

# Continuity, Change and Pragmatism in the Law



Continuity, Change and  
Pragmatism in the Law:  
Essays in Memory of  
Professor Angelo Forte

Edited by

Andrew R. C. Simpson, Scott Crichton Styles,  
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Aberdeen University Press

© the Contributors, 2016  
Aberdeen University Press  
19 College Bounds  
University of Aberdeen  
Aberdeen AB24 3UG

Typeset by the Research Institute of Irish and Scottish Studies,  
University of Aberdeen  
Printed and bound in Great Britain  
by CPI Anthony Rowe, Eastbourne

A CIP record for this book is available from the British Library

ISBN 978-1-85752-039-2

# Contents

List of Contributors	vii
Introduction: Professor Angelo Forte <i>Andrew R. C. Simpson</i>	1
Pragmatism, Precepts and Precedents: Commercial Law and Legal History <i>Hector L. MacQueen</i>	10
‘There’s a Scholar on the Water’: Angelo Forte and Obligations as the Bedrock <i>John Blackie</i>	43
Motives for Murder: The Role of Sir Ralph Paynel in the Murder of William Cantilupe (1375) <i>Frederik Pedersen</i>	69
Procedures for Dealing with Robbery in Scotland before 1400 <i>Andrew R. C. Simpson</i>	95
A Dubious Tale of Misfortune Revealing the True Nature of Udal Law on Shetland and the Schound Bill – Shetland Law at the Beginning of the Seventeenth Century <i>Jørn Øyrehagen Sunde</i>	150
The ‘authentick practique bookes’ of Alexander Spalding <i>Adelyn L. M. Wilson</i>	175
Scottish Marine Insurance before the Mid-Eighteenth Century <i>Scott Crichton Styles</i>	237
The Rationale and Fundamental Structure of the <i>Conditio Si Testator Sine Liberis Decesserit</i> in Scots Law <i>Roderick R. M. Paisley</i>	280

The Presumption Arising from Possession of Corporeal Moveable Property: Questioning Received Wisdom <i>David Carey Miller</i>	339
Ships as a Branch of Property Law <i>George L. Gretton</i>	367
Certainty and Security <i>Malcolm Clarke</i>	398
Economic Frustration Revisited <i>Ewan McKendrick</i>	413
The Exclusion of Consequential Loss in the Piper Alpha Case: A Study of Lord Rodger's Method of Textual Analysis <i>Greg Gordon</i>	434
Credit Rating Agencies and Their Conflicts of Interest: Causes, Consequences and Cure <i>Tom Burns</i>	466
Wind-Farms – Whither Nuisance? <i>Francis McManus</i>	511
Angelo Forte, Bibliography of Works	542
Index	549

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# Professor Angelo Forte

*Andrew R. C. Simpson*

The late Professor Angelo Forte held the Chair of Commercial Law at the University of Aberdeen between 1993 and 2010. This volume is published to demonstrate the nature and extent of his scholarship and in recognition of his outstanding contribution, particularly to the fields of commercial law and legal history. In this introduction, I will not seek to reiterate the many excellent and well-deserved tributes paid to Angelo in the course of this book. Nonetheless, as one who owes a great personal debt to him, it is fitting for me to mention how gratifying it is to see the quality and significance of his work recognised here by so many friends and colleagues. Many of those who have contributed to this book, myself included, have drawn inspiration in our writing from conversations we had with him, or from engagement with significant questions identified in and through his published work. That is not to say that all contributors have fully endorsed every conclusion which Angelo drew in his work; I suspect he would be slightly disappointed if they had. Nonetheless, by and large, the disagreements voiced are by way of qualification to his theses. That in itself is testament to the extent to which his work improved greatly our understanding of the legal past and the modern law.

## **Continuity, Change And Pragmatism In The Law**

The last comment made above draws attention to the fact that Angelo's research interests were eclectic. That eclecticism is reflected in the contributions to this memorial volume, which focus on a wide range of topics primarily – but not exclusively – related to the fields of legal history and modern commercial law. Most of the articles are based on a series of papers given in memory of Angelo at a conference which took place in the Linklater Rooms at



Aberdeen between 8 and 9 March 2013. The event was generously sponsored by Alexander Green of The Law Agency, as was the keynote address, which was given by Professor Hector MacQueen and constituted the Seventh Law Agency Lecture at Aberdeen.<sup>1</sup>

The theme of the conference was left deliberately open, so as to reflect Angelo's wide range of interests. Nonetheless, in the event all of the contributors explored the importance of various factors which can profoundly influence legal change, and, in retrospect, it became clear that many of these causes of legal development could appropriately be described as 'pragmatic'. For example, it was argued that practical problems in the administration of justice have frequently shaped the law itself. It was also claimed that in a variety of situations the lawyer's desire to find a workable solution to a problem can be as significant as purely theoretical and doctrinal concerns. The extent to which this ought to be the case was also explored to some extent. Given that Angelo himself was particularly interested in the theme of the role of such 'pragmatism' in informing legal change, it seemed appropriate to make this topic the broad theme of his memorial volume.<sup>2</sup> As he put it in one article,

The content of Scots law is determined by those who make, interpret, and apply it; and they do this with an eye on modernity and socio-economic efficiency free from sentimentality [...] As we move into the twenty-first century pragmatic realism and utilitarian functionalism will increasingly come to dominate legal developments [...] This already reflects the prevailing mood in Scotland's legal community and represents an approach which is entirely consistent with Scottish success both past and present. By maintaining this outlook it will serve us in the future also.<sup>3</sup>

Thus this book, broadly speaking, examines pragmatism and pragmatic concerns in legal development. However, this last comment must be qualified. A book entitled *Continuity, Change and Pragmatism in the Law* will make some

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<sup>1</sup> The revised version of this lecture is published below as Hector L. MacQueen, 'Pragmatism, Precepts and Precedents: Commercial Law and Legal History'.

<sup>2</sup> This point is outlined very clearly below in John Blackie's contribution, "'There's a Scholar on the Water': Angelo Forte and Obligations as the Bedrock'.

<sup>3</sup> A. D. M. Forte, 'Scots law and Scottish national identity', in G. Fellows-Jensen (ed.), *Denmark and Scotland: the Cultural and Environmental Resources of Small Nations* (Copenhagen, 1999), 239–250, 248. The rest of the article makes it clear that he understood the word "pragmatism" in the broad sense outlined here.

readers think of the extensive literature on the pragmatic position outlined by writers like Richard Posner in, for example, *Overcoming Law*.<sup>4</sup> This book does not consciously engage with such literature; nor does it advance any theoretical position. If it were to do this it would distort the conclusions which emerged from the conference held in March 2013. Furthermore, while Posner himself admits that ‘there is no “canonical concept of pragmatism”’,<sup>5</sup> this book is not intended to engage with that qualification either in any significant way. Nonetheless, it will hopefully be of interest to ‘pragmatists’ of various hues, so long as the qualifications outlined here are borne in mind.

### The Contents of this Volume

The theme of the influence of pragmatism, as described above, can be traced to some extent throughout this volume. It is explored in great detail in the first two chapters, written by Professor Hector MacQueen and Professor John Blackie. Both authors examine and evaluate different aspects of Angelo’s contribution to scholarship. Hector MacQueen evaluates one of Angelo’s central legal-historical arguments. This is that the Anglicisation of Scots law was initially driven not so much by the British Parliament at Westminster or by House of Lords judges in the nineteenth century. Rather, from the mid-eighteenth century onwards, Scottish legal practitioners were actively promoting the use of English law in practice. In order to explain this development, Angelo maintained that Scottish advocates were driven by pragmatic concerns. Rather than being concerned to maintain the doctrinal or theoretical purity of a system which owed much to the Civilian tradition, they wished to align Scottish commercial practice with that of England to facilitate trade, both with their southern neighbours and also with the burgeoning British Empire. In other words, Anglicisation was at first driven from within Scotland by Scottish lawyers – a point similar to that advanced elsewhere by the late Lord Rodger.<sup>6</sup>

In advancing these claims, Angelo relied primarily on evidence drawn from the law relating to contracts of insurance and bills of exchange. Hector MacQueen engages critically with his conclusions by suggesting that ‘his evidence base needs to be expanded so that his conclusions can be tested

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<sup>4</sup> R. Posner, *Overcoming Law* (Cambridge, 1995).

<sup>5</sup> Posner, *Overcoming Law*, 4.

<sup>6</sup> See, for example, A. Rodger, ‘Thinking About Scots Law’, *Edinburgh Law Review*, 1 (1996), 3–24.

more widely'. In an insightful and wide-ranging paper, he argues convincingly that such a broader study may ultimately lead to some qualification of Angelo's views. For example, it is shown that the contract of sale, which is at the heart of commerce, does not seem to display strong English influence prior to the mid-nineteenth century. Indeed, there seems to have been at least some resistance to wide-ranging Anglicisation in relation to that contract, so as to maintain a degree of doctrinal integrity in the law. This analysis does not undermine the view that Anglicisation was, at least in part, driven by pragmatic concerns. Nonetheless, it does show that the picture may be more complex than some of the evidence considered by Angelo suggests.

John Blackie likewise engages with Angelo's scholarship on the law of obligations. He considers how that work was informed by 'the significance of law as practised, the world of business, commerce and consumers, and above all the world of those who go down to the sea in ships'. He offers intriguing reflections on the ways in which what is today termed 'knowledge exchange' happened entirely naturally between the legal academy and the profession for some time prior to the mid-1990s, without any prompting from external influences. He shows how Angelo's interest in the practical realities of applying the law to concrete problems encountered by the profession led him to engage enthusiastically with that discourse. He also offers rather sobering thoughts about some of the causes of its decline. In his article, John Blackie also emphasises several other important features of much of Angelo's work. For example, it often emerged in response to specific cases, and on such occasions 'the case was a peg on which was hung by him a consideration of the area of law as a whole which related to the decision'. Furthermore, throughout this body of work, his pragmatism led him to adopt 'a marked preference for legal certainty as promoting what [...] was to him cardinal, namely reasonable commercial behaviour and reasonable distribution of risk in business life between businesses and between businesses and consumers'.

These critical engagements with Angelo's work in relation to legal history and commercial law are then followed by a series of essays which pay tribute to his contribution to the former discipline. Angelo would undoubtedly have been deeply intrigued by Dr Frederik Pedersen's detailed research into the medieval murder mystery surrounding the death of the nobleman William Cantilupe, and the remarkable back-story of his brother – or possibly his sister – Nicholas. The story illustrates how the law was used by Nicholas, his wife and his wife's family to find practical solutions to a situation which would have made little sense to anyone at the time. My own contribution follows. Drawing on a project which

Angelo and I were working on when he died, the article traces the ways in which medieval Scottish kings developed increasingly draconian procedures to deal with the problem of robbery and other crimes. This culminated in a form of process used against the sons of the notorious Wolf of Badenoch. This seems to have allowed Scottish judges to convict and sentence a man without summons. Arguably this development was driven by practical and political problems in the administration of justice; and yet, curiously, the way in which the reform was formulated owed much to the earlier Scottish legal tradition. Next, Professor Jørn Sunde's article explores the intrigue and power-politics surrounding the case of James Sinclair, which came before a commission at Scalloway in the Shetland Islands in 1637. The Shetlanders still used Norwegian laws in some cases, even though Scots law was coming into the ascendancy. Jørn Sunde demonstrates that the decisions of litigants to use a particular legal system was frequently driven by little more than the belief that it might provide a practical advantage in securing what they wanted. There was little – or nothing – in the way of a sentimental attachment to Norwegian law for its own sake amongst the Shetlanders; pursuers and defenders were more pragmatic than that. The next of the legal-historical contributions, that of Dr Adelyn Wilson, provides a detailed analysis of a legal manuscript associated with Alexander Spalding, who was a practitioner in the Commissary Court of Aberdeen. The manuscript sheds considerable light on how legal practice in provincial courts could be shaped by legal literature produced by lawyers working in the supreme court in Scottish civil matters, the College of Justice. The practical impact of such literature outside that court requires to be studied in much more detail, and Adelyn Wilson's work is pioneering in that regard. The last of the purely legal-historical contributions is written by Scott Styles; it augments and critically engages with Angelo's work concerning the history of the law of insurance. The chapter develops a detailed and compelling argument to show that the absence of a developed law of insurance and of Scottish underwriters in the seventeenth and early-eighteenth centuries does not demonstrate that Scottish merchants were not using insurance contracts widely. They found ways around the practical limitations caused by the insurance market at home in order to defend their interests. In particular, the chapter draws upon records of the Scottish Admiralty Court, which sheds light on the use of insurance in Scotland in an early period. The chapter advances our understanding of the law, and whets the appetite for more.

After these contributions, there follow two chapters which draw heavily on rigorous historical research to help lawyers understand some aspects of

modern Scots private law. The first, written by Professor Roderick Paisley, considers the ‘obscurity’ surrounding the rationale and fundamental structure of the *conditio si testator sine liberis decesserit*. He notes that an ‘optimist might observe that obscurity in this area has led to considerable opportunities for pragmatic development of the law enabling just and precise judicial solutions to be applied to the knotty factual problem immediately at hand’. Yet he also cautions against embracing such pragmatism too extensively. As he puts it, a ‘pessimist [...] might reflect on the continuing theoretical muddle, lament the lack of a systematic overview and predict a probable reduction in the ability of lawyers to foretell the application of the law to new factual situations’. Roddy Paisley skilfully addresses the obscurity surrounding this area of the law, drawing some principle out of the mass of ways in which the maxim has been understood and misunderstood over the centuries. The second contribution concerning the modern law which draws on detailed historical research is that of Professor David Carey Miller. He considers the operation of the presumption that the possessor of a corporeal moveable is its owner. As a rule designed to respond to commercial reality, it provides a pragmatic solution to the problem that such property can pass through many hands, making it difficult for a possessor to prove title to a particular moveable thing. His masterly work constitutes a powerful argument in favour of the view that the presumption has an extensive role to perform in the practical operation of the law governing corporeal moveables. Of particular interest is his suggestion that the presumption, properly understood, effectively bars the Crown from claiming moveable property in which a right of ownership has negatively prescribed under the terms of the Prescription and Limitation (Scotland) Act 1973.<sup>7</sup>

A series of chapters which are more directly relevant to Angelo’s work concerning commercial law follow. Professor George Gretton explores the extent to which the law relating to ships may be considered a branch of Scots property law. He notes that this ‘theoretical’ question has been raised in the past, but the ‘practical’ answer has simply been that the background law relating to Scottish ships is simply English law. This answer may indeed be ‘practical’, but it is shown that it may also simply be wrong; the law is, quite simply, a ‘mess’. In response, George Gretton has provided scholars with an extremely well-informed guide to the questions which need to be asked to tackle the problem. In his chapter, Professor Malcolm Clarke also

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<sup>7</sup> Prescription and Limitation (Scotland) Act 1973, c.52.

emphasises the pragmatic importance of certainty in the law of insurance. He demonstrates that it is of great moment that insurance contracts should be widely intelligible, and to that end they should be read and interpreted as part of the broader law of contract. Such views, in particular relating to the practical necessity for legal certainty, resemble closely Angelo's own, as explained in John Blackie's chapter. In his contribution, Professor Ewan McKendrick then revisits Angelo's views concerning frustration of commercial contracts. He begins by noting Angelo's view that the law of frustration – as it stood in 1986 – was not suitable to meet the practical needs of businessmen. In particular, he thought that 'economic distortion of a contractual obligation can justify adjustive judicial intervention'.<sup>8</sup> He did not think that 'every change in economic circumstances should warrant judicial intervention'. Yet there could come a point – which might 'be difficult to identify with precision' – when such 'intervention' would be warranted. Angelo also believed that courts should have powers, in such circumstances, to 'adjust or adapt' the contract to 'the changed circumstances'. Ewan McKendrick then revisits these arguments, with particular reference to the case of *Lloyds T.S.B. Foundation for Scotland v Lloyds Banking Group p.l.c.*<sup>9</sup> He argues convincingly that, in light of recent developments in the law, there remains considerable merit in the 'pragmatic' approach to the matter originally outlined by Angelo.

The following chapter, written by Greg Gordon, provides a fascinating account of the late Lord Rodger's approach to textual analysis, making reference both to his academic work and also to his judgement in *Caledonia North Sea Ltd v London Bridge Engineering Ltd*.<sup>10</sup> Lord Rodger's approach in this case to the problems caused by some traditional interpretations of the phrases 'consequential damages' and 'consequential loss' in contracts is expounded to great effect. It is shown that his Lordship, having carefully considered the traditional approach, applied scholarly rigour to establish an interpretation of the term 'indirect or consequential loss' which was informed by its context within a clause of the disputed contract. As a result, Lord Rodger's reading of the effect of the clause in question made considerable practical sense against the backdrop of commercial reality. The chapter as a whole lucidly introduces central aspects of Lord Rodger's approach to textual analysis. Indeed, it also recommends them, particularly to those interested in the sort of pragmatic

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<sup>8</sup> A. Forte, 'Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom', *Juridical Review*, [1986], 1–24, 18.

<sup>9</sup> 2013 S.C. (U.K.S.C) 169.

<sup>10</sup> 2000 S.L.T. 1123, affirmed 2002 S.C. (H.L.) 117.

approach endorsed in Angelo's work. The next chapter, written by Dr Tom Burns, explores the theme of reform of credit rating agencies. Drawing on a wealth of original research, he demonstrates the serious practical problems arising from the conflicts of interests faced by such bodies. For example, he notes there is often a 'fundamental conflict of interest arising from the fact that the main credit rating agencies have moved from a subscriber-pays business model to one where their fees are paid by the party that is being rated'. Quoting another scholar, he points out that this 'leads to the fundamental question of "whether one can trust a watchdog hired and paid by the party to be watched?"' In developing responses to the problem, he suggests that the existing law may provide one solution, through recognition of the principle that such agencies owe fiduciary duties to those who rely on their services. The final chapter is contributed by Professor Frank McManus. It explores the potential role of the law of nuisance in relation to wind-farms. An important element of the argument is concerned with the extent to which this area of the law is sufficiently flexible to respond to this issue. Much of the article holds in tension the practical difficulties caused by the lack of clarity in the case-law relating to the definition of nuisance, on the one hand, with the fact that this characteristic enables the law to respond to a wide range of situations, on the other. Such themes are also explored elsewhere in the volume, in particular by Roderick Paisley. Frank McManus suggests that wind-farms do not normally generate sufficient noise to constitute a nuisance – as defined in law – on that ground alone. Nonetheless, it is suggested that the combination of the noise with the visual impact of the turbines might potentially be actionable as a nuisance.

Thus there emerge in the course of this volume various points relating to the general theme of legal pragmatism, as defined above. Consistently authors draw attention to the ways in which commercial reality and legal practice have shaped and informed legal change. The presumption that the possessor of a corporeal moveable is its owner, as discussed by David Carey Miller, is an excellent example of a rule shaped simply by commercial reality. Some have also argued that the commercial lawyer's pragmatism leads him to seek certainty in the law. Nonetheless, it has also been noted that lawyers themselves, when offered the choice of which system of rules they might seek to apply in a case, have in the past been prepared to promote reliance on whichever rules gave their clients a practical advantage, a point explored in Jørn Sunde's article. Alongside this, the consequences which may follow from an overly flexible approach which simply responds to an immediate problem



by embracing whichever solution seems most practicable are also explored in Roderick Paisley's chapter. It is hoped that this volume will contribute to scholarly discussion of these broad themes, and the significant role of legal pragmatism – broadly defined – in informing legal change.

### **Acknowledgements**

The editors of the present volume wish to express thanks to various friends and colleagues. First and foremost, the Research Group for Legal Culture at the Faculty of Law of Bergen University, Norway, which is led by Jørn Sunde, provided a very generous subvention towards covering the costs of publication. The subvention was given to honour Angelo's links with the Research Group and the Faculty. Without this help, it would not have been possible to proceed to print. Second, together with Scott Styles, David Carey Miller organised the conference in Angelo's memory held in March 2013. The editors are particularly grateful to David Carey Miller for giving his time to advise on a range of matters relating to the publication of this book. Third, Alexander Green of The Law Agency sponsored the conference, the subsequent dinner and also the keynote address, which was delivered as the Seventh Law Agency Lecture. Alexander Green's great generosity in supporting legal scholarship at Aberdeen over many years is much appreciated. Fourth, the Research Committee of the University of Aberdeen School of Law, led in 2013 by Professor Peter Duff, and from 2014 by Professor Paul Beaumont, provided financial support for both the conference in Angelo's memory and also for the services of a copy-editor for the volume. Paul Beaumont also kindly provided practical advice to the editors during the preparation of the book, as did Roderick Paisley. Fifth, several anonymous reviewers gave generously of their time to improve the quality of a range of contributions submitted to this volume. For this we remain very grateful. Sixth, the postgraduate student who undertook the rather daunting role of copy-editor, Euan West, made such a significant contribution to the publication process that it was agreed that he should be recognised as a member of the editorial team. It is hoped that the efforts of those acknowledged here, together with those of the editors and contributors, will result in a fitting and lasting tribute to a very great scholar, gentleman and friend.

*Old Aberdeen  
Christmas 2015*



# Pragmatism, Precepts and Precedents: Commercial Law and Legal History

*Hector L. MacQueen*

## Introduction: Angelo and the History of Insurance and Bills

It is an honour and a privilege to be asked to give this Law Agency Lecture in commemoration and celebration of Angelo Forte.<sup>1</sup> I first met him in 1980, in Glasgow at a gathering which he and David Fergus had initiated to discuss setting up a Scottish Legal History Group. The success of that idea can be measured by noting that the Group continues to meet annually, having held its first conference in 1981. Re-reading much of Angelo's published work in preparation for this event has brought back so much else: our time as colleagues in Edinburgh, our collaboration in authorship, our mutual editing of each other's work, going to innumerable conferences and meetings together, acting as each other's external examiner at every level of study, and, above all, lots

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<sup>1</sup> This is a revised and expanded version of the Law Agency Lecture delivered at Aberdeen on 8 March 2013. I have however sought to maintain the style and tone of a lecture as this paper is meant more to prompt further questions than to formulate definitive answers. My researches owe much to the English and Scottish Law Commission teams working on the Commissions' joint project on insurance law and also, separately, on consumer law. The following frequently cited works are usually referenced in their most recent edition or reprint: James Dalrymple Viscount Stair, *Institutions of the Law of Scotland* (6th edn, Edinburgh, 1981); William Forbes, *Institutes of the Law of Scotland 1722–1730* (Edinburgh, 2012); Andrew McDouall Lord Bankton, *An Institute of the Law of Scotland 1751–3* (3 vols, Edinburgh, 1993–5); John Erskine, *An Institute of the Law of Scotland* (8th edn, 1871; Edinburgh, 1989); George Joseph Bell, *Commentaries on the Law of Scotland and on the Principles of Mercantile Jurisprudence* (7th edn, 1870; Edinburgh, 1990); idem, *Principles of the Law of Scotland* (4th edn, 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. With Forbes' *Institutes*, citations are to the page number of the reprinted edition, in preference to using the appallingly complex reference system that he himself devised; further, the easiest way into the MS. of his *Great Body of the Law of Scotland* as presented online at <http://www.forbes.gla.ac.uk/contents/> (accessed 22 March 2016) is by its foliation.

of enjoyable and stimulating conversations about law, history and much else besides, all reflecting our many over-lapping enthusiasms. Perhaps we bonded most in the late 1980s, however, when we took our daughters, each pre-school and much the same age, to Christmas pantomimes at the King's Theatre in Edinburgh, there to mortify them both by our exuberant over-engagement with demands from the stage for audience participation.

One area where I must admit our interests did not overlap much if at all was to 'go down to the sea in ships [and] do business in great waters'.<sup>2</sup> But even as one who tends to turn green at the very thought of setting foot on any sea-going vessel bigger than a motor-launch, I did find enthralling Angelo's vivid descriptions of his days as a crewman on fishing boats in the stormy waters of the North Sea and beyond. His enthusiasm and excitement about boats and the sea carried over, as I will try to show in a moment, into his academic research, and also into the public presentations of its results. I will never forget the relish with which he informed a bemused audience – the January 1998 Conference of Scottish Medievalists – that Polynesian sailors on inter-island voyages in the Pacific detected wave rhythms by the swing of their testicles.<sup>3</sup> I believe that Angelo was principally responsible for the chapter on 'Sailing the North Atlantic' in the co-authored book *Viking Empires*; certainly much of it is underpinned by personal observation and knowledge of how small wooden boats and their crews behave on the open sea. Swinging Polynesian testicles appear again, albeit this time accompanied by the wry comment that 'We must discount this possible means [of navigation] in more northerly climes'.<sup>4</sup>

Angelo's passion for boats and the sea above all informed his interests in the law, especially commercial law, and its history. Ships and other vessels have been of central importance to commerce from time immemorial; not just across the seas, moreover, but also on inland waters. It is no coincidence that most of Europe's major cities are either ports or places with ready access to significant rivers, or both. Until the last couple of centuries, carriage of goods by land for any distance was at best a much slower and more laborious business than doing so by water; and more could be carried in the latter way as well. The early products of the Industrial Revolution reached their markets

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<sup>2</sup> Psalms, 107, 23.

<sup>3</sup> In the published version this information is discreetly tucked away in a footnote: Angelo D. M. Forte, "'Kenning be Kenning and Course be Course": Maritime Jurimetrics in Scotland and Northern Europe 1400-1600', *Edinburgh Law Review*, 2 (1998), 56–88, 65, fn. 49.

<sup>4</sup> Forte, Richard Oram and Frederik Pedersen, *Viking Empires* (Cambridge, 2005), 346, fn. 60.

by canal, and only the successive comings of the railway line, tarmacadam, the internal combustion engine and powered flight transformed the position overland. Even now, however, as a visit to any modern container port will readily confirm, carriage of goods by sea remains a critical part of the global economy.

It was not so much the law of carriage by sea that Angelo focused on, however, even though he did touch upon it more than once in his writings, in both contemporary and historical settings. He was, of course, interested by the law of contract, which applies throughout commercial law, and this includes the hire, or chartering, of ships and the placing of goods on board them for carriage from one place to another. But amongst the several kinds of commercial contract he gave most attention to the law of insurance contracts. This was linked, I think, to various other interests: problems of risk generally; the use of standard form contracts and their concomitant, the regulation of unfair contract terms; and the gap between what the law appeared to say and its operation in practice under various 'soft law' devices provided through the insurance industry itself. But at least in part his interest may also have been connected with the significance of insurance in shipping transactions, and the fact that the governing statute on the subject in the United Kingdom was (and still is, at the time of writing) the Marine Insurance Act 1906, c.41.<sup>5</sup> A crucial invariable of ships transporting goods across the seas is risk, both to the ship itself and to the goods being carried; insurance is, and has been for a long time, the most important way of laying off those risks for those who would otherwise have to bear the losses should any of them materialise.

Angelo's first major historical study, published in 1987, confirmed the unsurprising fact that maritime commerce provided the initial setting for the use of insurance in Scotland.<sup>6</sup> Where he broke new ground was in an argument that, under Dutch rather than English influences, insurance began to be Scottish merchants' preferred method of allocating risk in the latter part of the seventeenth century and became widespread in the eighteenth, even although case law did not really emerge in any significant quantity in the Court of Session until after 1780. The first Scottish book on the subject, *Elements of*

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<sup>5</sup> Note however the Consumer Insurance (Disclosure and Representations) Act 2012, c.6, which modifies the 1906 Act considerably in its application to consumer insureds. Further, more wide-ranging, reform was brought about by the passage of the Insurance Act 2015 but still much of the 1906 Act remains intact.

<sup>6</sup> Forte, 'Marine Insurance and Risk Distribution in Scotland before 1800', *Law and History Review*, 5 (1987), 393–412.

*the Law Relating to Insurances* by John Millar junior, also appeared as late as 1787.<sup>7</sup> Angelo's article might have been timed to mark a bicentenary, but I think it was in fact coincidence! Whatever the truth of the matter, the study laid the basis for continuing work on the history of insurance law in Scotland over the next two decades, and also led Angelo ultimately to rather wider conclusions about the development of commercial law in Scotland, particularly in the vital century after the Anglo-Scottish Union of 1707.<sup>8</sup>

The most interesting finding published in these subsequent papers was the Court of Session's practice, documented by Angelo from cases between 1774 and 1808, of seeking the opinion of 'eminent English counsel' specialising in insurance law whenever the court was confronted with a new problem in the field.<sup>9</sup> They included such as John Dunning of the Middle Temple, 'one of the ablest barristers of the time'; James Alan Park of Lincoln's Inn, author of *A System of the Law of Marine Insurances* (first edition 1787); and Samuel Marshall, serjeant at law and author of a *Treatise on the Law of Insurance in Four Books* (first edition 1802).<sup>10</sup> Angelo liked to quote from the opinion of Lord Hailes in one of the earliest of these cases, *Stevens v Douglas* in 1774, mentioning Dunning alongside, indeed ahead of, a trio of leading English judges of the period:<sup>11</sup>

We in Scotland are in the helpless infancy of commerce. On a mercantile question, especially concerning insurance, I would rather have the opinion of English merchants, than of all the theorists and all the

<sup>7</sup> The book was published in Edinburgh.

<sup>8</sup> See the following papers by Angelo: 'John Millar junior – a Biographical Sketch of a Minor Jurist of the Eighteenth Century' in *A. J. Gamble (ed.), Obligations in Context: Essays in Honour of Professor D. M. Walker* (Edinburgh, 1990), 67–78; 'Opinions by "Eminent English Counsel": Their Use in Insurance Cases before the Court of Session in the Late Eighteenth and Early Nineteenth Centuries', *Juridical Review*, [1995], 345–64; 'Insurance' in K. G. C. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland* (2 vols, Oxford, 2000), II, 333–68; "'Calculated to our Meridian"? The Ius Commune, Lex Mercatoria and Scots Commercial Law in the Seventeenth and Eighteenth Centuries' in E. C. Reid and D. L. Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (Edinburgh, 2005), 120–37.

<sup>9</sup> An opinion by John Dunning, barrister, akin to those he and others gave in insurance cases of the period can be found in the Session Papers for the literary property case of *Dodsley v MacFarquhar* 1775 Mor. 8308: see Session Papers, Advocates Library (Edinburgh), Campbell Collection, vol. 26, no. 78; Session Papers, Signet Library (Edinburgh), vols 166 (no. 7) and 347 (no. 2)

<sup>10</sup> Forte, 'Opinions by "Eminent English Counsel"', 358–63 (quotation at 360). Both the books cited were published in London and ran to several subsequent editions.

<sup>11</sup> *Stevens v Douglas* (1774) Mor. 7096; Fol. Dic., III, 328; Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791* (Edinburgh, 1826), December 16, 1774.

foreign ordinances in Europe. The opinion of the English merchants is for the defender on the point of law, without contradictory voice. To the same purpose we have the judgment of English Courts, and the opinion of an eminent lawyer, Mr Dunning. It is vain to say that Mr Dunning does not understand the law of commerce: [...] Our Scottish insurances are copied from the English: for an interpretation of words in such copy, am I to go the original, or the ordinances of Amsterdam and Stockholm? I can have no doubt of the law: it is the law of Mr Dunning, Sir Joseph Yates, Lord Camden, and Lord Mansfield.

The practice of seeking English counsel's opinion faded away in the first half of the nineteenth century as the expectation grew that Scottish counsel should be able to refer to and discuss the English position in an intelligent fashion; but there continued the sense that on insurance matters Scots law should not deviate too far from the law in England. Another of Angelo's favourite quotations was from the case of *Strachan v McDougale* in 1835, where Lord Balgray said:<sup>12</sup>

I have some doubt whether the case should be decided with reference solely to the law of Scotland. Policies of insurance are a new species of instrument, which are of recent introduction in England, and are still more recent here [...] I am doubtful, therefore, whether a question of this character should not be viewed as belonging to the law mercantile, and whether we ought not to see more of the English practice and decisions in such cases, before we determine in this cause.

This all said, Angelo also recognised later that, at any rate up to 1800, English law was not the only source referred to in insurance matters. John Millar junior wrote 'within the *ius commune* tradition of scholarship' and when he referred to English writers they were 'those whose works conceived of the *lex mercatoria* as based on the *ius gentium* and pan-European mercantile custom'.<sup>13</sup> Counsel pleading in cases before the Court of Session cited *ius commune* material as well as English decisions and writers; despite Lord Hailes' powerful dictum in 1774, it was only in the nineteenth century that there was a decisive turn away from the law merchant in favour of the Common Law of England as

<sup>12</sup> *Strachan v McDougale* (1835) 13 S. 954, 958–9. The omitted passage is quoted below. See text accompanying note 76.

<sup>13</sup> Forte, "Calculated to our Meridian", 126.

the primary point of reference. Although the Marine Insurance Act 1906 took twelve years to reach the statute book after its introduction as a Bill in 1894, there does not seem to have been any controversy about its codification of English law applying throughout the United Kingdom, in contrast to what had happened with what became the Sale of Goods Act 1893.<sup>14</sup> Lord Balgray's dictum in *Strachan v McDougle*, however, actually shows that the earlier approach, distinguishing between purely domestic law and the trans-national law merchant (of which English law and practice might be powerful evidence), had by no means faded completely from view by 1835. I will return to this point below.

In his final contribution on the eighteenth-century development of commercial law, Angelo extended his inquiry beyond insurance to bills of exchange, and sketched what he thought was a broadly similar picture of a move away from *ius commune* understandings to an increasingly exclusive reliance on English authorities.<sup>15</sup> Unlike insurance, of course, bills were a well-established feature of Scottish mercantile life long before 1707.<sup>16</sup> The two editions of William Forbes' *Methodical Treatise Concerning Bills of Exchange*, published in 1703 (Edinburgh) and 1718 (Edinburgh) respectively, well illustrated the *ius commune* approach to the subject in Scotland, within which English writings were to be seen as potentially indicative of the *ius gentium* and mercantile custom, of which the law of bills formed part. By the later eighteenth century, although there was no practice of seeking the opinion of eminent English counsel in bills cases, 'counsel were increasingly turning to English cases as primary authorities in their pleadings.'<sup>17</sup> A hundred years later, the Bills of Exchange Act 1882 codified English law and with some minor amendments was applied to Scotland.<sup>18</sup>

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<sup>14</sup> See A. F. Rodger, 'The Codification of Commercial Law in Victorian Britain', *Law Quarterly Review*, 108 (1992), 570–90, 586, wherein it is noted briefly that the Marine Insurance Bill 'staggered uncertainly' on to the statute book as the commercial codification movement lost its impetus.

<sup>15</sup> Forte, "Calculated to our Meridian", 123–6, 128–36. See further on the whole subject A. M. Godfrey, 'Ratio Decidendi and Foreign Law in the History of Scots Law' in S. Dauchy, W. H. Bryson and M. C. Mirow (eds), *Ratio Decidendi: Guiding Principles of Judicial Decisions. Volume 2: 'Foreign' Law* (Berlin, 2010), 81, 102–4.

<sup>16</sup> See e.g. Siobhan Talbot (ed) 'The Letter Book of John Clerk of Penicuik, 1644–45' in *Miscellany of the Scottish History Society* (Woodbridge, 2014), 1–54, passim; and note the merchant Clerk's reluctance to go to law in cases of mercantile dispute (*ibid.*, 33).

<sup>17</sup> Forte, "Calculated to our Meridian", 131.

<sup>18</sup> Rodger, 'Codification of Commercial Law', 578–9.

The process was also apparent in the work on the subject of George Joseph Bell, who did not ignore the *ius commune* authorities but in general gave primacy of authority to English cases; here following, Angelo argued, rather than seeking to lead practitioners. Indeed, as Angelo recognised, Bell himself counselled against excessive use of English authority and the risk in departing too far from the *ius commune* as a result. But in this he was swimming against the current of the times and the in-coming tide of professional opinion and practice.<sup>19</sup> Angelo narrated in his professorial inaugural at Aberdeen the lesson which he drew from the outstanding figure of Bell:<sup>20</sup>

For me, Bell epitomises the genius of Scots law, then, as now, with regard to commercial matters. It is a system characterised historically by a process of what has been described as “willing borrowing and adaptation”. Bell’s objective in writing his *Commentaries* was to look at Roman law, continental jurisprudence, and English law, “all the cases and authorities with the greatest freedom”, in order to devise a rational, coherent, set of rules applicable to a wide variety of commercial dealings. No single component is regarded as being intrinsically more important than the others: although there is a clear and pragmatic realisation that in many cases it would not be prudent for Scottish commercial law to be too out of step with that of England.

The other, more general conclusions which Angelo offered on the development of Scots commercial law were mainly in critical reaction to the views of Sir Thomas (T. B.) Smith – and also, more mutedly, those of J. J. Gow and Andrew Dewar Gibb – who in a previous generation had argued that the eighteenth century was the last classical age of Scots law as a Civilian system, including its commercial law, with Anglicisation being primarily the result of interventions from Westminster in the nineteenth century, through either legislation or decisions of the House of Lords. Instead, Angelo suggested, the process of de-Civilianisation was ongoing and intensifying throughout the eighteenth century and was largely driven from inside Scotland, in particular by the bench and bar and also, if more ambiguously, by legal writers and in particular Bell.

<sup>19</sup> Ibid., 133-6; Bell, *Commentaries*, I, preface, xi.

<sup>20</sup> Forte, ‘A Great Future Behind It? Scottish Commercial Law and the Millenium [*sic*]’, *European Review of Private Law*, 2 (1994), 375–97, 383.



### Widening the Scope of Analysis

If Angelo were here today, the conversation I would like to have with him on his view of the history of the development of commercial law in Scotland would start from the observation that perhaps his evidence base needs to be expanded so that his conclusions can be tested more widely. While insurance and bills of exchange are obviously important commercial subjects, they are perhaps not at the absolute heart of commercial law. Instead I would suggest that the core of the subject is provided by the law of sale and that nearly everything else in commerce revolves around sales. It is also an important point that bills of exchange and insurance were unknown to Roman law and (especially insurance) were relatively modern developments in 1700. The question of where these two subjects fitted into the Roman structure of contracts which Scots law certainly had received by Stair's time was one of the difficult questions of the late seventeenth and early eighteenth centuries, at least in Scotland. I will start with this latter point before turning to the former.

We can tell that the Roman structure of contracts had been received in Scotland by Stair's time, because he spends a lot of words in his famous chapter on conventional obligations rejecting, re-working or restricting it.<sup>21</sup> For Stair, contract was based upon the will, or consent, of the parties to become engaged to each other; in a memorable aphorism, 'every paction produceth action.'<sup>22</sup> The four categories of contract in Roman law – 'either perfected by things, words, writ or sole consent', with only sale, location or hire, partnership or society and mandate in the last group – had been overtaken in Scotland, so that 'not only these, but all other promises and pactions are now valid contracts by sole consent, except where writ is requisite.'<sup>23</sup> This therefore covered the real contracts, under which a party had to hand over to another possession of some item of property as the first stage of performance of the contract. Stair dealt first with loan, where the receiver either became the owner but had eventually to return an equivalent (*mutuum*, particularly applicable to money), or simply a possessor for a time bound to return the same thing (*commodatum*, distinguished from location by being gratuitous).<sup>24</sup> The other real contract was custody or deposit, under which the receiver held the property for the other party who, however, remained owner; the transaction was distinct from

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<sup>21</sup> Stair, *Institutions*, I,10.

<sup>22</sup> *Ibid.*, I,10,7.

<sup>23</sup> *Ibid.*, I,10,11.

<sup>24</sup> *Ibid.*, I,11.



location in that the custodian had no right to use the deposited property while the owner had no obligation to pay for the service.<sup>25</sup>

Stair noted that the Roman escape route from the potential rigidities of its categories had been the innominate contracts,

which have not a special name and nature acknowledged in the law; and therefore oblige not by sole consent, but the giving or doing of the one party obligeth the other, as permutation, excambion, or exchange, when either a thing is given for another, or a thing is given for a deed, work, or use, or one deed or work is done for another, for which the law hath no special name; and therefore names them, *do ut des, do ut facias, facio ut facias*.<sup>26</sup>

Unless one party had ‘given’ or ‘done’, the mere agreement to give or do in this way was *nudum pactum* and either party could withdraw or resile. These innominate contracts of exchange could also be found in Scots law, and according to Stair included bills of exchange (‘money for money’) and ‘the contract of assurance, where money or things are given, for the hazard of anything that is in danger, whether it be goods or persons.’<sup>27</sup> Perhaps, however, it was as a matter of practical commercial reality that Stair dealt with bills of exchange in his chapter on loan as well.<sup>28</sup>

Stair accepted that Scots law still had the Roman nominate contracts. But the only use of the distinction between nominate and innominate contracts, he went on, was that while in all contracts parties had to perform not only that which was expressed but also that which was necessarily implied, the law had determined the implications of the nominate contracts.<sup>29</sup> The importance of this for bills of exchange and insurance was that their effect depended upon the express terms of the contract and anything further that could be implied therefrom; the law itself gave no further guidance. Further, permutation – barter or exchange – was ‘congenerous’ with sale, and not to be regarded as any longer amongst the innominate contracts.<sup>30</sup>

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<sup>25</sup> Ibid., I,13.

<sup>26</sup> Ibid., I,10,11.

<sup>27</sup> Ibid., I,10,12.

<sup>28</sup> Ibid., I,11,7.

<sup>29</sup> Ibid., I,10,12.

<sup>30</sup> Ibid., I,14 (here departing from the Roman characterisation of the contract as innominate: see further Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Cape Town, 1990), 532–7).

Writing a generation later, William Forbes paid little if any attention to Stair's arguments about the basis of contract and reinstated orthodoxy – the Roman structure of contract law – with little qualification. A contract 'is an Engagement betwixt two or more Persons, effectual to force Performance by an Action'.<sup>31</sup> Contracts are either real ('perfected by the Intervention of Things given or done'<sup>32</sup>); or verbal; or written; or, finally, 'perfected by sole Consent'.<sup>33</sup> Real contracts are loans, deposit, exchange or excambion, and (without any elaboration) insurance.<sup>34</sup> The only contracts perfected by sole consent are the Roman group: sale, letting and hiring, partnership, and mandate or commission.<sup>35</sup> Forbes then introduces a non-Roman mixed form, the contract 'perfect, partly by Writ, partly by Consent', and it is here that he places the bill of exchange.<sup>36</sup> Forbes thus had nothing to do with Stair's innominate contracts of exchange, made insurance a real contract presumably because the insured paid a premium for which a return would only be forthcoming upon events not certain to happen, and invented a new category – his one departure from traditional orthodoxy – to cover exclusively bills of exchange.

Moving on another generation, Bankton, who in general followed Stair in his structuring of the law, and did not treat the Roman law categorisations as definitive of the Scots law of contract, declared that the 'distinction of contracts into Nominated and Innominate, is of no use with us', so that parties to an agreement for an innominate exchange were nonetheless bound by the agreement alone. The concept of contracts by word was also not used in Scotland; while the Scottish rules on writing requirements were very different from contracts by writing in the sense of the Roman law.<sup>37</sup> But 'contracts, perfected by consent, are governed mostly with us by the same rules as in the civil law', the main examples being mandate, society, sale (including barter) and location.<sup>38</sup> He also treated together the real contracts of loan and deposit, separating them, however, with a chapter on bills.<sup>39</sup> In Bankton's view a bill of exchange 'is similar to *mutuum* [i.e. loan]' but 'partakes likewise of mandate

<sup>31</sup> Forbes, *Institutes*, 183. See also idem, *Great Body*, f. 781.

<sup>32</sup> Forbes, *Institutes*, 183; idem, *Great Body*, f. 788.

<sup>33</sup> Forbes, *Institutes*, 184; idem, *Great Body*, f. 825.

<sup>34</sup> Forbes, *Institutes*, 185-91; idem, *Great Body*, ff.788-818.

<sup>35</sup> Forbes, *Institutes*, 197-207; idem, *Great Body*, ff. 825-77.

<sup>36</sup> Forbes, *Institutes*, 207-11; idem, *Great Body*, ff. 880-98.

<sup>37</sup> Bankton, *Institute*, I,11,18-22 (quotation at 20).

<sup>38</sup> Ibid., I,11,63.

<sup>39</sup> Ibid., I,12-14. The whole of ibid., I,13 is devoted to the subject of bills of exchange.

and exchange, and is a compound of all three, and has something farther peculiar to itself.<sup>40</sup> Insurance, on the other hand, 'is a kind of sale, for thereby the assured purchases security to his goods for a certain premium given to the assurers';<sup>41</sup> and so Bankton treated the subject (at some length) in the same chapter as sale, i.e. as a consensual contract.<sup>42</sup> Part of Bankton's method was to make comparison with the law of England: of insurance he wrote, 'the law is the same in both parts of the kingdom, as being regulated by the mercantile law, which is part of the law of nations, and received into the law of England.'<sup>43</sup> Bills, he said, were 'governed by the same law and usage of merchants in England, as in other trading countries, and likewise with us.'<sup>44</sup>

John Erskine was more like Forbes in dealing with contract law in a very Romanist way. He has only one paragraph on contract in general in his *Institute*, dealing with incapacity and invalidity by reason of error, fraud, and force and fear.<sup>45</sup> He then goes on, within a couple of paragraphs, to describe the following particular contracts (loan, deposit, trust, and pledge), which for him are clearly the real contracts, as at the end he talks about the innominate real contracts, even although for him modern doctrines have moved on from Roman law: 'By our law all contracts, even innominate, are equally obligatory on both parties from the date, so that neither party can resile.'<sup>46</sup> His subsequent chapters become even more visibly Roman in their structure: the first deals with 'Obligations by word and by writing' (which is mostly about writing requirements), and the next with 'Obligations arising from consent, and of accessory obligations'. The obligations by consent include not only the expected sale (together with permutation), location, society or copartnery, and mandate, but also, quite independently of the others, insurance (as an aspect of the location, or chartering, of a ship).<sup>47</sup> Erskine thus did not follow Stair, Forbes or Bankton on the categorisation of insurance. Bills of exchange are dealt with in a Forbes-like way, however, in the chapter on obligations by word and by writing, with Erskine seeing them as a form of mandate, i.e. consensual, but always in writing, albeit informal.<sup>48</sup>

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<sup>40</sup> Ibid., I,13,1.

<sup>41</sup> Ibid., I,19,28.

<sup>42</sup> Ibid., I,19,1–37 (permutation and sale), 38–46 (policy of insurance).

<sup>43</sup> Ibid., I,19,19 (paragraphs 20–4 deal further with English law on insurance).

<sup>44</sup> Ibid., I,13, Observations on the Law of England, 1.

<sup>45</sup> Erskine, *Institute*, III,1,16.

<sup>46</sup> Ibid., III,1,35.

<sup>47</sup> Ibid., III,2,17.

<sup>48</sup> Ibid., III,2,25–38.

## Hume And Bell

All this has been said to show how the classical writers on Scots law differed on, or even struggled with, how to fit insurance and bills into their frameworks of the law, however orthodox or unorthodox they might be in their presentation of these matters. These struggles came to a sudden end with the Edinburgh Professors of Scots Law in the late eighteenth and early nineteenth centuries, Baron David Hume and George Joseph Bell. They simply by-passed the Roman structures and indeed, in Hume's case, the idea of any general theory or law of contract as distinct from contracts.<sup>49</sup> Bills and insurance became quite straightforwardly particular forms of contract alongside sale, hire and all the others. As early as Bankton's time, English law was being given attention in the exposition of the law on both subjects, but very much in the fashion identified by Angelo; that is, bills and insurance were part of the *ius gentium* or the mercantile law, received in England as in Scotland, and therefore deserving notice by Scots lawyers. In Hume's hands, however, discussion of insurance required extensive reference to English texts and cases, quite outweighing the native material; but without any mention of a wider legal background that might justify this approach.<sup>50</sup> Again, but in notable contrast, in his lectures on bills, Hume's predominant source by far was the Scottish case law, while the wider legal background, English or otherwise, was again practically ignored.<sup>51</sup> Perhaps for insurance at least Hume, occupant of the Edinburgh Chair of Scots Law from 1786, would merit more attention as an agent of the change of approach from talk of English law within the *ius gentium* to simple deployment of English cases and writers as the authorities to which reference had to be made for the law. But if so, we might also want to know why, as Angelo did point out, he stopped lecturing on insurance altogether after session 1809–10 when he still had a dozen years to go before he finally quit the Chair.<sup>52</sup> For both insurance and bills the key point is that Hume did not refer to wider notions of the law merchant or the *ius gentium*. His focus was on the decisions of the courts, Scottish and, where necessary, English.

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<sup>49</sup> See further Hector MacQueen, 'The Law of Obligations in Scots Law' in Reiner Schulze and Fryderyk Zoll (eds), *The Law of Obligations in Europe: A New Wave of Codifications* (Munich, 2013), 213–43, 218–22; and more generally John W. Cairns, 'Historical Introduction' in Reid and Zimmermann (eds), *History of Private Law in Scotland*, I, 166–72.

<sup>50</sup> Baron David Hume, *Lectures 1786–1822* (6 vols, Stair Society vols 5, 13, 15, 17, 18, 19, Edinburgh, 1939–58, henceforth 'Hume, *Lectures*'), III, 310–402.

<sup>51</sup> Hume, *Lectures*, II, 228–75.

<sup>52</sup> Forte, 'Marine Insurance', 393.

His successor cannot be simply lumped in with Hume on these matters, however. Bell did of course refer extensively to English law treatises and precedents in his writings, and not just in relation to insurance and bills. But he explained his reasons for doing so, and also for referring to other foreign material, including in particular French and US law as set out in the great treatises and commentaries of Pothier, Story and Kent.<sup>53</sup> While he did not use or attempt to fit Scots law into the Roman structures, Bell differed from Hume in standing firmly in the school of the law merchant and the *ius gentium*. He perhaps articulated and practised that approach more than any other Scottish lawyer before or since.<sup>54</sup> It is apparent in the *Principles* that he produced for his students, while the *Commentaries* in particular are shot through with it. There can be no doubt that Bell sought to make Scots law fit for a commercial and mercantile world. So he recognised a general law of contract and unilateral voluntary obligations (within which he placed bonds, cautionary obligations, bills of exchange and promissory notes), and divided what he called mutual contracts into first, sale, then hire, agency, maritime contracts and, finally, insurance. The structure of the law was governed more by mercantile functionality than by Roman categories.

Bell may however have stated his approach to and understanding of his subject most clearly in his last, indeed, posthumously published and so perhaps least-read, work, *Inquiries into the Contract of Sale of Goods and Merchandise: as recognised in the Judicial Decisions and Mercantile Practice of Modern Nations*. In the introduction to this work, which appeared in 1844, Bell argued that the forms and rigidities of municipal or domestic law were not always well suited to the needs of commerce, and that in consequence rules and usages had arisen amongst merchants generally which had then been recognised by the laws of all commercial countries as the law merchant:<sup>55</sup>

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<sup>53</sup> K. G. C. Reid, 'From Text-book to Book of Authority: the *Principles* of George Joseph Bell', *Edinburgh Law Review*, 15 (2011), 6–32, 22–8.

<sup>54</sup> Bell may thus have had a more activist conception of the law merchant than Sir John Baker has argued was the prevalent view in England before, during and after Bell's time: see J. H. Baker, 'The Law Merchant and the Common Law before 1700', *Cambridge Law Journal*, [1979], 295–322; John Baker, 'The Law Merchant as a Source of English Law' in William Swadling and Gareth Jones (eds), *The Search for Principle: Essays in Honour of Lord Goff of Chieveley* (Oxford, 1999), 79. See also Warren Swain, 'Lawyers, Merchants and the Law of Contract in the Long Eighteenth Century' in Matthew Dyson and David Ibbetson (eds), *Law and Legal Process: Substantive Law and Procedure in English Legal History* (Cambridge, 2013), 186.

<sup>55</sup> George Joseph Bell, *Inquiries into the Contract of Sale of Goods and Merchandise: as recognised in the Judicial Decisions and Mercantile Practice of Modern Nations* (Edinburgh, 1844), 2.

Under this system, [...] new instruments of debt and credit are introduced in the form of Bills and Notes, affording a rapid and safe mode of transmitting money from country to country, and a convenient circulating medium among merchants. [...] [T]he law of Insurance gradually arises, by which misfortunes, from the dangers of the sea or enemy, are mitigated; and losses, which would otherwise crush a single merchant, are spread among many adventurers, to whom they even become a source of gain, while the merchant immediately concerned is rendered safe.

Elsewhere Bell had already argued that Roman law ('nearest, perhaps, of any code of written law, to [...] universal jurisprudence'<sup>56</sup>) was not adequate for contemporary commercial purposes and that it had accordingly been developed significantly in Scotland even where outright innovation had not been required as in the cases of bills and insurance:<sup>57</sup>

In Rome, commerce and its relations and facilities were discouraged, or not regarded with favour. In the world as now constituted, they form the very object, and supply one of the ruling principles, of the jurisprudence of contracts. Instead of the amicable and gratuitous MANDATE, there has been introduced the onerous contract of agency or factory, the relation of principal and agent, imposing duties more imperative, entitling the principal to more entire reliance on the performance of his orders, and raising with third parties relations of great extent and importance in trade. Instead of SOCIETY, an arrangement merely for the joint management of a common subject, the important contract of PARTNERSHIP has brought into combined operation, for the extension of modern commerce, the skill, the industry, and the capital of many associated persons.

