *Institutions*, I, 1, 17.

¹² *Ibid.*, I, 1, 22.

another; and finally their enforcement. He began his substantive discussion with a title on liberty, and then in his third title he analysed Obligations in General. 'Rights called personal or obligations,' wrote Stair, 'being in Nature and time for the most part anterior to, and inductive of, rights real of dominion and property, do therefore come under consideration next unto liberty.'¹³ Here he is making what continues to be a fundamental distinction in Scots law between personal and real rights, or between obligations and property. He followed Roman law in his general definition of an obligation:

Obligation is a legal tie by which we may be necessitate or constrained to pay, or perform something. This tie lieth upon the debtor; and the power of making use of it in the creditor is the personal right itself, which is a power given by the law, to exact from persons that which they are due.¹⁴

In this title on obligations in general, however, Stair rejected the fourfold Roman distinction of obligations as *ex contractu*, *quasi ex contractu*, *ex maleficio* and *quasi ex maleficio*, in favour of the distinction he had already drawn between *obediential* and *conventional* obligations.¹⁵ The title continues to discuss the distinctions between natural and civil obligations, between principal and accessory obligations, and between pure and conditional obligations; but this is as far as Stair takes the idea of obligations in general at this point. Thereafter he treats particular heads of obligation, beginning with the *obediential* conjugal and parent-child obligations and the closely related obligations between tutors and curators, on the one hand, and pupil and minor children respectively, on the other.¹⁶ Then Stair deals with what we would now call unjustified enrichment (for him, restitution and recompense, including *negotiorum gestio*) and *delict* (reparation is Stair's term).¹⁷ All of these are clearly labelled as *obediential* in nature.

Finally Stair arrives at a title headed 'Obligations Conventional, by Promise, Paction, and Contract', which is followed with six titles on the particular contracts of loan, mandate, custody, sale, location and society

¹³ *Ibid.*, I, 3, 1.

¹⁴ *Ibid.* It should be noted (as Stair does) that there is a very old tradition in Scotland where an obligation is seen as a unilateral undertaking, usually written. This sense survived until at least the mid-nineteenth century.

¹⁵ *Ibid.*, I, 3, 2.

¹⁶ *Ibid.*, I, 4–6.

¹⁷ *Ibid.*, I, 7–9.

(partnership).¹⁸ In this he again clearly rejected as ‘unnecessary’ a traditional Romanist division, that of contracts into ‘four kinds, either perfected by things, words, writ, or sole consent’.¹⁹ Instead, ‘all pactions and contracts being now equally efficacious’, the key distinction between them all lay in the gratuitousness or otherwise of the transaction.²⁰ This explained the order in which the particular contracts were dealt with in the six later titles (loan, mandate and custody having a more gratuitous character than the definitely onerous sale, location and society). In the general title Stair treated ‘the common requisites and properties of contracts’ as ‘deeds of the rational will’ which therefore could not be entered by those lacking the power of reason such as ‘infants, idiots [and] furious persons’ and those affected by ‘fear’, ‘drunkenness’, ‘disease’, or ‘err[or] in the substantials of what is done’. The ‘act of contracting must be of purpose to oblige’, in relation to things within the parties’ powers; ‘contracts of impossibilities’ and ‘in things unlawful’ are void. He also discussed equality of exchange, abatement of price, and the principle of mutuality or reciprocity in onerous contracts.²¹

Having finished with the particular contracts, Stair next turned to accessory obligations, in a title which is essentially about personal securities (or caution, as it is usually termed in Scots law).²² Stair concluded his treatment of obligations with a title entitled ‘Liberation from Obligations’, in which he describes how conventional obligations cease by contrary consent, discharge, renunciation, pacts *de non petendo*, payment or performance, consignation, acceptilation, compensation (i.e. set-off), retention, innovation and confusion.²³ Stair thus followed his declared method of considering the various ways in which personal rights come into existence, including contract both in general and in its particular forms, before finishing with the more general question of how obligations come to an end. In all this, contract is clearly seen as part of the law of obligations, albeit as distinctive and multifaceted, and as separate from the law of property.

For Stair, the starting point for the recognition of conventional obligations was certainly the moral position with regard to the exercise of free will. Being

¹⁸ Ibid., I, 10–16.

¹⁹ Ibid., I, 10, 10; see also, *ibid.*, I, 10, 7 and 11. Note the comment of J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007), 213, that Stair here actually makes a sustained comparison between ‘our Custome’ and ‘the Civil Law’.

²⁰ Stair, *Institutions*, I, 10, 12.

²¹ For the foregoing, including all quotations, see *ibid.*, I, 10, 12–16.

²² Ibid., I, 17. Stair also uses the term ‘surety’: *ibid.*, I, 17, 3–4.

²³ Ibid., I, 18.

God-given, however, this was subject to the obediential obligations also flowing directly from the will of God; ultimately conventional obligations were also obediential.²⁴ Stair's statement that people give up their liberty through a promise or contract, 'whereby *God* obliges us to performance, by mediation of our own will', is wholly in keeping with Calvinist orthodoxy.²⁵ This may also in part explain Stair's comment about the interaction of obligations: 'Contract may intervene where there intercedes a natural and obediential obligation [...] yet where obediential and conventional obligations are concurring, they are both obligatory.'²⁶

The originality of Stair's approach in Scotland is readily apparent from a comparison with the equivalent writings of his near contemporary, Sir George Mackenzie of Rosehaugh, and, in the next generation of Scots lawyers, Professor William Forbes of Glasgow University. Both treated real rights before turning to personal rights or obligations. While they followed the definition of obligation as a 'legal tie', Mackenzie expressly deployed the classification of obligations as *ex contractu*, *quasi ex contractu*, *ex maleficio* and *quasi ex maleficio*, and acceptance of this is also apparent in Forbes' successive treatments of contracts, obligations arising from quasi-contracts, and obligations arising from crimes and offences. Finally, neither gave much attention to contract in general, preferring instead to use the traditional divisions of contracts from Roman law that Stair had rejected, i.e. real, written, verbal and consensual.²⁷

²⁴ Stair, *Institutions*, I, 1, 18.

²⁵ Stair, *Institutions*, I, 10, 1 (emphasis supplied). See also *ibid*, I, 1, 20. See further Hogg 'Perspectives', 650–1; Hogg, *Promises*, 142; Bogle, 'Emergence of Will Theory', ch. 4 section D(5); MacQueen and Bogle, 'Private Autonomy', 281–2.

²⁶ Stair, *Institutions*, I, 10, 13.

²⁷ For the foregoing see Sir George Mackenzie of Rosehaugh, *The Institutions of the Law of Scotland* (1st edition, Edinburgh, 1684), books II and III, especially at III, 1–4; William Forbes, *Institutes of the Law of Scotland 1722–1730* (reprinted Edinburgh, 2012; citations to the page numbers of this edition, in preference to the complex reference system that Forbes himself devised), 128–78 (real rights), 179–245 (obligations and personal rights), especially at 179, 183–4, 211–15; *idem*, *Great Body of the Law of Scotland* (Glasgow University Library MS 1246–52, available online at <http://www.forbes.gla.ac.uk/contents/>, accessed 18 August 2015) ff. 570–775 (real rights), 776–1095 (obligations and personal rights), especially at ff. 776, 781–2, 899 and 927. MS foliation is again an easier way into Forbes' *Great Body* than his own internal referencing system. On Mackenzie and Forbes (and also Alexander Bayne), see further Bogle, 'Emergence of Will Theory', ch. 8, sections E (Mackenzie), G (Forbes), and I (Bayne).

(2) Bankton and Erskine

By the middle of the eighteenth century, however, Stair's approach seemed to have gained some ground.²⁸ The next major institutional writer, Andrew McDouall Lord Bankton, picked up the distinction between conventional and other obligations (which he termed 'natural'), and followed Stair in dealing first with the latter and including therein the obligations arising from marriage, between parent and child, and between tutors or curators as well as the obligations of restitution, gift or recompense, and reparation for crimes and delinquencies.²⁹ Conventional obligations arise from the will of the parties 'in matters where they are otherwise free'; the Romanist structure of real, written, verbal and consensual contracts did not fit Scots law.³⁰ Bankton went on after this general title to describe more or less the same particular contracts as Stair had done, and in the same order, before also finishing his account with titles on accessory obligations and liberation from obligations.³¹ The whole discussion is however rather laborious and disjointed, and it remains unclear how far Bankton shared or was able to develop Stair's thinking on either obligations or contract in general.

Writing not long after Bankton, Erskine adopted a more traditionally Romanist structure in his account of the law of obligations, albeit one in which contract was highlighted as the chief exemplar of an obligation.³² While in some ways reverting to Mackenzie's structure, yet in substance Erskine too largely followed Stair, picking up the vital distinction between real and personal rights,³³ and giving an account of obligations in general covering the same

²⁸ I here omit any reference to the work of Lord Kames on obligations, which is rather differently focused from the other treatises discussed in this article: but see Hogg, 'Perspectives', 655–56, and Hogg, *Promises*, 149–50 (stressing Kames' reliance-based approach); Andreas Rahmatian, *Lord Kames: Legal and Social Theorist* (Edinburgh, 2015) ch. IX ('Obligations and Enforcement'); Bogle, 'Emergence of Will Theory', ch. 8 section J.

²⁹ Andrew McDouall Lord Bankton, *Institute of the Law of Scotland 1751–3* (reprinted in 3 vols, Edinburgh, 1993–5), I, 4–10. See also Hogg, 'Perspectives', 654–55; Hogg, *Promises*, 147–8; Bogle, 'Emergence of Will Theory', ch. 8 section K. Unlike Stair, Bankton became a judge *after* completing his *Institute*.

³⁰ Bankton, *Institute*, I, 11, 1 and 18–23.

³¹ *Ibid.*, I, 12–24.

³² Erskine, *Institute*, III, 1–4. See also the similar approach in John Erskine, *Principles of the Law of Scotland* (first published in Edinburgh, 1754), III, 1–4, discussed in Bogle, 'Emergence of Will Theory', ch. 8 section L.

³³ Erskine, *Institute*, III, 1, 2.

ground as Stair.³⁴ Erskine also used the distinction between obediential and conventional obligations, treating under the former head the law of restitution and recompense and the law of delinquency (delict).³⁵ The treatment is not however extensive. Then Erskine moved to obligations by contract, on which however he has only a general paragraph dealing with incapacity and invalidity by reason of error, fraud, and force and fear.³⁶ He then, within a couple of paragraphs, described the following particular contracts (loan, deposit, trust, and pledge). That these are the real contracts of Scots law in his view becomes apparent from his subsequent titles which are more explicitly Roman in their structure. The first deals with ‘Obligations by word and by writing’,³⁷ and the next with ‘Obligations arising from consent, and of accessory obligations’.³⁸ The obligations by consent include sale, permutation, location, freighting of a ship, insurance, society or copartnery, and mandate. Into this title Erskine also inserted discussions of the quasi contracts, i.e. *negotiorum gestio*, *indebiti solutio*, liability under the *Lex Rhodia*, and the right of division in relation to common property. The title continues with a discussion of accessory obligations, the major example of which is, as with Stair, the contract of caution but which also includes the obligation to pay interest. Erskine then turned to what he calls the ‘general properties of obligations’,³⁹ which includes impossibility, conditionality, implement and damages, and interpretation. Erskine’s final title is ‘Of the dissolution of obligations’, which goes through the grounds of extinction also set out by Stair.⁴⁰

Overall, then, Erskine’s approach was through the idea of a unified law of obligations, with contract in its different forms the dominant instance of an obligation. But it cannot be said that his analysis has the power and intellectual coherence of Stair’s vision, or that he has a very well developed sense of a general law of contract. Erskine can be characterised as a Romanist positivist rather than as a philosophical natural lawyer.

³⁴ Ibid., III,1,3–7.

³⁵ Ibid., III,1,8–15.

³⁶ Ibid., III,1,16.

³⁷ Ibid., III,2. The chapter includes a long discussion of bills of exchange (ibid., III,2,25–38).

³⁸ Ibid., III,3.

³⁹ Ibid., III,3,83.

⁴⁰ Ibid., III,4.

(3) Hume and Bell

The next significant treatments – or perhaps non-treatments – of the law of obligations were by Erskine's successors in the Edinburgh chair of Scots law, David Hume (1786–1822), and George Joseph Bell (1822–38). Under them the idea of a general law of obligations almost entirely disappears. Even the idea of a general law of contract, only faintly apparent in Erskine, as we have seen above, was abandoned by Hume, although thereafter partially reinstated by Bell. There is a quite striking contrast with the position of the two men on property law. Hume provided a general account of property law in which approach, however, he was not followed by Bell. The latter not only distinguished sharply between heritable and moveable property but also gave independent treatment to incorporeal forms of property.⁴¹ It is also noteworthy that Bell's fairly brief discussion of the general law of contract, first published in 1829, remained the sole published account of the topic for almost the next 100 years.

Despite being the nephew of the great philosopher of the same name, Hume professed to be sceptical of the value of philosophical generalisations about the nature and substance of law, at least for the beginning student of the subject. But he also challenged the utility of Roman law structures for his own times,⁴² criticising in positivist vein Stair and Erskine's Romanist definition of obligation as a legal tie by which one is bound to pay or perform something to another:

[Obligation] may with more propriety be defined that state of relation in which one person stands to another whereby law compels him to

⁴¹ On the significance of the contrast between Hume's general account of property law (Hume, *Lectures*, Vol. 3, 202–61; Vol. 4, 1–126) and the divided treatments in Bell, *Principles*, §§636–1505, and Bell, *Commentaries*, Vol. 1, 19–311, see K. Reid, 'Property Law: Sources and Doctrine', in Reid and Zimmermann (eds), *History of Private Law in Scotland*, 204–10; and note also D.L. Carey Miller with D. Irvine, *Corporeal Moveables in Scots Law* (2nd edition, Edinburgh, 2005), §1.04.

⁴² Hume, *Lectures*, Vol. 1, 2–8. See also *ibid.*, 357 (from lecture notes taken in session 1796–7). For an argument that Hume's lectures "had a theoretical foundation and analytical structure founded in the work of [John] Millar and [Adam] Smith", see J.W. Cairns, 'The Legacy of Smith's jurisprudence in Late-Eighteenth-Century Edinburgh', forthcoming in a festschrift given to Knud Haakonssen.

do something for the benefit of that other. ... The criterion of a legal obligation then is that it may be performed and gives action.⁴³

Aspects of Erskine's structuring of the law were also criticised:

Erskine, after the Roman Law, has divided contracts into either written or verbal, but there seems no room for this mode of classing them, as the same contract when applied to one subject may be perfectly good though verbal, whereas when applied to another it is perfectly ineffectual unless attended with all the legal solemnities.⁴⁴

Hume argued that the objects of the law were not the Roman Persons, Things and Actions but rather, more simply, Rights and Actions ('the means of prosecuting and enforcing Rights in the course of law').⁴⁵ Although he recognised and utilised the concepts of real and personal rights, he did not dwell much upon the differences between the two, beyond saying that real rights were about the relationships between a person and a thing while personal rights, or obligations, sprang from a person forming connections with other individuals.⁴⁶ Hume said even less than this about the sources of such personal rights. In earlier versions of his lectures Hume mentioned in passing and without direct comment Stair's distinction between obediential (called 'natural' by Hume as by Bankton) and conventional obligations.⁴⁷ But later he simply said that personal rights arose from contract, delict, quasi-contract and quasi-delict – here, perhaps, surprisingly Romanist.⁴⁸

Hume offered no general account of contract law, commenting only that, of these sources of obligation, 'contract is by far the most ample and important'.⁴⁹ He then continued: 'And here I will first direct your attention to the contract of sale, the most frequent and most necessary of them all.'⁵⁰ There follows a lengthy treatment of sale, which in turn is followed by similarly long discussions of other particular contracts: location, charter

⁴³ Hume, *Lectures*, Vol. 2, 276.

⁴⁴ *Ibid.*, 278.

⁴⁵ Hume, *Lectures*, Vol. 1, 9–10.

⁴⁶ *Ibid.*, 10–11; Hume, *Lectures*, Vol. 2, 1–3.

⁴⁷ *Ibid.*, 277.

⁴⁸ *Ibid.*, 3.

⁴⁹ *Ibid.*, 3.

⁵⁰ *Ibid.*, 3.

party, loan, mandate, society, cautionary, and bills of exchange.⁵¹ Up until about 1810 he also lectured on insurance.⁵² There is no attempt in any of this to identify general principles or rules, and Roman categorisations beyond the labels attached to each of the particular contracts are ignored. Hume's discussion of particular contracts is followed by a chapter on assignation of personal claims and four chapters on extinction of obligation by payment, compensation and retention, novation, and prescription.⁵³ The focus of these chapters is clearly on the contractual context. Only after they are complete does Hume's treatment turn to obligations *ex delicto*, obligations *quasi ex contractu*, and obligations *quasi ex delicto*.⁵⁴

At least Hume said of Stair that he did 'propose what upon the whole is a just enough order of arrangement',⁵⁵ and in some respects his own ordering of the law of personal rights was close to that of Stair.⁵⁶ In particular, property followed obligations. In no sense, however, could anything like this be said of Hume's successor Bell. His treatment of substantive law in the *Commentaries on Mercantile Jurisprudence* began with the law of property before moving on to 'Creditors by personal obligation or contract'. The focus is on contract or unilateral voluntary obligations, with nothing on delict, unjustified enrichment or *negotiorum gestio*. Bell thus felt no need to discuss obligations in general. The treatment of general contract law was also relatively brief compared to the mass of material on particular contracts.⁵⁷ Caution became simply a unilateral obligation rather than the main example of an accessory one; bills of exchange were also instances of unilateral obligations.⁵⁸ Sale, hire, carriage, agency and factory were dealt with under the heading 'Mutual contracts', and there were

⁵¹ *Ibid.*, 3–55 (sale), 56–108 (location), 109–24 (charter party), 125–42 (loan), 143–70 (mandate), 171–96 (society), 197–227 (cautionary), 228–75 (bills).

⁵² *Hume*, Lectures, Vol. 3, Appendix A (310–402). The context is almost entirely maritime, and the chapter also discusses charter parties, salvage and general average.

⁵³ *Ibid.*, 1–15 (assignation), 16–27 (extinction by payment), 28–59 (compensation and retention), 60–2 (novation), 63–119 (prescription; see also Appendix C at 420).

⁵⁴ *Ibid.*, 120–164 (delict), 165–85 (quasi contract: see also Appendix B at 403–19), 186–98 [quasi-delict]. *Negotiorum gestio* and general average are treated under the head of quasi contract: see *ibid.*, 176–81.

⁵⁵ *Hume*, Lectures, Vol. 1, 8.

⁵⁶ So, like Stair, Hume treats the obligations between husband and wife, parent and child, and guardian (tutor and curator) and ward, as the first set of topics within the law of obligations: *ibid.*, 19–319. Next for Hume comes master and servant (*ibid.*, 321–54), which for Stair was one of the contracts of location (Stair, *Institutions*, I, 3, 15; I, 15). Hume however treats reparation, restitution and recompense *after* contracts.

⁵⁷ Bell, *Commentaries*, Vol. 1, 312–51.

⁵⁸ *Ibid.*, 351–454.

also chapters on maritime contracts and on insurance.⁵⁹ Proprietary securities were dealt with only insofar as they affected heritable estates, that is, land.⁶⁰

If it is clear that in the *Commentaries* Bell completely abandoned the taxonomic basics of the previous century of Scots law, this could be explained by the distinct aims of his book, which was not to provide an account of the whole of private law, but to consider those aspects of it most relevant to bankruptcy. It is also clear, however, that in lecturing his Edinburgh students Bell likewise moved some way away from a general concept of an obligation. The first sentence of his *Principles* says: ‘The object of jurisprudence is the protection and enforcement of Civil Rights’, and there follows a very brief definition of real and personal rights. In his earliest editions Bell underlined his departure from Stair’s thinking:

It signifies little in what order rights relative to things shall be considered, whether Personal rights relative to things, or Real rights, be first taken: But some conveniences in explanation seem to recommend an arrangement by which the Rights arising from Contract or Convention shall first be considered.⁶¹

The substantive discussion begins immediately thereafter with general contract law. There is no real attempt to explain the general idea of an obligation other than the old notion that an obligation was unilateral while a contract was mutual.⁶² The particular contracts are all dealt with before at last we reach a few pages on ‘Obligations independent of convention’, which are sub-headed ‘Restitution’, ‘Recompense’ and ‘Reparation’. Bell offered no explanation of why these topics are being treated as obligations save that each involves invasions of right. This part having been completed, Bell’s text moves on to ‘Extinction of obligations’, covering all the usual ground in some detail.

Although this paper in general eschews speculation as to the sources of influence upon Scottish writers in their analysis of the law of obligations, it is worth noting here the admiration which Bell had for the work of the French

⁵⁹ Ibid., 454–677.

⁶⁰ Ibid., 712–95.

⁶¹ This statement appears in the introduction to the first, second and third editions of Bell’s *Principles*, but not the fourth (1836), the last to be published in Bell’s lifetime. Note also the absence of justification for the structure of his course in his inaugural lecture on 12 November 1822, published in K. G. C. Reid, ‘George Joseph Bell’s Inaugural Lecture’, *Edinburgh Law Review* 18(3) (2014) 341–57, at 351–2.

⁶² See note 14 above.

jurist Robert Joseph Pothier (1699–1772), in particular his *Traité des Obligations*, first published in 1761, with many editions thereafter. French-speaking from childhood, Bell had no need to rely on the English translation of Pothier's treatise by W. D. Evans published in Britain in 1806. Bell's *Principles* and *Commentaries* cite Pothier's treatise on obligations frequently, as well as his as yet un-translated work on the other particular contracts such as sale, hire, partnership, deposit and charter party.⁶³ For Pothier too contract was the dominant form of obligation; his obligations treatise touches on other sources of obligation – by quasi contracts, by injuries and negligence and by law – for only four of the 619 pages of the Evans translation.

(4) The Nineteenth Century: A Fallow Period

The later nineteenth century saw the rise in Scotland, as in England, of the textbook on particular topics of law. There was very little, however, to sustain the idea of a law of obligations as distinct from a law of contract or a law of reparation or a law of particular contracts such as sale or partnership.⁶⁴ In 1847 Bell's son-in-law Patrick Shaw published *A Treatise on the Law of Obligations and Contracts*, saying in the preface that his aim was to systematise 'the doctrines of Law in relation to Obligations and Contracts, which are scattered through [Bell's] works'. In reality however this is a book on contract law (where obligations are generally mutual between the parties) and unilateral voluntary obligations.⁶⁵ There is a treatment of a single chapter's length of restitution, repetition, recompense, *negotiorum gestio* and reparation; but it is headed 'Implied obligations', hinting that even these rest in some obscure way on the consent of the parties. Shaw's derivative work apart, the general notions of obligation and contract were expounded in the nineteenth century only in the successive editions of the great institutional works of Stair, Erskine and Bell, and the *Principles* of the latter two writers as edited by others.

At the very end of the century there appeared the first Encyclopaedia of Scots Law, which included a fairly short article under the title 'Obligation'.⁶⁶

⁶³ See K. G. C. Reid, 'From Text-Book to Book of Authority: The *Principles* of George Joseph Bell', *Edinburgh Law Review* 15 (2011) 6–32, at 24–6.

⁶⁴ See e.g. Mungo Ponton Brown, *Treatise on the Law of Sale* (Edinburgh, 1821) (purporting to follow Pothier's arrangement in his *Treatise on Sale*: Brown, *Sale*, preface, vii–viii); Francis William Clark, *Treatise on the Law of Partnership and Joint-Stock Companies* (Edinburgh, 1866).

⁶⁵ Shaw thus maintains the ancient understanding of 'obligation' in Scots law: see note 14 above.

⁶⁶ R. E. Monteith Smith, 'Obligation', in John Chisholm (ed.), *Green's Encyclopaedia of the*

Its structure and content owed much to Stair, Erskine and Bell, with continued deployment of the distinction between personal and real rights, the use in some form of Stair's distinction between obediential and conventional obligations, and analysis of conditional obligations and of the extinction of obligations. But very little was done to link this brief discussion to fuller analyses of the substantive law of contract, delict and unjustified enrichment elsewhere in the volumes of the Encyclopaedia. The article did not reappear in the 1912 edition of the Encyclopaedia. But in 1930 the so-called 'Dunedin Encyclopaedia' (named for its Consultative Editor, the judge Lord Dunedin) contained a slightly more detailed article on 'Obligations', which again made use of Stair's division of obligations and discussed conditions and the extinction of obligations.⁶⁷

(5) Twentieth-Century Revival

The systematic presentation of obligations with contract law, both general and particular, having its place therein rather than dominating the whole field, came back to the fore with the twentieth-century renewal of the general work covering the whole of Scots law, aimed principally at law students but of course also of value to the practising profession. *Gloag & Henderson* from its first edition in 1927 has had as its third chapter (following accounts of sources of law and the legal system) 'General Law of Obligations'. This distinguishes between obligations by consent and other obligations, making some brief reference to Stair's concept of the obediential obligation and also explaining the difference between personal and real rights. The chapter also included the important observation that 'it is desirable to confine the term obligation to those legal ties which can be enforced by some specific creditor', and that obligations owed to all humanity are more properly termed 'duties'.⁶⁸ From

Law of Scotland, Vol. 9, (Edinburgh, 1898), 78–85. The volume also contains an article on 'Obligations in Roman Law' by J. M. Irvine (at 85–7).

⁶⁷ A. C. Black, 'Obligations', in: Lord Dunedin, John Wark and Archibald Black (eds), *Encyclopaedia of the Law of Scotland*, Vol. 10 (Edinburgh, 1930), 419–33.

⁶⁸ W. M. Gloag and R. C. Henderson, *Introduction to the Law of Scotland* (Edinburgh, 1927), 24. The statement appears in every edition until the 11th of 2001, when it was accidentally lost in the process of re-structuring the volume. It is restored in para. 3.02 of the 14th edition (Edinburgh, 2017). See also W. M. Gloag, *The Law of Contract* 2nd edition, (Edinburgh, 1929), 1 (preferring to confine the use of the word 'obligation' to 'those obligations where the creditor is a specific person, or definite group of persons, and where the counterpart, from the point of view of the creditor, is a right *in personam*'). On the importance of the observation, see D. N. MacCormick, *SME Reissue General Legal Concepts* (Edinburgh, London and Dublin, 2008), paras 29, 35–39 and 73

the point of view of the creditor, this also further clarifies the distinction between personal and real rights.

The chapter specifically covers a number of topics such as conditions and joint and several liability; but until the 11th edition in 2001 extinction of obligations received its own, separate chapter, followed by one on prescription. These came after several other chapters on the general law of contract and one on Quasi-Contract (which included *negotiorum gestio*). The chapters on extinction and prescription of obligations were followed by a series on particular contracts – Lease, Sale, Rights in Security, Caution, Master and Servant (now employment), Agency, Hiring and Deposit, Partnership, Company, Bills, Insurance, Carriage by Land and by Sea. Next were chapters on General Average and Salvage; Reparation; and Defamation. Thus Professors Gloag and Henderson divided contractual from other obligations; but unjustified enrichment was included in contract, and extinction and prescription were seen as chiefly relevant to contract.⁶⁹ Modern restructuring now places extinction in the chapter on the general law of obligations (although prescription retains its own chapter), while leases and rights in security are to be found in the Property section of the book. There has also been re-ordering of the other chapters on particular contracts, while the chapter on unjustified enrichment and *negotiorum gestio* stands alongside the four devoted to delict.

These more coherent approaches followed the appearance of T. B. Smith's *Short Commentary* in 1962.⁷⁰ Smith drew heavily on Stair in seeing the core of private law as based upon the rights of a person over the objects of law, which were real and personal rights, that is, property and obligations. He highlighted the key distinction between contract and conveyance (the transfer of real rights). 'It does not follow that, because a contract could be reduced on grounds of fraud or (in some cases) because of error, real rights transferred in pursuance of such a contract are also vulnerable, if they have subsequently transferred to an onerous third party.'⁷¹ Smith's detailed discussion of obligations began with questions of the subject's internal classification. He divided the subject into three: (1) Obligations *ex lege* (which included Quasi-Contract including *negotiorum gestio*, as well as Strict Liability without Personal

('Rights necessarily belong to or "vest in" persons') and the same author's *Institutions of Law: An Essay in Legal Theory* (Oxford, 2007), 76–82, 114–15, 120.

⁶⁹ It is worth noting that Gloag, *Contract* (first published in 1914 in Edinburgh), also treated quasi-contract (including *negotiorum gestio*) in some detail, although not delict: see ch. XVIII in both editions.

⁷⁰ See above text accompanying note 7. See further Hogg, 'Perspectives', 657–9.

⁷¹ Smith, *Short Commentary*, 280.

Fault (Quasi-Delict)); (2) Delict (Liability for fault or Culpa); and (3) Voluntary Obligations (essentially contract and unilateral promise). Smith also touched on conditions as an aspect of general obligations law, but only lightly. Smith became the first jurist to discuss concurrent and cumulative liability in the Scots law of obligations: 'In general, it may be said, where an obediential duty is owed by A in delict, this duty remains due to B though A has entered into a contractual relationship with B – unless the terms of the contract restrict the delictual duty.'⁷² The rationale for the position was explained in a way that Stair would have recognised:

It may be stressed that the categories of liability *ex lege* or those based on fault such as reparation or delict, restrict a person's freedom irrespective of his will, and therefore logically take priority in the hierarchy of obligations. Though contract may, as between the parties, modify the duties which the law would otherwise impose, unless they are so modified, they are not superseded merely because parties have entered into a contractual relationship. A person suffering damage as a result of *culpa* or fault may elect to base his action on reparation rather than contract.⁷³

Smith did not however consider the relationship between either contract or delict and unjustified enrichment, the latter of which seems not to have interested him very much. Extinction of obligation, including prescription, was considered only in the context of contract, and that quite briefly.

Smith once described sale as the master contract from which argument by analogy was frequently made.⁷⁴ But even his use of the past tense here is misleading so far as Scots law is concerned. Although sale may provide the commonest examples used by writers and teachers in expounding contract law, it is difficult to see the subject historically as providing any sort of guiding model for contract law in general. Sale is not even necessarily treated first amongst the particular contracts by the earliest institutional writers. It is true that Hume, who gives no account of general contract law, begins with sale in his treatment of particular contracts;⁷⁵ but there is no real sense in his

⁷² Ibid., 622.

⁷³ Ibid., 282.

⁷⁴ Ibid., 297 (the context being an argument that since sale contracts were *bonae fidei*, so good faith was a general concept in the law of contract).

⁷⁵ See above, text accompanying note 50.

exposition, or in later chapters, that this is because it is a guiding model around or upon which either the general law or the law of other forms of contract is built. Sale has however gained some prominence since it was also placed first amongst the particular contracts by Bell in his *Principles*, an approach followed (if only from the second edition of 1933) in *Gloag & Henderson*.⁷⁶ Books on commercial law often give sale of goods a position at or very nearly at the start of the book, hinting that this is the core of commerce and commercial transactions in general;⁷⁷ but such a pattern of exposition is by no means invariable.⁷⁸

David M. Walker's *Principles of Scottish Private Law*, which first appeared in 1970, is highly structured in form, with separate volumes devoted to Obligations and Property respectively.⁷⁹ The Obligations volume has a brief general introduction drawing on Stair's distinction between obediential and voluntary obligations, before turning to an elaborate treatment of the latter category (which includes promises as well as contract). The discussion of the general principles of contract leads on to a series of chapters on particular contracts (curiously, not including sale⁸⁰). Walker then moves on to obediential obligations, within which are treated the obligations of restitution, recompense, *negotiorum gestio*, general average and salvage as well as obligations of reparation arising from delict generally. Then particular delicts are considered, and finally there are chapters on obligations arising from, respectively, statute and court decrees. But there is little or no consideration of the interaction of the different heads of obligations.

⁷⁶ In the first edition lease contracts were treated before sale of goods.

⁷⁷ J. J. Gow, *The Mercantile and Industrial Law of Scotland* (Edinburgh, 1964), ch. 2 (following chapter on general principles of voluntary obligations); C. B. Burns and J. N. Quar, *Commercial Law of Scotland*, 3rd edition (Glasgow, 1980), ch. 2 (following chapter on contract); A. D. M. Forte (ed.), *Scots Commercial Law* (Edinburgh, 1997), ch. 2 (following chapter on resolution of commercial disputes); F. P. Davidson, L. J. Macgregor and D. J. Garrity, *Commercial Law in Scotland* (3rd edition, Edinburgh, 2014), ch. 1.

⁷⁸ J. A. Lillie, *The Mercantile Law of Scotland* (6th edition, Edinburgh, 1965), ch. 4 (after chapters on contract, agency, rights in security over moveables); E. A. Marshall, *Scots Mercantile Law* (3rd edition, Edinburgh, 1997), ch. 4 (after chapters on agency, partnership and companies); Gillian Black and Josephine R. Bisacre (eds), *Business Law in Scotland* (2nd edition, Edinburgh, 2011), ch. 5 (after chapters on sources of law, structure of legal system, business regulation and contract law); Iain G. MacNeil (ed.), *Scots Commercial Law* (Edinburgh, 2014) ch. 6 (after chapters on juristic persons, general principles of contract and property, agency and partnership).