In the *Inquiries* Bell went on to explain that while uniformity was desirable in the international and trans-national law merchant, it was not always achieved thanks to its inevitable interaction with municipal laws:<sup>58</sup>

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<sup>56</sup> Ibid., 6–7.

<sup>57</sup> Bell, *Commentaries*, I, 506.

<sup>58</sup> Bell, *Inquiries*, 7–8.

A concise view of the differences which have thus arisen, and which sometimes amount to inconsistency, and are productive of embarrassment in their effects, may be of use, not only in making those differences better known, but in pointing out the cause or principle from which they have arisen, or even, perhaps in suggesting some reconciling ground on which they may be compromised; and it cannot well be said that the Law-Merchant is a system of universal application, till the great rules, in which all agree, shall be distinguished, and the exceptions and peculiarities marked out for observation. Such is the object of this work. It is directed to an investigation into the differences which are to be found in different countries relative to the important contract of Sale of goods and merchandise; [...] my object being only to investigate the principles on which mercantile usage may be brought more nearly to a common standard in different countries.

His study therefore extended beyond Scotland and England to the U.S.A. (where ‘the Judges in the Supreme Courts, in determining any unsettled question in mercantile law, have examined, with a liberal and learned spirit, the principles of Roman law, the doctrines and precedents of the English and Scottish laws, and the authorities and decisions in continental Europe’<sup>59</sup>), and to France and Holland (which had specialist *tribunaux de commerce* subject to appeals to *cours royaux*). Bell indicated that his intention was ‘to extend the inquiry’ beyond sale ‘into the other branches of mercantile and maritime law’;<sup>60</sup> but the publisher’s prefatory note to the *Inquiries* tells us that while Bell ‘had for some time been engaged in the preparation of a series of similar Treatises on other subjects relative to Commercial Law’, the present volume was ‘the only one which he had finally revised for publication’.<sup>61</sup> It would be a matter of some interest to know what other commercial topics Bell proposed to address in the series, and how far his work on them had got before his death.

### Some Further Thoughts on Insurance

The conflicts between municipal law and the law merchant which Bell sought to reconcile can be seen in some of the insurance cases reported in *Morison’s Dictionary* and discussed by Angelo. He noted that the earliest case in *Morison*

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<sup>59</sup> Ibid., 6.

<sup>60</sup> Ibid., 7.

<sup>61</sup> Prefatory Note to Bell, *Inquiries*.

was dated 1755.<sup>62</sup> But, like Angelo, this reader's impression from that and the later cases is not of insurance as a novelty at that point. Merchants seem to be well accustomed to taking out insurance on both foreign and coastal or inland water journeys, with the underwriters being their fellow merchants, increasingly from the same port that was the insured's principal place of business, although still sometimes also from places outside Scotland, whether in England or elsewhere. While Angelo may well have been correct to see the practice as having been learned from abroad, he was certainly right to see it as fully understood and established as a means of risk-spreading between merchants in Scotland by the middle of the eighteenth century.<sup>63</sup> There is also fairly frequent reference to brokers practising in Edinburgh and Glasgow to bring together groups of underwriters for particular voyages while also gathering in from insureds the premiums for transmission on to the underwriters. The existence of such brokerage businesses surely confirms the normality and regular, ongoing flow of marine insurance as an essential element in a burgeoning trading economy.<sup>64</sup> A final general impression from the printed reports is that many of the cases come before the Court of Session only after earlier proceedings in the Admiralty Court; so that marine insurance appears to be one of the areas where in the later eighteenth century the Lords of Session were asserting, by way of various procedural and remedial devices, their superiority over the Judge Admiral. The conflict would end only in 1830 when the Admiralty jurisdiction was absorbed by the Court of Session.<sup>65</sup> The

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<sup>62</sup> *Lutwidge v Gray* (1755) Mor. 7109 (taken from Woodhouselee's *Folio Dictionary*, vol. 3, 333–4). There is a problem with the dating of this decision: see further *Lutwidge v Gray* (1732) Mor. 10111 (taken from Kames' *Folio Dictionary*, vol. 2, 59), reversed by the House of Lords (1734) 1 Pat. 119.

<sup>63</sup> Between 1766 and 1770 James Boswell was acting in a Court of Session case about the insurance of a cargo of sugar consigned to Glasgow (from the West Indies?): Hugh M. Milne (ed.), *The Legal Papers of James Boswell* (Stair Society vol. 60, Edinburgh, 2013), 50–54. I owe this reference to Hugh Milne.

<sup>64</sup> See Bell, *Principles*, § 219, 2(4): 'Insurance-brokers are also special agents for effecting insurance, selecting proper underwriters, arranging the premium and terms of the policy, and keeping an account on the one hand with the assured, and on the other with the underwriters, debiting or crediting each with the premium, as middleman for settling the payment of it.'

<sup>65</sup> Lord Cooper of Culross, 'The Central Courts after 1532' in G. C. H. Paton (ed.), *An Introduction to Scottish Legal History* (Stair Society vol. 20, Edinburgh, 1958), 341–9, 346–7. Boswell's case (1766–70) had reached the Court of Session from the Admiralty Court (above note 62). On admiralty jurisdiction before 1830 in general see now I. MacLagan, 'The Maritime Rights of the Magistrates of Rothesay' in Hector L. MacQueen (ed.), *Miscellany VII* (Stair Society vol. 63, 2015), 265–366.



lack of Court of Session cases before 1755 may therefore simply be because before that time disputes in this area were the unchallenged preserve of the Admiralty or other more local courts.<sup>66</sup>

We can thus see marine insurance as something that had indeed been developed by merchants amongst themselves well before it ever came into serious contact with the judges, advocates and other lawyers who practised in Parliament House in Edinburgh. The sort of conflict to which this might give rise can be seen in *Selkrig v Pitcairn and Scott*, a case decided by the Court of Session in June 1808 and one of those in which the opinion of English counsel was sought before the judgment of the court was handed down.<sup>67</sup> The dispute arose from the bankruptcy of an underwriter who, in accordance with what was apparently universal practice, had yet to receive any premiums on certain policies that he had subscribed. The insured parties and their brokers withheld payment of the premiums on the basis that insurance was a mutual contract, the argument being that 'it is a general rule of our law, that in a mutual contract, a party cannot demand implement of the obligation *de presenti* of the other party, if it appears that he would not be able to implement his own counter obligation *de futuro*; and this rule equally affects those who, by bankruptcy, come to take the place of either of the parties.'<sup>68</sup> The opinions of the English counsel consulted were clear that this would not be the position in England, with the reason being that the insurance policy signed by all parties stated that the premium had been paid, whether or not in fact it had been. Accordingly the broker's debt to the underwriter was not conditional but absolute, and the unpaid premiums could be recovered by the bankrupt's trustee.<sup>69</sup> The debate then became one of whether or not this was the result of

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<sup>66</sup> Note the account of the Admiral's jurisdiction in William Welwood, *An Abridgement of All Sea Lawes* (London, 1613), 11 ('all complaints, contracts, offences, pleas, exchanges, *assecurations* [emphasis supplied], debts, counts, charter-parties, covenants, and all other writings concerning lading and unlading of shippes, freights, hyres, monie lent upon casualties and hazard at sea'). 'Assecuracion' is interpreted as insurance in T. C. Wade (ed.), *Acta Curiae Admirallatus Scotiae 1557–62* (Stair Society vol. 2, Edinburgh, 1937), xvii. See further Scott Styles' contribution to the present volume.

<sup>67</sup> *Selkrig v Pitcairn and Scott* 1808 Mor., 'Insurance', Appendix, No. 10 (31-9); F.C., June 14, 1808. Note also the distinguishing of the previous case of *Bertram v Richmond and Freebairn's Trustee* 1802 Mor. 7122, where the issue arose in the broker's insolvency but the underwriter succeeded in recovering the premiums from the broker's trustee. The opinion of English counsel Mr Wood in this case is appended to the report of *Selkrig* alongside those obtained from James Park, Sir Vickary Gibbs, and Serjeant Marshall in the latter proceedings (1808 Mor., 'Insurance', Appendix, 38-39).

<sup>68</sup> *Selkrig*, 1808 Mor., 'Insurance', Appendix, 33.

<sup>69</sup> The opinions are summarised at *ibid.*, 33. In essence the doctrine being expounded

a general rule of English law; if not, as argued for the bankrupt's trustee, the rule was 'demonstrative [...] of the mercantile law of insurance, which is not more the law of England than of this country'.<sup>70</sup> The argument continued:<sup>71</sup>

By this mercantile law, the Courts of Scotland must be guided in cases of insurance, though it were contrary to our general rules relative to contracts; but in truth it is not contrary to these rules, since it only applies to contracts of a form quite different from any of those to which these general rules ever were held applicable.

With one dissent from Lord Meadowbank, the court upheld this argument, Meadowbank's doubt being whether the general rules should yield to those of the law merchant given that actual payment of the premium to the underwriter (as distinct from the payment presumed from the policy in the law merchant) had yet to take place.<sup>72</sup>

A similar debate took place nearly thirty years later in *Strachan v McDougle*,<sup>73</sup> the case in which Lord Balgray uttered his already quoted doubts about applying the law of Scotland in an insurance case. The context in which these remarks can be placed should by now be apparent, and this is confirmed by the facts of the case and the decision of the court. The point at issue was whether an arrestment of a life assurance policy taken out with the Scottish Life Insurance Office (later to become known as Standard Life<sup>74</sup>) could

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was that eventually codified in the Marine Insurance Act 1906, s.53: see further Michael Lobban, 'The Law of Insurance' in William Cornish and others, *The Oxford History of the Laws of England Volume XII 1820-1914: Private Law* (Oxford, 2010), 674-727, 696-7. Proposals for reform of s.53 were canvassed in Law Commission and Scottish Law Commission, *Insurance Contract Law: Post Contract Duties and other Issues: a Joint Consultation Paper* (Law Com. C.P. No. 201, 2011; Scot. Law Com. D.P. No. 152, 2011), Parts 18-20.

<sup>70</sup> *Selkraig*, 1808 Mor., 'Insurance', Appendix, 36.

<sup>71</sup> *Ibid.*, 36. It should also be noted that the argument began with this proposition: 'In a question depending on a point of mercantile law, the desire of rendering the decisions on our law here uniform with those of the Courts of England, where that law has been so much longer known, and so much more fully considered, has always been the paramount principle in the minds of our Judges.' (*ibid.*, 36).

<sup>72</sup> See what may well be an eye-witness account of the debate between the judges at avizandum in Bell, *Commentaries*, II, 116, note 2. Note also several references to the law merchant in Boswell's pleadings in the Court of Session in 1770 (above note 63).

<sup>73</sup> *Strachan v McDougle* (1835) 13 S. 954.

<sup>74</sup> See Michael Moss, *The Building of Europe's Largest Mutual Life Company: Standard Life 1825-2000* (Edinburgh, 2000).

prevail against an unintimated assignation of the policy where the document had been delivered to the assignee. To complicate matters still further, the assignee lived in Berwick-upon-Tweed and was domiciled in England where, according to her counsel, 'in this and many similar instances, a right was effectually transferred, or a pledge effectually created, by mere deposit of the deeds constituting the right.' The Scottish requirement of intimation to complete an assignation, they argued, had no basis other than custom, whereas 'as policies of life insurance were of comparatively recent introduction, and, in some measure, belonged to mercantile law, it was unnecessary that there should be intimation at assigning them.' Further, 'the Assurance Office never paid till the policy was produced, and therefore the reason for intimation, to put a debtor on his guard, had no application.' Counsel for the arrester replied that the completion of assignation by intimation was a fundamental part of the law of Scotland, and while it rested on custom, so did a very large part of Scots law. Moreover, life assurance policies were not part of mercantile law, and the English law referred to was 'highly injurious and much regretted'. If the assignee's argument was upheld, life assurance policies would have the same 'extraordinary privileges' as bills of exchange and other negotiable instruments (i.e. be payable to bearer); this 'would be contrary both to principle and expediency'.<sup>75</sup>

The court held for the arrester and also rejected a conflict of laws argument that English rather than Scots law was applicable to the assignation. Lord Gillies was most worried by the possible effect of a contrary decision that would make life assurance policies in effect negotiable, while Lord Mackenzie also thought that if general Scots law principles were to be excluded by the law mercantile much more precise averments as to the law and practice of England and Europe were necessary. The Lord President was more hesitant, having in mind the insurers' established practice of requiring exhibition of the policy documents before they would pay out. Was there here a usage or custom of trade capable of displacing the general requirement of intimation? Lord Balgray concurred in the final decision in favour of the arrester, but he also made some general remarks about policies of life insurance:<sup>76</sup>

But they are a new species of instrument which are of recent introduction in England, and are still more recent here. But they are highly useful and beneficial. They have become important from the

<sup>75</sup> All the quotations from the arguments of counsel may be found at (1835) 13 S. 957.

<sup>76</sup> *Ibid.*, 958.

extent to which the business of insurance is carried on, and this is every day increasing; and I think the Court ought to view them favourably, and give every facility, consistent with law, to their transference between debtor and creditor.

In truth, the life insurance market of the early nineteenth century could probably trace its beginnings back to the foundation of the Society for Equitable Assurances on Lives in London in 1762, and was not so very new. But in Scotland, ‘after the Scottish Widows Fund formed as the first Scottish life insurance office in 1815, six firms appeared between 1823 and 1826, and some twenty more by 1848.’<sup>77</sup> So it was indeed a recent and rapidly growing business phenomenon in Scotland in 1835. As the facts of *Strachan v McDougle* suggest, life assurance was not just a means of making individual savings and protecting the interests of the insured’s family but also a way of securing indebtedness, whether personal or commercial in origin. Hence, while there was room for doubt whether life assurance was as fully mercantile as marine insurance, it was certainly not an entirely personal and private matter between insurer and insured, cut off altogether from wider business interests.

### Other Mercantile Contracts: (i) Sale

A further line of enquiry prompted by Angelo’s work on insurance and bills is what was happening in the eighteenth and early nineteenth centuries to the many other mercantile contracts in Scots law, notably sale, hire (location), partnership (society) and mandate. Can we see the same kinds of shift and conflict between the established Scottish common law and mercantile custom or the law merchant? As we have already seen, Bell certainly thought that by his time society and mandate had moved far from their Roman origins.<sup>78</sup> While the replacement of society by partnership awaits its modern

<sup>77</sup> Timothy Alborn, *Regulated Lives: Life Insurance and British Society, 1800-1914* (Toronto, Buffalo and London, 2009), 25. See also Lobban, ‘Insurance’, 676-7, and other references there given. See further for Scotland C. W. Munn, ‘The Emergence of Edinburgh as a Financial Centre’ in A. J. G. Cummings and T. M. Devine (eds), *Industry, Business and Society in Scotland since 1700* (Edinburgh, 1994), 125-41, 136-7, and C. H. Lee, ‘The Establishment of the Financial Network’ in T. M. Devine and others (eds), *The Transformation of Scotland: The Economy since 1700* (Edinburgh, 2005), 100-27. The first Scottish case on life assurance I have noted is *Campbell v Allan* (1800) Mor., ‘Insurance’, Appendix No 3. The defender was an agent of the Westminster Insurance Society.

<sup>78</sup> See above, text accompanying note 57.

historian, Laura Macgregor has recently traced the development in Bell's time of agency, factory and brokerage alongside and, increasingly, in place of 'the amicable and gratuitous mandate'.<sup>79</sup> Here I would like to look briefly at developments in sale and hire.

As I have already suggested, sale in particular surely lies at the very root of commerce, and has always done so. How did sale and hire develop in Scotland during the period, and can we see there a similar or a different pattern of development to those found with insurance and bills? Another much missed colleague, the late Bill Gordon, has left us an overview of the history of sale in eighteenth- and early nineteenth-century Scotland.<sup>80</sup> He drew a picture in which a medieval customary law was gradually (but not completely) Civilianised, with Stair once again providing a significant impetus in that general trend. After the 1707 Union writers such as Forbes and Bankton showed awareness of English law in their accounts of sale, but more for its differences from Scots law than as an authority to be followed or considered by the Scottish courts. If there was reference in the eighteenth-century courts to English decisions or writers, Gordon does not mention it. Hume's account of sale is characteristically almost entirely based upon Scottish cases, with only glancing references to English (and indeed Roman) law.<sup>81</sup> Bell's *Commentaries* and *Principles* do however refer extensively to English law and cases along with, it must again be said, many references to Civilian and American sources as well as, of course, Scottish cases and writings.<sup>82</sup> It can be taken, therefore, that he was here following his usual approach as already described, looking to the law merchant rather than simply adopting English law wholesale. His posthumous *Inquiries* on the subject confirm this preference.

The first Scottish book devoted to sale was *A Treatise on the Law of Sale*, by Mungo Ponton Brown, advocate, published in Edinburgh in 1821.<sup>83</sup>

<sup>79</sup> Laura J. Macgregor, *The Law of Agency in Scotland* (Edinburgh, 2013), 49-80.

<sup>80</sup> William M. Gordon, 'Sale' in Reid and Zimmermann (eds), *History of Private Law*, II, 305-32, especially 305-19.

<sup>81</sup> Hume, *Lectures*, II, 3-55.

<sup>82</sup> Bell, *Principles*, §§ 85-132; Bell, *Commentaries*, I, 458-80.

<sup>83</sup> Brown is an obscure figure of whom little is known beyond the production of his treatise, perhaps because he died mid-career in 1832, sixteen years after his call to the bar. He was an Advocate-Depute in 1830. See Stephen P. Walker, *The Faculty of Advocates 1800-1986: A Biographical Dictionary of Members Admitted from 1 January 1800 to 31 December 1986* (Edinburgh, 1987), 19. Although Brown was thought of as a candidate to succeed Bell in the Edinburgh Scots Law Chair in 1827 (Reid, 'From Text-book to Book of Authority', 7), that did not come to pass as Bell himself failed to be appointed to the bench that year, and remained in the Chair until his death in

Brown stated that '[t]hroughout the greater part of [his] work, the general arrangement of Pothier's Treatise on the same subject has been followed',<sup>84</sup> hinting at a Civilian approach; and indeed throughout his book he cites Pothier (and quotes him in French), as well as the Digest, Domat and other *ius commune* authorities. But Brown's Preface points up from the start what is really the book's primary purpose:<sup>85</sup>

The Books of the Law of Scotland contain very ample materials for a separate treatise on the Contract of Sale; and much valuable matter has been added in the course of the last twenty years, in consequence of the practice which has prevailed so extensively during that period, of resorting for authority or illustration, upon questions connected with this branch of mercantile jurisprudence, to the decisions of the English Courts, and to the works of English writers. This practice, while it has contributed greatly to supply the materials required for such a work, has at the same time rendered it more desirable and necessary; because the English law of sale is, in some of its fundamental principles, altogether different from the law of Scotland, and unless those distinctions are rightly understood and kept in view, the utmost confusion of principle must ultimately result from the indiscriminate use of the English authorities.

In the present work, an attempt is made to exhibit in a systematical form, the principles and rules of the Contract of Sale, as they may be deduced from books of authority in the Law of Scotland, and from the decisions of the Court of Session; and at the same time, by an examination of the English authorities, to ascertain on the one hand, how far the doctrines of the Law of England upon this subject may be safely followed and relied on in analogous cases which may occur in our Courts; and, on the other hand, to point out the principles and maxims which are peculiar to the English law, and inconsistent with the principles and maxims which govern our practice.

The book begins with an 'Introductory Discourse', in which Brown sets out 'to state in general terms some of the leading distinctions between the Scotch

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1843.

<sup>84</sup> M. P. Brown, *A Treatise on the Law of Sale* (Edinburgh, 1821), vii–viii.

<sup>85</sup> *Ibid.*, v–vi.

and the English contract of sale'.<sup>86</sup> It is again worth quoting at length from the first couple of paragraphs of this introduction:<sup>87</sup>

1. It is obvious that the contract of sale must be substantially the same in all civilized countries, in as far as regards its general character, and in the ordinary consequences which result from it. From this circumstance we are naturally led to expect that the laws of different countries, in relation to this contract, should mutually illustrate each other. It appears, accordingly, to have been at all times the practice in our courts to resort for guidance and authority, in new and difficult cases of sale, not only to the civil law, which in Scotland has been the chief source from which the law of personal obligations has been drawn, but also to foreign systems of modern law, and to the judgments pronounced by foreign courts. In this way, the works of the English lawyers in particular, and the judgments of the English courts, have, for a long time, been allowed to be quoted in our courts, not only for the purposes of illustration, but in some cases as authorities to be relied upon and followed in the same manner as the decisions of our own judges. [...]

On the other hand, it is equally certain that, in a great many important particulars touching the nature and constitution of the contract of sale, as well as its effects, the law of Scotland is different from the laws of other countries, and particularly from the law of England.—While, therefore, it cannot be denied that the most beneficial consequences have resulted from the use of the foreign authorities, it is evident at the same time that the use of them must be kept within due bounds, and that unless it is restricted to matters in which the foreign law is truly analogous to the law of Scotland, the practice now alluded to will have no other effect than to mislead, and to introduce both confusion in principle and practical injustice.

2. These last observations are peculiarly applicable to the law of England, because while in *some* respects that system is both more strictly analogous to our own, and much more useful as a source of authority than any other system, it differs in other respects from the law of Scotland a great deal more than either the civil law, or the modern laws of the continental states. As the English law, therefore, is by far

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<sup>86</sup> Ibid., 3.

<sup>87</sup> Ibid., 1–2.

the most valuable source of illustration and authority to which we can resort in points in which it is analogous to the law of Scotland, this very circumstance renders it of the greater importance that we should be fully aware of the points of difference. Unless these are clearly understood, the use of the English authorities must, instead of being beneficial, become ultimately a source of confusion and error.

So alongside the authorities already mentioned, Brown does indeed cite and discuss, often at length, numerous English cases; the list in the book's table of English cases stretches to four pages as against the five for the table of 'Scotch' cases.

The first point to note is how similar all this appears to be to the picture set out above for insurance and bills of exchange. Reference to English law is justified by the fact that in its essentials the law of sale must be similar in all civilised countries, i.e. there is a *ius gentium*, or general mercantile jurisprudence, of sale, of which English and Scots law both form parts. In Brown's eyes, however, the period since 1800 had seen a strong tendency to rely on English cases as authorities in their own right, rather than as simply evidence of the *ius gentium*. It was not a tendency which Brown sought to resist, albeit he did seek to defend the principles and maxims of Scots law by presenting them systematically and in comparison, where appropriate, with English law. The aim was further, not simply to avoid incoherence, but also to prevent 'practical injustice'.

The only problem with all this, it might be suggested, is that, by giving so much attention to the English authorities, Brown actually reinforced rather than redirected the trend which his book sought to channel. But on the other hand there is little sign of the Scots law of sale becoming closer to its English counterpart in the first half of the nineteenth century. Bill Gordon at least saw 'no change of doctrine reflected in the case law' before the Westminster Parliament began to seek a more unified treatment of sales law in the Mercantile Law Amendment Act, Scotland, 1856, to be followed towards the end of the century by the much more strongly harmonising (and Anglicising) Sale of Goods Act 1893.<sup>88</sup> Each of these Acts is, of course, an indicator that significant differences did in fact continue to exist in the sales laws of the respective jurisdictions. And it is still true that the Scots common

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<sup>88</sup> Gordon, 'Sale', 323. See further Rodger, 'Codification of Commercial Law', 581–3.



law of sale, applying above all to land transactions, differs from the statutory rules for goods.<sup>89</sup> Perhaps, therefore, more research is required on the actual use of English case law in the Scottish courts both before and after 1821 as well as on the sources and influence of Brown's treatise itself to elucidate the character of the development of the law of sale in this period.

### Other Mercantile Contracts: (ii) Location or Hire

Location, or hire, was clearly another very important form of contract, covering, as Hume put it, 'a variety of the daily, and the most indispensable transactions of life'.<sup>90</sup> It embraced the hire of things (*locatio rei*), that is, both land and goods, and of the labour, work or services of persons (*locatio operarum*). The parties were the locator or lessor, who let the thing or service, and the conductor, or lessee or hirer, who hired the thing or service. Most writers up to and including Bell agreed that location was very similar to sale except that ownership of a thing let remained with the locator and did not pass to the conductor.<sup>91</sup> Bell pointed out another difference from sale in that risk never passed from the locator to the hirer unless there was 'a ground of liability against [the latter] by reason of negligent or faulty conduct'.<sup>92</sup> There was some debate, never really resolved, as to whether the conductor/hirer had to pay a price in money or could supply some other performance in return for his possession and use.<sup>93</sup> The Truck Act 1830 at least made clear that non-domestic servants – what Bell called 'the hiring of workmen in a manufactory'<sup>94</sup> – had to be paid in money. Finally, location could be usefully distinguished from other contracts also involving the transfer of possession: deposit, because it was gratuitous, and loan, either because it too was gratuitous when in the form of *commodatum*, or because the borrower did not have to return the specific thing lent, as in *mutuum*. Location of labour, work or services could also be

<sup>89</sup> Note A. D. M. Forte, 'A Civilian Approach to the Contract of Exchange in Modern Scots Law', *South African Law Journal*, 101 (1984), 691–704.

<sup>90</sup> Hume, *Lectures*, II, 56.

<sup>91</sup> See Stair, *Institutions*, 1,15,1; Bankton, *Institute*, I,20,1; Erskine, *Institute*, III,3,14; Bell, *Commentaries*, I, 481; *Principles* § 133, note.

<sup>92</sup> Bell, *Commentaries*, I, 481.

<sup>93</sup> Stair, *Institutions*, 1,15,1; Forbes, *Institutes*, 201; Bankton, *Institute*, I,20,1; Erskine, *Institute*, III,3,14; Hume, *Lectures*, II, 59. Bell (*Commentaries*, I, 481; *Principles* §§ 133–4) is non-specific on the point. Note that the Supply of Goods and Services Act 1982, c.29, s.11G(1), (3), allows the hire to be other than money (see also section 6 of the Consumer Rights Act 2015).

<sup>94</sup> Bell, *Principles*, § 171; note also *ibid.*, § 191 ('workmen or artisans').

distinguished from mandate, since in the latter the service had to be provided gratuitously. Bankton also discussed the strict liabilities of ship-masters, inn-keepers and stablers under the Praetorian edict *nautae, caupones, stabularii*, ‘as a distinct contract’, while suggesting that their holding of customers’ goods, ‘being for hire, [...] rather resembles Location’.<sup>95</sup> For Stair and Erskine, however, this edictal liability was an aspect of deposit, while for Forbes it was quasi-contractual, arising from the presumed consent of parties.<sup>96</sup>

Stair’s prime examples of location were the letting of land and work.<sup>97</sup> The same largely holds good for Forbes, Bankton and Erskine; their references on the subject are mainly to the Digest, with only occasional citations of Scottish cases.<sup>98</sup> Erskine’s treatment of location as a distinct heading is however confined to moveables; elsewhere he noted that, while leases or tacks of land were truly contracts of location, they needed separate treatment because ‘they have by statute received special qualities which distinguish them from the common contract of location’,<sup>99</sup> the principal reason for this being the real right which had effectively been created for tenants by the Leases Act 1449. Hence he dealt with the whole subject in his discussion of heritable property;<sup>100</sup> the first breakdown in the generality of the treatment of location.<sup>101</sup>

Bankton introduced a topic which had not been previously discussed at all as an aspect of location in the major Scots law books when, in his observations on the law of England in relation to hire, he considered mostly the strict liabilities of the common carrier, that is, ‘all persons carrying goods for hire,

<sup>95</sup> Bankton, *Institute*, I,16,1.

<sup>96</sup> Stair, *Institutions*, I,13,3 (see also *ibid.*, I,9,5 (reparation), and I,12,18 (mandate)); Erskine, *Institute*, III,1,28; Forbes, *Institutes*, 213–4; Forbes, *Great Body*, fs 921–4.

<sup>97</sup> Stair, *Institutions*, I,15.

<sup>98</sup> Forbes, *Institutes*, 200–1; Forbes, *Great Body*, fs 845–51; Bankton, *Institute*, I, 20; Erskine, *Institute*, III,3, 14–16.

<sup>99</sup> Erskine, *Institute*, II,6,20.

<sup>100</sup> *Ibid.*, II,6, 20–64.

<sup>101</sup> So Walter Ross later included a chapter on tacks in his *Lectures on the History and Practice of the Law of Scotland relative to Conveyancing and Legal Diligence*, delivered in 1783 and 1784 and published in Edinburgh in 1792 (2nd edn, Edinburgh, 1822). Lease of land was the only aspect of location to develop as a monograph subject. George Joseph Bell’s brother Robert, a Writer to the Signet and later an advocate also, published *A Treatise on Leases explaining the Nature, Form, etc of the Contract of Lease and Legal Rights of the Parties* in 1803. The book ran to four editions, the last appearing in two volumes in 1825 (Edinburgh) and 1826 (Edinburgh). It was then apparently superseded by Robert Hunter’s *Treatise on the Law of Landlord and Tenant*, which first appeared in 1833 and enjoyed three more editions, in 1845, 1860 and 1876 (Edinburgh).

as masters and owners of ships, lightermen, stage-coachmen, etc'.<sup>102</sup> He noted that the common carrier's liability is

a political institution of the law of England, that people may be safe in their dealings; and, if it were otherwise, carriers, that are frequently trusted with things of the greatest value, would often be tempted to confederate with thieves and robbers, and, on such affected pretences, defraud their employers.<sup>103</sup>

He then added: 'It is thought that this will hold with us [*i.e. in Scots law*], for the same reason, tho' we have no express law nor precedents, that I know, for it.'<sup>104</sup> In his chapter on 'the distinct contract' derived from the edict *nautae, caupones, stabularii*, Bankton suggested that this strict liability extended to common carriers.<sup>105</sup> Erskine too touched on this in his treatment of the edict as deposit.<sup>106</sup>

This edict is, by the usage of Scotland, extended to vintners in boroughs, though they be not innkeepers; *Master of Forbes*, 17 Feb 1687; and to householders who take in lodgers: *May*, 10 July 1694; and would possibly, from the parity of reason, be also applied against carriers.

Erskine also brought carriage into his account of location, however, when he noted, almost in passing, that a contract 'by which the owner of a ship or vessel freights her to a merchant for the transportation of goods from one port to another, for a certain sum, to be paid either by the day or upon the whole voyage, is a species of location.'<sup>107</sup> While hiring a ship could be seen as *locatio rei*, a contract merely to carry looked more like *locatio operarum* with, however, the additional feature that the locator also received goods (or, indeed, persons in passenger transport) from the conductor. This may explain the general non-appearance of carriage in discussions of location up to the time of Bankton and Erskine.<sup>108</sup> Stair had touched upon carriage by ship in his account of

<sup>102</sup> Bankton, *Institute*, I, 20, Observations on the Law of England, no. 2.

<sup>103</sup> *Ibid.*, no. 1.

<sup>104</sup> *Ibid.*

<sup>105</sup> Bankton, *Institute*, I, 16, 5. Note also Zimmermann, *Obligations*, 514–26.

<sup>106</sup> Erskine, *Institutes*, III, 1, 29.

<sup>107</sup> *Ibid.*, III, 3, 17.

<sup>108</sup> But note Alexander King, *Tractatus legum et consuetudinem navalium* (1590), title 6 ('De locatione et conductione navium'), a reference I owe to J.D. Ford and his as yet unpublished edition of this MS. treatise. In Roman times, carriage by sea where

mandate, noting however that ‘all Admiralties [...] are proper judges of these matters’;<sup>109</sup> while Forbes put carriage by ship as another quasi-contract.<sup>110</sup>

Hume’s treatment of location reunified the subject by dwelling at length upon the tack of land before turning relatively briefly to *locatio operarum*, the use of a thing or of service and labour. He too treated of carriage of goods and persons by land, presumably a subject of increasing significance as the landward transport infrastructure for the country as a whole improved around him,<sup>111</sup> before turning to a separate treatment of ‘one instance more, and a frequent one, of this sort of location, – of the use of a thing’, carriage of goods by sea and the hire of ships.<sup>112</sup> Throughout his citations are to Scottish cases, with only very occasional references to Roman and English law. Hume followed Bankton in noting that the common or public land carrier’s strict liability had been adopted as a matter of policy in Scotland and other countries, extending the principle of the edict *nautae, caupones, stabularii*, but he doubted whether Scots law would go so far as English law in the celebrated case of *Coggs v Bernard* in making the common carrier liable even for the robbery of the goods being carried.<sup>113</sup> England was thus the other country he had most prominently in mind on this topic. Alan Rodger as long ago as 1968 suggested that the development of edictal liability for land carriers in Scotland came about, not by analogising them (as Bell and others were to do in the early nineteenth century) with *nautae* as sea carriers, but because inn-keepers (*caupones*) were

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the merchant transporting goods was not also the ship-owner seems to have been financed by loans (*genus nauticum*) to the merchant in which the risk of failure was on the lender: Zimmermann, *Obligations*, 181–6. On arrangements in the medieval period see Edda Frankot, ‘Of Laws of Ships and Shipmen’: *Medieval Maritime Law and its Practice in Urban North Europe* (Edinburgh, 2012), 7–9; and for the early modern period see also J.J. Brown, ‘Merchant Princes and Mercantile Investment in Early Seventeenth-century Scotland’ in M. Lynch (ed.), *The Early Modern Town in Scotland* (London, Sydney and Wolfenboro, N.H., 1987), 125–46; P. G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich* (2 vols, Stair Society vols 21–22, Edinburgh 1962–3), II, 618–19 (‘Anent frauchting of schippis’; but note the reference at c.XXII to the master who ‘frauchtis or lettis to hire his schip to ane merchand’); William Welwood, *The Sea Laws of Scotland* (2nd edn, Edinburgh, 1592), title 2 (‘Of frauchting of schipis’); idem, *Abridgement*, title 7 (‘The frauchting of ships’). On Welwood see further J. D. Ford, ‘William Welwod’s Treatises on Maritime Law’, *Journal of Legal History*, 34 (2013), 172–210, especially 186.

<sup>109</sup> Stair, *Institutions*, I, 12, 18.

<sup>110</sup> Forbes, *Institutes*, 196; *Great Body*, f. 924.

<sup>111</sup> Hume, *Lectures*, II, 100, 104–8.

<sup>112</sup> *Ibid.*, II, 109–24 (quotation at *ibid.*, 109; note also *ibid.*, 102–3).

<sup>113</sup> *Ibid.*, II, 104–5. See also *Coggs v Bernard* (1703) 2 Ray. 900, 1 Salk. 26.

often also in the business of hiring out carriages and coaches;<sup>114</sup> but it may be that the English position, based as it was on public policy considerations, was the chief influence in changing the law to meet changing trading conditions in Scotland during the second half of the eighteenth century.

English law certainly comes fully into view in Bell's treatments of what he firmly called hiring rather than location.<sup>115</sup> As usual he cites English alongside Scottish cases, and also refers to Pothier's work, this time mostly the treatise on the *Contrat de Louage*, as well as Story's *Commentary on Bailments* and the relevant part of Kent's *Commentaries on American Law*.<sup>116</sup> In addition he refers to Sir William Jones' famous *Essay on the Law of Bailments* for English law, remarking that in it Jones 'has shown how the learning of a scholar and the liberality of a gentleman may be combined with the correctness of legal analysis'.<sup>117</sup> Jones was also an admirer of Pothier and a proponent of natural law along with the idea of law as a universal science, who could write of responsibility for negligence in the contract of bailment 'that a perfect harmony subsists on this interesting branch of jurisprudence in the codes of nations most eminent for legal wisdom, particularly of the Romans and the English'.<sup>118</sup> There was, in other words, a *ius gentium* in this field of law. It was an understanding very much in line with Bell's perception of how the law should be developed in relation to mercantile affairs.

So, on the responsibility of the hirer for injury received by the subject of the hire, Bell comments that 'the doctrine maintained by Pothier, and

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<sup>114</sup> Alan Rodger, 'The Praetor's Edict and Carriage by Land in Scots Law', *Irish Jurist*, 3 (1968), 175–86, especially 183–5. Note further Bell, *Commentaries*, I, 498: 'Innkeepers are responsible, on the principle of the edict, for whatever is placed under their charge, or that of their servants [...] Where an article is given to an innkeeper to be sent by a carrier or coach going from his house, he is liable for it. But it has been doubted whether, under this law, an innkeeper is responsible for a parcel addressed to one who was not a guest but merely called at his inn, and went on with post-horses.'

<sup>115</sup> Bell, *Principles*, §§ 133–93; *Commentaries*, I, 481–505.

<sup>116</sup> Robert Joseph Pothier, *Traité du Contrat de Louage* (Paris, 1764 and many subsequent editions; not translated into English until the mid-twentieth century: G. A. Mulligan (ed.), *Pothier's Treatise on the Contract of Letting and Hiring (contrat de louage)* (Durban, S.A., 1953); James Kent, *Commentaries on American Law* (New York, 1826–30), Lecture 40; Joseph Story, *Commentaries on the Law of Bailments: with Illustrations from the Civil and the Foreign Law* (Cambridge, Mass., 1832).

<sup>117</sup> Bell, *Commentaries*, I, 483, note 1. Jones' *Essay* was first published in 1781 and had three further editions in England, the last in 1833. I have used the modern edition (based on the 1781 edition) edited with an introduction by David J. Ibbetson and published as the fourth volume in the Welsh Legal History Society series (Bangor, 2004).

<sup>118</sup> Jones, *Essay on Bailments*, para. 17.

vindicated by Sir William Jones, is the established law of Scotland'.<sup>119</sup> This was the doctrine of *culpa lata*, *culpa levis*, and *culpa levissima* by which, where the contract was reciprocally beneficial to both parties (as in hire), the possessor's liability should be for 'ordinary neglect only'; where it benefited only the owner (as in gratuitous deposit), the possessor should be liable for gross neglect only; and where it benefited only the possessor (as in gratuitous loans), the latter should be liable for the slightest neglect.<sup>120</sup> Bell deploys this analysis in his *Principles* and his *Commentaries*.<sup>121</sup>

Bell's treatment of the praetorian edict is further indicative of the general approach of developing the law in mercantile matters to meet current practical issues identifiable through comparative study rooted in ideas of the *ius gentium* and the law merchant. The edict takes liability beyond the realms of the different kinds of *culpa*, on policy grounds recognised 'even in those countries where the Roman law has no avowed authority', i.e. England.<sup>122</sup> As already noted, on that basis Bell then applies the edict to the liability of the land carrier by analogy with the liability of the sea carrier.<sup>123</sup> There is a more general observation reflecting an understanding built on the *ius gentium* and the law merchant:<sup>124</sup>

This edict is not to be considered as positive law in Scotland, but as effectual only in so far as it has become a part of the maritime law of Europe, or as by its general policy it stands recommended to our adoption, and is now in its great principle recognised as a part of our jurisprudence.

Hire remains unequivocally hire in Bell's treatments, however, despite the link through Jones to the much wider English concept of bailment, which includes but is not limited to hire.<sup>125</sup> Bell covers the familiar ground of *locatio rei* and *locatio operarum*. The latter is however broken up into a number of sub-groups

<sup>119</sup> Bell, *Commentaries*, I, 483.

<sup>120</sup> Pothier's fullest discussion of these principles is in his essay, *De la Prestation des Fautes* (usually found appended to his *Traité des Obligations*); I have used the edition in M. Bugnet (ed), *Oeuvres de Pothier* (10 vols, Paris, 1861), ii, 497–501. See also Jones, *Essay on Bailments*, paras 6–16.

<sup>121</sup> Bell, *Principles*, §§ 232–4; Bell, *Commentaries*, I, 483.

<sup>122</sup> *Ibid.*, I, 495.

<sup>123</sup> *Ibid.*, I, 496.

<sup>124</sup> *Ibid.*, I, 495.

<sup>125</sup> See further below, text accompanying notes 129–130.

which appear to be of Bell's own devising. 'Labour and service' (which in turn is split into 'common' and 'skilled', the latter applying to professional persons, the former to the case where the workman is provided with the materials to be worked on, for example repair) is separated off from 'services' (where the division is that already mentioned between the domestic and the manufactory servant); the distinction appears similar to the modern one between a contract for services and a contract of service (employment). Carriage of goods, including inland carriage, is another form of hiring.

The one point at which Bell appears to expand the traditional scope of location in Scots law is when, following Jones,<sup>126</sup> he talks of 'hiring of care and custody'. Although elsewhere Bell discusses the old gratuitous contract of deposit,<sup>127</sup> the reality of non-owners having the safe-keeping of others' goods for commercial purposes and commercial returns had to be brought within the scope of legal analysis: 'This is the contract which regulates the duties of depositaries for hire, wharfingers, warehousemen, livery stablers, and persons who keep depasturing fields for cattle.'<sup>128</sup> Custody did however, like carriage, cut a slightly difficult figure as a form of location; while the locator clearly provided a service, he also received possession of goods from the conductor as well as the price paid for the service.

We can however see Bell deploying at least the idea of bailment when structuring his account of Scots law in cognate areas. In English law bailment (the etymology, according to Jones, being from the old French verb *bailler* meaning to deliver<sup>129</sup>) covered a range of situations where property was delivered with the intention that 'the recipient should have only the temporary use or profits of the thing (loan or hire) or should hold it passively as a pawn or deposit'.<sup>130</sup> Bell's departure from the Roman structure of contracts in favour of a more functional approach based on commercial realities has already been mentioned.<sup>131</sup> In his *Principles*, hiring was the first of a group of contracts treated under the heading 'Contracts Accompanied by Confidential Possession', the remainder being, in order, loan, pledge, deposit and, finally, mandate and factory; that is, a mixture of those traditionally considered as

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<sup>126</sup> Jones, *Essay on Bailments*, para. 129.

<sup>127</sup> Bell, *Commentaries*, I, 277-8; *Principles*, §§ 210-15.

<sup>128</sup> *Ibid.*, § 155. See also Bell, *Commentaries*, I, 488.

<sup>129</sup> Jones, *Bailments*, para. 121. *Bail* is still the French for lease.

<sup>130</sup> J. H. Baker, *An Introduction to English Legal History* (4<sup>th</sup> edn, London Belfast and Edinburgh, 2002), 389.

<sup>131</sup> See above, text accompanying notes 53-57.



either consensual or real.<sup>132</sup> ‘These are contracts,’ Bell told his students, ‘in which there is necessarily entrusted to one the custody, or use, or manufacture, of the property of another; called Bailment in the law of England and of America, but not distinguished in Scotland by any technical name.’<sup>133</sup> In the *Commentaries*, Bell noted that the same group of contracts were instances of property and possession of things being in different hands, and explored the consequences in the bankruptcy of the possessor, the general rule being that the owner could reclaim the property in question subject to any set off to which the bankrupt might be entitled. The exceptions were loans falling into the category of *mutuum*, collusive sale and lease-back transactions, and the unpaid pledgee. But particularly in factories several nice points fell to be discussed in detail.<sup>134</sup> While clearly in Scots law nothing closely approximated to the English idea that in some circumstances a bailee might have some kind of proprietary claim to the thing bailed, it must be doubtful how far Bell would have been able to take the analysis just summarised without the issue having been put into his mind by the comparison with bailment.

### Concluding Remarks

The ruminations just offered are no more than a first tentative toe in the water from one who, for reasons already given, does not much relish voyaging in such deep and potentially stormy waters. I have sought to take a little further Angelo’s basic point that in mercantile matters Scots law was developed through understandings of a *ius gentium* and a law merchant for which the most readily available (but not the only) evidence was the decisions of the English courts; a development which became, despite resistance, a recognition of those decisions as authorities rather than simply evidence of some wider general norms. Further attempts to trace the eddying currents of development in commercial law must be left to others better equipped to undertake the voyage. The project in which Angelo was very largely the first adventurer, has, in other words, a long way still to go; and it is very sad that he will not be around to pilot it further across the ocean. But re-reading his work has reminded me of many other good things. He introduced me to the verbs ‘to predicate’ and ‘to adumbrate’. He liked to be blunt and to speak frankly. He was fascinated by medieval law as well as medieval ships. His engagement with the Northern world of Orkney as well as

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<sup>132</sup> Bell, *Principles*, §§ 133–244. See also Bell, *Commentaries*, I, 481–545.

<sup>133</sup> Bell, *Principles*, un-numbered paragraph between §§ 132 and 133.

<sup>134</sup> Bell, *Commentaries*, I, 274–88.



the Vikings in general led on to the late turn of his work to Celtic law and the promising comparisons he drew between it and medieval Norse law. There was a very great deal about Angelo to love and admire; I miss his congenial presence and wide-ranging mind immensely.

# **‘There’s a Scholar on the Water’: Angelo Forte and Obligations as the Bedrock**

*John Blackie*

## **Teaching, Scholarship, Legal Practice And Business Reality**

Angelo Forte was not a cloistered scholar. He certainly worked very long and arduous hours. He was a great teacher, and that dimension was part of his scholarship, too. But also his mind engaged particularly with certain aspects of the world beyond the universities, teaching and scholarship, and these were the bedrock of his published work. He appreciated strongly the significance of law as practised, the world of business, commerce and consumers, and above all the world of those who go down to the sea in ships. The first was the product of his own experience and reflection when he worked at the start of his career as a solicitor. The second was rooted in his family’s business. The third, too, was rooted in his experience of the life of one side of his family – as fishermen. All three of these dimensions inspired and informed his teaching and writing on the law of obligations. But the sea had a special role in his thinking. It was not merely that he had an enjoyment in it, which he most certainly did. It was that as an environment of unpredictable risk it has always tested to the limits the law of obligations. Most obviously this was so with insurance law, which was a lifelong study for him. But it can be seen in his interest in salvage, and it appears off and on in some of his work on other aspects of the law of obligations. These dimensions of being a scholar and teacher together with mental engagement with things beyond the universities are captured by a quotation in the title of this essay. It is not to be found in Angelo’s writing. It comes from his conversation, which was every bit as rich. He was very conscious of, and reflected on, the dimensions to his own thought. In fact it dates from a time when he would relax fishing not on the sea as he had at one time done, but in waders on the bedrock of the River Ugie. Having revealed to a fellow angler he was a law professor, the response was: ‘I heard there was a scholar on the water’. (Things in rivers

on one occasion actually appeared in his writing: in his article on salvage he mentioned the rights of someone retrieving an angler's watch from a river, and the rights of a farmer who tows a caravan out of one).<sup>1</sup>

This essay seeks to explore in the light of the above dimensions Angelo's work on the law of obligations. Principle and pragmatism are the common features of this whole body of his work. In significant ways his body of work on the general law of obligations was the background to later work, including not only his work on insurance, where he continued to write on current law, as well as its history, but also many aspects of his later historical work. But it was more than that. It was in its own right a contribution to obligations scholarship.

Almost all of this body of work was written in the first half of his career. Most of it appeared in the *Journal of the Law Society of Scotland* and the *Scots Law Times*, with the former taking the lion's share. To appreciate the significance of the fact that it was published in these periodicals, and so read widely and regularly by practising lawyers, requires more than just knowing he was well aware of the importance of practice or saw it as a bonus.<sup>2</sup> It has to be underlined just how lively real knowledge exchange between the universities and those practising Scots law was at that period. It happened naturally. No one, therefore, felt any need, as there was none, to invent, as happens now for better or for worse, artificial criteria to try and find out whether any knowledge exchange takes place. It was central to the on-going work of all engaged with the law in Scotland. It was fostered particularly by writing in these two periodicals.<sup>3</sup> Their editors were keen in those days to publish work of academic rigour. They had readers who were interested in that too. As Angelo would have pointed out, they would not have published this sort of writing unless it helped to keep up the readership. Today pieces of this sort of depth would be lengthy, in 'peer reviewed' university based journals, and rarely seen by those practising the law.

It was developments from around the beginning of the 1990s that brought largely to an end this prominent aspect of the interaction between the profession and academic lawyers. Till these developments there was no

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<sup>1</sup> A. D. M. Forte, 'Salvage operations, salvage contracts and *negotiorum gestio*', *Juridical Review*, [1993], 247, 257.

<sup>2</sup> Cf. Forte, *Scots Commercial Law* (1st edn, Edinburgh, 1997) v: Preface (a book aimed firstly at students): '[s]hould it also find a place [...] indeed, in the busy practitioner's library that would be a bonus'.

<sup>3</sup> The same sort of work is found in Forte, 'Letters of Comfort or Letters of Cold Comfort', *Journal of Maritime Law and Commerce*, 21 (1990), 99–109.

concept of a distinction between ‘impact’ and ‘output’, nor between one audience and another.<sup>4</sup> That Angelo to a great extent stopped writing on the general law of obligations at this time may be connected with an increase in his interest in his work in other areas. But these developments probably played a part. The immediacy of practitioners’ concerns, together with the stimulus of a challenging new case or new statute law, fed into his own view of how law works. Without an audience which naturally included practising lawyers an important stimulus to his work on modern law had been taken from him. One of the developments that brought this change about was in the nature of the literature published directly for the profession. In this periodical literature in Scotland the balance at this time tipped away from in-depth scholarly pieces, whether short or long. This was less marked and over a longer timescale in the *Scots Law Times*. It was particularly marked, however, in the *Journal of the Law Society of Scotland*, where so much of Angelo’s work had appeared. The tradition of its containing significant writing by legal academics was developed by its editor of many years, Alfie Phillips.<sup>5</sup> It was continued by his successor, Willie Millar, who took over in 1983 and demitted office at the end of 1988. 1995 was the last year in which there was a significant number of academic contributions.<sup>6</sup> In 1997 the format became full colour and more like that of a magazine. It may be that changes within the legal profession meant practitioners were now looking for something different. Commercial pressures and values began to be increasingly dominant, and the burdens of practice were growing. Crucial too for academics were contemporaneous changes in the balance of goals within the universities, and in the assessment of how far they were being achieved. Especially important was the effect of government demands on universities which made the reference point for universities an international one. Through measures to assess the value of research done by academics successive governments focused on ‘reputation’ in the global world of academia, not reputation anywhere else, such as in the legal profession.

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<sup>4</sup> The recognition of a separate category of ‘impact’ (outside academia) as distinguished from ‘outputs’, i.e. published research, in the 2014 Research Excellence Framework is different as it presupposes a difference of interest between academia and other groups. See REF 2014: *Assessment framework and guidance on submissions*, <http://www.ref.ac.uk/media/ref/content/pub/assessmentframeworkandguidanceonsubmissions/GOS%20including%20addendum.pdf>, accessed 8 June 2015, part 3, section 3 and Annex C, para. 4.

<sup>5</sup> He was described as ‘the creator of the Journal as we know it’; see Willie Millar, ‘Editorial’, *J.L.S.S.*, [1989], 118.

<sup>6</sup> Fiona Raitt, ‘Mediation as a form of Alternative Dispute Resolution’, *J.L.S.S.*, [1995], 182; Kenneth Norrie, ‘Parental Responsibilities and Parental Rights’ *ibid* 340.

Repeated ‘research assessment’<sup>7</sup> exercises then consequentially developed in a way that devalued writing in ‘professional journals’, and devalued shorter pieces of writing, such as case notes, however in-depth and wide ranging. This was not clear with the first two research assessment exercises, in 1986<sup>8</sup> and 1989. But by the 1992 exercise it was and by that of 1996 very clearly so. The position had come to be such that ‘the game is that we are judged primarily by other academics, on the basis of publications read only by other academics’.<sup>9</sup> So, though the subject panel of assessors for Law in these exercises, unlike those of the vast majority of other panels, had a policy of not discriminating on the basis of where work was published,<sup>10</sup> the wider effect of the whole process against the background of a changed university culture was to disrupt fundamentally this aspect of an interaction with the legal profession that just happened naturally. In particular, it made it in effect impossible for an academic to write on a regular basis for a combined professional and academic audience.

One consequence of all of this is that it will certainly be easier for an academic in thirty or forty years from now to find quickly the whole of an academic’s body of published work. To find most of the body of work discussed in this essay has necessitated a manual search, page by page, of the *Journal of the Law Society of Scotland* and of the *Scots Law Times*. However, it needs emphasis that this body of work was in no way produced only for the moment. This was as much the case with the very many case notes that he published, whether relatively short or more often rather long, where the case was a peg on which was hung by him a consideration of the area of law as a whole which related to the decision. There is much, too, to be found in some of the book reviews that he published. The whole body of work was produced as a contribution at the highest level to private law scholarship in Scotland. It provided a range of legal scholarship that complemented that of

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<sup>7</sup> This phrase is used here for convenience. The earlier ones were called, ‘Research Selectivity Exercise’. Later ones were entitled ‘Research Assessment Exercise’. The most recent (2014) is ‘Research Excellence Framework’.

<sup>8</sup> For the history of these exercises from the start in the 1980s see V. Bence, ‘The Evolution of the UK’s Research Assessment Exercise: Publication, Performance and Perceptions’, *Journal of Educational Administration and History*, 37 (2006), 137, <https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/1804/1/benceevolution.pdf>, accessed 8 June 2015.

<sup>9</sup> N. Piercy, ‘Why it is fundamentally stupid for a business school to try to improve its RAE score’, *European Journal of Marketing*, 34 (2000), 27, quoted in V. Bence, *ibid* (see text following footnote 7 of that article).

<sup>10</sup> V. Bence, *ibid* (see text following footnote 6 of that article).

Bill Wilson, his fellow editor of what became the 1995 edition of Gloag and Henderson's *Introduction to the Law of Scotland*. Bill Wilson's death in 1994<sup>11</sup> meant that Angelo carried the whole through the press on his own. The memory of that still stands as a tribute to his tenacity as well as his scholarship.

I divide up my more detailed consideration into four parts. Three of these are the classic divisions of the law of obligations: contract, delict and unjustified enrichment. The fourth is special contracts, though not including among them Angelo's extensive work on insurance, which is covered in another essay in this volume.<sup>12</sup> It is convenient to deal with the first three of these in reverse order.

### Unjustified Enrichment?

I think that Angelo was less interested in this branch of the law of obligations than in the other branches. If I am right in that, I believe there are two reasons why. The first is that his focus was to see it as it related to contractual liability. Of course unjustified enrichment does have an interface with contract. But its standing as an autonomous area in the law of obligations was not in Scotland in the first half of his career so clear as it later became and the major formative modern decisions did not come till the 1990s.<sup>13</sup> The second reason I suggest for his relative lack of interest in unjustified enrichment was that he was anyhow something of a *ius commune* sceptic. That scepticism we often argued about. But it had a link to his pragmatic understanding of business life and a realistic appreciation that Scots contract law, while reflecting in its origin many general ideas from the *ius commune*, had given teeth to its rules and principles through case law, and in some areas, notably insurance law, but also for example the law of carriage, and for the most part sale, the law was U.K. law with U.K. statutes being of fundamental importance.

The closest he came to writing about an aspect of the law of unjustified enrichment is the article on salvage.<sup>14</sup> In this his thesis was that *negotiorum*

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<sup>11</sup> Before he died he had completed his own particular work on the text (H. L. MacQueen, 'Memoir of Professor William Adam Wilson' in *idem* (ed.), *Scots Law into the 21<sup>st</sup> Century – Essays in Honour of W. A. Wilson* (Edinburgh, 1996), 1, 7.

<sup>12</sup> H. L. MacQueen, 'Pragmatism, Precepts and Precedents: Commercial Law and Legal History'. *supra*, 10–42.

<sup>13</sup> Starting with *Morgan Guaranty Trust Co. of New York v Lothian Regional Council* 1995 S.C. 151.

<sup>14</sup> Forte, 'Salvage operations, salvage contracts and *negotiorum gestio*', *Juridical Review*, [1993], 247, 257.

*gestio*, which Bill Stewart, in his *The Law of Restitution in Scotland*,<sup>15</sup> had rejected as a basis for salvage, did have a relevance to that topic and secondly that the commonly held doctrine that ‘the existence of a contract excludes salvage claims’ was in some contexts simply wrong. The celebrated case of *The Goring*<sup>16</sup> in England held that the gallant members of the Island Bohemian Club, who put a line aboard a pleasure launch that had broken from her moorings in the non-tidal fresh waters of the Thames, had no right to salvage. Angelo would have appreciated the speculation that some of the judges in the House of Lords as children may have read Arthur Ransome’s *We Didn’t Mean to Go to Sea*,<sup>17</sup> or perhaps as adults Erskine Childers’ *The Riddle of the Sands*,<sup>18</sup> and from that reading have embedded at the back of their minds that yachtsmen dislike salvors (if salvaged the boat may need to be sold to pay, and the owner may never have the funds to go to sea again). Therefore they should not be readily able to become salvors themselves.

There are several features of his thesis that *negotiorum gestio* would give a claim that are striking. The first is that he suggests that perhaps something more than expenses could be awarded. This is supported by going back to Stair, who refers also to something for the pursuer’s ‘pains’,<sup>19</sup> though Angelo notes that Stair’s was currently an unfashionable view. His awareness of statute law, however, is more important here: the question would arise under the London Convention on salvage should that Convention ever be ratified by the United Kingdom and be given effect to be statute. The default position under that Convention was that it did apply to all waters including non-tidal fresh water. But it contained an opt out clause for a country to exempt where all the vessels were involved in inland navigation.<sup>20</sup> His pragmatic awareness was not limited to the farmer and the angler on the riverbank but extended prophetically to the salvor dousing a fire on an oil rig.<sup>21</sup>

Beyond this Angelo was characteristically interested in the interface of salvage with contract. The separate issue of contract as it relates to salvage

<sup>15</sup> William J. Stewart, *The Law of Restitution in Scotland* (Edinburgh, 1992), para. 10.10.

<sup>16</sup> [1988] A.C. 831.

<sup>17</sup> (London) 1937.

<sup>18</sup> (London) 1903.

<sup>19</sup> *Institutions*, I, 7, 4.

<sup>20</sup> The United Kingdom ratified the Convention in 1995 exercising that opt out, and also excluding ‘maritime cultural property of prehistoric, archaeological or historic interest on the sea bed’ (Merchant Shipping Act 1995, c.21, s.224 and sch. 11. The definition of inland waters has been further clarified in this legislation).

<sup>21</sup> Forte, ‘Salvage operations, salvage contracts and *negotiorum gestio*’, 258.

shows very clearly the way that he saw contract as central because in practice in the commercial world parties seek to distribute the risks by contracting. It is contractual analysis as much as analysis of the general law of salvage that matters in reality. Further in many areas of business life standard form contracts created for the whole field are widely used. He always sought these out when considering the law. In the world of professional salvage at that time the relevant standard form was the Lloyd's Open Form 1990 which in fact incorporated a great deal of the London Convention though it had not been ratified by the United Kingdom. What, for instance, would count as a 'useful result' is then really a question of what is laid down in that standard form contract. This was true of other contracts that may be involved, such as contracts of hire and towage. One of the few Scottish decisions<sup>22</sup> in this field in the second half of the twentieth century in that context is simply considered by him to be wrong.

### **Delict As Commercial Law**

What Angelo was interested in as regards delict was the law of negligence since it impacts on business and professional life. His interests did extend to other aspects of the law of delict. But I have been particularly reminded when looking at his work on delict of one evening working together on another topic which was of direct relevance to businesses. Fuelled by fish and chips, we were writing for a seminar for lawyers on product liability under the then brand new regime of strict liability for defective products introduced by the Consumer Protection Act 1987. Angelo's special enthusiasm was directed at fish, vegetables and blood. The question with which he was grappling was, what is 'industrial process', a necessary condition before a raw material becomes a product at all as defined in that legislation. His interest was not only commercially prescient, but in dealing with blood products he had hit on one of the issues in product liability that later became of huge public importance.

That work was never published, though it is still available.<sup>23</sup> All of what he did publish on delict was focused on questions of negligently caused pure economic loss. He wrote on pure economic loss as a general issue in the analysis

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<sup>22</sup> *Smith v Saville* 1990 S.L.T. 79.

<sup>23</sup> The papers are available: J. W. G. Blackie and Forte, 'Afternoon seminar on product liability: new law; the Consumer Protection Act 1987' (Edinburgh, 1988) (Edinburgh University Library, shelf mark KX Uni. (Edi.)).



of the concept of duty of care. But he also wrote specifically on questions of negligent misrepresentation. These (along with the law of economic delicts, about which he did not write) are the bits of the law of delict that bite directly on the activities of the commercial world.

His longest contribution on any aspect of the law of delict was the article that he and Sandy Wilkinson wrote on duty of care for negligently caused pure economic loss.<sup>24</sup> He was not unaware of the sixteenth and seventeenth century writing on delict. Not only does the article consider what the various Scottish institutional writers had to say that might be germane to the topic: it also brought to light a number of Scottish decisions of the late seventeenth and eighteenth century. Further it contains consideration of passages in Voet and Grotius, with an observation that Matthaeus was to a similar effect.<sup>25</sup> Nonetheless, there is it appears, even here, one feature of his being something of a *ius commune* sceptic. It is the pragmatic and realistic focus on the contemporary reality of Scots law in this field, essentially now the same as that of English law, that marks the work. The detailed deployment of the early material demonstrates that scepticism was not of the type produced by ignorance or because he did not understand *ius commune* material. He knew what there was but used that knowledge instrumentally to support his scepticism where the issue was entirely modern. The authors' conclusion is that the early cases were 'decided in a climate of judicial thinking about negligence which, whether for good or ill, is different from the contemporary'. They considered that the early material did not provide a basis for the Scots law of negligently caused pure economic loss as (a) the *ius commune* authors examined were focused rather on extending the rights beyond that of an owner narrowly described to those having 'reversionary and possessory rights',<sup>26</sup> and (b) 'the support is slender' for any broad generalisation of the law of delict to cover pure economic loss in the earliest Scots cases.

The taxonomy developed in this article may now seem obvious but at the time it was not. Like all good ideas it was not immediately apparent until it was stated. The authors' first distinction for analysis is between 'primary and secondary loss'. That, as a starting point, clears the mind and makes cases such as the disruption of a power supply not owned by the pursuer but

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<sup>24</sup> A. B. Wilkinson and Forte, 'Pure Economic Loss – A Scottish Perspective', *Juridical Review*, [1985], 1.

<sup>25</sup> These writers were all available in English translation. Angelo was able to use Latin, but I think he felt his fluency was not up to reading long texts in that language.

<sup>26</sup> Wilkinson and Forte, 'Pure Economic Loss', 6.

resulting in loss to him, her or it fall into one box (secondary) and other cases, including but not confined to negligent misrepresentation, into another box (primary). Scottish authority, in the twentieth century before *Junior Books*,<sup>27</sup> was in practice about secondary economic loss cases. These cases tended to deny a delictual liability; and they were now correctly challenged by the decision in *Hedley Byrne*.<sup>28</sup> That, in the authors' words, 'revolutionised' the law of primary economic loss. The argument then goes on to be developed that in cases of primary pure economic loss a distinction between negligent misrepresentation in words and through acts unsatisfactory as illogical.

The writers took the case of *Junior Books* as a springboard to develop their analysis of 'primary' cases. But typically they were prophetic in doubting the decision in that case on the facts. An understanding of the distribution of risk in commercial contracting certainly made Angelo unenthusiastic about any court enabling a party to leapfrog the contractual distribution of risk to get as here at a subcontractor, and so to 'pile Pelion on Ossa'.<sup>29</sup> However, they were even more prophetic in what they stressed in the decision. It was the focus on 'proximity' that mattered to them. A feature of all of Angelo's work on obligations, not highlighted above, is his extracting a general principle from the case law and then exploring the fine-tuning and limitations on that principle. The stress on 'proximity' is particularly remarkable since *Anns v Merton London Borough Council*<sup>30</sup> still provided the general framework for a duty of care in the form of 'foreseeability' and 'policy', a framework done away with later in *Murphy v Brentwood*.<sup>31</sup> Further, and likewise strikingly, in this article in the context of primary pure economic loss, the authors extracted a general principle of 'assumption of responsibility from which a duty can be predicated'.<sup>32</sup> This is long before 'assumption of responsibility' became a favourite of Lord Goff.<sup>33</sup> What is more the authors do not use assumption of responsibility as a self-explaining category, which is what made it so unsatisfactory in later decisions by Lord Goff and others. Their focus is on 'factors pointing to' that. Their method then is to look at particular factors that had been suggested, notably 'reliance', and 'the existence of a close or special relationship'. With respect

<sup>27</sup> *Junior Books Ltd v Veitchi Co. Ltd* 1982 S.C. (H.L.) 244.

<sup>28</sup> *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] A.C. 465.

<sup>29</sup> Wilkinson and Forte, 'Pure Economic Loss', 25.

<sup>30</sup> [1978] A.C. 728.

<sup>31</sup> *Murphy v Brentwood District Council* [1991] 1 A.C. 398.

<sup>32</sup> Wilkinson and Forte, 'Pure Economic Loss', 15.

<sup>33</sup> *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145.

to both of these factors they then question that they can provide the answer in all situations.<sup>34</sup>

They then focused particularly on secondary economic loss and on a consideration of policy and principle. Their view on this is worth quoting in full: 'Whether the law can wholly distance itself from policy considerations may be doubted. Nor is the distinction between policy and principle always clear. A policy once embodied in precedent may become a principle'.<sup>35</sup>

They had already published<sup>36</sup> on the implications of the case of *Junior Books* in the immediate aftermath of the decision. This was a long trailer for the later full article. It assumed an interested audience of Scots academics and practitioners. It has 101 footnotes. As noted above, and in other contexts below, many of the 'case notes' that Angelo wrote are not confined at all to the rightness or wrongness of the decision in question but extend to what the case reveals about wider principle, and sometimes the implications of the decision for real life, particularly commercial life. The abstracted concept, assumption of responsibility, does not appear in this slightly earlier piece, nor does the terminology of 'primary' and 'secondary', though secondary cases are separately dealt with at the end of the piece. Nonetheless the highlighting of principle and relevant factors is already there, and there is more extensive consideration of a number of Commonwealth decisions. The reader is then given four specific points, a technique helpful to the informed practitioner as well as to the academic lawyer.

This was not the first time that Angelo addressed the question of primary pure economic loss. Even earlier he had been keeping his eye on the English case law. In the previous year he published a case note<sup>37</sup> on the first English decision where it was recognised that there was a duty of care to the purchaser of that building on the part of a surveyor instructed to value it by a building society.<sup>38</sup> At that time, before the law was changed in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, there were Scottish decisions which stood in the way of developing liability. These denied a remedy where as a result of negligent misrepresentation the pursuer suffered economic loss by entering into a disadvantageous contract with the misrepresenter.<sup>39</sup> In the

<sup>34</sup> Wilkinson and Forte, 'Pure Economic Loss', 16.

<sup>35</sup> *Ibid.*, 22.

<sup>36</sup> Forte and Wilkinson, 'Liability for Pure Economic Loss – Considering Junior Books Ltd v The Veitchi Co Ltd 1982 SLT 492', *J.L.S.S.*, 28 (1983), 148.

<sup>37</sup> Forte, 'Negligence – a survey', *J.L.S.S.*, 27 (1982), 128.

<sup>38</sup> *Yianni v Edwin Evans & Sons* [1983] 3 All E.R. 692.

<sup>39</sup> Particularly the Inner House decision *Manners v Whitehead* (1898) 1 F. 171. Angelo

particular context, however, they were not in point. Angelo's conclusion was very simple. In the case of the building society surveyor with a duty to the purchaser 'such liability ought to exist [and] rests ultimately on a determination of policy [...] There seems no good reason why surveyors [...] should not be subject to a duty of care to the purchaser'.<sup>40</sup> There are no problems of indeterminate liability that arise. He ended with a typically pragmatic message that professional advisers 'should be extremely careful with advice, opinions or information'. As in other situations, however, it was never far from his mind that parties by taking appropriate steps could protect themselves from a development in the general law, here in the law of negligent misrepresentation. A few years later, encouraged by the first Scottish building society surveyor and purchaser delict case, he explored this in an article in the *Scots Law Times*.<sup>41</sup> He was, as I shall consider in more detail later in connection with contract law, very expert in the law relating to contractual exemption and limitation clauses, including in their drafting and the impact of the Unfair Contract Terms Act 1977 (and then later the Unfair Terms in Consumer Contracts Regulations). In connection with the surveyor protecting himself or herself from a claim in delict by the purchaser he considered the technical challenge in delict was greater than in contract. To deal with this challenge, he distinguished two functions: (a) the clause which 'operates to prevent a duty of care from arising in the first place' and (b) the clause which does not do that but 'may support an argument that, on the particular facts of the case, it was not reasonable for the recipient of the information, to which the disclaimer was attached, to rely on it'. There was at the time very little material available to explore this other than the material in contract law. It is to his extensive knowledge of that body of material that he resorts, highlighting the need for including the clause before the relationship capable of giving rise to liability develops and, more subtly, how that is not unconnected with the contents of the clause: 'Reasonableness of content may therefore, be relevant to incorporation'.<sup>42</sup> 'Since a disclaimer attempts to denude the surveyor's relationship with a

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wrote an extended commentary on section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 which removed this rule (Forte, 'Negligent Misrepresentation – Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 10', *J.L.S.S.*, 33 (1988), 93) in which he brought together everything he had written on the topic of negligent misrepresentation.

<sup>40</sup> Forte, 'Negligence – a survey', 129.

<sup>41</sup> Forte, 'Disclaiming Liability for Negligent Property Surveys', *S.L.T. (News)*, [1986], 293.

<sup>42</sup> Forte, 'Disclaiming Liability for Negligent Property Surveys', 295.

potential purchaser of any liability for negligence, thereby depriving the latter of what is, perhaps, his only source of a remedy if the property is materially disconform to expectations, it is at least arguable that to be effective it should be quite explicit as to its effect'.<sup>43</sup> It was then necessary to get out of the way an argument that a notice would always result in *volenti non fit injuria*. This involved careful analysis of section 13(1) of the Unfair Contract Terms Act 1977 in the light of the equivalent English section 2(2). The conclusion was, although the Scottish part of the Unfair Contract Terms Act 1977 did not in terms apply to non-contractual notices, the same result would be achieved. It was believed that the Lord Advocate had advised that Scotland did not need law on this because it already had it. Such 'here's tae us wha's like us' approach to law was utterly foreign to Angelo's legal mind. He was of the view that, nonetheless, it was 'quite unsatisfactory that, in Scotland, this added protection is lacking in the case of non-contractual notices'.<sup>44</sup>

### The General Law Of Contract

Angelo was an inspirational teacher of contract law. The enthusiasm that lay behind that was grounded in his strong belief that contract was central to commercial life, and to the day to day life of all of us, as consumers of goods and services. This latter dimension deserves emphasis, since otherwise his extensive work on commercial law might mislead into the thinking that he was only driven by business goals. He gave a considerable amount of advice to the Consumers Association over several years. He was not above reviewing, unfavourably, a work produced in England for a lay audience that purported to deal with Scotland, but missed really important differences.<sup>45</sup> In truth his concern was with reasonable commercial behaviour and reasonable distribution of risk in business life between businesses and between businesses and consumers. He was certainly amongst the first, perhaps the very first, at least in Scotland, to adopt the now standard terminology of distinguishing a 'business to business' contract from a consumer contract.<sup>46</sup> His general

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<sup>43</sup> *Ibid.*, 296.

<sup>44</sup> *Ibid.*, 298.

<sup>45</sup> Forte, 'Review of John Harries, *Consumers: Know Your Rights* (2nd edn)', *J.L.S.S.*, 26 (1981), 375.

<sup>46</sup> It is implicit in much of his earlier writing on contract. The phrase, "business-to-business", is used by him in Forte, 'Good Faith and Utmost Good Faith: Insurance and Cautionary Obligations in Scots Law' in *idem* (ed.), *Good Faith in Contract and Property* (Oxford and Portland, 1999), 77, 100.

concerns are reflected in the particular topics on which he chose to concentrate in general contract law.

As we have just seen in considering notices seeking to exclude liability for negligent misrepresentation, Angelo was interested in interpretation and of course a huge amount of his work on insurance law was about the interpretation of insurance contracts. But interpretation was not one of the topics that he wrote on as an aspect of general contract law. His work on special contracts implies that he probably thought general principles of interpretation were really not anyhow of great use in advising on contract disputes. What was really important was the standard form contracts, whether in the salvage industry, in the construction industry, in international trade or in carriage of goods by land. The meaning to be given to particular terms in insurance contracts, carriage contracts etc. was really determined by the developing case law on these industry-wide standard forms. That is what lawyers particularly need to know.

Where general contract truly mattered, therefore, was in considering two issues. First the rules governing the creation of contracts and, secondly, the rules restricting parties in the validity of the terms of their contracts. In 1982 Angelo published an article<sup>47</sup> on the role of telex in communication of acceptance. That article can still be read with profit though the old clunky telex machine has long disappeared from our lives to be replaced by email and other forms of digital communication. It is related that a high point in his contract lectures came when he was exploring the communication of an acceptance to offeror. The most exciting point was when he was dealing with the oldest form of human communication, oral speech. He would lead his audience to shout an acceptance to him, or it may be that he shouted an acceptance to them, they being confident that the contract would come into existence when they shouted. But at that moment he fired a starting pistol so nobody heard the content of the shout. The point, of course, was a serious one and it is what the article on communication by telex was about, namely that while it is 'trite law [...] acceptance must be communicated to the offeror' that tells us little. Communication as an idea requires to be unpicked and the famous postal rule that acceptance is complete when it is put into the national postal system where postal acceptance is expressed or implied as a form of acceptance that can be adopted needs explanation. The rule for him was 'arbitrary'. He notes that the postal rule in its impact is affected by the fact that in Scots law and

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<sup>47</sup> Forte, 'Communication of Acceptance: the Role of Telex – *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1982] 1 All ER 293', *J.L.S.S.*, 27 (1982), 202.

English law an acceptance can be revoked in some circumstances, whereas in some legal systems it cannot be. The immediate issue that had given rise to the decision of *Brinkibon*<sup>48</sup> was whether or not the postal rule applied *mutatis mutandis* to distance communications like telex? Angelo drew on German law. The BGB provides that communication of an acceptance must come to the attention of the offeror for a contract to come into existence,<sup>49</sup> but he expressly noted that in German law the telex example would be treated as a contract *inter praesentes*.<sup>50</sup> But, characteristically, it is a much wider proposition that he makes. This proposition was inspired by an article by the well-known American contract lawyer of Scottish family background, Iain MacNeil:<sup>51</sup> ‘no one rule can solve all the variations of communications of acceptance’. As ever an important underpinning of Angelo’s approach to contract law was that it was concerned with appropriate risk distribution. So his conclusion here reflects that: ‘the law is really concerned with the risk of revocation and wishes to protect the offeree from unreasonable exposure to that risk’. Therefore, decisions need to be made by a legal system as to where that risk should lie between the parties. It might be in some situations that the common law was not capable of achieving this.

Angelo’s strong focus on the difference between the reality of business to business transactions and those involving members of the public made this very clear to him in one particular area of contract formation law: that dealing with the effectiveness of an offer in the form of a ‘referential bid’.<sup>52</sup> The simple example of that is where an offeror bids a particular sum as a fixed amount above the highest bid from another party. As Scottish practice in the purchase and sale of heritable property is that the would-be seller seeks offers, the possibility in practice of someone seeking to work with a referential bid of this type is of particular importance. In 1984 the English Court of Appeal<sup>53</sup> decided in a case concerning bids for the purchase of shares that a referential bid of this type was a valid offer which could be accepted resulting

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<sup>48</sup> *Brinkibon Ltd v Stabag Stahl und Stahlwarenhandels-Gesellschaft mbH* [1982] 1 All E.R. 293.

<sup>49</sup> §130(1) BGB.

<sup>50</sup> Citing several works in German.

<sup>51</sup> I. R. MacNeil, ‘Time of Acceptance: Too Many Problems for a Single Rule’, *U. Pa. L. Rev.*, 112 (1964), 947.

<sup>52</sup> Forte, ‘The Use of Referential Bids in Offers to Purchase Heritable Property’, *J.L.S.S.*, 29 (1984), 448.

<sup>53</sup> *Harvela Investments Ltd v Royal Trust Co. of Canada (C.I.) Ltd* [1985] Ch. 103. This article was written before that decision was reported, other than briefly in the Times, and is a very early instance of an academic writing using a digital source, LEXIS.



in a completed contract, and in doing that rejected an argument ‘that in a sealed-bid system’ there was an implied term that a ‘bid which depended on a reference to another bid could not be regarded as valid’. The Law Society of Scotland and Scottish lawyers generally had always taken the view that referential bids were not legally valid in the sale and purchase of heritable property. Again, however, it is the analysis of contractual principle on which Angelo concentrated. It was clear that the decision of the English court was fundamentally correct as a matter of law. His concern was then, as so often, first with the micro application of this to facts. He pointed out that where more than one bidder made a referential bid none of the bids of that type would in fact be valid. Essentially they cancel each other out in their cross-references back and forth. But again as a matter of policy and practice he has another dimension. That is to point out that what may be appropriate, for example, in commodity transactions in the commercial world may not be appropriate in transactions such as those in Scottish domestic conveyancing involving ordinary members of the public.<sup>54</sup> The Law Society of Scotland was called on by him to give new guidance, inspired as their guidance in the past had been in part by ethical and practical considerations. Law is not the only way in which a fair balance of risk can be achieved.

The background to the Law Society of Scotland’s guidance twenty years earlier was that ‘the pages of the Journal rang with the sound of battle’. With such a strong sense of the commercial realities Angelo naturally saw much of formation of contract as being an aspect of the on-going battle to make money in the commercial world. It was particularly apt that it was to the ‘battle of the forms’ that he was to turn to in 1986 in another very fruitful joint authorship project, this time with Hector MacQueen.<sup>55</sup> Once again it was, in one sense, a case<sup>56</sup> which prompted the writing of the article. But it is abundantly clear that the authors had been developing their ideas on contract formation, and the ‘battle of the forms’ problem in particular, already.<sup>57</sup> It is much more those ideas than the specific problem of the decision on the facts and some rather

<sup>54</sup> Forte, ‘The Use of Referential Bids in Offers to Purchase Heritable Property’, 451.

<sup>55</sup> Forte and MacQueen, ‘Contract Procedure, Contract Formation and the Battle of Forms’, *J.L.S.S.*, 31 (1986), 224.

<sup>56</sup> *Uniroyal Ltd v Miller & Co. Ltd* 1985 S.L.T. 101.

<sup>57</sup> See also the case note on *Butler Machine Tool Co. Ltd v EX-Cell-O Corporation Ltd* [1979] 1 All E.R. 965 (Forte, ‘The Battle of Forms’, *J.L.S.S.*, 24 (1979), 375), which prefigures much of what was developed in the later joint article, and the case note on *Gibson v Manchester City Council* [1979] 1 All E.R. 972 (Forte, ‘The battle of forms – postscript or epitaph?’, *J.L.S.S.*, 25 (1980), 69).



simple analysis of the law by the judge<sup>58</sup> in question that is the burden of the article. A real difficulty with the traditional, narrow analysis of 'battle of the forms' negotiations was that it resulted in a 'bias in favour of the party firing the last shot when there is a clearly worded overriding clause present in the form sent by the party firing first shot'. Various solutions, notably that of the United States Uniform Commercial Code<sup>59</sup> and that of Lord Denning in the minority in *Butler Machine Tool Co Ltd v EX-Cell-O Corporation Ltd*,<sup>60</sup> in different ways depended on identifying terms in a hierarchy, so that certain categories of term, if agreed, would result in a contract while still there are others still not fixed. These approaches were seen to have foundered basically on the rock of unreality as well as that of complexity. What was needed was a sensible approach that could distinguish between different situations of contract negotiation. Few had seen the light with regard to this. But one 'profoundly sensible' view had led a Scottish Sheriff Principal<sup>61</sup> to give effect to an overriding clause in the first shot of a roofing contractor in his standard form that no alterations etc. would form part of the contract unless that was confirmed in writing by them as being nonetheless accepted the call then logically was for law reform.

Reading Angelo's work from this period again reminds one of how central the question of exemption (exception) and limitation clauses was in work of contract lawyers from the 1970s through to the 1980s. There was great debate about fundamental breach, a concept invented and then abandoned by the English courts. But above all it was the passing of the Unfair Contract Terms Act in 1977 that focused consideration of such clauses. We have seen already the importance of this in Angelo's consideration of delictual liability of surveyors. In fact he had already by 1978 developed a detailed understanding of these issues in contracting. In that year he published a short review of the commentary by Matthew Clarke<sup>62</sup> on the Scottish part of the Act and there reveals his own knowledge of the English part.<sup>63</sup> The following year he published an article headed 'The Unfair Contract Terms Act 1977'.<sup>64</sup> This piece describes itself as a 'short note'. It is not that short and is full of

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<sup>58</sup> Lord Allanbridge.

<sup>59</sup> U.C.C., 2 1-207(1) and (2).

<sup>60</sup> [1979] 1 All E.R. 965.

<sup>61</sup> *Roofcare v Gillies* 1984 S.L.T. (Sh. Ct) 8.

<sup>62</sup> Now Lord Clarke.

<sup>63</sup> Forte, 'Review of W. V. H. Rogers and M. G. Clarke, *The Unfair Contract Terms Act 1977*', *J.L.S.S.*, 28 (1978), 436.

<sup>64</sup> Forte, 'The Unfair Contract Terms Act 1977', *S.L.T. (News)*, [1979], 41

learning ranging beyond Scots law to English law and one of his favourite special contracts: the contract of carriage. In particular Angelo considered the provision in the Road Traffic Act of 1930 which made void an exclusion of liability or limitation of liability for death or bodily injury to a passenger in a public service vehicle. Thus what in his work on surveyors' liability was confined specifically to that type of notice is here broadened to many other types of notice. One attractive touch comes towards the end<sup>65</sup> in considering whether advocates or barristers might take to putting exclusion clauses in their opinions. Angelo submitted that, 'in theory at least, this zone is by its very nature ideal for a disclaimer of the type under discussion' Then immediately there is an afterthought that if it were regularly to be done it might 'result in an understandable diminution in the faith reposed' in the person giving the opinion. He himself sometimes wrote opinions. I do know what his own practice may have been with respect to including or not including a disclaimer in them.

Cumulatively he produced a significant body of writing on exclusion or limitation clauses and unfair terms generally. It includes questions of interpretation (where he approved of asking 'what the words in the clause really meant and not the application of some rigid formulaic approach')<sup>66</sup> and the impact of interpretation on the application of the Unfair Contract Terms Act.<sup>67</sup> This was triggered by a case involving a vessel in the harbour at Aberdeen.<sup>68</sup> Consideration of the meaning of the term 'standard form contract' in the Unfair Contract Terms Act was prompted by a case involving a contract to supply weed killer.<sup>69</sup> This latter piece demonstrates another feature of Angelo's work: his tendency to make connections between different aspects of contract law. Here the work on 'battle of the forms' connects with work on the meaning of a section in a statute.<sup>70</sup> Again it mattered greatly because it is only in standard form contracts that business to business contracts are generally regulated under the Unfair Contract Terms Act. In fact he was keen to point out that the control of terms in such situations had nothing

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<sup>65</sup> *Ibid.*, 46.

<sup>66</sup> Forte, 'Construing an exemption clause: *Graham v The Shore Porters' Society*, 1979 SLT 119', *J.L.S.S.*, 24 (1979), 470.

<sup>67</sup> Forte, 'Limitation clauses and the limitation of meaning', *J.L.S.S.*, 27 (1982), 472.

<sup>68</sup> *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd* 1982 S.L.T. 377.

<sup>69</sup> *McCrone v Boots Farms Sales Ltd* 1981 S.L.T. 103; Forte, 'Standard Form Contracts: A Definitional Problem: *McCrone v Boots Farm Sales Ltd* 1981 SLT 103', *J.L.S.S.*, 26 (1981), 380.

<sup>70</sup> Unfair Contract Terms Act 1977, s.17.

whatsoever to do with ‘pernicious “weapons of consumer oppression”’.<sup>71</sup> Indeed, he warned against seeing inequality of bargaining power between businesses as solely a function of lack of negotiation, it being rather one involving many other factors. On this occasion his conclusion was not that further law reform should be undertaken. Instead through fine-tuning by courts, considering specific business situations in connection with standard forms, the law could produce the right solutions. Because there has built up since then a considerable body of example case law, especially from the English courts, Angelo has been vindicated in this. However, his view of how to achieve fine-tuning for circumstances was never one that it should just be decided on a case to case basis. He favoured a goal of reasonable certainty, whether developed by legislation or by case law, while still allowing the law to respond to the variety of facts that the world of contracting would produce. In a consideration of the control of the validity of clauses in restraint of trade,<sup>72</sup> written around the same time, he was fierce in his criticism<sup>73</sup> of the Court of Session in a recent prominent case on the topic.<sup>74</sup>

Inevitably his interest in exclusion and limitation clauses (and clauses in restraint of trade) was accompanied by an interest in contractual breakdown. He was particularly interested in remedies for breach in the special contracts of sale and barter (exchange of goods), as noted below. However, he published only once on breach of contract as a general issue in contract law. This is an interesting case note<sup>75</sup> on an English House of Lords case<sup>76</sup> which contains a comparative analysis of the principles underlying the English concept of repudiation, which, he considered, ‘depends upon intention and that intention is to be gauged by the circumstances of the case’. His own opinion, with which that general proposition could be reconciled, was that it was necessary to take an objective view of the situation. This he considered to be the view in Scots law so that an express notice of a refusal to proceed cannot be anything other than an act which the other party is entitled to treat as a repudiation. Thus the House of Lords was wrong in its decision on the facts. Again it is with the reality that Angelo is concerned. Again, too, he draws on underlying principles of contract law, here, in particular, that contract law is not, or at least not generally, concerned with the state of mind of a party but with an

<sup>71</sup> Forte, ‘Standard Form Contracts: A Definitional Problem’, 382.

<sup>72</sup> Forte, ‘Restraint of Trade in Contracts of Employment’, *S.L.T. (News)*, [1981], 21.

<sup>73</sup> Forte, ‘Restraint of Trade in Contracts of Employment’, 22-23.

<sup>74</sup> *Bluebell Apparel v Dickinson* 1980 S.L.T. 157.

<sup>75</sup> Forte, ‘Does unjustified rescission amount to repudiation?’, *J.L.S.S.*, 26 (1981), 32.

<sup>76</sup> *Woodar Investment Development Ltd v Wimpey Construction U.K. Ltd* [1980] 1 All E.R. 571.

objective assessment from what a party does or says. This approach is very manifest in an enthusiastic review he published in the same year of Hugh Beale's monograph on breach. Indeed, in that he himself uses the phrase 'the stress on contextual realism' in describing the author's use of empirical studies on business contracts,<sup>77</sup> and though he never expressly considered economics and law, he shows here an understanding of what an empirical approach can add.

### Special Contracts

Special contracts were cardinal to Angelo's thinking about contract. Two pieces of work towards the end of the period when his general work on contract was largely written illustrate one of his central concerns in his work on special contracts. This is the interplay between general principles and rules of contract law more widely with particular principles and rules governing special contracts.

Two of his several pieces on special contracts particularly reveal his techniques and concerns. The first of these pieces is on carriage in the area of special contracts was written over twenty year later, again on carriage. He covered the whole topic in 1997 in *Scots Commercial Law*.<sup>78</sup> Now history as fun would appear along with analysis of the modern law. The reader was referred to the Aberdeen Stylebook 1722 for 'the long-standing importance of seaborne commerce', and to the *Lex Rhodia de jactu*, and the cutting away of a mast – not really a feature of ships in the 1990s, which had none or, at the most, only a vestigial metal structure.<sup>79</sup> The aim of this chapter, however, is not historical. It is to give a comprehensive analysis of the law of carriage in Scotland in the light of modern realities. So, for example, the temptation to luxuriate in the field of the edict *nautae* is avoided. He makes clear that what really matters is the Road Haulage Association's Conditions of Carriage,<sup>80</sup> conditions which contractually resulted in goods being carried not by a public carrier but by a private carrier, and in many other specific ways are central in the actual business of carriage. For example they provide for a contractual general lien,<sup>81</sup> though the general law of carriage only gives a special lien. So,

<sup>77</sup> Forte, 'Review of Hugh Beale, *Remedies for Breach of Contract*, J.L.S.S., 26 (1981), 192.

<sup>78</sup> Forte (ed.), *Scots Commercial Law* (1997).

<sup>79</sup> *Ibid.*, 108.

<sup>80</sup> 1991 version at that time

<sup>81</sup> Forte, *Scots Commercial Law* (1997), 88 fn. 2; Road Haulage Association's Conditions of Carriage (1991), condition 15.

though he cites as an example of an act of God exempting a (public) carrier 'severe and unexpected rain in mid-July in Moray which causes rivers to flood in roads to be submerged',<sup>82</sup> possibly a reference to the floods of 1829,<sup>83</sup> these Conditions are more significant in putting boundaries on the carrier's liability.<sup>84</sup> In considering actual exclusion of liability in the contract again the specific consideration of the contract of carriage is carried back to the position under the Unfair Contract Terms Act 1977 but also now the then much more recent Unfair Terms in Consumer Contracts Regulations.<sup>85</sup> He notes that a contract term which excludes edictal liability may be treated as being unfair and not binding on the consignor of the goods where the consignor is a consumer.<sup>86</sup> This is a very clear and convincing example of his practice of drawing on the general law of contract in the context of the specific law of contract of carriage. So, too, he directs the reader at significant points in his exposition of the law of carriage of goods by sea to the general law of carriers' liability. It is not just that he highlights one of the three features of a bill of lading as being the contract or, it may be, evidence of the contract, of carriage. He also draws on the general law in pointing out that in the coastal trade bills of lading are often not used. The relevant case law then is the celebrated case of *McCutcheon v David Macbrayne Ltd*,<sup>87</sup> to which other authors might have been less likely to refer, thinking of it only as relevant to the general law of contact. Other nice practical examples to give reality to the exposition of the law appear elsewhere in the chapter. One is that demise charter parties 'were in the past used for the pirate radio stations which operated in the North Sea, and appear also to be the preferred form of acquiring ship capacity when major cargoes of illegal drugs are being smuggled into this country'.<sup>88</sup>

A striking example of Angelo's technique of drawing on general contract principles at the same time as considering special contracts is in the second piece. It is his last publication on modern contract law, dating from 1999. It originated in a symposium that he organised in Aberdeen the previous October. The title of the essay highlights insurance and caution.<sup>89</sup> But the

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<sup>82</sup> Today it probably would not be an act of God.

<sup>83</sup> See Sir Thomas Dick Lauder, *An Account of The Great Floods of August 1829, in the Province of Moray and Adjoining Districts* (3<sup>rd</sup> edn, Elgin, 1873).

<sup>84</sup> Forte, *Scots Commercial Law* (1997), 86.

<sup>85</sup> S.I. 1994/315.

<sup>86</sup> Forte, *Scots Commercial Law* (1997), 87.

<sup>87</sup> 1964 S.C. (H.L.) 28.

<sup>88</sup> Forte, *Scots Commercial Law* (1997), 101.

<sup>89</sup> Forte, 'Good Faith and Utmost Good Faith: Insurance and Cautionary Obligations

content extends from those special contracts to be as much part of his work on general contract law. This time he worked out from special contracts to inform the general law of contract rather than as he often did the other way round. He explored good faith by showing how in practice it had actually operated not only in insurance law, where in one form or another it was well accepted, but also he drew on the law of caution to provide further material. As ever for him what business does was crucial. He gave prominence to the Codes of Practice in operation in British banking at that time. They specifically provided that customers in certain circumstances should be alerted to risks. This was every bit as significant as, one year previously, the House of Lords had handed down a decision<sup>90</sup> on the need to warn spouses entering into contracts of caution on behalf of the other spouse.

Often the debate as to the desirability of having a concept of good faith in contract law is polarised between people taking a free market approach (who are against it) and those taking roughly a social market approach (who are in favour of it). But Angelo, who was in favour of it, took neither of these approaches. He knew business too well to think that operators of businesses favoured ‘the bully boy approach to the making of commercial contracts’. He was particularly aware too of the particular position of small businesses when contracting with very large corporations or public bodies. So he saw the law in fact as ‘peppered with specific examples of the application of good faith in the business-to-business context.’<sup>91</sup> This being so, it followed that practical distinctions had to be made between different business contexts. Taking the example of banking it was then a practical insight that clearly banks cannot be expected as a matter of good faith to be constantly breaching the confidences of their customers. The concept of good faith, therefore, in this context has to be an objective standard, to determine when there should an awareness that the cautioner should reasonably be advised to be careful. The context has to be properly understood and not caricatured.

The other central concern that is apparent in his work on special contracts is the detailed rules governing them as these contracts operated in modern commercial and consumer transactions. The routine transaction of acquiring a new car through the customer trading in the current one and paying a sum of money on top provided a classic example for him. Two case notes he

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in Scots Law’, 77.

<sup>90</sup> *Smith v Bank of Scotland* 1997 S.C. (H.L.) 111.

<sup>91</sup> Forte, ‘Good Faith and Utmost Good Faith: Insurance and Cautionary Obligations in Scots Law’, 100.

published in 1983 constitute a complete academic analysis of the rules and principles that should determine whether such a contract is one of sale or of barter (exchange of goods). The witty title of the first puns on the old civilian term for barter, permutation.<sup>92</sup> He left no stone unturned. The institutional writers, the views of T.B.Smith,<sup>93</sup> Gow,<sup>94</sup> and Walker,<sup>95</sup> (which last Angelo considered ‘expressed in language that is less than wholly unequivocal’)<sup>96</sup> provided just the starting point. The English cases referred to in Scotland are explored and shown to have been misunderstood, and one significant one, about gramophone records given in return for 1/6 (7½p) and three chocolate wrappers, missed.<sup>97</sup> An Irish Supreme Court decision<sup>98</sup> is prayed in aid as well as a consideration of it in the *Modern Law Review*,<sup>99</sup> and there is more besides. His conclusion on how to classify car trade in cases as in some circumstances sale and in others barter is convincing. It fits with the reality that there are all sorts of different arrangements made under the loose heading ‘trade in’ or ‘part exchange’. Thus ‘[t]he involvement of money *per se*, is too crude an instrument of classification.’ It can only be done by considering factors in the circumstance, such as whether the trade in goods were actually valued. Any definitive hard edged rule sought for is a ‘chimera’.<sup>100</sup> The case that provided the springboard for this study was heavily influenced by a belief that only if classified as a sale would the customer have an effective remedy, because otherwise an implied term of ‘merchantable quality’ would not be part of the contract. In drawing on earlier Scottish material dealt with by both T.B.Smith and Gow he accordingly showed that this was not correct that as the law applicable to barter was the same as the pre-1893 Scots law of sale and an equivalent term was implied. But his reasoning is in no way based on preferring a civilian approach to some other approach. It was not because it was part of the civilian heritage, but because it is the law. Further he stressed

<sup>92</sup> Forte, ‘Permutations on the Contract of Sale – The background to *Sneddon v Durant* 1982 S.L.T. (Sh. Ct) 39’ *J.L.S.S.* 108 (1983).

<sup>93</sup> T. B. Smith, ‘Exchange or Sale?’, *Tul. L.R.*, 48 (1974), 1029.

<sup>94</sup> J. J. Gow, ‘Warrantice in Sale of Goods: Nature and State of the Goods’, *Juridical Review*, [1963], 31; idem, *The Mercantile and Industrial Law of Scotland* (Edinburgh, 1964), 93.

<sup>95</sup> D. M. Walker, *Principles of Scottish Private Law, Volume II* (2nd edn, Oxford, 1975), 1617.

<sup>96</sup> Forte, ‘Permutations on the Contract of Sale’, 39.

<sup>97</sup> *Chappell & Co. Ltd v Nestle Co. Ltd* [1960] A.C. 87.

<sup>98</sup> *Flynn v Mackin and Mabon* [1974] I.R. 101.

<sup>99</sup> E. M. Clare Canton, ‘Sale of Goods and Barter’, *M.I.L.*, 39 (1976), 589.

<sup>100</sup> Forte, ‘Permutations on the Contract of Sale – The background to *Sneddon v Durant* 1982 S.L.T. (Sh. Ct) 39’ *J.L.S.S.* 108 (1983) at 110.



that the absence, as he saw it, of an *actio quanti minoris* in Scotland meant that there was a serious problem in that the acquirer of a defective vehicle in circumstances where the contract was rightly classified as one of barter did not have available the remedy of keeping the vehicle and suing for the cost of repairing the defects. But his final conclusion again reveals some *ius commune* scepticism: 'however much the modern Scottish civilian esteems the old law as sufficient [...] the fact is that the distinct between sale and exchange would matter less if Scots law adopted a uniform approach based on the model of the Sale of Goods Act 1979.'<sup>101</sup> It was a call for law reform.

The question of remedies in a case of barter received further treatment by him later in the same year.<sup>102</sup> The remedies question was an acute one in this new case he was commenting on, since there was literally a smell of fish: the vehicle given by the customer in exchange had subsequently been used to 'draw a fishmonger's caravan', and so was undesirable to have back. This time further reading<sup>103</sup> had given rise on his part to an awareness that perhaps something like an *actio quanti minoris* was available after all. While others, therefore, might have argued that this was a ground for keeping the common law, his view was that the unclarity about that being the case was rather another reason that made it 'commercially sensible'<sup>104</sup> to reform the law to make clear the rules and that the same rules apply to barter as to sale – just as the English had done the year before.<sup>105</sup> He does not, it is clear, recommend the English solution because he considered it in itself desirable that the law be identical throughout the United Kingdom. There is no evidence that he thought that was a benefit generally. The model of English law is recommended on this occasion because it was here the result of considered law reform resulting in recent legislation. Moreover, in the Unfair Contract Terms Act 1977, for Scotland as well as for England sale and barter came under the same regime for the control of exclusion and limitation clauses. Thus England is recommended because as a matter of comparative law it provided a 'commercially sensible' solution, which made

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<sup>101</sup> *Ibid.*

<sup>102</sup> Forte, 'The Scope of the right of rejection in contracts of exchange' – *Ballantyne v Durant* 1983 S.L.T. (Sh. Ct) 38' *J.L.S.* 314 (1983)..

<sup>103</sup> M. G. Clarke, 'The Buyer's Right of Rejection', *S.L.T. (News)*, [1978], 1; W. W. McBryde, 'Sale of Defective Goods', *S.L.T. (News)*, [1979], 225.

<sup>104</sup> Forte, 'The Scope of the right of rejection in contracts of exchange' – *Ballantyne v Durant* 1983 S.L.T. (Sh. Ct) 38' *J.L.S.* 314 (1983) at 316.

<sup>105</sup> Supply of Goods and Services Act 1982, c.29.



the system of remedies and the associated controls on contracting to exclude or limit them a coherent one.

It is particularly fitting to conclude with what was Angelo's first ever published work. It was on a very specific aspect of the law of carriage, the carriage of letters and parcels by post. It dates from the time when he was on the staff of Robert Gordon's<sup>106</sup> and was published in 1976 *Scots Law Times*.<sup>107</sup> The opening sentence stands as the heading for all his later work: the theme of law and business reality and his engagement with the theory of the former and what happens in the latter. It is: 'One of the least discussed aspects of the law of carriage has ironically become one of the major talking points of the business community recently'. The talking point was whether the monopoly of the Post Office, given the rise in its charges could be broken legally under the relevant legislation. The question of law was the precise extent of that monopoly in terms of the Post Office Act 1953, c.36. When he wrote this he may well have had recent direct experience of delivering letters as an apprentice for his masters in a solicitor's firm. He says in terms that '[t]o do, then, what solicitors have done for a long time and entrust the delivery of letters to their messengers is perfectly correct practice to which the Post Office cannot make an objection'.<sup>108</sup> There is then consideration of common carriers. In that what he was concerned with was exactly how the transfer of information might be structured in a way that it did not meet the definition of a 'letter' in the Act and would be outwith the monopoly of the Post Office. It is clear that at the time it had been suggested that a way round this could be to package up a load of letters into a large parcel which would then magically cease to be a letter. Not surprisingly, he thought very dubious that suggested commercial wheeze, which relied upon the manifestly untenable argument that the letter was not a letter unless it was in an envelope. Later in his career the historian in him would have pointed out that until a certain date in the nineteenth century a high number of letters were folded and did not have an envelope. So this starting work was a cold shower on crazy ideas. As so often later in his work he called for legislation. That came to pass with the loosening of the Post Office monopoly.

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<sup>106</sup> I am grateful to Professor G. R. Rubin, himself a legal historian, whose help is acknowledged by Angelo at the end of this article, for confirming that they were, indeed, at Robert Gordon's together as young academics.

<sup>107</sup> Forte, 'The Post Office alternative carriage possibilities', *S.L.T. (News)*, [1976], 109.

<sup>108</sup> Forte, 'The Post Office alternative carriage possibilities', 109.

## Conclusion

Writers on the law in common with writers on any other topic are obviously partly a product of the culture of the time. Within that they have their own distinctive voices, which are more or less marked. There are features of Angelo's writing on the law of obligations which, not surprisingly, confirm the first of these truisms. As a body of writing that began in the late 1970s it comes from a time when a particular version of drawing on the civilian heritage of Scots law, which had given rise to much of the stimulating work on Scots law in the 1960s and into the 1970s, had largely been completed. Further the business world was beginning to change. It was in the later 1970s that there began to emerge prioritisation of private sector business in an economy where the large companies and state enterprises that had dominated since the nineteenth century were ceasing to exist or to play quite the dominant role that they previously had. At the same time over the coming years there were many new and much smaller businesses and with that came a growth of understanding of the special problems that they and consumers would encounter in this sort of economic landscape. For someone with considerable curiosity about the way business operates and the natural inclination to consider its concerns this could not but impact on how he approached the law and law reform. In his version of *ius commune* scepticism he was also influenced by the time. He did not reject comparative law that extended to a consideration of the European tradition. But that only became really clear in his later work, and particularly his work on the law of insurance, which is not covered in this essay. The generation of Scots academic lawyers to which he belonged took various different paths with respect to this, all of which paths started from the stimulating work of the 1960s. He had a real knowledge of the civilian tradition and the institutional writers. But he had a marked preference for legal certainty as promoting what, as already observed above, was to him cardinal, namely reasonable commercial behaviour and reasonable distribution of risk in business life between businesses and between businesses and consumers. He favoured law reform, liked statutes, approved of appropriately controlled standard form contracts and approved of sound commercial codes of practice.

His voice was a markedly distinctive one in the literature on the Scots law of obligations. It was very strongly that of a pragmatist, but one who enjoyed the nuances of legal rules, and would cast his net widely as much when his starting point was to comment on a single case as when it was to start with a general consideration of a particular area. To point to his interests outside the law is not just to uncover the springs of much of the fun for which he

was well-known and loved and which was there in his writing too. Pointing to these interests brings out a dimension of what made his voice distinctive. This was that legal enquiry was for him a response to things in the world. Fully to explore in what ways this was the case would require considering also his work on insurance, and his work as a general historian, and as a legal historian, neither of which are within the scope of this essay. Suffice it to say that historical study for him when it came to considering modern law was not used as a tool for supporting a particular taxonomy or rule. But it further confirmed his feeling that all sorts of legal responses to things have always occurred. The law being in a messy state was, therefore, always likely. Words of his about the modern law of insurance in the fullest of his historical treatments of the topic are implied everywhere else in his work on the law of obligations as his default position: 'We need to take stock of the state of the law and to admit there are problems with some of the rules we apply. We need to question some of the basic premises upon which these rules are based'.<sup>109</sup>

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<sup>109</sup> Forte, 'Insurance' in K. G. C. Reid and R. Zimmermann (eds), *A History of Private Law in Scotland – II Obligations* (Oxford, 2000), 331, 368.

# Motives for Murder: The Role of Sir Ralph Paynel in the Murder of William Cantilupe (1375)

*Frederik Pedersen*

## Introduction

On the evening of Friday 23 March 1375, the young nobleman William Cantilupe was attacked and murdered by his cook and squire at his manor in Scotton in North-East Lincolnshire. After the murder William's assassins cleaned his corpse with warm water, put the naked body into a sack and carried it on horseback seven miles east of Scotton to a field near the village of Grayingham. Here they dressed the body in a set of clothes, spurs and a belt and left it by the side of the road in the hope that it would appear as if highwaymen had killed William. While later juries identified Roger Cook and Richard Gyse, William's cook and squire, as the actual murderers there is a strong circumstantial case to be made that they were acting under the direction of William's wife, Maud Nevil, who was also indicted in early stages of the investigations into the murder, together with William's chambermaid, Agatha Lovell. In fact, the records of the subsequent murder trials show that fifteen members of William's household were initially indicted for the murder, but only the cook and squire were convicted and put to death. The records also show that Sir Ralph Paynel, a local magnate and royal retainer, was accused of aiding the criminals after the deed in his manor in Caythorpe more than ninety miles away from the crime scene.

This spectacular crime was first discussed by Rosamund Sillem in the introduction to her 1936 edition of the *Lincolnshire Peace Rolls*, and her outline and conclusions concerning the case have been repeated regularly in subsequent academic literature.<sup>1</sup> It is generally agreed that Maud or William's maid, Agatha

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<sup>1</sup> Notably in John Bellamy, *Crime and Public Order in England in the Later Middle Ages* (London and Toronto, 1973), 53–5; Graham Platts, *Land and People in Medieval Lincolnshire* (History of Lincolnshire) (Lincoln, 1985), 252–4. James Gillespie in the D.N.B. accepts the accusation against Maud Neville without question: James Gillespie,

Lovell, let the two assassins into William's bedroom. Sillem speculated that William's wife, Maud Nevil, planned the murder with the Lincoln sheriff, Thomas Kydale, whom she married soon after the trials. Sillem noted that the four main suspects - Maud, Agatha, and the assassins Roger Cook and Richard Gyse - took a lengthy escape route from the manor of Scotton. They travelled across more than ninety miles of open country to seek refuge near Sir Ralph Paynel in Caythorpe in Kesteven in southwest Lincolnshire.