⁷⁹ See above text accompanying note 7.

⁸⁰ Sale is dealt with in the property section of Walker, *Principles* (Vol. 3, Book 5.33).

The *Stair Memorial Encyclopaedia* made an ambitious if not completely successful attempt to develop further an approach founded on the idea of a general law of obligations in its volume 15 (published in 1996). This contains a lengthy article ‘Obligations’, the structure of which is based on that found in T. B. Smith’s *Short Commentary*. The article too is sub-divided into an introductory general part followed by major sections on ‘Obligations arising by force of law’ (which includes unjust enrichment, *negotiorum gestio* and strict liability delicts), ‘Obligations arising from a wrongful act’ (delict involving a party’s fault) and ‘Voluntary obligations’. It concludes with a section on ‘Substitutionary redress’ (i.e. damages). The introductory part is brief, explaining the major divisions in what follows, and then commenting on conditions, the parties to an obligation, the object of obligations and, finally, concurrent and cumulative liability. Extinction of obligations is treated independently in each of ‘Obligations arising from a wrongful act’ and ‘Voluntary obligations’. As the joint but independent work of several hands, the article lacks overall coherence, and is essentially a compilation of treatments of the various components of the law of obligations rather than a unified whole. To some extent this was compensated for by Neil MacCormick’s discussion of the concept of obligations in his 1990 contribution to volume 11 entitled ‘General Legal Concepts’, re-issued in revised form in 2008.⁸¹

A reissue of the Obligations volume is in development, however, and the aim is for a much more coherent treatment, with a detailed general analysis of the law of obligations as the introduction, and the different sources of obligation being treated thereafter in a fashion taking full account of their possible interaction and links to the general principles previously set out. The general analysis in the reissued volume will be by Professor Martin Hogg, who has already published what is the most significant contribution to the understanding of the Scots law of obligations since at least the work of T. B. Smith, and perhaps since the publication of Stair’s *Institutions*. The book, entitled simply *Obligations*, was first published in 2003, and reached a second edition in 2006.⁸² Hogg’s starting point is the classic definition of an obligation as a legal tie between persons who are thereby bound to perform or refrain from performing specified conduct. He also uses the traditional division between voluntary and imposed obligations but shows that this is not sufficient for a full understanding of the concept of an obligation.

⁸¹ *SME* Vol. 11, paras 1027–34; *SME Reissue General Legal Concepts*, paras 27–34. See also MacCormick, *Institutions of Law*, 114–20.

⁸² Both editions were published in Edinburgh.

The remainder of Hogg's book is concerned with the interactions between the different sources of obligation, i.e. concurrent liability. It is by far the most sophisticated treatment yet to appear of that aspect of the law of obligations in Scotland. Hogg argues that concurrency is allowed between contract and delict unless there is some good reason to deny it. Contracting parties may by their contract exclude delictual liability between themselves and to third parties. A claim in unjustified enrichment is excluded where there is in place between the parties a valid subsisting contract in terms of which the enriched party has received the benefit in question, since the contract provides the cause, or legal justification, of the enrichment. But a contracting party who is disabled from making a claim on the contract – for example by being in material breach or because the contract is frustrated – is allowed to claim for any unjustified enrichment of the other party. There is no general concurrency between delict and unjustified enrichment, although there are specific examples of the court granting gain-based remedies in respect of delicts, and enrichment claims arise when unjustified interference with the pursuer's rights has benefited the defender. But such interference need not constitute a delict; the concept is a free-standing one in enrichment law.

The foregoing discussion has made clear that for writers such as Stair, Erskine, T. B. Smith, David Walker and Martin Hogg, general contract law is an integrated part of a general law of obligations.⁸³ *Gloag & Henderson* has also maintained this approach through fourteen editions under various editorial hands from 1927 to 2017. With its single volume on Obligations within which the general law of contract is surveyed along with the law of delict and enrichment, the *Stair Memorial Encyclopaedia* ensures that this approach remains dominant in the exposition of the modern law as a systematic whole, the one that would be followed should (*per impossibile*) Scots private law ever be codified.

There is another dimension to the tradition, however. For George Joseph Bell and his follower Patrick Shaw, contract was the principal form of obligation, and the general law on matters such as conditions and extinction of obligation was best approached through the medium of contract law. Other sources of obligation such as quasi-contract and delict could be given separate but fairly brief consideration apart from contract. In this, as already noted, they may have been influenced by Pothier's treatise on the law of obligations.⁸⁴ The approach has also informed the writers of the major modern books on

⁸³ See also Hogg, 'Perspectives', 659–60.

⁸⁴ See above, text accompanying note 63; note also Hogg, *Promises*, 152–7.

the law of contract, such as Gloag, Walker and W. W. McBryde.⁸⁵ Student texts on contract do discuss in a little more detail in their opening chapters the place of their subject within the broader fields of obligations and, indeed, private law;⁸⁶ but otherwise contract law is treated by and large as a self-supporting structure.

(6) Freedom and sanctity of contract

A final general observation can be made. Freedom and sanctity of contract were fundamental for Stair thanks to his emphasis on engagement as a way in which persons exercised their even more fundamental right of liberty. ‘There is nothing more natural than to stand to the faith of our pactions,’ he wrote.⁸⁷ In a famous aphorism he also said that ‘every paction produceth action’,⁸⁸ ‘with even *pactum corvinum de haereditate viventis* [...] binding with us’.⁸⁹ The major exception to the general rule of enforceability was the *pactum de quota litis*.⁹⁰ Stair also minimised the role of requirements of form to be found in Scots law.⁹¹ Only if a contract was impossible or illegal, or if a party was incapable, compelled by another, or made an error about the ‘substantials’ of the agreement, might it be struck down.⁹² Fraud and extortion were wrongs which gave rise to the obediential obligation of reparation, which could be set off against the obligations arising under any resultant contract rather than striking it down;⁹³ an application of the primacy of obediential over conventional obligations later stated by Stair.⁹⁴ There was no doctrine of equality of exchange beyond what the parties agreed, although there might

⁸⁵ For Gloag see above, notes 5, 67 and 68; see also D. M. Walker, *The Law of Contracts and Related Obligations in Scotland*, 3rd edition (Edinburgh, 1995); W. W. McBryde, *The Law of Contract in Scotland*, 3rd edition (Edinburgh, 2007).

⁸⁶ G. Black, *Woolman on Contract*, 5th edition (Edinburgh, 2013), ch. 1; Hector L. MacQueen and Joe Thomson, *Contract Law in Scotland*, 4th edition (Haywards Heath, 2016), ch. 1.

⁸⁷ Stair, *Institutions*, I, 1, 21.

⁸⁸ *Ibid.*, I, 10, 7.

⁸⁹ *Ibid.*, I, 10, 8. A *pactum corvinum de haereditate viventis* is a ‘crow-like’ bargain about the inheritance of a still-living person.

⁹⁰ *Ibid.*, I, 10, 8. A *pactum de quota litis* is an agreement for a share of the subject of a law suit.

⁹¹ *Ibid.*, I, 10, 9 and 11.

⁹² *Ibid.*, I, 10, 13. See further John MacLeod, ‘Before Bell: The Roots of Error in the Scots Law of Contract’, *Edinburgh Law Review* 14 (2010) 385–417.

⁹³ Stair, *Institutions*, I, 9, 8–14.

⁹⁴ *Ibid.*, I, 10, 13; see above, text accompanying notes 24–6, and also Dot Reid, ‘Fraud in Scots Private Law’ (Ph.D. thesis, University of Edinburgh, 2012), 67.

be abatement of price for the latent insufficiency of goods sold, and penalty or similar clauses ‘ought to be and are reduced to the just interest, whatever the parties’ agreement be’.⁹⁵ Innominate contracts were enforceable, the only ‘profitable distinction’ from nominate contracts being that ‘in all contracts, not only that which is expressed must be performed, but that which is necessarily consequent and implied; but in nominate contracts, law hath determined these implications.’⁹⁶

Bankton likewise declared that the ‘distinction of contracts into Nominate and Innominate, is of no use with us’, so that parties to an agreement for an innominate exchange were bound by the agreement alone.⁹⁷ Erskine took a similar line: ‘By our law all contracts, even innominate, are equally obligatory on both parties from the date, so that neither party can resile.’⁹⁸ Hume too rejected Romanist distinctions between nominate and innominate contracts: ‘These distinctions are all done away with us.’⁹⁹ There was some emergence in the later eighteenth and early nineteenth centuries of an idea that freedom and sanctity of contract, being themselves based on public policy (rather than the free will which Stair had predicated), must yield to weightier concerns of the same public policy, for example in the preservation of an individual’s freedom to trade or practise a profession.¹⁰⁰ But this was balanced by an increasingly restrictive approach to fraud and error as grounds for escaping from a contract,¹⁰¹ and in general Scots common law has shared its English counterpart’s aversion to playing a regulatory role over contractual freedom.¹⁰² It has usually needed legislation to achieve protection for employees, consumers and other potentially disadvantaged contracting parties.

⁹⁵ Stair, *Institutions*, I, 10, 14–15.

⁹⁶ *Ibid.*, I, 10, 12.

⁹⁷ Bankton, *Institute*, I, 11, 18–22 (quotation at 20).

⁹⁸ Erskine, *Institute*, III, 1, 35.

⁹⁹ Hume, *Lectures*, Vol. 2, 277. Contracts which were both innominate *and* unusual were subject to some constraints of proof until the relevant rule was abolished by the Requirements of Writing (Scotland) Act 1995 s 11. See for an account of the pre-1995 law W. W. McBryde, *The Law of Contract in Scotland*, 1st edition, (Edinburgh, 1987), paras 27.22–24. For a subsequent deployment of the concept of an innominate contract in relation to software licences, see *Beta Computers (Europe) Ltd v Adobe Systems (Europe) Ltd* 1996 SLT 604.

¹⁰⁰ McBryde, *Contract*, paras 19.06–13; P. G. Stein, ‘The General Notions of Contract and Property in Eighteenth Century Scottish Thought’, *Juridical Review* 8 (1963) 1–13.

¹⁰¹ See McBryde, *Contract*, paras 1.19–20, chs 14 and 15; Reid, *Fraud in Scots Private Law*, ch. 5.

¹⁰² Joe Thomson, ‘Judicial Control of Unfair Terms’, in Reid and Zimmermann (eds), *History of Private Law in Scotland*, Vol. 2, ch. 6.

Conclusions

The primary purpose of this contribution has been to trace the varying but nonetheless fairly consistent use by Scottish text and treatise writers of the idea of a general law of obligations within which a general law of contract plays an important and substantive part alongside the rules applying to particular kinds of contracts. While a general law of contract has the important role of enabling the law to recognise new kinds of contract different from those it has already identified and named, the significance of a general law of obligations may be less apparent. Perhaps the most valuable tasks for such a general concept are defining and explaining, first, its relationship with other general parts of the law, notably property law; and second, the relationship of its components with each other, that is, when questions of concurrency and cumulation arise between them. Such matters are not merely theoretical or conceptual: they arise as hard issues for the law, notably the first when insolvency looms. But as Martin Hogg has shown in great detail, concurrency and cumulation also pose questions continuously in the courts and legal practice, and the answers do depend upon an understanding of the law of obligations as a whole.¹⁰³

Stair's work in particular helps to underline the substantive effects that can result from an understanding of the law of obligations as a whole. The principle which he identified as marking out the law of conventional obligations, namely, an act of will made with 'purpose to oblige', enabled him to propose a doctrinal footing for two outcomes which had been previously achieved in the Scottish courts without much theoretical reflection: the enforceability of the unilateral promise, and of benefits conferred upon a third party by the contract of others. In neither case did the beneficiary have to make an act of acceptance; in each it was sufficient that the relevant party or parties had intended to make an engagement with the beneficiary.¹⁰⁴ In this form these two institutions became distinctive elements of Scots law, even if somewhat distorted in their course of development after Stair's time.¹⁰⁵

¹⁰³ See above, text following note 82.

¹⁰⁴ Stair, *Institutions*, I, 10, 2–6.

¹⁰⁵ See further Hector L. MacQueen and W. David H. Sellar, 'Scots Law: *Ius quaesitum tertio*, Promise and Irrevocability', in Eltjo J. H. Schrage (ed.), *Ius quaesitum tertio* (Berlin, 2008), 357–83; Hogg, 'Perspectives', 660–4; Hector L. MacQueen 'Unilateral Promises: Scots Law Compared with the PECL and DCFR' *European Review of Private Law* 24 (2016) 529–51; idem, 'Reforming Third Party Rights in Contract: a Scottish Viewpoint' in Lena Peters (ed.) *Eppur si muove: The Age of Uniform Law – Festschrift for Michael Joachim Bonell, to celebrate his 70th birthday* (UNIDROIT, Rome, 2016) 1066–86;

Those familiar with the recent work of such as Klaus-Peter Nanz, James Gordley and Wim Decock will recognise the extent to which Stair's work on obligations and in particular conventional obligations clearly places him amongst the 'northern natural lawyers' of the seventeenth century who also included Grotius (1583–1645) and Pufendorf (1632–1694).¹⁰⁶ Stair is already well-known to have been influenced by Grotius in particular.¹⁰⁷ But the latter in turn was inspired by the late scholastics and moral theologians of the preceding century. They had synthesised the philosophy of Aristotle and Thomas Aquinas in seeing promises in general as binding in nature on the persons who made them, reflecting the virtues of fidelity (keeping one's word), liberality (the sensible giving away of resources to chosen others) and commutative justice (the equivalence of exchanges so that one was enriched at the expense of another). The question then was how far positive law might square with that position. The expanding recognition of innominate contracts was crucial in undermining the Roman position that *ex nudo pacto non oritur actio*.

For Scots law, Stair regarded the proposition that a promise seriously intended is binding without acceptance as a consequence of 'the Canon Law

Contract (Third Party Rights) (Scotland) Act 2017.

¹⁰⁶ See (1) Klaus-Peter Nanz, *Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert* (München, 1985), helpfully reviewed by W. M. Gordon, *Journal of Legal History* 8 (1987) 373–6; (2) the following writings by James Gordley: *The Philosophical Origins of Modern Contract Doctrine* (Oxford, 1991), 71–7; 'Some Perennial Problems', in idem (ed.), *The Enforceability of Promises in European Contract Law* (Cambridge, 2002), 2–10; *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment* (Oxford, 2006) ch. 13; *The Jurists: A Critical History* (Oxford, 2013), ch. V; and (3) Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Leiden and Boston, 2013). See also Hogg, 'Perspectives', 648; Hogg, *Promises*, 127–8; HJ Berman, *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (Cambridge, Harvard University Press, 2003) 108–29.

¹⁰⁷ See J. J. Gow, 'The Introduction of the Theory of Justice in Scots Law' (Ph.D. thesis, University of Aberdeen, 1952); P. G. Stein, 'Stair's General Concepts: The Theory of Law' in D. M. Walker (ed.) *Stair Tercentenary Studies* (Edinburgh, 1981), 181–7; W M Gordon, 'Stair, Grotius, and the sources of Stair's Institutions', in J. A. Ankum, J. E. Spruit and F. B. J. Wubbe (eds), *Satura Roberto Feenstra* (Leiden, 1985), 571–83 (also in idem, *Roman Law, Scots Law and Legal History: Selected Essays* (Edinburgh, 2007) 255–66); Carey Miller, 'Systems of Property: Grotius and Stair', (above note 1); Thomas Richter, 'Molina, Grotius, Stair and the *jus quaesitum tertio*' *Juridical Review* (2001) 219–22; idem, 'Did Stair Know Pufendorf?' *Edinburgh Law Review* 7 (2003) 367–78; Dot Reid, 'Thomas Aquinas and Viscount Stair: The Influence of Scholastic Moral Theology on Stair's Account of Restitution and Recompense', *Journal of Legal History* 29(2) (2008) 189–214; Adelyn L. M. Wilson, 'Stair and the *Inleydinge* of Grotius', *Edinburgh Law Review* 14(2) (2010) 259–68.

having taken off the exception of the Civil Law, *de nudo pacto*'.¹⁰⁸ In this regard, he said, 'the common custom of nations [had] follow[ed] the canon law.'¹⁰⁹ Stair's recognition of the unilateral promise and third party benefits from contracts binding without the beneficiary's acceptance extended the virtues of fidelity and liberality further in positive law even further than most other European jurists before or after his time. At the same time he took a narrower approach to equality of exchange in onerous transactions than many others.¹¹⁰ Decock has shown that for the late scholastics and moral theologians respect for the freedom and sanctity of contract sprang from respect for the moral value of acts of God-given free will rather than the Enlightenment and later perceptions of the economic and social value of persons pursuing their self-interest.¹¹¹ For Stair, as we have seen, the starting point was certainly the moral position with regard to the exercise of free will which however, being God-given, was subject to the obediential obligations also flowing ultimately from the will of God.¹¹² But a further clear perception was that 'freedom of commerce' is one of law's primary aims.¹¹³ Equality in this context was too subjective, with 'no determinate or certain rule but [the parties'] own opinions'.¹¹⁴ And in the following passage, he turned to Roman rather than theological or canon law sources in recognising the realities of the market place:

And therefore it is safest to conclude with the law, *l. si voluntate, C. de rescin. Vend.* which saith, This is the substance of buying and selling, that the buyer having a purpose to buy cheap, and the seller to sell dear, they come to this contract, and after many debates, the seller by little and little diminishing what he sought, and the buyer adding to what he offered, at last they agree to a certain price, or as Seneca says, *lib.6, de beneficiis, cap. 15*. "It is no matter what the rate be, seeing it is agreed between the buyer and the seller; for he that buys well, owes nothing to

¹⁰⁸ Stair, *Institutions*, I, 10, 4.

¹⁰⁹ *Ibid.*, I, 10, 7.

¹¹⁰ Cf Decock, *Theologians and Contract Law*, ch. 7.

¹¹¹ See *ibid.*, chs 3.3–3.5.

¹¹² See above, text accompanying note 24.

¹¹³ Stair, *Institutions*, I, 1, 18. See further MacCormick, 'Stair and the Natural Law Tradition', 5; Bogle, 'Emergence of Will Theory', 3–4, 124–5, 136–7.

¹¹⁴ Stair, *Institutions*, I, 10, 14.

the seller”. Therefore the equality required in these contracts, cannot be in any other rate than the parties agree on.¹¹⁵

This would certainly have chimed well with Adam Smith and David Hume the philosopher in the eighteenth century, and indeed most of the lawyers and economists of the nineteenth century.¹¹⁶

The relative decline of deep interest in questions of the law’s basic structures apparent after Stair’s time may reflect, not only eighteenth-century Enlightenment scepticism about its natural law foundations and the positivism that followed, but also the fairly profound conservatism of jurists such as Forbes and Erskine and, in a different way, Baron Hume. An exception must however be made for Bell. As I have argued elsewhere,¹¹⁷ although Bell sought actively to develop the law away from Roman and natural law concepts because they were inapt for a modern commercial society, he did not generally confine himself to Scots law sources in the manner of Hume. Instead he actively sought to modernise by study of the law merchant as part of the *ius gentium*, that is, what Stair would have called ‘the law of nations’.¹¹⁸ The forms of municipal or domestic law were not always well suited to the needs of commerce, and in consequence rules and usages had arisen amongst merchants generally which had then been eventually recognised by the laws of all commercial countries as the ‘law merchant’. It therefore behoved local lawyers dealing with mercantile questions to consider how other jurisdictions had responded to them and to follow where they seemed to lead. Again, Stair, who thought ‘the expedients of the most polite nations, for ascertaining and expending the rights and

¹¹⁵ Ibid., I, 10, 14. Professor Walker as editor supplies the reference to the Code: C.4, 44, 8. The other reference is to Book 6 Chapter XV of a dialogue by the Stoic philosopher and dramatist Seneca the Younger (c.4 B.C.E.–65 C.E.) entitled *De Beneficiis* (On Benefits). See further Hogg, *Promises*, 139–40.

¹¹⁶ David Hume, *Treatise of Human Nature*, III, 2, 5 (‘Of the Obligation of Promises’) (I have used the edition edited by David F. and Mary J. Norton, published Oxford, 2001, reprinted 2011); Adam Smith, *The Wealth of Nations*, I, 7 (‘Of the Natural and Market Price of Commodities’) (I have used the edition edited by R. H. Campbell, A. S. Skinner and W. B. Todd, published Oxford, 1976); P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979); Warren Swain, *The Law of Contract 1670–1870* (Cambridge, 2015).

¹¹⁷ Hector MacQueen, ‘Pragmatism, Precepts and Precedents: Commercial Law and Legal History’, in Andrew R. C. Simpson, Scott C. Styles, Euan West, and Adelyn L. M. Wilson (eds), *Continuity, Change and Pragmatism in the Law: Essays in Memory of Professor Angelo Forte* (Aberdeen, 2016), 10–42, 22–4, 38–41. Note also Reid, ‘Bell’s Inaugural Lecture’, 349–50.

¹¹⁸ Stair, *Institutions*, I, 1, 11.

interests of mankind' valuable evidence of 'material justice (the common law of the world)', would have understood the approach.¹¹⁹ But the goals of Bell's work, primarily focused on property rights and particular contracts in their mercantile context, did not lend themselves to the analysis of more general concepts and structures.

It is perhaps too early, however, to know what to make of the resurgence of such general concepts in the twentieth century, particularly through the work of T. B. Smith and those who, like David Carey Miller, have sought to follow in his footsteps. How far modern Scottish doctrines are open to James Gordley's observation that they are 'founded originally on philosophical ideas discarded long ago' awaits deeper analysis than can be offered here.¹²⁰ There have certainly been rich fruits: in addition to the works already discussed on private law as a whole, and on obligations and contract, delict, general property law, and unjustified enrichment have all emerged from the shadows of, respectively, reparation, conveyancing and contract.¹²¹ The 'Scottish legal nationalism' often rather misleadingly associated with Smith cannot be the whole explanation since the roots of the resurgence antedate him (not least, perhaps, in the writings of William Murray Gloag). For the opposite reason the European private law movement is also not an explanation, although it may well have helped reinforce the interest in taxonomy in Scotland through its emphasis on code-like instruments such as the UNIDROIT Principles of International Commercial Contracts (1994–2010), the Principles of European Contract Law (2002) and, most significantly perhaps, the Draft Common Frame of Reference (2009). The most potent factor, however, has probably been the revival of legal literature sparked by the growth of academic law in the universities, especially after the creation of the full-time Honours law

¹¹⁹ Ibid., Dedication to the King.

¹²⁰ Gordley, *Philosophical Origins of Modern Contract Doctrine*, 9. See also idem, 'Contract and Delict: Towards a Unified Law of Obligations' *Edinburgh Law Review* 1(3) (1997) 345–60. In his *Foundations of Private Law*, 4–5, Gordley argues that the philosophical ideas should be reinstated: 'principles that commend themselves to our own common sense, that were once accepted almost universally long ago, that were discarded for the wrong reasons, still best explain private law.'

¹²¹ D. M. Walker, *The Law of Delict in Scotland* (1st edition, Edinburgh, 1966; 2nd edition 1981) was the first of, by now, many books on the subject. For property law see D. L. Carey Miller, *Corporeal Moveables in Scots Law* (1st edition, Edinburgh, 1991; 2nd edition cited above, note 41), and K. G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996). Robin Evans-Jones, *Unjustified Enrichment* 2 vols (Edinburgh 2003–2013) represents the culmination of work that began in the 1980s.

degree in 1961.¹²² In this last, David Carey Miller played a remarkably active, wide-ranging, yet self-effacing role for over forty years, mainly but by no means only in the pursuit of a deeper understanding of moveable property law. He more than fully earned the gratitude and deep affection of everyone who has tried to follow his gentle, generous, and witty example.

¹²² See Kenneth G. C. Reid, 'The Third Branch of the Profession: The Rise of the Academic Lawyer in Scotland', in Hector L. MacQueen (ed.), *Scots Law into the 21st Century* (Edinburgh, 1996), 39–49; idem, 'Smoothing the Rugged Parts of the Passage: Scots Law and its Edinburgh Chair', *Edinburgh Law Review* 18(3) (2014) 315–40, 327–39.

Contract and the Contracting Process: Reconsidering our Metaphors

Erich Schanze

Our Metaphors of Contract Law

In the fall of 1967 David Carey Miller was concerned with animal liability.¹ When he made his first presentation at the small workshop in the pristine Old College office of Sir Thomas Broun Smith I came to understand that this topic of largely historic significance under German law was highly relevant for the contemporary condition of the Scottish Highlands. The northern part of Scotland of the day was grazing sheep and one lane roads, fencing in livestock being a remote option. Hence, a strict liability for straying animals might have changed the livelihood of many people and, indeed, once again, the character of the Highlands. I later realised that David had tackled a problem which would be finally worth a Nobel Prize in economics in 1991.²

For me, coming from an urban environment of the City of Frankfurt, the ‘metaphor’ of animal liability was ‘dogs biting postmen’. I was, of course, taking for granted that the regime should be strict liability. David, coming from Natal, South Africa, was guided by a different metaphor. Without having heard of the underlying theoretical economic concepts, he would come to an understanding of the paramount relevance of ‘transaction costs’ in alternative liability regimes and the ‘reciprocal nature’ of rights.

¹ David L. Carey Miller, *Liability for Animals Causing Injury to Persons or Property: A Comparative Study* (LL.M thesis, University of Edinburgh, 1969).

² R. H. Coase, ‘The Problem of Social Cost’, *Journal of Law and Economics*, 3 (1960), 1–44, one of the two cited articles for awarding the prize. The key example in this article is the problem of fencing in cattle. The deeper jurisprudential part of this problem is treated in the remarkable study of Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge, Mass., 1991). A student of Scottish history will note that the idyllic picture of the ‘blackies’ in the Highland is related to the dark moments of a largely involuntary change in land use in the Clearances Movements of the eighteenth and nineteenth centuries.

Our understanding of legal institutions is guided by examples, concepts and ideas. These pre-existing clusters of motivations are embraced nicely by the term ‘metaphor’. If we venture for an analysis of a legal problem, we should try to be aware of these guiding metaphors and reflect their relevance in the current social and economic context. This chapter in honour of David tries to revisit our understanding of *contract* and the *contracting process*. Aspects of this issue had brought me to Edinburgh in 1967.³ Let me start with three textbook cases.

The Examples

(1) Forfar Potato⁴

On 29 November 1977 Forfar Potato Co. telexed an offer to Dutch potato wholesaler Wolf & Wolf concerning the delivery of Angus potatoes under certain conditions, ‘open for acceptance on 30 November till 17:00 hrs’. The Dutch party telexed back on that day and signalled general agreement but specified different terms. After a telephone conversation they sent another telex purporting acceptance of the original offer but requested that their purchasing conditions should be given consideration. Forfar Potato did not deliver and was sued for damages. Six years later the Court of Session decided on appeal that there was no contract between the parties. The Court restated the generally recognised iron-clad contract rule that an offer falls when it is ‘accepted’ with modifications or qualifications. The declaration of the potential buyer was a counter-offer which had to be accepted by the seller. The buyer could not return to the original offer.

(2) Thekla Bohlen⁵

An earlier potato-case is a staple in German contract teaching. In spring 1908 the MS ‘Thekla Bohlen’ was steaming from the shores of West Africa via the Canary Islands to Hamburg. Two Hamburg gentlemen had ordered from the defendant 1,000 boxes of new Canary potatoes. On arrival at Hamburg the parties found out that only 106 boxes of this kind of potatoes were available on board. The buyers sued for damages resulting from a more expensive

³ Erich Schanze, *Information Liability – The Allocation of Economic Losses Caused by Misinformation* (LL.M. thesis, Harvard University, 1969).

⁴ *Wolf and Wolf v Forfar Potato Co.* 1984 SLT 100.

⁵ OLG Hamburg, *Seuffert's Archiv* 65, No. 160 [1910].

covering purchase for a similar quality. The Hamburg court of appeal looked at the civil law doctrine of nullity of a transaction concerning a non-existing item. But it granted damages relying on an ‘implied guaranty of the availability of a business item’. Today, doctrinal writing refers to the new s. 311a II BGB, an extension of the *culpa in contrahendo* doctrine. This new, highly debated norm, introduced in 2002, allows recovery up to the expectation interest in case of a violation of a pre-contractual duty.⁶

(3) Jhering’s cigars⁷

The third case concerns the private purchase of cigars. It is one of the hypothetical scenarios introduced by Rudolf von Jhering in 1860 for advancing his theory of *culpa in contrahendo*. Jhering, at that time professor at Giessen, would ask ‘his’ agent, who travels to Bremen, for ordering a quarter box (whatever that is) of cigars. The agent orders four boxes instead, which are sent by a mix of stage coach and railway to Giessen (near Marburg). In Jhering’s view, the culpable agent who had caused the error has to come up for the costs of returning and re-sending the cigars.

(4) Comment

A present contract student will have the easiest time with the third case. The obvious consumer transaction is covered by the latest version of the EU consumer directive.⁸ The consumer can withdraw without stating reasons. Error, or even *culpa*, has become an irrelevant concept here. Of course, smoking Rudolf von Jhering would have to carry the cost of returning the boxes. Whether he could recover those costs from his agent would depend on the nature of the relationship.

I do not want to deride the two potato cases. *Forfar Potato* shows a nice academic point concerning offer and acceptance which is settled globally in the way it was decided. Both cases, however, contain behavioural oddities from the perspective of a twenty-first century commercial setting. True, they

⁶ On its contentious nature, see Palandt-Grüneberg, *Kommentar zum BGB* (74th edn, München, 2015), § 311a, notes 11 and 29 et seq.

⁷ Rudolf von Jhering, ‘Culpa in contrahendo oder Schadensersatz bei nichtigen oder nicht zur Perfection gelangten Verträgen’, *Jherings Jahrbücher*, 4 (1861), 1–112, 4–5.

⁸ Council Directive 2011/83/EU of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L304/64.

are not covered – like most examples which we used in our contract lectures in the last forty years – by consumer law. They concern trade transactions. But they arise in trading environments which lack modern information and communication technology, the new ‘formalities’ of professional routines, memoranda and check lists. In short: they do not meet the standards of proper business management in the current ISO-certified world. The steamer *Thekla Bohlen*, built in 1894, was obviously not yet equipped with suitable on-board means of communication. The telex world of *Forfar Potato* is gone. Indeed, a short look in the internet would show that both parties to this Scots law suit of the eighties of the last century have ceased their active commercial existence. They have been merged into better organised trading houses which are operating on formalised trading platforms or under specified umbrella agreements.

The Dissolution of Contract Theory

(1) Consumer contracts

My reference to consumer legislation in the *Jhering's cigar* case indicates a fundamental divide in the world of contracting. There are business contracts and consumer contracts. In the business sphere we find a wide structural variety beyond the standard typology of contracts found in the continental codes. There are one-shot spot contracts, contracts with a single performance in time, with sequential multi-performances, with long-term multi-performances. There are, moreover, umbrella contracts, symbiotic and corporate arrangements between firms.

Catchwords concerning consumer transactions are ‘weakness’ of consumers, asymmetrical information about contractual items, one-sided ‘boilerplate’, and ‘take-it-or-leave-it’. This all would reflect a sort of inherent ‘unfairness’, a situation where bargaining on terms does not happen. The political and legal reaction has been statutory ‘protection’ of a defined class of consumers which has been high on the political agenda of all modern industrial states.

A closer analysis of this move might point to the dialectics of protection and incapacitation within a full ‘consumption cycle’. Producing and buying in this context is increasingly distanced from independent decision making at the sales point but rather reflects a smooth loop of a generation of needs and their satisfaction. This is associated with shifting the workload of selecting,

packaging and carrying the consumption item to the sales point. There, the electronic registry does not only spell out a bill for the client but also registers typical consumer choices, organises the refilling process of the shelves, and so on. This loop is accompanied by ‘no hassle’ policies. Similar or even more radical features are found in the internet trade.⁹

Structurally, the system of mandatory rights and duties in consumer contracts could be better understood as part of new obligations *ex lege*, technically similar to the areas of delict/tort and unjust enrichment. The cost of ‘protection’ is pooled and spread among the customers.

Of course, it might be a nice point for the contract class asking: ‘When will the “contract” be made in these instances?’ In a Scottish classroom, we might eventually arrive at the *Forfar potato* case for finding out that, in theory, the customer, and not the ‘seller’ would make the ‘offer’ at the sales point. Elsewhere in the world, we would not be surprised finding the same rule. But even then, we might still be perplexed, that the sales person will be smiling gently when he or she will tolerate my ‘breach of contract’ without charges – in case I should return the bottle of *Ledaig* after the sale (if it is still intact). This is all fairly remote from textbook contract doctrine.

What are the salient problems in this field? Mistake and error are broadly remedied by rights of withdrawal. The main area of litigation concerns defective products where statutory rights prevail. Snails in bottles,¹⁰ exploding bottles,¹¹ as well as unsafe premises¹² have been covered by special doctrines of product and occupiers’ liability. Holiday makers enjoy the benedictions of the relevant EU directives.¹³

(2) The declining relevance of pure sales law

Even if the classical contract doctrine has lost its significance in the field of

⁹ On the situation in the net see e.g. Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, ‘Does Anyone Read the Fine Print?’, *Journal of Legal Studies*, 43(1) (2014), 1–35; generally: Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, 2012).

¹⁰ *Donoghue v Stevenson* 1932 AC 562 (HL).

¹¹ *Escola v Coca Cola Bottling Co.* 24 Cal. 2nd 453 [Cal. Supreme Ct 1944].

¹² A falling linoleum carpet role hurting a customer in a department store caused the first recourse to the *culpa in contrahendo* doctrine after the introduction of the BGB: RGZ 78, 239 (1911). It was related to a narrow definition of vicarious liability in s. 831 BGB. Today, these cases are covered by the doctrine of ‘Verkehrspflichten’, an extension of tort liability.

¹³ E.g. Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/23.

consumption it may still be valid for the area of commercial dealings. The problem here is the dominating, and in my view misleading metaphor of sales law. It is the contract equivalent to ‘dogs-biting-postmen’ of animal liability.

Students of Roman law know the extensive treatment of the *emptio venditio* in books 18 and 19 of the Digest, storing all technicalities of the relevant remedies of the first centuries AD.¹⁴ Ernst Rabel’s two volume masterly study on the law of sales (1936, 1957) demonstrates the relevance of the trade of goods in the sphere of international transactions in the nineteenth and twentieth centuries.¹⁵ The international conventions on sales law (Hague, 1964 and Vienna/CISG 1980) as well as the ‘Principles of European Contract Law’ (since 1982) are guided by the standard spot and distance sales metaphors. There is no single legal field in private law which has attracted more academic attendance. Moreover, the relevance of the sales metaphor has been reinforced in the last thirty years by economic jargon. Many transactions including the ever increasing areas of services or financial contracting are framed in terms of ‘buying’ and ‘selling’. We ‘buy’ our lunch, and we ‘sell’ our professional advice, or complex swaps.

A closer study of negotiated business transactions in the globalised economy of our day would show a dramatic decline of ‘pure’ sales transactions which would fall under the definitions of the modern sales conventions. There is a pervasive shift to complex forms of long-term contracting, typically containing mixes of sales, finance and services. Design, production and marketing of goods and services are happening in interlinked relationships at various locations, in which the associated sales transactions play only a subordinated role.

Standardised goods are sometimes traded on business platforms in a sales format. But the essential elements in platform trading are ‘club’ membership and the observance of the requisite ‘by-laws’. There is ‘trading of goods’ within corporate groups. But here, the rules of the game are defined in the headquarters. There is ‘trading’ between legally independent firms. But in the large majority of cases we find ‘umbrella agreements’, outright ‘workbenches’, or other special long-term co-ordination procedures. There are numerous important technical reasons why the modern highly sophisticated doctrines of

¹⁴ Slaves and land dominated the ‘sales’ of that period; for land see: ‘A Naïve Buyer. Publius Calpurnius Lanarius Seeks Recourse’ in Detlef Liebs, *Summoned to the Roman Courts. Famous Trials from Antiquity*, trans. Rebecca L. R. Garber and Carole Gustely Cürten (Berkeley, 2012), 33–42.

¹⁵ Ernst Rabel, *Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung, vols 1 and 2* (Tübingen, 1936; Berlin, 1958).

the substantive law concerning sales of goods, particularly those of the CISG, play only a marginal role in the practice of negotiated business transactions, and in the associated settlement of disputes.¹⁶

(3) Vanishing litigation?

This all does not mean that there are no causes for litigation – and reasons for developing adequate clear rules. One of the most influential studies on contract theory of the second half of the last century has been Stewart Macaulay's paper on 'Non-Contractual Relations in Business'.¹⁷ This empirical study suggests that businessmen do not litigate. In particular, Macaulay emphasises that appeal court contract doctrine is irrelevant in this context, and businessmen rather rely on a handshake.

This is not my point, even if I am stressing the obsolescence of pure sales law. From practical experience, I would rather predict that new empirical evidence, taken fifty years later, would fail in supporting Macaulay's claims. Today, parties do not rely on a handshake. They are keen to formalise their transactions, of course, using contemporary electronic documentation techniques, check-lists etc. And parties do litigate if they are confronted with cheating and other awkward business practices.

One of the explanations for an increase in litigation relating to business transactions, and particularly concerning unprecedented values, may be a change of attitude of business management. In the last fifty years we see a change, from a style of manager-owner driven behaviour to that of today's salaried professionals who will not assume the risks of personal trust and of settlement but rather tend towards shifting those risks into the (costly) litigation process. They can then blame lawyers and courts for having lost the suit.

There is also a noticeable division of motivations for litigation. Experienced judges in public courts and on arbitration panels understand the difference between, what I have tried to call the 'curative' and the 'punitive' avenues of contract litigation.¹⁸ In practice, we see relatively rare instances in which parties are trying to adjust their relationship before a court of law. Well

¹⁶ For detail, concerning mainly the CISG: Erich Schanze, 'Dispute Resolution in the Shadow of Uniform Contract Law?' in Carl Baudenbacher (ed.), *International Dispute Resolution* (Stuttgart, 2012), 153–60; for the CESL see the critical assessment of Lisa Bernstein, 'An (Un)Common Frame of Reference: An American Perspective on the Jurisprudence of the CESL', *Common Market Law Review* 50(1/2) (2013), 169–86.

¹⁷ Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', *American Sociological Review*, 28(1) (1963), 55–69.

¹⁸ See Schanze, 'Dispute Resolution', 159.

drafted agreements contain ‘conflict screening’ clauses, in which disputes are ‘filtered’ and referred to special non-judicial conflict resolution bodies.¹⁹ The majority of litigated cases relate to a ‘terminal litigation’, in which one party typically seeks a sort of ‘civil punishment’ of the other. The *Forfar potato* case may be understood as one of the latter situations. Why would a substantial Dutch potato trading house sue a small Scottish competitor/counterparty for non-delivery after an obvious failure in obtaining a clear commitment on its purchasing conditions and in establishing a serious commercial relationship?

(4) Risks in contracts, risks in contracting

The institutional mechanism of the business contract serves to make credible commitments for planning a ‘future’ between entrepreneurs in capitalist economies. It promotes a transformation of uncertainty into insurable risk. It is the basis of carrying out projects, of providing credit, and of sharing risks. Sanctioning breaches is not a moral issue, but rather one of keeping the mechanics of this important facilitative institution at work. If a contract is concluded, breaches will have to be indemnified. Reasonable expectations created by agreement will have to be protected.

In the pre-contractual stage, however, contracting options have to be kept open. In a competitive environment, goods and services will have to reach their best possible hosts – the economic actors who value those items most. Of course, ‘expectations’ will be created in the negotiating stage.²⁰ Nevertheless, if we take negotiating in a market with many interested parties seriously, we will have to live with disappointed counterparts. A wilful termination of negotiations must be possible. In principle, it is an exercise of the contracting actors ‘without obligation’.

¹⁹ ‘Conflict screening’ and self-enforcing features are pervasive elements of large contracts such as investment agreements; on the technology see Erich Schanze, ‘Complex Business Contracts: Lessons from Mining Agreements’, *University of St. Thomas Law Journal*, 12(1) (2015), 77–86, 81–85; see also idem, ‘Regulation by Consensus: The Practice of International Investment Agreements’, *Journal of Institutional & Theoretical Economics*, 144(1) (1988), 152–71.

²⁰ This is the starting point of the detailed analysis of pre-contractual liability with a model of sequential ‘investments’ by the negotiating parties in Alan Schwartz and Robert E. Scott, ‘Precontractual Liability and Preliminary Agreements’, *Harvard Law Review*, 120(3) (2007), 661–707. It is, moreover, the most informative present study on the relevant US case law, and an example of state-of-the-art contract research. They do not, however, tackle the ‘policing’ problems of evidently unacceptable contracting behaviour, including staged misinformation and tricking the counterparts, which has to be dealt with in practice.

In this stage, the parties are obviously not completely free to harm their counterparts. The legal task is a proper calibration of the pre-contractual risks. Partly, the actors will be able to allocate risks by special agreement. Think, for example, of outlays for making bids for projects. But generally, we operate under the assumption that risks and associated costs are left where they lie, and that commitments are non-binding – although they are taken seriously. From this starting point, we will have to ask under which qualified circumstances, and to what extent, do we sanction unacceptable damaging action of parties who harm their counterparts in the negotiating process, either relating to the later contents of the agreement, or to the likelihood of coming to terms.

The magic terms, in which this problem has been legally treated in the twentieth century, have been ‘good faith’, and ‘culpa’/‘negligence’.²¹ These catchwords have offered us little more than a look in a colourful doctrinal kaleidoscope.

Obscuring Principles: Misunderstandings of *culpa* and Good Faith in the European Contract Doctrine of the Last Century

(1) Starting point: risks in contracts, risks in contracting, applied

The clear-cut division between risk in the contractual and pre-contractual stages has two fundamental consequences for business contracts. The first concerns the need for a set of functioning legal terms for determining whether an agreement is binding. Because these terms are of crucial significance for the allocation of risks, goods, rights and services, they should be simple and transparent for the benefit of both the business community and the courts applying them.

As I tried to explore above, the evidence for consumer contracts would point into a different direction. The legal theories about ‘contracting’ at the sales point of a supermarket, the click on the internet, or drawing the card from the automat at the entry barrier of the parking lot do rarely affect the fluid operation of the consumption cycle, including its statutory treatment of risks. The question whether a ‘contract’ is concluded at the shelf of the supermarket, or at the final sales point, is more a matter of legal ornament. We do not have to invent new doctrines for unilateral contracts, if we find a sign

²¹ For Scots law see Hector L. MacQueen, ‘Good Faith in the Scots Law of Contracts: an Undisclosed Principle’ in Angelo D. M. Forte (ed.), *Good Faith in Contract and Property Law* (Oxford, 1999), 5–38.

in the shop: ‘You break it, you buy it!’ Should a problem of this kind arise in practice, it is definitely one of delict/tort, backed by insurance.

The second consequence of a different treatment of the pre-contractual and contractual stages in business contracts is the need for a suitable liability regime for ‘misbehaviour’ at the pre-contractual stage. I will briefly review the history of the second issue and its confusions, before I will get back to the first in a later section.

(2) The invention of *culpa in contrahendo*

In 1860, Rudolf von Jhering offered a comprehensive ‘systematic’ solution to the problem of pre-contractual liability.²² Jhering’s ideas did not enter into a legal void. The *ius commune* of his time operated with two simple cornerstone concepts. There was an extensive theory of error that would lead to contracts being rendered void. And there was the *actio de dolo* as a remedy for fraudulent practices. This regime, with obvious restrictions on the ‘delict’ side, stood in contrast to a vaguely formulated, broad liability for *culpa* in the *usus modernus* of the eighteenth century, the Prussian codification of 1794, the Code civil (in art. 1382, 1383), and also in Scots law.²³ Friedrich Carl von Savigny had summarised his critique of the old *culpa*-doctrine in a famous footnote, saying that ‘culpa’ as such cannot be a cause of action (for pure economic loss).²⁴ This resembles the contemporary English situation, restated later in the rule of *Derry v Peek* (1889).²⁵

I do not want to go into the details of Jhering’s doctrinal suggestions, using his concept of *culpa in contrahendo*. For our purposes it may suffice reporting that in the course of the debates of German codification (BGB, 1900) all problems, which Jhering wanted to tackle with his (technically: quasi-delict) liability scheme, were settled in the BGB, without using the general principle of

²² Jhering, ‘Culpa in contrahendo’. The whole volume of *Jherings Jahrbücher* was bound in 1861. However, the article appeared in the first issue in 1860. Jhering changed his methodological approach in 1861; hence, the date of appearance is relevant for understanding the motivation of the paper; see Erich Schanze, ‘culpa in contrahendo bei Jhering’, *Ius commune*, 7 (1978), 326–58.

²³ The key problem seems to be the many meanings of ‘culpa’ in the *practice* of these jurisdictions in the late eighteenth and the first half of the nineteenth century. Savigny’s disciple Hasse was, of course, working within the paradigm of the Historical School, interested in its use in classical Roman law (see n. 24 below).

²⁴ Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol. III (Berlin, 1840), 245 note (d); the issue had been treated in detail by Johann Christian Hasse, *Die Culpa des römischen Rechts* (1st edn, Kiel, 1815; 2nd edn, Bonn, 1838).

²⁵ *Derry v Peek* 14 AC 337 (1889, HL).

culpa. No ‘gap’ was left. But Jhering, who had moved from the small university of Giessen to Vienna and had become the hero of ‘Interessenjurisprudenz’, had invented a smashing legal slogan ‘*culpa in contrahendo*’ which would make its way into textbooks and decisions of the twentieth century, side by side with an extensive new understanding of good faith (s. 242 BGB). How could this happen?

(3) Levelling of risks and duties in an ‘organic’ contract theory

The key to a sudden pervasive use of *culpa in contrahendo* and good faith is a new general doctrine of contract law, rising in the twenties of the last century, which views contract as part of an ‘obligational organism’.²⁶ The ‘organic’ set of organisational rights and duties starts with the initial contact of the parties, goes through the phases of contracting to the execution, and resumes in post-contractual duties. In all phases, the parties owe each other duties of care. This was understood as a progress from libertarian theories of contract, in which, so goes the story, shrewd ‘horse-trading mentalities’ were prevailing. One of the dominating proponents, Franz Wieacker, speaks of making the law of obligations ‘socially sensible’ within a broader movement of a ‘materialisation of private law’.²⁷

One could trace this theory back to corporatist visions of the right and left of the first half of the twentieth century. What matters here, is not only the doubtful ‘social appeal’ and background of the theory,²⁸ but rather a strategic function of levelling the pre-contractual and the contract phases, thereby granting judges an almost unlimited *ex-post* discretion of formulating *ex-ante* duties of care for the contracting process. The incorporation of the theory into the revision of the BGB of 2002, particularly in the new sections 282 and 311a BGB, and the associated critical reaction of the courts of returning to their

²⁶ It starts, in our context, with a paper by Heinrich Stoll, ‘Haftung für das Verhalten während der Vertragsverhandlungen’, *Leipziger Zeitschrift* (1923), 532, goes on to Philipp Heck, *Grundriss des Schuldrechts* (Tübingen, 1929), 124, and would become an integral part of German writing in the 30s, as part of a ‘new’ law of obligations.

²⁷ The most significant postwar publication is Franz Wieacker, *Zur rechtstheoretischen Präzisierung des § 242 BGB* (Tübingen, 1956). See also Claus-Wilhelm Canaris, *Die Vertrauenshaftung im deutschen Privatrecht* (München, 1971); idem, ‘Wandlungen des Schuldvertragsrechts – Tendenzen zu seiner “Materialisierung”’, *Archiv für die civilistische Praxis*, 200(3/4) (2000), 273–364.

²⁸ On this, see the short account by Wilhelm Wolf, *Vom alten zum neuen Privatrecht* (Tübingen, 1998), 131–3.

case law before the enactment,²⁹ shows a part of the problems associated with this broad doctrinal move.

(4) ‘Dogmatic’ advantages and practical disadvantages

There were implicit ‘dogmatic’ advantages of levelling the difference of the pre-contractual with the contractual phase under the aspect of ‘social justice’. It would keep the different worlds of consumer contracts and business contracts within the scope of this ‘organic’ contract doctrine. It fitted particularly well for ageing codified systems and their commentators.

The ‘whole’ civil law codification is the prevalent scheme in the middle of Europe. Here, the new theory also helped preserving a superficial coherence of the technical organisation of contract law as part of a law of obligations in the code. Consumer law could be developed from, and attached to, notions of *culpa in contrahendo* and good faith. Case law and commentary had been built up, linked loosely, typically in ‘introductions’, to the relevant sections of the codes. In this format, consumer law could be smoothly annexed to the existing sets of general rules and rules for ‘contract types’ in most existing private law codifications of the various European member states. Some of the associated problems became apparent when the European (EC and EU) consumer directives had to be transposed into the two legal orders of the UK which had kept their distance from notions of an ‘organic contract law’.³⁰

The practical disadvantage of maintaining an artificial coherence of consumer and business contracting has been the loss of competence for litigating major international transactions. The mix of classical contract rules with obligations originating in protectionary policies (making sense in a consumer context) created an environment of vagueness and surprise for the central question of contract drafting: ‘What will courts apply and enforce in fact?’ If the choice of law and jurisdiction will go to a public court instead of agreeing to commercial arbitration, it is unlikely that the case will be litigated in Amsterdam, Frankfurt, Paris, or Rome.

The Level of Care in the Pre-Contractual Phase

What should be the level of care to be exercised before the contract is concluded? Case-law in most jurisdictions indicates that acting negligently

²⁹ See above (n. 6).

³⁰ See e.g. the chapters in Hugh Collins (ed.), *Standard Contract Terms in Europe* (Alphen, 2008).

alone will not support claims for pure economic loss in view of frustrated expectations in the contracting phase. One of the conventional additional thresholds is the criterion of a ‘special relationship’ between the parties.³¹ It is invoked if a party acts with special professional competence which gives rise to special trust and confidence of the direct counterpart, or even third parties who are likely to be affected. On closer analysis, the majority of cases, in which out-of-pocket losses have been awarded, relate to situations in which, short of deceit, the action or omission has been an objectively determined (*ex ante*) *evident unlawful violation* of basic rules of fairness in a specified business context.³² This would be an expedient ‘bright-line’ rule against fraudulent practices which undermine the functioning of the negotiating process.

This concept is in line with the statement of Lord Rodger of Earlsferry, commenting on the restrictive application of good faith in Scots law. Discussing the report of Zimmermann and Whittaker on good faith in European contract law,³³ he argued that a return to the original meaning of the concept of good faith in the *bonae fidei iudicia* of classical Roman law (requiring the absence of *dolus malus*) might clarify its application in Scots law.³⁴ Is this a return to Savigny who seems to suggest that only *dolus in contrahendo* would be actionable? Not quite, because *dolus* implies a subjective element, bad intentions, thereby posing a burden of proof that, if taken seriously, will be frequently insurmountable. Liability for evidently unacceptable behaviour might be a better starting point for an analysis of frustrated expectations in the pre-contractual stage of business transactions than operating with duties of ordinary care (simple negligence), and then trying to upscale this standard with additional thresholds. Even if we maintain this approach, the facts, that the parties have entered into contract negotiations, and that their ‘reliance’

³¹ Since *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] All ER 575; see the comparative reports in Efsthathios K. Banakas (ed.), *Civil Liability for Pure Economic Loss* (London, 1996).

³² This is observable in the new interpretation of § 826 BGB. See Gerhard Wagner, ‘Commentary on §§ 826 BGB’ in *Münchener Kommentar zum BGB* (5th edn, München, 2009), notes 76–147 on various liability situations concerning pure economic loss; for the development of the concept within the context of ‘veil piercing’ see Erich Schanze, ‘Gesellschafterhaftung für unlautere Einflussnahme nach § 826 BGB’, *Neue Zeitschrift für Gesellschaftsrecht* (2007), 681–6.

³³ Published as: Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law* (Cambridge, 2000).

³⁴ Lord Alan Rodger of Earlsferry, speech at the occasion of the ‘Symposium on Good Faith in Contract and Property Law’ (Aberdeen, 30–31 October 1998), *author’s recollection*. He suggested: ‘Read Beseler!’ (Georg von Beseler, ‘Fides’ in *Atti del Congresso Internazionale del Diritto Romano*, vol. 1 (Padova, 1934), 133–67.)

has been ‘detrimental’, should not, as such, give rise to liability in a business context.

A Return to Formality – The Contracting Process and its ‘Rules of Procedure’

The secular tendencies of contract law in the nineteenth and twentieth centuries are opening up the contract typology, making all legally admissible contracts enforceable, and promoting the liquidity of transactions by removing most formal requirements. From this perspective, it should have been a matter of years in our lifetime that potential legal oddities like, for example, the doctrine of consideration in English and US contract law, would have disappeared without traces.³⁵ The simplicity, liquidity and noiselessness of consumer contracts with their disinterest in the person at the sales point, and ‘no-hassle’ policies, seems to underline this trend to informality.

However, there is a pronounced return to a new ‘procedural’ formality in business contracting over the last thirty years.³⁶ Negotiating processes of significant nature are accompanied by professional routines which frequently involve teamwork between contract and tax lawyers, accountants, business economists, and engineers. Law firms have developed professional methods of organising and accessing model files, checklists and memoranda for numerous transactions. The costs of negotiating are estimated; there are understandings about their distribution. There are preliminary agreements about secrecy and procedures for information exchange, or information production by independent experts. The point(s) when the arrangement will become binding is fixed in extended clauses. Special legal opinion is furnished for complex regulatory issues, such as, for example, antitrust, IP, or international tax matters. All steps of contracting are documented and ratified, although it is clear to the participants of this exercise that the final contract may not go through. Even minor standard transactions will receive a high formal attention which is being required and enforced by increasing in-firm or

³⁵ But see *Williams v Roffey Bros and Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512; Melvin A. Eisenberg, ‘The Principles of Consideration’, *Cornell Law Review*, 67(4) (1982), 640–65.

³⁶ See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, trans. Tony Weir (3rd edn, Oxford, 1998), 378. On the economic function of formality see Benito Arruñada, *Institutional Foundations of Impersonal Exchange. The Theory and Policy of Contractual Registries* (Chicago, 2012).

intra-firm compliance procedures. Macaulay's 'handshakes' and other rituals are happening, as a matter of business climate, but they are far from being essentials in present-day business contracting.

This short description of the contracting practices indicates the inadequacy of tackling this world legally in general terms of 'detrimental reliance'. It is an irony that even the American leading case on s. 90 of the Restatement (Second) of the Law of Contracts was obviously 'protecting' the wrong party. In *Hoffman v Red Owl Stores*³⁷ a closer study of all the records reveals that, if anybody, Hoffman would have to be blamed for breaking-off the negotiation process.³⁸ Hoffman was ingenious in staging the case in his favour, exploiting the organisational turmoil of the franchisor. Failure to meet professional standards in the business contracting process is hardly to be remedied in court proceedings.

An important recent English case illustrates the problem.³⁹ For thirty years, Baird Textiles had been in a close relationship with Marks & Spencer, delivering chain-store branded garments. The seasonal collections were ordered on a half-yearly basis. In late fall of 1999 Marks & Spencer informed Baird, without warning, that they would not order a spring collection, and declared the relationship terminated. Baird sued Marks & Spencer, asserting that, given the long-term arrangement, the chain store was, based on contract and estoppel, under a duty of giving reasonable notice. The judge dismissed the contract claim, but allowed appeal on the questions of an implied contract or estoppel. On appeal, the three judges unanimously denied the claim on both counts. In their carefully reasoned speeches they endorse the key argument of the judge that Baird was also interested in a flexibility of the relationship, and that it should not be the exercise of the court in this situation 'to seek to fetter business relationships', in other words, writing *ex post* a contract containing unknown terms for termination.⁴⁰ The reasons given by the Court of Appeal reflect the notion that the parties could have entered into a formalised umbrella agreement which is a standardised option in the drafting practice of current business contracting.⁴¹

³⁷ *Hoffman v Red Owl Stores, Inc.* 133 NW 2nd 267 (Wisconsin Supreme Ct 1965).

³⁸ See Robert E. Scott, 'Hoffman v. Red Owl Stores and the Myth of Precontractual Reliance', *Ohio State Law Journal*, 68(1) (2007), 71–102.

³⁹ *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ. 274, [2002] All ER 737.

⁴⁰ *Ibid.*, Mance LJ at note 76.

⁴¹ See Stefanos Mouzas, Michael Furmston, 'From Contract to Umbrella Agreement', *Cambridge Law Journal*, 67(1) (2008), 37–50; for the broader concept of 'symbiotic

Where Do We Go From Here?⁴²

There is every reason to contemplate new ‘metaphors’ for understanding contract and the contracting process in the twenty-first century. Let us think, for example, of workbench co-operations, joint ventures, turn-key contracts, mergers and acquisitions, or OTC swaps, terms which do not show up in standard contract textbooks. It may be a promising adventure for academia to follow the paths of international professional contract making, and also to study the risks and institutional mechanisms of the contracting phase in these contexts.⁴³ The theoretical approach matching this empirical project would be the interdisciplinary theory of incentive compatible contracting which has shown its promise in many studies on institutional design.⁴⁴

To be sure, professional contract making has long left the boundaries of national laws. It is also not confined to Europe, nor is it an immediate target for codification. The analysis, description, and ‘coding’ of the global practices in their regulatory contexts would offer an exercise for comparatists in which the old metaphor of ‘mixed jurisdictions’ could be reflected in a new light.

arrangements’ see *my* entry in the *New Palgrave Dictionary for Economics and the Law*, vol. III (London, 1998), 554–9; see also Erich Schanze, ‘New Directions in Contract Research’ in Børge Dahl and Ruth Nielsen (eds), *New Directions in Business Law Research* (Copenhagen, 1996), 61–72.

⁴² In ‘our’ Edinburgh year of 1967, Martin Luther King used this rhetorical question, and answered it with the felicitous phrase: ‘We must first honestly recognise where we are now’.

⁴³ See e.g. Schwartz and Scott, ‘Precontractual Liability’.

⁴⁴ See e.g. the seminal articles by Ronald J. Gilson, ‘Value Creation by Business Lawyers: Legal Skills and Asset Pricing’, *Yale Law Journal*, 94(2) (1984), 239–313; Ian Ayres and Robert Gertner, ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’, *Yale Law Journal*, 99(1) (1989), 87–130. On the co-operation between the disciplines for institutional design see Erich Schanze, ‘Legalism, Economism, and Professional Attitudes Toward Institutional Design’, *Journal of Institutional & Theoretical Economics*, 149(1) (1993), 122–40.

Thinking About Principles and Actions: Unjustified Enrichment in Scots and South African Law

Robin Evans-Jones

Restitution

Fritz Schulz in his book, *Classical Roman Law*, in a chapter entitled, 'Unjustified Enrichment and *Negotiorum Gestio*' remarks with reference to unjustified enrichment that:

The classical law was sound and cleverly contrived [...] but the compilers have completely ruined the classical law [...] This law is one of the worst parts of Justinian's law; it has confused and irritated generations of lawyers and exercised an evil influence on continental codifications down to our times.¹

Schulz then provides an overview of the 'the very simple classical law the compilers so horribly mutilated'.² He does so wholly by reference to the *condictio*. At that time it was an action (remedy) with a *formula* of its own for the recovery of a certain sum of money or a certain thing (*certum*) the ownership of which had been transferred by a *datio* from P (pursuer) to D (defender) under circumstances which the law required to be reversed. One example was the payment in error of a sum/thing that was undue (*condictio indebiti*). However, as Schulz himself recognised, the *formula* of the *condictio* had a condemnation for the return of exactly the same sum/thing that had been paid/transferred judged by reference to the moment of its receipt.³ It had a strictly restitutionary measure. This meant that, if bound to return the *certum*, D might have to give up more than the amount by which he was enriched. Therefore, when viewed from the perspective of Roman law, the *condictio* was not a claim of unjustified *enrichment* as represented by Schulz. Its understanding in this respect was to change in due course and the first steps in that direction

¹ Fritz Schulz, *Classical Roman Law* (Oxford, 1954), 611.

² *Ibid.*, 612.

³ *Ibid.*

were taken by Roman law. The modern French legal system still adheres to a restitutionary understanding of the *condictio* law which is distinguished from an enrichment claim *strictu sensu*.⁴ This was the position taken by early modern Scottish law as represented by Stair for whom the *condictio* was also a restitutionary and not an enrichment claim. However, in contemporary Scots law, because it is now subject to a defence of change of position, the *condictio* is a claim of unjustified *enrichment*.

Enrichment

‘Actiones in factum: condemnatio de eo (in id) quod ad eum pervenit or in id quod locupletiores facti sunt’

The origin of ‘enrichment’ is not in the *condictio* but in other remedies of Roman law which recognised a number of praetorian actions *in factum* in which the measure of recovery was formulated as the recovery of what remained of a benefit that had been received by a third party but that was now held by D (*in id quod ad eum pervenit*) or the *enrichment* which D had acquired under certain circumstances at P’s expense (*in quantum lucratus*).⁵ These were *ad hoc* adjectival responses to a range of fact situations and not a unitarily sourced body of law. However, when, very much later, ‘unjustified enrichment’ became recognised in its own right as a unitary source of obligations, a central identifier of its content was those claims which gave rise to an ‘enrichment’ measure of recovery. In other words, the measure ‘enrichment’ was (and still is) a central identifier of the law called ‘unjustified *enrichment*’. The development was complicated because of considerable fluidity in the understanding of the circumstances in which an enrichment measure of recovery should be recognised. Some instances in which Roman law had conceived of such a measure had come to be understood in wholly different terms. They, therefore, do not form part of the modern law of ‘unjustified enrichment’. However, to the opposite effect, some cases like the *condictio*, which had not given rise to an enrichment measure in Roman law, were later understood by some legal systems in such terms and

⁴ K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (3rd edn, 1998), 545.

⁵ See E. Levy, *Privatstrafe und Schadensersatz* (Berlin, 1915), esp. 88ff; Max Kaser, *Das Römische Privatrecht (erster Abschnitt)* (Berlin, 1955), 502, 523.

therefore they do now form part of ‘unjustified enrichment’. This is the case in Scotland and South Africa.

‘Unjustified’ Enrichment as a Source of Obligations: Beginnings

Pomponius is credited with the statement:

Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorum. (By the law of nature it is fair that no one becomes richer by the loss and injury of another).⁶

This statement of principle shows that classical Roman law had developed beyond ‘enrichment’ as a measure of recovery alone towards the idea of ‘(unjustified) enrichment’ as a source of obligations. Lenel traces the text’s origin to a commentary on the *condictio* which suggests that some of the applications of the *condictio* had come to be associated with the idea of the prevention of *enrichment* from a relatively early period.⁷ In time Pomponius’ statement became a fertile source of new law. Hallebeek has observed that it was realised that the maxim against allowing one person to be enriched at the expense of another ‘not only plays a role in legal reasoning, but is even suitable for actual application [...] This was even acknowledged already in Justinianic law’.⁸

Principle and the Development of Remedies

To begin with, the main formative influence of the principle against ‘enrichment’ was still manifested as a measure of recovery. The difference was that it was now extended to some new fact situations in which it was thought appropriate to prevent one person benefitting (being enriched) at the expense of another. Prominently, ‘enrichment’ came to be applied by Roman law as a novel measure within *negotiorum gestio*.⁹ Therein begins the history of the

⁶ *Digest*, 50.17.206. Cf. the related text *Digest*, 12.6.44.

⁷ Otto Lenel, *Palingenesia iuris civilis* (1889).

⁸ Jan Hallebeek, ‘Developments in Mediaeval Roman Law’ in Eltjo J. H. Schrage (ed.), *Unjust Enrichment, The Comparative History of the Law of Restitution* (2nd edn, Berlin, 1999), 59–120.

⁹ Max Kaser, *Das römische Privatrecht, die nachklassischen Entwicklungen* (Munich, 1975), 415.

actio negotiorum gestorum contraria (utilis) as an enrichment action.¹⁰ At this point in time ‘unjustified enrichment’ was too indistinct a conception to provide it with actionability in its own name. Rather, actionability was provided to the novel fact situations under the umbrella of a recognised remedy like the *actio negotiorum gestorum contraria* which was seen by some jurists as suitable for the application of an ‘enrichment’ measure in a particular, extended, fact situation. ‘Enrichment’ that had been a feature of the praetorian law was now recognised also by the *ius civile*. In its later history this special claim was applied by some legal systems to cases of unauthorised improvement of another’s property that could not be accommodated under the terms of the *condictio*.

Early Modern Period: Scots Law

Pomponius’ principle against unjustified enrichment provided a broad reference point as a source of new law. The first formal identification of unjustified enrichment as a unitary body of law was by Hugo Grotius in 1631.¹¹ The full recognition of unjustified enrichment as a distinct source of obligations in Scots law has been in the last thirty years (1985–2015), nearly four hundred years later than Grotius. As Lord Macmillan observed in *Fibrosa*, ‘The mills of the law [can] grind slowly’.¹² One major delaying factor was the influence of the writings of Stair (1681).¹³ His scheme of obligations drew from a theological tradition according to which obligations are ‘conventional’ (contract) or ‘obediential’ (owed to God). Stair, like Roman law, did not conceive of a body of law called unjustified enrichment. The subject matter that is now the contemporary law of unjustified enrichment is scattered within his titles on ‘restitution’ and ‘recompence’ which are sub-divisions of ‘obediential’ obligations formed, in line with the theological teaching, according to the content of the response, whether restitution, recompence (or reparation). This has now been closely studied by contemporary scholars and is well understood.¹⁴ However, Stair’s natural law classifications were not

¹⁰ See e.g. for Italian Law, Paolo Gallo, ‘Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile’ in Schrage (ed.), *Unjust Enrichment*, 275–88.