The fact that Sir Ralph Paynel was indicted for aiding the assassins led Sillem to speculate that he was, in fact, if not the mastermind behind the whole crime then at least deeply involved in the planning of a long-planned and expertly executed murder. Sillem suggested that Paynel's motivation might be found in an incident that had taken place some years earlier.<sup>2</sup> Entries in the *Calendar of Patent Rolls* show that William's older brother, Nicholas, accused Sir Ralph Paynel on 15 March 1366 of having led an armed attack on the Cantilupe seat, Greasley Castle in Nottinghamshire, some forty miles from Caythorpe, during which Paynel had 'ravished' Nicholas' wife.<sup>3</sup> The calendars of the King's Bench records indicate that a commission of *oyer et terminer* was established, but Sillem was unable to find any further evidence concerning this case in the King's Bench records and concluded that the commission never met.<sup>4</sup> Sillem subsequently suggested that the Lincoln sheriff Thomas Kydale and his lover Maud Nevil had planned the murder of William Cantilupe and that Ralph Paynel also played a prominent, if undefined, role. Though she had no problem presenting evidence of a romantic liaison between Thomas Kydale and Maud Nevil that satisfied her that they ruthlessly planned William's murder so they might marry, Sillem found it difficult to account for Paynel's involvement.<sup>5</sup> Clearly the *Calendar of Patent Rolls* showed that there had been tension between the two families, but Sillem was unable to identify the nature of their quarrel.

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'Bussy, Sir John (d. 1399)' in H. C. G. Matthew and Brian H. Harrison (eds), *Oxford Dictionary of National Biography* (Oxford, 2004).

<sup>2</sup> Rosamund Sillem, 'Introduction' in *Records of Some Sessions of the Peace in Lincolnshire, 1360-1375* (Publications of the Lincoln Record Society, vol. 30.) (Hereford, 1936), lxii.

<sup>3</sup> *Calendar of Patent Rolls. Edward III, 1364-67, vol. 13 of Calendar of Patent Rolls. Edward III, 1327-1377* (London, H.M.S.O., 1891), 281.

<sup>4</sup> Sillem's lack of success is explained by the fact that the published *CPR, Ed. III, 1364-67*, 281 erroneously dates the complaint 15 March 1366. The original plea in KB 27/434 dates the attack two years later, on 15 February 1368.

<sup>5</sup> Sillem, 'Introduction', lxiv.

Sillem's lack of success is due to the fact that the *Calendar of Patent Rolls* gave the wrong date for the attack: the original King's Bench record shows that Sir Ralph Paynel attacked Greasley castle on 15 February 1368.<sup>6</sup> Nicholas' inability to defend his castle against assailants armed with 'sticks, bows and arrows' may have been acutely embarrassing, but in his libel before the King's Bench Nicholas claimed that the attack also had serious financial consequences: in addition to abducting his wife, the raiders had taken away 2000 Pounds worth of silverware and jewellery.<sup>7</sup> However, when Ralph Paynel 'ravished' Nicholas' wife, he was in fact liberating his own daughter whom Nicholas had incarcerated in Greasley castle to force her to abandon her case to have their marriage annulled because of his impotence.<sup>8</sup> Nicholas' wife was Katherine Paynel, the daughter of Sir Ralph Paynel, and Ralph Paynel was thus Nicholas' father-in-law.

Nicholas Cantilupe died aged 27 or 28 in 1370, approximately 24 months after the attack on Greasley Castle and was succeeded by his younger brother William. On his succession to Nicholas' Cantilupe estates William successfully claimed several manors that were initially granted to Katherine Paynel as dower when she married Nicholas. At first glance it would therefore seem that Ralph Paynel and his daughter therefore had good reason to wish revenge on William Cantilupe. However, the evidence of the York annulment case initiated by the Paynels alleging Nicholas' permanent impotence in 1368 implies that the Paynels had accepted the loss of these castles: the lands were held by Nicholas in fee tail, which meant they could only be handed down to the heirs of his body. When the Paynels initiated annulment proceedings it would therefore have been clear to them that the lands would be lost to their family.

However, there are other reasons why the relationship between Nicholas Cantilupe and the Paynels is pivotal for an understanding of William Cantilupe's

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<sup>6</sup> KB 27/434. The record of the actions taken in the case can be found online: [http://aalt.law.uh.edu/AALT2/E3/KB27no434/aKB27no434fronts/IMG\\_0117.htm](http://aalt.law.uh.edu/AALT2/E3/KB27no434/aKB27no434fronts/IMG_0117.htm) & [http://aalt.law.uh.edu/AALT2/E3/KB27no434/bKB27no434dorses/IMG\\_0316.htm](http://aalt.law.uh.edu/AALT2/E3/KB27no434/bKB27no434dorses/IMG_0316.htm), both accessed 11 July 2015.

<sup>7</sup> '*die Iovis proximo ante festum sancti Petri in cathedra anno regni domini regis nunc quadragesimo secundo vi et armis, scilicet gladiis, baculis, arcibus, sagittis, et cetera, Katerinam uxorem ipsius Nicholi apud Gresley rapuerunt et eam cum bonis et catallis eiusdem Nicholi, anulis aureis et argenteis, coupis deauratis, ciphis et peciis de argento, ciphis de mazero, coclearis argenteis, serculis cum petris preciosis, discis plateris et saltaris de argento abduxerunt et ea ei adhuc detinent et alia enormia, et cetera, et contra pacem et cetera. Et unde dicit quod deterioratus est et dampnum habet ad valorem duarum mille Librarum.*' (KB 27/434, [http://aalt.law.uh.edu/AALT2/E3/KB27no434/aKB27no434fronts/IMG\\_0117.htm](http://aalt.law.uh.edu/AALT2/E3/KB27no434/aKB27no434fronts/IMG_0117.htm), accessed 11 July 2015).

<sup>8</sup> See below, pp. 86–8.

murder. These include events leading up to the attack on Greasley Castle – in particular Nicholas’ abduction and six-month incarceration of Katherine – and the fact that there was such enmity between Katherine Paynel and Nicholas Cantilupe that the consistory court in York annulled their marriage in April 1369 after more than a year of acrimonious litigation. Nicholas was related to St Thomas of Hereford being the grandson of Sir Nicholas, third baron Cantilupe who on several occasions served as a judge in Northern England, so there can be little doubt that Nicholas was intimately acquainted with legal procedure and that he knew the relevant laws and how to use them. The annulment was granted against Nicholas’ wishes after Nicholas had exhausted all avenues open to him. Nicholas exploited legal procedure to gain time and ultimately secured an appeal to the Curia, most likely on procedural grounds. But he also went against the letter and the spirit of canon law by his extra-judicial abduction of Katherine. His clever use of canon law procedure—i.e. that he secured an appeal against the York decision because he had not been subject to a physical examination in York – ultimately did not help him: he died in early 1370 pursuing his appeal against the ruling of the York court at the papal court in Avignon.

### **The Cantilupes And The Paynels**

This is not the place for a history of the fourteenth-century fortunes of the Cantilupe family, but a brief outline is in order. Neither of the two Cantilupe brothers, William and Nicholas, lived a long life: William was murdered in 1375 when he was around 30 years of age, and, though foul play was initially suspected, Nicholas died of natural causes when he was around 27 in early 1370. Had the two brothers lived longer they would have been wealthy landowners with substantial holdings bequeathed to them by their grandfather, Nicholas, who had come into *his* inheritance as third Lord Cantilupe around 1321 and who added such substantial tracts of land to his patrimony by a combination of royal favour and clever marriage that by the end of his life he was one of England’s largest landholders.

Nicholas Cantilupe, the third Lord Cantilupe, died on 31 July 1355 in possession of lands stretching from the Irish Sea to the Lincolnshire coast. He arranged to be succeeded by his grandson, also called Nicholas, then aged thirteen and under-age. The older Nicholas therefore left half his estate to his widow, Joan Kymas, to be passed on to his grandson, Nicholas, on her death, while the other half of his lands was granted in fee tail to both his grandsons

Nicholas and William (the latter of whom was around ten years of age in 1355). Until their step-grandmother's death seven years later in 1362, the under-age children thus shared possession of the Cantilupe lands with her.<sup>9</sup> Towards the end of her life, this arrangement may have created a difficult situation for the twice-widowed Joan Kymas. It must have been increasingly difficult for her to protect their wide-ranging lands and a wish for peace and security may have motivated her to arrange a marriage between her step-grandson Nicholas and Katherine, the daughter of her neighbour, Sir Ralph Paynel.

Nicholas' prospective father-in-law, Ralph Paynel, was a well-connected and influential northern magnate. In the first half of the 1360s Paynel served as the Black Prince's surveyor of game in Yorkshire and he remained a retainer until the Prince's death in 1376. However, Paynel also seems to have been a bit of a loose canon and was cited to answer for his excesses before the King's Council in 1355 and 1360.<sup>10</sup> With his combination of wealth, connections and general bravado Paynel may have appeared to Joan Kymas as the ideal protector of her step-grand-children's interests if she should die before either of them reached maturity. An agreement for a future marriage between Paynel's daughter Katherine and Nicholas Cantilupe was reached sometime before Joan Kymas died. On her death in 1362 the twenty year-old Nicholas Cantilupe gained possession of her half of the inheritance and thus held the majority of his grandfather's lands. 'These grants of land were made in fee tail and succession was thus secured for Nicholas' 'heirs of his body'. In addition to Nicholas' extensive ancestral lands, which gave him wealth, his influence was strengthened by the fact that he counted several chancellors, bishops and even a saint among his recent kin, which would have given him added political influence and social status.

However, discord arose between Nicholas and Ralph Paynel quite soon after Joan's death and, as we have seen, in 1368 Paynel and Cantilupe crossed swords in a confrontation that culminated in Paynel's armed storming of Nicholas' ancestral stronghold, Greasley Castle. We know details about this attack because of the commission of *oyer et terminer* that convened in late

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<sup>9</sup> Richard Partington, 'Cantilupe, Nicholas, Third Lord Cantilupe (c. 1301–1355)' in H. C. G. Matthew and Brian Harrison (eds), *Oxford Dictionary of National Biography* (Oxford, 2004).

<sup>10</sup> Calendar of Close Rolls. Edward III, 1327–1377, *vol. 1354–1360* (London, H.M.S.O., 1896), 122; Calendar of Close Rolls. Edward III, 1327–1377, *vol. 1360–64* (London, H.M.S.O., 1896), 144; CPR, Ed. III, 1364–67, 144, 281; 1348–1377, in Calendar of Inquisitions Miscellaneous (Chancery) Preserved in the Public Record Office, *Vol. 3* (reprint, 1937) (Nendeln, Kraus Reprint, 1973), no. 511.



April 1369. The work of the commission had been delayed from February 1368 until April 1369 by the fact that Nicholas was already engaged in litigation against the Paynels at the ecclesiastical court in York. Because spiritual cases took precedence over secular cases it was not until late April 1369 that the commission concerning the attack on Greasley Castle interrogated three witnesses. They gave evidence to a conflict that had lasted for at least two years.

### Paynel Versus Cantilupe: A Quarrel Over A Small Thing With Large Consequences

The King's Bench heard Nicholas Cantilupe's complaint against Ralph Paynel, Robert Raufchaumberlayn Paynel, John de Hevore, and Margaret Halton of Holland during Trinity Term 1369.<sup>11</sup> Nicholas Cantilupe argued that they had participated in an unlawful attack on Greasley Castle on 15 February 1368 during which they took away Nicholas' wife and goods to the value of more than 2000 Pounds. When heard by King's Bench the defendants made it clear that the case was not as simple as appeared from Nicholas' libel.

Sir Ralph Paynel, who organised the attack, had a good reason to attack Nicholas' castle. Although he never appeared before the court the other defendants made it clear that Nicholas Cantilupe wrongly accused them of unlawfully attacking Greasley and ravishing Katherine Paynel: Robert Raufchaumberlayn argued that Katherine Paynel had left Greasley of her own free will because she did not consent to her marriage to Nicholas:<sup>12</sup>

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<sup>11</sup> Published in part in Morris S. Arnold (ed. and trans.), *Select Cases of Trespass from the King's Courts, 1307–1399. Vol.1* (Selden Society Publications, vol. 100) (London, 1985), 83–4.

<sup>12</sup> *'predicta Katerina dum ipsa extitit minoris etatis desponsata fuit prefato Nicholao que quidem Katerina cum ad etatem suam pervenisset ad matrimonium illud se non consentivit eo quod eadem Katarina habuit causam prosequendum divorcium erga ipsum Nicholaum; per quod eadem Katerina ab eodem Nicholao recessit ex voluntate sua ad dictum divorcium prosequendum et venit ad predictum Radulphum Paynel, patrem suum, apud Castthorpe in comitatu Lincolnensis Et divorcium illud coram officiali archiepiscopi Eboracensis apud Eboracum prosecuta fuit et processu inde continuato quousque dictum divorcium inter eos ibidem, scilicet die Sabbati proximo post festum Sancti Georgii ulterio preterito, celebratum fuit.'* KB 27/434/50.

I have used the medieval spelling of Caythorpe in this translation. Arnold, *Select Trespass Cases, Vol.1*, 83–4 erroneously identifies *Castthorpe* as *Gasthorpe*, which is a town in Norfolk.

The aforesaid Katherine when she was underage was espoused to the aforesaid Nicholas, and this Katherine when she came of age did not consent to this matrimony since the same Katherine had cause for pursuing divorce against the same Nicholas; for which reason the same Katherine left the said Nicholas of her own free will to pursue the said divorce and she went to the aforesaid Ralph Paynel her father at Castthorpe in the county of Lincoln. And that divorce was prosecuted before the official of the archbishop of York at York and the process continued therein until the said divorce was proclaimed between them there, namely on the Saturday next after the feast of St George (i.e. 28 April) last past.

The court subsequently allowed the release of the three accused under mainprise until another meeting of the court to be convened on 15 September 1369. At this meeting Robert Raufchaumberlayn presented the reason why Ralph Paynel did not appear before the court: a royal letter of protection for Ralph Paynel stated that Paynel was abroad on royal business and therefore was to be quit of all suits at court. The court therefore dismissed the case and took no further action. Nicholas subsequently pursued an alternative route to preserve his honour: since the royal court would not hear his case and the consistory court in York had annulled his marriage without following proper procedure, he travelled to France to pursue an appeal against his divorce at the papal court.

### **The Paynel C. Cantilupe Case Before The Consistory Court In York**

The King's Bench record leaves out many details of the dispute between Paynel and Cantilupe but it also directs us to the consistory court in York where we find the records of the annulment case between Katherine Paynel and Nicholas Cantilupe. Katherine had indeed been in a difficult situation that caused her family considerable embarrassment and Ralph Paynel's attack on Greasley was the culmination of a long series of events. The evidence presented before the King's Bench is silent about the surprising reason for the marital discord that had arisen between Nicholas Cantilupe and his wife - a problem of such a nature that the annulment of the marriage had been announced by the official of the archbishop of York only a few days before the three witnesses were interrogated by the King's Bench.

The annulment case between Katherine Paynel and Nicholas Cantilupe is now kept at The Borthwick Institute of Archives in York, where it is designated Cause Paper E 259. The transcripts show that Ralph Paynel's patience would have been sorely tested and that he had good reasons for his attack on Greasley: as a consequence of Katherine Paynel's plea for a grant of annulment of her marriage to Nicholas Cantilupe on the grounds of Nicholas' impotence he had abducted Katherine Paynel from her father's manor in Caythorpe and had forced her for six months to stay with him against her will and compelled her to publicly swear to his sexual potency, threatening to keep her in chains in a cell furnished with manacles and ankle irons within the precinct of Greasley Castle. These threats were made because Katherine alleged to the consistory court in York that her husband Nicholas had 'insufficient' genitals and that he had fraudulently married her knowing that he would never be able to consummate their marriage.

The first dated document in the York cause paper shows that the case was initiated before 25 March 1368, about a year before Paynel's attack on Greasley castle. The surviving documentation consists of 16 documents of varying length, including ten depositions by seven witnesses.<sup>13</sup> The Cause Paper documents show that the consistory court examined the case between March 1368 and 21 April 1369 and that a combination of depositions and strenuous

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<sup>13</sup> The case files consist of the following documents (They do not have individual reference numbers and therefore they are listed in chronological order): Letter of excommunication of Nicholas Cantilupe for non-appearance before the court in York (this document is dated 20 October 1367 which is most likely a mistake for 1368). Plaintiff's libel (no date); plaintiff's libel (with *acta* on dorset) (no date). Plaintiff's articles (no date). Constitution of John de Stanton as proctor for plaintiff (25 March 1368). Plaintiff's application for the court's protection *lite pendente* (22 April 1368). Exceptions by the defendant (24 April 1368). Plaintiff's positions and articles (26 April 1368). Replications against plaintiff's case by defendant (26 April 1368). Seven depositions for plaintiff (4 of them taken down on 7 June 1368, three of them taken down on 25 June 1368). Three witnesses to the abduction to Greasley Castle (15 July 1368). Positions and articles against Nicholas' replications to the witnesses of 15 July (25 July 1368). Mandate to Robert Bekeby peremptorily to compel Nicholas to appear in the York Minster on Wednesday before St. Michael for a physical examination of his genitals (31 July 1368, endorsed on 5 August 1368 with the information that summons was delivered in the church of Banyngton in the presence of two witnesses, Katherine's brother, John Paynel, and John Auncell (who subsequently became Katherine Paynel's husband) (sealed with the seal of the Christianity of Lincoln and endorsed by John Colby, notary public). Letter from Lincoln confirming the delivery of summons to Nicholas (4 August 1368). Letter from Lincoln stating that Nicholas appeared in Lincoln on 19 September 1368. Sentence granting annulment to the plaintiff Katherine Paynel (29 April 1369).

attempts by Nicholas to avoid a physical examination of his genitals led the court in York to annul the marriage on 21 April and the provision of a written copy of the sentence on 28 April 1369. Nicholas Cantilupe appealed the case to the Papal Curia where he was contesting when he died at Avignon in early 1370. However, the conflict between the couple began several years earlier, only a few days after Nicholas Cantilupe and Katherine Paynel confirmed their marriage by exchanging vows.

We cannot say exactly when that marriage had originally been agreed, but Robert Raufchaumberlayn told the King's Bench record that a marriage had been agreed while Katherine Paynel was still under age. If we take Robert Raufchaumberlayn Paynel's testimony to the King's Bench to refer to the canonical age of twelve for girls, these negotiations would have been concluded around 1358, in the final years of Joan Kymas' life. I suggested above that Kymas may have tried to protect her lands with the help of her powerful neighbour Ralph Paynel. But it is equally possible that Ralph Paynel was trying to force Kymas and her adopted grandchildren to give up lands owned by the recently deceased third Lord Cantilupe. If that is the case, Kymas may have been trying to secure peace by negotiating a marriage between her adopted grandson, who – if the medical diagnosis suggested below is correct – at that time would have appeared to be a healthy teenage boy, and Ralph Paynel's daughter, Katherine. We will never know for certain what motivated Kymas to agree the marriage, but when she died in 1362 Nicholas had secured the promise of Katherine as his wife, and in 1364 at the age of 24 he confirmed his marriage with the eighteen year-old Katherine Paynel, endowing her with the manors of Withcall, Kingthorpe and Lenton in Lincolnshire.

In her first deposition – which seems to have deliberately obscured the fact that Nicholas had abducted Katherine and incarcerated her in his castle – Margaret Halton, who, in her own words, was privy to Katherine's inner secrets because she was Katherine's *socia in lecto*, explained to the court that for the first year the couple had lived in the Paynel household in Caythorp in Lincolnshire and the following year they lived in Nicholas' castle, Greasley in Nottinghamshire. Katherine then returned to Caythorp to live with her parents for six months. During that time she was persuaded by several people—Margaret Halton, the Official of the archdeacon of Stow, Thomas Waus, 'and others' – to return to Nicholas in Greasley in the company of these two and master Robert Bekeby. Katherine lived with Nicholas until the feast of the Purification of the Virgin.

But Margaret also explained that three days after the initial solemnisation of the marriage, Margaret had to console Katherine because Nicholas could not go through with intercourse, not having ‘sufficient natural members because his testicles were missing’.<sup>14</sup> Katherine even swore that she was willing to be burnt at the stake if anyone could disprove her statement. Katherine’s story gains some extra credence through the reported taunt of one of Nicholas’ kin - possibly a sister - whom Margaret Halton identified only as ‘the wife of Sampson de Strelley, knight, a kinswoman of said Nicholas in the first degree of consanguinity’ who said to Katherine ‘My lady, I shall give you a penny if you ever have joy from your husband’.<sup>15</sup>

Katherine’s claim that her husband had no genitals caused disbelief and consternation. Katherine’s father initially refused to believe that there was anything wrong with Nicholas. He ascribed their marital problems to the fact that Katherine was young and inexperienced and added that ‘she was stupid and she did not understand what she should do’.<sup>16</sup> Despite this initial paternal outburst, Katherine persevered and in the end her mother arranged for her to see master Thomas Waus, who was well acquainted with canon law, being the official to the Archdeacon of Stow.<sup>17</sup> Waus listened to the young girl describing her attempts to consummate the marriage. Persuaded by her story, he arranged for her to speak on several occasions to the Bishop of Lincoln, John Buckingham, who interrogated Katherine in the comforting all-female presence of Katherine’s mother and Margaret Halton. Bishop Buckingham and Waus explained canon law governing annulments of marriage – in particular the requirement for intent to procreate and cohabitation for three years – to Katherine, and she returned to Nicholas to comply with the law’s demands. But as soon as the necessary period was over, she returned to her parents announcing that she had been told in confession<sup>18</sup> that she could now proceed to a church court to have the marriage annulled.

In response, her husband defied the ecclesiastical court, reacted with violent threats, endured excommunication, and initiated proceedings at the

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<sup>14</sup> *‘prefatus Nicholas non cognoverat eam carnaliter nec habuit membra naturalia sufficientia, quia deerant sibi testiculi’.*

<sup>15</sup> *‘ista jurata audivit uxorem Sampsonis de Strelley, militis, que est conjuncta, ut credit, in propria gradu consanguinitatis dicere dicta Katherine: “Domina, ego dabo tibi unum denarium si umquam habetis gaudium de marito tuo”’* (CP E 259, 1368–9).

<sup>16</sup> *‘quod fuit fatua et quod non intellexit quid fecit’* (CP E 259, 1368–9).

<sup>17</sup> Waus was also the priest of Burton outside Lincoln, one of the benefices in the gift of the Paynells.

<sup>18</sup> *‘in foro conscientie’.*

King's Bench, culminating in an appeal to the Papal Curia in Avignon, all done in an attempt to avoid a decision by a legal institution that confirmed his impotence.

### The Canon Law Procedure In Cases Of Annulment For Impotence

Unlike today, medieval spouses enjoyed no access to divorce, i.e. the dissolution of a valid marriage leaving the parties free to marry a different spouse. Instead they faced two options: separation or annulment. In the case of separation, the parties were allowed to live apart, but had to remain celibate for the duration of their partner's life. In the case of annulment, the parties had to prove the existence of an impediment to the marriage which was therefore deemed never to have been legally valid. One such impediment was *impotentia coeundi*, literally: 'the impossibility of coming together'. This phrase and its corollary *frigiditas* referred equally to men and women, and in theory women could find themselves as the defendants in suits for annulment of marriage because of impotence. However, in practice, these phrases referred to *male* impotence. For practical reasons the courts focused on the man and his erectile function which provided the easiest way to demonstrate the likelihood that the marriage had not been and was not going to be consummated. Focusing on the man allowed for fewer problems of interpretation.

Canon law distinguished between two kinds of impotence, which created different impediments to marriage. One was *permanent impotence* caused by a congenital incapacity for sex that had been concealed from the contracting party at the time of the celebration of marriage: if proven this led to an annulment. The second was *temporary impotence*, which was generally supposed to have been caused by *maleficia* or 'sorcery'. Pope Alexander III (1159–81) allowed marriages to be dissolved for this reason, but the practice was discontinued by Pope Innocent III (1198–1216), possibly as a consequence of his encounter with this argument in his confrontation with Philip II of France over his Danish consort, queen Ingeborg.<sup>19</sup>

<sup>19</sup> Jean Gaudemet, 'Le dossier canonique du mariage de Philippe Auguste et d'Ingeburge de Denmark (1193–1213)', *Revue historique de droit français et étranger* 62(1) (1984), 15–29; Robert Davidsohn, *Philipp II. August von Frankreich und Ingeborg* (Stuttgart, 1888); Frederik Pedersen, 'The Danes and the Marriage Break-up of Philip II of France', in Paul Brand, Kevin Costello and W. N. Osborough (eds), *Adventures of the Law: Proceedings of the Sixteenth British Legal History Conference, Dublin, 2003* (Dublin, 2005), 54–69; Helene Tillmann, *Pope Innocent III, Europe in the Middle Ages* (Amsterdam, 1980), 333–48; John W. Baldwin, 'La vie sexuelle de Philippe Auguste', in Michel Rouché

Three methods of proof were generally required in the legal discussions of impotence: a physical examination of the parties, the sworn testimony of witnesses and the evidence of two full years of cohabitation.<sup>20</sup> In his recent investigation of courts on the continent Charles Donahue, Jr, found only two impotence cases from Paris to illustrate this point in practice.<sup>21</sup> Donahue concluded that the Parisian courts dealt effectively with these kinds of cases and seemed to follow the canon law more literally than the English courts. In one case the court passed sentence based on the evidence of two doctors, the sworn testimony of the wife, and the oaths of six men who swore that they believed the testimony of the wife and that they had no knowledge of the man having intercourse with another woman. In the other case, both the man and the woman swore to the impotence and their statements were confirmed by a master of medicine, a surgeon and the oaths of five men.<sup>22</sup>

The practice of the English courts on the other hand involved a different group of experts. The English courts generally conducted a physical examination of the man's erectile function with the help of varying numbers of 'honest women', who attempted to stimulate the impotent man, often (but not always) by baring their breasts and kissing and fondling him.<sup>23</sup> Only one fifteenth-century man under investigation 'passed' such an examination (and that was after a second try), a failure (or should that be 'success') rate of one-sixth.<sup>24</sup>

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(ed.), *Mariage et sexualité au moyen âge: Accord ou crise?* (Paris, 2000), 217–29.

<sup>20</sup> Physical examination: X 4.15.1. Three years and witnesses: X 4.15.7.

<sup>21</sup> Charles Donahue, Jr, *Law, Marriage and Society in the Later Middle Ages: Arguments About Marriage in Five Courts* (Cambridge, 2008), 145, 277–8 and 295–6.

<sup>22</sup> Ibid., 371. Texts are transcribed in Donahue, Jr, 'Texts & Commentary' in ibid., 738–9. [http://www.cambridge.org/us/files/3913/6690/0088/5363\\_9780521877282tc\\_p673-976.pdf](http://www.cambridge.org/us/files/3913/6690/0088/5363_9780521877282tc_p673-976.pdf)).

<sup>23</sup> For an example of the practice see P. J. P. Goldberg (ed. and trans.), *Women in England c. 1275–1525: Documentary Sources* (Manchester, 1995), 219–22. On the practice of the English courts in impotence cases in general, see R. H. Helmholz, *Marriage Litigation in Medieval England* (Cambridge, 1974), 87–90; Jacqueline Murray, 'Trial by Congress', *The Lawyers Weekly*, 6(44) (20 March 1987), 20–1, 31; Jacqueline Murray, 'On the Origins and Role of "Wise Women" in Causes for Annulment on the Grounds of Male Impotence', *Journal of Medieval History*, 16(3) (1990), 235–49; Frederik Pedersen, *Marriage Disputes in Medieval England* (London, 2000), 30, 88, 115–20, 136–37, 145–48, 190, 208; Bronach Kane, *Impotence and Virginity in the Late Medieval Ecclesiastical Court of York* (York, 2008); Frederik Pedersen, 'Privates on Parade' in Per Andersen, Mia Münster-Swendsen and Helle Vogt (eds), *Law and Private Life: Proceedings of the Sixth Carlsberg Conference on Medieval Legal History* (Copenhagen, 2011), 81–105.

<sup>24</sup> CPF 175 (Barley c. Barton, 1433–34). Donahue does not investigate the witness accounts in CPF 224 (Gilbert c. Marche, 1441). CPF 40 alleges impotence but has no



Thus European church courts seem to have applied roughly similar standards of proof and a physical examination of the man's sexual capacity was necessary. However, this statement must be taken with the important *proviso* that the courts encountered the problem only rarely: the dossiers of only six pre-Reformation cases survive from the consistory court in York (making up only 3 per cent of the total marriage case-load); two have been identified among the diocesan archives in Canterbury; and another two are found in the episcopal court act book in Ely.<sup>25</sup> It is clear that these cases were few in number and that the accusation of impotence was rarely made frivolously. The rules of canon law—which made it impossible for the impotent partner to remarry<sup>26</sup> and demanded that he or she return to their spouse if the dysfunction disappeared—would create a deterrent from bringing this kind of suit without good cause.<sup>27</sup>

### The Cantilupe Case At The York Consistory Court

Donahue points to an intriguing jurisdictional problem with the Paynel c. Cantilupe case.<sup>28</sup> By rights, the consistory court in Canterbury should have heard the case, but it was examined in York. The plaintiff lived in the jurisdiction of Canterbury and initial steps in the case were taken in Lincoln, which also fell under Canterbury's jurisdiction. However, the York consistory court heard the case. Although initially confusing, the explanation behind this unusual choice of forum may be influenced by two factors: firstly that Nicholas held the manor of (Little) Lavington by knight's service from the archbishop of York,<sup>29</sup> and secondly that the case took its legal beginnings during the chaotic last eight months of the reign of Archbishop Simon Langham of Canterbury. Langham, a former chancellor of the realm, only occupied the

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surviving witness accounts Donahue, 'Texts & Commentary', 718.

<sup>25</sup> Canterbury Sede Vacante S B. Ill no. 127 (1292) Canterbury Cathedral archives, Y1 1, f. 70r. Cambridge University Library, Ely Diocesan Records, D/2/1, ff. 100-154 (passim). Cf. Kane, *Impotence and Virginity*, 8. For an analysis of the surviving impotence material from a medical perspective, see Pedersen, 'Privates on Parade'.

<sup>26</sup> X 4.15.2.

<sup>27</sup> X 4.15.1.

<sup>28</sup> Donahue, 'Texts & Commentary', 717.

<sup>29</sup> Lavington is called Lenton today. It is located in south Kesteven in Lincolnshire. 44-47 Edward III, *vol. 13 of Calendar of inquisitions post mortem and other analogous documents preserved in the Public Record Office prepared under the superintendence of the Deputy Keeper of the Records* (London, H.M.S.O., 1954), 76-8.



seat of Canterbury briefly, beginning his reign on 24 July 1366 and ending it when he took up the office of cardinal of St Sixtus on 22 September 1368. Because he accepted this appointment without consulting Edward III the king seized Canterbury's revenues in November 1368 arguing that Langham had forfeited the see by his acceptance of the cardinal's hat. The uncertainty of the situation in Canterbury may thus have made litigation in Canterbury cumbersome and difficult.<sup>30</sup>

The earliest surviving dated procedural document in the case is a commission dated 25 March 1368 which established Master John Stanton as the proctor of Katherine Paynel. Stanton applied to the court for protection for his client on 22 April 1368 and within a week she was not only given the court's permission to live separately from Nicholas while the case lasted, but from 1 May 1368 she stayed in the care of Lady Margaret, wife of Sir Edmund Hastings,<sup>31</sup> in the fortified Roxby castle, near Pickering in Yorkshire.

In her (undated) libel which is roughly contemporary with the establishment of John Stanton as her proctor, Katherine told the court that she had married 22 year-old Nicholas Cantilupe four years earlier<sup>32</sup> and that he had not yet had intercourse with her. She claimed that the reason behind the non-consummation was that he had 'insufficient' genitals and was unable to emit semen. Seven witnesses in support of Katherine's case were interrogated on 7 June and 27 June 1368. To a modern historian interested in the construction of gender it is frustrating that by requesting an annulment on the grounds of her husband's permanent impotence, Katherine ensured that the court at York could only focus on the question of whether or not Nicholas was able to consummate marriage and effectively shut down any discussion of his construction of gender. This practical outcome of the rules of legal procedure thus forces the historian to make the pragmatic choice to focus exclusively on the medical aspects of the case.

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<sup>30</sup> W. J. Dohar, 'Langham, Simon (d. 1376)' in H. C. G. Matthew and Brian Harrison (eds), *Oxford Dictionary of National Biography* (Oxford, 2004).

<sup>31</sup> Sir Edmund was a nephew of the later High Sheriff of Yorkshire (1376–1377), Sir Ralph Hastings. Cf. Simon Walker, 'Hastings Family (Per. C.1300–C.1450)' in H. C. G. Matthew and Brian Harrison (eds), *Oxford Dictionary of National Biography* (Oxford, 2004). The Hastings family provided protection of vulnerable litigants at the court in York on several occasions.

<sup>32</sup> i.e. in 1364 when Katherine was eighteen years old.

## Medical Aspects Of The Case

Katherine's startling claim that Nicholas did not have sufficient genitals to perform intercourse was the lynchpin of her case. Given that it would have been extremely easy to disprove and that Nicholas seems to have gone to extreme lengths to avoid a physical examination, it is likely that this allegation was true. Katherine's allegation is unexpected and does not conform to any standard impotence 'narrative', and it is also so easy to disprove that we must take it seriously, particularly because though it is uncommon it is not impossible.

Katherine produced seven witnesses in the York consistory court who all swore to having heard about the impotence, either directly from Katherine or from neighbourhood rumour. Master Thomas Waus related to the court that Katherine had sworn:<sup>33</sup>

That she often tried to find the place of said Nicholas' genitals with her hands when she lay in bed with said Nicholas and he was asleep, and that she could not stroke nor find anything there and that the place in which Nicholas' genitals ought be is as flat as the hand of a man.

Margaret Halton, who had been Katherine's *socia in lecto* since childhood, explained that Katherine had told her about Nicholas' impotence three days after the solemnisation of their marriage. Five other witnesses confirmed the existence of neighbourhood rumour to Nicholas' impotence.

Although Katherine's accusation may sound surprising, the physical deformity that she alleged indicates that Nicholas suffered from a real physical defect. Among the possible diagnoses are *Aphallia* (which is extremely rare),<sup>34</sup> Leydig cell hypoplasia,<sup>35</sup> Klinefelter syndrome<sup>36</sup> and congenital adrenal hyperplasia (C.A.H.). Because the circumstances of Nicholas' death in Avignon

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<sup>33</sup> *'Et dicit quod audivit Katarinam referre quod sepius temptavit manibus suis cum jacuit in lecto cum dicto Nicholo et ipse dormibat locum genitalium dicti Nicholi et quod nulla palpare nec invenire potuit ibidem et quod locus in quo genitalia sua deberent esse est ita planus sicut manus hominis'* (CP E 259, 1368–9).

<sup>34</sup> S. J. Skoog and A. B. Belman, 'Aphallia: Its Classification and Management', *Journal of Urology*, 141(3) (1989), 589–92.

<sup>35</sup> 'Leydig cell hypoplasia' in *National Library of Medicine*.

<sup>36</sup> 'Klinefelter syndrome' in *Medline Plus*, <http://www.nlm.nih.gov/medlineplus/ency/article/000382.htm>, accessed 11 July 2015.

led the English authorities to arrest his brother on suspicion of murder,<sup>37</sup> C.A.H., which is well known in the medical literature, if somewhat rare in real life, appears to be the most likely diagnosis.<sup>38</sup>

C.A.H. is a non-hereditary congenital condition that affects both boys and girls. Those born with C.A.H. lack an enzyme needed by the adrenal gland to make two hormones, cortisol and aldosterone. Without these hormones, the body produces more androgen, a type of male sex hormone. This causes male characteristics to appear early or inappropriately in both male and female children. Neo-nate boys will present a large penis with a mature colouring, while female children will present varying degrees of virilisation ranging from an enlarged clitoris – which can look remarkably like a penis – to a total absence of external genitalia. Though their internal reproductive organs may be complete and they thus may have a vagina, fallopian tubes and ovaries, they can also suffer fused labia and present a flat *mons veneris*. Because of the thickening of the skin in the genital area, they can present like boys with a penis-like appendage and upon examination appear even to an experienced midwife to have undescended testes.<sup>39</sup>

Although at least one modern commentary on this case expected Nicholas to display typically feminine characteristics, such as a high voice,<sup>40</sup> the opposite would almost certainly have been the case. Indeed, it is likely that at the time of his engagement, when clothed, Nicholas would have long since have shown most of the traits of a boy well past his puberty with a high muscle mass, clear beginnings of a beard and a normal male voice. Of course, had he been unclothed his lack of an adult penis would have been obvious upon examination. But Nicholas was also later to show evidence of other traits that are characteristic of C.A.H.. When Katherine was abducted from her father's

<sup>37</sup> See text accompanying note 53 below.

<sup>38</sup> The tentative diagnosis that I am proposing here was first suggested to me at Clare Hall, Cambridge, by Dr. Richard G. Mackenzie (now at the University of Southern California). I subsequently discussed the case with Professor Ieuan Hughes (Professor of Paediatrics, Addenbrooke's Hospital, Cambridge) and the Climb C.A.H. Support Group in the U.K..

<sup>39</sup> That it is possible to live an entire life unaware of C.A.H. is demonstrated by the recent case of a Chinese virilised woman who only found out about his condition at the age of 66. K. F. Lee, et al., 'Late Presentation of Simple Virilising 21-Hydroxylase Deficiency in a Chinese Woman with Turner's Syndrome', *Hong Kong Medical Journal*, 19 (2013), 268–71. I find it unlikely that Nicholas Cantilupe suffered from 'Turner's Syndrome' as the court did not comment on his height or muscular abnormality as it did in the case of William Aungier c. Johanna Malcake (Borthwick Institute for Archives, York CP E 76).

<sup>40</sup> Derek G. Neal, *The Masculine Self in Late Medieval England* (Chicago, 2008), 142–6.

estate in Caythorpe Nicholas met his raiding party at the gate of Greasley castle. In other words, he did not join the riding party when it rode the 36 miles to Caythorpe and back.

Although there may be other reasons for his absence from this raid, this avoidance of physical exertion, and the fact that, unlike his brother, he did not become a royal retainer, is consistent with the medical diagnosis proposed.

Today, about 1 in 18,000 children are born with C.A.H. and there is no reason to believe that the frequency of the condition would have been different in historical populations.<sup>41</sup> There are two variations of this syndrome: 67 per cent of babies with C.A.H. have the salt-losing variant of the syndrome and will die within a year if untreated.<sup>42</sup> If untreated, sufferers from the salt-losing form of C.A.H. will die in infancy, because they cannot produce enough salt-retaining hormones to maintain a sustainable electrolytic balance in their bodily fluids. The end-result would be vomiting and dehydration and, eventually, death. In fact the final stages of C.A.H. are remarkably like the symptoms of several kinds of poisoning. Among the remaining babies born with C.A.H., non-salt-losing girls usually appear healthy. Today C.A.H. is treated with hormone replacement, replacing one or both of the hormones missing.

Of course, medieval medicine was very different to modern medicine and the condition may have been a contributory cause of Nicholas' premature death in Avignon in February 1370. The fact that Nicholas survived to inherit from his grandfather makes it clear that s/he was one of the third of children with less severe C.A.H., non-salt losing C.A.H., in which their salt balance is normal. However, when exposed to stress, whether it be physical or psychological, sufferers with non-salt losing C.A.H. may become salt losers. Therefore current advice on living with C.A.H. recommends extra attention being paid to common illnesses and stress-inducing situations, such as injury and exercise. Today C.A.H. is treatable, but in the Middle Ages the life expectancy of sufferers would have been short.<sup>43</sup>

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<sup>41</sup> Songya Pang and Anastasia Clark, 'Congenital Adrenal Hyperplasia Due to 2:L-Hydroxylase Deficiency: Newborn Screening and Its Relationship to the Diagnosis and Treatment of the Disorder', *Screening*, 2 (1993), 105–39.

<sup>42</sup> Perrin C. White, 'Congenital Adrenal Hyperplasia and Related Disorders' in R. M. Kliegman, R. E. Behrman and B. F. Stanton (eds), *Nelson Textbook of Pediatrics* (Philadelphia, 2007), ch. 570.

<sup>43</sup> Deborah P. Merke and Stefan R. Bornstein, 'Congenital Adrenal Hyperplasia', *The Lancet*, 365(9477) (18–24 June 2005), 2125–36.

## The Case against Nicholas Cantilupe in York, his Reaction, and his Death

The fact that Nicholas might not be a man was never an issue in this case. Following canon law's understanding of the legality of marriage bonds the York consistory court took it for granted that he was male. Thus, the court only needed to establish whether there was sufficient evidence that intercourse could never take place and, if proven, whether this fact had been unknown to the plaintiff at the time of the marriage contract. Katherine therefore only needed to produce evidence concerning the alleged impotence and demonstrate her adherence to the rules of the Church in cases of impotence, i.e. she wished for and intended to have children and that she had cohabited with her putative husband for two full years.

However, in his responses to Katherine's witnesses, whose depositions were submitted to the court after 27 June 1368, Nicholas claimed that Katherine had sworn in front of witnesses that he had known her carnally. This allegation made the court recall three witnesses – Thomas Waus, the official of the archdeacon of Stow; Margaret Halton, Katherine's *socia in lecto*; and Robert Bekeby, Ralph Paynel's chaplain – on 15 July 1368 to be re-examined to learn more about the oath that had allegedly been freely sworn by Katherine. Katherine's witnesses did not contest Nicholas' contention that Katherine had sworn an oath, but they provided compelling evidence that Katherine's oath had been produced under duress and presented a narrative in which Nicholas actively twisted the law to his own purpose. From their accounts Ralph Paynel's reasons for attacking Greasley Castle become clear: Nicholas had abducted Katherine from Caythorpe; had threatened her with life-long incarceration; and had kept her as a prisoner for six months. The three witnesses had indeed witnessed an oath affirming Nicholas' potency sworn by Katherine. Waus argued that the oath had been brought about by force. Nicholas had his men abduct her 'weeping and wailing' to his castle in Greasley on the Wednesday after the Assumption of the Virgin (i.e. 18 August) 1367 and Robert Bekeby added that Nicholas did not ride with his men but met Katherine and her other abducted companions at the castle gate, where:<sup>44</sup>

<sup>44</sup> CPE259, 1368-9: '[loquebatur] torvo vultu "Maledicta es mulier inter omnes mulieres." Ipsamque statim una cum iste jurato et aliis contestibus proximis prenotatis in quodam oratorio situato in eodem castro introduxit, ubique dicta Katerina alloquuta fuerat sub his verbis: "tu scis bene quod ego sum sufficienter potens tecum carnaliter comiscere, habens instrumenta ad coheundum satis apta." Que respondit "sic." Dicit insuper Nicholas: "volo quod te jures quod ego sum potens ad coheundum, habens instrummenta naturalia, ut premititur, et quod tu de cetero non recedas a comitiva

with a grim face [he said]: “you are a cursed woman among all women.” And he led her and this witness and the other aforementioned fellow witnesses into a certain chapel situated within that castle, and there he spoke to said Katherine in these words: “You know well that I am sufficiently potent to copulate with you having genitals that are good enough.” She answered: “yes.” Said Nicholas added: “I wish that you swear that I am able to have intercourse, having sufficient natural instruments (as he said) and that you henceforth do not leave my company without my special permission and that you do not reveal this counsel in any way.” To which Katherine answered: “I will swear to whatever was said by you.”

Waus had been abducted with Katherine and his two fellow witnesses and he emphasised that the oath was produced under severe duress: Nicholas showed Katherine a room he had made as a prison for her where he intended to keep her if she did not comply with his wishes.<sup>45</sup> Margaret Halton, Katherine’s servant, added that he had ankle-irons and hand-cuffs ready if she refused to swear his oath.<sup>46</sup> Six months later, in February 1368, Ralph Paynel attacked

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*mea sine licentia mea speciali, et quod consilium meum nullatenus reveles.” Ad que dicta Katerina respondit: “volo jurare quaecumque vobis fuerunt prolata.”* (CP E 259, 1368–9). Derek Neal suggests that this record of Nicholas’ greeting was a ‘malevolent inversion of the angel Gabriel’s address to the virgin Mary in Luke’s gospel, also familiar as the “Ave Maria”’ (Neal, *The Masculine Self in Late Medieval England*, 146–7). I find this unlikely: the phrase ‘Benedicta tu in mulieribus’ is a part of the ‘Ave Maria’ – a prayer that every medieval person would have been able to recite by heart. The obviously different scansion, the difference in grammar and the awkwardness of the phrase ‘inter omnes mulieres’ makes me think that on the contrary the scribe was consciously trying to avoid this possible echo.

<sup>45</sup> *Interrogatus qualiter compulsa fuerat ad jurandum dicit quod dictus Nicholas dixit isti jurato quod nunquam cum eo moretur nisi tunc prestaret hunc juramentum. Et nicholominus iste juratus vidit locum ad modum carceris ordinatum quem dictus Nicholas sibi ostendit pro mora et inclusione dicte Katherine nisi juramentum hunc prestitisset. Et postquam dicta Katherine dictum prestitit juramentum, auditur iste juratus ipsam dicere dicto Nicholo: “Quidquid vos dicetis ego volo facere vobiscum et in omnibus concordare.” Et per premissa scit iste juratus, ut dicit, quod si quamdam confessionem extunc fecit vel emisit dicta Katherine de potentia coeundi prefati Nicholi vel quod ipse fuit potens in opere copule carnalis, illam confessionem fecit metu ducta, ut premititur, compulsa, quia a tempore quo dicta Katerina venit ad castrum predictum, ut prefertur, semper fuit sub metu et districtu dicti Nicholi non habens suam ipsius liberam potestatem’* (CP E 259, 1368–9).

<sup>46</sup> (Margaret Halton agreed with the other witnesses) *‘hoc addito quod habuit compedes paratos in quibus poneret eandem Katerinam nisi sibi in omnibus acquiesceret et prestaret hunc juramentum’* (CP E 259, 1368–9).

Greasley Castle to liberate Katherine and thus enabled her to pursue the annulment case in York.<sup>47</sup>

The York consistory court accepted this narrative as proof of the fact that the oath sworn by Katherine had been produced under duress. The York consistory court therefore sent Robert Bekeby a mandate to cite and compel Nicholas to appear in York for a physical examination on the Monday before the feast of St. Michael (i.e. 25 September 1368). The summons was read out to Nicholas when he attended mass on Sunday 6 August, but he strenuously (and deviously) resisted a physical examination: when the assigned day arrived, Nicholas appeared in Lincoln for his physical examination.<sup>48</sup>

As a consequence of his non-appearance, the cause paper file contains a letter of excommunication of Nicholas Cantilupe dated 20 October.<sup>49</sup> The case contains no further evidence until the consistory court passed sentence against the marriage on 28 April 1369,<sup>50</sup> presumably after the necessary three absences by Nicholas.

Deviating from common practice, the written copy of the sentence makes it explicit that the court's decision was reached through circumstantial evidence.<sup>51</sup> This outcome was probably what Nicholas wanted: it made it possible for him to argue that owing to a procedural error, i.e. that Nicholas had not undergone a physical examination, the case should be re-examined by the Curia. The York Consistory court duly acquiesced to Nicholas' request for an appeal to the Apostolic See. Having taken out letters of attorney to ensure the smooth running of his estates on 7 July 1369, and having exhausted his legal possibilities at the King's Bench, Nicholas travelled to Avignon in October 1369, where he died in February 1370.<sup>52</sup>

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<sup>47</sup> When considering the veracity of this second narrative of the relations between Nicholas and Katherine it is worth remembering that the witnesses had to convince the court that force that induced 'fear that can fall upon a constant man' had been brought to bear on Katherine and that their stories probably should be approached with a certain amount of scepticism.

<sup>48</sup> The cause paper file contains a letter from Lincoln stating that Nicholas did appear there on 19 September 1368.

<sup>49</sup> The document gives the year as 1367, a likely scribal error for 1368.

<sup>50</sup> This date is initially surprising. Nothing seems to have happened in the case between October 1368 and April 1369, but the date is clearly *not* a scribal error: the scribe copied out the last part of the year in full as 'm ccc lx *nono*'. However, it would have allowed for Nicholas to have missed three consecutive meetings of the court, after which canon law procedure allowed the court to proceed to sentencing.

<sup>51</sup> '...quia per allegata proposita, confessata et alia probationes generalia inveniensi...'.

<sup>52</sup> Nicholas Cantilupe was present in person when Paynel's letter of safe conduct was presented at a meeting of the King's Bench in October 1369 (KB 27/434/50). The



Initially, Nicholas' death seemed to the English authorities to be highly suspicious, but it is in tune with the medical diagnosis of C.A.H. proposed above. Both Ralph Paynel and Nicholas' brother William were in Aquitaine at the time of Nicholas' death – Ralph Paynel with John of Gaunt and William as a soldier. At the final meeting in the case at the King's Bench Robert Raufchaumberlayn Paynel presented a royal letter of safe conduct that granted Ralph Paynel immunity against any legal proceedings. But William Cantilupe (who stood to gain from his brother's death) was immediately apprehended for having murdered his brother. John Vendour of Newark was later paid for bringing William Cantilupe to the Tower of London 'for the death of Nicholas Cantilupe, his brother, slain'. The suspicion had clearly been strong enough for the King to provide an expensive armed guard to ensure that William answered for his alleged crime in London. From the same source we learn that Vendour had been instructed to keep Cantilupe in the Tower until the King and Council had decided what to do in his case.<sup>53</sup> This royal expense adds further circumstantial weight to the suggestion above that Nicholas suffered from C.A.H.: the final stages of C.A.H. present symptoms that are remarkably similar to acute arsenic poisoning, in particular the cardiovascular symptoms of hypotension, shock, ventricular arrhythmia, congestive heart failure, and irregular pulse.<sup>54</sup>

Subsequent inquisitions post-mortem into Nicholas' possessions most likely took place after William had been released from the tower. William's subsequent plea in the court of Chancery from December 1370 claiming the rights to the three castles that the inquisitions had identified as being in Katherine's possession indicate that he was most likely released before May or June 1370, but at any rate certainly before December of that year. Thus, the English authorities appear to have quickly accepted the fact that, despite his young age, Nicholas had died from natural causes.

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Inquisitions Post Mortem disagree slightly over the date of Nicholas' death. The majority have Friday before St Peter in Cathedra, 45 Ed III (15 February 1370), but one inquisition puts the date of his death one week earlier, on Friday before Valentine's Day *IPM 44–47 Edward III*, 76–78.

<sup>53</sup> Frederick Devon (ed.), *Issues of the Exchequer* (London, 1837), 200.

<sup>54</sup> Agency for Toxic Substances and Disease Registry, 'Environmental Health and Medicine Education: Case studies: Arsenic poisoning' (<http://www.atsdr.cdc.gov/csem/csem.asp?csem=1&po=12>, accessed 24 November 2015). Compare these symptoms to an adrenal crisis in C.A.H.: a seriously low level of sodium in the blood (which can cause ventricular arrhythmia), diarrhoea, vomiting, dehydration, low blood-sugar levels and shock.



### The Inquisitio Post Mortem: A Final Insult?

At the time of his death Nicholas was between 27 and 28 years of age. Inquisitions post mortem were taken in May and July 1370. They showed him to have been in possession of Little Claydon and Eselbergh (Buckingham), Ilkeston (Derby), Greasley Castle and Kynmerley (Nottinghamshire) and Helmsill (of the honour of Peverel, in Lincolnshire).<sup>55</sup> Greasley was the Cantilupe family's largest manorial holding at over 5,500 acres, incorporating towns, villages and hamlets from Selston to Nuthall and Eastwood. The adjoining manor of Ilkeston in Derbyshire increased that holding to cover a huge swathe of land straddling the River Erewash. Nicholas also died in possession of three further manors in Lincolnshire: Withcall, Kingthorpe and Lavington. Nicholas held the manor of Lavington by knight's service from the archbishop of York.<sup>56</sup> Although some of the inquisitions after Nicholas' death say that he held these manors jointly with *Katherine, his wife*, which indicates that the secular juries correctly regarded the annulment case as pending, by the time William died these castles had been transferred into his possession.<sup>57</sup>

Katherine wasted no time in getting married again and on 3 December 1371 she contested the rights to the manors of Withcall, Kingthorpe and Lavington with her new husband, John Auncell, knight.<sup>58</sup> Auncell had already met Katherine and her brother John when Auncell and John Paynel appeared as witnesses to the citation to appear for a physical examination that was read out to Nicholas on 6 August 1368. Auncell was indicted in 1375 for having attacked a royal judge in connection with a long-running dispute in Kesteven, but the accusation was not severe enough to prevent him from representing Lincolnshire in Parliaments in 1377, 1378 and 1379. In 1379 Auncell represented Lincolnshire together with William Bussy, who was later to marry William Cantilupe's widow Maud when her second husband

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<sup>55</sup> A second inquisition concerning Greasley and Ilkeston was taken 12 July 1370. The manors of Withcall, Kinthorpe and Lavington were contested by Katherine who claimed that she held these jointly with Nicholas. Three inquisitions were made: on 8 May, on 14 June and on 28 June. Both of these had fourteen jurors, while the calendar does not inform us how many swore to the last inquisition held 28 June. IPM 44-47 Edward III, 76-8.

<sup>56</sup> IPM 44-47 Edward III, 76-8.

<sup>57</sup> 48-51 Edward III, vol. 14 of Calendar of inquisitions post mortem and other analogous documents preserved in the Public Record Office prepared under the superintendence of the Deputy Keeper of the Records (London, H.M.S.O., 1904), 105-6.

<sup>58</sup> Calendar of Patent Rolls. Edward III, 1370-74, in Calendar of Patent Rolls. Edward III, 1327-1377 (London, H.M.S.O., 1891), 163.

Thomas Kydale died.<sup>59</sup> On 26 September 1371, letters were sent to Robert de Twyford, the King's escheator in Nottinghamshire and Derbyshire, to deliver the manor of Ilkeston and the castle of Greasley and their proceeds since the death of Nicholas to William, and to John de Olneye, the king's escheator in Buckinghamshire, to hand over the manors of Little Clayton and Eselburgh to the same.<sup>60</sup> Although William's claims to Withcall, Kingthorpe and Lavington were initially less clear-cut – we learn from the Patent Rolls that on 3 December 1371 the King issued an order to deliver these manors to two caretakers, Thomas Boys of Bedfordshire and John Aghton from Nottinghamshire, to be held by them until William's claim to these castles had been heard by the King's Court – by the time of his death, William had clearly won the case, for the Inquisitions Post Mortem list them among his possessions.

The murder of William Cantilupe was important both because it marks the end of the Cantilupe family as a major baronial family in England and because it was the first murder to be tried under the 1351 Treason Act which included members of households rebelling against their masters. Many additional questions have to be asked before we have a full picture of the case: would the consequences of being found to be impotent have been more severe than being assigned female gender? Did these two cases form part of a more widespread power struggle in Lincolnshire in the final years of Edward III's reign? And how do they fit into the traditions of the two major legal systems, ecclesiastical and secular, in medieval England? Although some initial steps into the wider legal context of surviving medieval impotence cases have been made,<sup>61</sup> full answers to such questions must await future consideration. It has been the aim of this paper only to answer the query raised by Sillem in 1936: 'what was the nature of the quarrel between Ralph Paynel and Nicholas Cantilupe?' and to offer some consideration of whether the events of 1368 and 1370 provide sufficient motivation for participating in the planning of murder.

The Cantilupe murder has been known in the academic literature for more than seventy years and the romantic involvement of Maud Nevil and Thomas Kydale has been accepted by most as the main motive for the crime. The role

<sup>59</sup> J. S. Roskell, 'The Parliamentary Representation of Lincolnshire During the Reigns of Richard II, Henry IV and Henry V', *Nottingham Medieval Studies*, 3 (1959), 53, 77.

<sup>60</sup> 1369-1374, vol. 13 of Calendar of Close Rolls. Edward III, 1327-77 (London, H.M.S.O., 1896), 252.

<sup>61</sup> Frederik Pedersen, 'Privates on Parade' in Per Andersen, Mia Münster-Swendsen and Helle Vogt (eds), *Law and Private Life: Proceedings of the Sixth Carlsberg Conference on Medieval Legal History* (Copenhagen, 2011).

and motivations of Ralph Paynel have been more obscure. The literature has accepted that he probably played a crucial role in the murder, and that he was pivotal in ensuring that most of the persons involved in the crime avoided the censure of the law. But his reasons for becoming involved in the first place have been unclear. This article has added new evidence from the King's Bench and the consistory court in York and has shown that Paynel had reason to dislike the Cantilupe family for the appalling treatment meted out to his daughter Katherine. An additional, but weaker, motive may have been the loss of several castles previously in the possession of the Paynels.

By combining the evidence of the York annulment case with current medical knowledge it has become possible to suggest a medical diagnosis that explains why Nicholas Cantilupe could not consummate his marriage and thus brought embarrassment and notoriety to both families. However, ultimately, it is impossible to show that this condition motivated Ralph Paynel to plot the murder of Nicholas' brother. In addition, when initiating divorce proceedings against Nicholas Cantilupe, the Paynels would have been aware that this meant losing possession of the castles that had been given to Katherine as dower. Nicholas held them in fee tail, which meant that they could only be handed down to the heirs of his body. The events of the case have been outlined and we have seen how Katherine Paynel's claim that her husband had no genitals was initially rejected, even by her own family, but that her perseverance meant that the case progressed by the required steps from the archdeacon of Stow, to the bishop of Lincoln, to the archbishop of York. Ralph Paynel may have been forced to contend with the unusual and embarrassing nature of his daughter's reasons for pleading for an annulment of her marriage, but on balance it is probably not likely that on its own this would have motivated him to plan the murder of Nicholas' brother. If he did do so it is more likely to have been due to his distress over the incarceration of his daughter. Nicholas' condition may be one of the earliest recorded – but not recognised – examples of a rare congenital disorder that today affects one in 18,000 children. However, it is unlikely that Ralph Paynel would ever have understood the condition or sympathised with Nicholas' predicament.

Though the case followed the proper steps, Nicholas tried to stop it becoming public knowledge and, though he should have known better, he eventually snapped and had his wife abducted with her retinue to his ancestral seat in Greasley. In response, Ralph Paynel attacked Greasley from whence he liberated his daughter. Paynel's attack on Greasley castle enabled his daughter to pursue her case at the consistory court in York where she was granted the

protection of the court and provided with shelter in Roxby Castle. Changing tack, Nicholas Cantilupe subsequently tried to delay and obstruct the case. Ultimately, because of his non-cooperation with the court, he was able to appeal the case to the Papacy. However, before the case could be heard, he died and left his brother William to continue the bloodline.

William was not minded to let his ancestral lands pass on to the Paynels through his brother's unsuccessful marriage and therefore he challenged Katherine for possession of three Cantilupe castles that had been left in her possession by the death of his brother. Thus in this earlier case and its aftermath we find several possible motives for Ralph Paynel's involvement in the murder of William Cantilupe. Paynel was no doubt acutely aware of the multitude of insults he had suffered at the hands of the Cantilupes. Leaving aside what he may have thought about Nicholas' condition (which he most likely did not understand), Nicholas had challenged the honour of the Paynels by dishonouring Katherine through his abduction and her long imprisonment in Greasley Castle, by subsequently claiming that Paynel had attacked Greasley castle without just cause, by his delaying and obstructing tactics and by his appeal to the papacy. He had subjected Ralph Paynel's daughter to degrading treatment and threatened to hold her prisoner chained to a wall in his castle until she complied with his demands, demanding that she reveal his threats to no one and that she stay in his castle unless expressly permitted to leave by him.

Nicholas' actions may have been enough to turn Ralph Paynel against the Cantilupes. But his brother William added insult to injury by reclaiming the three castles from the Paynels, by arguing that the castles with which Nicholas had endowed Katherine would only have come into her possession if she had borne Nicholas an heir, an event that Nicholas must have known could not happen when he celebrated his marriage to Katherine in 1366.

Ultimately, none of the parties in these two cases come out particularly well: William Cantilupe paid a heavy price for his brother's (and his own) challenge to Ralph Paynel. William would have felt secure in the knowledge that he and his family were magnates of the realm and that, in addition to their powerful patrons, they were under the special protection of William's great-great uncle, the recently sainted Thomas of Hereford. Ralph Paynel had good reason to detest the Cantilupes, but whether he took time to prepare his revenge with dedication and skill must remain uncertain.

Nicholas Cantilupe is perhaps the person who is most intriguing in these cases. When he was born there would have been little reason for his mother

or the midwife to doubt that he was the son and heir of William Cantilupe, the son of Nicholas, third Lord Cantilupe. His condition would not become noticeable until his early teens, and by then social convention meant that it was impossible to change his gender since outwardly he would have been a short but masculine boy, who, his family could testify, had entered puberty early. Though he must have been increasingly aware that he was not like other men, he was promised in marriage to Katherine Paynel and when they celebrated their marriage it became impossible for him to hide his condition. His wife's horrified reaction to his physical appearance, which made her flee his company within days, and her reluctant cohabitation with him for the canonically required period ultimately led her to pursue her case in the court in York. Consequently he reacted with a series of increasingly desperate and violent measures, at first attempting to force her publicly to acknowledge their marriage and subsequently by evading the law, and finally taking his case to the papacy. Nicholas' life was brief, but the details of his story and the aftermath of his death may still provide much information. Future studies of this case can provide information not only about late fourteenth-century English history, but also about the construction of late medieval gender and the obstacles faced by those who did not conform to the expectations of their society.

# Procedures for Dealing with Robbery in Scotland before 1400

*Andrew R. C. Simpson*

## Introduction

This study will examine the law concerning robbery in medieval Scotland. As will be explained in more detail below, ‘robbery’ may be defined as the theft of goods with force or violence. Three objectives will be pursued here. First, the article will reconstruct the legal procedures that dealt with robbery prior to 1400. One already existed in the twelfth century, and others were introduced in later periods. Secondly, it will be demonstrated that each of these new procedures became increasingly draconian, at least from the perspective of those accused of robbery. Such individuals had at first been granted various legal protections and defences, but these safeguards were gradually omitted in the later forms of process. Thirdly, the paper will seek to explain these developments. It will be argued that successive periods of political disorder gave rise to practical problems in the administration of justice, and these in turn resulted in the introduction of ever more severe measures that could facilitate the quick identification and punishment of wrongdoers. And yet it would be wrong to suggest that the laws that will be examined here were simply shaped by such pragmatic concerns. Drawing in part upon the work of other historians, this article will show that the responses of law-makers to contemporary political problems were heavily indebted to existing traditions of legal ideas found in the Scottish common law, the English common law and the canon law of the Catholic Church.

The paper will begin by briefly considering the definition of ‘robbery’ given above. It will then examine the procedures used to provide redress for this wrong in the historical order in which they were established. The study will halt at 1400 because during the first half of the fifteenth century several existing procedures that dealt with robbery were reworked and combined with other legal rules to create a new form of action, known as *spuilzie*. The

substantive wrong that this action remedied came to be significantly broader than robbery. As a result, its emergence merits separate treatment elsewhere.

## Defining Robbery

For the purposes of this article robbery is defined as the theft of goods with force or violence. This is a working definition, which is not to be found in the medieval Scottish sources; nonetheless, it can arguably be used without much risk of anachronism. From the late-twelfth century onwards Scottish law-makers did use the words ‘*rapina*’, ‘*roboria*’ and ‘*reif*’, all of which can be translated with the modern English word ‘robbery’, in order to refer to one particular crown plea.<sup>1</sup> A crown plea was one that could normally only be heard before the king or his justiciars, who were senior royal officers.<sup>2</sup>

Some elements of the substantive wrong of robbery may perhaps be deduced from an ordinance which can be dated to the reign of William I

<sup>1</sup> See, for example, G. W. S. Barrow, *The Kingdom of the Scots: Government, Church and Society from the Eleventh to the Fourteenth Century* (2nd edn, Edinburgh, 2003), 89; G. W. S. Barrow and W. W. Scott (eds), *The Acts of William I King of Scots 1165-1214* (*Regesta Regum Scottorum, 1153-1424* vol. 2, Edinburgh, 1971), no. 80; Alice Taylor, ‘*Leges Scochie* and the lawcodes of David I, William the Lion and Alexander II’, *The Scottish Historical Review*, 88 (2009), 207-288, 260-2, 282-3 (c.7 of Taylor’s edition of the *Leges Scochie*, hereafter referred to as ‘*L.S.*’); *Acts of the Parliaments of Scotland* (*A.P.S.*) i, 403; T. M. Cooper (ed.), *Regiam Majestatem and Quoniam Attachiamenta: Based on the Text of Sir John Skene* (Stair Society vol. 11, Edinburgh, 1947), I.1; *A.P.S.* i, 598. Of these sources, note that the act referred to in *A.P.S.* i, 403 survives in a text known as the *Statuta Regis Alexandri* (*S.A.*); the edition of *S.A.* found in *A.P.S.* is flawed, as demonstrated in Alice Taylor, ‘The Assizes of David I, king of Scots, 1124-53’, *Scottish Historical Review*, 91 (2012), 197-238, 216-20, and at more length in idem, *The Shape of the State in the Kingdom of the Scots* (Oxford, 2016), Chapter 5. All citations of *S.A.* here will reference both the problematic text contained in *A.P.S.* and also Taylor’s draft edition of *S.A.* (hereafter *S.A.*), but Taylor’s edition will be relied upon as the more authoritative guide to the content of the text. I am very grateful to Dr Taylor for allowing me to read relevant sections of her draft edition of *S.A.*. I am also grateful to her for allowing me to read a draft of Chapter Five of *The Shape of the State* as it stood in May 2014. Dr Taylor’s book was published after the current article went to press, and so it has not been possible to take the full implications of her extremely important work into account in the current article. References to “Chapter Five of *The Shape of the State*” below are to the draft Dr Taylor shared with me in May 2014, and not to the final version published in 2016.

<sup>2</sup> Barrow, *Kingdom*, 89. Of course, the Scottish crown pleas may have been modelled on the English pleas which placed a man in the king’s mercy; for a list of these, see L. J. Downer (ed.), *Leges Henrici Primi* (Oxford, 1972), 117 (c.13). On the justiciars generally, see Barrow, *Kingdom*, 68-111.

(r.1165–1214).<sup>3</sup> It established rules to be followed where one individual accused another of stealing or robbing chattels (*‘de catallo furato uel raptō’*).<sup>4</sup> Thus robbery and theft were trespasses that an individual could commit in relation to moveable goods. Furthermore, the complainer who established the validity of his accusation of theft or robbery was entitled to an award of possession of the disputed chattels, or compensation and punitive damages. The text implies that these damages were intended to provide redress for the loss of the goods. In other words, the original accusation of theft or robbery seems to have involved a claim that the complainer had lost the disputed chattels, and that this loss required some redress. Taken together, these points indicate that robbery and theft both arose where one individual wrongfully took chattels away from another. There is evidence to suggest that this remained the case throughout the period under investigation here.<sup>5</sup> However, this cannot be the whole story, for two reasons. First, while theft and robbery involved the ‘wrongful taking’ of goods from another, it is not yet clear precisely what exactly made the taking ‘wrongful’ in each case. Secondly, even though the two wrongs had something in common, medieval Scots law also sharply distinguished them. Considering this last point may shed light on the nature of both theft and robbery.

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<sup>3</sup> *L.S.* c.1.

<sup>4</sup> At *L.S.* c.1, Taylor translates this phrase as ‘stealing or plundering chattels’. It may be better to translate it as ‘stealing or robbing chattels’, simply because seizing ‘plunder’ could be construed as a legitimate act, which was clearly not the case here. The use of the word ‘robbery’ avoids this possible confusion. I am grateful to Professor John Ford for pointing this out to me. Furthermore, it should be noted that while I have followed Taylor in translating the word *‘catallum’* as ‘chattel’, contemporaries might have translated it as ‘cattle’; this is discussed in more detail below. As Pollock and Maitland put it, ‘Flocks and herds were the valuable chattels; “chattel” and “cattle” are the same word’ (see Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (2nd edn, 2 vols, Cambridge, 1892), II, 32). I am grateful to Professor MacQueen for pointing this out to me. I have otherwise followed Taylor’s translations of the original Latin of *L.S.*, for example in her decision to translate the word *‘latrones’* as thieves; her reasons for doing this are explained in Taylor, *Leges Scocie*, 283 fn. 923.

<sup>5</sup> Consider *A.P.S.* i, 603 (a version of *L.S.* c.1 found in an early-fourteenth century text, the date of which is discussed below); see also Records of the Parliaments of Scotland to 1707, <http://www.rps.ac.uk/>, accessed 16 July 2015 (henceforth *R.P.S.*), 1384/11/7, which seems to have reformed the procedure found in *L.S.* c.1, although, admittedly, it makes no reference to robbery as such. The point made here was certainly true in a much later period; see John Skene, *De Verborum Significatione* (1597) *s.v.* ‘REIF’. Unless otherwise indicated, translations of ordinances such as the 1384 act given here are those found on the *R.P.S.* website.



The existence of a distinction between the trespasses in the minds of thirteenth-century Scots is demonstrated by a statute of 1244, which made it clear that those convicted of the crown plea of robbery (*roborea*) were to forfeit their goods to the crown, whereas those convicted of theft were to forfeit their goods to the feudal lords of the lands where they were seized.<sup>6</sup> In other words, the distinction had direct financial consequences for the Scottish king and the nobility, and therefore it would presumably have been relatively well understood at the time. But what was it? Commenting on the crown pleas generally, Grant states the view that '[r]obbery (as opposed to theft), rape and arson all involved deliberate violence, and so were premeditated breaches of the king's peace'. The suggestion that robbery was theft with violence is plausible, for reasons that will be given shortly; and yet Grant does not develop the point further.<sup>7</sup> Armstrong's treatment is more detailed. Discussing evidence drawn from the late-fifteenth and sixteenth centuries, he notes that Scots of that period distinguished some forms of theft, such as *furtiva surreptio*, which may have been 'purposively secret', from some forms of robbery, such as 'stouthreif', which were particularly overt.<sup>8</sup> Nonetheless, his argument that '[r]apina (robbery, rapine or in Scots as "reif") was theft aggravated by violent force'<sup>9</sup> rests upon the late-sixteenth-century treatment of 'reif' found in Sir John Skene of Curriehill's *De Verborum Significatione* (1597).<sup>10</sup> Skene seems to have been the first Scottish lawyer to define robbery, and he described it as 'the taking of [u]ther mens geare be force and violence', and he described the wrongdoers with the label of '*raptores*'. He continued by stating that robbery was 'different from theft quhilk is committed quietly and privily, without violence'. Skene also noted that robbery was a more serious offence than theft, because it was 'committed baith in the gudes, and in the person of the

<sup>6</sup> *A.P.S.* i, 403; *S.A.* c.2(ii). Furthermore, robbery was classified in this act as a felony, whereas theft was not. It is worth noting that most people date the act to 1245, but based on the extant manuscript evidence Dr Keith Stringer has re-dated it to 1244 in his forthcoming edition of the acts of Alexander II (as explained in Taylor, 'Assizes', 230 fn. 225). I am grateful to Dr Taylor for discussing these points with me.

<sup>7</sup> Alexander Grant, 'Franchises North of the Border: Baronies and Regalities in Medieval Scotland' in Michael Prestwich (ed.), *Liberties and Identities in the Medieval British Isles* (Woodbridge, 2008), 155-199, 156-157. I am grateful to Dr Taylor for discussing this point with me.

<sup>8</sup> Jackson Armstrong, 'The Justice Ayre in the Border Sherifffdoms, 1493-1498', *Scottish Historical Review*, 92 (2013), 1-37, 22-5.

<sup>9</sup> Armstrong, 'Justice Ayre', 24-5.

<sup>10</sup> Skene, *De Verborum Significatione*, s.v. 'REIF'. In *De Verborum Significatione*, Skene attempted to expound the meanings of various terms drawn from medieval Scottish legal texts.

possessour theirof; and theft is of the gudes and geare allenarly'. Immediately after making these comments he did not refer to any Scottish sources, but instead cited Barthélemy de Chasseneuz's commentary on the custom of Burgundy (originally printed in 1517).<sup>11</sup> Chasseneuz's commentary concerning theft (*furtum*) and robbery (*rapina*) in turn drew upon a variety of sources, including the book of Exodus and the works of St Thomas Aquinas, but his thinking, like Skene's, was evidently indebted to the distinctions drawn between *furtum* and *rapina* in Roman law.<sup>12</sup> Briefly, in Roman law *furtum* arose where one individual interfered with a corporeal moveable thing in which another party had an interest, such as ownership.<sup>13</sup> The interference had to be 'against the interested person's will'; furthermore '[o]ne who thought the owner consented [to the interference] was not a thief, nor was one who thought the owner did not consent, when in fact he did'.<sup>14</sup> Different grades of *furtum* were recognised, including *furtum manifestum*, where the thief was caught in the act; such an individual was liable for higher damages than one who was not apprehended at the time of the theft. The most serious type of *furtum* was *rapina*, whereby one individual – referred to in the texts as a *raptor* – used force and violence to seize goods from another.<sup>15</sup>

These Roman distinctions were clearly in operation in early modern Scots law. But were they also used in the medieval period to explain the difference between *furtum*, on the one hand, and *rapina* or *roboria*, on the other? The Scottish usage of the terms *furtum* and *rapina* during the twelfth, thirteenth and fourteenth centuries was clearly derived, however indirectly, from Roman law; and therefore it seems plausible to proceed on the assumption that it was essentially the Roman distinction that was being drawn here.<sup>16</sup> Nonetheless, it must be emphasised that this only provides historians with a working definition

<sup>11</sup> On this work, and the original date of its publication, see J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford and Portland, 2007), 194, 210, 252–3, 278. Skene's reference was to the text found in Barthélemy Chasseneuz (Chasseneus), *Consuetudines Ducatus Burgundiae* (1543), f.38<sup>v</sup>, Rubrica I, s.5 (although which edition of Chasseneuz that Skene used is unclear).

<sup>12</sup> Chasseneuz, *Consuetudines Ducatus Burgundiae*, f.38<sup>v</sup>.

<sup>13</sup> See the discussion in W. W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (3rd edn, rev. Peter Stein, Cambridge, 1963), 576–85; see also *The Institutes of Justinian*, trans. J. B. Moyle (5th edn, Oxford, 1913), IV.1–2.

<sup>14</sup> Buckland, *Text-Book*, 578.

<sup>15</sup> *Ibid.*, 584–5.

<sup>16</sup> I am very grateful to Professor Ford for helping me to formulate this point.

of the wrong as it would have been understood by contemporaries, and it may need to be refined if other evidence comes to light.<sup>17</sup>

Finally, it may be possible to illuminate further the meaning of the term 'robbery' by looking at the crime in its social context in medieval Scotland.<sup>18</sup> In this regard, a large number of the cases involving the violent seizure of moveable goods were probably disputes over animals. So Pollock and Maitland argued that the 'typical medieval chattel' was 'a beast' and also that, in England, '[t]he usage which has differentiated *chattel* from *cattle* is not very ancient'.<sup>19</sup> Scottish historians have also noted that a man's wealth, rank, life-value and status were measured in cattle at this time.<sup>20</sup> Furthermore, Pollock and Maitland show that very few other moveables were within the 'ordinary province of litigation'.<sup>21</sup>

In addition, it seems plausible to suggest that a great deal of litigation in relation to thefts and robberies would have focused on remedying two problems. First, disputes arose over the sale of stolen or robbed goods to a *bona fide* third party in a market-place, either in the countryside or in the burghs.<sup>22</sup> As will be

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<sup>17</sup> In particular, Dr Alice Taylor's work on the medieval laws of Scotland will almost certainly shed further light on this subject. On this, see Taylor, 'Assizes', 199 fn. 7. Furthermore it should be noted that the contemporary meaning of theft is discussed in Alice Taylor, 'Crime without Punishment: Medieval Scottish Law in Comparative Perspective', *Anglo-Norman Studies: Proceedings of the Battle Conference 2012*, 35 (2013), 287-304, 291-292; this in turn draws upon Welsh legal treatises, as discussed in Dafydd Jenkins, 'Crime and Tort and the Three Columns of Law' in T. M. Charles-Edwards and Paul Russell (eds), *Tair Colofn Cyfraith. The Three Columns of Law in Medieval Wales: Homicide, Theft and Fire* (Bangor, 2005), 1-25, 3-12; Taylor's conclusions on the basis of this evidence concerning the nature of theft closely resemble those drawn here. It should be noted that T. David Fergus, *Quoniam Attachamenta* (Stair Society vol. 41, Edinburgh, 1996), 317, shows that a text included in some late medieval manuscripts of *Quoniam* described robbery as a violent wrong.

<sup>18</sup> I am grateful to Professor MacQueen for his suggestion that this might be helpful.

<sup>19</sup> Pollock and Maitland, *History of English Law*, II, 150-1.

<sup>20</sup> See Fiona Watson, 'Landscape and People' in Edward J. Cowan and Lizanne Henderson (eds), *A History of Everyday Life in Medieval Scotland, 1000 to 1600* (Edinburgh, 2011), 25-35, 28-9; Taylor, 'Crime without Punishment', 295-7.

<sup>21</sup> Pollock and Maitland, *History of English Law*, II, 150-1.

<sup>22</sup> In Scotland it would seem that this problem was never addressed through the introduction of a doctrine of market overt, as in England. On the English solution, see J. H. Baker, *An Introduction to English Legal History* (4th edn, Oxford, 2002), 385-386; on the Scottish position, see David L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), para. 10.15, and the sources cited there. See also L.S. c.2 for what probably was a proposed Scottish solution (each sale transaction had to be witnessed by a 'pledge' who would act as its guarantor); I am grateful to Dr Taylor for discussing this with me.

seen below, the law certainly took steps to try to remedy this issue. Secondly, some unlawful poindings might have been classifiable as robberies. A poinding was a form of diligence, whereby a creditor could attach his debtor's goods in order to sell them and so satisfy the debt.<sup>23</sup> This procedure was governed by various rules, and the breach of those rules rendered the poinding 'unlawful'.<sup>24</sup> MacQueen has pointed out that such unlawful poindings could have been violent;<sup>25</sup> and so it is possible that some 'robberies' would in fact have arisen from the wrongful and forcible seizure of goods in order to satisfy some debt.

### Procedures For Dealing With Robbery Before 1300

#### (1) The Accusatorial Procedure Described in the *Leges Scocie*

What legal procedures, if any, were used to remedy robbery? As explained above, from the twelfth century onwards robbery was treated as a plea of the crown, meaning that the king and his justiciars alone had ultimate authority to bring robbers to justice. So in a well-known charter of lands written between 1165 and 1173, William I granted the lands of Annandale to Robert de Brus, but expressly reserved to himself the *causa* of robbery (*rapina*) and also the other crown pleas of murder, premeditated assault, rape, arson and treasure trove.<sup>26</sup> Similarly, an assize of William I, which Taylor has shown can be dated to 14 July 1180, also provided that in the courts of the sheriffs, bishops, abbots, barons and other freeholders four pleas were reserved to the king's business – rape, robbery (*rapina*), arson and murder.<sup>27</sup> Furthermore, on 26 May 1197 the bishops, abbots, earls, barons and thanes of Scotland swore 'that they would not maintain or receive thieves, murderers or [robbers]',<sup>28</sup> on pain of the loss of their jurisdictions.

<sup>23</sup> On poinding, see the discussions in Alan Harding, 'The Medieval Brieves of Protection and the Development of the Common Law', *Juridical Review*, [1966], 115–49, 120–1 (I am grateful to Dr Jackson Armstrong of Aberdeen University for first referring me to this article); Barrow and Scott, *R.R.S.* II, 72; Hector L. MacQueen, *Common Law and Feudal Society* (reprinted edition with new introductions, Edinburgh, 2016), 40, 124–6, 195.

<sup>24</sup> For the rules referred to here, see, for example, Harding, 'Medieval Brieves of Protection', 115, 119, 120–1; *R.P.S.* 1318/10.

<sup>25</sup> MacQueen, *Common Law and Feudal Society*, 40.

<sup>26</sup> Barrow and Scott, *R.R.S.* II, no. 80. Presumably the crime relating to treasure trove was that of fraudulent concealment.

<sup>27</sup> *L.S.* c.7.

<sup>28</sup> *L.S.* c.15. Again, I have chosen to translate '*raptores*' as 'robbers' rather than 'plunderers', which is the word Taylor uses. Barrow suggested that this provision may have been modelled on Hubert Walter's *Edictum Regium* of 1195 (Barrow, *Kingdom*, 89);

These early rules reveal little more about the exact procedures that were used to pursue crown pleas. However, the assize of 1180 is included in a collection of laws known as the *Leges Scocie* (L.S.). Taylor's study demonstrates that much of this collection can be dated to the reign of William I (r.1165-1214), and she argues that those chapters within the text 'which cannot be dated exactly also seem to belong to the twelfth or early thirteenth century'.<sup>29</sup> L.S. c.4 reveals that thieves taken red-handed after being pursued by the 'hue and cry of the neighbourhood' would receive immediate justice, apparently at the hands of the community.<sup>30</sup> But what would happen in cases of theft with violence that did not fall within the ambit of L.S. c.4? L.S. c.1 contains a series of more detailed rules that were to be followed where an individual was accused of stealing or robbing chattels (*de catallo furato uel rapto*) – these were considered briefly above. Exactly how this procedure operated in relation to the crown plea of *rapina* will be discussed below. First it is necessary to reconstruct the rules contained in L.S. c.1.<sup>31</sup>

(a) *The Procedure of L.S. c.1*

The procedure contained in L.S. c.1 commenced with an accusation of robbery or theft. When one individual accused another of stealing or robbing chattels from him ('*de catallo furato uel rapto*'), the disputed goods were to be taken 'to the place in each *comitatus* where King David enacted disputed chattels ought to be brought'.<sup>32</sup> The accused was then entitled to respond to the accusation

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this is discussed in detail in Taylor, '*Leges Scocie*', 212–13.

<sup>29</sup> Taylor, '*Leges Scocie*', 243.

<sup>30</sup> Note here the following points from John W. Cairns, 'Historical Introduction' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2 vols, Oxford, 2000), I, 14–184, 25: 'the majority of infefments for knight service' dating from the reign of William I 'bestowed grants of [...] "infangthief" which conferred upon the recipient rights of "trial and execution of thieves taken on the land either red-handed or in possession of the stolen goods".'

<sup>31</sup> For the date of this enactment, see Taylor, '*Leges Scocie*', 223–6; she comments (at 226) that '[t]he cumulative effect' of the 'contextual evidence' she discusses 'seems to place "*Claremathan*" (or L.S. c.1) firmly in the reign of William the Lion'. Note that the decision to use the term "chattels" here is discussed in footnote 4 above.

<sup>32</sup> Taylor, '*Leges Scocie*', 234–6 discusses the possibility that L.S. c.16 is to be treated as the enactment referred to here (it also appears as c.14 in *S.A.*). She suggests that L.S. c.16 may represent a later, interpolated version of the original act. I am grateful to Dr Taylor for suggesting to me that I should retain the Latin '*comitatus*' in the quotation given rather than translating the word as 'earldom'; the difficulty is that it is not clear that the word is always used in contemporary documentation to describe lands belonging to earldoms.

by summoning a 'warrantor'. Such a response stayed proceedings for various periods of time, depending upon where the warrantor lived. So the accused was given fifteen days to summon his warrantor if he dwelt between the Forth and the Spey, and an additional month if he lived further afield. Various procedural devices existed to compel the warrantor to attend the 'assize' that would oversee the subsequent attempt to determine the truth or falsehood of the accusation of theft or robbery.<sup>33</sup> In particular, the act required that if the warrantor refused to attend and 'vouch for the accused', then the warrantor's lord<sup>34</sup> was to be summoned to stand in the place of the warrantor. If the lord ignored this summons then he was to 'render 100 cows to the lord king', failing which 'his body' was to be 'at the will of the king' and the warrantor was to 'render three times the value of the chattel to the accused'. This award of penal damages in favour of the accused is explicable in light of the next section, which explains what happened where the accused could not produce any warrantor within the appointed time-frame. If the warrantor could not be brought before the assize, then it could still proceed against the accused. He would be bound to 'render the disputed chattel to the challenger through a pledge until the time when he [could] be cleared against his warrantor'. But once the accused was 'cleared' he was to 'have his chattel' and the warrantor was bound to 'render threefold to the challenger on whom the warranty fell'.<sup>35</sup>

Several questions emerge from these provisions that are of relevance here. Who was the warrantor, and what exactly was he supposed to warrant? What precisely happened to an accused individual who could not produce his warrantor? Would the assize presume that he had no warrantor, and proceed to some form of trial to establish his guilt or innocence? The first question can be answered with some certainty by making reference to the internal evidence of *L.S.* c.1. A possible answer to the second and third questions can probably be reconstructed from the provisions of a later act promulgated on 13 October 1230, in the reign of Alexander II. This purported to reform the

<sup>33</sup> On the mysterious role of the Abbot of Glendochart in this process, see now Gilbert Márkus, 'Dewars and relics in Scotland: some clarifications and questions', *The Innes Review*, 60 (2009), 95-144, 129-132, and the scholarly literature cited there.

<sup>34</sup> On lordship – which did not necessarily refer to a relationship of tenurial lordship at this time – see Alice Taylor, 'Homo ligius and unfreedom in medieval Scotland' in Matthew Hammond (ed.), *New Perspectives on Medieval Scotland 1093–1286* (Woodbridge, 2013), 85–116.

<sup>35</sup> *L.S.* c.1.

earlier law concerning accusations of theft and robbery, and in the process outlined elements of the older position.<sup>36</sup>

(b) *The Role of the Warrantor*

As regards the role of the warrantor, evidently the law-makers who promulgated *L.S.* c.1 believed that his testimony could be of relevance for an assize when it sought to establish the guilt or innocence of a man who was accused of stealing or robbing chattels. Such testimony might conceivably have concerned either the good character of the accused, or the manner in which he acquired the disputed goods. The first possibility is problematic for a variety of reasons. First, the warrantor could be called from a part of the kingdom that was very distant from the home of the accused, perhaps making it less likely he would have been able or willing to testify concerning his character. Secondly, the warrantor – and the warrantor's feudal lord – could be compelled to attend the assize at the request of the accused, perhaps pointing to the existence of some pre-existing legal relationship between the parties. Additionally, *L.S.* c.1 made the warrantor who failed to attend court liable to the accuser, perhaps indicating that he might have had a legally enforceable relationship with him too. Again, that undermines any suggestion that his function was simply to testify to the good character of the accused.

This makes it rather more likely that the role of the warrantor was to declare to the assize that the accused had acquired the disputed goods in a lawful manner. What could have qualified him to advance such a claim? One explanation that seems to fit all of the available evidence is that when the accused alleged he had a warrantor, he was alleging that a particular individual had transferred the disputed goods to him, and guaranteed or warranted that his title thereto would not subsequently be disputed.<sup>37</sup> Such an individual would undoubtedly have been useful to the accused in answering a complaint that he had stolen

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<sup>36</sup> *A.P.S.* i, 399–400 (c.5–6).

<sup>37</sup> An alternative possibility is that a warrantor was an individual who witnessed the initial transaction between the accused and the individual who transferred the disputed goods to him. That possibility seems to be ruled out by *L.S.* c.2, which apparently recognises the existence of such an individual, but refers to him as the *plegius* and not the *warrantus*. The *plegius* could be pursued 'when bought goods [were] challenged', which in itself indicates that he would have had some role in robbery and theft cases too; the pledge would have been liable for discharging whatever obligation was found to be due by one who failed to turn up in court. I am grateful to Dr Taylor for discussing the respective roles of the *plegius* and the *warrantus* with me. It is worth noting that *L.S.* c.12 seems to support the reading of the role of the warrantor given here.



or robbed chattels from another. Furthermore, on this reading the warrantor would have had a pre-existent legal relationship with the accused, which would explain why he was obliged to attend the assize. Additionally, if the accused persuaded the assize that he was actually innocent, in spite of his failure to produce any warrantor, and the accuser maintained his accusation that *someone* had stolen or robbed his chattels, then the finger of suspicion would obviously point to the warrantor – the transferor of the allegedly stolen goods – as the possible wrongdoer. That would explain why the warrantor was potentially liable to the accused as well as the accuser. His failure to answer the initial complaint before the assize seems to have been taken as an admission of guilt, resulting in his liability to make threefold restitution to the accuser.

Thus where the text of *L.S.* c.1 stated that a person accused of theft or robbery of chattels could summon a warrantor, it meant that he could summon an individual who had sold or transferred the disputed goods to him. It may be noted that this fits well with the role of the warrantor in near-contemporary English legal texts,<sup>38</sup> and with MacQueen's reconstruction of the content of the obligation of warrandice in relation to twelfth and thirteenth century disputes over feudal property.<sup>39</sup> If a vassal's right to lands was challenged, he was entitled to sue the disponer of the lands to fulfil an obligation of 'warrandice' in respect of those lands. This meant that the disponer was obliged to warrant the grantee's undisturbed possession. If he failed to do this, then he was bound to provide the grantee with 'an exchange of a value to [his] reasonable satisfaction'.<sup>40</sup>

### (c) *Proceedings where No Warrantor Appeared or Was Summoned before 1230*

Clearly the right to summon a warrantor was an important safeguard for those

<sup>38</sup> G. D. G. Hall (ed.), *Tractatus de legibus et consuetudinibus regni Anglie qui Glanvilla vocatur* (London, 1965), III.1–2. See also Baker, *Introduction to English Legal History*, 390; Richard W. Ireland, 'Law in action, law in books: the practicality of medieval theft law', *Continuity and Change*, 17 (2002), 309–31, in particular at 320–1. On the existence of a similar legal system in Wales, see Jenkins, 'Crime and Tort', 7–9.

<sup>39</sup> MacQueen, *Common Law and Feudal Society*, 45–7. See also the discussions of the role of the warrantor in Hector L. MacQueen, 'Scots Law under Alexander III' in Norman H. Reid (ed.), *Scotland in the Reign of Alexander III* (Edinburgh, 1990), 74–102, 88–90; in William Croft Dickinson, *The Sheriff Court Book of Fife* (Scottish History Society, Third Series vol. 12, Edinburgh, 1928), 332–3; and in William Croft Dickinson, *Early Burgh Records of Aberdeen 1317, 1398–1400* (Scottish History Society, Third Series vol. 49, Edinburgh 1957), cxxxviii. I found all of these discussions very helpful when reconstructing the role of the warrantor.

<sup>40</sup> MacQueen, *Common Law and Feudal Society*, 46.



accused of robbery or theft, whereby they could stay proceedings brought against them. But what happened if the warrantor did not respond to the summons? And what happened if no warrantor was summoned in the first place?<sup>41</sup>

*L.S.* c.1 shows that if a warrantor had been summoned and subsequently failed to appear in court, the accused would then be required to surrender the disputed chattels to the accuser 'through a pledge'. But that cannot have been the end of the matter. Thieves faced the death penalty, according to *L.S.* c.9.<sup>42</sup> Furthermore, it seems that *L.S.* c.7, which was promulgated on 14 July 1180,<sup>43</sup> expressed a rule that those convicted of theft and robbery also faced financial penalties. One possible reading of this act is that the king could have exacted such penalties from those guilty of a trespass that was covered by one of the crown pleas, while the local feudal lords would have been entitled to the penalties that were due for other offences, such as theft.<sup>44</sup> This was certainly the case by 1244, as was explained above.<sup>45</sup> So once an accusation of theft

<sup>41</sup> If the accused had managed to produce a warrantor, and the warrantor subsequently acknowledged his duty to warrant the right of the accused to the disputed goods, it seems likely that the warrantor himself would then have faced an accusation of theft or robbery. Of course, he too might have tried to defend himself by summoning a warrantor. This is discussed in more detail below; the fourteenth-century evidence is clearer on the point.

<sup>42</sup> *L.S.* c.9. But see Croft Dickinson, *Sheriff Court Book of Fife*, 336–7, who suggests that a verdict of 'common theft' was necessary for the imposition of the death penalty in a later period. This is defined in William Croft Dickinson, *The Court Book of the Barony of Carmarthen 1523–1542* (Scottish History Society, Third Series vol. 29, Edinburgh 1937), cviii fn. 6, where he argues that "[c]ommon theft" must be taken to mean a thief by common repute, or known to be a thief in cases other than that then coming before the court'.

<sup>43</sup> *L.S.* c.7.

<sup>44</sup> *L.S.* c.7 reads as follows: '[...] in all [...] courts, four pleas are reserved to the king's business pertaining to his crown: that is, rape, [robbery], arson and murder. And if the sheriff does not come when summoned to baronial courts nor does he send another of the king's sergeants, the baron may hold his court lawfully without the king's forfeiture and by lawful witness. On all others who hold pleas, every free man who has a court shall have whatever has fallen there, saving the justice of the lord king'. It seems likely that the reference to those with jurisdiction receiving 'whatever' had 'fallen' in their courts is a reference to a right to uplift penalties for various wrongs. The 'justice of the lord king' was exempted from these general rules, which implies that he had the right to uplift penalties for certain specific wrongs. Given that the act had already explained that the pleas of robbery, murder, arson and rape were reserved to the crown, it seems at least arguable that these were the wrongs in question.

<sup>45</sup> See *S.A.* c.2; *A.P.S.* i, 403 (c.14), as discussed in Hector L. MacQueen, 'Canon Law, Custom and Legislation: Law in the Reign of Alexander II' in Richard Oram (ed.), *The Reign of Alexander II, 1214–49* (Leiden and Boston, 2005), 221–51, 242–3. As will

or robbery had been made, and once the accused had failed to produce his warrantor, it seems quite likely that he would have been subjected to a trial to establish his innocence or guilt.

How might this trial have been conducted? An act promulgated during the assize of October 1230 may hold an answer.<sup>46</sup> Like *L.S.* c.1, this act (*Statuta Regis Alexandri* (*S.A.*) c.6)<sup>47</sup> outlined the procedure to be followed where one man accused another of theft or robbery. It explained that in such cases, the truth of the matter was no longer to be determined ‘*per fossam uel ferrum*’ – that is to say, by ordeal of water or iron. This indicates that before 1230 such modes of proof were acceptable. A second act of 1230 (*S.A.* c.5) reveals that prior to its enactment those who were accused of theft could challenge their accusers to prove their claims by means of a duel; it seems that the same rule applied in cases of robbery.<sup>48</sup> After 1230 the defender’s right to trial by battle was qualified in certain circumstances, as will be explained shortly.

One final point ought to be noted here, concerning the ultimate outcome of the legal process. *S.A.* c.6 declared that an accuser who failed to prove the truth of his allegation of robbery or theft during the course of the trial would be ‘*in misericordia domini Regis uel comitis uel baronis si sit de furto*’.<sup>49</sup> Probably this meant that he would have faced some penalty, which would have been owed to the king if his accusation had been one of robbery, and to the local earl or baron if it had been one of theft.<sup>50</sup> In this regard, it is not clear if *S.A.* c.6

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be apparent from the footnotes, the argument presented here is greatly indebted to Professor MacQueen’s work in this last article.

<sup>46</sup> Concerning this assize, see A. A. M. Duncan, *Scotland: The Making of the Kingdom* (Edinburgh, 1975), 539–41; MacQueen, ‘Canon Law, Custom and Legislation’, 239–41 (and note his defence of the authenticity of the statutes, which is followed here); Taylor, ‘Assizes’, 216–17.

<sup>47</sup> *S.A.* c.6; *A.P.S.* i, 400 (c.6).

<sup>48</sup> *S.A.* c.5; *A.P.S.* i, 399 (c.5). Taylor, *Shape of the State*, at Chapter Five, notes that the *Capitula Assisarum et Statutorum Domini David Regis Scocie* (*C.D.*) c.3, 14 and 33, and also *S.A.* c.11, preserve the right of one accused of theft or robbery to trial by battle. Taylor dates *C.D.* to the early fourteenth century; see Taylor, ‘Assizes’, 216–221. On trial by battle at this time, see also Taylor, ‘Assizes’, 208–209. On the duel in medieval Scotland more generally, see now A. D. M. Forte, “‘A Strange Archaic Provision of Mercy’: The Procedural Rules for the *Duellum* under the Law of *Clann Duib*”, *Edinburgh Law Review*, 14 (2010), 418–50. Neilson also notes that proof by compurgation was possible in some cases – see George Neilson, *Trial by Combat* (Glasgow, 1890), 77–9, 136–8.

<sup>49</sup> *S.A.* c.6; *A.P.S.* i, 400 (c.6).

<sup>50</sup> Certainly by 1244 it was well established that the king had the right to the forfeited goods of robbers, whilst the relevant local lords had the right to the forfeited goods of thieves. See *S.A.* c.2; *A.P.S.* i, 403 (c.14).

was simply clarifying the existing law, or amending it in some way. However, it seems plausible to suggest that the accuser was always expected to provide some sort of security that his accusation was not purely malicious, even before the enactment of *S.A.* c.6. Otherwise *L.S.* c.1 would have enabled litigants to act with impunity in making entirely spurious and untrue allegations of robbery or theft against those in possession of valuable goods, such as herds of cattle. The obvious incentive for making such allegations would have lain in the hope that the accused would not have been able to summon a warrantor, or demonstrate his innocence at trial; the result could have been a large and undeserved windfall for the dishonest litigant. This may serve to explain the rule that an accuser had to take the risk of falling into the king's mercy when accusing another of robbery. Yet if such a rule promised members of the community at large some protection from purely malicious accusations, it may nevertheless have represented a double-edged sword. The legal consequences of failing to sustain an accusation might potentially have discouraged some victims of theft or robbery from making allegations of wrongdoing in the first place, particularly if they thought they might face evidential difficulties in demonstrating the truth of their claim. More will be said about this shortly.

#### (d) *Conclusion*

The procedure outlined in *L.S.* c.1 applied where one person accused another of stealing or robbing his chattels. The accused was entitled to defend himself by summoning his warrantor, if such an individual existed. By summoning a warrantor, he was claiming that he could bring before the court the man who had sold or otherwise transferred the disputed goods to him; proof of this claim would have established his innocence. But if no warrantor was summoned, or if a warrantor failed to appear in court when required, the case would have proceeded against the accused. Reading *L.S.* c.1 and *S.A.* c.5–6 together, it seems plausible to suggest that prior to 1230 such an individual could have faced trial by ordeal of water or iron, or by battle. Furthermore, *S.A.* c.6 states that accusers who failed to prove accusations of robbery at the trial fell into the mercy of the king. It may be that this rule, or something very like it, existed before its recognition in statute in 1230.

As will already be clear from the discussions of *S.A.* c.5–6 above, this procedure was reformed during the reign of Alexander II. At the same time, an exception was created to the normal procedure to be used in cases of theft, and this seems to have facilitated the introduction of a new form of process

in criminal cases, which was known as procedure on dittay. From 1244 there is evidence to show that this procedure could be applied in cases of robbery. All these changes will be considered next. It will be shown that MacQueen is correct to emphasise the significance of canon law in influencing these developments.<sup>51</sup> Arguably, contemporary law-makers turned to this source of legal ideas for inspiration in order to solve certain practical problems in the administration of justice.

## (2) Reform, Innovation and Procedure per Inquisitionem in the Reign of Alexander II

### (a) *Reforming the Existing Law*: S.A. c.5-6 (1230) and S.A. c.2 (1244)

On 13 October 1230, Alexander II and an assembly of his leading clerics and magnates promulgated a series of acts at Stirling.<sup>52</sup> Among other things, the acts aimed to restrict the role of the ordeal in cases of robbery and theft. So S.A. c.6 declared that thereafter trial '*per fossam vel ferrum*' was no longer to be used in these matters.<sup>53</sup> In its place the accused was offered the option of seeking trial by jury ('*uisnet*').<sup>54</sup> Furthermore, he still had the option of insisting on trial by battle – except in the circumstances laid out in S.A. c.5. This act was concerned with clergymen, widows and others who were unable to participate in trial by battle ('*qui non poterunt pugnare*').<sup>55</sup> If they alleged that their goods had been stolen,<sup>56</sup> then they were entitled to approach the local lord of the feu for help.<sup>57</sup> The lord was then required by the statute to summon the sheriff and convene a *visnet* drawn from three baronies to investigate the matter.<sup>58</sup> It was the role of lord and the *visnet* – and not the

<sup>51</sup> MacQueen, 'Canon Law, Custom and Legislation', 239–41.

<sup>52</sup> On the date and place of the acts, see Taylor, *Shape of the State*, Chapter Five; *A.P.S.* i, 399 (c.4).

<sup>53</sup> Note that Taylor argues that it is unclear to what extent S.A. c.6 actually resulted in the abolition of the ordeals *per fossam vel ferrum* in practice. See Taylor, *Shape of the State*, Chapter Five.

<sup>54</sup> S.A. c.6; *A.P.S.* i, 400 (c.6).

<sup>55</sup> S.A. c.5; the text reads slightly differently in *A.P.S.* i, 399 (c.5).

<sup>56</sup> Duncan, *Making of the Kingdom*, 539 claims that here 'it is clear that theft is not meant'; he states that the wrong that the 1230 act was designed to remedy was spoliation. I intend to respond to this argument elsewhere in more detail, but the verb *spoliare* is absent from the act found in *A.P.S.* i, 399 (c.5), in S.A. c.5 and in the version of the text preserved in the early-fourteenth-century Ayr MS. (National Archives of Scotland Ref. PA5/2), f.40<sup>v</sup>–41<sup>r</sup>.

<sup>57</sup> S.A. c.5; *A.P.S.* i, 399 (c.5).

<sup>58</sup> This is much more fully discussed in Taylor, *Shape of the State*, at Chapter Five. Taylor points out that in the king's own demesne lands, the complainant was instructed by

clergyman or widow whose goods had been stolen – to establish who might be accused of the trespass.<sup>59</sup> In other words, the wrongdoer was formally identified for trial not by an accusation made by the victim, as in *L.S.* c.1 and *S.A.* c.6, but rather by the decision of the *visnet*. This may be important; if those who were unable to fight did not *have* to make criminal accusations in order to initiate proceedings in cases of theft, then it follows that they did not have to take the risk associated with making such an accusation under *S.A.* c.6. Specifically, unlike most litigants they did not risk falling into the mercy of the local lord if they failed to prove their claim, because they did not need to make a formal accusation, and because in any event it was the duty of the lord and the *visnet* to indict a man for the trespass and prove his guilt or innocence. A final point to note from the procedure outlined in *S.A.* c.5 is that once the wrongdoer was convicted, the act provided that he was to be punished as the law required.<sup>60</sup>

Thus *S.A.* c.5 created an exception to the apparently ‘normal’ procedure outlined in *L.S.* c.1 and *S.A.* c.6. While this exception only affected cases of theft, as was noted above it seems to have influenced the subsequent emergence of a procedure that could be used to provide redress for robberies. This was

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the statute to make his allegation before the sheriff, who then had responsibility for conducting the inquest.

<sup>59</sup> This, at least, is my reading of the phrase which explains that those who were unable to fight should go ‘*quod si aliquid furatum fuerit a uiris religiosis clericis uiduis prebenderiis uel ab eis qui non poterunt pugnare conquerentes ueniant ad dominum feodi et ipse dominus vocato vicecomite patrie secundum proportionem trium baroniarum partrie die rationabili et sine dilacione statuto diligenter et fideliter per legales homines de uisneto inquirat quis sit ille malefactor. Et si per illam proportionem malefactor ille conuictus fuerit uiris religiosis uiduis uel aliis predictis petentibus et conquerentibus ablata restituantur*’. I have taken this text from *S.A.* c.5, although I suspect that Dr Taylor may interpret the provisions slightly differently than I do. The central question here relates to whether or not widows and clergymen had to make an accusation in order to initiate proceedings in cases of theft, thus risking falling into the mercy of the local lord as provided in *S.A.* c.6. But it seems to me from *S.A.* c.5 that widows and clergymen were not required to make any allegations about who had stolen the goods from them prior to making their complaint before the lord. If this is correct, then it would rule out the possibility that these groups were *required* to make an accusation against a specific individual in order to use *S.A.* c.5. All that the act says is that if something were to have been stolen from widows or clergymen, then they should bring their complaint before the lord of the feu (*‘quod si aliquid furatum fuerit a uiris religiosis clericis uiduis prebenderiis uel ab eis qui non poterunt pugnare conquerentes ueniant ad dominum feod’*).

<sup>60</sup> That the *visnet* had the duty both to investigate the wrong and to determine the guilt of the accused is argued in Ian D. Willock, *The Origins and Development of the Jury in Scotland* (Stair Society vol. 23, Edinburgh, 1966), 24–5; but see now Taylor, *Shape of the State*, at Chapter Five.

known as procedure on dittay, and it was established by an act of a later law-making assembly of 1244 (*S.A.* c.2). Arguably, it is helpful to consider this statute together with *S.A.* c.5-6 prior to any attempt to explain why Alexander II and his counsellors chose to reform the procedures that dealt with robbery as they did.