¹¹ Robert Feenstra, ‘Grotius’s Doctrine of Unjust Enrichment as a Source of Obligations: its Origin and its Influence in Roman-Dutch Law’ in Schrage (ed.), *Unjust Enrichment*, 197–236.

¹² *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 58.

¹³ Stair, *Institutions of the Law of Scotland* (1681), I.3.7–9.

¹⁴ D. Reid, Thomas Aquinas and Viscount Stair, the influence of scholastic moral

fully accepted by those who immediately followed him and the Roman law scheme of obligations sourced in contract, quasi contract, delict and quasi delict re-asserted itself over time. David Daube has shown that the form in which a law(s) is first cast can sustain its influence long after its original rationale has ceased.¹⁵ The Roman scheme did not wholly supplant that of Stair. What resulted over time was a mix of the two. Notable was the idea that what, for Stair, was the *response* of 'recompence' in a range of obediential obligations came to be understood as a group of *causes of action* in the Scots law of unjustified enrichment. A broader classification known as the three 'Rs' then became established that, depending upon the context, expressed either most of the causes of action *or* the responses of a body of law which was centrally, but, at the edges, only loosely, associated with the idea of 'unjustified enrichment'. Pomponius' principle again played a developmental role in the gradual pulling-together of disparate causes of action around a broadly conceived idea of 'unjustified enrichment'.

Peter Birks, in two articles written in the late 1980s, provided the diagnosis that was eventually to sweep away the classificatory muddles into which Scots law had sunk.¹⁶ He suggested that part of the cure lay in jettisoning causes of action like *condictio indebiti* drawn from the civilian tradition in favour of what he argued were the functionally superior 'unjust factors' of English law. He attracted supporters and opponents in Scotland. There followed a period of considerable academic debate and judicial activity. The results have been referred to by Niall Whitty as the Scottish 'enrichment revolution'.¹⁷ Its direction has been to affirm and develop the civilian foundations of Scots law and to begin to re-cast the classifications of the past. Part of its achievement, mainly due to Lord Rodger's judgment in *Shilliday v Smith* (1998),¹⁸ was to re-define the three 'Rs' as remedies/responses¹⁹ alone to which the causes of action of unjustified enrichment give rise. He also identified the *condictio* in its

theology on Stair's account of restitution and recompence, 29(2) (2008) *Journal of Legal History*, 189-214.

¹⁵ Daube, *Forms of Roman Legislation* (Westport, Conn., 1979).

¹⁶ Peter Birks, 'Six Questions in Search of a Subject – Unjust Enrichment in a Crisis of Identity', *Juridical Review* (1985), 227–50; idem, 'Restitution: A View of Scots Law', *Current Legal Problems*, 38(1) (1985), 57–82.

¹⁷ Niall R. Whitty, 'The Scottish Enrichment Revolution', *Scottish Law and Practice Quarterly*, 6 (2001), 167–85.

¹⁸ 1998 SC 725 ('*Shilliday*').

¹⁹ Lord Rodger identified them as remedies. It is thought that they are better understood to be 'responses' derived in origin from Stair. The remedy sought is the order of the court to make restitution or recompence.

various manifestations in Scots law as representative of a group of causes of action and *not* remedies. This had, in fact, been the position since the time of Justinian but was consistently mis-understood in Scots law by those who, due to the powerful iconography of classical Roman law, sought to re-invest the Scottish *condictio* with the remedial character that it had had in the formulary system of old Roman law. Lord Rodger's focus in *Shilliday* was exclusively on the *condictio* claims. He did not seek to enumerate what he saw to be the causes of action of unjustified enrichment as a whole nor did he consider their overall categorisation.

The purpose of this chapter is to examine two recent significant developments in the law of unjustified enrichment in Scotland that are major steps forward in the continuing enrichment revolution first remarked upon by Whitty: (1) the division of unjustified enrichment into groups of cases according to the *manner* in which the enrichment was acquired. This results from academic commentary on the law and needs to be explained further; and (2) the recognition, due to judicial activism, of *a general enrichment principle* that any benefit held by D at the expense of P *without a legal ground* is recoverable. Both developments import changes in the law which are challenging. However, each finds its origin, and therefore its initial justification at least, in the Scottish materials. Additionally, both resonate with equivalent understandings of unjustified enrichment in modern German law. Scots law in this context draws from the same historical materials as German law and there are perhaps lessons to be learnt from the German experience, not all of which are positive.

A further theme of the chapter is to examine briefly the debate concerning the recognition, or not, of what is commonly referred to as a general enrichment 'action' in contemporary South African law that would mirror the new 'general' cause of action in Scotland. In South Africa the law of unjustified enrichment seemingly had reached stability in its overall conception on civilian lines as expressed in the recent monographs of Daniel Visser²⁰ and Jacques du Plessis.²¹ This stability has now been challenged by Helen Scott who, in her more recent book, argues that the South African courts in fact adopt, and indeed should adopt (?) as functionally superior, an approach based to a significant degree on 'unjust factors' as developed by English law.²² The experience of Scots law shows that problems arise at the interface of

²⁰ Daniel Visser, *Unjustified Enrichment* (Cape Town, 2008).

²¹ Jacques du Plessis, *The South African Law of Unjustified Enrichment* (Claremont, 2012).

²² Helen Scott, *Unjust Enrichment in South African Law, Rethinking Enrichment by Transfer* (Oxford, 2013).

the unfamiliar “general” civilian concept “retention without a legal ground” with the individual causes of action of unjustified enrichment with which the Scottish judges trained in the common law method are more familiar. What does ‘retention without a legal basis’ actually mean and how does it fit within a *system* of unjustified enrichment which, over time, has developed without it and in a different direction?

From Actions to General Justiciability: Remedies to Rights

The later history of the civil law (including Scots law) saw the recognition, at a differential rate, of unjustified enrichment as a concept that expresses the core requirements of a unitarily conceived body of law that now stands alongside e.g. ‘contract’ and ‘delict’, as a source of obligations. A range of disparate fact situations was first provided with actionability in remedies (actions) of Roman law that in the civilian tradition rested on the authority of the text of the *Corpus Iuris Civilis*. In Scotland the break from Roman law was made by Stair who replaced it, partly at least, with the authority of a Christian God. A positive by-product of Stair’s revolution was to strip Scots law of much of the nomenclature of old Roman law drawn in origin from the formulary system, some of it obsolete even for late Roman law. ‘*Condictio*’ remains part of the language of contemporary Scots law but, as we are reminded by Lord Rodger in *Shilliday*, the term no longer has an ‘actional’ import but has long been representative only of causes of action understood as a *system of rights* to recover a benefit under defined circumstances.²³ The transition from ‘actions’ to ‘rights’ renders obsolete for modern law restrictions like that of the *condictio* of the formulary system to the recovery only of a *certum*. In a properly conceived law of unjustified *enrichment* any benefit that enriches D at the expense of P is recoverable in principle. The cause of action *condictio indebiti* therefore must now also encompass the value of the performance of an undue service (*incertum*) if D was enriched by its receipt. Again the point was made by Lord Rodger in *Shilliday*.²⁴ Proceeding still further, since unjustified enrichment is recognised by the Scottish courts as a source of obligations, it – in all its applications – is generally justiciable as a system of rights on the basis of that recognition alone. ‘Actions’ as previously understood should have no

²³ *Shilliday*, 728C–D.

²⁴ *Ibid.*, 727I–728A–D.

role to play. However, discussions of what is known as a general enrichment ‘action’ persist in modern Scots and South African law. It is a puzzling dynamic.

The general enrichment ‘action’ is nothing other than one of a number of general principles of unjustified enrichment. It is referred to in such general ‘actional’ terms because, centrally, it expresses a single criterion of liability (cause of action) for the whole of the subject area. For South Africa Du Plessis explains that the scope of the modern law of unjustified enrichment has been constrained by the recognition only of a limited number of individual claims defined narrowly in conformity with their Roman law origins.²⁵ As yet South Africa has not recognised a *general*, all-encompassing, enrichment ‘action’. If, as is likely, it is recognised in the future, it is argued that its major benefit will be to provide justiciability to fact situations which lie beyond the scope of the limited number of established claims. It may wholly supplant the established claims which all then become justiciable under its unitary terms or it may operate at a subsidiary level to them merely as a gap-filler.²⁶ A further benefit for South Africa in recognising the general ‘action’ is identified by Visser.²⁷ It will permit greater conceptual flexibility by enabling a redefinition of some claims in the light of developments in their understanding brought about by modern scholarship. He highlights ‘interference’ claims and argues that, because conceptually they are directed to the recovery of D’s gain, they should not be subject to the normal rule that P must have suffered a mirror economic loss.

Sub-Diving Unjustified Enrichment into Groups of Claims

Due to the influence of Stair, Scots law now distinguishes according to the nature of the response to which each claim of unjustified enrichment gives rise, whether ‘restitution’ or ‘recompence’.²⁸ Otherwise it has treated unjustified enrichment as a unity. By and large all the separate cases have been conceived in similar terms and subjected to the same general rules and principles. Since the law of unjustified enrichment itself lacked clear definition

²⁵ Du Plessis, *The South African Law of Unjustified Enrichment*, 1ff. For Scots law, see Martin Hogg, *Obligations* (2nd edn, Edinburgh, 2006), 237ff.

²⁶ See further below.

²⁷ Daniel Visser, ‘The Potential Role of a General Enrichment Action’, *Stellenbosch L.R.*, 20(3) (2009), 454–67, 461. Cf. for Scots law, *Exchange Telegraph Co. Ltd v Guilianotti* 1959 SC 19.

²⁸ *Institutions*, I.7–9.

until very recently, this is unsurprising. However, the 'enrichment revolution' has brought about major developments. Academic commentaries now recognise that although they are all expressions of 'unjustified enrichment', there are groups of claims in Scots law that have to be handled differently because they are conceptually and functionally distinct from each other in some significant respects.

The explanation for the existence of the 'groups' is that they were conceived as different causes of action in Roman law each with a distinct remedy of its own. They are brought together as expressions of unjustified enrichment only much later by modern scholarship. In Roman law the groups were the *condictio*, good faith possessor/builder on another's land, some acquisitions of ownership by D of what belonged to P without his permission, and payment of another's debt cases. The same groups are now identified, and distinguished from one another in Scots law, according to the *manner* in which the enrichment is acquired; whether by *deliberate conferral* of a benefit upon D by P; by P's *imposition* of a benefit upon D, by D's *interference* with the property and analogous rights of P and by D having had his *debt* or duty *discharged* by P under certain circumstances.

The identification of the groups by reference to the *manner* in which the enrichment was acquired is made by German law which in turn drew from Roman law. In Roman law the *condictio* required a '*negotium*' between the parties. The German Civil Code of 1900 gave '*negotium*' primacy by specific mention of those cases of unjustified enrichment received by a '*Leistung*' (deliberate performance) distinguished from a residual amorphous category of cases acquired 'in any other way' (*in sonstiger Weise*). Notwithstanding the wording of the Code that a benefit might be received in different ways (by performance or not) unjustified enrichment as a whole was then treated as a unity in the sense that all cases were subject to the same general rules.²⁹ In particular, a single criterion of liability in the form of a general enrichment principle or action was, and *ex facie* still is, applied in a unitary sense to all the cases. The principle is that any person who, at the expense of another, received a benefit *without a legal ground* (*ohne rechtlichen Grund*) is bound to restore it. However, unjustified enrichment is a composite of different groups of cases in which different party interests are involved. This was the important recognition of Walter Wilburg and Ernst von Caemmerer writing on German law commencing in

²⁹ There are some specific rules which only apply to the *Leistungskondiktion*: §§ 814, 815, 817, s. 2 BGB.

the 1930s.³⁰ Extrapolating from the approach of the Code which identifies the manner in which the benefit was acquired (*Leistung [...] oder in sonstiger Weise [...] erlangt* – what was received by performance or in any other way) they sub-divided what had been the amorphous ‘other’ group along the lines of its original Roman law constituents but now, under the influence of the Code, they identified each group by reference to the different manner in which the benefit was acquired. They also showed that the general principle ‘retention without a legal ground’ has to be understood differently depending on the group of cases to which it is applied. It is now accepted in Germany that the Code provisions on unjustified enrichment have to be understood in this way.

The groups of the contemporary law of unjustified enrichment originate in the different forms of action of Roman law but their description according to the manner of the enrichment is a modern innovation. The ‘manner’ descriptors are useful expressions of the essence of each group and therefore as the first signposts in understanding the law. For example, where property has been improved in circumstances giving rise to a cause of action they focus the initial enquiry on whether the enrichment resulted from a ‘*deliberate conferral*’ resulting e.g. from an *agreement* between the parties which went wrong, or, which is quite different, from an ‘*imposition*’ because an improver acted in the mistaken belief that the property was his own.

The differentiation between the groups has substantive value. For example, in most unjustified enrichment claims mirror ‘loss’ on P’s part is a necessary requirement. However, in an ‘interference’ claim, as where D knowingly used P’s property without right, at issue is the recovery by P of D’s unjustified *gain*. As noted by Visser, it is not essential that P should have suffered a mirror loss in such a case. No differentiation was made in Scots law between the groups at the time of the decision in *Exchange Telegraph Co. Ltd v Giulianotti* which explains why, in what looks like a clear ‘interference’ case, one reason for the rejection of P’s claim was that it had suffered no loss through D’s unauthorised use of its service.³¹

Sometimes the ‘manner’ descriptors are treated as statements of the causes of action of unjustified enrichment. This is incorrect. Thus, for example, the ‘deliberate conferral’ grouping in Scots law comprises the many *condictio* based

³⁰ Walter Wilburg, *Die Lehre von der ungerechtfertigten Bereicherung nach österreichischem und deutschem Recht* (Graz, 1934); Ernst von Caemmerer, ‘Bereicherung und unerlaubte Handlung’ in *Festschrift für Ernst Rabel*, vol. 1 (Tübingen, 1954), 333–401.

³¹ 1959 SC 19.

causes of action. The ‘imposition’ group comprises the causes of action built up upon the good faith possessor/improver paradigm *etc.*

Causes of Action and the General Enrichment Principle (Action)

As a result of recent judicial activism Scots law has recently recognised a single criterion of liability to which all causes of action in unjustified enrichment now conform that a benefit which is retained by D at P’s expense *without a legal ground* is recoverable. This is the general enrichment principle that is commonly referred to as the general enrichment ‘action’.

In *Shilliday*, Lord President Rodger said that:

[M]any [...] have pondered what is meant by unjust enrichment. While recognising that it may well not cover all cases, for present purposes I am content to adopt the brief explanation which Lord Cullen gave in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* at pp. 348–349: a person may be said to be unjustly enriched at another’s expense when he has obtained a benefit from the other’s actings or expenditure, *without there being a legal ground which would justify him retaining that benefit*.³²

Lord Rodger applied the principle only to the *condictio* cases. This was rapidly to change. Drawing from modern civilian legal systems, Lord Hope elevated what had been a broad principle in Scots law into a general principle. In the hearing of the appeal of *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* before the House of Lords (1998), he said:

The event which gives rise to the granting of the remedy is the enrichment. *In general terms* it may be said that the remedy is available where the enrichment *lacks a legal ground to justify the retention of the benefit*. In such circumstances it is held to be unjust.³³

The principle was then given a still wider application. In an English appeal before the House of Lords (1999), Lord Hope said that:

³² *Shilliday*, 727B–D. The emphasis is my own.

³³ 1998 SC (HL) 90 (*Dollar Land*) at 98H–I, 99E–F. The emphasis is my own.

[T]he underlying principle [...] is that of unjust enrichment. The purpose of the principle is to provide a remedy for recovery of the enrichment *where no legal ground exists to justify its retention*.³⁴

The concept ‘without a legal ground’ (*sine causa*) originated in relation to the *condictio*. The classical Roman jurist, Papinian, said that:

Haec condictio ex bono et aequo introducta, quod alterius apud alterum sine causa deprehenditur, revocare consuevit (this *condictio* which is based on the idea of what is good and fair enables a person to recover from another what the latter holds without a legal ground).³⁵

Papinian’s statement is taken from Justinian’s Digest title on the *condictio indebiti*. A more general formulation of the *condictio* is dealt with in Book 12.7 of Justinian’s Digest entitled, ‘*De Condictione Sine Causa*’ (*condictio* claim for what is retained without a legal ground). In the language of the *ius commune* the *condictio sine causa* has both a particular application (*sine causa specialis*) to facts which fall outwith the established claims and a general application (*sine causa generalis*) as ‘the common basis of all of the enrichment *condictiones*’. It has been used in both senses in Scots law since the earliest of times; *Findlay v Monro* decided in 1698 is a nice example.³⁶ The nominate *condictio* claims like e.g. *indebiti* supported by the *condictio sine causa* as defined is *the* system of the *condictio*. The system, its operation and its value for Scots law have been laid out in detail elsewhere.³⁷ As noted, Birks in his early work on restitution, founding on the decision of the Court of Session in *Masters and Seamen of Dundee v Cockerill*,³⁸ criticised the overly narrow operation of the *condictio indebiti* and recommended that it be jettisoned by Scots law in favour of the more expansive cause of action of English law, ‘mistake’.³⁹ However, he focused on one application of the *condictio* alone (*indebiti*) and ignored the wider ‘system’ of which the *condictio sine causa* is a part. *Masters and Seamen of Dundee* raises a problem of overly narrow pleadings and not of the limitations of the *condictio* when it is understood as a complete system.

³⁴ *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 409. The emphasis is my own.

³⁵ *Digest*, 12.6.66.

³⁶ Mor. 1767.

³⁷ Robin Evans-Jones, *Unjustified Enrichment, vol. 1: Enrichment by Deliberate Conferral* (Edinburgh, 2003), esp. ch. 6.

³⁸ (1869) 8 M. 278 (*Masters and Seamen of Dundee*), discussed further below.

³⁹ Birks, ‘Six Questions’; idem, ‘Restitution: A View of Scots Law’.

General Enrichment Principle: Different Meanings for Different Groups

The origin of the concept ‘retention without a legal ground’ is in the *condictio* alone in Roman law. In Stair it is also applied only to the *condictio*. This was its sole context where it was therefore a broad but not a general principle. Its recent elevation to a general principle is a major innovation for Scots law that has been brought about by leading judge(s), in particular by Lord Hope. The nature of the causes of action in the groups of enrichment cases is so different that if the application of the principle is to be ‘general’, then ‘without a legal ground’ has to be understood differently in relation to each group. This was recognised by German law in the 1930s. The *condictio* claims, broadly expressed, apply to cases where the parties have deliberately transacted for a legally recognised purpose (ground) that failed. *Condictio indebiti*, for example, applies where P deliberately conferred a benefit on D to discharge an existing debt or duty: e.g. P pays D £100 because he thinks that he owes him £100. If the payment discharges the existing debt D’s ground (right) to retain the money lies in the valid discharge. However, if the parties then discover that the debt had already been paid, because discharge of a non-existent debt is not possible, their purpose to discharge the debt with the second payment necessarily failed. Since there was no discharge D holds the money ‘without a legal ground’ and it is recoverable. The identification of the ‘ground’ in the ‘discharge’ is very different indeed from the meaning given to it e.g. in the recent decision in *McGraddie v McGraddie and Green*.⁴⁰ P had paid his son money to buy him, P, a house. His son (D1) and partner (D2) did not buy the house and used the money for their own purposes. The son was held to be in breach of a fiduciary duty and his partner liable in unjustified enrichment because she held the benefit ‘without a legal ground’. D2 had benefitted gratuitously from money to which P alone was entitled. The paradigm in unjustified enrichment is ‘interference’ with P’s property rights. ‘Without a legal ground’ signifies that the benefit was taken ‘without right’ as that is understood in relation to an ‘interference’ claim. No assimilation in this sense is possible with the meaning ‘failure to discharge’ in the *condictio indebiti*.

General Enrichment Principle: It is Not a Wholly New Beginning

In Scots law ‘retention without a legal ground’ now identifies the single

⁴⁰ [2010] CSOH 60; [2012] CSIH 23.

condition under which P has a right in unjustified enrichment generally to recover a benefit held at his expense by D. Its function as a broad principle in relation to the *condictio* claims has always been recognised by Scots law albeit, to date, sometimes in a haphazard fashion. One value of the judicial recognition of the general application of the principle is that it emphasises the importance of the ‘system’ of the law of unjustified enrichment as a whole of which the *condictio* is just one part. It also provides breadth to the *condictio* claims and a mechanism for flexibility while maintaining stability. New fact situations may arise which do not fit within the requirements of an established cause of action. They may nevertheless be recognised as generating a cause of action if they are expressive of the general principle.⁴¹ For example, *condictio indebiti* narrowly construed concerns the recovery of undue sums/things/services conferred in error as to legal liability. The *condictio sine causa* (retention without a legal ground) permits recovery of undue sums made under compulsion or in doubt as to legal liability. The common element which provides the stability in all of these cases is that the benefit must be *undue* and held without a legal ground in that sense. Flexibility is provided by the recognition that what is undue should be recoverable beyond cases of error alone; as in a case of doubt as to liability. ‘Doubt’ has long been recognised by Scots law – in the language of English law – as a sufficient vitiating factor to found a claim where the recovery of ‘undue’ is at issue.⁴² Where P *knew* that what he conferred was undue it is not recoverable in the absence of compulsion. ‘Knowledge’ cannot normally be assimilated with ‘error’ as a vitiating factor, whereas ‘compulsion’ and ‘doubt’ can.

Some Problems: *Condictio Causa Data Causa non Secuta* and Retention without a Legal Ground

All contemporary Scottish judges were educated to think of ‘unjustified enrichment’ only within the terms of the three Rs. Against that background the recognition of the general enrichment principle is a large step. Its ‘newness’ has led some judges to seek wholly fresh beginnings in the concept ‘retention without a legal ground’. For example, in a *condictio* context, where the conclusion is inappropriate, they have held that a legal ground which entitles D to retain what he received from P must be a *legally obligatory* transaction like a contract.

⁴¹ Evans-Jones, *Unjustified Enrichment*, vol. 1, ch. 6; idem, vol. 2, ch. 3.

⁴² Cf. *Balfour v Smith and Logan* (1877) 4 R 454.

The *condictio causa data causa non secuta* has had a complicated history in Scots law mainly because of its exposure to the idea that it lies in circumstances of ‘failure of consideration’. That apart, it is the claim to recover what is given for a future legal purpose out with contract that fails. For example, as in *Shilliday*, P repaired D’s house in anticipation of their marriage. The marriage did not take place. P recovered her expenditure to the extent that D was enriched thereby. It is of the essence of the claim that the future purpose that failed (marriage) is *not* enforceable: P was unable to force the marriage on D but she is entitled to recover benefits conferred on that ‘ground’ if it never took place. However, drawing from the principle ‘retention without a legal ground’ two recent cases before the Court of Session turned the ‘non–enforceability’ of the future purpose (ground) on its head by requiring that it must be legally obligatory. At issue in both cases was the determination of the time from when prescription begins to run. It was decided in each that, because P was not *legally bound* to enrich D when he/she did, prescription runs from the moment of the receipt of the benefit since from that moment there was also no legal ground for its retention. On a novel understanding of ‘legal ground’ in both cases a claim which, *ex facie*, had not prescribed was dismissed on the ground that it had prescribed.

(1) *Virdee v Stewart*⁴³

P, at her own expense but with some grant aid, built a house on the croft of her brother for use by her family and her brother when the house was not occupied. The house was completed in August 1994. In 2009 the relationship of the siblings broke down and P was excluded by her brother from use of the house. She raised a claim of unjustified enrichment for her costs. It was held that since the brother had no enforceable legal right to the house when it was built it was retained by him without a legal ground from that moment. The prescriptive period of five years was therefore seen to have run from 1994. However, the basis for D’s retention of his enrichment was the agreement with his sister (which was not conceived as a contract). The agreement failed in 2009 which is when the prescription should have started to run. The case was not appealed. If the claim had been successful it would have raised an interesting issue concerning the measure of recovery.

(2) *Thomson v Mooney*⁴⁴

⁴³ [2011] CSOH 50.

⁴⁴ [2012] CSOH 177.

In June 2005 P enriched D by a series of payments which he claimed were made in anticipation of marriage and continued co-habitation. The parties never married and in September 2007 they ceased to co-habit. P raised the *condictio causa data causa non secuta* to recover the money. D's defence was that the claim had prescribed. In the decision at first instance D's ground for retention of the benefit was approached from the perspective of the new general enrichment principle. The reasoning was that since P's payments were gratuitous (not legally enforceable) he could have recovered them immediately from D had he wished. The conclusion was then drawn that since D had never had an enforceable legal entitlement to the money, by definition she had had no legal ground to retain it from the moment of its receipt. P's payments had been made more than five years before the claim was raised and it was held that it had therefore prescribed.

(3) Retention without a Legal Ground: Possible Origins of the Idea that the Ground must be Legally Enforceable?

Lord Hope was partly, perhaps primarily, responsible for the recognition of the general enrichment principle in Scots law. In his leading judgment before the House of Lords in *Dollar Land* he identified a contract as a legal ground which entitles D to retain a benefit received by him at P's expense.⁴⁵ On the facts before the Committee the consequence was that it was by reference to the surviving lease contract between the parties that their dispute had to be resolved. This was important because the result based on the contract was very severe. For their investment of more than two million pounds in Cumbernauld shopping centre Dollar Land was held, under the terms of the contract, to be entitled to a return of £1 (one pound) *per* year for the next 125 years. It was probably from the presentation of contract as the paradigm 'legal ground' that the conclusion has been drawn elsewhere that a legal ground must be a legally enforceable transaction.

(4) Subsidiarity

Lord Hope was clear in *Dollar Land* that the law of unjustified enrichment is subsidiary to contract. This is well understood. Within the law of unjustified

⁴⁵ *Dollar Land* at e.g. 94D–F. The merits of the decision of the House of Lords is sometimes questioned; see Robin Evans-Jones, 'Thinking about Some Scots Law: Lord Rodger and Unjustified Enrichment' in Andrew Burrows, David Johnston and Reinhard Zimmerman (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013), 431–45.

enrichment the issue of subsidiarity arises at a number of levels. One concerns the standing of the general ‘action’. Martin Hogg has written that ‘it is not necessarily the case that [...] there is, or ought to be, a general anti-enrichment “action” [...] opinion is divided as to whether there should be a number of anti-enrichment actions or [...] a single general enrichment action’.⁴⁶ What Hogg means is that, once recognised, should the general ‘action’ supplant all the other long established claims under its unitary terms or should it remain subsidiary in that it is used only when absolutely necessary? Subsidiarity of the general claim is very strongly advised.⁴⁷ Firstly, it has been shown that it is not in fact unitary in meaning but has to be understood differently according to context. Secondly, it can too easily undermine the established law if it is not constrained. For example, to found a *condictio indebiti* P must prove that the benefit was received by D, that it was undue and conferred in error as to legal liability. The *condictio indebiti* may also certainly be expressed more succinctly in the terms of the general principle that D retains the benefit ‘without a legal ground’. However, if, instead of using it as a mere convenient shorthand, a court approaches the applications of the *condictio indebiti* from the perspective of the general principle alone, because it expresses only a single abstract condition (without a legal ground) the result can be to elide and confuse what are the more numerous conditions that need to be satisfied to found the claim.⁴⁸ In determining what is ‘unjustified’ and founds a cause of action, Birks made the point that the law looks downwards to the decided cases and not upwards to an unknowable justice in the sky.⁴⁹ In *Virdee* and *Thomson* examined above the general principle was treated as a wholly new beginning in the understanding of the cause of action even although its requirements as a *condictio* in Scots law have been well known for hundreds of years. The result was that unjustified enrichment had indeed set off in pursuit of an unknowable, or simply wrong, justice in the sky.

(5) Turning the Corner: Appeal in *Thomson v Mooney*⁵⁰ and Judgment of Lord Tyre in *Stork Technical Services (RBG) Ltd v Ross*⁵¹

The problems with the understanding of ‘legal ground’ in respect of the cause of action *condictio causa data causa non secuta* can be viewed as the inevitable early

⁴⁶ *Obligations*, 237–238.

⁴⁷ Cf. Hogg, *Obligations*, 237.

⁴⁸ Cf. Visser, ‘The Potential Role of a General Enrichment Action’, 456–8.

⁴⁹ Peter Birks, *An Introduction to the Law of Restitution* (Oxford, 1989), 19.

⁵⁰ [2013] CSIH 115.

⁵¹ [2015] CSOH 10A.

consequence of the major innovation which the recognition of the general principle represents. A greater judicial ease with the results of the enrichment revolution is evidenced by two more recent decisions.

(a) *Thomson v Mooney*

The decision at first instance was overturned on appeal. Drawing on the writing of Stair on the *condictio causa data causa non secuta* the Inner House of the Court of Session identified the failure of the parties' agreement as the moment from which prescription began to run and not the time of payment. It therefore held that P's cause of action had not prescribed:

so long as the cause in contemplation of which the enrichment was conferred is still in contemplation or still to be provided, and its accomplishment has not yet failed, the enrichment cannot be said to be *sine causa* (without a legal ground) and thus cannot be unjustified.

(b) *Stork Technical Services (RBG) Ltd v Ross*

Lord Tyre considered whether a claim for restitution is available to recover a payment made by one party to a contract for a reciprocation by the other that amounts to a failure of mutuality which is a breach of their contract. He stated that the law of Scotland is still in development and that the outcome is 'of more than academic interest'. In an insightful judgment he brought to an end the troubled history of the *condictio causa data causa non secuta* as the appropriate claim for restitution following rescission of a contract for a *serious* breach and he identified the right to restitution in such circumstances as founded in the law of contract, not unjustified enrichment. The restitutionary right which had been understood for many years to lie in circumstances of 'failure of consideration' in the law of unjustified enrichment was re-defined by Lord Tyre as resting on a 'failure of mutuality' within the contract.⁵²

General Enrichment 'Action': South Africa

Writing in 1985 Reinhard Zimmermann noted the 'cause célèbre' of *Nortje en 'n ander v Pool* where in 1966 the South African Appellate Division (now the Supreme Court of Appeal) rejected the idea of a general enrichment

⁵² See esp. R. Evans-Jones and J. A. Dieckmann, 'The Dark Side of *Connelly v. Simpson*', *Juridical Review* (1995), 90–101.

action.⁵³ The underlying policy consideration was that such an action would open the floodgates for judicial intervention'. However, Zimmermann argued persuasively in favour of recognition of the principle. He concluded his review of the issues in the following terms: 'There seems to be a valuable treasure of experience at hand once South African law has done what seems inevitable: recognised the general enrichment principle.'⁵⁴

Thirty years later the general enrichment action/principle has still to be recognised. Nevertheless the Rubicon, if such it ever was, has probably been crossed. Visser observes in relation to two recent decisions of the Supreme Court of Appeal, especially *McCarthy Retail (Pty) Ltd v Shortdistance Carriers CC*,⁵⁵ that they:

represent a watershed in the South African law of unjustified enrichment. By announcing that it would, when the next opportunity arose, recognise a general enrichment action, the Supreme Court of Appeal has made it possible to refashion this part of our law in a way which resonates with current values in our society, and which renders it responsive to modern commercial demands.⁵⁶

(1) *McCarthy Retail (Pty) Ltd v Shortdistance Carriers CC*

The respondent's truck had been damaged. It was taken to the appellant's garage where the respondent's (owner's) instructions were that it was not to be repaired until the respondent's insurers had given the go-ahead. Due to a misunderstanding between the appellant and the respondent's insurers, the truck was repaired without the go-ahead being given. The respondent's insurance claim was repudiated (albeit wrongfully). Subsequently the insurance claim prescribed. The appellant claimed from the respondent (owner) the cost of the repairs to the truck by way of an enrichment claim. The claim was dismissed in the Provincial Division. Before the Supreme Court of Appeal (SCA) it was held that: the case concerned a typical instance of necessary and useful improvements made to an owner's property without there being a contract between the repairer and owner. The appellant had been either a

⁵³ Reinhard Zimmermann, 'A Road through the Enrichment Forest', *Comparative and International Law Journal of Southern Africa*, 18 (1985), 1–20; citing 1966 (3) SA 96 (A).

⁵⁴ *Ibid.*, 20.

⁵⁵ 2001 (3) SA 482 (SCA).

⁵⁶ Visser, *Unjustified Enrichment*, 7.

lawful or *bona fide* occupier and on that ground it (garage) was entitled to the cost of the repairs from the owner.

The leading judgment was given by Schutz JA. He observed that the rich Roman source material has (to date) not led to an unqualified judicial recognition of a unified general principle of unjustified enrichment nor a general enrichment action.⁵⁷ Fear of a tide of litigation has constrained the recognition of the latter. In his view this fear has been misplaced because it fails to take into account that a general enrichment action is itself subject to constraints: ‘under a general action only very few actions would succeed which would not have succeeded under one or other of the forms of action or their continued extensions’. He identified the function of the general enrichment action as being to fill the gaps: ‘In a rare case where even an extension of an old action will not suffice I would favour the recognition of a general action. The rules governing it should not be too difficult to establish [...] We have been applying many of them for a long time’.

Schutz JA signalled that in due course South Africa will recognise a general enrichment action. Harms JA expressed ‘some diffidence’ on the point.⁵⁸ According to Schutz JA it is best treated as subsidiary to the established claims; its function will mainly be gap-filling. It should not initiate a wholly new beginning for unjustified enrichment. As regards its impact, he is conservative. Visser, by contrast, sees its potential as more transformative.

Conclusions

(1) Scotland

As a result of the recent ‘revolution’ – both academic and judicial – unjustified enrichment is recognised in Scots law as a source of obligations in its own right subject to a set of general principles stated within a new structure. In *Shilliday* Lord Rodger affirmed that the term *condictio* represents a cause of action alone and, building on the insight of Birks, he provided the judicial authority which has led to the solution of the classificatory muddles of the three Rs. The judiciary has recognised a general cause of action, ‘retention without a legal basis’. Most prominent in this regard has been Lord Hope. The recognition did not arise from the need to address a novel fact situation. It came about as an organic, natural, development of the law. Was it worthwhile? Views no doubt

⁵⁷ *McCarthy Retail*, 487E–J, 488–9.

⁵⁸ *Ibid.*, 496A–B.

differ. In this writer's opinion it is important in providing 'range' and 'system' to the law of unjustified enrichment. We may note that Visser has suggested that come the day of its recognition in South Africa, it will be the *Donoghue v Stevenson*⁵⁹ of the law of unjustified enrichment.⁶⁰ However, it has not been without problems. 'Retention without a legal ground' has complicated the landscape of unjustified enrichment in Scotland. There have been difficulties in understanding what it means and it has been treated by some judges as a wholly new beginning and not subsidiary to the established causes of action. Thereby it immediately started to go wrong. It is best treated as subsidiary as that has been explained.⁶¹

One big question remains: Why the revolution in which the judiciary has been so rapidly and usefully pro-active? When he held the Chair of Civil Law at the University of Edinburgh, Birks convinced the broad legal community in both England and Scotland of the importance of the 'new' subject 'unjustified enrichment'. The "revolution" in Scotland is a testament to the powerful personal influence of Peter Birks notwithstanding that he first argued for the development of the law in a different direction from that which has since been taken in Scotland.

(2) South Africa

Sixteen years after *McCarthy Retail* (2001) the general enrichment action has yet to be recognised notwithstanding many attempts by academics to foster it. Much has been made of the negative influence of the decision of the Appellate Division in 1966 in *Nortje en 'n ander v Pool*.⁶² Whether that is justifiable has been questioned elsewhere by this writer.⁶³

The recognition of a general enrichment action in South Africa will not occur as an organic development of the law as it has in Scotland. A special case that reveals a "gap" in the law is required. *McCarthy Retail* was not seen to be the right case because, according to the SCA, it did not raise a 'new' fact situation. It was treated as a "typical" improvements case in which the owner was the only person enriched, who, *ipso facto*, was therefore liable. Whether this conclusion was justified is open to question for a number of complex reasons which cannot be explored here. Some observations highlight the problem. The

⁵⁹ 1929 SC 461; 1932 SC (HL) 31; [1932] AC 562.

⁶⁰ Visser, *Unjustified Enrichment*, 12.

⁶¹ Cf. Hogg, *Obligations*, 237.

⁶² 1966 (3) SA 96 (A).

⁶³ Evans-Jones, 'Searching for "Imposed" Enrichment in Improvements'.

owner of the truck was made to bear the risks deriving from the relationship garage-insurance company even although he had had no dealings with the garage. Yet, Mr Dinkel, the garage proprietor, was described as an impatient and impulsive man who could easily have jumped to the conclusion that he had the authority to repair when in fact he did not.⁶⁴ Furthermore, the owner had paid the insurance premiums and so, to that extent at least, by being held liable in full to the garage for the repair costs he was made to “double-pay”. In the circumstances it seems to this writer that some attempt should have been made to balance the interests of the owner and the garage. The easy classification of the facts as a “typical” improvement case allowed a too easy attribution of all risks to the owner of the truck.

Over a long period of time the Appellate Division/SCA has refused to recognise a general enrichment “action” because it fears academic and judicial “over-creativity” which, as Birks described it, would lead to an unknowable justice in the sky. The recent experience of Scotland confirms that, to begin with at least, such a fear may not be misplaced. Yet there is perhaps some irony in the fact that arguably the SCA was overly creative in *McCarthy Retail* in seeking to maintain the *status quo*. Its purpose in presenting this as a “typical” improvements case was to reach a fair solution in which the owner was not allowed to get off “scot-free”.⁶⁵ He certainly did not get off scot-free; quite the opposite. Yet quite where the justice of the result lies seems rather elusive.

⁶⁴ Ibid., 486. This judgment of the character of Mr Dinkel was made by the judge of first instance.

⁶⁵ I am very grateful to Philip Hellwege, Jacques du Plessis, Helen Scott and Euan West for their comments.

Partial Ademption

Roderick R. M. Paisley

David Carey Miller had a deep knowledge of property law in both Scotland and his native South Africa. Alongside that he retained a wide interest in legal systems outside those beloved jurisdictions. His interest was enriched by the longstanding friendships he struck up, across generations, with legal scholars in many countries. I first knew him as my teacher in Roman law and he later became a valued colleague and good friend. I dedicate this essay to his memory.

Introduction

Ademption is a doctrine shared by many legal systems but in all of them much is left unexplained. This is particularly so with partial ademption despite its practical importance. In terms of the doctrine of ademption a special legacy (a legacy that relates to a specific thing¹) may lapse in certain circumstances. Broadly stated, these are as follows. If, after the date of the making of the legacy and before the testator's death, the subject of the legacy ceases to be owned by the testator because it is alienated – sold or given away – or ceases to exist, then the legacy lapses. Variants of doctrine are found in both Civilian and Common Law jurisdictions and it is therefore no surprise that it is encountered in the mixed legal system of Scotland. As special legacies relate to those specific items picked out by the testator for especial treatment in his will – where the testator wants a specific thing to go to a specific person – they are usually high monetary value items or items of particular sentimental value such as jewellery or a house or a living creature. If misunderstood the doctrine has the potential to have unforeseen catastrophic effects particularly on special bequests of financial derivatives and similar products where the provider of such investments frequently has

¹ This is known in some jurisdictions as a “specific legacy”.

the power unilaterally to alter the form and substance of the investment. Although the examples in the various authorities noticed in this article largely relate to physical objects the significance of the doctrine of ademption will be perceived if the potential application to financial derivatives and investments is borne in mind. Such are likely to be the means whereby wealth in increasingly greater quantity is transferred across generations in future years. It is therefore essential that the doctrine of partial ademption is better known and its effects accurately predicted by those who draft testamentary documentation. The deep obscurity with aspects of the law of ademption, particularly partial ademption, in recent years, has tended to lead modern lawyers to advise clients not to use special bequests.² This has the direct effect that a major tool necessary to effectuate testamentary intention in respect of particularly valued items is underused. For the first time in the published literature this article seeks to establish the relevant doctrinal law to remove some of the considerable obscurity in this important area and to assist in restoring special bequests to their rightful place in the panoply of tools available to testators.

Background Doctrine: A Very Brief Overview

A great divide exists between two underpinning theories behind the doctrine of ademption. Although subtle variations do arise in particular jurisdictions, in general this divide may be described thus. On the one hand, the “Intention theory”, underpinning the rule found largely in Civilian legal systems, maintains that the special bequest is adeemed only if the lifetime alienation by the testator was voluntary and there was *animus adimendi* (the intention to adeem). There is also a separate caduciary rule in many Civilian systems in terms of which a bequest may be lapse if it is frustrated by destruction of the thing. This operates regardless of intention, but, as many similar issues arise, it is convenient to examine it alongside the rules of ademption whilst noticing that it does exist to deal with both total and partial destruction. In Common Law systems when an item ceases to exist as part of the testator’s estate the bequest will adeem regardless of what his intention was. This sort of rule is based on what is known as the “Identity theory”. In essence, from the perspective of a Civilian jurist, the caduciary rule has swallowed up ademption in Common Law jurisdictions. Legal rules based respectively

² I have come to this conclusion after speaking to numerous practising lawyers across Scotland over the last ten years.

on the Intention and Identity theories may occasion different consequences. However, both have to grapple with the common problem of partial alienation and destruction of the thing bequeathed. In this regard knowledge of the solutions offered in the various traditions can assist those seeking to understand and apply the law in any legal system. This is particularly true for Scots law which, to the disgust of Professor T. B. Smith (1915–1988)³, jumped the fence from a Civilian to a Common Law approach to ademption.⁴ He condemned the Scottish transfer of allegiance as:

“...a series of Scottish cases in which the Roman and English law were alike misunderstood and the latter was imitated.”

He concluded ruefully:

“Scots law has been heavily influenced by the English doctrine on the subject of ademption, and has accordingly surrendered certain principles of Roman law.”

As expected, the existing Anglophone literature on ademption concentrates solely on the Identity theory and, typically, there is only a passing reference to the original Civilian sources. That shortcoming is addressed in this article and the relevant passages are identified, quoted and analysed with a view to stating the effect of the doctrine today. In addition, the complex practical issues associated with partial ademption in a contemporary context are addressed in this article. This is the first time this has been done in the published literature. The sources used in this article are deliberately chosen to assist comparative analysis. Not only is reference made to the European *Ius Commune* but, contrary to academic fashion stretching back over a century, this article makes extensive use of American reported cases, from both Common Law and Civilian jurisdictions and also cites case law and statute from India. Lawyers in the two greatest democratic Republics in the world have much to teach their Scottish counterparts.

³ T. B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962), 442–4.

⁴ *Pagan or Plomer v Pagan or Lowell* (1838) 16S. 383; 13 Fac. 330, case no. 48; *Watson Chalmers v Robert Chalmers and others* (1851) 14D. 57; (1851) 24 Sc. J. 19; 1 Stuart 19.

Partial Ademption: The Problem Defined

Ademption may be partial where, after the bequest is made and before the testator's death, there is partial destruction of the thing bequeathed or where the testator disposes of part of the subject matter of the legacy. This rule is subject to an important proviso. The thing bequeathed must be of such a nature as to allow partial destruction or partial alienation.⁵ Partial ademption is also known as ademption *pro tanto* referring to the fact that the extent of the ademption is generally intended to match the extent of the alienation or destruction. In principle, partial ademption can be admitted across all jurisdictions that recognise ademption regardless of whether they base their doctrine on the intention of the testator⁶ or on the existence of the asset.⁷ It also applies *mutatis mutandis* to a separate caduciary theory based on impossibility or frustration upon destruction of the thing. This should not suggest, however, that all jurisdictions must necessarily reach identical conclusions in particular cases where partial ademption is claimed to have occurred. A number of difficult value judgments must be made when applying the rules applicable to partial ademption and, in making these, there is a margin of tolerance within the established principles. It is also fair to say that some values may have changed over time so that whilst old authorities may illustrate the application and development of principles, a modern court might not reach the exactly same conclusion on the same facts.

Consistent with their different methods of legal analysis and development, the rule of partial ademption tends to be illustrated in case law in the Common Law tradition on the one hand and set out in the writings of the Civilian tradition on the other. In the latter, the most famous passage is contained in the *Institutes* of Justinian:⁸

⁵ This is examined below in the text at footnotes 48–85.

⁶ E.g. Roman law: Justinian, *Institutes*, 2.20.12; *Digest*, 30.1.8 pr. (Pomponius); 30.1.65 pr. (Gaius); 33.7.27(3) (Scaevola); Roman Dutch law: Voet, *Pandects*, 30–2, 52; 34, 4, 2 translated in Percival Gane, *The Selective Voet* (8 vols, Durban, 1955–1958) vol. 5, 148 and 249; South African law: M. M. Corbett, H. R. Hahlo, G. Hofmeyr, E. Kahn, *The Law of Succession in South Africa* (2nd edn, Cape Town, 2001), 107.

⁷ Of course, specific laws could be enacted in a particular jurisdiction to limit or restrict the generality of this statement.

⁸ Justinian, *Institutes*, 2.20.12 translated in T. C. Sandars, *The Institutes of Justinian* (7th Ed., 17th Impression, London, 1934), 231.

<i>Si vero quis partem rei legatae alienaverit, pars, quae non est alienata, omnimodo debetur, si non adimendi animo alienata sit.</i>	If, again, a part of the thing given is alienated, the legatee is of course still entitled to the part which remains un-alienated, but is entitled to that which is alienated only if it appears not to have been alienated with the intention of taking away the legacy.
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In his commentary on this passage the Roman Dutch jurist Arnold Vinnius (1588–1657), having dealt with the ademption of the whole of a legacy, observed as follows:⁹

<i>Hoc omnino praecedentibus est consequens: nam quod juris est in toto quoad totum, idem etiam valere debet in parte quoad partem. Et ideo si pars tantum rei legatae alienata sit, pars, quae non est alienata, semper debetur. Quae alienata est, debetur, aut non debetur, prout eam animo adimendi aut non adimendi alienatum esse constabit.</i>	This is the inevitable consequence of the foregoing: for what is the law as regards the whole applies equally to part thereof. And therefore if part only of the subject of a legacy is alienated, the part which is not alienated remains due. Whether what is alienated is due [to the legatee] or not depends on whether it is established that it was alienated with an intention to adeem or not to adeem.
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Many other Civilian jurists took the same view.¹⁰ To describe partial ademption as an inevitable consequence of the recognition of the possibility of total ademption is, however, somewhat of an overstatement. It is more accurate to say that the possibility of partial ademption is the usual consequence of the recognition of a general doctrine of ademption. Indeed, qualifications to the general position do exist. In some particular cases the possibility of partial ademption may be excluded and these will be explored later in this article.

⁹ Arnold Vinnius, *Institutionum Imperialium Commentarius*, (4th edn, 2 vols, Amsterdam, 1665) vol.1, 436 citing *Digest*, 6.1.76 (Gaius), 30.1.6 (Julian) and 30.1.8 pr. (Pomponius). The translation is that of the present author.

¹⁰ E.g. the German jurist Caspar Manz (1606–1677), *Commentarius Ratio-Regularis In Quatuor Libros Institutionum* (4th edn, Nürnberg, 1722) Book 2, pages 493–4, para. 10.

Basis of the Rule

Some of the rigours of the doctrine of ademption may be mitigated by the recognition of the possibility of partial ademption. One could argue that partial ademption is to be regarded as one manifestation of, or, at least, a complement to, a presumption against ademption. That said, there is no clear authority that such a presumption exists in Scots law and other jurisdictions vary on the point.¹¹ Whatever the position in that regard, a legal system's recognition of partial ademption signals a desire to avoid an "all or bust" approach to ademption. It indicates a willingness to place some limits on the effects of ademption so that the beneficiary ultimately receives a part, although not the entirety, of what was originally bequeathed.

Some Civilian writers¹² find a basis for the doctrine of partial ademption in the following passage from the Roman jurist Celsus recorded in the *Digest*.¹³ Others¹⁴ seek justification in the writing of Gaius also recorded in the *Digest*.¹⁵

¹¹ The debate in the Civilian tradition is noticed in Simon van Leeuwen (1626–1682), *Censura Forensis*, edited by Gerard de Haas, (Leiden, 1741), 234–5, 3,8,41 and in the South African case *Oelrich v Beck* NO 1920 OPD 209 at 212–3. For a startlingly unqualified observation from the Common Law tradition see *White v Winchester* 6 Pick. 48, 23 Mass. 48, 1827 (Supreme Judicial Court of Massachusetts) at 56 per Wilde J.: "It is however clearly settled, that the alienation of a specific legacy is presumptive proof, and it is strong proof, of an intention to adeem". The legislative attempts to curb the excesses of the identity theory have not resolved the matter; see specific provisions in certain American States e.g. Montana Code Annotated 72–2–616(1)(f) Official Comments stating that it gives rise to a "mild presumption against ademption by extinction" commented upon in *Holtz v Diesz*, Supreme Court of Montana, (2003), 316 Mont. 77, 68 P.3d 828 at 88 and 835 respectively per the opinion of the Court delivered by Justice Patricia O Cotter.

¹² See, e.g. the German jurist Johann Jacob Wissenbach (1607–1665), *Exercitationum Ad Quinquaginta Libros Pandectarum* (4th edn, Leipzig, 1673), 641, para. 8; Simon à Gronenewegen van der Made, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia* (Nijmegen, 1664), 213.

¹³ *Digest*, 6.1.49(1) (Celsus).

¹⁴ See, e.g. the Spanish jurist (active 1635–1650), Antonio Torres y Velasco, *Institutiones Hispanae Practico-Theorico Commentatae* (Madrid, 1735), comment on Justinian, *Institutes*, 2.21.11 on page 307.

¹⁵ *Digest*, 6.1.76 (Gaius) translated in T. Mommsen, P. Krueger, A. Watson (eds), *The Digest of Justinian*, (4 vols, Philadelphia, 1985), vol. 1, 211. The reference is sometimes coupled with *Digest*, 30.82.3 (Marcellus) see, e.g. the German jurists Wolfgang Adam Lauterbach (1618–1678), Ulrich Thomas Lauterbach (1655–1710), *Collegii Theoretico-Practici a Libero Vigesimo Pandectarum*, Part 2, (Tübingen, 1723), 944, para. IX.

<i>Quae de tota re vindicanda dicta sunt, eadem et de parte intelleganda sunt, officioque iudicis continetur pro modo partes ea quoque restitui iubere, quae simul cum ipsa parte restitui debent.</i>	Our statements about <i>vindicatio</i> of a whole thing should be understood to apply equally to that of a part, and the judge would, as a matter of course, order that anything be delivered together with the part should be delivered proportionally.
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In their application to ademption, however, these statements somewhat beg the question of what the beneficiary is entitled to in the first place? They also ignore the important qualification that the taking away of a part may so transform the remainder that the remainder no longer can be regarded as part of the original.

The policy of the law may be stated in terms of fairness and such a formulation was proffered by the Roman Dutch writer Johannes Voet (1647–1713) when he asserted that a legatee is still entitled to the principal item bequeathed even if certain of its accessory parts are destroyed:¹⁶

<i>Aequum ergo non fuit, pereunte eo, quod erat accessorium, extinguí legatum ius, quod principale est</i>	It was therefore not fair that the legacy of the main thing should be wiped out when the thing which was accessory perished.
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That policy of seeking fairness may still hold good in modern legal systems, whether based on the Intention or Identity theory, albeit in the latter, where ademption is equiparated with a caducuary or impossibility doctrine leading to the lapse of a bequest, unfair consequences are irrelevant.¹⁷ This tends somewhat to undermine the assertion that fairness is a basis for partial ademption in those jurisdictions although one could possibly regard it as a means to mitigate loss.

In jurisdictions that espouse the Intention theory of ademption one strong candidate for a possible basis for partial ademption is the approach that the testator's actions mirror his intention. This is evident from the observation of the French jurist Jean-Marie Ricard (1622–1678) to the following effect:¹⁸

¹⁶ Voet, *Pandects*, 6.1.28 translated in Gane, *The Selective Voet*, vol. 2, 240.

¹⁷ Civilian systems may indeed have such a doctrine applicable, for example, to cause the lapse of a bequest of a ship that sinks, but this is not regarded as an instance of ademption. Ademption in Civilian systems leads to revocation of a bequest not lapse.

¹⁸ Jean-Marie Ricard, *Traité des Donations entre-vifs et Testamentaires*, (dernière édition, 2 vols, Paris, 1701), vol. 1, 484–485, para 273 citing Justinian, *Institutes*, 2.20.12; *Digest*, 24.1.32(15) (Ulpian); 30.8 pr. (Pomponius); 35.1.33(3) and (4) (Marcianus). This is the

<i>Si le testateur a aliéné partie de la chose léguée, & qu'il ait conservé l'autre, on presume suivant les mêmes règles qui viennent d'être établies, que sa pensée suivy son action, & qu'il a eu dessein de revoquer le legs à proportion de l'alienation qu'il en a fait, de forte que le surplus es dû au légataire.</i>	If the testator has alienated part of the thing bequeathed and is he has also retained the other part, one presumes following the same established rules that his intention conforms to his action and he had intended to revoke the legacy in proportion to the alienation which he made with the effect that the part remaining is due to the legatee.
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There is one further, significant, possible basis of the rule of partial ademption which is attractive to modern legal systems that emphasise the centrality of the will of the testator in the law of succession. Just as ademption itself may be seen as being grounded in the actual or inferred intention of the testator, (as per the Intention theory), or, alternatively, (in the Identity theory), although not based in actual intent, as likely to be consonant with the wishes of a reasonable testator, so too can one regard the limits on ademption given effect to by the possibility of partial ademption. Indeed, if the testator has shown his favour to a beneficiary by making an initial bequest of an item to that beneficiary, one may presume that he (and any reasonable testator) would wish the legatee to receive something despite a marginal or peripheral change of circumstances. Of course, the highlighting of the autonomy of the testator leads to one further qualification. Having caused partial ademption of a specific bequest, a testator is free to consider matters once more and to alienate or destroy the remainder of the thing bequeathed so that total ademption ensues. This was recognised by the Huguenot jurist François Hotman (1524–1590):¹⁹

<i>Pars rei legatae non alienato, quamvis altera pars adimendi animo alienata sit, debetur tamen. Si ex toto fundo legato testator partem alienasset, reliquam dumtaxat partem alienari placet.</i>	When a part of thing bequeathed has not been alienated, although the other part has been alienated with an intention to adeem the bequest, the part that has not been alienated is nonetheless due [to the legatee]. If a testator alienates part of a complete farm, it is lawful for the remaining part up to all of what is left to be alienated.
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translation of the present author.

¹⁹ François Hotman, *Commentarius in Quatuor Libros Institutionum Iuris Civilis* (Basle, 1560), 241, commenting on Justinian, *Institutes*, 2.20.12 and citing *Digest* 30.8 pr. (Pomponius) and 30.6 (Julian). Hotman became John Calvin's secretary in Geneva.

Examples

Partial ademption and the caduciary rule relating to destruction may be exemplified by reference to cases decided in various jurisdictions and illustrated by the observations of jurists and other legal commentators. In all of the cases outlined below the bequest in question must be a specific or special bequest and the will must lack a suitable anti-ademption provision that would otherwise provide a substitute gift to the beneficiary in lieu of what has been alienated or destroyed.

If a whole farm is specially bequeathed and the testator alienates a part the legatee is entitled to the rump.²⁰

If a building is bequeathed and then burned or pulled down the legatee is entitled to the site.²¹

Where the testator dies shortly after an accident involving the car that he has specially bequeathed, a legatee to whom “my car” is specially bequeathed will be entitled to the car in its damaged state and not to its value undamaged or the insurance proceeds arising.²²

If a testator bequeaths a particular flock of sheep and some of them die the legatee is entitled to the remainder. If all of them die except one, the legatee is entitled to the single remaining sheep²³ and the argument that a

²⁰ *Digest*, 30.8 pr. (Pomponius) and 34.4.2(2) (Pomponius). See, e.g. the Indian case *G. Moorthanna v G. Chinna Ankiah* AIR 1975 AP 97 at para. 9 per Sambasiva Rao, J. (Andhra High Court) and the Texas case *San Antonio Area Foundation v Lang* 35 S.W. 3d 636 (2000) (Supreme Court of Texas). Cf. *Rose v Rose*, Appeals Court of Massachusetts, 80 Mass. App. Ct. 480 (2011) where the bequest adeemed *quoad* the rump also because the testatrix voluntarily combined its title with another plot of land. See also the Western Australian case *Borlang v The University of Western Australia* [2001] WASCA 425; *The Public Trustee as Executor and Trustee of the Estate of Mary Agnes Horsfall v Hallee and others* [2000] WASC 262 (property sub-divided and amalgamated with adjoining properties).

²¹ *Digest*, 30.1.22, (Pomponius) commented upon in Voet, *Pandects*, 6.1.28 translated in Gane, *The Selective Voet*, vol. 2, 1955, page 240.

²² See the American case *In re Barry's Estate*, 208 Okla. 8, 252 P.2d 437 (1952) (Supreme Court of Oklahoma) where the legatee was entitled not to the receipts under the insurance policy but to the value of the damaged car because, after the death of the *de cuius*, the insurance company exercised an option under the insurance policy to take ownership of the damaged car. See Allan Jay Garfinkle, *Wills – Descent of Insurance Proceeds Covering Extinguished Specific Bequests* (1953–1954) 33 *Nebraska Law Review* 116–8.

²³ See the English writer Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes* Part VII (London, 1590), § xx “Of ademption of legacies”; 281, para 20; the French jurist Jaques Cujas (1520–1590), *Opera Ad Parisienem Fabrotianam Editionem* (13 vols,

single sheep does not amount to a “flock” is to be ignored.²⁴ It is only when the last sheep has died that the bequest will adeem fully. As is stated by the French Jurist Jean Domat (1625–1696):²⁵

<p>... si d'un troupeau de boeufs ou de montons leguez il n'en restoit aucun au temps de la mort du testateur, mais seulement les cuirs ou la laine, le legataires n'auroit à ces restes.</p>	<p>... if, a herd of cattle or a flock of sheep being bequeathed, there should not remain any one of them at the time of the testator's death, but only the hides or the wool, the legatee would have no right at all to these remains.</p>
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Where an animal is left in a special bequest but takes ill or is injured after the date of the will and remains in this state at the testator's death the legatee is entitled to the animal in its unhealthy or injured state and cannot demand that the executor takes steps to cure any illness or heal any injury.²⁶ Clearly, however, a positive duty on the executor to prevent animal suffering and a consequent liability for failure to act may arise under relevant provision for animal welfare. Whether the costs of such veterinary attentions fall on the legatee in the specific bequest or on those entitled to the estate as a whole is a separate matter.²⁷

A legatee to whom a library of books is bequeathed will be entitled to those books that survive a fire during the testator's lifetime or are damaged in the same fire but, as regards the books destroyed in the fire, the legacy will partially adeem.²⁸ Even if the ashes have a commercial value the legatee will not be entitled to them.

Prato, 1836–1844), vol. 2, *In Lib. II Institut. Justiniani*, page 923, § 18.

²⁴ *Digest*, 30.1.22 (Pomponius) commented upon in Voet, *Pandects*, 6.1.28 translated in Gane, *The Selective Voet*, vol. 2, 240. C.f. *Digest*, 7.4.31 (Pomponius); Henry Swinburne, *A Briefe Treatise of Testaments and Last Willees*, Part VII, § xx “Of ademption of legacies”, 281, para. 20.

²⁵ Jean Domat, *Les Loix Civiles Dans Leur Ordre Naturel*, (2nd edn, 3 vols, Paris, 1695), vol. 3, 661, 4.2.11.18. The translation is provided in Jean Domat, *The Civil Law in Its Natural Order*, (translated by William Strathan), ed. Luther Stearns Cushing, (Boston, 1850), vol. 2, 581.

²⁶ *Viz Digest*, 30.1.45(1) (Pomponius) relative to the health of a slave.

²⁷ In general this will be determined by the provisions of the will.

²⁸ See the New York case *In re Hilpert's Estate*, 165 Misc. 430, 300 N.Y.S. 886, (Surrogate's Court, Kings County, New York, 1937). The legatee was not entitled to the proceeds received under the policy of fire insurance effected on the books.

Similarly where a testator bequeaths certain farming implements and disposes of some of them prior to his death the legatee will be entitled to those farming implements as were not disposed of by the testator during his life.²⁹ The same has been held as regards slaves in at least one pre-civil war case in South Carolina³⁰ although human beings are now regarded in that particular jurisdiction, as also in Scotland and elsewhere, as *extra commercium* and incapable of being owned or the subject of a bequest.

So too partial ademption occurs where a testator receives payment in his lifetime of part of a specially bequeathed debt.³¹ The payment may come in the form of a dividend upon the debtor's insolvency³² or a payment from trustees or suitable insolvency practitioners appointed to distribute the estate of a defunct corporation.³³

If a testator purchases furniture (or some other thing) by spending part of a sum of money that he has clearly designated in his will and specifically bequeathed to a person the legatee will be entitled only to the unspent money.³⁴

Where the contents of a particular bank account have been specifically bequeathed but the testator withdraws and spends part of the sums at his credit, the legatee will be entitled to the balance.³⁵

A bequest of "the proceeds of sale" of a particular property will adeem to the extent that the proceeds have been dissipated after sale.³⁶

²⁹ Viz the Maryland case *Brady v Brady* 78 Md. 461, 28 Atl. 515 at 518–9 per Roberts J, Md. 1894 (Court of Appeals of Maryland).

³⁰ *Bailey v Wagner*, 2 Strob. Eq. 1, S.C.App. Eq. 1848. (Court of Appeals of Equity of South Carolina).

³¹ See the comments of Lord Elchies in the unreported case of *Hugh Ross of Holm v His father's widow*, 12 February 1742, noted in *Presbytery of Kirkcudbright v Alexander Blair*, 12 June 1740, Elch. Vol. II, "Legacy" No. 10 on page 241. Cf the English case *Fryer v Morris* (1804) 9 Ves 360; 32 Eng. Rep. 641 and the observations of the Vice Chancellor Sir John Stuart in *Clark v Browne* (1854) 2 Smale & Giffard 524; 65 Eng. Rep. 510 at 528 and 513 respectively. See also the illustrations to the Indian Succession Act 1925, Chapter XVI, ss.155 and 156; B.B. Mitra, *The Indian Succession Act*, ed. M. N. Das, (13th edn, Calcutta, 1997), 216.

³² For English authority see *Asbburner v Maguire* (1786) 2 Br. C.C. 108; 29 Eng Rep. 62.

³³ Viz the decision of the Chancery Court of New York in *Walton v Walton* 7 Johns Ch. 258, 2 N Y Ch Ann 286, 11 Am.Dec. 456, N Y Ch 1823.

³⁴ See the Mauritius case *Robin v Robin* (1941) MR 106.

³⁵ Viz the Irish case *Re Lyster: Toole v Hamilton* [1901] *New Irish Jurist and Local Government Review*, Vol. 1, page 221.

³⁶ Viz the Vermont case *In re Barrows' Estate*, 103 Vt. 501, 156 A. 408 (1931) (Supreme Court of Vermont).

Where a testator bequeaths one hundred shares to a single beneficiary in a form that is regarded as a specific bequest but, prior to his death, sells ten of them the legatee is entitled to the ninety.³⁷

Where a testator bequeaths a certain value of government bonds but, prior to his death, a third of these have been redeemed by the government, the legacy will adeem to the extent of one third.³⁸

Where shares are the subject of a special bequest and, after the making of the will, the rights attached to those shares are curtailed with new shares issued in compensation for the loss of rights, the original shares (as curtailed) will pass at death but not the newly issued shares.³⁹

Where a testator disposes *inter vivos* only of a *pro indiviso* share of the property right in the subjects of a specific bequest the bequest can be sustained to the extent of the *pro indiviso* share retained by him at death.⁴⁰

If the testator's will provides a beneficiary with the option of taking one of two separate items but, prior to death one of the items no longer is part of the testator's estate, the first alternative choice in the option will adeem but the beneficiary will remain free to chose the second.⁴¹

A testator may bequeath a stamp collection to a beneficiary and prior to his death give away some of the individual stamps within the collection. The bequest is adeemed as regards the stamps given away but the beneficiary is entitled to the remainder.⁴²

If the testator bequeaths property described by reference to a specific use such as "my farm" at a stated address and, after the date of the will, part of the geographic area occupied by the farm is converted into another use, it is arguable that the specific bequest of the farm may adeem to the extent of the

³⁷ *Torrance v Torrance's Trs.* 1950 SC 78; 1950 SLT 106 per Lord Patrick *obiter* respectively at 101 and 117. *Viz* the English cases *Partridge v Partridge* [1736] Cases T. Talbot 226; 25 Eng. Rep. 749 respectively at 227 and 750 per Lord Chancellor Talbot; *Humphreys v Humphreys*, (1789) 2 Cox 184; 30 Eng Rep. 85; *Re O'Brien; Little v O'Brien* (1946) 115 LJ Ch 340; 90 Sol Jo 528, 175 LT 406; 62 TLR 594. There is a similar position in Massachusetts: *White v Winchester* 6 Pick. 48, 23 Mass. 48, 1827 (Supreme Judicial Court of Massachusetts).

³⁸ E.g. the American case *Taylor v Hull* 121 Kan. 102, 245 P. 1026 Kan. 1926 (Supreme Court of Kansas).

³⁹ See the English case *Re Kuypers; Kuypers v Kuypers* [1925] Ch. 244.