*S.A.* c.2<sup>61</sup> provided that the justiciar of Lothian should make a diligent and secret enquiry '*diligentum et priuatum inquisitionem faciat*' – concerning evil-doers and their reseters – '*de malefactoribus terre et eorum receptatoribus*'. The act declared that the oaths of good and faithful men ('*sacramenta bonorum et fidelium hominum*'), together with those of the local stewards of the towns, were to be relied upon so as to identify those who were thought to have committed some crime. The men of the local town and the king's servants were then to attach the accused individuals, so as to ensure that they would answer the challenge of an assize. Those convicted by a 'faithful jury' ('*per fidele uisnetum*') of wrongs that were pursued through the pleas of the crown – specifically '*de murthra siue roboria uel de consimilibus felonis ad coronam domini Regis pertinentibus*' – were to forfeit their goods to the monarch. The goods of those convicted '*de furto uel homicidio seu de consimilibus*' were to remain with the lord of the land where those goods were found. This procedure came to be known as procedure on 'dittay'.<sup>62</sup> It was evidently more sophisticated than *S.A.* c.5, but like that act it relied heavily on an inquisitorial approach in order to establish guilt and innocence. While at first procedure on dittay was used in Lothian, it was subsequently relied upon in other parts of the kingdom; Barrow traced an example of its application in Aberdeenshire in 1266.<sup>63</sup>

It may be helpful to summarise the conclusions drawn here concerning the differences between the procedure outlined in *L.S.* c.1 and *S.A.* c.6, on the one hand, and the procedures contained in *S.A.* c.5 and *S.A.* c.2, on the other. *L.S.* c.1 and *S.A.* c.6 assumed that criminal proceedings in cases of robbery and theft would commence with an accusation made by the victim, or by one with an interest in the recovery of the disputed goods. In response to such an allegation, the accused could demand trial by battle or trial by *visnet*, but the ordeal was otherwise restricted from 1230 onwards. If he failed to sustain his accusation, the accuser risked falling into the mercy of the king or the local lord. But it was argued above that, under *S.A.* c.5, certain classes of litigants

<sup>61</sup> *S.A.* c.2; *A.P.S.* i, 403 (c.14). On the authenticity of this statute, see MacQueen, 'Canon law, Custom and Legislation', 239–40; Taylor, 'Assizes of David I', 230–1.

<sup>62</sup> Barrow, *Kingdom*, 90.

<sup>63</sup> *Ibid.*.

– those who were unable to fight – were exempted from the duty to make criminal accusations *of theft*, and so from the danger of falling into the mercy of the relevant local lord. Now it was the duty of the lord to investigate a theft in response to the complaints of these litigants; he and the *visnet* had the duty to identify and try possible wrongdoers. In 1244 this more ‘inquisitorial’ approach was developed and extended further. A royal judge could now act on the oaths of ‘good and faithful men’ and the local stewards of the towns to identify, attach and try with the *visnet* those who were widely believed to be guilty of theft, robbery or other crimes. In contrast with the position outlined in *S.A.* c.6, no accuser had to take the risk of falling into the king’s mercy before a man could be tried for robbery. *S.A.* c.2 omitted that particular procedural protection for those who were accused of the trespass.

All this does not mean to say that the procedure found in *L.S.* c.1 was superseded by that contained in *S.A.* c.2; it will be shown below that this was probably not, in fact, the case. Arguably the procedure on ditty introduced in 1244 operated alongside that contained in *L.S.* c.1 and *S.A.* c.6, and continued to do so for some time.

(b) *Changes Caused by Practical Problems in the Administration of Justice?*

What motivated these reforms of the procedures that dealt with robbery? The key to answering this question lies in explaining the restriction of the role of the ordeal from 1230 onwards. MacQueen has shown that this was directly linked with developments in near-contemporary canon law.<sup>64</sup> Earlier in the century, Pope Innocent III had summoned the Fourth Lateran Council, and in 1215 it had forbidden clergymen to participate in ordeals, whether by water, iron, battle or anything else. The withdrawal of clerical support for this form of proof weakened its authority as a mechanism for determining God’s judgements in secular courts. The Scottish Bishop Malveisin of St Andrews had been at the Fourth Lateran Council, and was also present at the assize of 1230; MacQueen argued that this may explain the restriction of the ordeal in *S.A.* c.5–6.<sup>65</sup>

<sup>64</sup> See MacQueen, ‘Canon Law, Custom and Legislation’, 239–41.

<sup>65</sup> *Ibid.*; in the course of his discussion MacQueen cites Willock, *Origins and Development of the Jury*, 23–8 and Neilson, *Trial by Combat* (Neilson’s discussions at 75–146 and 207–59 are particularly relevant here). At 13–14, Neilson states that the clergy did not generally fight in person, but through a champion. But note his suggestion (at 114–16 and 134) that this was not possible in relation to accusations of crimes such as robbery prior to 1230. This is discussed further in MacQueen, *Common Law and Feudal Society*, 198. On the presence of Malveisin at the assize of 1230 see also Taylor, *Shape*



While this argument is convincing, the role of canon law in shaping *S.A.* c.5-6 and *S.A.* c.2 may have been greater still. MacQueen has argued that *S.A.* c.2 may have been influenced by a new form of canonical procedure known as procedure *per inquisitionem*, which was designed to deal with 'secret' or occult crimes, such as clerical concubinage, which were difficult to prove.<sup>66</sup> Procedure *per inquisitionem* made it possible for a man to be accused of such wrongs on the basis that his guilt was widely suspected within his community. Given that it adopted a similar form of process for the prosecution of crimes, perhaps *S.A.* c.2 was influenced by the new canonist rules. But in order to explore this further, it is necessary first to outline in more detail various developments in near-contemporary canon law, and to explain how these gave rise to procedure *per inquisitionem*.

Prior to the 1190s, the *ordo iudiciarius*, or normal procedure employed by the canon law, required that criminal charges should be brought publicly against a wrongdoer by an accuser. As Brundage puts it, '[p]roof of an accusation [...] required the accuser to bring forward testimony from two credible persons who were prepared to testify under oath that they had personally witnessed the events or the behaviour complained of'. Of course, these standards of proof were very high, as were the risks inherent in making a criminal accusation. An accuser who failed to prove his accusation 'became liable to punishment himself'.<sup>67</sup>

Taken together, these factors meant that it was very risky in canon law to allege that secret or 'occult' crimes had occurred, including, in particular, clerical concubinage. In response, Innocent III developed procedure *per inquisitionem* from 1199, which allowed a judge to proceed without any individual coming forward to accuse another of wrongdoing. The judge could initiate proceedings on the basis that it was widely believed within a community that one of its members might be guilty of some trespass. However, once he had reached the conclusion that ill-fame or *mala fama* existed, the accused had to be cited to attend court, and enjoyed the protections of the normal *ordo iudiciarius* – at least according to the medieval canonist Durandus.<sup>68</sup> It is worth

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*of the State*, at Chapter Five. On the canonical prohibition of the ordeal, see also James Brundage, *Medieval Canon Law* (London and New York, 1995), 140–2.

<sup>66</sup> MacQueen, 'Canon Law, Custom and Legislation', 242–3.

<sup>67</sup> Brundage, *Canon Law*, 93; see also 142–4.

<sup>68</sup> *Ibid.*, 148–50; for the point that *mala fama* gave rise to a suspicion of guilt that could then be investigated through procedure *per inquisitionem*, see Richard M. Fraher, 'Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence' in James Ross Sweeney and Stanley Chodorow (eds), *Popes, Teachers, and*



noting here that, in canon law, this departure from the traditional rules of the *ordo iudiciarius* was defended by many canonists by making reference to another decretal of Innocent III, the decretal *Ut fame* of 1203.<sup>69</sup> In *Ut fame*, Innocent III famously declared that ‘*publicae utilitatis intersit, ne crimina remaneant impunita*’ – meaning that ‘[i]n the interest of public utility, crimes ought not to remain unpunished’.<sup>70</sup> So the canonist Hostiensis argued that the public interest in ensuring that crimes ought not to remain unpunished justified the conferral of powers upon the judge to investigate criminal matters without a public accusation being made by any one individual.<sup>71</sup>

There are parallels between these reforms of canon law and the development of the inquisitorial procedures found in *S.A.* c.5 and *S.A.* c.2 alongside the older, more ‘accusatorial’ procedures of *L.S.* c.1 and *S.A.* c.2. It would surely have been very easy for a Scottish canonist who was active in the reign of Alexander II to conceptualise the procedure laid down in William I’s time as ‘accusatorial’, like that found in the *ordo iudiciarius*, and to suggest that it should be supplemented with a variant of procedure *per inquisitionem* in certain circumstances. But if these developments in canon law did indeed help to inspire the Scottish reforms, one might expect the newer procedure to be used specifically to deal with a ‘secret’ crime, or secret crimes. Furthermore, one might expect that it would overcome the limitations of the ‘accusatorial’ procedure of *S.A.* c.6, which required a litigant to risk facing a penalty if he failed to prove his claim. So did *S.A.* c.5 or *S.A.* c.2 reflect these particular concerns?

Arguably *S.A.* c.5 did. It dealt with a ‘secret’ crime, in this instance theft; it was committed ‘privily’, to use the term employed by Skene in his early-modern discussion of the legal history.<sup>72</sup> In addition, it relieved certain litigants of the burden of making criminal accusations, and taking the risk of falling into the mercy of the relevant feudal lord. But why were clergymen, widows and those who were unable to fight singled out to receive this protection?

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*Canon Law in the Middle Ages* (Ithaca and London, 1989), 212–33, 224–5 and 225 fn. 49.

<sup>69</sup> Richard M. Fraher, ‘The Theoretical Justification for the new Criminal Law of the High Middle Ages: “Rei Publicae Intersit, Ne Criminia Remaneat Impunita”’, *University of Illinois Law Review*, [1984], 577–595. *Ut fame* can be found in X.5.39.35; I have made reference to Aemilius Freidberg (ed.), *Corpus Iuris Canonici* (2 vols, 1878–1881).

<sup>70</sup> Fraher, ‘Theoretical Justification’, 578–9.

<sup>71</sup> *Ibid.*, 581–2.

<sup>72</sup> Skene, *De Verborum Significatione*, s.v. ‘REIF’; see also Taylor, *Shape of the State*, at Chapter Five; Taylor, ‘Crime without Punishment’, 291–2 (this treatment is convincing, and in 292 Taylor grounds her argument in the Scottish sources).

In order to answer this question, it may be helpful to pause to consider why these groups were deemed 'unable to fight' in the first place. The clergy were undoubtedly exempted from the duel in response to the rules laid down by the Fourth Lateran Council. But this does not explain why widows also enjoyed this privilege; surely they might simply have been permitted to appoint champions to represent them.<sup>73</sup> A more complete explanation for the exemption of clergymen *and* widows from the duel can be found in the king's general duty to extend his protection to particularly vulnerable groups within contemporary Scottish society.<sup>74</sup> The recognition of the need to exempt the clergy from the duel may have prompted further questions about how appropriate it was to require other vulnerable groups within the kingdom to participate in this type of ordeal. Furthermore, the king's duty to extend his protection to these groups may also explain why he chose to give them the special privilege mentioned above when they sought the return of their stolen goods. Their vulnerability might have rendered them less willing to make an accusation of theft, and so to risk falling into the mercy of their local lord if they failed to prove it. Thus Alexander II declared not only that they were relieved of the burden of making such accusations. He also conferred the duty of identifying and pursuing the wrongdoers on the local lords, who in this way became instruments of the king's protection.<sup>75</sup>

Thus it is argued that the way in which the 'accusatorial' procedure of *L.S.* c.1 and *S.A.* c.6 was developed alongside a more inquisitorial form of process in *S.A.* c.5 paralleled the way in which the *ordo iudiciarius* of the canon law was supplemented by procedure *per inquisitionem*. The parallel is close enough to imply that the Scottish statutes were directly influenced by canonist thought. It seems that at least one member of the assembly at Stirling in 1230 – possibly Bishop Malveisin – consciously had in mind the example of procedure *per inquisitionem* when promoting the promulgation of *S.A.* c.5.

<sup>73</sup> Neilson, *Trial by Combat*, 13-14 notes the practice of appointing champions to represent the clergy in trials by battle. He also notes (at 114-16 and 134) that champions may not have been permitted to represent those accused of various crimes, including robbery, prior to 1230.

<sup>74</sup> I am grateful to Professor MacQueen for pointing this out to me; it is briefly discussed in A. M. Godfrey, *Civil Justice in Renaissance Scotland* (Leiden and Boston, 2009), 45, citing Hector L. MacQueen, 'Pleadable Brieves and Jurisdiction in Heritage in Later Medieval Scotland' (Ph.D thesis, University of Edinburgh, 1985), 258. On this, see MacQueen, *Common Law and Feudal Society*, 220 (citing evidence that is admittedly from a later period than that under consideration here).

<sup>75</sup> Again, I am grateful to Professor MacQueen for helping me to formulate this point.

Arguably the development of this more inquisitorial approach to the prosecution of crime also facilitated the promulgation of *S.A.* c.2 twelve years later. It developed the idea found in *S.A.* c.5 that crime should be dealt with effectively by the power of the king and his lords acting together even where no victim was willing or able to take the risks involved in coming forward with a formal accusation of wrongdoing.<sup>76</sup> It extended that idea to facilitate the prosecution of crimes other than theft, such as robbery. This was entirely consistent with the underlying rationale of procedure *per inquisitionem* found in *Ut fame*, which was that crimes ‘should not remain unpunished’ even where no-one was accused of a trespass under the strict rules of the *ordo iudiciarius*. Additionally, like procedure *per inquisitionem*, *S.A.* c.2 promoted the investigation of robbery and other crimes by a judge acting on the basis of beliefs that were widely held within the community at large. Furthermore, MacQueen has suggested that another parallel between *S.A.* c.2 and procedure *per inquisitionem* arises from the fact that *S.A.* c.2 was also concerned with ‘secret’ crimes.<sup>77</sup> Undoubtedly it did seek to outline the punishments for theft, and also robbery, both of which *could* be committed secretly. Murder was also dealt with under *S.A.* c.2; how contemporaries would have defined this crime cannot be established with certainty, but it seems that it covered killings perpetrated in secret and also possibly other particularly outrageous and dishonourable killings. But the procedure referred to in *S.A.* c.2 could also be used in the prosecution of homicide; and it, unlike murder, was probably simply thought of as an ‘open’, public killing of one person by another.<sup>78</sup> This may undermine the idea that *S.A.* c.2 was promulgated simply to deal with secret crimes.<sup>79</sup> Nonetheless, on the basis of the other arguments advanced above, it seems

<sup>76</sup> On the co-operation of the king and his lords as revealed in the acts of 1230, see Taylor, ‘Crime without Punishment’, 300.

<sup>77</sup> MacQueen, ‘Canon Law, Custom and Legislation’, 242–3.

<sup>78</sup> On the definitions of murder and homicide at this time, see W. David H. Sellar, ‘Forthocht Felony, Malice Aforethought and the Classification of Homicide’ in W. M. Gordon and T. D. Fergus (eds), *Legal History in the Making. Proceedings of the Ninth British Legal History Conference Glasgow 1989* (London and Rio Grande, 1991), 43–59, 48 (who suggests that the ‘original meaning’ of the word murder was ‘secret killing’). But see also Alexander Grant, ‘Murder will Out: Kingship, Kinship and Killing in Medieval Scotland’ in Steve Boardman and Julian Goodare (eds), *Kings, Lords and Men in Scotland and Britain, 1300–1625* (Edinburgh, 2014), 193–226. Grant suggests (at 223, fn. 180) that murder should be viewed as ‘an outrageous, essentially unpardonable crime – of which secret killing was the typical example’. More will be said about this below.

<sup>79</sup> However, note that twelfth-century canonists promoted the punishment of homicide simply on the grounds of its enormity as an offence; see Richard M. Fraher, ‘Preventing Crime in the High Middle Ages’, 218–19.

highly likely that *S.A.* c.2 was strongly influenced by canonist procedure *per inquisitionem*. While Malveisin was dead by 1244, his successor as Bishop of St Andrews, David Bernham, was present at the assembly that promulgated the statute concerning procedure on dittay.<sup>80</sup> Bernham had been a member of Malveisin's household between 1225 and 1233, and so would surely have been aware of any involvement his master had had in the promulgation of the statutes of 1230.<sup>81</sup> Moreover, Bernham had studied at a university, and is thought to have been trained in the law at some point, because he acted as judge subdelegate for Holyrood Abbey in ca.1230.<sup>82</sup> Perhaps he would have had the legal learning required to shape *S.A.* c.2 in light of the canonist influences detected above.

Thus it is argued here that the canonist framework of 'accusatorial' and 'inquisitorial' procedures influenced the law-makers who promulgated *S.A.* c.5–6 and *S.A.* c.2. And yet English law may also have played a part in shaping the new procedure that was designed to deal with robbery and other crimes. The late-twelfth century English legal text *Glanvill* also recognised a basic distinction between criminal proceedings that were initiated by 'a specific accuser [*certus accusator*]' on the one hand, and proceedings initiated on the basis of ill-fame, on the other. The latter were to be investigated '*per multas et varias inquisitiones et interrogationes coram iusticiis*'.<sup>83</sup> Furthermore, some historians<sup>84</sup> have suggested that a possible source of inspiration for the terms of either *S.A.* c.5 or *S.A.* c.2 may have been the English Assizes of Clarendon of 1166.<sup>85</sup> This also included a procedure whereby the oaths of good and faithful men, together with those of the local stewards of the towns, would be relied

<sup>80</sup> See *A.P.S.* i, 403 (c.14) as discussed in MacQueen, 'Canon law, Custom and Legislation', 239–40.

<sup>81</sup> On Bernham, see Marinell Ash, 'David Bernham, Bishop of St Andrews, 1239–1253', *Innes Review*, 25 (1974), 3–14; see also D. E. R. Watt, *A Biographical Dictionary of Scottish Graduates to A.D. 1410* (Oxford, 1977), 41–4.

<sup>82</sup> See Ash, 'Bernham', 4; Watt, *Biographical Dictionary*, 41.

<sup>83</sup> Hall (ed.), *Glanvill*, XIV.1; the translator renders this passage 'by many and varied inquests and interrogations before the justices'. For the date of *Glanvill*, see Hall's introduction to the text at xxx–xxx; Hall suggests a date between 1187 and 1189. On the distinction between procedure on 'appeal' and by 'indictment' in medieval English law, see Baker, *Introduction to English Legal History*, 503–6.

<sup>84</sup> On *S.A.* c.5, see Willock, *Origins and Development of the Jury*, 30. Neilson, *Trial by Combat*, 82, notices the difference between the English and the Scottish provisions, albeit that he suggests the latter were enacted earlier than is suggested here. As regards the influence of English law on *S.A.* c.2, see also Barrow, *Kingdom*, 90; MacQueen, 'Canon Law, Custom and Legislation', 242.

<sup>85</sup> On this, see Baker, *Introduction to English Legal History*, 505–506.

upon to indict a particular individual for a trespass.<sup>86</sup> Certainly in these regards *S.A.* c.2 and the Assizes look very similar. However, the parallel is not exact; the Assizes also specified that ‘*iiii. legatiores homines de qualibet villa*’ were to investigate whether trespasses had taken place, alongside ‘*xii legatiores homines de hundredo*’. But the reference to ‘*xii. legatiores homines*’ is absent in the Scottish act. Furthermore, Taylor’s draft edition of *S.A.* demonstrates that late Scottish manuscripts of the text did indicate that the oaths of ‘*trium vel quatuor*’ faithful men of the locality were required to indict an individual for a trespass. Yet this phrase is not attested in the earliest witnesses.<sup>87</sup> In the case of *S.A.* c.5, the parallel between the Assizes and Taylor’s reconstructed text of the act is even less exact.<sup>88</sup> Thus if the Assizes did influence the provisions of *S.A.* c.2 – as seems plausible – their terms were adapted to meet Scottish needs and circumstances; and it would appear that in this case canon law was the more significant source of inspiration for development.<sup>89</sup>

(c) *Another Possible Explanation for the Introduction of the 1244 Act*

The arguments advanced above indicate that the developments of 1244 might be explained, at least in part, simply with reference to the practical problems in the administration of justice that arose from the existing law relating to robbery. Specifically, in order to ensure that crimes would not remain unpunished, it may have been necessary to develop a procedure whereby no one had to take the risks associated with making a formal accusation of criminal wrongdoing, as outlined in *S.A.* c.6. Nonetheless, more political factors may also have helped to trigger the decision to reform the law in some way at this point in time. Notably, the killing of Patrick of Atholl in 1242, and the subsequent raiding, robberies and feuding that that event unleashed within the kingdom,

<sup>86</sup> See the edition of the text by Nicholas Vincent available at <http://www.earlyenglishlaws.ac.uk/laws/texts/ass-clar/view/#edition,/apparatus>, accessed 16 July 2015.

<sup>87</sup> *S.A.* c.2.

<sup>88</sup> *S.A.* c.5 differs markedly from *A.P.S.* i, c.5, which looks as if it is indebted to the Assizes of Clarendon because it includes a reference to a role for ‘*quatuor fideles homines de villa*’ in investigating crimes. But this is absent in Taylor’s version of the text.

<sup>89</sup> It is also possible that *L.S.* c.17 was an influence; it permitted conviction on the grounds of ill-fame where the accused could not find a pledge. However, that procedure did not depend upon an investigation led by royal officers; accusers still had to come forward to denounce the accused before proceedings could begin. See also *L.S.* c.3, which contains a similar procedure. Croft Dickinson also suggests that one could have been punished for theft *partly* on the basis of ill-fame; see Croft Dickinson, *Barony Court Book of Carnwarth*, cviii fn. 6.

may form what MacQueen calls 'part of the background' to the statute of 1244.<sup>90</sup> And yet equally significant is the point that the *nature* of the changes adopted in response to such problems can be largely explained by making reference to near-contemporary trends in either canonist or English legal thought. As MacQueen implies in his article on the subject, when thirteenth-century law-makers detected problems within the legal system, they seem to have analysed and resolved them in part through reliance on ideas drawn from these other legal systems.<sup>91</sup>

#### (d) *Conclusions*

It may be concluded that the 1244 act represented an important development in the Scots common law relating to robbery, and indeed crimes more generally. Now it was the case that if a man was widely reputed within his community to be guilty of the trespass, then he could be forced to undergo trial by a *visnet*. No one individual had to take the risk of accusing him publicly of the wrong in order to initiate proceedings against him.<sup>92</sup> It should also be noted that it is not clear that the accused could summon a warrantor in such proceedings in order to demonstrate his innocence.

Yet it is argued here that the new procedure on dittay did not altogether supersede the older 'accusatorial' procedure found in *L.S.* c.1. As will be explained shortly, that procedure was reproduced in several fourteenth-century texts, and it would seem to have remained applicable in cases of both theft and robbery. Indeed, there is evidence that seems to reveal it was applied in practice, at least in cases of theft. There are several reasons why both procedures might have continued to operate side by side, even though the accusatorial procedure presented greater risks for litigants. First, the procedure introduced in 1244 required the exercise of jurisdiction by the justiciar, whose ayres would appear in a locality only twice a year at best.<sup>93</sup> But there is no real reason to believe that

<sup>90</sup> MacQueen, 'Canon Law, Custom and Legislation', 241. On the death of Patrick of Atholl, see Richard Oram, *Alexander II, King of Scots 1214–1249* (Edinburgh, 2012), 158–74; Michael Brown, *The Wars of Scotland 1214–1371* (The New Edinburgh History of Scotland vol. 4, Edinburgh, 2004), 39–41.

<sup>91</sup> MacQueen, 'Canon Law, Custom and Legislation'.

<sup>92</sup> This also meant that no-one had to take the (considerable) risk that the defender would insist on trial by battle. I am grateful to Professor MacQueen for pointing this out to me.

<sup>93</sup> MacQueen, *Common Law and Feudal Society*, 59–60; see too, in this regard, David Carpenter, 'Scottish Royal Government in the Thirteenth Century from an English Perspective' in Matthew Hammond (ed.), *New Perspectives on Medieval Scotland* (Woodbridge, 2013), 117–159, 133–8.

the procedure outlined in *L.S.* c.1 required the intervention of the justiciar until such times as the initial question of whether or not the accused had a warrantor had been settled.<sup>94</sup> That would have determined whether or not the disputed chattels were to go to the accuser, albeit through a 'pledge'. It would also have established who exactly was to undergo trial for robbery or theft. Furthermore, there is also no indication that the procedure outlined in 1244 furnished the victim of the wrong with any redress. Rather, the goods of the convicted wrongdoer were simply to be forfeited to the crown. This is perhaps quite easily explicable. If no one was prepared to come forward and publicly accuse a wrongdoer of a particular wrong, as required under *L.S.* c.1, then it would have been difficult to identify any particular claimant with rights to recover goods found in the possession of the trespasser. It may be the case that those who wished to recover goods robbed or stolen from them still had to rely upon the procedure outlined in *L.S.* c.1, unless they were protected by *S.A.* c.5.<sup>95</sup>

(e) *An Objection to the Conclusions Presented*

Nonetheless, it might be argued that one piece of evidence challenges the conclusion that accusatorial procedure continued to be available in cases of robbery after 1244. Having outlined the inquisitorial procedure to be adopted in the cases discussed above, *S.A.* c.2 then provided that those accused of 'felonies' were no longer to be attached, or compelled to attend a trial, by the king's 'servants' acting on the accusation of only one man.<sup>96</sup> Rather, the king's servants could only attach a man for a felony if he had been identified as a possible wrongdoer through the new inquisitorial procedure.<sup>97</sup> *S.A.* c.2 itself declared that robbery was a felony. It follows that after 1244 the king's

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<sup>94</sup> Even then, it is not clear when the justiciar would have become involved in the earlier period; *L.S.* c.15 (dated to 1197, as discussed above) makes it clear that lords had responsibilities in bringing robbers to justice. Also note here the point made in Cairns, 'Historical Introduction', 25, that 'during the reign of William I, the majority of infestments for knight service bestowed grants of [...] "team"' and that "'team" concerned warranty of sales, especially cattle, and [the right] to determine disputes arising out of that warranty'.

<sup>95</sup> Similarly, the English procedure by appeal continued to be used as a mechanism whereby the victim of a crime could secure compensation (or restitution in cases of theft) even after procedure by indictment became commonplace. See Baker, *Introduction to English Legal History*, 504.

<sup>96</sup> The technical meaning of the word 'attachment' is discussed in Fergus (ed.), *Quoniam Attachiamenta*, c.1.

<sup>97</sup> Cairns, 'Historical Introduction', 22.



servants were unable to attach a man for robbery simply on the accusation of another. So did this provision have the potential to undermine the ability of litigants to use the ‘accusatorial’ procedure discussed above in such cases? This conclusion might be thought to follow if it were to be assumed that the king’s servants were required to attach a man in order for the accusatorial procedure outlined in *L.S.* c.1 to function at all. Yet such an assumption is not supported by the fourteenth-century evidence discussed below, which indicates that accusatorial procedure continued to operate in cases of robbery. Furthermore, *L.S.* c.1 itself did not require the king’s ‘servants’ to attach a man in order to initiate proceedings. Proceedings under that law were initiated by what later medieval Scots termed the ‘attachment’ of the disputed *goods*, rather than the accused individual.<sup>98</sup> Admittedly, *L.S.* c.1 did give some roles to the king’s ‘servants’, and also to a distinct group of officers referred to as the sheriff’s ‘servants’.<sup>99</sup> In certain specific geographical regions of the kingdom they were required to *uphold* the rights of one accused of robbery, and to compel the lord of the accused’s warrantor to defend the accused if necessary. Yet it still seems to be the case that no such officers were required to attach *the accused* in order for the proceedings outlined in *L.S.* c.1 to commence.

So what was the purpose of the provision in *S.A.* c.2 under discussion here, and how did it affect the broader law concerning robbery? On closer inspection, it seems likely that it was designed to prevent abuse of authority exercised by the king’s ‘servants’ or ‘sergeants’.<sup>100</sup> While the precise functions of these officers are not clear, in Galloway the ‘sergeants’ of local lords had the power to accuse men of crimes, and such an accusation seems to have given rise to a presumption of guilt.<sup>101</sup> Seen in this light, the effect of *S.A.* c.2 may simply have been to prevent the king’s ‘servants’ from acting in this way in cases of felony, and so robbery – at least on the evidence of one man alone. But this would surely have left open the possibility that individual victims of robbery could still utilise the older ‘accusatorial’ procedure, at least in order to

<sup>98</sup> For this use of the word ‘attachment’, see Fergus, (ed.), *Quoniam Attachiamenta*, c.1 and c.8.

<sup>99</sup> Note that W. Croft Dickinson, ‘The *Toschederach*’, *Juridical Review*, [1941], 85–111, 94, draws out the distinction between the king’s ‘servants’ and those of the sheriff in the law referred to here as *L.S.* c.1.

<sup>100</sup> For this point, see Croft Dickinson, ‘The *Toschederach*’, 92–94; W. Croft Dickinson, ‘Surdit de Sergeant’, 170–5, 170–1; Hector L. MacQueen, ‘The Laws of Galloway. A Preliminary Survey’ in Richard D. Oram and Geoffrey P. Stell (eds), *Galloway: Land and Lordship* (Edinburgh, 1991), 131–43, 134–5.

<sup>101</sup> See Croft Dickinson, ‘Surdit de Sergeant’, 170–1; MacQueen, ‘Laws of Galloway’, 133.



recover the goods robbed from them.<sup>102</sup> In so doing most of them would, of course, have taken the risks implicit in *S.A.* c.6.

Of course, this argument is not without its problems, because it depends in part upon evidence drawn from Galloway, which had laws that differed from those applied elsewhere in the Scottish kingdom at this time.<sup>103</sup> Further research into the functions of those described as the king's 'servants' will be required before these matters can be dealt with definitively. Yet there seems to be no reason to think that any such research would undermine the argument that accusatorial procedure continued to be used in cases of robbery after 1244.

### Procedures For Dealing With Robbery In The Early 1300s

While the 'accusatorial' procedure found in *L.S.* c.1 continued to be used during the 1300s, it seems to have been modified so as to gain wider application during the late fourteenth century. At the same time, the more inquisitorial forms of process developed during the reign of Alexander II underwent some changes. Additionally, new procedures were introduced that were broad enough in scope to provide new types of remedies for robberies. Each of these points will be considered here in turn.

#### (1) The *L.S.* c.1 Procedure in *Regiam* and *Quoniam*

The procedure found in *L.S.* c.1 can be traced in *Regiam Majestatem* (*R.M.*);<sup>104</sup> a form of the same process, with possibly significant variants, is also contained in *Quoniam Attachiamenta* (*Q.A.*).<sup>105</sup> As is well known, *R.M.* was composed during the fourteenth century, and probably during the reign of Robert I (r.1306-1329); it is largely based on the late-twelfth-century English text

<sup>102</sup> It is worth noting that the argument that the accusatorial procedure could still be used to deal with cases of robbery after 1244 resembles the view adopted in MacQueen, 'Laws of Galloway', 134. There it is stated that 'Outwith Galloway from the mid-thirteenth century onwards, criminal actions were increasingly made only on private appeals or by presentment and indictment by a jury'. Yet MacQueen's discussion does not mention robbery as such.

<sup>103</sup> MacQueen, 'Laws of Galloway'.

<sup>104</sup> I have consulted both the version of *Regiam* found at *A.P.S.* i, 597 and also that found in Cooper (ed.), *Regiam Majestatem*; references to *Regiam* in the text of this article employ the *A.P.S.* system of numbering.

<sup>105</sup> See Fergus (ed.), *Quoniam Attachiamenta*.

*Glanvill* and some native Scottish assizes.<sup>106</sup> *R.M. I.15*<sup>107</sup> incorporates a text that is substantially the same as *L.S. c.1*, although it examines the rules laid down there within the context of broader feudal disputes. *R.M. I.5-14* had already explained the procedure to be followed in a court where only the pursuer and the defender had to be present. Following the structure of *Glanvill*,<sup>108</sup> the author of *R.M.* then stated his intention to explore the procedure to be followed where the presence of a third party, such as a warrantor, was required. *R.M. I.15* subsequently digressed from its treatment of how to summon warrantors in feudal cases, and examined how this was to be done in disputes concerning chattels. It is worth emphasising that *R.M. I.15*, like *L.S. c.1*, expressly declared that it applied in cases of theft *and* robbery.<sup>109</sup>

In the printed editions of the text that are currently available,<sup>110</sup> *R.M. I.15* departed from *L.S. c.1* in only one way that is significant here.<sup>111</sup> The difference concerned what was to happen once an individual accused of theft or robbery had been ‘cleared’ against his warrantor. It will be recalled that in this situation *L.S. c.1* awarded the disputed chattels to the accused, and allowed his accuser to proceed against the warrantor. But, according to the printed versions of *Regiam*, *R.M. I.15* declared that even after the accused was ‘cleared’ the goods were to be awarded to the *accuser*, and the *accused* was to proceed against the warrantor. In other words, the accuser was entitled to recover the goods, even after it had been established that the accused was probably what modern lawyers would call a *bona fide* acquirer for value.

<sup>106</sup> See A. A. M. Duncan, ‘*Regiam Majestatem*: A Reconsideration’, *Juridical Review*, [1961], 199–217; P. G. Stein, ‘The source of the Romano-canonical part of *Regiam Majestatem*’, *Scottish Historical Review*, 48 (1969), 107–23; MacQueen, *Common Law and Feudal Society*, 90–91; Hector L. MacQueen, ‘*Regiam Majestatem*, Scots Law, and National Identity’, *Scottish Historical Review*, 74 (1995), 1–25.

<sup>107</sup> *A.P.S.* i, 539.

<sup>108</sup> Compare *R.M. I.15* with Hall (ed.), *Glanvill* III.1–2.

<sup>109</sup> Early manuscript witnesses of *R.M. I.15* attest this point; see British Library Ref. Additional MS. 18111 f.13<sup>v</sup>–14<sup>v</sup>; National Library of Scotland Ref. MS. 21246 f.31<sup>v</sup>. For the date of these manuscripts, see Duncan, ‘*Regiam Majestatem*’, 202–5; Fergus (ed.), *Quoniam Attachiamenta*, 6. I am grateful to Dr Jackson Armstrong of Aberdeen University for discussing with me how to read correctly the relevant passage in National Library of Scotland Ref. MS. 21246 f.31<sup>v</sup>.

<sup>110</sup> No critical edition of the text is yet available.

<sup>111</sup> It should also be noted that R.P.S. 1318/18 regulated what was to happen ‘in pleas concerning the seizure of chattels [*in placitis de captione catallorum*]’ by providing that the pursuer was to specify in his complaint ‘the year, day, place that the chattels were seized and where they were detained’; the act also stated that the ‘number of the chattels and the damage should be specified exactly’. It may be that this developed the procedure found in *L.S. c.1*.

Thus it would seem to be the case that *R.M.* I.15 reversed the position found in *L.S.* c.1. Yet it must be emphasised that this view depends upon the evidence of the printed editions. An early manuscript witness of the text – Additional Manuscript 18111, which may perhaps be dated to the late fourteenth century – simply follows *L.S.* c.1 in awarding disputed chattels to an accused who had been ‘cleared’ against his warrantor.<sup>112</sup> Thus it is possible that *R.M.* I.15 as it is presented in the printed editions of *R.M.* does not represent the law as it might have been understood in the fourteenth century. It will not be possible to discuss this point with any real confidence until a critical edition of the text of *R.M.* is available. That said, to some extent there are parallels between the rule found in the printed versions of *R.M.* I.15, on the one hand, and the position outlined in *Q.A.* c.8, on the other. As Fergus notes, *Q.A.* is probably to be dated to the first half of the fourteenth century.<sup>113</sup> In order to explain these parallels, it will be necessary first to outline the content of this text in some detail.

*Q.A.* c.8 contains a variant of the procedure found in *L.S.* c.1. It describes the procedure as one of the pleas of ‘wrang and unlaw’.<sup>114</sup> The right to hear such pleas seems to have been a minor jurisdictional privilege frequently conferred upon the courts of lower-ranking lords.<sup>115</sup> In order to bring a claim to recover a chattel, a man had to do two things; he had to allege that the thing had been ‘taken from him’ and he had to be prepared to ‘haymhald’ it. The ‘haymhald’ procedure was fairly simple;<sup>116</sup> the claimant had to swear with two witnesses that the thing ‘was taken from him, as he stated in his plaint, and [...] it was neither given away nor sold in any way by him’. If the chattel was an

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<sup>112</sup> British Library Ref. Additional MS. 18111 f.14<sup>v</sup>. I am very grateful to Dr Taylor for bringing this point to my attention. For some discussion of the date of the text of *Regiam* in this manuscript, see Duncan, ‘*Regiam Majestatem*’, 202–205 (although Fergus (ed.), *Quoniam Attachiamenta*, 6, gives a date range of ?x1460). As regards the point under discussion here, the early text of *Regiam* found in National Library of Scotland Ref. MS. 21246 f.32<sup>r</sup> agrees with British Library Ref. Additional MS. 18111 f.14<sup>v</sup>. Its date is also discussed by Duncan and Fergus in the passages just cited.

<sup>113</sup> Fergus (ed.), *Quoniam Attachiamenta*, 106–7.

<sup>114</sup> See Hector L. MacQueen, ‘Some Notes on Wrang and Unlaw’ in idem (ed.), *Stair Society Miscellany Five* (Stair Society vol. 52, Edinburgh, 2006), 13–26.

<sup>115</sup> The point is discussed in MacQueen, ‘Some Notes on Wrang and Unlaw’, 13–16.

<sup>116</sup> I am very grateful to Sheriff Douglas Cusine for kindly sharing his notes on haymhald with me. ‘Haymhald’ came to be viewed as a Scottish variant of the Roman *vindicatio* during the early modern period, but great care should be taken before it is assumed that fourteenth-century law-makers would have seen it in such terms. On this point, see Skene, *De Verborum Significatione* s.v. ‘HAIMHALDARE’.

animal, the oath had to be sworn on a book – presumably a Gospel book or a Bible – placed on the animal's head.<sup>117</sup>

It is unclear exactly how many responses were open to a defender against such a claim. *Q.A.* c.8 permitted him to summon a warrantor; but it omitted all of the detailed rules found in *L.S.* c.1 concerning warrantors summoned from different parts of the kingdom, and the penalties they faced for failure to appear in court. If the warrantor appeared, then he too could summon a warrantor, who in turn could summon his warrantor. But this last individual – the third warrantor – would have to answer the pursuer's claim. It is worth noting here that *R.M.* laid down a different rule, allowing four successive warrantors to be summoned.<sup>118</sup> Under the provisions laid down in *Q.A.* c.8, if no warrantor appeared, then the chattel would be forfeited to the pursuer once the latter had sworn the oath required to 'haymhald' the thing. The conclusion that seems to follow from this is that subsequently the defender had no further opportunity to recover the thing. However, he presumably retained the ability to proceed against his warrantor. This reflects the printed version of the text of *R.M.* I.15, but it is markedly different from the position in *L.S.* c.1, which allowed an accused individual who had been 'cleared' against his warrantor to recover the disputed chattel. Yet it is difficult to establish the significance of the discrepancies detected here between, on the one hand, *L.S.* c.1 and the text of *R.M.* I.15 as attested in Additional MS. 18111, and, on the other, *Q.A.* c.8 and the printed versions of *R.M.* I.15. These discrepancies may represent some legal change during the period under discussion, but they may also represent genuine legal ambiguity.<sup>119</sup> Again, any discussion of this matter can only proceed with confidence once a critical edition of *R.M.* is produced.

A final point concerning *Q.A.* c.8 should be noted here. It is the first version of the procedure found in *L.S.* c.1 that does not make any specific reference to the need to initiate proceedings with an accusation of theft or

<sup>117</sup> The procedure used in pleas of 'wrang and unlaw' is discussed more generally in MacQueen, 'Some Notes on Wrang and Unlaw', 15; the discussion is based upon *S.A.* c.9 (I am grateful to Dr Taylor for drawing this to my attention, and for sharing with me her draft critical edition of *S.A.* c.9).

<sup>118</sup> *R.M.* I.22; see also National Library of Scotland Ref. MS. 21246 f.32<sup>v</sup>, British Library Ref. Additional MS. 18111 f.16<sup>r</sup> and Croft Dickinson, *Early Burgh Records*, cxxxviii.

<sup>119</sup> The importance of recognising the possibility of legal ambiguity at a particular point in time is discussed in David Ibbetson, 'What is Legal History a History of?' in Andrew Lewis and Michael Lobban (eds), *Law and History* (Current Legal Issues vol.6, Oxford, 2003), 33–40, particularly at 35–6; see also Godfrey, *Civil Justice in Renaissance Scotland*, 449–453.

robbery. Modern lawyers looking at this might be tempted to conclude that the ‘accusatorial’ procedure found in *L.S.* c.1 was becoming more ‘civil’ in character. Certainly it has been argued convincingly that medieval Scots were capable of making a distinction between ‘civil’ and ‘criminal’ claims,<sup>120</sup> and the procedure in *Q.A.* c.8 need not have been founded upon, or given rise to, an accusation of theft or robbery. It is quite possible to imagine situations where an individual’s chattels could have been wrongfully taken without being stolen or robbed. And yet the picture is more complex; the accusatorial procedure could, in practice, still give rise to ‘criminal’ consequences. One of the few surviving cases concerning the use of the procedure in practice is *Buchan v Baxter* (1398), which is found in the printed version of the Aberdeen Burgh Records. Baxter’s right to the carcass of a cow was challenged, and he was permitted to summon his warrantor. As MacQueen notes, he justified this on the basis that the claim could turn into one that would affect ‘life and limbs’ – presumably meaning that it could become an accusation of theft.<sup>121</sup>

In summary, what seems clear is that the ‘accusatorial’ procedure found in *L.S.* c.1 survived and developed during the fourteenth century. It continued to facilitate the recovery of stolen and robbed goods. *R.M.* I.15 expressly stated that this was so. Furthermore, *Q.A.* c.8 declared that any situation where one man wrongfully retained the goods of another could be remedied through the procedure outlined in *L.S.* c.1. The language of *Q.A.* c.8 indicates that it applied regardless of whether or not the disputed chattels had originally been stolen or robbed, or indeed lost in some other way. Finally, the evidence cited from the Aberdeen Burgh Records reveals that the older form of process could still give rise to subsequent proceedings against a man for theft, and possibly also for robbery.

## (2) Procedure *per Inquisitionem* and the Punishment of Robbery

The inquisitorial procedure used to punish robbery also developed during the early fourteenth century. *R.M.* I.1 shows that robbery continued to be treated as a plea of the crown; and *R.M.* IV.6 indicates that, in the absence of any grants of jurisdiction to the contrary, this plea could only be raised in the

<sup>120</sup> A. D. M. Forte, ‘The Horse that Kills. Some Thoughts on Deodands, Escheats and Crime in Fifteenth Century Scots Law’, *Tijdschrift voor Rechtsgeschiedenis*, 88 (1990), 95–110, 105–6.

<sup>121</sup> MacQueen, ‘Notes on Wrang and Unlaw’, 21; Croft Dickinson, *Early Burgh Records*, 25, 29. See also the cases of *Spryng v Crane* (1399) and *Schethock v Bricius* (1399) which possibly represent the use of the procedure found in *L.S.* c.1 (Croft Dickinson, *Early Burgh Records*, cxxxviii, 63–4, 131–2).

justiciar's court. Nonetheless, in the reign of Robert I some robberies could be dealt with in the courts of the lords of regality.<sup>122</sup> These lords were granted their lands *in liberam regalitatem*, usually meaning that they received 'jurisdiction over the four pleas of the crown' within their territories, 'plus immunity from interference with the regality or its inhabitants by royal officers'.<sup>123</sup>

In other respects many elements of the thirteenth-century law concerning the punishment of robbers seem to have remained unchanged during the early fourteenth century. The English discussion of the distinction between 'accusatorial' and 'inquisitorial' procedures in criminal matters that was included in *Glanvill* was incorporated into R.M. IV.1.<sup>124</sup> It should be noted here that Robert I slightly developed the procedures governing indictments for robbery; he declared that 'no indicted person should be essonzed [excused] before the justiciar of Scotland in holding his pleas, except only for the king's service [...] or for the essonzie which is called bed-evil'.<sup>125</sup> He also decreed that everyone convicted '*de homicidio, rapino, furto aut aliis delictis tangentibus vitam et membra*' should receive 'common justice [...] without redemption, saving royal power and saving the liberties specially granted by the kings of Scotland ancestors of the king who now is'.<sup>127</sup> Of course, procedure on dittay remained in use throughout the fifteenth century and beyond, as Armstrong has shown.<sup>128</sup>

<sup>122</sup> Note that here grants of jurisdiction over the crown pleas can be traced in earlier charters, such as that granted to Dunfermline Abbey in the reign of David I (see J. M. Webster and A. A. M. Duncan, *Regality of Dunfermline Court Book 1531–1538* (Alva, 1953), 1–4, and the discussion in Cairns, 'Historical Introduction', 24–5). I am grateful to Professor MacQueen and Dr Taylor for discussing this point with me.

<sup>123</sup> Grant, 'Franchises North of the Border', 167; see also 168–9.

<sup>124</sup> See Cooper, *Regiam*, 251. Once again, the discussion in R.M. IV.1 focused on treason.

<sup>125</sup> R.P.S. 1318/8. 'Bed-evil' was an illness that confined a man to bed; see <http://www.dsl.ac.uk/>, search term 'bed-evil', accessed 16 July 2015.

<sup>126</sup> Presumably '*rapina*' in the ablative is meant; I am grateful to Dr Taylor for discussing this with me.

<sup>127</sup> R.P.S. 1318/5. It is unclear why the translators of this statute have chosen to render '*rapina*' as rape in this context; surely robbery would be an equally plausible translation. Whichever is meant, robbery would be caught by the phrase '*aut aliis delictis tangentibus vitam et membra*'. Robert I also developed certain fast-track procedures to deal with those accused of transgressions such as *rapina* when they came to the army, and declared that any soldier who seized goods for his sustenance without making payment was to be treated as a robber. See R.P.S. 1318/6–7.

<sup>128</sup> See Armstrong, 'Justice Ayre'.

### (3) New Remedies for Robbery? The Brieves of Novel Dissasine and Protection

An individual who wished to obtain redress for the violent theft of chattels may have been able to utilise two other legal devices by the early fourteenth century, at least in certain circumstances. These were the brief of novel dissasine and the brief of protection.

The brief of novel dissasine, which was modelled on its English namesake, had been introduced into Scots law by Alexander II in 1230 (*S.A.* c.7).<sup>129</sup> It originally provided a remedy for one who had been dissaised unjustly and without a judgement. As MacQueen explains, '[t]o have sasine was to have been put into possession of land by the granter, typically although not invariably the lord of whom the lands were to be held'.<sup>130</sup> Those who had lost sasine could recover it through the brief of novel dissasine, and the remedy was designed to operate quickly.<sup>131</sup> A particularly important aspect of this was that the defender was not permitted to stay proceedings in order to summon a warrantor. The law seems to have assumed that this would have been inappropriate, either because the defender would generally have been either the pursuer's own feudal lord, who would have needed no warrantor, or because the defender would have been 'a mere dissaisor'.<sup>132</sup>

Could this action ever have been used to recover possession or 'sasine' of moveable goods? This may seem to be a strange question to pose, but it must be remembered that late-twelfth century English lawyers could speak of the 'seisin' of chattels; and, as Maitland noted, the 'plaintiff in an assize of novel disseisin' would recover 'seisin of the land and seisin of his chattels also, *seisinam omnium catallorum*'.<sup>133</sup> The clearest evidence that suggests that the Scottish courts were also prepared to use the brief to give litigants an action

<sup>129</sup> See *S.A.* c.7; *A.P.S.* i, 400 (c.7); MacQueen, *Common Law and Feudal Society*, 136–8, and generally at 136–66. Note that Taylor's research demonstrates that the text of the act included in *A.P.S.* is unreliable in a number of respects.

<sup>130</sup> MacQueen, *Common Law and Feudal Society*, 140.

<sup>131</sup> Significant questions have now been raised concerning how popular this action could have been in practice in the thirteenth century due to the high amercement of £10 that litigants seem to have had to pay if they failed in their action. In this regard, see Carpenter, 'Scottish Royal Government', 148–151; Taylor, *Shape of the State*, Chapter Five; see also Andrew R. C. Simpson, 'Foreword: Common Law and Feudal Society in Scholarship since 1993', in MacQueen, *Common Law and Feudal Society*, xxix–lxi, xliii–xlvi.

<sup>132</sup> That is to say, a mere interloper who had no putative title at all; I am grateful to Professor MacQueen for explaining this point to me. For the passage quoted, see MacQueen, *Common Law and Feudal Society*, 151.

<sup>133</sup> F. W. Maitland, 'The Seisin of Chattels', *Law Quarterly Review*, 1 (1885), 324–41, 325–6.



for the recovery of moveables can be dated to the early 1300s, and that is why the brieve is considered at this stage in the argument presented here. Nonetheless, it may be that it could have been used as a remedy for the violent theft of chattels – in the circumstances covered by the text of the brieve – from 1230 onwards.

The evidence concerning the use of the brieve to recover moveable goods comes from the text known as the *Capitula Assisarum et Statutorum Domini David Regis Scocie* (hereafter *C.D.*). There is an updated version of *S.A.* c.7 in that text, which Taylor has dated to the early fourteenth century.<sup>134</sup> This explained that once the pursuer had demonstrated he had been dissaised, the court was to ensure that his ‘chattels or land [*catalla [...] seu terra*]’ were to be ‘restored immediately [*restituantur statim*] [...] at the same court with damages or arrears’.<sup>135</sup> The chattels in question would obviously have been those that had been on the land at the time of the act of dissasine. This was not a general remedy for theft with violence; but it would clearly have provided a remedy for a man whose goods were robbed during the course of a dissasine. Furthermore, it would have given him a faster remedy than that which was available under *R.M.* I.15, because of the rule that no warrantors could be summoned in dissasine proceedings.

Nonetheless, it should be noted here that in the turbulent situation following the Wars of Independence, Robert I seems to have relaxed the rule that defenders in actions of novel dissasine could *never* proceed against any warrantors they had. His Parliament of 1318 contemplated the possibility that dissaisors might transfer the property they wrongfully seized to *bona fide* third parties, who might then become the defenders in cases of novel dissasine. Consequently such individuals were allowed to proceed against their warrantors, but in entirely separate proceedings. It remained the case that no warrantors could be summoned in response to a brieve of novel dissasine.<sup>136</sup> Consequently, the availability of the brieve of novel dissasine in such disputes perhaps made it harder for those who were defenders in litigation over chattels to retain the disputed goods.

Another mechanism may have been used during the fourteenth century to enable litigants to recover chattels taken from them in acts that amounted to robbery. This form of action was the brieve of protection.<sup>137</sup> The brieve –

<sup>134</sup> Taylor, ‘Assizes’, 216–21.

<sup>135</sup> *Ibid.*, 219.

<sup>136</sup> MacQueen, *Common Law and Feudal Society*, 146–53.

<sup>137</sup> It is known that this brieve was in use in the fourteenth century – see MacQueen,



which echoed the English writs of trespass, as both Harding and MacQueen have argued – was heard before the justiciar, and involved the accusation that the defender had broken the king's peace *cum equis, vi et armis* ('with horses, force and arms').<sup>138</sup> Presumably many acts of robbery could have been described as constituting such breaches of the peace. The pursuer had to assess his losses at a definite amount; if the defender could not refute the claims made against him, then the matter was to proceed to an assize. If the assize found that the defender had broken the king's peace, then he was in the king's mercy, and could be 'condemned to the pursuer in the [amount of] the losses concerning which he was impleaded'.<sup>139</sup> While there is evidence to suggest that the *briefe* had no application in disputes over land, it does seem to have been used in at least one dispute over chattels. In an undated case, it was alleged that a defender "“wrangwisely and aganis the law” took away twenty-one beasts of various kinds not belonging to him'. Apparently, this 'broke the king's firm peace and protection, causing "“il, molest, wrang and greif” to the pursuer'. The remedy sought was damages of four hundred pounds.<sup>140</sup> This last point is perhaps significant; if the *briefe* of protection did offer a remedy for some acts of robbery, the redress it offered was clearly damages, and not restitution. This distinguished it from the procedures found in *L.S.* c.1, *R.M.* I.15, *Q.A.* c.8 and the *briefe* of *novel dissasine* preserved in *C.D.*

## Procedures For Dealing With Robbery In The Later 1300s

### (1) Robbery and Procedure *per Notorium*

Thus far it has been shown that the Scottish 'accusatorial' procedure furnished those accused of robbery with a variety of defences and procedural protections. But new mechanisms were introduced to remedy robbery from 1230 onwards, and these omitted many of the safeguards that were found in the older forms of process. It will be argued here that this trend continued during the second

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*Common Law and Feudal Society*, 128.

<sup>138</sup> See Harding, 'Medieval Brieves of Protection', 120–1; MacQueen, *Common Law and Feudal Society*, 127–9; Alan Harding, 'Rights, Wrongs and Remedies in Late Medieval English and Scots Law' in Hector L. MacQueen, *Stair Society Miscellany Four* (Stair Society vol. 49, Edinburgh, 2002), 1–8; Hector L. MacQueen, 'Legal Afterword' in A. A. M. Duncan (ed.), *Scottish Formularies* (Stair Society vol. 58, Edinburgh, 2011), 361–74, 361, 369, 372–3.