⁴⁰ *Thomson's Trustees v Lockhart* 1930 SC 674; 1930 SN 62; 1930 SLT 377. See also *Digest*, 30.1.5(1) (Paul referring to Labeo).

⁴¹ *Findlay's Executor v Findlay's Trs* 1921 1 SLT 247. *Viz* the American case *Industrial Trust Co. v Tidd*, 49 R.I. 188; 141 Atl. 464 (1928) (Supreme Court of Rhode Island).

⁴² See *Clark's Executor v Clark* 1943 SC 216 at 219 per Lord Patrick.

land converted to the other use.⁴³ The basis for the application of the doctrine of ademption is that the lands of which the use has changed have ceased to conform to the description in the will. However, a contrary view may be put forward to the effect that the continued agricultural use of any part of the subjects is not an essential precondition of inheritance and, provided all parts of the subjects can be identified, the beneficiary is entitled to inherit the whole regardless of the actual use.

Where a testator bequeaths a particular ornament in which various precious stones are mounted but, prior to his death, takes out some of the precious stones and puts them to another use, the legatee in the specific bequest of the ornament will be entitled to the ornament under exclusion of the precious stones that have been removed.⁴⁴

If a testator bequeaths the moveables given to him by his brother but thereafter disposes of a portion of them the beneficiary will be entitled to the remainder whilst the bequest will adeem as regards the proportion of moveables disposed of.⁴⁵

Susceptibility to Partial Ademption

The proviso, noticed above,⁴⁶ is that partial ademption will operate only if the thing bequeathed was of such a nature as to allow partial destruction or partial giving or taking away.⁴⁷ In considering the susceptibility of an item to partial destruction one may have regard to both the physical and legal natures of the item on the one hand and the wishes of the testator expressed within the will on the other. Although these two matters are theoretically wholly distinct, we shall see that they do have an impact one on the other.

⁴³ *In re Henderson's Estate*, 197 Misc. 468, 94 N.Y.S. 2d 693 N.Y. Sur 1950 (Surrogate's Court, Munroe County, New York).

⁴⁴ See, e.g. Voet, *Pandects*, 34.2.6 and 34.4.2 and translated in Gane, *The Selective Voet*, vol.5, 231 and 249.

⁴⁵ E.g. the Sri Lankan case *Mohammed Cassim v Mohammed Hassen*, 1927, 29 NLR 89 at 93 per Dalton J.

⁴⁶ See text at footnote 5.

⁴⁷ The relevant passages in the Roman authorities apply to express or implied revocation by contrary deed (see *Digest* 34.4.2(1) (Pomponius); 34.4.14(1) (Florentinus)) but were clearly understood in Roman Dutch law to apply to ademption generally (see Voet, *Pandects*, 34.4.2; Gane, *The Selective Voet*, vol. 5, 249). Scots law would take the same approach as Roman Dutch law.

Partial Ademption – Nature of the Item

Partial ademption in the context of ademption by alienation presupposes that the rules of property law in the legal system governing the transfer of the property in question permit the relevant thing to be partially alienated. If partial alienation as regards a particular item of property is not legally competent or is limited, the potential for partial ademption is commensurately excluded. There are potentially a multiplicity of reasons for which property may be regarded as indivisible or divisible only in certain ways. These vary considerably from jurisdiction to jurisdiction.⁴⁸

A distinct issue is where partial alienation or destruction of a thing is permitted by the relevant legal system but, contrary to the normal rule, the rules of ademption so treat the nature of the thing bequeathed that they do not require the extent of the surviving bequest to mirror exactly the extent of what survives the lifetime destruction or alienation. This may be seen as a qualification of the general rule that partial ademption is *pro tanto*.

Living Things

Living things present distinct challenges for the doctrine of ademption. A living thing, such as an animal or a plant, may be the subject of a specific or special bequest. The fact that such a thing was living as at the date of the making of the will may be particularly relevant to the issue of partial ademption. As we shall see below, it is not the case that a legacy of a living thing is incapable of partial ademption in any respect.

Some examples are relatively simple to deal with. If a particular potted plant is bequeathed, but is pruned and thereby has a number of branches removed after the date of the bequest but before the testator's death, the legatee will be entitled to the living plant but not the cut off branches. The living plant remains but the cut off branches cease to be part of the plant. In principle this remains the case even if the cut off branches are used as living cuttings for the purposes of propagation of more plants and not as

⁴⁸ An example relating to the indivisibility of a servitude in Roman law is seen in *Digest* 8.1.11 (Modestinus) and *Digest* 34.4.1 (Paul). See also *Digest* 7.6.1(1) (Ulpian); 34.4.3(6) (Ulpian) and 34.4.14(1) (Florentinus). See also the recognition that ademption could not create for a person the status of being partially free: *Digest*, 34.4.14(1) (Florentinus). See further Porcius Azo (1150–1230), *Summa Azonis Locuples Iuris Civilis Thesaurus*, ed. Henricus Draesius (Venice, 1566), 1089, paras 6 and 7 *In II Librum Institutionum – de Ademptione Legatorum*, & Translatione.

dead wood for kindling or burning. So too if an orchard of fruit trees is bequeathed and a crop of apples is taken from the trees prior to the testator's death the legatee will not be entitled to the apples but will be entitled to the orchard and the trees. Likewise, if a bequest is made of a specific cow but the animal is injured and has a leg amputated before the testator's death, the beneficiary will remain entitled to the three legged cow. In all these cases there is partial ademption. So too if a testator who has bequeathed a complete tree, cow or dog may alienate a share in the property right in the same prior to his death and the remaining *pro indiviso* share in the living thing will be due to the legatee.⁴⁹

A different issue arises, however, where the living thing dies or is killed prior to the testator's death. The animal or plant originally described in the bequest may otherwise remain physically intact but is dead. It is in this context that the interaction between the nature of the subject bequeathed and the operation of doctrine of ademption may be illustrated. A similar issue may be observed as regards human beings owned by others in the jurisprudence of legal systems that have admitted human slavery.⁵⁰ However, even in those jurisdictions, a legacy of a free human being was excluded.⁵¹ Such bequests are incompetent in Scotland as slavery has never been legally recognised and both living human beings⁵² and human corpses⁵³ are regarded as *extra commercium*.

It is generally accepted in Common Law,⁵⁴ Civilian⁵⁵ and mixed legal

⁴⁹ *Digest*, 30.1.6 (Julian).

⁵⁰ In one nineteenth century American case ademption applied when a bequeathed slave was killed: *Ross's Executor v Carpenter*, 9 B.Mon. 367, 48 Ky. 367, 50 Am.Dec. 513 (1849) (Court of Appeals of Kentucky). The legatee was not entitled to the damages received from a third party by the testatrix for the loss of the slave as a result of the trespass on the slave. For the effect of the death of a slave on a legacy to the slave, and a bequest of his *peculium* and *vicarii*: *Digest*, 30.1.107 (Africanus); 33.7.22, 33.8.1 and 4 (Paul); 33.8.12 (Julian). See also Voet, *Pandects*, 30-32.52 translated in Gane, *The Selective Voet*, vol. 5, 148–9.

⁵¹ Voet, *Pandects*, 30.1.30 translated in Gane, *The Selective Voet*, vol. 5, 1956, page 126.

⁵² *Joseph Knight v John Wedderburn*, 15 January 1778, M. 14545. For a stimulating analysis: John W. Cairns, *Freeing From Slavery in eighteenth Century Scotland* in Andrew Burrows, David Johnston, Reinhard Zimmermann (eds.), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013), 367–82. See also John D. Ford, Stair's Title "Of Liberty and Servitude" 135-158 in *The Roman Law Tradition*, eds. A.D.E. Lewis and D.J. Ibbetson, (Cambridge, 1994).

⁵³ *Anent the Arresting of Corpses*, 1 June 1677, 3 B.S. 136 which appears to record a discussion amongst advocates and refers, *inter alia*, to *Digest*, 31.49 pr. (Paul).

⁵⁴ For England see *Stanley v Potter* (1789) 2 Cox 180; 30 Eng Rep. 83 at 182 and 84 respectively per Lord Chancellor Thurlow.

⁵⁵ See mediaeval Spanish law: *Las Siete Partidas* Part VI, Title IX, Law XLI, translated by

systems⁵⁶ that the death of the thing bequeathed causes ademption of the bequest, at least where the testator has made no contrary provision in the will. A suitable rationale is that the completed process of death brings a marked and irreversible change to the animal in question. It is no longer an animal. It has ceased to be animated.⁵⁷ It is not the case that the body of a dead animal is *extra commercium*. The possibility of such a change on the animal's death can be foreseen and accommodated in the wording of a special bequest. A bequest of "dead stock" (which may be encountered in relation to farming businesses) is valid as regards animals that are living as at the date of the will but dead and in the form of mere carcasses at the testator's death.⁵⁸ A testator may expressly leave a bequest of an animal whilst it is alive and its remains if it dies. Both such bequests involve situations where the testator envisages that an animal alive at the time of the will might die before his own death. Such expressed intention will prevent the application of ademption occurring on the death of the animal but not, of course, if the carcass were to be burned, buried or subject to some other process of change.

Roman Dutch Law – A Development

Where no such express testamentary provision is made by the testator, one could argue that death of an animal is a mere partial destruction in that, after death, there remains a carcass. The argument could then run that the carcass is derived from the living animal and the beneficiary is entitled to that – however unlikely it might be that he would wish to claim the same.⁵⁹ The

Samuel Parsons Scott, (ed. Robert I. Burns, S.J.), *Las Siete Partidas: vol. 5, Underworlds: The Dead, The Criminal, and the Marginalized* (Philadelphia, 2001), 1255.

⁵⁶ Baron David Hume, *Baron David Hume's Lectures, 1786-1822*, (6 vols, *Stair Society* vols 5, 13, 15, 17, 18, 19, Edinburgh, 1939-1958), vol. 5, 228; C de B Murray, *The Law of Wills and Succession* (Edinburgh, 1945), 105.

⁵⁷ The word *anima* is Latin for living spirit or soul.

⁵⁸ *Digest*, 36.2.28. (Scaevola). See the New Zealand case *Re Starr (Deceased)* [1926] GLR 465. For a wider construction of the term in a Common Law jurisdiction: *In the Estate of Henry McGrath* (1975) 23 W.I.R. 406 at 413 per Parnell, J (The Supreme Court of Jamaica).

⁵⁹ There is the potential (albeit the present author would put the matter no higher than that) for the basis of such an argument in *Digest*, 6.1.49(1) (Celsus) quoted above in the text at footnote 16. See the German jurist Johann Jacob Wissenbach (1607–1665), *Exercitationum Ad Quinquaginta Libros Pandectarum* (4th edn, Leipzig, 1673), 641, para 8; and the Roman Dutch jurist Simon à Gronenewegen van der Made (1613–1652), *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia* (Nijmegen, 1664), 213.

Roman Dutch position, as indicated by Voet,⁶⁰ equiparated the flesh, hide and horns of a bequeathed ox to the rubble of a house that has been pulled down. Consequently, in Voet's view, the legatee as regards the living ox was entitled to the animal's remains.⁶¹ If one were to accept this approach and admit the possibility of partial ademption, there is a further complication. If the corpse has been subject to the attentions of a taxidermist and remains the property of the *de cuius*⁶² as at his death difficult issues might arise as to whether the thing bequeathed has totally ceased to exist upon the creation of a new *res*. A new thing will clearly exist where the carcass has been the subject of work and has been turned into fertilisers, clothes, furniture or ornaments. Unfortunately, no detail is given in the Roman Dutch writings as to why such a view developed.⁶³ However, what this view of Voet, shared with others in the Roman Dutch tradition like Simon à Groenewegen,⁶⁴ does indicate is that the Civilian tradition could move on and adapt old laws to suit local and more modern conditions.

The Civilian Mainstream

The Roman Dutch view just described was not in the mainstream of the writers of the European *Ius Commune*, the vast majority of which adhered to the approach of the *Digest*⁶⁵ (which will be set out below). For one school of

⁶⁰ See also the discussion in Simon à Groenewegen van der Made, *A Treatise on the Laws Abrogated and no Longer in use in Holland and Neighbouring Regions*, edited and translated by B. Beinart, (3 vols, Doornfontein and Johannesburg, 1975), vol. 2, 220, on *Digest*, 6.4.49.

⁶¹ Voet, *Pandects*, 30.1.52 referring to *Digest* 6.1.49(1) (Celsus) and 30.1.22 (Pomponius) but not to *Digest*, 31.49 pr. (Paul). See also Voet, *Pandects*, 6.1.28 citing *Digest*, 30.1.53(5) (Ulpian) and *Digest*, 31.49 pr. (Paul). In the latter passage Voet justified his approach on the ancient distinction between legacies of vindication and condemnation. See also Simon à Groenewegen van der Made, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia* (Nijmegen, 1664), 213.

⁶² This is an abbreviation of the expression *de cuius hereditate agitur* meaning "the one whose estate is at issue."

⁶³ For further discussion see the French writer, Jaques Cujas (1520–1590) in Jacobus Cujacius, *Opera ad Parisiensem Fabrotianam* (11 vols, Venice and Modena, 1758–83), vol. 7, 985.

⁶⁴ Simon à Groenewegen van der Made, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia* (Nijmegen, 1664), 213.

⁶⁵ See, e.g. the German jurist Johann Jacob Wissenbach (1607–1665), *Exercitationum ad Quinquaginta Libros Pandectarum* 4th edn, Leipzig, 1673), *De Legatis et Fideicommissa*, Book 2, page 641–2; the Portuguese jurist Petrus Barbosa (died 1606), *Opera Posthuma* (Geneva, 1737), 325; the German jurist Joannes Martinus Hertogh, *Dux ad Universum*

thought within this mainstream the parallel which informed their view was to equate the bodily parts of the dead animal with the planks of a dismantled boat. This particular example is to be found in passage of the jurist Paul preserved in the *Digest*.⁶⁶ Just as the legatee of a boat would not be entitled to the separate planks so too would the legatee of a live animal not be entitled to the body parts of the dead animal.⁶⁷ Nevertheless, the analogy is not exact. A dismantled boat may be restored by a boat builder but an animal cannot be brought back to life.

There is, however, another strand of analysis within the Civilian tradition in which may be seen the development of a more sophisticated, albeit still fundamentally traditional, approach that, in turn informs many modern legal systems. A brief survey of a number of selected Civilian writers will illustrate this development. The starting position for the Civilian tradition is the passage in the *Digest* recording the view of the jurist Paul.⁶⁸

<i>Mortuo bove qui legatus est neque corium neque caro debetur.</i>	When a bequeathed ox has died neither the hide nor the flesh will be due.
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The Accursian gloss⁶⁹ on this passage added remarkably little and was to the effect of illustrating the proposition by reference to an example:⁷⁰

Jus (Leuven, 1743), 186, 222 and 224; the French jurist Jaques Cujas, *Commentaries*, in Iacobus Cuiacius, *Opera ad Parisiensem Fabrotianem Editionem*, vol. 7, 17, comment on *Digest*, 6.1.49(1) (Celsus); 985, comment on *Digest*, 30.21 (Ulpian) and 22 (Pomponius); 1150, comment on *Digest*, 31.49 pr. (Paul); and André de Barrigue de Montvallan, *Traité des Successions, conformément au droit romain et des ordonnances du royaume*, (2 vols, Aix, 1780), vol. 1, 552: “*si un boeuf légué est mort, ni la peau ni la chair n’appartiennent au légataire*”. Notice the distinction with the partial destruction of a thing which is the subject to a vested obligation: see the French jurist Robert Joseph Pothier, *A Treatise on the Law of Obligations or Contracts*, translated by William David Evans, (2 vols, London, 1806) vol. 1, 440–3, Part III, c.6, Article IV.

⁶⁶ *Digest*, 32.1.8(2) (Paul).

⁶⁷ See, e.g. André de Barrigue de Montvallan, *Traité des Successions, conformément au droit romain et des ordonnances du royaume*, vol. 1, 552.

⁶⁸ *Digest*, 31.49 pr. (Paul). See also *Digest*, 7.4.30 (Gaius). Cf the duty of the heir for destruction after death: *Digest*, 30.1.53(5) (Ulpian) and the right of the owner during his life to recover the hide from a thief: *Digest* 13.1.14(2) (Julian). This is translated in Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 48.

⁶⁹ Franciscus Accursius (1182–1260) born near Florence and died at Bologna.

⁷⁰ *Infortiatum, seu, Pandectarum Iuris Civilis, Tomus Secundus, Commentariis Accursii* (Lyon, 1627), 937. The translation is that of the present author.

<i>Legavi tibi bovem: & ante diem cedentem mortuus est bos; non habebis tu legatarius neque corium vel carnem.</i>	I have made a bequest of an ox in your favour: and before the day on which the bequest vests in you the ox dies; as legatee you will be entitled neither to the hide nor to the flesh.
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The post-glossator Bartolus a Saxoferrato (1314–1357)⁷¹ went further. He sought to identify the rationale behind the given case. In distinguishing a bequest of an ox that subsequently died (where no part of the dead animal would be due) from a bequest of a destroyed house (where the legatee would remain entitled to the site) he observed:⁷²

<i>Re perempta non debetur mihi aliquid, intellige quando perit illud quod principalius erat in re, ut spiritus vitalis vel anima sensitive in bove.</i>	From the thing that is destroyed nothing is due to me if there is the distinguishing feature that the thing which perishes has as its principal characteristic the breath of life or animal sensation as occurs in the example of the ox.
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This criterion of distinction was further developed in later writers of the European *Ius Commune* such as the North German pandectist Johannes Borcholt (1535–1593). He examined the instance of the legacy of a house which then is destroyed before the death of the testator and concluded the site would be due to the legatee as the site was part of the house.⁷³ So too where a team of four horses trained to draw a chariot is legated and one of them dies before the death of the testator, the legatee would be entitled to the remainder as they are the remaining part of the team.⁷⁴ However, he distinguished a bequest of an ox that dies prior to the testator’s death in the following way:⁷⁵

⁷¹ He was professor at Pisa and Perugia.

⁷² Bartolus a Saxoferrato, *In Secundam Infortiati Partem* (Venice, 1570), *Ad Digest Lib. 31, Lex 50*. This is to be renumbered *Digest*, 31.49 pr. (Paul). The translation is that of the present author.

⁷³ This is a reference to the example given in *Digest* 30.22 (Pomponius). See also *Digest* 6.1. 49 pr. (Celsus).

⁷⁴ This is a reference to the example given in *Digest*, 31.1.65(1) (Papinian).

⁷⁵ Johan Borcholt, *Commentaria* (5th edn, Nürnberg, 1640), ed. Statius Borcholt (the author’s son), 105. The same passage is found in the edition prepared by the author: Johan Borcholt, *Commentaria* (Helmstadt, 1590), 90. The translation is that of the present author.

<p><i>At bove mortuo, qui legatus erat, nihil debetur, quia bos vivus legatus est, ejus vivi pars nulla superest. Caro namque, & corium nihil aliud sunt, quam bos mortuus. Et testator non legavit bovem vel vivum vel mortuum, sed vivum tantum. Itaque; legatarius vivum petere debet, non mortuum, & mortuo bove, nihil debetur.</i></p>	<p>But where an ox is bequeathed and it dies [prior to the testator's death], nothing will be due to the legatee, because it was a live ox that was bequeathed and nothing remains of the thing that was alive. For the flesh and the hide are not to be regarded as anything other than a dead ox. The testator did not bequeath the ox, dead or alive, but only insofar as it was alive. Therefore the legatee may seek the living thing but not the dead thing and, as regards the dead ox, no part of it is due.</p>
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To similar effect, although using for what would appear to be the first time⁷⁶ a particular manner of expression that subsequently would become very significant in the modern Common Law analysis of ademption, are the writings of two German jurists who wrote at the turn of the sixteenth and seventeenth century.

The first is Peter Heige (1559–1599) who observed:⁷⁷

<p><i>Non eadem est forma mortui pecoris, quae viventis, nec materia vel caro eadem, mutata autem forma & substantia rei perit.</i></p>	<p>The form of a dead flock is not the same as when [the animals were] alive, nor is the flesh of the animal the same material [as the live animal]. The thing that has died has changed in form and substance.</p>
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The second is Johann Harpprecht (1560–1639). He wrote as follows:⁷⁸

⁷⁶ Other writers had used part of the words when they referred only to the substance of the legacy e.g. the Spanish jurist Antonio Gómez (1501–1597), *Commentariorum variumque resolutionum iuris civilis communis* (3 vols, Frankfurt, 1702), vol.3, 178: “*Mortuo bove, qui legatus est, nec corium, nec caro debetur: quia ibi res ipsa animata, quae erat legata, est perempta, quae longe differt in substantia ab illa, quae remansit: & ideo nihil debetur.*” Still others referred to the “form” but not the substance: e.g. the Italian jurist Girolamo Cagnoli (active 1577–1585), *Commentaria Doctississima in Primam & Secundam Digesti Veteris* (Venice, 1566), 176: “*quia extincta est forma rei, quae consistebat ex anima sensitiva, propterea extinguitur legatum.*”

⁷⁷ Peter Heige, *Commentarii Super Quatuor Libri Institutionem Imperialum* (Wittenberg, 1603), 230.

⁷⁸ Johann Harpprecht, *Commentarius Institutionum Juris Civilis* (4th edn, 4 vols, Lausanne,

<p><i>Ubi mortuo bove, qui legatus fuerat, ita penitus extinguitur legatum, ut ne corium quidem, aut caro debeatur. Nam illic res ipsa animata, quae legata erat, vivo testatore perempta est: quae longe differt in substantia ab illa, quae remansit. Siquidem non eadem est forma mortui pecoris quae-viventis, nec materia vel caro eadem. Mutata autem forma, & substantia rei concidit.</i></p>	<p>Upon the death of an ox that was the subject of a legacy, that legacy is completely extinguished. For the former thing which itself was living is destroyed during the lifetime of the testator: and it differs markedly in substance from which remains. The reason for this is the form of a dead beast is not the same as it was when alive nor is the corpse the same matter as existed before. Moreover, a change in form and substance of the thing destroys what existed before.</p>
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The turn of phrase that has been alluded to above is the distinction between *forma* and *substantia*. Perhaps unwittingly, the foundation was laid for the future development of test of a “change in form but not substance” that was much later to be adopted and developed by lawyers in Common law jurisdictions albeit without any recognition of a debt owed to the Civilian tradition. That test is now at the core of the application of the rules of ademption in England and Wales⁷⁹ elsewhere in the British Commonwealth and in various American states.⁸⁰ This “form and substance” doctrine has also been applied by the courts in Scotland⁸¹ who derive it, almost certainly, from the Common Law sources and not the Civilian writings just noticed. It appears that the developments in the Common law world and the Civilian writings are an example of the two great traditions reaching a similar result in total isolation one from the other.

1748), vol.2, 719, para 12. The translation is that of the present author. See also 1748 edition, vol. 1, 49, para 17.

⁷⁹ The *locus classicus* of the expression of this doctrine is the much quoted observation of Cozens-Hardy M.R. in *In re Slater: Slater v Slater*, [1907] 1 Ch. 665 at 672.

⁸⁰ See Alvin E. Evans, *Effect of Corporate Transformations Upon Ademption, Lapse, and Fiduciary Appointments* (1940) 88 *University of Pennsylvania Law Review* 671–91; A W H T., Jr, Note, *Ademption by Extinction: The Form and Substance Test* (1953) 39 *Virginia Law Review* 1085–96; John C. Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost* [1971] 2 *Texas Tech Law Review* 194–233 at 199–203.

⁸¹ E.g. *Anderson v Thomson* (1877) 4R. 1101.

Common Law

The classical Roman position did, however, influence some individual writers in the Common Law at least prior to the full blown development of the Identity theory of Ademption in English law. In the sixteenth century Henry Swinburne (1560–1623), citing the provision in the *Digest*, quoted above, wrote:⁸²

“If the thing bequeathed do perish or be destroyed, the legacie is extinguished, and the legatarie destitute of remedie: For example; the testator doth bequeath unto thee his best ox, which ox is afterwards killed: In this case the legacie is extinguished, insomuch that neither the skin, nor the flesh, nor the price, is due unto thee”.

Although Swinburne was far more influenced by Civil law than most other English writers,⁸³ this statement is likely to reflect accurately the mainstream position of many Common Law jurisdictions.⁸⁴ Indeed, this may be illustrated by a nineteenth century Maryland case in which a specific legacy of all the cows owned by the testator failed because none of the cows living as at the date of the execution of the will of the testator were still alive as at the time of his death.⁸⁵ There is, however, no detailed discussion of the rationale of the rule in the case law or writing of commentators in the Common Law tradition as regards the death of animals. That said, the traditional mainstream Civilian reasoning identified above is readily capable of application to the Common Law context.

⁸² Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes* (London, 1590), 293, Part VII, § xxiii, 1. See also John Godolphin (1617–1678), *The Orphan's Legacy* (London, 1674), 305, Part III, c.20, para 18.

⁸³ Reference to *Digest* 31.49 pr. (Paul) occasionally occurs elsewhere in writings from Common Law jurisdictions e.g. John George Phillimore (1898–1865), *Principles and Maxims of Jurisprudence* (London, 1856), 348 but these are not generally to be regarded as mainstream publications.

⁸⁴ See the observation in *Warren v Shoemaker*, 4 Ohio Misc. 15, 207 N.E. 2d 419 at 19 and 422 respectively per Van Heyde, J (Probate Court of Franklin County, Ohio).

⁸⁵ *Brady v Brady* 78 Md. 461, 28 Atl. 515 at 518 per Roberts J. Md. 1894 (Court of Appeals of Maryland). For *dicta* to similar effect see *Ford v Ford* 3 Fost. 212, 1851 WL 4429 (N.H.) 1851 per Gilchrist C.J. (Superior Court of Judicature of New Hampshire); *Bool v Bool* 165 Ohio St. 262, 135 N.E. 2d 372 Ohio 1956 respectively at 268 and 376 per Judge Stewart (Supreme Court of Ohio).

Scots Law

There is no direct authority in Scots law as to the effect of the death of an animal that is the subject of a special bequest in the period between the making of the bequest and the death of the testator. However, Scots law is likely to take a similar approach to the traditional mainstream Civilian, noticed above: total ademption of the bequest. The rationale is likely to be the change in substance of the animal itself. Of course, a testator will be free to make provision in the will itself to exclude ademption in such a situation as the bodies of dead animals or their constituent parts are not *extra commercium* and may be bequeathed.

The Wider Principle – Primary and Ancillary Elements

Partial ademption occurring in the context of the termination of the life of a specially bequeathed animal may be regarded as but one example of the application of a principle applicable on a wider scale.

This principle is to the effect that partial ademption is excluded where an essential or primary component part of a particular bequeathed thing is destroyed or alienated.⁸⁶ What remains, it may be argued, is so altered that it is simply not the thing bequeathed and, at best, comprises only those things that were merely accessory to the primary thing bequeathed. As a result, ademption applies to the whole bequest including the accessory items.⁸⁷ By reference to the writings of Roman jurists collected in the *Digest*, this general principal was confirmed by the French writer André de Barrigue de Montvallon (1678–1779):⁸⁸

⁸⁶ Antonio Gómez, *Commentariorum variumque resolutionum iuris civilis communis*, vol.3, 178 and 193; M. Chalret du Rieu (Henri-Antonin), *Thèse pour la Licence, Faculté de Droit de Toulouse*, (available on Gallica Website, at <http://gallica.bnf.fr/accueil/?mode=desktop>), (1855), 7, § 4 referring to *Digest*, 31.1.49 pr. (Paul): “*Si vivo testatore res perierit, legatum inutile fit, nec quod adhuc extat legatarius consequi potest, quia accessio cedit principali; sic mortuo bove, neque corium, neque caro debetur.*”

⁸⁷ Unless, of course, the testator provides to the contrary.

⁸⁸ André de Barrigue de Montvallon, *Traité des Successions*, vol. 1, Aix, 1780, 552 citing *Digest* 33.8.1 and 2 (Paul and Gaius) and 50.17.129(1) (Paul). See also *Digest* 50.17.178 (Paul). The translations are respectively provided in Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 133 and vol.4, 964.

<p><i>Si le principal qui avoit été légué vient à être aliéné ou à périr, le legs de l'accessoire finit avec le principal. "Servo legato cum peculio, vel alienato, vel manumisso, vel mortuo; legatum etiam peculii extinguitur". Digest 33,8,1 and 2, La raison de la dernière de ces Loix est conçue en ces termes: "Nam quae per accessionem locum obtinet, extinguuntur, cum principales res peremptae fuerint." Ce qui est conforme à la règle du Droit. Cum principalis causa non consistit, nec ea quidem quae sequuntur locum habent." Digest 50,17,129(1).</i></p>	<p>If the principal thing that has been legated is alienated or perishes, the legacy of the accessory comes to an end with the principal thing. "If a slave is legated with his <i>peculium</i> and is alienated or manumitted or dies, the legacy of the <i>peculium</i> is also extinguished". <i>Digest</i>, 33,8,1 and 2. The rationale of the second of these laws is set out in the following terms: "For those things which occupy the place of accessories are extinguished when the principal property is destroyed". This is consistent with the general rule of law: "When the principal case does not stand, those that follow do not have any standing either". <i>Digest</i> 50,17,129(1).</p>
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The corollary of that stated above is as follows. The principal thing bequeathed remains to be claimed by the legatee where only an accessory item is destroyed or alienated by the testator even if it is not replaced prior to his death.

Principal and Accessoriness in Legacies

For centuries, legal systems from many traditions have recognised the general principle of accessoriness across numerous fields of private law including but not restricted to the law of testate succession.⁸⁹ The principle may be applicable in the law of succession where a specific thing is bequeathed in a special bequest. Two particular contexts may be noted. The first involves functional subordination in the context of the doctrine of annexation and the second involves no annexation.

Functional Subordination and Annexation

The doctrine of *accessio* is a generally applicable doctrine of property law in terms of which two pieces of corporeal property are joined to each other

⁸⁹ The general principle of accessoriness is recognised (albeit not specifically in a succession context) in *Digest*, 50.17.129(1) (Paul). More generally for Scots law see Stair, *Institutions*, 2.1.34 and 39; Erskine, *Institute*, 2.1.14 and 2.6.4.

in such a way that one of them (the “accessory”) is regarded as having become subsumed in the other (the “principal”).⁹⁰ The rule may be stated *accessorium principale sequitur*⁹¹ or *accessorium sequitur suum principale*.⁹² A condition of annexation is that the accessory is in some way functionally subordinate to the principal. Where the property of a testator is subject to *accessio* there may be implications for the testamentary arrangements of the testator. First of all, on initial annexation, a specific legacy of the accessory may adeem.⁹³ Second, if the annexation is reversed at a later stage, an earlier special bequest of the combined thing may partially adeem and the beneficiary left with an entitlement to the rump of the combined thing less the now detached accessory. There is room for partial ademption in this second context in two ways. First, where there is no complication of a third party entitlement to the combined item, the testator, after severance, may retain ownership of the principal item⁹⁴ and the thing severed. Partial ademption arises because the principal item and the thing severed become two separate things with the latter no longer falling within the description of the former. In other cases the result may be different because legal systems apply the applicable principles of annexation in somewhat varied ways. However, in Scots law, this may be illustrated by reference to the fixtures installed by a tenant in leased property. Where the combined item is subject to a lease conferring on the tenant a right of severance, ownership of the detached thing may transfer to the tenant and there would be partial ademption by virtue of the transfer of the property right – an instance of ademption by alienation.

This phenomenon, although without the complexity of a third party involvement, was examined by the Roman Dutch writer Johannes Voet:⁹⁵

⁹⁰ Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), paras 3.01–3.32.

⁹¹ E.g. Trayner, *Latin Phrases and Maxims* (Edinburgh, 1861), 6; K. G. C. Reid, *Property Law* (Edinburgh, 1996), para. 570 *et seq.*

⁹² E.g. *Graham v Murray*, 26 January 1671, 2 B.S. 508 at 509 per counsel.

⁹³ E.g. Voet, *Pandects*, 34.2.6 translated in Gane, *The Selective Voet*, vol. 5, 230–2.

⁹⁴ Reid, *Property Law*, para. 588.

⁹⁵ Voet, *Pandects*, 34.4.2 and 34.2.6 translated in Gane, *The Selective Voet*, vol. 5, 249 and 230–2 citing *Digest*, 34.4.2(2) (Pomponius) and 14(1) (Florentinus) and *Code*, 6.37.23; 34.2.6 pr. and (1) (Marcellus), 34.2.6(1) (Marcellus) and 32(8) and (9) (Paul citing the opinion of Scaevola), 19.1.17(1) (Ulpian) and 18(1) (Javolenus), 34.2.6pr and (1) (Marcellus) and 34.2.32(8) and (9) (Paul citing the opinion of Scaevola).

<p><i>Extenuatur autem seu minuitur legatum ex testatoris voluntate, non modo, si partem rei legatae aperte adimat, vel in alium transferat; dummodo res talis legata fuerit, quae pro parte dationem & ademptionem natura sua recipit sed & aliis multis modis. ... Ornamento ... aut domo legata, si testator tigna, columnas, marmora detraxerit, & in alios usus transtulerit, vel gemmas quasdam ornamento detractas alteri ornamento adjecerit, non manet in causa legati, quod ita detractum est. Quomodo ex adverso decedunt legato ornamenti gemmae illae, quas testator post conditum testamentum inde detraxit, ne iterum iisdem jungat, sive illas in aliud ornamenti genus transtulerit, ut illud pretiosus efficiat, sive nulli alteri ornamento junxerit. Diversum esset, si eo animo exemptae fuerint, ut reponantur. Ut tamen in casu, quo exemptae ne reponantur, nihilominus ipsum ornamentum, unde gemmae detractae sunt, legatario ita diminutum praestari debeat, si modo non deferat ornamentum esse.</i></p>	<p>...[T]hose precious stones which a testator has taken from an ornament after the framing of his last will, with the intention that he will not again attach them to the same materials, drop out of a legacy of such ornament, whether he has transferred them to some other class of ornament so as to make it more valuable, or has not attached them to any other ornament. It would be different if they had been taken away with the intention of being put back again. The reservation must however be made that in the case in which the things have been taken away not to be replaced, the ornament itself from which the precious stones have been detached ought none the less to be made good thus reduced to the legatee, provided that it has not ceased to be an ornament.</p> <p>Moreover a legacy is whittled away or cut down in virtue of the wish of the testator not only if he clearly takes away or transfers to another a part of the thing bequeathed (provided the thing bequeathed was such as to allow in its nature of a partial giving and taking away) but also in many other ways. ...</p> <p>...[W]hen a house or an ornament has been bequeathed, if the testator has withdrawn and transferred to other purposes timbers, columns or marbles, or has withdrawn certain jewels from the ornament and attached them to another ornament, what has been so withdrawn does not remain in the cause of the legacy</p>
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It is questionable whether Scots law would recognise ademption occurring where there was an unlawful severance by a third party. One might illustrate this by reference to a thief stripping the slates from the roof from a house.

In such a case Scots law would probably take the view there is no severance for the purposes of the doctrine of accession.⁹⁶ There remains the argument that the slates have ceased to form part of the house described in a specific bequest. However, it is submitted that the unlawful act in such a case will not be regarded as causing partial ademption.⁹⁷ It may be, however, if the stolen property is not recovered the bequest of the house insofar as it relates to the slates may lapse by a caducary doctrine separate from ademption: that part of the bequest simply cannot be implemented. Put another way, if the item cannot be recovered the special bequest lapses due to impossibility of performance akin to the contractual notion of frustration.

Functional Subordination Where No Annexation

In the majority of situations the doctrine of accession involves physical annexation. However, in some circumstances functional subordination may occur where there is no annexation. In such a case the accessory items remain separate things but may still be legated along with the primary thing where, either expressly or impliedly, the testator uses suitably expansive words to describe the subject of the legacy. The testator's description cannot be expected to specify every last detail of the subject bequeathed and, to effectuate the intentions of the testator, the law recognises that the object bequeathed carries with it, by implication, the accessories of the principal object unless, of course, the testator provides to the contrary. In general, this rule has been developed by judicial determination or by illustration of jurists but, occasionally, there are statutory examples.⁹⁸ Practical applications of this general principle abound. They may be illustrated as follows:

A bequest of a working farm, at least insofar as the business includes animal husbandry, will include the dung heap and straw beds.⁹⁹

⁹⁶ Reid, *Property Law*, para. 574.

⁹⁷ Adopting an intention based theory one could argue that such slates remain part of the house because they never were intended to be detached by the testator and would be replaced by him if recovered from the thief: see *Digest* 19.1.18(1) (Javolenus).

⁹⁸ Copyright, Designs and Patents Act 1988, c.48, s.93: a gift by will of, or including, a document or other material thing recording or embodying a literary, dramatic, musical or artistic work, or a film or sound recording, carries the copyright (to the extent that the deceased owned it immediately prior to his death) in the absence of a direction to the contrary in the will or a codicil thereto.

⁹⁹ *Digest* 19.1.17(2) (Ulpian).

A bequest of a working business will carry with it the equipment necessary for its exploitation by the testator such as, in the case of a mine, buckets, pick axes, and railways¹⁰⁰ and, in the case of a brewery, the plant and utensils.¹⁰¹

A bequest of a plot of land will carry with it all servitude rights benefiting the plot.¹⁰²

A bequest of land will include the title deeds thereto.¹⁰³

A contingent preference dividend will be included in a bequest of shares from which the dividend arises.¹⁰⁴

A bonus payable on an insurance policy will be included in a bequest of the proceeds of that policy.¹⁰⁵

From a doctrinal point of view there is no single reason for the categorization of the constituent parts of a bequest into principal and accessory. However, in the context of construing a will, the intention of the testator is relevant. Clearly, the testator may indicate the utility of such a means of analysis if he expressly or impliedly refers to a particular item and its accessories. The testator need not explain why he has so framed his will. In the absence of indications arising from the will of the testator, the categorization may be applied by law and be based on various grounds including the shared origin of the two parts of the bequest, the comparative value of the times, the inability of the accessory to exist without the principal or its dependence thereon, the linked function of the accessory and principal or the history of their combined use. In other cases it is possible that particular rules of a legal system may demonstrate a policy that certain items are, or are not, to be regarded as having the relationship of principal and accessory.

¹⁰⁰ E.g. ancillary items in connection with intestate succession to an item of heritage: *Dirleton's Doubts and Questions in the Law of Scotland, Resolved and Answered*, Sir James Steuart of Goodtrees (2nd edn, Edinburgh, 1762), 133–4 (buckets in a coal mine) and 288 where the horse and the other *instrumenta mobilia* are considered as passing to the heir with a mill.

¹⁰¹ See the English case *Wood v Gaynon* (1761) Amb. 395; 27 Eng. Rep. 263.

¹⁰² Cf the English case *Pheysey v Vicary* (1847) 16 M & W 484.

¹⁰³ See the English case *Re Joseph Robson* [1891] 2 Ch 559 at 566 per Chitty J. In the Scottish case *McArthur's Executors v Guild* 1908 SC 743; 1908 15 SLT 1023 the testator, in a will executed in 1905, made a specific legacy of a hotel and expressly included therein “the pertinents, the writs and the title deeds”.

¹⁰⁴ See the English case *Re Marjoribanks, Marjoribanks v Dansey* [1923] 2 Ch 307.

¹⁰⁵ See the English case *Roberts v Edwards* (1863) 33 Beav 259; 55 ER 367.

Roman Law

Outwith the context of annexation, the notion of a primary thing and accessory items is clearly illustrated in Roman law in the context of ademption of bequests involving slaves.

<p>PAUL: <i>Servo legato cum peculio et alienato vel manumisso vel mortuo legatum etiam peculii exstinguitur.</i></p> <p>GAIUS: <i>Nam quae accessionum locum optinent, exstinguuntur, cum principales res peremptae fuerint.</i></p> <p>PAUL: <i>At si ancilla cum suis natis legata sit, etiam mortua ea vel alienata vel manumissa nati ad legatarium pertinebunt, quia duo legata sunt separata.</i></p> <p>GAIUS: <i>Sed et si cum vicariis suis legatus sit servus, durat vicariorum legatum et mortuo eo aut alienato aut manumisso.</i></p> <p>JULIAN: <i>Tunc inutile legatum peculii sit, cum servus vivo testatore decedit: ceterum si mortis tempore servus vixerit, peculium legato cedit.</i></p> <p>PAUL: <i>Si ancilla cum liberis legata sit, et ancilla sola, si non sint liberi, et liberi soli, si non sit ancilla, debentur.</i></p> <p>CELSUS: <i>Si ancillas omnes et quod ex his natum erit testator legaverit, una mortua Servius partum eius negat deberi, quia accessionis loco legatus sit: quod falsum put et nec verbis nec voluntati defuncti accommodate haec sentential est.</i></p>	<p>PAUL: If a slave is legated with his <i>peculium</i> and is alienated or manumitted or dies, the legacy of the <i>peculium</i> is also extinguished.</p> <p>GAIUS: For those things which occupy the place of accessions are also extinguished when the principal property is destroyed.</p> <p>PAUL: But if a slave-woman is legated with her children, even if she dies or is alienated or manumitted, the children, will belong to the legatee, because the two legacies are separate.</p> <p>GAIUS: Moreover if a slave is legated with his <i>vicarii</i>, the legacy of the <i>vicarii</i> endures even if the slave dies or is alienated or manumitted.</p> <p>JULIAN: The legacy of a <i>peculium</i> becomes void, when the slave dies during the testator's lifetime; but if the slave was alive at the time of death, the <i>peculium</i> will go to the legatee.</p> <p>PAUL: If a female slave has been bequeathed with her children, the female slave only is due if there are no children, and the children only if there is no female slave.</p> <p>CELSUS: If the testator bequeathed all his female slaves and their offspring and one has died, Servius denies that her offspring is owed, because this was bequeathed by way of addition. I hold this to be false. This opinion accords with neither the words nor the wishes of the deceased.</p>
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The *Digest* preserves the views of a number of jurists (two of which have already been referred to in the quotation from Montvallon noticed above¹⁰⁶). They remain important because they indicate a situation in which the law may decline to accept that there is a relationship of principal and accessory. The passages are as follows:¹⁰⁷ In three of the examples contained within these passages, a bequest of one human being is not regarded as being accessory to the bequest of another human being. Although there is no such explanation in these passages in the *Digest* itself,¹⁰⁸ the reason for the refusal to admit of such subordination of a person to another has been explained in the Civilian tradition as being grounded respect for human dignity.¹⁰⁹ In the words of one commentator who examined the bequest of an *ordinarius servus* (a slave who had a special office in the establishment such as a cook or a barber) and his attendants known as the *vicarii*:¹¹⁰

“... in the case of this legacy, the law considered them [i.e. the *vicarii*] as having an independent existence, (*propter dignitatem hominis*), and not merely as accessories to the *ordinarii*.”

A similar view was taken in a case from the Common Law jurisdiction of South Carolina, whilst slavery was still recognised in that State, where the court examined the bequest of a female slave and refused to regard her children as

¹⁰⁶ See text at footnote 88.

¹⁰⁷ *Digest*, 33.8.1–4 and 12 and 30,62 and 63. See also Justinian, *Institutes*, 2.20.17. A *peculium*, broadly speaking was property under the management of the slave. “An *ordinarius servus* was a slave who had a special office in the establishment, as cook, barber, baker, etc. The *vicarii* were his attendants, and were generally reckoned as part of his *peculium*”: Sandars, *The Institutes of Justinian*, 234. See Mommsen, Krueger, Watson, (eds), *The Digest of Justinian*, vol. 3, 17, 133 and 135.

¹⁰⁸ Cf *Digest*, 21.1.44 pr. (Paul citing Pedius) using the words “*propter dignitatem hominum*”.

¹⁰⁹ Johann Gottlieb Heinecke (1681–1741), François Baudouin (1520–1573), *Jurisprudentia Romana et Attica* (3 vols, Leiden, 1738), vol.1, 908; T. Lambert Mears (1839–1918), *Analysis of Joseph-Louis Elzéar Ortolan's Commentary on Justinian's Institutes* (2008 Reprint, The Lawbook Exchange, Ltd, New Jersey), 206, para. 896; the French jurist Balthazard-Marie Emerigon (1716–1785), *A Treatise on Insurances*, translated by Samuel Meredith, (London, 1850), 166 referring, *inter alia* to Justinian, *Institutes*, 2.1.37; *Digest* 21.1.44 pr. (Paul citing Pedius); *Digest*, 5.3.27 pr. (Ulpian); and *Digest*, 50.16.207 (Africanus citing Mela). See also Jacques Cujas, *Opera Jacobi Cujacii*, vol. 10, 981, *In Lib. IV, Priores Codicis Justiniani, ad Tit LX*.

¹¹⁰ Sandars, *The Institutes of Justinian*, 234.

ancillary to the primary part of the bequest.¹¹¹ This regard for human dignity is a value or policy judgment precluding the recognition of a relationship of principal and accessoriness in that particular context. In other contexts, the refusal to admit of a principal and accessory relationship was based on entirely different policy grounds. For example, in Roman law, where a bequest was made of a house and the house was destroyed, the beneficiary is still entitled to the rubble of the house and its site and neither were regarded being merely accessories of the house.¹¹² The policy in this particular instance has nothing to do with the dignity of mankind and may relate to the giving effect to the deemed intention of the testator by retaining for the beneficiary a benefit in the form of a potential to rebuild the house. There could be no such deemed intention if the site itself were destroyed. Alternatively, the house can be regarded as accessory to the land.¹¹³

The Primary Thing Destroyed

The destruction of the primary element of the thing specifically bequeathed was very clearly illustrated in Roman Dutch law by both Voet¹¹⁴ and Grotius¹¹⁵ in relation to a living horse. If the animal bequeathed is destroyed prior to the testator's death, neither his bit and bridle nor his caparison¹¹⁶ is due.

Clearly there is merit in this approach and, to some extent, it may be adopted by Scots law. For example, where a pet dog, left as a special bequest, dies prior to the testator's death, the legatee will probably not be entitled to the dog's collar and lead: but if the dog collar and lead were destroyed, the legacy of the dog would remain valid. So too where a testator leaves a special bequest of one hundred identified bottles of Scotch whisky (or, should his taste prefer it, Irish whiskey) the legatee will be entitled to the containers as

¹¹¹ *Hester Tidyman v Hugh Rose, Executor of Catharine Coffie*, (1832) Rich. Cas. 294, 9 S.C.Eq 294, 1832 WL 1600 (S.C. App.).

¹¹² *Digest* 30.22 (Pomponius). See also *Digest* 6.1.49pr (Celsus). See Roman Dutch law: Voet, *Pandects*, 30-32.52 translated in Gane, *The Selective Voet*, vol. 5, 148.

¹¹³ That is indeed the case in accordance with the law of accession: *inaedificatio solo sol cedit*.

¹¹⁴ Voet, *Pandects*, 30.1.52 translated in Gane, *The Selective Voet*, vol. 5, 148-9.

¹¹⁵ Hugo de Groot (1583-1645), *Inleidinge Tot De Hollandische Rechts-Geleerheid*, ed. F. Dovring, H.F.W.D. Fisher and E.M. Meijers (2nd edn, Leiden, 1965), 2.22.15, as translated by A.F.S. Maasdrorp, *The Introduction to Dutch Jurisprudence* (2nd edn, Cape Town, 1888), 109, para 15.

¹¹⁶ A caparison is a covering or cloth laid over a horse, particularly if it is used as a pack animal.

well as the contents because the former is ancillary to the latter.¹¹⁷ If, however, the testator drinks all the whisky prior to his death the composite bequest of the whisky and the bottles will adeem entirely even though the bottles may still exist physically and remain part of his estate on death. A similar illustration is to be located in the *Digest*. The Roman jurist Paul wrote:¹¹⁸

<p><i>Nam quod liquidae materiae sit quia per se esse non potest, rapit secum in accessionis locum id sine quo esse non potest: uasa autem accessio legatae penus, non legatae sunt: denique penu consumpta uasa non debentur. Sed et si penum cum uasis specialiter sit legatum, uasa non debentur uel consumpta penu uel adempta.</i></p>	<p>For liquid, because it cannot be kept without a container, carries with it as an accession that without which it cannot be kept. Vessels, however, are not legated but are an accession to the legacy of stores; the vessels are not owed when the stores have been consumed. Indeed, even if the stores are specifically legated with the vessels, the vessels will not be owed when the stores have been either consumed or removed.</p>
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At the core of this approach is, yet again, a judgment as to what is of the essence of a bequest and what is merely ancillary. Monetary value of the constituent parts will inform this judgment but it cannot be the only relevant factor.¹¹⁹ If, for example, the empty whisky bottles and the labels thereon were themselves collectors' items, perhaps having some considerable monetary value, it is possible to argue that the legatee would be entitled to them despite the consumption of their contents. This argument might be strengthened if the testator was aware that the legatee in question was a collector of such items at least insofar as the testator gave some indication of this awareness within the will. Another factor that may be taken into account is the function of the containers. In this respect one might have regard to design features such as the actual mass or size of the containers for the liquid. Although ordinary sized bottles might easily be regarded as ancillary to their liquid contents, large vats or industrial tanks containing the same liquid, albeit in vaster quantities, may be regarded as an ancillary not to the liquid contents but to the industrial

¹¹⁷ *Virg. Digest* 33.6.3(1) (Ulpian); 33.6.14 (Pomponius); 33.6.15 (Proculus); 33.9.3(11) (Ulpian). See also Voet, *Pandects*, 33.6.2 translated in Gane, *The Selective Voet*, vol. 5, 198.

¹¹⁸ *Digest*, 33.9.4 pr. (Paul) translated in Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 138.

¹¹⁹ *Digest* 34.2.19(20) (Ulpian) and 34.2.20 (Paul). See also Voet, *Pandects*, 34.2.4 translated in Gane, *The Selective Voet*, vol. 5, 229–230.

building or farm in which they are located or imbedded.¹²⁰ In some cases the containers might even be so massive as to form fixtures attached to the underlying land.¹²¹

In the case of a legacy of a pet dog one might wish to contend in a particular case that a bejewelled collar and lead are not ancillary to a specific dog. Much may depend on the affection showered by the testator on a particular pet dog. If, for example, the collar and lead were made as bespoke adornments for a particular animal there is a strong case to regard them as ancillary to that dog. The case against ancillary existence *quoad* one particular animal is strengthened if the collar and lead have been used for more than one dog, especially if a series of new pets owned by the testator have benefited from their use before and after the death of the bequeathed animal. However, it could even be the case that the whole matter is the other way round. It could be the case that the bejewelled ornaments were always regarded as the items of primary value and the dog may have used by the testator merely as a means of displaying those items. Put another way, the dog was used as a living mannequin for a fashion item.

In regard to these non-living items it is perhaps the case that the age of mass manufacture and interchangeable parts has made it less likely that an element in a bequest will be regarded as essential and irreplaceable. A bequest of a trawler seems likely to be sustained even if parts essential to propulsion, such as the engine and propeller, were to be removed and not replaced. The same remains possible, at least in some cases, with a car even if the engine or transmission were to be removed.

The Primary Component Part Replaced

We have seen above the application of the rule that if during the lifetime of the testator, the primary part of the specific thing legated is destroyed leaving only accessory parts, the special legacy will adeem. This is subject to a qualification. If the testator replaced the destroyed primary part of the thing specially legated and thereafter dies, the legacy of that thing will not adeem.¹²²

¹²⁰ *Digest*, 33.6.3(1) (Ulpian); 33.6.14 (Pomponius) and 33.6.15 (Proculus). See further *Digest*, 7.1.15(6) (Ulpian) and the Roman Dutch position explained in Voet, *Pandects*, 33.6.2 translated in Gane, *The Selective Voet*, vol. 5, 198.

¹²¹ On the basis *inaedificatio solo solo cedit*.

¹²² This seems somewhat at odds with the general rules on re-acquisition in terms of which ademption is not undone: *Digest*, 34.4.15 (Paul); 34.4.26 and 27 (Paul); Voet, *Pandects*, 34.4.6 citing *Digest*, 34.4.15 (Paul) translated in Percival Gane, *The Selective*

The position of classical Roman law is found in the *Digest* as stated by the jurist Papinian.¹²³

<i>Quadrigae legatum equo postea mortuo perire quidam ita credunt, si equus ille decessit qui demonstrabat quadrigam: sed si medio tempore diminuta suppleatur, ad legatarium pertinebit.</i>	When a four-in-hand is bequeathed and a horse subsequently dies, some believe that the legacy is extinguished if it is the leading horse that has died. But if the loss is meanwhile made up, the four-in-hand will belong to the legatee.
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It is not expressly stated by Papinian what his view would be as to the position if the dead leading horse is not replaced before the death of the testator. A possible inference, however, is that the bequest would fail because of ademption.¹²⁴ If this is correct, it would seem therefore that a living leading horse is not to be regarded as an accessory part of the overall bequest but as a principal element in it although one that can be replaced by another living leading horse.

This indeed was the interpretation placed on the passage by those mediaeval Spanish jurists who adopted and developed Civilian thought as is evidenced by the following passage from the major code of law from thirteenth century Spain, *Las Siete Partidas*. Although they limited their illustration to a cart pulled by a single horse rather than a team of four, this merely serves to accentuate the essential aspect of the horse to the overall bequest but does not alter the underlying principle:¹²⁵

Voet, vol. 5, 253. For the law of South Africa: Corbett, Hofmeyr, Kahn, *The Law of Succession in South Africa*, 107. *Partridge v Partridge* [1736] Cases T. Talbot. 226; 25 Eng. Rep. 749 at 227 and 750 per the Lord Chancellor. Cf The Indian Succession Act 1925, s.166; the Illinois case *Phillippe v Clevenger* (1909) 239 Ill. 117, 87 N.E. 858 and the New York case *In re Charles' Estate*, 3 Ad. 2d 119, 158 N.Y.S.2d 469, 1957 where the rule of construction that the will speaks from time of death was used to circumvent it.

¹²³ *Digest*, 31.1.65(1) (Papinian). A "four in hand" means a four horse chariot. For a translation see Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 51.

¹²⁴ A different view was taken by Simon à Gronewegen van der Made, *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia*, 213. See also Schorer's *Notes*, 473, note CLVII to Section 20 contained within Hugo Grotius, *The Introduction to Dutch Jurisprudence*, translated by A. F. S. Maasdrorp, Capetown, 1878, 1009–1010, para. 20.

¹²⁵ *Las Siete Partidas* Part VI, Title IX, Law XLII. *Las Siete Partidas Del Sabio Rey Don Alonzo El Nono* Glosadas Porel Licenciado Gregorio Lopez, (4 vols, Madrid, 1789), vol.3, 175 translated by Samuel Parsons Scott, (Ed. Robert I. Burns, S.J.), *Las Siete Partidas*: vol. 5, *Underworlds: The Dead, The Criminal, and the Marginalized* (Philadelphia, 2001), 1256.

<i>Otro si dezimos, que si el testador fiziere manda de alguna carreta, o carro, que aquel a quien es mádada tal cosa la dene auer con la bestia que la trae. Pero si despues, en vida del testador, se muriesse la bestia que la solia traer, desatase porende la manda e non vale; fueras ende, si el testador en su vida metiesse otra bestia en lugar de aquella que fuesse muerta, ca estonçe aura la manda aquel a quien fecha.</i>	We also decree that if a testator makes a bequest of a cart or a wagon, the party to whom the bequest is made is entitled to it along with the animal which draws it. Where, however, subsequently, and during the life of the testator, the animal which usually drew said vehicle dies, the bequest shall be annulled for that reason and is void, except where the testator, during his lifetime, substituted another animal in the place of the one that died; for in this case the party to whom the bequest is made shall be entitled to it.
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A modern application might lie in a bequest of a motor car. If the engine is removed prior to the testator's death one could argue that the car no longer has a motor and deprived of such an essential element it ceases to be what was originally bequeathed.¹²⁶ However, if the engine is replaced by a new one prior to the testator's death the bequest will be effective.

There is, however, a contrary view that may be presented. A motor car, although primarily a means of transport, is by no means a simple article such as a cart. It may be regarded by some as a thing of beauty. If indeed the car bequeathed was an antique rarely, if ever, used on the road, the removal and disposal or destruction of the existing engine, could be argued not to deprive the particular car of its essence as an antique car. Such an argument may well be fortified if indeed the description used in the will refers to "my antique car". Even a modern car, intended for the road, could retain substantial value without an engine (or some other part essential for motion such as a transmission or a rear axle). A high value sports car without an engine or such a part retains substantial value and is still recognisably a car. It could still be attractive to a legatee who wished to sell it or to reinstate it as a road worthy vehicle. Furthermore, if the function of the vehicle is more than just to provide a means of transport, such as a motor home, or a mechanical tool such as a crane, a digger, a tractor or a mobile cement mixer, one could perhaps argue against any classification of the engine as an essential element of the vehicle itself. Clearly difficult judgments remain to be made by modern jurists despite the guidance in the Civilian authorities.

¹²⁶ See text above at footnote 86.

Partial Ademption – The Intention of the Testator

The rules of partial ademption are subject to the testamentary wishes of the testator. The intention of the testator as expressed within the will can rule out, vary or confirm the effects of partial ademption. It is possible for a testator to indicate that if a specially bequeathed item is partially destroyed or alienated before his death the beneficiary is to receive nothing, some or all of its value before or after partial destruction or alienation, alternatively, a substitute item or provision.

Matters are somewhat more difficult when there is no clearly express testamentary statement of the effect of partial destruction or alienation. In such a case one must consider whether the intention of the testator may be implied from the words used in the will. In this regard two particular problems emerge: (a) whether there is to be a variation of the rules of ademption because of the use by the testator of collective nouns or special names; and (b) whether the words employed by the testator indicate a functional subordination of one part of the bequest to another even if such a subordination would not be implied by law. These two matters shall be addressed in order.

Collective Nouns and Partial Ademption

By use of suitable terms in a will a testator may expressly exclude the possibility of partial ademption. Clearly the words used are to be construed to ascertain if that is indeed the testator's intention. In this regard the use of a collective noun is significant. Illustrations are "a pair" of shoes or gloves, "a set" of knives, golf clubs or chess pieces, "a flock" of sheep, a "portfolio" of shares, a "collection" of stamps. Does the very use of such collective nouns indicate that there is an intention on the part of the testator to exclude partial ademption when one of the set, pair, flock, portfolio or collection is alienated or destroyed prior to the testator's death? Does the legatee lose everything upon the pre-death alienation or destruction of a single constituent part? Put another way, does the use of the collective noun by the testator render the continued existence of the overall entirety "material" to the efficacy of the bequest?

Roman Law

Roman law again provides the starting point for analysis in the Civilian tradition. However, it soon becomes clear that the jurists whose views are recorded in the *Digest* did not entirely speak with one voice.

From the legatee’s point of view a generous approach is supported by Ulpian in a passage dealing with a collection of books:¹²⁷

<i>Si Homeri corpus sit legatum et non sit plenum, quantaecumquae rhapsodiae inueniantur, debentur.</i>	If Homer’s works are bequeathed and the set is incomplete, as many cantos as can be found will be due.
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Nothing is stated by Ulpian in this particular passage as to what should occur if the lost book was replaced in the testator’s lifetime. However, one may assume, by analogy with the replacement of a member of a team of horses,¹²⁸ that the replacement book would pass to the legatee as part of the reinstated set. Nor, in this same passage, does Ulpian deal with the situation of a bequest of a collection of books of a living writer who continues to publish after the date of the testator’s will. If the testator continues to collect the new books and his set of books by that writer continues to expand with the result that at his death he has far more books by the same writer than he had at the time of the making of the will, is the legatee to be entitled to them all? The answer of Ulpian is in the affirmative when one examines his views on a bequest of a herd of animals:¹²⁹

<i>Grege legato et quae postea accedunt ad legatarium pertinent.</i>	If a herd has been bequeathed, any subsequent accessions belong to the legatee.
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The example of the herd of animals is one examined by other Roman jurists whose views are collected in the *Digest*. Pomponius, for example, wrote:¹³⁰

¹²⁷ *Digest*, 32.1.52(2) (Ulpian) translated in Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 88.

¹²⁸ See text above at footnote 139.

¹²⁹ *Digest*, 30.1.21 (Ulpian) translated in Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 5. This is also the view of Julian as recorded in Justinian, *Institutes*, 2.20.19.

¹³⁰ *Digest*, 30.1.22 (Pomponius) translated in Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 5.. He took a rather different view as regards a usufruct and

<i>Si grege legato aliqua pecora vivo testatore mortua essent in eorumque locum aliqua essent substitute, eundem gregem videri: et si deminutum ex eo grege pecus esset et vel unus bos superesset, eum vindicari posse, quamvis grex deisset esse, quemadmodum insula legata, si combusta esset, area possit vindicari.</i>	<p>If a herd has been bequeathed and some herd animals die in the testator's lifetime and are replaced by others, it is taken to be the same herd. And if the livestock from this herd is diminished and only one ox survives, the legatee may vindicate it, although the herd has ceased to exist, just as when a tenement building has been bequeathed and is burned down the site may still be vindicated.</p>
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So too in Justinian's *Institutes*:¹³¹

<i>Si grex legatus fuerit posteaque ad ovem pervenerit, quod superfluerit, vindicari potest.</i>	<p>If a flock is given as a legacy, and it is afterwards reduced to a single sheep, the legatee can claim by real action what remains.</p>
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Undoubtedly this approach favoured the beneficiary in the relevant specific bequest and was followed in the later Civilian tradition.¹³² Johannes Voet's explanation for the generous interpretation was based in a concept of justice supported by a canon of construction of the word "flock" that was reasonable rather than strict. He observed:¹³³

maintained that if the usufruct as a legacy and the numbers of the flock are reduced to such an extent that it can no longer be regarded as a flock the usufruct comes to an end: *Digest* 7.4.31 (Pomponius).

¹³¹ Justinian, *Institutes*, 2.20.18 translated in Sandars, *The Institutes of Justinian*, 234.

¹³² E.g. Arnoldus Vinnius (1588–1657), *Institutionum Imperialium, Commentarius* (4th edn, 2 vols, Amsterdam, 1665), vol. 1, 443, 11.20.18; Hugo de Groot, *Inleidinge Tot De Hollandische Rechts-Geleerheid*, (ed. F. Dovring, H. F. W. D. Fisher and E. M. Meijers) (2nd edn, Leiden, 1965), 2.22.20 translated by A. F. S. Maasdorp, *The Introduction to Dutch Jurisprudence* (2nd edn, Cape Town, 1888), 109–10.

¹³³ Voet, *Pandects*, 6.1.28 translated in Gane, *The Selective Voet*, vol. 2, 240–1 citing *Digest* 3.4.7(2) (Ulpian).

<p><i>Et gregem quod attinet, licet ad unam ovim pervenerit, & ita naturaliter grex esse deficerit, tamen, quia civiliter grex manet, & in uno capite superstite stat nomen universitatis. Fas erat, ovim, in quam jus et nomen gregis reciderat, praestari.</i></p>	<p>As for a flock, though it has come down to a single sheep and so has physically ceased to be a flock, still since civilly it remains a flock and the name of the collection resides in the single surviving head, it was justice that the sheep to which the right and name of the flock had been reduced should be given up.</p>
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Beyond Civilian jurisdictions the passage from Pomponius quoted above was used by the English writer Swinburne (1560–1623) to support in English law a position similar, if not identical, to that seen in the Civil law tradition:¹³⁴

“If the testator do bequeath a flocke of sheepe, and afterwards the number decreasing, they become fewer than a flocke, (a flocke consisteth of ten at the least¹³⁵) be it that of al the flocke there be left but one: In this case the will of the testator is not presumed to be altered, nor the legacie adempted, and therefore that one sheepe is due.”

Although there appears to be no reported modern decision on the point this analysis remained the accepted one in the Common Law tradition.¹³⁶ However, the means of coming to the same result would perhaps be rather differently expressed by a lawyer from the modern Common Law tradition. In the modern Common Law tradition, where the thing given is stated in generic terms (i.e. where the subject matter is capable of increase or decrease during the testator’s lifetime), the presumption that a will speaks from the date of death is applied so that the property answering the description as at the date of death of the testator passes under the gift.¹³⁷

¹³⁴ Henry Swinburne, *A Briefe Treatise of Testaments and Last Willes*, Part VII, § xx “Of ademption of legacies”, 281, para. 20.

¹³⁵ The number has its origins in *Digest* 47.14.3 pr. (Callistratus) which deals with an aspect of criminal law. The number was applied for more general purposes by Swinburne and also by various Civilian writers, exemplified by the German jurist Joachim Hoppe (1656–1712), *Commentatio Succincta ad Institutiones Justinianas* (Frankfurt, 1701), 551 in a comment on Justinian, *Institutes*, 2.12.12.

¹³⁶ E.g. William Ward, *A Treatise on Legacies of Bequests of Personal Property* (Philadelphia, 1837), 10.

¹³⁷ For England see, e.g., *In Re Loveland: Loveland v Loveland* [1906] 1 Ch. 542. For Northern Ireland see *Wills and Administration Proceedings* (Northern Ireland) Order 1994/1899, Part II, para 17(1).

A Collective Noun with a Certain Number

Some collective nouns give no indication of the number of items within the existing collection at any one time. Into this category belongs the very word “collection” and also others such as “herd”, “portfolio”, “set”, “pack”, “litter”, “flock”, to name but a few.¹³⁸ A third party examining the “collection” of a testator for the purposes of a specific bequest may never know that any part of it has been destroyed or alienated prior to his death.