<sup>139</sup> Fergus (ed.), *Quoniam Attachamenta*, c.39. The square brackets are original.

<sup>140</sup> MacQueen, *Common Law and Feudal Society*, 128.

half of the fourteenth century. Parliament developed a new mechanism to deal with homicides in 1372, and twenty years later this was used to remedy a variety of other trespasses, including robberies. Ultimately this made it possible to convict a man of a robbery without first summoning him to answer any charge. The next section of this article will seek to demonstrate and explain these changes. It will begin by briefly examining the reforms introduced in 1372, and it will then proceed to consider the ways in which the 1372 act was developed in 1392, so as to be used in the punishment of robberies and other crimes.

(a) *'Notorious' Wrongdoing: Homicide and the Act of 1372*

In March 1372 a Parliament of Robert II (r.1371–1390) promulgated a statute to deal with the problem of homicide.<sup>141</sup> As Sellar notes, it distinguished 'murders' and homicides that were 'perpetrated from a certain and deliberate purpose' from killings committed 'from the heat of anger, namely *chaudmella*'.<sup>142</sup> These terms were used in practice in order to describe various different types of homicides;<sup>143</sup> but what exactly did they mean? Grant has argued convincingly that the word 'murder' was probably defined in the fourteenth century in much the same way as it was in Skene's *De Verborum Significatione* (1597).<sup>144</sup> This work makes it clear that the secrecy or publicity of a killing was of key importance in its legal classification. So Skene defined a murder as a 'private' homicide 'whereof the author is unknown'. As Grant points out, the perpetrator of such an act tried to eschew his society's normal 'pacification mechanisms', making it difficult for the kin of the victims to obtain any form of justice. For this reason, murder was seen as dishonourable and cowardly. Skene contrasted such killings with the second type group of homicides mentioned

<sup>141</sup> R.P.S. 1372/3/6.

<sup>142</sup> Sellar, 'Forthocht Felony', 48–9, 50, 51, 57. The phrases quoted here are translations of sections of the original Latin text found at R.P.S. 1372/3/6, which classified homicides into those committed '*ex certo et deliberato proposito vel per forethouchfelony sive murther vel ex calore iracundie videlicet chaudmelle*'.

<sup>143</sup> Sellar, 'Forethocht Felony', 48–9; Grant, 'Murder will Out', 212–26. As Sellar notes, they can be traced to earlier acts of David II; and MacQueen has suggested that they may have had some roots in the thirteenth-century law. See MacQueen, 'Canon Law, Custom and Legislation', 241–2.

<sup>144</sup> Grant, 'Murder will Out', 224, quoting Skene, *De Verborum Significatione*, s.v. 'MURTHURUM'. On the definition of these terms, see also the different account given in W. D. H. Sellar, 'Was it Murder? John Comyn of Badenoch and William, Earl of Douglas' in Christian J. Kay and Margaret A. Mackay (eds), *Perspectives on the Older Scottish Tongue: A Celebration of DOST* (Edinburgh, 2005), 132–8.

above, namely those that were ‘public’ and ‘committed by forethought felony’. Finally, he pointed out that murder could not be committed by ‘suddenly’ – presumably a reference to killings *chaudmella*.<sup>145</sup> As the term suggests, acts committed ‘*chaudmella*’ were ‘perpetrated in hot blood’, and evidently Skene’s meaning was that such homicides committed ‘from the heat of anger’ were not treated as murders. It will be assumed here that essentially these distinctions were in operation at the time the 1372 act was drafted; such an assumption does seem to be supported by the evidence Grant cites.<sup>146</sup>

In this context, the 1372 act sought to establish different procedures to deal with these various different types of homicides. It provided that various officers of the law were to seize and imprison killers, and that ‘immediately’ afterwards those same officers were to convene an assize to establish the nature of the wrongdoer’s act of homicide.<sup>147</sup> If the assize found that it had been perpetrated with forethought felony, or that it constituted a murder, then ‘justice [was] immediately to be done’.<sup>148</sup> But if the homicide had been committed *chaudmella* then the accused was to have ‘the legitimate and due delays and defences by the laws of the kingdom and the customs approved hereto’.<sup>149</sup> Furthermore, the act provided that fugitive killers were to be publicly commanded to appear before the sheriff, so that an assize could determine if the killing was a murder or a forethought felony. Failure to comply with this order within forty days would result in the banishment and forfeiture of the trespasser.

Nonetheless, the 1372 act also explained that all these rules would only apply if one important criterion were to be satisfied. It stated ‘*Et hec omnia locum habent et habebunt ubi homicidium est notarium et de homicida notorie potest constare*’. In other words, the procedures outlined in the 1372 act only applied where the homicide was notorious, and where it was possible to be certain

<sup>145</sup> Grant, ‘Murder will Out’, 224–5; reference is also made to near-contemporary French evidence at 223.

<sup>146</sup> *Ibid.*, 222–6. It is hoped that the comments made here do not over-simplify Grant’s sophisticated and persuasive argument; constraints of space make it impossible to offer here any further critical reflections on his attempts to reconstruct medieval classifications of homicide. In any event, such a task would be beyond the scope of this study. Note that a murder was not necessarily the same thing as a homicide with forethought felony; the latter sort of killing could clearly be carried out openly and publicly, whilst the former seems to have been a ‘secret’ crime.

<sup>147</sup> R.P.S. 1372/3/6. This point is noted in Grant, ‘Murder will Out’, 215–16.

<sup>148</sup> R.P.S. 1372/3/6; see also Grant, ‘Murder will Out’, 215–16.

<sup>149</sup> R.P.S. 1372/3/6.

concerning the notorious killer (*homicida notorie*).<sup>150</sup> Presumably this meant that the procedures applied where it was possible to be sure of the *guilt* of the notorious killer.

How, then, was the 'notoriety' of a man's guilt of homicide established in the first place? Was it established on the basis of an earlier trial, or simply on the basis of popular conviction within a particular community that the accused was guilty of a trespass? The first possibility seems rather unlikely, because of the explanation that Parliament gave for the enactment of the 1372 statute. It was promulgated because the administration of justice in cases of homicide was 'not as fast as was expedient for the common profit'.<sup>151</sup> If the 1372 act had created a new procedure to supplement an existing trial that was used to establish the 'notoriety' of a particularly killing, that would surely have resulted in increased *delays* in the administration of justice. Evidently the drafters of the act did not believe that that would be its effect. Furthermore, the wording of the act does not indicate that 'notoriety' was determined through a formal legal procedure; notorious killers were simply to be 'seized', 'imprisoned' and then 'immediately' confronted with an assize.

This strongly indicates that a *notorius* killer was simply an individual whose community was certain that he was guilty of homicide. It is important to contrast such 'notoriety' with the concept of *mala fama*, or ill-fame, that had been relied upon to indict individuals for crimes since the promulgation of S.A. c.2. Ill-fame simply gave rise to a suspicion of guilt, which meant that the suspect should proceed to trial so that the truth could be determined. 'Notoriety' evidently implied much more; it meant that the community was already certain that a particular individual was responsible for a homicide. Consequently, his guilt could be presumed.<sup>152</sup> Such a man would then be brought before an assize, and if its members found that the killing amounted to murder or forethought felony then he would face immediate punishment. He would not be allowed to utilise any other procedural protections that were normally available at common law. Admittedly the measures introduced in 1372 were originally only to remain in force for three years,<sup>153</sup> perhaps indicating that they were regarded as forming a short-term solution to a particularly serious problem in the administration of justice.<sup>154</sup> But the ideas the 1372 act

<sup>150</sup> Ibid..

<sup>151</sup> Ibid..

<sup>152</sup> I found Fraher, 'Preventing Crime in the High Middle Ages', 224–5 and 225 fn. 49, particularly helpful when developing this line of argument.

<sup>153</sup> R.P.S. 1372/3/12.

<sup>154</sup> See Grant, 'Murder will Out', 215–16.

introduced into the law continued to exercise influence for many years, as will be shown next.

(b) *Notorious Wrongdoing: Robbery, Arson, Homicide and the Act of 1392*

The procedure created by the 1372 act to deal with *notorius* homicides was also ultimately used to prosecute individuals who were widely thought to have committed various other crimes, including robberies. This can be seen from a statute of a Scottish General Council that was promulgated in March 1392. It sought to respond to a particularly violent raid on certain territories in the lowland county of Angus. The attack had been led by two sons of Alexander Stewart, Earl of Buchan, who is better known as the ‘Wolf of Badenoch’.<sup>155</sup> They and their allies, including the Gaelic-speaking kindred *Clann Donnachaidh* from northern Perthshire, probably targeted the territories of Sir David Lindsay of Glen Esk. Having raided and robbed the lands, they then retreated towards the hills. Lindsay and his allies, including Sheriff Walter Ogilvy of Angus, pursued them and engaged them in battle. Ogilvy was killed, and Lindsay himself was severely wounded, whilst it would seem that the leaders of the highlanders escaped.<sup>156</sup>

The broader political context of this raid will be discussed in more detail below; for now, it is only necessary to consider the political reaction it triggered. On 25 March 1392, a General Council promulgated an act denouncing the sons of Buchan and their associates as ‘*malefactores notorii*’ who had committed ‘homicides, burnings, destructions, [robberies – i.e. *rapinas*] [... or ...] other terrible crimes’. The statute also declared that they had acted with aforethought intent (*‘intentis affectibus’*). On the next day the king, Robert III (r.1390–1406), wrote to the Sheriff and Bailies of Aberdeen, commanding those royal officers to declare publicly that, as a result of the judgement of the

<sup>155</sup> On Buchan, see Stephen Boardman, *The Early Stewart Kings: Robert II and Robert III* (The Stewart Dynasty in Scotland vol. 1, Edinburgh, 1996), in particular at 72–89, 130–5, 168–81; A. Grant, ‘Alexander Stewart [called the Wolf of Badenoch]’ in *Oxford Dictionary of National Biography* (online edition, 2004), available at [www.oxforddnb.com](http://www.oxforddnb.com), accessed 16 July 2015.

<sup>156</sup> For these points, see R.P.S. 1392/3/1; David Laing (ed.), *The Orygynale Cronykil Of Scotland. By Androw of Wyntoun* (3 vols, The Historians of Scotland vols 2, 3, 9, Edinburgh, 1872–1879), III, 58–60; D. E. R. Watt et. al. (eds), *Scotichronicon by Walter Bower in Latin and English* (9 vols, Aberdeen, 1987–2002), VIII, 6–7 (why ‘*in resistendo rapine factis*’ is translated as ‘while resisting acts of theft’, rather than robbery, is unclear); Neilson, *Trial by Combat*, 248; Ranald Nicholson, *Scotland: The Later Middle Ages* (The Edinburgh History of Scotland vol. 2, Edinburgh, 1974), 207–8; Boardman, *Early Stewart Kings*, 179–81.

Estates of the realm, Buchan's sons and their accomplices were at 'the horn'.<sup>157</sup> This meant that they were rebels against royal authority, and consequently faced the forfeiture of their goods and execution.<sup>158</sup> The Sheriff's declaration was to go even further; any member of the lieges who discovered the location of the wrongdoers was expected to arrest or kill them on sight. Those who failed to pursue the condemned men with such rigour risked 'loss of life and limb' and 'disinheritance of lands and possessions'.

Clearly these measures were highly draconian; and yet one provision did offer the *malefactores notorii* an opportunity to stay proceedings against them. This declared that once they were put to the horn, they had fifteen days to appear before the sheriff. They had to bring with them 'sufficient secure pledges on certain penalties' to guarantee that they would answer for their wrongs before an assize within the following fifteen days. But their guilt was presumed, and they could be punished immediately; only by engaging with the legal process could they hope to suspend the process of outlawry brought against them.<sup>159</sup>

There are parallels between the provisions of this statute, on the one hand, and the provisions of the 1372 act discussed above, on the other. Both ordinances seemed to have relied upon the 'notoriety' of the guilt of the accused within his community in order to initiate proceedings against him. In the case of the 1372 act, such notoriety was sufficient to allow an assize to presume that a man was guilty of homicide. All it then had to do was to decide what sort of homicide had been committed, so as to avoid immediate justice being visited upon the head of one who had acted *chaudmella*. Likewise, it seems that the General Council that met in Perth presumed that Buchan's sons and their allies were guilty of robbery and other crimes on the basis that they were '*malefactores notorii*'. There is certainly no evidence that they were given any opportunity to respond to the accusations made against them prior to their denunciation. While the Sheriff of Aberdeen was required to offer them such an opportunity *after* he had put them to the horn, this simply serves to reinforce the impression that the wrongdoers had not had any other chance to answer the charges brought against them.

It might be objected here that if the 1392 act really was following the procedure outlined in the 1372 statute then surely it would have required an assize

<sup>157</sup> R.P.S. 1392/3/1.

<sup>158</sup> On the procedure of 'horning', see Philip J. Hamilton-Grierson, *Habbakuk Bisset's Rolment of courtis* (Scottish Text Society, New Series vols 10, 13, 18, Edinburgh, 1920–1926), III, 53–61; see also Croft Dickinson, *Sheriff Court Book of Fife*, 312. See also R.P.S. 1450/1/3.

<sup>159</sup> R.P.S. 1392/3/1.

to convene in order to determine whether the wrongdoers had acted ‘in the heat of anger’ or not. But this was clearly unnecessary in this case; the sons of Buchan and their allies could hardly claim that they had invaded Angus from the highlands of Perthshire *chaudmella*, and that they had then proceeded to rob and burn and kill ‘in the heat of the moment’. Consequently it was clear, as the 1392 act stated, that they had acted ‘*intentis affectibus*’ (with aforethought intent). It followed that the conditions laid down in the 1372 act for conviction of crime and immediate punishment were satisfied. The guilt of the sons of Buchan was notorious, and they had evidently not acted ‘in hot blood’.

Such a procedure stripped those accused of robbery of virtually all the safeguards that they would have received had they been accused of the crime under the ‘accusatorial’ procedure of *S.A.* c.6, or the ‘inquisitorial’ procedure outlined in *S.A.* c.2. So *S.A.* c.6, for example, had required a specific accuser to come forward and take the risk of falling into the king’s mercy if he failed to prove his claim. Arguably *S.A.* c.2 omitted this protection, but still gave one indicted for robbery the right to a trial prior to a finding of guilt. Now it was possible to convict a man of a robbery – and condemn him to be punished – simply on the basis that the members of his community were certain that he was responsible for the crime. It should be noted that the effect of the 1392 act does not seem to have been to suspend the operation of the older procedures; as was noted above, they remained in operation throughout the period under consideration here. But it did give the authorities a more draconian mechanism for the punishment of robbery, and other crimes. So where did it come from, and why was it introduced into Scotland during the last three decades of the fourteenth century?

(c) *The Inspiration for the Acts of 1372 and 1392? Canonist Procedure per Notorium*  
The special procedure used to punish ‘*notorius*’ wrongdoing that is found in the 1372 act, as reconstructed here, is strikingly similar to the canonical procedure *per notorium*. Like procedure *per inquisitionem*, this was developed during the pontificate of Innocent III,<sup>160</sup> and justified through the use of the maxim *publicae utilitatis intersit, ne criminia remaneat impunita*.<sup>161</sup> As Brundage puts it, ‘conviction in proceedings *per notorium* simply required that the judge establish that numerous members of the community in which the defendant resided believed that he was guilty of some crime’. While in procedure *per inquisitionem* an individual’s *mala fama* was only sufficient to give rise to the suspicion that

<sup>160</sup> X.3.2.8, as discussed in Brundage, *Canon Law*, 145.

<sup>161</sup> Fraher, ‘Theoretical Justification’, 581; he cites Gratian, *Decretum*, C.2q.1.



he was guilty, in procedure *per notorium* the guilt was thought to be so well known that it 'could not be hidden by any tergiversation'.<sup>162</sup> In the latter form of process, no eyewitnesses had to testify; and the judge<sup>163</sup>

could proceed *ex officio* against a defendant to establish whether he was notoriously suspect of a crime. He need only find two witnesses prepared to testify that the defendant was generally believed by members of the community to have committed the crime. Once they had done so, the judge could forthwith find the defendant guilty and impose punishment. Conservative jurists [...] abhorred this course of action [...] [and] [...] insisted that the judge must at least summon the defendant and question him about the allegations before pronouncing judgment.

The similarities between this procedure and that outlined in the ordinances of 1372 and 1392 surely leave little doubt that the canon law helped to inspire this development of the Scottish common law. In both legal systems, wrongdoers could be identified and convicted of a wrong simply on the basis that their trespasses were *notorius*. Furthermore, after the trespasser's guilt had been established, the 1372 act required an assize to determine the precise nature of the trespass. This was perhaps a nod in the direction of the concerns of more conservative jurists, such as Tancred, who thought that the judge had at the very least to give the accused the opportunity to answer the allegations made against him.<sup>164</sup> The 1372 act undoubtedly gave the accused such a chance to be heard, if only before an assize that was instructed to determine what type of homicide had been committed. While the 1392 act did not give the accused any opportunity to respond to the accusations levelled against him *prior* to conviction, it did give him the right to present himself before a sheriff within the fifteen days following his condemnation. Such an action would then stay the proceedings against him until such times as an assize could determine whether or not he was indeed guilty as charged.

The suggestion that the canon law influenced the promulgation of the ordinance of 1372, and ultimately that of 1392, is perhaps rendered more

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<sup>162</sup> Fraher, 'Preventing Crime in the High Middle Ages', 224–5 (see in particular 225 fn. 49); the passage quoted is found at 224, and translated by Fraher from Innocent III's decretal *Tua Nos*, at X.3.2.8.

<sup>163</sup> Brundage, *Canon Law*, 145, and at 144–7 more generally.

<sup>164</sup> Brundage, *Canon Law*, 145.



plausible by the fact that at least one canonist was present in Parliament when the earlier statute was enacted. John Carrick, the Chancellor of the realm, was described as ‘skilled in decrees’ in 1374, and on this basis MacQueen suggests that he ‘studied canon law at a European university’.<sup>165</sup> He also seems to have had some experience of legal practice.<sup>166</sup> As Chancellor he witnessed a charter in Parliament on 6 March 1372, alongside the justiciars and some leading magnates. Presumably he had also been present four days earlier when the legislation concerning *notorius* killings had been passed.<sup>167</sup>

Therefore it seems plausible to argue that the effect of the 1372 act was to introduce a new procedure *per notorium* into the Scottish common law. At this stage, it was only to be used in cases of homicide, but in 1392 it was extended so that it could be used to remedy other crimes, such as robbery and arson. But while canon law was influential here, its significance should not be overstated. So Sellar has shown that the distinction between crimes committed with ‘forethocht felony’ and crimes perpetrated ‘*chaudmella*’ was probably borrowed from contemporary English law.<sup>168</sup> Furthermore, the canonist procedure *per notorium* was developed in order to facilitate the prosecution of ‘secret crimes’ – such as clerical concubinage.<sup>169</sup> By contrast, the Scottish procedure was evidently introduced primarily to speed up the administration of justice; as was noted above, that was the central purpose of the 1372 act.<sup>170</sup> Canonist ideas were made to serve Scottish political needs and governmental policies.

#### (d) *Explaining the Acts of 1372 and 1392 in their Political Contexts*

Is it possible to explain why law-makers chose to develop the law in this way during the late-fourteenth century?<sup>171</sup> The 1372 act itself declared that it was promulgated because there had been ‘many killings’ that had remained unpunished prior to its enactment. Does this indicate that the act was promulgated to remedy some specific type of disorder – as seems to have been the case with the ordinance of 1392? It is difficult to be certain.

<sup>165</sup> H. L. MacQueen, ‘Carrick, John (d. 1380/1)’ in *Oxford Dictionary of National Biography* (online edition, 2004), available at <http://www.oxforddnb.com>, accessed 17 July 2015. See also Watt, *Biographical Dictionary*, 89–91.

<sup>166</sup> MacQueen, ‘Carrick, John’.

<sup>167</sup> On the date of the legislation, see R.P.S. 1372/3/6.

<sup>168</sup> Sellar, ‘Forethocht Felony’, 56–7.

<sup>169</sup> Brundage, *Canon Law*, 144–5.

<sup>170</sup> R.P.S. 1372/3/6.

<sup>171</sup> I am grateful to Professor MacQueen for discussing this question with me, particularly in relation to the role of remissions in medieval Scotland.

But, as Sellar and Grant have pointed out in the past, it is clear that in one respect the 1372 act was not innovative.<sup>172</sup> The basic idea that a killer should face automatic and immediate punishment if his act of homicide were to be classified as murder or forethought felony was developed in the reign of David II (r.1329–1371). As Grant explains, an act of 1370 had declared that in cases of murder – and possibly also homicide with forethought felony – the killer was not to receive mercy in the form of a remission, that is to say a royal pardon.<sup>173</sup> Earlier statutes in David's reign had also sought to regulate royal power to grant remissions in the context of homicides;<sup>174</sup> one, promulgated in 1357, allowed the king to review remissions granted whilst he had been out of the kingdom. This act was followed by another declaring that the lieges were no longer to 'move war' against their neighbours.<sup>175</sup> It is possible that the two acts had similar purposes – to facilitate royal involvement in the resolution of feuding.<sup>176</sup> Conceivably the subsequent use of legislation to regulate the king's power to pardon those guilty of homicide – perhaps primarily in the context of feuds – could have resulted from dissatisfaction with the ways in which he dealt with the problem. However, this is speculative. Regardless, the problems that caused law-makers to concern themselves with homicide seem to have persisted throughout the 1360s and into the 1370s, judging from the legislative activity that resulted. Furthermore, the 1372 act itself shows that it was felt David II's government had not addressed these problems adequately, whatever

<sup>172</sup> Sellar, 'Forethought Felony', 48–49; Grant, 'Murder will Out', 214–16.

<sup>173</sup> R.P.S. 1370/2/12, discussed in Grant, 'Murder will Out', 215. Note that R.P.S. 1370/2/12 makes no reference to homicide with forethought felony, but the contemporary (or near-contemporary) evidence of 1370/2/36 indicates that this was also in the contemplation of the drafters of the act. Also note that if David II was selling remissions, as is suggested in Michael Penman, *David II 1329–71* (Edinburgh, 2004), 397–8, then it is not clear that he was doing anything unusual for a medieval Scottish monarch. I am grateful to Professor MacQueen for discussing this with me. On this and remissions generally, see Christopher H. W. Kane, 'The Effect of a Pardon in Scots Law', *Juridical Review*, [1980], 18–46, 18–21 (which admittedly focuses on evidence drawn from a later period). See also Cynthia J. Neville, 'Royal Mercy in Later Medieval Scotland', *Florilegium*, 29 (2012), 1–31.

<sup>174</sup> R.P.S. 1366/7/6, 13.

<sup>175</sup> R.P.S. 1357/11/12–13.

<sup>176</sup> This is implied in Grant, 'Murder will Out', 215. On the feud in Scotland see this last article, and also Jenny Wormald, 'Bloodfeud, Kindred and Government in Early Modern Scotland', *Past and Present*, 87 (1980), 54–97; this, of course, has inspired a great deal of scholarship on the subject, including the important recent contribution in Taylor, 'Crime without Punishment'.

they were. The suggestion that they involved feuding will be considered again shortly.

The political context in which the ordinance of 1392 was promulgated is much clearer. Arguably, its reconstruction may also shed light on the rationale for the introduction of the 1372 act. The 1392 act was one of a series of statutes that were promulgated by fourteenth-century Scottish Parliaments and General Councils<sup>177</sup> in a bid to deal with the problem of disorder in the highlands.<sup>178</sup> Grant, Boardman and Brown have argued that the roots of this disorder lay in significant changes in the structure of lordship within the north and west of the kingdom. Many leading figures amongst the higher nobility in the highlands had been on the losing side of the civil wars between the Bruces and the Balliols. While Robert I and David II attempted to replace them with their own supporters, the new men frequently lacked the local connections required to govern effectively. The problem was particularly acute in regions like Moray, where many of the noble families used by Bruce to maintain order failed in the male line during the mid-fourteenth century. Their heiresses were married to magnates whose powerbases lay in southern Scotland, and at first they had little ability to exercise control in the north. Into the resulting power vacuum, in Moray and elsewhere, stepped members of the lesser nobility, who fought and feuded amongst themselves for dominance over their localities. In the upland regions these noble families were often drawn from Gaelic-speaking kindreds, and the pattern of lordship exercised amongst them threatened further instability. They depended heavily upon cattle herding and raiding to sustain themselves, and in order to protect their own herds and seize those of others they maintained large 'bands of retainers, described by the Gaelic word, *ceathern*, Anglicised to *cateran*'. They were '[l]ightly armed and armoured [...] semi-professional troops'.<sup>179</sup> The raids led by these men

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<sup>177</sup> General Councils had most of the powers possessed by Parliament, but not all; so only Parliaments could try treason cases. See Alexander Grant, *Independence and Nationhood: Scotland 1306-1469* (Edinburgh, 1984), 166.

<sup>178</sup> See, for example, R.P.S. 1368/6/11-12; R.P.S. 1384/11/10; R.P.S. 1385/4/3; R.P.S. 1388/12/3.

<sup>179</sup> The word '*cateran*' seems to come from the Gaelic '*ceatharn*', meaning a 'troop'; see <http://www.dsl.ac.uk>, accessed 17 July 2015, using the search term '*cateran*'. For the points made in this paragraph, see Grant, *Independence and Nationhood*, 200-209; Stephen Boardman, 'Lordship in the North-East: The Badenoch Stewarts I, Alexander Earl of Buchan, Lord of Badenoch', *Northern Scotland*, 16 (1996), 1-30; Brown, *Wars of Scotland*, 328-334; the passages quoted here are taken from Brown, *Wars of Scotland*, 332.

were not necessarily seen as dishonourable in Gaelic society;<sup>180</sup> but they were completely inconsistent with Anglo-Norman conceptions of law and order, according to which they were simple acts of robbery. Those with lands and interests in regions that bordered on the highlands – such as the bishops of Moray and Aberdeen, and the lairds of Angus – were particularly vulnerable to the raiding of these kindreds. They were probably behind many of the repeated complaints to Parliaments and General Councils concerning disorder in the highlands that were made from the 1360s onwards.<sup>181</sup>

The feuding and conflict that resulted from the breakdown of order in parts of the highlands may explain Parliament's preoccupation with homicide during the 1360s, and its insistence that acts of royal mercy should be strictly regulated. Only homicides carried out in the heat of anger were to be remitted. Premeditated attempts to commit homicide, and so to initiate or perpetuate feuding, were not to be tolerated. But this is highly speculative. What is clear is that the enactment of the ordinance of 1392 was prompted by the breakdown in order discussed here. To explain, this breakdown created a power vacuum in Moray in particular, which was ultimately exploited by Alexander Stewart, the son of Robert II. From his powerbase in Badenoch he sought to maintain order. But in so doing he did not adopt a different form of lordship from that which was exercised amongst the caterans who threatened the interests of the church and the landholders in the lowland parts of the region. Rather, he allied himself with many of these Gaelic-speaking kindreds and led large bands of caterans himself. In so doing he became the most powerful man in the north of the kingdom, and in the eyes of the Gaels he was *Alasdair Mór, Mac an Rígh*<sup>182</sup> ('great Alexander, son of the king'). But he also incurred the enmity of those lowland prelates and magnates whose lands and herds became important sources of sustenance for his troops.<sup>183</sup>

<sup>180</sup> Michael Newton, *Warriors of the Word. The World of the Scottish Highlanders* (Edinburgh, 2009), 134–5. Admittedly the evidence relied upon there is drawn from a much later period, but the idea of an honourable cattle raid in Gaelic-speaking Scotland was clearly much older – see, for example, Watson, 'Landscape and People', 28–9; Stephen Boardman, *The Campbells 1250–1513* (Edinburgh, 2006), 78–9.

<sup>181</sup> See the discussions in Grant, *Independence and Nationhood*, 200–9; Boardman, 'Lordship in the North-East: The Badenoch Stewarts I, Alexander Earl of Buchan, Lord of Badenoch'; Brown, *Wars of Scotland*, 328–34.

<sup>182</sup> I am grateful to Dr Eystein Thanisch of Edinburgh University for advising me that in the orthography of the late medieval period the Gaelic words '*mór*' and '*rígh*' would have had acute accents on the letters 'o' and 'i' respectively.

<sup>183</sup> See Boardman, *Early Stewart Kings*, 72–89; Grant, 'Alexander Stewart [called the Wolf of Badenoch]'.

While Robert II had control of the Scottish government, Alexander Stewart's power simply increased. He was made Earl of Buchan, and acquired control of the earldom of Ross, and possibly also the northern justiciarship, in 1382. But in 1384 Robert II's direct control of the government was curtailed by a General Council, and largely transferred to his son John, Earl of Carrick (the future Robert III). It has been argued that one reason for this may have been his failure to curb Buchan's power.<sup>184</sup> Certainly the General Council expressed a concern to remedy widespread disorder across the kingdom. So it sought to mete out punishment upon the caterans. In order to put a stop to their 'pillaging [*rapientes*]' it was declared that they were to be seized and punished; those who resisted arrest could be killed with impunity.<sup>185</sup> It is also worth noting that a separate statute promulgated in 1384 also apparently reformed the accusatorial procedure derived from *L.S.* c.1. While it is partially lost, the act seems to have declared, amongst other things, that warrantors who had confessed that they owed obligations of warranty and then subsequently failed to turn up in court were to be treated as guilty of theft, and punished.<sup>186</sup> Other acts of this General Council reveal a strong concern that justice was not being done quickly enough in many cases, and in this they echoed the 1372 act on notorious killings.<sup>187</sup>

Carrick also failed to deal with complaints against Buchan, and Boardman suggests that this contributed to his own fall from power in 1388. His successor as Guardian of the realm was his brother Robert, Earl of Fife. Fife acted decisively against Buchan; he stripped him of the justiciarship, and challenged his control of various territories, including Ross. In so doing he acted together

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<sup>184</sup> Boardman, *Early Stewart Kings*, 130–5. On Buchan's time as justiciar, see Hector L. MacQueen, 'Tame Magnates? The Justiciars of Later Medieval Scotland' in Steve Boardman and Julian Goodare (eds), *Kings, Lords and Men in Scotland and Britain, 1300–1625. Essays in Honour of Jenny Wormald* (Edinburgh, 2014), 93–120, 102–3 (I am grateful to Professor MacQueen for sending me a pre-publication copy of this article).

<sup>185</sup> R.P.S. 1384/11/10.

<sup>186</sup> R.P.S. 1384/11/7. Note that a non-fugitive who accepted his obligation of warranty and then subsequently failed to turn up in court was to be punished as a thief (*fur*). The language of the act may indicate a contrast between his position and that of one who was found to have wrongfully denied an obligation of warranty and was subsequently found guilty of theft. He was to be punished as a *latro* (*'si convictus fuerit, fiet de eo iusticia tamquam de latrone attincto'*). While the editors of R.P.S. 1384/11/7 translate this word as 'robber', it was explained above in footnote 4 that this approach is not followed here. Further investigation into the history of theft in Scots law is required before this statute can be fully understood.

<sup>187</sup> R.P.S. 1384/11/12–13, 17.

with his allies, including Lindsay of Glen Esk. Buchan's responses generally involved force; most famously, in 1390 he burned Elgin Cathedral, the seat of his enemy the Bishop of Moray.<sup>188</sup>

This power struggle for control of the north forms the political context against which it is possible to understand the raid led against Lindsay's lands in Angus by Buchan's sons and their allies in *Clann Donnachaidh*.<sup>189</sup> As has been seen, the furious response of Fife and the Estates of the realm was to promulgate the 1392 act. This, it was argued above, extended and developed the procedure *per notorium* that was outlined in statute in 1372 so that it could be used to deal with the robberies, homicides and acts of arson perpetrated by the attackers. Fife's aim was probably to use this procedure simply to deal with one particular problem, and to show that his government would fiercely punish cateran raids and deal with the threat presented by Buchan and his associates. But Fife had set a dangerous precedent. If a man's guilt of robbery was *notorius* within his community, and if it was clear to a judge that his act must have constituted a forethought felony, then in theory at least he could be convicted of the crime without first being given an opportunity to answer for it. The long-term impact of this development on the Scottish common law concerning robbery will be discussed in the conclusion.

## (2) The 1397 Act and its Political Context

While the Scottish variant of procedure *per notorium* was applied to address the raid of 1392, it does not seem to have been used to remedy robbery more generally during the 1390s. In other words, it is important not to overstate the extent to which its introduction represented a permanent legal change. As was noted above, the 1372 act was originally designed to be a temporary expedient, to last for only three years; perhaps procedure *per notorium* in general was treated as a mechanism to be used only in times of significant disorder.<sup>190</sup> In 1397, a few years after the promulgation of the ordinance of 1392, slightly less draconian measures were promulgated to deal with 'grete and horrible destructiouns, heryschippis, brynyngis and slachteris' and with the problem of 'reif' (that is, robbery). This act required the sheriffs to lead inquests to establish the identity of the 'common destroyouris of the countre'. The sheriffs were then required to arrest those men; they would be released if

<sup>188</sup> Boardman, *Early Stewart Kings*, 175–6; Grant, 'Alexander Stewart [called the Wolf of Badenoch]'.

<sup>189</sup> Boardman, *Early Stewart Kings*, 180–1.

<sup>190</sup> R.P.S. 1372/3/12.

they provided surety that they would appear before the next justice ayre. If they failed to provide such surety then they would be tried immediately by the sheriff and an assize, and condemned to death if found guilty. This evidently extended the sheriff's powers to punish robbers, amongst others.<sup>191</sup> On the other hand, those who were able to provide surety that they would appear before the justiciar were to be released until their trial. If they subsequently failed to appear in court, then they were to be put to the horn. Those who had stood surety for them would then be commanded to compensate or 'assyth' the 'party pleygnand' – presumably this was one who had made a complaint of wrongdoing to the sheriff prior to the inquest.

In 1398 these provisions were augmented by a General Council at Perth, which declared that after the sheriff had identified the 'common destroyouris of the countre' by means of an inquest, he was then to declare publicly who they were. Having been denounced in this way, the accused were then required to present themselves before the sheriff so that they could be assigned a day to stand trial. If they failed to do this within forty days, then they were to be put to the horn.<sup>192</sup> As Grant notes the new rules were developed further in 1399.<sup>193</sup> The sheriff could now denounce a man for the crimes of 'thift, reif, slacher, brynnyng or ettyng of the cuntre' either on the basis of the findings of an inquest – as in 1397 and in 1398 – or simply on the basis of the victim's written complaint.<sup>194</sup> As the law-makers put it, the sheriff could proceed 'be enquerre or [...] be complaynt'.<sup>195</sup> If the sheriff could not arrest the accused, then a public proclamation was to be made giving him fifteen days to find pledges to guarantee he would comply with the law. Failing this, he was to be 'at the kyngis horne' and his 'landis and gudis' were to be 'eschete' – that is to say, forfeited.<sup>196</sup> However, these rules were only to remain in force for three years.<sup>197</sup>

These procedures evidently owed much more to the old procedure on dittay than the newer procedure *per notorium*. The acts of 1397-99 preserved

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<sup>191</sup> See R.P.S. 1397/1-2. Note that R.P.S. 1392/3/1 was clearly a special commission; as has been explained elsewhere, normally the power to punish robbers pertained to the justiciar's court.

<sup>192</sup> R.P.S. 1398/9. The acts of 1397-98 are also discussed in Grant, 'Murder will Out', 216.

<sup>193</sup> Grant, 'Murder will Out', 216.

<sup>194</sup> R.P.S. 1399/1/14.

<sup>195</sup> R.P.S. 1399/1/16.

<sup>196</sup> R.P.S. 1399/1/16; R.P.S. 1399/1/15 also developed these rules.

<sup>197</sup> R.P.S. 1399/1/14, again noted in Grant, 'Murder will Out', 216.



the accused's rights to a trial prior to conviction before the justiciar and an assize in cases of robbery and other such crimes *if* the accused engaged with the legal process in a certain way, or within a certain period of time. This more conservative approach was adhered to in spite of the fact that the General Council of 1398 probably witnessed sustained complaints about the treatment of the clerical establishment in Moray in the face of the activities of caterans, this time led by Alexander, Lord of Lochaber, who was the brother of Donald, Lord of the Isles.<sup>198</sup> Perhaps it was thought that the normal protections of the common law could only be dispensed with in light of very grave problems, such as that identified in 1372, or in light of a flagrant breach of the established order, as occurred during the raid of 1392.

It is also interesting to note here that the procedures introduced between 1397 and 1398 did achieve something that has not been found thus far in the records. It combined an inquisitorial procedure led by a royal officer, on the one hand, with a procedure to 'assyth' the victims of the wrong, on the other. It seems that a victim of robbery could now receive a compensatory remedy for the wrong without utilising the accusatorial procedure of *L.S.* c.1, the *brieve of protection* or the *brieve of novel dissasine*. The 1399 act went further. Prior to the promulgation of this statute, the procedure outlined in 1397-98 could only be triggered by an inquest led by the sheriff. But now the victim's written complaint alone could initiate this form of process against a trespasser; there was no need for an inquest to make an independent accusation of wrongdoing. These new procedures seem to have inspired further developments in the law during the next few decades, albeit that at first they were considered short-term measures.<sup>199</sup>

### Conclusion And Afterword: The Wrongs Of Robbery And Spoliation

By 1392, the Scottish common law contained a wide array of procedures that could be used by litigants and royal officers in proceedings against those suspected of robbery. A reformed version of the accusatorial procedure of the reign of William I remained in operation, as did the inquisitorial procedure on *dittay* established in the reign of Alexander II. Furthermore, from the fourteenth century the *brieves of novel dissasine* and *protection* provided litigants with new ways of seeking redress for robbery in certain situations. Most recently, a Scottish variant of the canonist procedure *per notorium* had

<sup>198</sup> Boardman, *Early Stewart Kings*, 209–11; see also R.P.S. 1398/8.

<sup>199</sup> Consider R.P.S. 1426/10; R.P.S. 1434/3.



been used in proceedings against the leaders of a raid into Angus. It has been shown that the newer procedures frequently omitted various protections that had been granted to those accused of robbery in earlier periods. For example, the inquisitorial procedure introduced in 1244 did not require anyone to come forward to accuse an individual of robbery, and so risk falling into the king's mercy if he failed to demonstrate his claim. Furthermore, the *briefe of novel dissasine* might have been employed to remedy an act of theft with violence, and the use of this procedure would have prevented the defender from staying proceedings so as to summon his warrantor. Most notably, the procedure applied in 1392 to convict the sons of the Earl of Buchan and their associates seems to have denied them even the right to respond to the charges levelled against them prior to conviction.

Thus there does seem to have been a generally consistent trend in the development of the common law relating to robbery during the thirteenth and fourteenth centuries.<sup>200</sup> And yet it is clear that this trend was not driven by one consistent policy throughout this period. The need to adapt the law in light of the provisions of canon law concerning the ordeal strongly influenced developments in 1230. The new inquisitorial procedure that was introduced at about this time, which was indebted to the reforms of Innocent III, and possibly also to English law, may have been partly inspired by the need to ensure that wrongs should not remain unpunished in the wake of the murder of Patrick of Atholl. Robert I's reforms of the law in relation to novel dissasine and robbery were driven by the particular political circumstances of the wars of succession over the Scottish crown. The introduction of procedure *per notorium* probably resulted from political pressure on the new government of Robert II following the perceived failure of David II to deal adequately with homicides. The decision to extend this procedure so as to respond to the raid on Angus in 1392 evidently resulted from Fife's desire to present himself to the nobility of Lowland Scotland as a man who could be trusted to break Buchan's power. Furthermore, before Fife became Guardian of the realm, lords, clerics and litigants more generally seem to have complained about the fact that the administration of justice at common law was very slow. An obvious solution was to create procedures that offered speedy justice through the sacrifice of protections and safeguards usually given to those accused of robbery and other crimes.

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<sup>200</sup> An exception to the trend may perhaps be found in *S.A.* c.2, which limited the power of the king's 'servants' to attach men for felonies.

Yet while the causes of the trend identified here were complex, there was some consistency in its development. It was generally informed by existing traditions of legal ideas concerning how best to provide redress for robbery and other wrongs. Scottish governments sometimes gave expression to their political policies in this regard through procedural mechanisms that were already well-established in English law or in canon law. But these ideas were never simply borrowed wholesale; they were adapted and shaped by the Scots, sometimes in response to practical problems in the administration of justice and political pragmatism. So procedure *per notorium* was originally designed to facilitate the prosecution of 'secret' crimes, such as clerical concubinage. But in Scottish hands its purpose seems to have changed; it was used to facilitate the quick and efficient prosecution of trespasses. Furthermore, once procedures drawn from other legal systems had been received into Scots law, they were consistently developed and reformed by Scottish law-makers over a long period of time to meet the demands placed upon the royal administration. Thus the 1384 statute concerning the summoning of warrantors probably augmented the procedure found in *L.S.* c.1, a text which can be dated to the reign of William I. The acts of 1397 and 1398 reformed procedure on dittay, which had first been established in 1244. In other words, the Scottish common law itself furnished law-makers with a tradition of legal ideas that they frequently used and augmented in framing their statutes. This conclusion closely resembles the thesis advanced by Sellar, that the reception of legal ideas from outside Scotland 'can only be properly understood against the background of a strong and resilient native tradition'.<sup>201</sup>

Furthermore, it is possible that the medieval law of robbery strongly influenced the later development of Scots law. Once the idea that procedure *per notorium* could be used in certain circumstances had become embedded within the legal system, it too was used to rework and develop the existing common law. Arguably the 1392 act concerning the punishment of the raid on Angus, or something very like that ordinance, provided the inspiration for an act of the King's Council passed on 24 December 1438.<sup>202</sup> This dealt

<sup>201</sup> W. D. H. Sellar, 'The Resilience of the Scottish Common Law' in David L. Carey Miller and Reinhard Zimmermann (eds), *The Civilian Tradition and Scots Law. Aberdeen Quincentenary Essays* (Berlin, 1997), 149–64, 164. Here Sellar was discussing the reception of ideas from Roman law. Another similar conclusion about the causes of legal change in medieval Scots law is drawn in MacQueen, *Common Law and Feudal Society*, 264–7.

<sup>202</sup> R.P.S. A1438/12/1; see Roland Tanner, *The Late Medieval Scottish Parliament. Politics and the Three Estates 1424–1488* (Scottish Historical Review Monograph vol. 12,

with ‘oppin and publy [public] reyff’ of ‘kyrk gudis or ony utheris’. Those denounced before the sheriff for committing such ‘oppin and publy’ acts were to be immediately arrested and required to make restitution of the ‘gudis’ seized from their victims. As in 1392, they seem to have had no opportunity to argue that they were not guilty; presumably their wrongdoing was established by the ‘oppin and publy’ nature of their deeds. If they refused to obey the law at once then they were to be put to the horn. And yet, in a provision that is at least reminiscent of the 1392 act, they were to have fifteen days to comply with the sheriff’s commands to make restitution and to find ‘souerte till undirly the law for dysobeysans’. Failing that, the wrongdoers were to be ‘notorly cryit rebellouris to the kyng’.

The 1438 act evidently stems from the statutory tradition that established procedure *per notorium* in Scots law. It is also widely regarded by historians as representing an important stage in the development of the action of spuilzie.<sup>203</sup> This is because the procedure outlined in the act could be used to remedy ‘oppin and publy reyff or spoliationne’.<sup>204</sup> This may suggest that procedures designed to remedy the wrong of ‘reyff’ were absorbed into the later action of spuilzie, which was probably one of the most commonly raised actions in the late-medieval and early modern Scottish courts.<sup>205</sup> But this possibility can only be explored in another article.

Regardless, I hope that this study would have been of interest to the late Professor Angelo Forte. He and I had originally intended to publish jointly on part of the topic considered in this paper, and so it seems appropriate that it should be included in a volume in his honour.<sup>206</sup> Angelo was a very great friend and mentor to me, throughout my undergraduate and postgraduate studies at Aberdeen and beyond. He was exceptionally generous with his time, and would

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Phantassie, 2001), 76, 79, 88.

<sup>203</sup> See, for example, Godfrey, *Civil Justice in Renaissance Scotland*, 239–47, particularly at 240, 243.

<sup>204</sup> The emphasis is mine.

<sup>205</sup> Cairns, ‘Historical Introduction’, 73–4.

<sup>206</sup> We planned to write an article on the law of *Claremathan*, a name which was given to the law preserved in *L.S.* c.1 at some point in its history. I am grateful to Dr Taylor for the information that one of the earliest known attestations of the name for the law is found in *S.A.* c.12. For some discussions of the meaning of the word *Claremathan*, see George Chalmers, *Caledonia: or, An Account, Historical and Topographical of North Britain from the Most Ancient Times to the Present Times* (4 vols, London and Edinburgh, 1807), I, 448; John Longmuir (ed.), *Jamieson’s dictionary of the Scottish language; in which the words are explained in their different senses, authorized by the names of the writers by whom they are used, or the titles of the works in which they occur, and derived from their originals* (based on the abridgement by John Johnston, Aberdeen, 1867); see also Taylor, ‘*Leges Scocie*’, 218–19.

always make room in his busy life to give me a chance to discuss questions and problems that we both found interesting. His great breadth of knowledge and his enthusiasm for the subject were inspiring. Indeed, those qualities of his teaching, coupled with his generous and kind encouragement, were some of the most important factors that influenced my decision to pursue a career in academia. For this I will always be deeply grateful to him.<sup>207</sup>

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<sup>207</sup> I am grateful to Professor Hector MacQueen of Edinburgh University, Dr Alice Taylor of King's College London, and Professor John Ford and Professor Roddy Paisley of Aberdeen University for their comments on this article. Any errors remain my own.

# A Dubious Tale of Misfortune Revealing the True Nature of Udal Law on Shetland and the Schound Bill – Shetland Law at the Beginning of the Seventeenth Century

*Jørn Øyrehagen Sunde*

## **Bringing History, Society And Law Alive**

In his article ‘Black Patie and Andro Umfra: A Prosopographical Study of “Just Feir or Dredour” in Early Seventeenth-Century Shetland’, published by the Stair Society in 2006,<sup>1</sup> Angelo Forte displays the nature of both Shetland’s economy and politics, and of Scottish contract law in the early seventeenth century. Moreover, it is the mix of three factors in Forte’s article – history, society and law – that brings all of these to life and reveals the symbiosis in which they naturally dwell.

Likewise, this article proposes to illustrate a similar symbiosis in yet another tale. The protagonist is another Shetlander: Frances Sinclair of Uyea. Exactly like Andro Umfra, he was a ‘hard-headed businessman who was not above using some strong-arm tactics’;<sup>2</sup> and also appears as a victim on the backdrop of the chaotic state of affairs of Shetland during his lifetime. But unlike Andro Umfra, Frances Sinclair was unsuccessful in business, and he added to his misfortune by participating in manslaughter. Still, the central issue in this paper is that Frances’s father transferred his property in 1580, according to Scots law, to his son as feudal land, but that the land was also treated as udal property, according to Norwegian law. This case thereby illustrates the intricate nature of Shetland law at the beginning of the seventeenth century, and it was an issue during the hearings of a commission that met in Scalloway, Shetland, held from September to November 1637. Frances Sinclair was

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<sup>1</sup> Angelo D. M. Forte, ‘Black Patie and Andro Umfra: A Prosopographical Study of “Just Feir or Dredour” in Early Seventeenth-Century Shetland’ in Hector L. MacQueen (ed.), *The Stair Society: Miscellany Five*, *Stair Society* vol. 52 (Edinburgh, 2006), 89–101. I met Professor Angelo Forte for the first time in 2005, and within minutes we talked of Shetland and Shetland law. It was the beginning of a both educational and dear friendship.

<sup>2</sup> Forte, ‘Black Patie and Andro Umfra’, 100.

deceased at this time, but his property was reclaimed by his nephew, James Sinclair, from its then owner. The legal foundation of the claim was obscure, but the same can be said of Shetland law after it had gradually become more Scottish during the sixteenth century, before Norwegian law was totally abolished in 1611.<sup>3</sup>

At first glance, it may appear that the case of Frances Sinclair can be studied in a ‘golden age’ and ‘non-golden age’ context. The first context – the golden age – refers to the Norse period up until the mortgage of Shetland to the Scottish crown in 1469, and maybe even up until the final and decisive administrative separation of Shetland from the Danish-Norwegian kingdom in 1611. This conclusion is largely based on an understanding of udal law as the foundation for a non-hierarchical legal order regulating a society of free men. But the empirical data justifying the conclusion of a golden age can be questioned. This is due both to the fact that Shetland was exposed to Scottish influence during the Norse period as well and to the fact that the udal legal order proved to be a handy tool for suppression, especially during the reign of the Stewart earls during the period 1581–1610, when the feudal law was favoured by Shetland lairds. Such a perspective hence deprives Shetland of a ‘golden age’.

These pitfalls of Shetland history were discussed in 1990 by Brian Smith in his article ‘Shetland, Scandinavia, Scotland 1300–1700: The Changing Nature of Contact’.<sup>4</sup> In his article, Smith also gives a brief account of the conflict concerning the land of Frances Sinclair to display how intricately the Norse and the Scottish elements were interwoven into the corpus of Shetland law.<sup>5</sup> The complex nature of Northern Isles law is also the theme of Katherine Anderson’s thesis of 2015.<sup>6</sup> This article will further investigate this influence. The ambition is, like that of Angelo Forte’s article from 2006, to display the details of the story rather than passing judgements on a most complex historical period.

<sup>3</sup> John H. Balantyne and Brian Smith (eds), *Shetland Documents 1580-1611* (Lerwick, 1994), 261–2, no. 528.

<sup>4</sup> Smith, ‘Shetland, Scandinavia, Scotland 1300–1700: The Changing Nature of Contact’ in Grant G. Simpson (ed.), *Scotland and Scandinavia 800–1800* (Edinburgh, 1990), 25–37.

<sup>5</sup> A reference to and comment on the case can be found in Michael Jones, ‘Notions of “udal law” in Orkney and Shetland: From medieval Norse law to contested vestiges of customary rights within Scots law’ in Steinar Imsen (ed.), *Legislation and State Formation – Norway and its neighbours in the Middle Ages* (Trondheim, 2013), 144.

<sup>6</sup> Katherine Anderson, *The Influence of Scots and Norse Law on Law and Governance on Orkney and Shetland 1450-1650* (Ph.D. thesis, University of Aberdeen, 2015).

### **A Dubious Tale of Misfortune**

In 1637, James Sinclair, the nephew of Frances Sinclair, attended the commission in Scalloway on Shetland to explain the background for his claim to lands his uncle possessed until 1602, but which were now in the possession of Andro Bruce of Muness:<sup>7</sup>

Efter the death of [...] William Sinclair [Frances's father], [...] [his wife] Margaret Stewart married William Bruce of Simbister to hir second husband (who was a servant and follower of Laurence Bruce of Cultemalindis, half brother to the earle of Orknay, and schireff deput of Yetland), and efter his mariage the said William Bruce sat downe in the said William Sinclaire his dwelling place, and medled with the haille moveables, and tuick possession of the most part of the lands that belonged to umquhill William Sinclair, his wyves first housband, and pat all the bairnes to the doore, and would acknowledge non of them. And be occasion of this unduetifull carrage Frances, and Robert [his brother] [...] fell in evill companie, and became airt and pairt of slaughter, and sua unlegall, which was a thing that the said William Bruce most desyred.

In the mean tyme the said Laurence Bruce of Cultemalinds, schireff deput of Yetland, finding the said Frances Sinclair unlegall, and understanding that the said William Bruce at his owne hand had medlet with the maist pairt of the said Frances Sinclairs landis, he thairupon as schireff (quhilk was all the pretext he had) tuick occasion and possest himself with ane great part of the rest of Frances Sinclairs lands, and dispones the same to Andro Bruce of Mownes, his sone, and gave him infeftment thair of, and albeit he had no ryght, himself and the said Andro Bruce of Mownes took the haille rest of the said Frances Sinclairs lands, and keepes the samein violently, and hes dispoined the same to Andro Bruce, younger, of Mownes, his sone, and given him infeftment thair of, albeit he had no ryght himself.

According to James Sinclair, the property William Sinclair of Underhoull left to his sons Frances and Robert Sinclair of Ramnago was first taken possession

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<sup>7</sup> SA, SC12/65/3. This document is made a part of the still unpublished manuscript in Balantyne and Smith (eds), *Shetland Documents 1612–1637* (forthcoming). The editors have made this manuscript available to me. The subsequent citation is taken from the same source.

of by their stepfather William Bruce of Symbister. Later, after they were convicted of manslaughter of their uncle Mathew Sinclair in 1602, the sheriff deputy Laurence Bruce of Cultemalinds confiscated the property as a part of the punishment, and sold it to his son, Andro Bruce.