In such a case there is a strong policy reason for the permitting of partial ademption. Where a testator leaves a bequest such as “the whole of my collection of postage stamps”,¹³⁹ this description, although a specific or special bequest, contains no detailed specification of the subject matter. There will always be a risk that, unknown to anyone else, the testator may have altered the extent of the collection by alienation or destruction of certain of its constituent parts. It would be overly unfavourable to the legatee to require the ademption of the whole bequest unless that beneficiary could prove that the collection as at the death of the testator is identical to that which existed as at the date of the making of the will.

In contrast to this, some collective nouns do indicate an exact number of constituent parts. They include “a pair” of gloves or earrings, a “brace” of geese and “a couple” of dogs, etc.. In all of these cases, if only one item remains as at the death of the testator, one may conclude that either the testator made a mistake as to the completeness of his possessions or that one of the items has been destroyed or alienated. The same applies where the collective noun, although unspecific in isolation, when interpreted by reference to the nature of the object described, probably refers to a certain number of constituent parts. An example is a “set” of chessmen. In such a case the issue arises as to whether the probable linkage of the collective noun to a certain number leads to total rather than partial ademption when less than the full complement of constituent parts remains at death?

Roman Law

A good starting position for analysis is another passage from Ulpian’s writing preserved in the *Digest*. Here a sophisticated approach was put forward in

¹³⁸ One can also add to this category the oddity of a “singular” of boar.

¹³⁹ An example noticed in *Clark v Executor v Clark* 1943 SC 216 at 219 per Lord (Ordinary) Patrick.

respect of the very same item considered by Papinian, the four-in-hand. The very name of the item bequeathed suggests a certain number of horses. These particular remarks of Ulpian addressed the issue not of ademption but of the circumstances in which a legacy of a usufruct of the four-in-hand will terminate. Ulpian stated his view thus:¹⁴⁰

<p>ULPIAN: <i>Quadrigae usu fructu legato si unus ex equis decesserit, an extinguatur usus fructus quaeritur: ego puto multum interesse, equorum an quadrigae usus fructus sit legatus: nam si equorum, supererit in residuis, si quadrigae, non remanebit, quoniam quadriga esse debet.</i></p> <p>PAUL: <i>Nisi alius ante diem legati cedentem substitutus sit.</i></p>	<p>ULPIAN: If the usufruct of a team of four chariot horses is left as a legacy and one of the horses dies, is the usufruct thereby extinguished? My own opinion is that the question turns on whether the usufruct bequeathed was of the horses or of the team. If it was of the horses, it will continue to exist in respect of the surviving horses; but if it was of the team, it will not be preserved, as the team has ceased to exist,</p> <p>PAUL: Unless another horse is substituted for the one that died before the vesting of the legacy.</p>
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The point of distinction between the alternatives available is found by Ulpian in a construction of the testator’s words: it is grounded in the intention of the testator. That being the case, one must always be wary of applying a general rule to the terms of any particular will in hand. It would be inappropriate to defeat the wishes of a particular testator by application of a general rule, particularly one relying on subtle distinctions which may reflect values and an understanding not shared by that testator.

Roman Dutch Law

Such concerns were reflected in the writings of Roman Dutch writers. One finds further reference to this same example of a four-in-hand in Roman Dutch law although, there, it is tempered by a certain distancing of Roman Dutch law from the sophistication evidenced in the Roman sources. Johannes

¹⁴⁰ *Digest*, 7.4.10(8) (Ulpian) and 7.4.11 (Paul) translated in Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.1, 237.

Voet considered the much contemplated issue of the bequest of the four-in-hand and expressed his view thus:¹⁴¹

<p><i>Et quamvis Romanis placuerit, quadrigae legatum uno equo extincto in totum evanescere, nisi locus ejus iterum suppletus sit. Tamen quia legatis quatuor equis, ac uno perempto, tres reliqui adhuc legatorio praestandi sunt, magis simplicitati morum nostrorum, & voluntati testatoris conveniens videtur, id, quod ex quadriga restat, ex legato deberi.</i></p>	<p>It is true that the Romans held that a legacy of a team of horses entirely disappeared if one horse had been wiped out, unless its place had in turn been filled up. Nevertheless since the three remaining horses must still be made good to the legatee when “four horses” have been bequeathed and one of them has been destroyed, it appears to be rather more in agreement with the simplicity of our customs and with the wish of the testator that what remains of a team of four horses should be due under the legacy.</p>
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To similar effect was Simon à Groenewegen van der Made (1613–1652):¹⁴²

<p><i>Quadrigae legatum si unus ex aequis decesserit, extrigintur, quoniam quadriga esse desiit: quatuor vero equorum legatum superest in residuis. Subtile magis, quam ex usu et mente testatoris.</i></p>	<p>Where there was a legacy of a team of four horses and one of the horses died, the legacy of the team was extinguished, since there has ceased to be a team; however, if it was a legacy of four horses it remained valid in respect of the remaining horses. This distinction is too subtle to suit general practice and the intention of testators.</p>
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¹⁴¹ Voet, *Pandects*, 30.52 citing *Digest* 7.4.10(8) (Ulpian) and 7.4.11 (Paul). See also Voet, *Pandects*, 7.4.9. These are respectively translated in Gane, *The Selective Voet*, vol. 5, 148–9 and vol. 2, 392–3.

¹⁴² Simon à Groenewegen van der Made, *Tractatus De Legibus Abrogatis Et Inusitatis in Hollandia Vicinisque Regionibus* (3rd edn, Amsterdam, 1669), *ad Digest* 31,1,65(1). See Simon à Groenewegen van der Made, *A Treatise on the Laws Abrogated and no Longer in use in Holland and Neighbouring Regions*, (3rd edn, Amsterdam, 1669) edited and translated by B. Beinart, (3 vols, Doornfontein and Johannesburg, 1975), vol. 2, 220, on *Digest*, 31,1,65(1) referring to the French jurist Bernard Automne (1567–1666) *Autumnus, Conférence du droit Francois and Censura Gallica, ad Digest* 31,1,65(1) (Paris, 1610).

Clearly, the Roman Dutch jurists tempered analysis with pragmatism. It seems likely that Scots law would take a similar approach. If a valuable chess “set” is specially bequeathed it seems unduly harsh that the legatee should be excluded from inheriting the remaining pieces if the white king were to be permanently lost or destroyed. The argument that an element essential to the participation in a game of chess has been lost does not appear overly convincing. The set, with items missing, still may be a valuable antique or hold some other attraction. Similarly, a bequest of “my set of golf clubs” or even “my complete set of golf clubs” is unlikely to fail if the putter is lost even though the legatee could not participate in the game unless he were to acquire another similar club. The subject of a special legacy of a “set” of socket spanners may lack one or two items – clearly evident by the gaps in the presentation box – but it still may be what the testator wishes to confer on the legatee. So too, does it appear likely that where a specific “pair” of gloves is bequeathed but one is lost, the legatee would be entitled to the single item that remained.

Special Name and Partial Alienation or Destruction

In some cases a testator leaves a special bequest of a particular item describing it by reference to a name which he (or his family or neighbours) has conferred on the property itself. This is common not only with animals such as pets (illustrated by a bequest of “Rover”) and prize farm animals (a bull named “Taurus”), but also inanimate property, particularly land (a house known as “Woodvale” or a farm of land known as “Kilnaslee Home Farm”). If the subject of the bequest is then partly destroyed or alienated in part during the lifetime of the testator the issue of partial ademption may arise. This is complicated to some extent by an inference that may arise from the special name itself. The removal of part of the thing in question may so alter it that the thing is no longer recognisable by that special name. Clearly animals are unlikely to be sub-divided in this way except after they die in which case, as has already been indicated above,¹⁴³ the phenomenon of death has probably caused ademption. However, with land, the problem does arise. If an existing farm known as “Mullaghurtherland” has one field sold off there may remain sufficient of a core for that farm to continue to be known by that name. If, however, the vast bulk of the fields are split off to neighbouring farmers and all that remains is a steading or a homestead, matters may be otherwise.

¹⁴³ See text at footnotes 48–85.

What remains may simply have ceased to be what the testator intended to be described by the original special name.

This issue arose in a case from Western Australia.¹⁴⁴ A testatrix framed her will so that it contained instructions for the *mortis causa* trustees to sell property described as follows:

“... my property “Elemore”, being more particularly known as:

- (i) Avon Location 14428 being the whole of the land comprised in Certificate of Title Volume 1298 Folio 933.
- (ii) Avon Location 24530 being the whole of the land comprised in Certificate of Title Volume 843 Folio 101, and
- (iii) Avon Location 16396 being the whole of the land comprised in Certificate of Title Volume 1052 Folio 999.”

The will then instructed the trustees to pay the proceeds into a trust and the income then to be paid to a number of charities.

Two of these three constituent titles were sold to an adjacent farmer during the testatrix's life, some fourteen years prior to her death. What remained was a relatively small part of the total farm, representing that part of the farm on which the homestead and certain sheds were located. In a dispute as to the proper division of the estate, it was argued by counsel for the executor that as there was no property recognizable as “Elemore” at the date of the testatrix's death the specific bequest failed and the remaining property fell into the residue. The Court took the view that in this case there was an “intention to adeem” and this had been indicated by the use of the special name “Elemore”. By the use of this name the testatrix had impliedly indicated that if nothing recognizable by that name remained at her death, the bequest should fail. Significantly, this decision was handed down in a jurisdiction where the “Identity theory” of ademption prevails,¹⁴⁵ the decision was taken by reference to the implied intention of the testatrix. What remained in her estate at her death ceased to comply with the description of the subjects that she had specifically bequeathed so the whole bequest failed.

¹⁴⁴ *Richard Digby Rees-Weebe (Executor of Elizabeth Lodge) v TA & D Boyne & Sons*, [2004] WASC 125, Simmonds J., (Supreme Court of Western Australia).

¹⁴⁵ The Court referred to Hockley, J et al, *Wills, Probate and Administration Service Western Australia*, paras 25.055.1 and 25.060.

A similar issue may arise where a plot of land is registered in the relevant property register under a certain Title Number.¹⁴⁶ The testator may have made a specific bequest of this property referring only to this particular title number to identify the property. If the property is sub-divided during the lifetime of the testator and then the title of the constituent parts are amalgamated with those of adjoining properties with the result that the original title number is no longer used,¹⁴⁷ the issue may arise as to whether the bequest is deemed as regards all constituent parts of the original bequest even though some or all of it remains owned by the testator as at death.¹⁴⁸

Functional Subordination Indicated by the Testator

A testator may make it clear, by virtue of express or implied provision, that some minor things bequeathed by him are to be regarded as functionally subordinate to a major item bequeathed. The minor things could have been bequeathed separately but they are linked by the design of the testator. For example, if a testator bequeaths a house “together with its full contents”, this is to be regarded as a single gift.¹⁴⁹ If there is no alienation or destruction of the subject of the gift during the testator’s lifetime, ademption does not occur and the entire gift vests on the death of the testator. In such circumstances the beneficiary is not entitled to elect to accept only part of the gift: he must take it all or not at all. However, if ademption does occur as regards part of the gift, it remains to be decided whether the beneficiary can take what remains on the testator’s death. In this regard, the words “together with” may indicate a functional subordination of the furniture to the house. A similar inference might arise from a bequest of a house “and its accessories”. Formulae like this, suggest the possibility that, by his words, the testator has varied the default rules of ademption with the effect that the whole gift will fail only if the

¹⁴⁶ For Scotland see Land Registration etc. (Scotland) Act 2012, asp. 5, ss.4 and 12(5).

¹⁴⁷ For Scotland see Land Registration etc. (Scotland) Act 2012, asp. 5, s.13(2)(a).

¹⁴⁸ See the American case *Rose v Rose*, Appeals Court of Massachusetts, 80 Mass. App. Ct. 480 (2011), where the bequest adeemed *quoad* the rump also because the testatrix voluntarily combined its title with another plot of land. See also the Western Australian case *Borlang v The University of Western Australia* [2001] WASC 425; *The Public Trustee as Executor and Trustee of the Estate of Mary Agnes Horsfall v Halleen and others* [2000] WASC 262 (property sub-divided and amalgamated with adjoining properties).

¹⁴⁹ See the English case *Re Joel: Joel v Rogerson* [1943] Ch. 311.

primary part of the gift is alienated or destroyed but will remain effective *quoad* the principal part if only the ancillary part is destroyed or alienated.

Roman Law

This possibility of functional subordination indicated by the words of the testator was recognised in classical Roman law as is evident from Justinian’s *Institute*.¹⁵⁰

<i>...si fundus instructus vel cum instrumento legatus fuerit: nam fundo alienato et instrumenti legatum extinguitur.</i>	...if the testator gives as a legacy, land “provided with instruments of use or ornament”, or “with its instruments of culture”. If the land is alienated, the legacy of the instruments is extinguished.
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The same issue was the subject of the more extensive comments of two jurists, Labeo and Paul, juxtaposed in a single passage in the *Digest* relating to the subtleties of the meaning variations of words used in connection with legacy a farm and its associated gear and equipment:¹⁵¹

<p>LABEO. <i>Si cui fundum et instrumentum eius legare uis, nihil interest, quomodo leges “fundum cum instrumento” an ea “fundum et instrumentum” an “fundum instructum”.</i></p> <p>PAULUS. <i>Immo contra: nam inter ea legata hoc interest, quod, si fundo alienato mortuus fuerit, qui ita legauit, ex hac scriptura “fundum cum instrumento” nihil erit legatum, ex ceteris poterit instrumentum esse legatum.</i></p>	<p>LABEO. If you want to legate to someone a farm and its <i>instrumentum</i>, it makes no difference whether you word the legacy “the farm with its <i>instrumentum</i>” or “the farm and the <i>instrumentum</i>” or “the <i>fundus instructus</i>.”</p> <p>PAUL. On the contrary, for there is this difference between the legacies, that if the man who made such a legacy died after alienating the farm, by the form of words “the farm and its <i>instrumentum</i>” nothing will be legated, while by the other forms of words the <i>instrumentum</i> can be legated.</p>
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¹⁵⁰ Justinian, *Institutes*, 2.20.17 translated in Sandars, *The Institutes of Justinian*, 234.

¹⁵¹ *Digest*, 33.7.5 (Labeo and Paul). *Instrumentum* means gear or equipment. *Fundus instructus* means the equipped farm. See also *Digest*, 33.7.1 (Paul). For a translation see Mommsen, Krueger, Watson (eds), *The Digest of Justinian*, vol.3, 124.

Obviously where gear or equipment¹⁵² was bequeathed in the same bequest as the farm to which it related, that gear or equipment, in the absence of express provision by the testator, would be regarded as ancillary to the primary legacy of the farm itself. Functional subordination appears to be the rationale. However, a straightforward interpretation of these passages from the *Digest* would indicate that the testator could, by the use of appropriate words, indicate that the gear or equipment was to be regarded as a second separate legacy that would not fail upon the ademption of the primary legacy. In short, by express drafting, a testator could provide for a scheme emulating partial ademption where otherwise ademption would be complete.

Roman Dutch Law

In the Roman Dutch tradition Voet offered a much more sophisticated analysis.¹⁵³ He explained the passages in the *Digest* just quoted on the basis that *instrumentum* comprised the gear of the farm whilst a bequest of *fundus instructus* comprised the farm, its gear and the separate bequest of the gear of the father of the household.¹⁵⁴ Although the ancillary legacy of the gear of the farm lapsed when the primary legacy of the farm adeemed upon destruction or alienation, the separate legacy of the gear of the father of the household remained extant. Notwithstanding this sophistication, Voet expressly recognised that the testator, by appropriate wording, could vary the legally implied rules as to complete and partial ademption. Voet confirmed that, just as was possible in Roman law,¹⁵⁵ the testator could leave an entirely separate legacy of the farm without gear.¹⁵⁶ The corollary of this, although not expressly mentioned by Voet, is a separate bequest of the gear without the farm. There is no suggestion that these bequests were outwith the testamentary power of the testator. The outcome is clear. By breaking down the elements of a larger bequest into smaller separately bequeathed units, this would be

¹⁵² As regards a farm such gear or equipment comprised things necessary to raise, collect and preserve the fruits; Voet, *Pandects*, 33.7.2 translated in Gane, *The Selective Voet*, vol. 5, 201–3. It presumably included ploughs, farm horses and such equipment. The modern equivalent would include tractors, harvesters, harrows, etc..

¹⁵³ Voet, *Pandects*, 33.7.1, 2 and 3 translated in Gane, *The Selective Voet*, vol. 5, 201–205.

¹⁵⁴ Voet, *Pandects*, 33.7.2 translated in Gane, *The Selective Voet*, vol. 5, 201–3. These were not accessory to the farm but extended to furniture, gold, silver, wine, wheat, medicines and other things.

¹⁵⁵ *Digest* 33.10.14 (Callistratus).

¹⁵⁶ Voet, *Pandects*, 33.7.4 translated in Gane, *The Selective Voet*, vol. 5, 205–6.

effective to emulate partial ademption. The phraseology employed in wills was crucial and it remains so to this day.

Modern Testators

The wording used by contemporary testators is no less open to this form of analysis in the context of the analysis of ademption.

The matter may be illustrated by reference to a comparison between a case from Louisiana and another from India. In the Louisiana case¹⁵⁷ a testatrix made a residuary bequest¹⁵⁸ in trust to establish and forever maintain a school at her homestead site as a memorial to her deceased husband. After making her will, she sold her homestead and made a lifetime gift of most of the proceeds to a university to endow an auditorium as a memorial to her husband. The sale of the homestead site accounted only for approximately one fifth of the value of the bequest to the school. It was held that the location of the school was an indispensable condition of the entire residuary bequest and the entire bequest was revoked under the subsequent disposition.¹⁵⁹ In contrast to this stands an Indian case¹⁶⁰ in which a testatrix made a will containing a bequest to trustees for a tomb of a muslim saint. The bequest comprised two houses and a plot of land. The purpose of the bequest was to endow the tomb enabling its repair and maintenance and to facilitate worship at the tomb. After the will was made the testatrix donated the plot of land to her sister. It was accepted that the gift to the sister caused the partial ademption of the whole bequest. However, the remainder of the bequest, comprising the two houses, remained effective. The Indian case may be distinguished from the Louisiana case in that the trust for the saint could still benefit from the income in the manner originally envisaged by the testatrix. There was never any intent on the part of the testatrix that the tomb should be moved to the land given away to her sister or that worship should be carried out there. The overall purpose of the bequest was therefore not frustrated by the lifetime donation of the testatrix.

This issue of functional subordination is not one that has come directly before the Scottish courts for decision in the context of ademption. However,

¹⁵⁷ *Succession of Race*, 144 La. 157, 80 So. 234 La. 1918 (Supreme Court of Louisiana).

¹⁵⁸ The relevant revocation provision then in force in Louisiana was not limited to specific bequests.

¹⁵⁹ Louisiana Civil Code, art 1691.

¹⁶⁰ *G. Moorthanna v G. Chinna Ankiah* AIR 1975 AP 97 at para 9 per Sambasiva Rao, J. (Andhra High Court).

the facts of one decided case indicate how easily it might arise. In one Scottish case¹⁶¹ a testator left testamentary arrangements¹⁶² comprising a special bequest to a single beneficiary of a liferent of (a) a mansion house, (b) the furnishings and plenishings therein, (c) the “tenancy” of the home farm¹⁶³ (d) the garden and farm implements and (e) a sum of £2,000. A lifetime transfer of the mansion house to a company owned by the testator under reservation of a lease of the home farm was held to adeem the bequest *quoad* items (a) and (c) – the bequest of the liferent of the mansion house and the “tenancy” of the home farm. However, the parties to the litigation were agreed that the beneficiary remained entitled to a liferent of the remaining items (b), (d) and (e) and the court order reflected this agreement.¹⁶⁴ It does not appear to have been argued that items (b) and (d) might also be subject to ademption even though they had not been conveyed away by the testator. An argument to this effect would have been relatively simple to construct. Item (b) – the bequest of the furniture and plenishings of the mansion house – could have been argued to be so linked in function to item (a) – the mansion house itself – that one could reasonably have asserted the testator would have wished them to have been bequeathed separately. On balance, it seems that argument would fail.¹⁶⁵ However, there is an even stronger argument as regards item (d) – the garden and farm implements. The trust disposition and settlement expressly provided that the liferent of the implements were those “required for the garden and farm”. If the beneficiary did not receive the bequest of the garden or the farm it could be argued that this bequest of implements should adeem also leaving no room for partial ademption. The possibility of the argument arising could have been avoided by the will declaring expressly that the bequests of items (a) to (e) inclusive were all severable and to be treated as separate bequests. However, there was no such express provision in the trust deed and settlement considered in the case in hand. The decision therefore allows us to speculate but to draw no firm conclusions.

¹⁶¹ *Ogilvie-Forbes’ Trs Ogilvie Forbes* 1956 SLT 121; 1955 SC 405.

¹⁶² The Trust Deed and Settlement of Sir George Arthur Drostan Ogilvie-Forbes of Boyndlie, Aberdeenshire with two relative codicils all dated 14th March 1952. The testator died on 10th July 1954.

¹⁶³ The wording use in the trust deed and settlement is obscure here but it appears to have been a liferent of the home farm rather than a lease.

¹⁶⁴ *Ogilvie-Forbes’ Trs Ogilvie Forbes* 1956 SLT 121; 1955 SC 405 at 124 and 412 per Lord President Clyde.

¹⁶⁵ *Viz Digest*, 33.10.14 (Callistratus).

Linked Bequests

The issue of linked bequests may be seen in the observation of the Roman jurist Venuleius concerning ademption of the bequest of liberty to a slave and its effect on bequests to that slave:¹⁶⁶

<i>Cum libertas adimitur, legata servis relicta nihil attinet adimi.</i>	Where a grant of freedom to some slaves is adeemed, there is no point in specifically adeeming any legacies left to them.
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This is an example of a phenomenon of the ademption of a primary bequest having an effect on other bequests linked in some way to that primary gift. Bequests expressly linked to each other by express testamentary provision are not unknown. The application of ademption to such bequests is not entirely predictable. Consider the situation where a testator bequeaths to a single legatee an animal together with specific equipment for the care or transport of the animal or a sum of money for the purpose of the maintenance of the animal. If, prior to the testator’s death, the animal dies or the animal is sold, the bequest of the equipment is, as indicated above, likely to be regarded as adeemed on the basis that it is ancillary to the primary bequest of the animal. However, is the general, but linked, bequest of money also to lapse?

A situation of this sort was considered in a New York case.¹⁶⁷ A testatrix bequeathed two horses with saddles, harness and equipment, together with a sum of money to a single beneficiary, directing that the money was to be used for the care and maintenance of the animals. After the testatrix was declared incompetent, an appointed committee sold the horses and the equipment. The testatrix, still an incompetent, died 20 years later and her will remained in unchanged terms. It was held that the bequest of the horses and the equipment had adeemed.¹⁶⁸ However, the entitlement to the bequest of cash

¹⁶⁶ *Digest* 34.4.32 (Venuleius). See also *Digest*, 34.4.26 pr. (Paul). For a translation see Mommsen, Krueger, Watson, (eds), *The Digest of Justinian*, vol. 3, 170.

¹⁶⁷ *In the Matter of the Construction of the Will of Mary C. Johnston*, 277 A.D. 239; 99 N.Y.S. 2d 219; 1950 N.Y.A. D. LEXIS 3033 (Supreme Court, Appellate Division, Third Department, New York). The decision was followed in *In re Erl’s Estate*, 30 Col. App. 203, 491 P.2d 108 Colo. App. 1971 (Colorado Court of Appeals) dealing with the death of a dog during the lifetime of the testator where there was a bequest to a beneficiary for the maintenance of the dog. It is unclear whether there was a bequest of the dog itself.

¹⁶⁸ *Ibid* respectively at pages 241 and 222 per Justice Deyo. Cf the Scottish approach that alienation by an attorney acting under a continuing power of attorney for an *incapax*

was disputed. It was held that although the bequest of cash was conditional, the performance of the condition had been rendered impossible through no fault of the legatee and by no act of the testatrix. Consequently, the condition would be disregarded and the gift given absolute effect. There is the potential for a complex application of this approach to ademption. The judgment suggests that the pecuniary legacy would have lapsed if ademption of the bequest of the horses had been caused by a voluntary alienation by the testatrix but not by an involuntary destruction, loss, compulsory sale, or alienation for an *incapax*. In short, the absence or presence of *animus adimendi* as regards the specific legacy of the horses could be relevant to determine if the linked pecuniary legacy is to lapse.

A Roman and Roman Dutch lawyer would tend to analyse the matter by examining the nature of the requirement that the money should be used for the care of the horses. In the absence of a clear indication to the contrary, the stated purpose would probably be regarded by such lawyers as a *modus* rather than a condition.¹⁶⁹ The general rule would be that where the performance of the *modus* is impossible the *modus* is to be regarded as *pro non scripto*¹⁷⁰ with the result that the beneficiary will take the bequest free from the requirement to dedicate it to the stated purpose. This may remain the case even if the reason for the impossibility of the performance of the *modus* arises as a result of the actings of the testator himself. Consequently, albeit by a different frame of analysis, Roman Dutch law may arrive at the same result as the Court in the New York case.

Scots Law

Although legacies *sub modo* are recognised in Scots law,¹⁷¹ the detail of Scottish jurisprudence in this regard, particularly their interaction with the doctrine of

testator does not cause ademption unless the disposal was necessary and not merely an act of prudent administration: *Turner v Turner* [2012] CSOH 41; 2012 SLT 877. My thanks to Derek Francis, advocate, for allowing me to sit in on the debate in this case.

¹⁶⁹ *Digest* 35.1.17(4) (Gaius).

¹⁷⁰ Voet, *Pandects*, 35.1.15 translated by Gane, *The Selective Voet*, vol. 5, 308 cited for the purposes of South African law in Corbett, Hofmeyr, Khan, *The Law of Succession in South Africa*, 340.

¹⁷¹ Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights* (Edinburgh, 1751–3; reprinted as *Stair Society*, vols 41–3, Edinburgh, 1993–5), 1.9.17, page 231 and 3,8,45, page 389 referring respectively to *Code*, 8.55 and to *Commissioners for the Shire of Berwick v Craw*, 18 June, 1678, M.1351. That case, however, could equally be regarded as an instance of a public trust albeit the nature of the bequest was not

ademption, is yet to develop. Broadly the same function fulfilled by gifts *sub modo* is served in many cases by a Scottish *mortis causa* trust. If the trust purposes fail there arises the possibility of the entire gift failing leading to a resulting trust and the property falling back into the estate for distribution in terms of a residue clause or, failing that, by the rules of intestacy.

Two Essential Parts

One should also note that it is possible to have two parts of a single subject of a bequest where neither part is subordinate to the other but both are essential to each other. In such a case, if any one of the parts is destroyed, the entire original thing is altered even if something remains. This possibility was noticed by the glossator Azo of Bologna (1150–1230). He first identified two situations. First, where the possibility of partial ademption in the context of a testator who left a bequest of a farm and then varied the bequest to retain the bare property right in the farm leaving the legatee with a liferent. Secondly, the possibility of partial ademption where the testator varied the same initial bequest by reserving a liferent and leaving the legatee with the property right burdened by the liferent. Clearly a beneficiary in the first situation could receive a liferent and, to do so, it was not essential that he also receive the property right in the same thing. A beneficiary in the second situation could receive the property right and to do so it was not essential that he receive the beneficial use of that property. Azo then proceeded to distinguish these two situations from yet another:¹⁷²

<i>Si autem duo sunt legata, quorum unum non potest esse, sine alio: adempto uno, sine quo alterum non potest esse, utrunque videtur ademptum.</i>	If, however, two things are bequeathed and neither of them can exist without the other, if the bequest is adeemed in respect of one of them without which the other cannot exist, both elements [of the bequest] are regarded as adeemed.
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clearly conceptualised. Counsel, however, did refer to an *actio popularis* as justifying the title of the pursuers to sue and that is the hallmark of a public trust as compared to a *donatio sub modo*. See also *Stair Memorial Encyclopaedia*, vol. 24, “Trusts, Trustees and Judicial Factors”, paras 4, 6 and 118 and *Stair Memorial Encyclopaedia*, vol.8, “Donation” para. 40. Cf. *Macfarquhar v McKay* (1869) 7 M. 766.

¹⁷² Porcius Azo, *Summa Azoonis Locuples Iuris Civilis Thesaurus*, ed. Henricus Draesius, (Venice, 1566), 1089, para 9 *In II Librum Institutionum – de Ademptione Legatorum, & Translatione*. This is the translation of the present author.

Whilst this appears simple enough to state in principle, exactly how this can be illustrated in modern practice is more problematic. However, it is submitted that central to the resolution of many situations is how the testator describes the object bequeathed. For example, if a single thing - described in a will as “a hammer” - is bequeathed, the whole special bequest will probably adeem if either the hammerhead or the shaft of the hammer is alienated by the testator in his lifetime. What is left is within the testator’s estate as at the moment of his death simply no longer “a hammer”. However, if the very same item is bequeathed as two things and described in the will as “the hammerhead and the shaft”, this very description indicates that they can exist separately and this possibility was acknowledged by the testator. If the hammer is dismantled during the lifetime of the testator and one of its two constituent parts is then alienated by the testator, again in his lifetime, the legatee will probably be entitled to the other constituent part remaining in the estate as at his death.

Juristic Acts – Grants of Subsidiary Real Rights

The final variant of circumstances sometimes thought to require application of the rules of partial ademption involves rights in the same thing held by the testator. There seem to be two situations of potential relevance.

First, the testator may own the thing, such as a plot of land, and also hold a sub-lease in the same land. The two rights remain unmerged as a third party holds the right to an interposed lease. The testator may leave a bequest of the property right separately from the bequest of the tenant’s right in the sub-tenancy. These are two distinct real rights. If the testator disposes of the property right during his lifetime this may effect a total ademption of that bequest but it has no effect on the bequest of the tenant’s right in the sublease and *vice versa*. Thus analysed there is no issue of partial ademption.

A second type of situation arises where a testator holds the property right in an item and, in his will, grants a bequest not only of the property right in the thing to one party but also a bequest of a new derivative real right in the same thing to someone else. If, during his lifetime, the testator thereafter alienates the property right in the thing the bequest of that property right will adeem. So too will the bequest of the proposed derivative real right as the testator will have no power to grant the same at the time of his death. This is simply

an application of the rule stated by Ulpian and collected in *Digest*:¹⁷³ *nemo plus iuris ad alium transferre potest, quam ipse habet*. No-one may confer to anyone else a right more extensive than he himself has. An exception arises where, upon the lifetime alienation, the testator reserves the derivative real right. That right then comes into existence by virtue of an *inter vivos* juristic act and potentially remains in the estate of the testator to satisfy the bequest. This can apply *mutatis mutandis* if the *inter vivos* act is a grant of the derivative real right that is the subject of the bequest. In a passage collected in the *Digest*, Pomponius dealt with the rather different situation of express partial revocation of a bequest of land that is expressly restricted by means of later testamentary provision to a liferent only.¹⁷⁴ The beneficiary remains the same but he receives a lesser right. This passage was extended by the French jurist Jaques Marie Boileux (1803–1872) as follows to deal with partial ademption:¹⁷⁵

<i>Si une partie seulement de la chose léguée a été aliénée, la disposition subsiste pour le surplus. Exemple: le testateur a légué la propriété d'un immeuble, puis il aliène la nue propriété de cet immeuble: le legs subsistera pour l'usufruit; – s'il aliène l'usufruit, le legs subsistera pour la nue propriété.</i>	If only a part of the bequeathed item is alienated, the disposition remains effective as regards the remainder. For example, if the testator has bequeathed the property of a piece of immoveable property and then he alienates the bare property right in the item of property: the legacy will subsist for the liferent; – if he alienates the liferent therein, the legacy will subsist for the bare property right.
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This situation is indeed the same as identified by Azo as quoted above. This could still occur in modern legal systems and the answer is likely to be the same as suggested in the quotation immediately above.

Conclusion

This article demonstrates that complexities of partial ademption have straddled two millennia and a number of legal traditions and are likely to continue

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Digest 50,17,54 (Ulpian).

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Digest 34.4.2 pr. and (1) (Pomponius).

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J. M. Boileux, *Commentaire sur Le Code Napoléon* (6th edn, 7 vols, Paris, 1856), vol. 4, 188, comment on French Civil Code, Article 1038. This is the translation of the present author.

particularly as the complexity of financial products continues. Despite the divergence in theory in the Common Law and Civilian models of ademption, much remains to be gleaned from the comparison provided herein and each tradition can use the authorities of the other in this particular context. Above all else this article is not an enterprise in obscurantism. The principles in the Civilian authorities remain highly useful in solving contemporary testamentary problems in a wide range of jurisdictions, particularly in Scotland as a mixed legal system. To date the principal barrier for Scottish lawyers has been unfamiliarity caused largely by a language barrier and an unfounded perception that Latin is irrelevant to modern thinking and legal practice. It is hoped that the analysis presented in this article will demonstrate the contrary. In addition, the translations herein provided should serve to make the Civilian sources more readily available to solve contemporary legal disputes relating to partial ademption and facilitate the administration of modern estates.

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Prepared by Kieran Buxton

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