Laurence Bruce was appointed sheriff of Shetland by his half-brother, Earl Robert Stewart, around 1571. Due to personal mischief and oppressions, Laurence Bruce was expelled from office and banished from the islands in 1577. An important backdrop for this event was a complaint made by an overwhelming number of Shetlanders, and an important protagonist in their campaign was Arthur Sinclair of Aith. The following year Laurence Bruce returned to Shetland, now in the capacity of sheriff deputy. He continued to acquire property from the islanders, and built a tiny castle at Muness at Unst. Unst, the northernmost of the Shetland islands, was also the home of Frances Sinclair and where important parts of his estate were located. The castle at Muness and much of the property of Laurence Bruce was inherited by his son Andro. In the account he presented to the commission in Scalloway, James Sinclair thus linked much of the misfortune of Frances Sinclair to the well-known villainy of Laurence Bruce.<sup>8</sup>

Laurence Bruce was not the only villain in the Shetlands at the turn of the sixteenth century, which is a period in Shetland history that closely resembles Italian politics and society during the Renaissance. Another villain was Earl Patrick Stewart, the son of Earl Robert, and hence the nephew of Laurence Bruce. Earl Patrick returned to Frances the lands he claimed had been taken from him by his stepfather. The Earl even tried to seize the castle of Muness in 1608. But just as that attempt failed, so did the restoration of Frances Sinclair to his property – the Court of Session overruled the Earl's decision on restoring the lands to Frances Sinclair, and these lands were therefore also lost in what is portrayed as a Bruce conspiracy:

The said Francis being mad unlegall as airt and pairt of the forsaide slaughter, and for not fulfilling of the said William Bruce his decreit, he was forced to leave the countrie. [...] In the meantyme of this his banischment he was forced to contract debt, and for not payment thair of was incarcerat in the tolbuith of Edinburgh, and remained therein ay and quhill he was releived be James Sinclair of Skalloway, his neer cousigne, who not only payit all his debt, and releived him out of ward, bot also

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<sup>8</sup> Smith, 'Shetland, Scandinavia, Scotland 1300–1700', 33.



tuick him back to the countrie of Yetland, gat him mad peaceable thair, and entertained him twentie four yeers thair efter, in meat, cloth, bed and buird, dureing the quhilk tyme the said Frances Sinclair gave tickets and bands to the said James Sinclair for such sowmes as he payed and advanced for him, and efter compt and reckoning all the sowmes wer insert in a simple band of ten thousand merks.

As noted above, Frances Sinclair participated in the slaughter of his uncle, Mathew Sinclair, in 1602. His properties were confiscated and he was exiled from Shetland as punishment. Without property and penniless, Frances Sinclair contracted debts and was bailed out by his nephew James, who brought him back to Shetland and cared for him until Frances' death. James Sinclair told the commission in Scalloway the terribly sad tale of a man deprived of his rights by a villain. However, in the turmoil of the Shetland islands in the late-sixteenth and early-seventeenth centuries, things were rarely black and white.

Firstly, Frances Sinclair was back at Shetland in June 1608, when he witnessed a contract entered into at Sumbourgh head,<sup>9</sup> and he died before December 1634.<sup>10</sup> The report that he was cared for by James Sinclair for about twenty-four years, and not twenty-six years, is an insignificant inaccuracy in history. Nevertheless, there is more of this kind of inaccurate information given in the case, that is of importance.

Secondly, William Sinclair did not transfer his property to his sons Frances and Robert, but only to Frances, with the exception of 'the landis of Eway and the haill landis of Underhull and Crosbustay, quhylk I have gevin to my spous Margaret Stewart as lyf rentter'.<sup>11</sup> While udal property is in principle shared by all siblings, feudal property in Scotland was passed on from father to the eldest son. William Sinclair did not inherit feudal property from his own father, Olaw Sinclair, but his own estate was granted a feudal status by the Great Seal in 1578.<sup>12</sup> William Sinclair could hence transfer the 'quilk landis I have holdin of our sufferane King graice maggestie, as the chartour at mair

<sup>9</sup> Balantyne and Smith (eds), *Shetland Documents 1580–1611*, 213, no. 449.

<sup>10</sup> NAS, CS7/475. See also NAS, CS7/454. This manuscript is part of the currently unpublished Balantyne and Smith (eds), *Shetland Documents 1612–1637* (forthcoming), which the editors have made available to me.

<sup>11</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579* (Lerwick, 1999), 247–9, no. 265.

<sup>12</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579* (Lerwick, 1999), 241, no. 260.

lenth proporttis, gevin at Styrling' to 'Frances, my eldest sone, all rycht and tityll.'<sup>13</sup>

It may appear strange that a Shetland landlord from the Norse period should choose to give his property the legal character of the Scottish period of influence on Shetland law. But since the new lairds had feudal property, passed on as one unit to the oldest son, and the old landlords had udal property, divided in shares between their children, the old landlords were bound to vanish. The reason is that only udal land would be on the market, acquired by old and new landowners alike, and over time there would be fewer and fewer old landlords with considerable estates, and the number of new lairds and their estates would grow. The udal property system can hence only prevail within jurisdictional borders where there is no competition from the feudal property system. Such competition will arise when politics and economy favour the feudal system. A plausible explanation for why udal law was able for such a long time to withstand the competition of feudal law on Shetland – longer than the Orkneys and much longer than the Western Isles – might be that the small-scale fishery economy based on trade with the Hanseatic League dominated longer in the Shetlands, as opposed to big business exports dependent on larger amounts of capital and estates.<sup>14</sup>

The transfer of the estate from William Sinclair to his son Frances was a feudal transfer disregarding the other children as heirs, but was presented by James Sinclair as less feudal in nature since the two brothers inherited the property together. At 8 o'clock on the evening of the transfer, the event was observed by a ritual of property transfer used in Scotland:<sup>15</sup>

the said William Sincler past on the grownd off Eway in name of the haill landis nomenatt within the chartour, and thair be traditioun of muld and stane, and ane neffull of corn, delyverit and gaif stat, sesin, reall, corporall and actuall posessioun of the chartour and the landis.

The passing on of dirt ('muld') and stone ('stane') was a Scottish ritual.<sup>16</sup> It also corresponds fairly well with a ritual used when transferring udal property

<sup>13</sup> Ibid., 247–8, no. 265.

<sup>14</sup> Hance D. Smith, *Shetland life and trade – 1550–1914* (Edinburgh, 1984), 29–32, and more in general 10–45. See also Smith, 'Shetland, Scandinavia, Scotland 1300–1700' (Edinburgh, 1990), 31–2.

<sup>15</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 248, no. 265.

<sup>16</sup> George L. Gretton, 'The Feudal System', in Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996), para 89–93.

according to the Gulating compilation XII-15 and 28 (chap. 279 and 292), applied in western Norway. As we shall see, this compilation of law applied also in Shetland but was replaced only in 1267, and then in 1274 by what Shetlanders refer to as the 'Magnus Code', and was not a part of Shetland law in 1580.

Thirdly, Frances Sinclair contracted debt before being exiled from Shetland for manslaughter in 1602. In 1593 he gave an obligation 'to Williame Chaipe, burgess of Edinburgh, on 600 merks for board and provision of meat and clothing for the previous six years.'<sup>17</sup> In 1599 he took up a loan of 3000 merks from Andro Lawsoun, also burgess of Edinburgh.<sup>18</sup> In 1600 Andro Lawsoun put Frances Sinclair to the horn, which means he was made subject to imprisonment and that his property was confiscated, for not repaying his debt.<sup>19</sup> The misfortunes of Frances Sinclair might hence be less due to a Bruce conspiracy than to a misfortune in business.

Fourthly, Frances Sinclair cannot have been deprived of all property by his stepfather before it was lost anyway in 1602. In 1590 and 1591, Frances Sinclair is also regarded as having rights in the properties left to him by his father,<sup>20</sup> and mortgaged property in 1597, 1598, 1599, 1601, and even in 1603.<sup>21</sup> Indeed, it seems that it was not until 1608, a date later than the conviction for manslaughter and the subsequent exile and return to Shetland, that a conflict about land arose between Frances Sinclair and his stepfather William Bruce.<sup>22</sup> This makes the cover story of a Bruce conspiracy against Frances Sinclair less likely to be true.

Fifthly, in 1597 Frances was among the landlords on Shetland, together with Andro Umfra – the protagonist of Angelo Forte's paper – required to find caution that he would 'keip peace, quitnes and gude rule in the countrie'.<sup>23</sup> This shows that Frances Sinclair was involved in the turmoil of Shetland politics before the confiscation of his property following the conviction for manslaughter. This brings us over to the sixth factor to keep in mind: Frances Sinclair was not a stranger to using violence to get his way, the manslaughter of 1602 not being the only indication. In 1609 Frances Sinclair, with Earl Patrick, his brother Robert and others, is said in a decree of the Court of Session to

<sup>17</sup> Balantyne and Smith (eds), *Shetland Documents 1580-1611*, 94, no. 213.

<sup>18</sup> *Ibid.*, 125-126, no. 280.

<sup>19</sup> *Ibid.*, 130, no. 291. See also *ibid.*, 161-2, no. 357.

<sup>20</sup> *Ibid.*, 74, no. 167 and 78, no. 178.

<sup>21</sup> *Ibid.*, 118, no. 265; 124, no. 276; 125-6, no. 280; 145, no. 325; 170, no. 375.

<sup>22</sup> *Ibid.*, 222-3, no. 465.

<sup>23</sup> *Ibid.*, 114, no. 257.

have caused great damage to William Bruce's property at Sumburgh.<sup>24</sup> And in 1612 Frances Sinclair was one of eight who, in an order by the Privy Council, was named as a servant of Earl Patrick Stewart, and was said to be disrupting the work of his majesty's commissioners. He 'oppressis and overthrawis the poore inhabitantis', according to the order.<sup>25</sup> All of which take us to a seventh factor in the case: James Sinclair played down the fact that his uncle Frances had been an ally of Earl Patrick, a tyrant of even larger proportions than Laurence Bruce.

It seems that James Sinclair was not telling the whole story when he appeared in front of the the commission in Scalloway in 1637, and there are indications that there is even more to the tale. What is important in this context, is the fact that the tale served to legitimise James Sinclair's claim to the confiscated property bought by Andro Bruce more than thirty years earlier: 'The said James Sinclair tuick advise of freinds and lawers howe he might get payment. And he was advysit to compryse the said Frances Sinclairs lands for that ten thowsand merks.'<sup>26</sup> James Sinclair hence made a claim for the property of Frances Sinclair to cover the debt Frances had contracted while in the care of his nephew, a claim that could only be made in relation to property belonging to Frances and not Andrew Bruce who possessed it.

The social legitimisation for the claim could draw both on the sad destiny of Frances Sinclair, but also on the underlying political dimension linking the loss of the property to the tyranny of Laurence Bruce. This was of importance, since the opponent to James Sinclair, Andro Bruce, the son of Laurence Bruce, derived his right to the properties from his father's dispositions. James Sinclair himself was the son of Arthur Sinclair, who in 1577 submitted the written document with the complaints of the Shetlanders 'befoir the regents grace and lordis of the secreit counsale contrair Laurence Bruce of Cultemalindie.'<sup>27</sup>

<sup>24</sup> *Ibid.*, 230–2, no. 473. See also *ibid.*, 274–275, no. 554.

<sup>25</sup> RPC, 1st series, ix. This document is made a part of the still unpublished Balantyne and Smith (eds), *Shetland Documents 1612–1637*, which the editors have made available to me.

<sup>26</sup> Hamilton-Grierson explains what it meant to 'compryse' lands in the following terms: 'Comprising or apprising was a form of diligence by which the debtor's lands were valued, and a portion of them corresponding to the amount of debt was made over to the creditor.' See Philip J. Hamilton-Grierson, *Habbakuk Bisset's Rolment of courtis* (Scottish Text Society, New Series vols 10, 13, 18, Edinburgh, 1920–1926), III, 125–6.

<sup>27</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 183, no. 237.

We see that the facts of the case are rather obscure and intricate. The commission that met in Scalloway in the autumn of 1637 did not examine the facts at all. Their task was to look at the law of the case. This was because Andro Bruce defended himself by claiming he had schound bill-based udal rights in the property for which James Sinclair made a claim. For the commission, udal law was probably a little known legal institution, and the schound bill an unknown document. There are reasons to believe that, from a contemporary perspective, the case appeared as obscure then as it does in the aftermath. But to understand the nature of the schound bill, we first have to study udal law in the Shetlands.

### The True Nature of Udal Law In The Shetlands

James Sinclair's claim is a strange one. His uncle Frances Sinclair was in debt to him without the means to pay him back, and in 1624 he took out a bond for 10,000 merks to cover the debt.<sup>28</sup> Why, then, would James Sinclair make a claim on the confiscated property of Frances Sinclair to cover his debt?

As stated above, Scots law became Shetland law as of 1611. Up until that time, Shetland, like the Orkney and Faroe Islands, was a part of Gulating. The legal territories of Gulating – covering the western part of Norway – and Frostating, covering the middle and northern part of the realm – can with certainty be traced back to the early tenth century. Still, it is probable that these legal territories outdate the Norwegian realm, which – in theory, at least – can be dated to the victory of King Harald Fairhair at the battle of Hafsford in 872. The legal territories of Borgarting – covering the area around the Oslofjord in eastern Norway – and Eidsivating – covering the interior of eastern Norway – date back to the eleventh and twelfth centuries.<sup>29</sup>

Each legal territory had its own compilations of law. Still, there are good reasons to believe that there was great variety within each territory. It was not until King Magnus VI, later referred to as the Law Mender, reformed these compilations of law between 1267 and 1269 that the law was unified within each legal territory. In 1271, King Magnus the Law Mender reminded the Faroes that their old compilation of law was now no longer to be used, except

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<sup>28</sup> NAS, RD1/368. This document is made a part of the still unpublished Balantyne and Smith (eds), *Shetland Documents 1612–1637*, which the editors have made available to me.

<sup>29</sup> See Steinar Imsen, 'Introduction' in idem (ed.), *Legislation and State Formation – Norway and its neighbours in the Middle Ages*, 15–19, 27.

the book on settlement.<sup>30</sup> Shetland, also being under the revised Gulating law of 1267, probably also had had their own compilation of law, which was replaced.<sup>31</sup>

In 1274, a code for the entire Norwegian countryside was issued. It covered all land territory except Iceland, which got its own code in 1281, while the cities received their code in 1276. The Code of 1274 was issued separately for each legal territory, but the content was ostensibly the same for all four.<sup>32</sup> This was quite an event, since only the European kingdoms of Sicily, Castilla and Norway had a code for the entire realm in the thirteenth century. This must have given the Code of 1274 a prestige that would last well into the sixteenth century. At the same time, the administrative structures promoted by the Code made it popular, since it combined centralized and local power through an arrangement of circuiting civil servants. Currently, thirty-nine complete manuscripts and forty-nine manuscript fragments of the Code of 1274 made before 1350 have been preserved. The Norwegian realm at that time had about 500,000 inhabitants. If we have preserved 20 per cent of the manuscripts that actually existed in 1350, which is a quite generous estimate,<sup>33</sup> there was perhaps as many as one manuscript per 1150 inhabitants in the Norwegian realm at the time of the Black Death. This is ample indication of the code's popularity and actual use, including in Shetland.

Thus, it was the Code of 1274, with later amendments – local, regional and for the entire realm – that was the legal foundation of Shetland law until 1611. For a long time, the court of appeals for Gulating, since about 1300 situated in Bergen, also served as a high court for Shetland. We know that in 1538 a Shetland case was reviewed here,<sup>34</sup> and in 1566, Queen Mary appeared to presume that a conflict concerning the lease of the Papa estate in Shetland was to be decided by the Court of Appeal in Bergen.<sup>35</sup> In 1576, however, a matter on udal law was decided by the Lord regent and Lords of Secret Council, despite the fact that the plaintiff had resided in Bergen for most of

<sup>30</sup> Gustav Storm (ed.), *Norges gamle Love indtil 1387, vol. 4: indeholdende Supplementer til de tre foregaaende Bind samt Haandskriftbeskrivelse med Facsimiler* (Christiania, 1885), 353–4.

<sup>31</sup> See the discussion in Imsen, 'Introduction', 20–2, 29–32.

<sup>32</sup> On the making of the Code of 1274, see Jørn Øyrehaugen Sunde, 'Daughters of God and Counsellors of the Judges of Men – A Study in Changes in the Legal Culture in the Norwegian Realm in the High Middle Ages' in Stefan Brink and Lisa Collinson (eds), *New Approaches to Early Law in Scandinavia* (Turnhout, 2014), 132–141.

<sup>33</sup> Normally it is estimated that 10 per cent of Medieval manuscripts are preserved today.

<sup>34</sup> J. Storer Clouston (ed.), *Records of the Earldom of Orkney 1299–1614* (Edinburgh, 1914), 96–9, no. 43.

<sup>35</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 112–14, no. 154.

his life.<sup>36</sup> Nonetheless, the matter was decided according to Shetland law, which originated from the Code of 1274.<sup>37</sup> As late as 1567, the Scottish Parliament confirmed that the old Norse law in Shetland and the Orkneys, and hence the Code of 1274, still applied.<sup>38</sup> This means that the Code of 1274 was still in use. However, the ties to Norway were weakening. In 1573, the Danish-Norwegian King made a last attempt to send a royal judge to Shetland, but he was never installed in his office.<sup>39</sup>

We know that at least one manuscript of the code existed on Shetland in 1602, because in August of that year, there was a case made against Adam Sinclair of Brow that ‘the essaye taking lang and mature deliberatioun, be the inspectioun of the chepturis of the law buik and parteikis of the contrie in sic caices.’<sup>40</sup> It was the same law book, the same chapter and the same provisions as those applied in the case of Frances Sinclair during the same month of 1602. There are even examples of legislation from Norway as late as the sixteenth century that was adopted and applied in Shetland. Samuel Hibbert refers in an article from 1831 to a court case the essence of which was that ‘a newer law of inheritance favouring primogeniture had [...] been introduced into Norway; and an appeal was made to the lawting by interested parties with the view of setting the old Shetland custom aside.’<sup>41</sup> In a supplication made by Shetlanders to the Scottish Parliament in 1592, it was claimed that:<sup>42</sup>

we and our predecessoires of ther udach [udal] landis haiff been in continuall possession theroff according to tenor of the haldin abovewretten, first established in Norroway, allowit in Denmark and imbracit and ressavit be ane invioable custome in this kingdome thir fivagis bygone and mair.

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<sup>36</sup> Clouston (ed.), *Records of the Earldom of Orkney 1299–1614*, 378–9, no. 239.

<sup>37</sup> For more on this case, see Brian Smith, ‘Dull as ditch water or crazily romantic Scottish historians on Norwegian law in Shetland and Orkney’ in Imsen (ed.), *Legislation and State Formation – Norway and its neighbours in the Middle Ages*, 123.

<sup>38</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 123, no. 168.

<sup>39</sup> Brian Smith, ‘When did Orkney and Shetland become part of Scotland? A contribution to the debate’ (paper given at Shetland Museum and Archives, September 2007). See also Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 163, no. 216.

<sup>40</sup> Gordon Donaldson (ed.), *The Court Book of Shetland 1602–1604* (Edinburgh, 1954), 43.

<sup>41</sup> Samuel Hibbert, *Memoir of the Tings of Orkney and Shetland*, *Archaeologia Scotica*, 3, 1831, 205.

<sup>42</sup> Balantyne and Smith (eds), *Shetland Documents 1580–1611*, 87, no. 198.



This is a very accurate description of the issuance on 24 June 1539 of a statute strengthening ‘aasædet’, the primogeniture right to the main farm. The statute was issued by two Norwegian governors and not the king, and unaltered by the king, who was in Denmark, and hence accepted as valid legislation.<sup>43</sup> The legal contact between Norway and Shetland at this time was still strong enough for the statute to be applied in Shetland. This is not surprising, given that transporting a copy of the statute from Bergen to Shetland would take less time and be less troublesome than transporting it from Bergen to Stavanger, and even from Bergen to the end of the Hardangerfjord just south of Bergen, since sailing the open sea is more convenient than sailing along the rugged Norwegian coastline and in the fjords.

The above-mentioned Adam Sinclair was convicted of the slaughter of Mathew Sinclair, for which ‘Frances Sinclair [was] the principall committair and actuall doar’.<sup>44</sup> Earlier in August 1602, Frances Sinclair, along with seven others, among them his brother Robert, had been convicted for that slaughter in June of the same year: ‘all the forisaidis personsis haill guides and gere movable togidder with thair haill landis as far as thay have tytil and rycht to, to be escheit’.<sup>45</sup> As we have seen from the case against Adam Sinclair of Brow the same month in 1602, ‘the essayse taking lang and mature deliberatioun, be the inspectioun of the chepturis of the law buik’, was most likely referring to the Code of 1274, which still was the law book for Shetland at this time. And according to sections IV-3 and IV-6 of the Code, confiscation of movable and immovable goods was the punishment for a shameful murder. There are no references to these provisions in the court book, but it is probable that the term ‘crewel and merceless slachter’ refers to them. In the case against Adam Sinclair, it is stressed that ‘the said Adame gave up freindschipe with the said Mathow’, which would make the slaughter a breach of peace, and hence shameful according to IV-3.<sup>46</sup>

Unlike for Adam Sinclair of Brow, who was first convicted, and later found not guilty, of participating in the slaughter,<sup>47</sup> and therefore had his property restored,<sup>48</sup> the legitimacy of the conviction and punishment of Frances Sinclair

<sup>43</sup> See Jon Skeie, *Odelsretten og åseteretten* (Oslo, 1950), 16.

<sup>44</sup> Donaldson (ed.), *Court Book of Shetland 1602–1604*, 42.

<sup>45</sup> *Ibid.*, 38.

<sup>46</sup> See Jørn Øyrehagen Sunde, ‘Murder in Shetland in 1602’, *Unkans – Newsletter of the Shetland Museum and Archives*, 33 (2012), 4.

<sup>47</sup> Donaldson (ed.), *The Court Book of Shetland 1602–1604*, 42–3.

<sup>48</sup> Smith and Balantyne (eds), *Shetland Documents 1580–1611*, 201–2, no. 429. See also 163–4, no. 358.



was never questioned – not even by James Sinclair. The property should then have been lost. James Sinclair never articulates the legal premise for his claim to the property, but there are two possible lines of argument that he might have used.

First, the Code of 1274 only stressed that even udal property could be confiscated in such cases. Feudal property was not mentioned, since it did not exist in any part of the Norwegian realm in 1274. In Shetland it did exist from the sixteenth century and onward. Among these properties was the estate of Frances Sinclair, which, as we have seen, was made feudal in 1578. James Sinclair himself had no feudal rights to the property of Frances Sinclair. However, as we have seen, he had a bond from Frances Sinclair for 10,000 merks that he sought coverage for in the property that once belonged to his uncle. If the property was confiscated according to rules applicable only to udal land and not feudal land, the property might be pre-empted.

It may also be the case that James Sinclair made an udal claim on the property that once belonged to Frances Sinclair. The property was made feudal in 1578. In 1617, Frances Sinclair himself made dispositions over part of the same property (not necessarily with any right at all to do so) to James Sinclair, ‘togidder with my uthell, roith, aying and sammyng thairof’.<sup>49</sup> The following year, he again made dispositions over parts of the property, again to James Sinclair, and this time he disposed of ‘48 merks feued land in Underhowll and 4 merks feued land in Crosbister, held in feuferme and heritage of the heirs of the deceased Robert, earl of Orknay, all in the isle of Unst’.<sup>50</sup> It seems that the legal nature of the estate was as unclear for Frances Sinclair as the legal foundation of the claim to the estate later made by James Sinclair. It is possible, therefore, that he made a claim for it in accordance with udal law.

In Shetland, udal law is a term having a dual meaning, which at times causes confusion.<sup>51</sup> Firstly, udal law refers to the legal order in Shetland during the Norse period up until 1611 and is hence in contrast to the Scottish feudal law which replaced Norse law. In a very general sense, udal law is a ‘horizontal’ legal order in contrast to the ‘vertical’ feudal law. This means that rights and

<sup>49</sup> NAS, RD1/292. This document is made a part of the still unpublished manuscript of Balantyne and Smith (eds), *Shetland Documents 1612–1637*, which the editors have made available to me.

<sup>50</sup> SA, D12/61/1/1. This document is made a part of the still unpublished manuscript of Balantyne and Smith (eds), *Shetland Documents 1612–1637*, which the editors have made available to me.

<sup>51</sup> The term ‘udal law’ is explained in Knut Robberstad, ‘Udal Law’ in Donald J. Withington (ed.), *Shetland and the Outside World, 1469–1969* (Oxford, 1983), 59–64.

property ownership do not derive from contractual structures between superior and subordinated. Rights and udal ownership hence have to be contractually limited, and not positively constituted. As far as udal ownership is concerned, it is full from the outset. Udal law as a legal order, however, also affected features of legal governance, poverty relief and other aspects of public law.

On the one hand there were on Shetland individuals known as udallars, who were possessors of udal property, with tenants. Tenancy is definitely a horizontal structure whereby property and rights derive from a contract. The tenant system developed in Norway from the early-thirteenth century,<sup>52</sup> and given a more comprehensive legal framework with the Code of 1274, had the same origin in Roman law as did feudal law. On the other hand, tenants paid the same *scatt* – the same dues – to king and church as udallars, performed the same service in court, etc., illustrating the horizontal structure that is the backbone of udal law.

Secondly, udal law refers to a specific legal property law institution.<sup>53</sup> Udal property, according to the Code of 1274 VI-1, is inherited by all siblings, not only the oldest son. Daughters were nevertheless entitled to half the share of sons. According to V-7, the oldest son inherits the main farm, which is called ‘høffwidt bølge’ in a document from Shetland from 1516.<sup>54</sup> This is later referred to as ‘heid bull’ in 1575 in a Scottish translation of this Norse term.<sup>55</sup> The siblings would get other land or monetary compensation. If there was only one property and no monetary resources to pay the other siblings off, the main farm might have been split between the siblings into equal shares to be used by each according to the Code of 1274 VI-3. It might also have been split into equal shares, but only used by the oldest while the others received a yearly rent. The oldest male heir would thus have a privileged right to the main farm not enjoyed by his siblings, and therefore might paradoxically end up as their tenant. This was possible due to the horizontal structure of udal law.

Another feature of udal law as a legal institution, and maybe the most important, is the right to pre-empt udal property that is sold out of the family. When selling udal property, it shall according to VI-4 first be offered to the udallars’ kinsmen who have an udal right in the property. If the one with the privileged right is abroad, he has to make a claim for pre-emption within twelve

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<sup>52</sup> Tore Iversen, ‘Jordeie og jordleie – Eigedomsbegrepet i norske middelalderlover’, *Collegium medievale*, 14 (2001), 79–114.

<sup>53</sup> See Skeie, *Odelsretten og åseteretten*, 14–16.

<sup>54</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 54, no. 79.

<sup>55</sup> *Ibid.*, 163, no. 216.

months after he has returned to the country. This was the case in Orkney in 1576, when Nicoll Oliversoun made a claim for pre-emption of his father's land after having been in Norway for forty years.<sup>56</sup> However, if the kinsmen do not have the means to acquire the property, the one with the best right shall proclaim his intent to buy it and his temporary lack of funding. He must do this every ten years in order to keep his right to pre-empt the property. After sixty years, this right is precluded, and the property becomes the udal property of the new owner according to VI-2 in the Code of 1274.

The property that the sheriff deputy Laurence Bruce confiscated from Frances Sinclair in 1602 was treated by him, and seemingly all others, as udal property despite the fact that, as we have seen, it was made feudal in 1578. But there is no evidence that any claimants with udal rights in that property attempted to pre-empt it. Hence, this right should have been precluded already after ten years. But there is likewise no evidence that pre-emption was made possible. This would have left the kinsmen in the same situation as if they were abroad, and logically the right could not have been precluded. All we are able to ascertain is that James Sinclair made a claim for the property that belonged to his uncle up until 1602, and that if it was udal property, the claim could be based on a right to pre-emption. This would be advantageous to him if he got the property at a favourable price, an outcome made possible by the Code of 1274 in VI-5, because it meant that James Sinclair got at least some coverage for his uncle's debt to him in the form of 10,000 merks.

As stated above, the legal foundation for the claim made by James Sinclair is unclear. This might have been a strategic choice. It may also be the case that he did not know exactly what the basis of his claim was, and that he did not even care much. He was certainly well aware of the fact that Frances Sinclair himself, in 1615, had made a similar claim based on the same arguments, but for a different part of the properties he had lost.<sup>57</sup> Frances Sinclair lost the case in 1615 when facing the same arguments that Andro Bruce used. There are also reasons to believe that the feudal and/or udal nature of Frances Sinclair's property, and the consequences of that nature, were reviewed by the Court of Session in 1609, when it convicted Frances Sinclair and others for the violence against his former tenants. Whether the claim was based on feudal or udal law, James Sinclair had a weak case and slim chances of winning. But he had two factors strengthening his claim that his uncle lacked more than 20 years earlier. First, feudal and udal law were being mixed in Shetland in the aftermath of

<sup>56</sup> Clouston (ed.), *Records of the Earldom of Orkney 1299–1614*, 378–379, no. 239.

<sup>57</sup> Donaldson (ed.), *Court Book for Shetland 1615–1629*, 6, 10.

the abolishment of Norse law in 1611, and the legal situation was becoming blurred.<sup>58</sup> The risk of pursuing the claim was hence worth taking because the Court of Session did not understand what was going on in the case, nor could they get a proper explanation through the use of a commission. Second, the deeds Andro Bruce claimed to have for the property had burnt with his castle at Muness in 1627. The legal foundation of James Sinclair's claim might have been unclear, simply because he put his faith in these non-legal factors rather than in the legal ones.

### **The True Nature Of The Schound Bill**

Unlike James Sinclair, Andro Bruce was quite keenly aware of the legal foundation of his defence: udal law. According to the Code of 1274 VI-2, an udal right to property could be achieved either through lawful possession for sixty years, possession by three generations prior to the present owner, acquisition of the property as a gift from the king, or attribution of the property if it had been divided between two or more heirs to an udallar. None of this applied in the dispute between James Sinclair and Andro Bruce. Instead, the dispute was over the written deed from which Andro Bruce could derive his title to the property – the schound bill. Even if this were explicitly articulated and argued, the character of the schound bill was probably even more obscure to the commission set in Scalloway during autumn of 1637 than Shetland law in general, and is still so for scholars today. This is the reason why a commission had to investigate the matter in Shetland before the Court of Session decided the case. By examining the investigation, the nature of the schound bill, and, by extension, Shetland law, can be reconstituted, and hence saved from obscurity.

The Code of 1274 no longer applied in Shetland when the commission investigated to ascertain what udal rights might be tied to the property confiscated from Frances Sinclair in 1602 and purchased by Andro Bruce. Nonetheless, as we have seen, the Code was applied in 1602. The change in Shetland law in 1611 had no retroactive effects and hence did not alter existing titles in land. Therefore, even though udal law as a legal order was abolished in Shetland in 1611, udal law as a land law institution was still in effect.<sup>59</sup>

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<sup>58</sup> See Jones, 'Notions of "udal law" in Orkney and Shetland: From medieval Norse law to contested vestiges of customary rights within Scots law', 140–4.

<sup>59</sup> Robberstad, 'Udal Law', 59.

The whole udal issue in the case originated from the question of title to land according to written deed, and James Sinclair claimed that ‘seassings, being only the assertion of ane nottar without anie adminicle, and given be the father to his sone, can be no valid rycht.’ He then adds that ‘seassings ar null because they ar given upon a pairt of the lands for the remnant, not lying contigue, and ther is no unione.’ Andro Bruce had produced sasines for each piece of property, and not one single written deed covering the transfer of the whole estate that was confiscated from Frances Sinclair in 1602. James Sinclair, on the other hand, stresses that he could produce ‘his owne and his authors infeftments, holden of the kyng’. This must have been the charter under the great seal of 1578 and the transfer William Sinclair made to his son, Frances Sinclair, in 1580. This is because the two charters could be used to prove that the property was feudal and not udal property, and hence that it could not be split and disposed of in bits and pieces. As we have seen, the problem for James Sinclair was that the estate had been treated as udal, even partly by Frances Sinclair.

What was pressing for the Court of Session, was to establish certainty concerning what kind of legal instrument a schound bill was, and this was the basis of Andro Bruce’s defence. The problem of the court was that two different understandings, well fitted to support their claims, were made by the two parties and their witnesses on the nature of schound bills.

It was alleged before the commission that a schound bill ‘is only a naicked possession without anie wreatten securitie [...] according to the Danische lawes and custome of that countrie.’ A schound bill did not in itself entitle anyone to an udal right. It could just serve as an evidence of a right, not the source of a right. If the commission accepted this understanding of a schound bill, Andro Bruce would lose the case since he did not fulfil the criteria according to the Code of 1274 to hold the properties with an udal right, but only had the schound bills to prove his rights as an udallar.

It was also alleged that ‘[a]ll the udaillers to mainteine thair possession have ane wretten securitie called ane schoundbill, efter the Danisch lawes,’ meaning that there would be no udal right unless it was stated in a schound bill, and then hence that a schound bill proved an udal right.

As the commission laconically noted: ‘both the parties [were] defending themselves by ane udaill rycht, and yet discenting in the forme of it; the one acknowledging it to be by wreat, the other denying anie wreat at all.’ Whom should the commission trust? The commission’s report refers to the reverend Gilbert Mowat, who stressed that udal rights are not dependent on a schound

bill – the right must be derived from another source. As we have seen above, whereas the Code of 1274 discusses how to achieve udal rights in property, a schound bill is not an issue at all, indicating that Gilbert Mowat was right. Of course, he ought to know what he was speaking of, since his father, Andrew Mowat, had, until his death in 1610/1611, owned an estate in Norway in addition to land in Shetland.<sup>60</sup> Gilbert Mowat was also the father-in-law of Andro Bruce, and given that he emphasised something that was to his son-in-law's disadvantage, it ought to be treated as reliable. Still, the relationship was not entirely amicable. In 1634 Thomas Mowat, the son of the reverend, tried to shoot and kill Andro Bruce, but instead hit and wounded his servant Robert Cowtis.<sup>61</sup> The event was a result of a quarrel between Gilbert Mowat and Andro Bruce about land. Thomas Mowat, the notaries John and Ninian Neven and fifteen to sixteen armed persons simply confiscated the land. Gilbert Mowat himself was in charge of a mob in both 1630 and 1631, doing harm to the tenants in Papa Stour of his sister-in-law, Christian Stewart; the tenants had paid rent to her instead of him. He also witnessed a contract Magnus Mowat signed in 1620, on the tip of a sword, held by his brother James Mowat, which is why the contract was later annulled.<sup>62</sup> According to Brian Smith, 'Laurence Bruce of Cultmalindie was not the kind of person one would like to meet up a dark alley.'<sup>63</sup> One would not like to have met Gilbert Mowat either at night in the closses climbing their way up from Commercial Street to the Hillhead. This illustrates the problem the commission was facing – in a society in turmoil, where violence prevails over law, it is hard to find reliable witnesses. So even if Gilbert Mowat was right according to the Code of 1274, was he being sincere?

As we have seen above, the Gulating compilation applied on Shetland till 1267. According to VI-14 (chap. 115) a *siaundar* should be held seven days after the death of a man to have all claims on his property brought forward, and the inheritance divided between the heirs. *Siaund* simply means

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<sup>60</sup> Jørn Øyrehagen Sunde, *From a Shetland Lairdship to a Norwegian Barony – the Mouat family and the Barony of Rosendal* (Lerwick, 2009), 8–10, 13–19.

<sup>61</sup> Gardie House on Bressey, Shetland, Gardie House Private Archive, Memoribilia Zetlandica by Tho. Mouat of Garth.

<sup>62</sup> Jørn Øyrehagen Sunde, *Vegen over havet – Frå Mowatane på Shetland til Baroniet Rosendal* (Rosendal, 2010), 39–41.

<sup>63</sup> Brian Smith, 'The Last of the Shetland Aristocrats' in Barbara E. Crawford (ed.), *Northern Isles Connections – Essays from Orkney & Shetland presented to Per Sveaas Andersen* (Kirkwall, 1995), 101.

the seventh,<sup>64</sup> and according to I-23 (chap. 23) there should be held a feast for the deceased the seventh or the thirtieth day after his death. This provision in the Gulating compilation probably applied on Shetland as well. It certainly did after the core of it was adopted in V-12 in the Code of 1274. This rule still said nothing of making a written document concerning claims and the division between the heirs, and procedures for this. But, according to the Code VIII-11, all transfers of property of value should be done in a written deed, in the presence of the appeals court judge or the sheriff, or other good men, and with their seals on the contract. We have already seen how the Norse term for main farm changed from the Norse 'høffwidt bølle' in 1516 to the Scottish 'heid bull' in 1575. The Norse term *siaund* was written in various ways in Norway even before the decay of the Norse language in the sixteenth century, and we find it for example written 'seiound' in 1339 and 'syonde' sometime between 1426 and 1427.<sup>65</sup> On Shetland the term was altered to 'scaun' in 1546, 'schenyth' and 'schoneth' in 1558, 'schau' in 1575, 'schound' in 1577, and 'shownd bill' in 1592.<sup>66</sup> The event when a schound bill was made was referred to as a 'schowndis' in 1602, 'schound' in 1603, 'shewnd' in 1604, 'schouind' in 1605, 'schownd' in 1605, 'schound' in 1607, and 'schound' in 1608.<sup>67</sup> And before the commission it was explained that:

[a]ll the udaillers to mainteine thair possession have ane wretten securitie called ane schound bill, efter the Danisch lawes, maid be the schireff with a considerable number of honest men and neighbours (answering lyk unto our service of ane air), efter the death of the udailler, seallit and subschrit be them, or then be the udailler befor his deceis, or on his dead bed, be ane bill of division, be way of testament, dividing his lands and moveables among his wif and children.

This corresponds well with what is actually described in the document of

<sup>64</sup> Ebbe Hertzberg (ed.), *Norges gamle Love indtil 1387*, vol. 5: indeholdende Supplement til foregaaende Bind og Facsimiler samt Glossarium med Registre (Christiania, 1895), 558; 'sjaund'.

<sup>65</sup> *Diplomatarium Norvegicum*, vol. 1 (Christiania, 1848), 206, no. 258 (26 May 1339) and 515, no. 717 (between September 1426 and September 1427).

<sup>66</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 57, no. 83; 76, no. 114; 159, no. 211; 208, no. 237, and Balantyne and Smith (eds), *Shetland Documents 1580–1611*, 87, no. 198 and 159, no. 354.

<sup>67</sup> Donaldson (ed.), *The Court Book of Shetland 1602–1604*, 32, and Balantyne and Smith (eds), *Shetland Documents 1580–1611*, 182, no. 394; 185, no. 402; 188, no. 409; 202, no. 431; and 218, no. 460.



1516,<sup>68</sup> and how a schound bill was explained in a petition to the Scottish Parliament by Shetland and Orkney udallars in 1592: ‘ane breiff of devisioun callit in Denmark and Norroway ane shownd bil, and is put in executioun be the sheriff and his deputis.’<sup>69</sup> It should also be noted that such meetings for dividing inheritance, and deeds on the actual division, could be held and made without any reference to schound. This was, for example, the case in Orkney in 1563.<sup>70</sup> The events in Orkney, for instance, recorded in documents dated 1456 and 1593,<sup>71</sup> might also be interpreted as schounds. Such examples are also found in Norway.<sup>72</sup>

As we have seen, in 1592 it was explicitly stated that a ‘shownd bill’ was a ‘breiff of devisioun’. The brieve of division was a legal instrument known from Scots law, and the reference was used to explain the schound bill, which, as we have seen, was a Norwegian term on a Norwegian institute of law. When the practice of making schound bills vanished with the abolition of Norwegian law in 1611, a brieve from the royal chancery to obtain ‘service of the heir’ would take its place, as stressed by Gordon Donaldson.<sup>73</sup> A major difference between a schound bill and a brieve of division was that the schound bill was made at the initiative of the heirs, and the participation of the appeals court judge, the sheriff or other good men was to make the transfer notorious and well witnessed. A brieve of division could according to Sir James Balfour be issued by the royal chancery to involve civil servants.<sup>74</sup> Hence the two institutions are different. Still, the reference to a brieve of division would be appropriate for two reasons: first, because there are sufficient similarities for the reference to have a clarifying value; second, because it seems that the process leading up to a schound bill seems to be interpreted and understood in the light of the brieve of division. The fact that Earl Partick in 1604 on several occasions accused the underfouds – the baillies of Shetland – of holding schounds without commission, indicates that the Earl found that a schound was established by order of a superior and

<sup>68</sup> Balantyne and Smith (eds), *Shetland Documents 1195–1579*, 54, no. 79.

<sup>69</sup> Balantyne and Smith (eds), *Shetland Documents 1580–1611*, 87, no. 198.

<sup>70</sup> Clouston (ed.), *Records of the Earldom of Orkney 1299–1614*, 112–17, no. 51.

<sup>71</sup> Ibid., 191, no. 89 and 168–70, no. 76 (the latter being different from 130–3, no. 59).

<sup>72</sup> Taranger, ‘The Meaning of the Words Oðal and Skeyting in the Old Laws of Norway’, in Paul Vinogradoff (ed.), *Essays in Legal History – Read before the international congress of historical studies held in London in 1913* (Oxford, 1913), 171–2.

<sup>73</sup> Gordon Donaldson (ed.) *Court Book of Shetland 1615–1629* (Lerwick, 1991), viii.

<sup>74</sup> Peter G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich, vol. II* (1754; Edinburgh, 1963), 440–2.



not the desire of the heirs.<sup>75</sup> Acting as notary, and among other things writing the schound bills, was a source of income for the appeals court judges in the Norwegian realm, and the earls were quite right in maintaining that it was more their job than the baillies' job to participate in schounds. Nevertheless, it may be that the earl found that, in the king's place in Orkney and Shetland, he should commission schounds as the king's chancery commissions briefes of division in general.

The schound bill was made for division of land as well as moveables.<sup>76</sup> It was no requirement to get an udal right but it was a requirement for all property transfers of value, which an udal right would be. A schound bill as a written deed confirming udal rights was hence not directly based on the Code of 1274, but a logical derivation from it, and became Shetland custom. It was probably due to Scottish linguistic, administrative and legal influence that the term schound bill became a way of explaining and legally placing these kind of deeds, not least in relation to sasines and testaments. This is probably also the beginning of a slow transformation of the legal content of the schound bill from evidence of a legal right to being identified as the origin of the legal right.

Gilbert Mowat could therefore be trusted when giving his testimony to the commission in Scalloway in the case between James Sinclair and Andro Bruce – a schound bill could not be regarded as the origin of an udal right. Still, this was changing in Shetland due to the influence of Scots law. Andro Bruce hence still had a chance to win the case. His problem was of course that his schound bills burnt with the castle on Muness: 'It was replied that the seassings and possession is sufficient to defend him without his authors rychts, because in anno 1627 the Dunkirkers brunt the suspenders wreaths and house.' After all the fuss about the schound bill, Andro Bruce claimed that his rights to the property had to be decided on the basis of the kind of Scots property documents the Court of Session already knew well.

The burning of the castle ten years earlier, and the resultant loss of certain documents, cannot have come as a surprise to Andro Bruce. So why did he use udal law and the schound bill in his argumentation? The answer is probably because the law and the case for him, as it was to James Sinclair, were only a framework for the work of non-legal factors. This is probably also the reason why other legal arguments were not at play, like prescription. And this may

<sup>75</sup> Donaldson (ed.), *The Court Book of Shetland 1602–1604*, 126, 128, 131, 132 and 147.

<sup>76</sup> Ibid., 43 and 95; and Balantyne and Smith (eds), *Shetland Documents 1580–1611*, 202–204, no. 431.

simultaneously explain why Andro Bruce in the end seems to have trusted that offering the Court of Session quite normal sasines to ease their confusion, after facing udal law and the schound bill, would be to his advantage. This was because his case was not much stronger than that of James Sinclair. Bruce claimed an udal right he could not have had according to the law, while James Sinclair claimed a feudal or udal right that had not been given recognition in previous cases.

Andro Bruce's opponent, James Sinclair, went even further than abandoning udal law at the end of his argumentation in the case:

The Danisch lawes ought to have no respect heir now efter so long tyme since the annexation of the countrie of Yetland to the crowne of Scotland, bot ought to be altogether abolisched, because be the 3 parliament of Kyng James the first, cap. 48,<sup>77</sup> it is therby statut that all the kyngs leidges live and be governed under the kyngs lawes and statuts of the realme allennerly, and under no particular lawes of other countries nor realmes; and sicklyk be ane uther act maid be King James the 4, in his 6 parliament, cap. 79,<sup>78</sup> it is therby statut and ordained that all our souveraine lords leidges be under his obeysance, and in speciall the iles be rulled be our souveraine lords owne lawes, and the commone lawes of the realme, and be none uther lawe.

For a long time it was uncertain whether James Sinclair based his claim on feudal or udal law, while it is quite clear that Andro Bruce based his defence on udal law. But Andro Bruce abandoned udal law and fell back on Scots law due to the loss of his schound bills. James Sinclair, on the other hand, facing the udal arguments for Andro Bruce, denounces the validity of udal law altogether, and hence had to rely on feudal law to get a claim to the properties of Frances Sinclair to get payment for his bond on 10,000 merks.

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<sup>77</sup> For this statute see the Records of the Parliaments of Scotland to 1707, <http://www.rps.ac.uk/>, accessed 24 November 2015 (henceforth R.P.S.), 1426/6.

<sup>78</sup> For this statute see R.P.S. 1504/3/45; see also R.P.S. A1504/3/124. The original text of R.P.S. 1504/3/45 expressly extended the effect of the act beyond the Hebrides to 'Orknay' and 'Scheteland', but this wording was deleted in the final version of the statute – a point which would not have been known to Bruce or Sinclair in this case. For a comment on this matter, see J. W. Cairns, 'Historical Introduction' in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2 vols, Oxford, 2000), I, 14–184, 56–7.

### Bringing More Life To History, Society And Law

The development of the udal law case examined by a commission the autumn of 1637 can be seen as an illustration of the development of Shetland at the time. Shetland society, economy, culture and law was during the sixteenth century, changing from a Norse to a Scottish foundation for its own particular mix. There were no immediate and sudden changes, however. Rather there was first a fusion. Shetlanders held on to their Code of 1274; they adopted new Norwegian legislation, and they used the appeals court in Bergen as their high court for quite some time. But with the exception of the Code of 1274, there was a change in the middle of the sixteenth century. At this time, the legal terminology is also changed from Norse to Norse with Scottish pronunciation and spelling.

With further Scottish influence, this seemingly harmonic fusion caused problems. The administration, culture and economics of Shetland were changing and moving rapidly away from the context for which the Code of 1274 had been made. Just as both Andro Bruce and James Sinclair renounced udal law as the foundation of their claims in the end, Shetlanders generally moved away from the Norse sources to contemporary Scottish sources to influence and renew their mechanisms of dispute resolution.

It ought to be noted that it was James Sinclair who, in the end, renounced udal law altogether. He was the son of Arthur Sinclair, who was a principal protagonist behind the complaint of the Shetlanders in 1577. The complaints are often viewed as a defence for the old Norse system against the Scottish influence Laurence Bruce, among others, represented. The Sinclairs' presence in the Northern Isles was also primarily due to the fact that the family were earls of Orkney under the Norwegian kings during parts of the fourteenth and early-fifteenth centuries, and hence also, as family, were much linked to the Norse past of the islands. Andro Bruce, on the contrary, used udal law as his defence as long as he could, and never denounced it as legitimate law. He was the son of Laurence Bruce, and directly linked to the Scottish influence in Shetland from the late-sixteenth century. At times, he also acted like his father. For example a document of 1622 states that:<sup>79</sup>

Androw Bruce of Mowaness with certaine his servands came upoun  
the day of last by past, to my hous of Vaillie, and perforce tuik me out

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<sup>79</sup> OA, SC11/50/1. This document is made a part of the still unpublished manuscript of Balantyne and Smith (eds), *Shetland Documents 1612–1637*, which the editors have made available to me.

of my awin hous to his hous of Mowanes, quhair he deteinit me the space of dayis, and causit me tuich the pen of Scipio Bruce, nottar, for subscribing of ane band to him, that I sould not sell my lands to any uther persone bot to him, quhilk I was forceit to do *metus causa*.

From a golden or non-golden age perspective, neither James Sinclair nor Andro Bruce acted as they ought to have acted. The reason is that they probably could not have cared less whether the law was Norse or Scottish. Their concern was property rights. This also applies for other confrontations between Norse and Scots law on Shetland – the law invoked was only an instrument to achieve a goal, and the origin of the law was of far less importance than the outcome of the case.

But, just for the sport of it, let us imagine that when King James VI married Anne of Denmark in 1589, Shetland had been returned to Norway as part of the marriage deal. What would have been the status of Norwegian law in general in Shetland in the seventeenth century, and udal law – as a land law institution – more specifically? In the sixteenth century, Norwegian law was still based on the Code of 1274. At this time, it was outdated and in a language that was difficult to read for most people, whether learned or laymen. It was therefore published in 1604 in a printed edition with minor changes. Later the content of the code was altered through numerous additional statutes, that were collected in a separate compilation of law in 1643. In 1687 the Code of 1274 was abandoned altogether. But with society continuing to change rapidly, more than 4500 additional statutes were published between 1687 and 1814 for Norway. From this perspective, the changes in Norwegian law in Norway in the seventeenth century were essentially on a par with those on Shetland. That Shetlanders abandoned the Code of 1274 and experienced major changes in law was less due to the Scottish connection than to more general changes in Northern European societies. One result of these changes was a series of attempts to alter udal law in Norway. The first attempt, though unsuccessful, was made as early as 1536. This was probably due to a move from less small-scale to more large-scale trade. Still, udal law hardly had any competition from feudal law in Norway, and this might be one reason why udal law was not abandoned until 1811 (before being reintroduced in 1816 by the sovereign Norwegian Parliament established in 1814). Nonetheless, udal law was in decline in Norway as it was in Shetland from the sixteenth century onwards. In general, even from a Norwegian perspective, the changes in law in general, and udal law more specifically, in Shetland in the seventeenth century are not

really surprising, and would even have occurred if Shetland had returned to the Norwegian realm.

Angelo Forte, in his article on Andro Umfra in 2006, wrote a contribution to the first chapter on the move away from the Norse sources to the Scottish sources of legal influence and renewal, from the reign of the Stewart earls until the beginning of the seventeenth century. This article is a contribution to the second chapter where the full consequences of this process, with the abolition of Norse law in 1611 as a crucial event, are displayed. In both articles, a tale of villainy turns out to be more complicated than it seems at first glance, and through an investigation of the nuances of the story, history, society and law are brought to life. That is what legal history is all about, and what Angelo Forte contributed to the subject through his research.

# The ‘authentick pratique bookes’ of Alexander Spalding

*Adelyn L. M. Wilson*

## Introduction

Towards the end of his career and the beginning of mine I was fortunate to have Angelo Forte as both my colleague and my mentor. We met at the British Legal History Conference in Oxford in 2007, when I was in the first year of my doctoral studies. I have very fond memories of that conference, and one of the most treasured is of a dinner at a local restaurant which he, Andrew Simpson and I shared. Angelo and I stayed in touch after that event, and, a year later, it was he who first encouraged me to apply for the lectureship which I still hold. He was formally my first mentor as a new lecturer, and I had the pleasure of teaching Honours courses in Scottish and European Legal History with him before his retirement. As several of the contributions in this volume show, his presence is still missed by colleagues in the School of Law and across the University.

One of Angelo’s great interests was the practical application of law, as is evident in many of his works on legal history. One of his collaborative projects was the editing and analysis of an eighteenth-century manuscript stylebook from the Aberdeen Sheriff and Commissary courts.<sup>1</sup> Angelo Forte

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<sup>1</sup> The author would like to thank: Professor Gero Dolezalek for introducing her to A.U.L., MS. 558 (‘the Aberdeen manuscript’) and for sharing with her some of his unpublished notes on Maitland’s practicks; the Aberdeen Humanities Fund for its generous support of this research through a Hunter Caldwell award; the Aberdeen University Library Special Collections Centre for access to its collections and for the digitization of the Aberdeen manuscript as an in-kind contribution to the project; the Royal Faculty of Procurators in Glasgow, the National Library of Scotland, St Machar Cathedral and National Records of Scotland for allowing her to access their manuscript holdings; Professor John Ford and Dr Andrew Simpson for reading earlier drafts of this article; Professor John Finlay for his assistance on a point about notaries in Scotland, and Jamie Ross and Katherine Anderson for their work as research assistants on this project.

and his colleague, Michael Meston,<sup>2</sup> identified twenty-eight styles or writs in that manuscript which were relevant to practice in the local Commissary court between 1698 and 1722.<sup>3</sup> Analysis of these writs allowed them to conclude that this was ‘an active and busy court’<sup>4</sup> and reflect on its jurisdiction and procedure more generally.<sup>5</sup> One of the reasons that the stylebook is so important is that in October 1721 ‘an accidental dreadful Fire happened within the Town of *Aberdeen* [...] whereby the Office, commonly called the Commissar Clerks Office, was suddenly consumed, and at the same Time the Registers and Records therein [...] were intirely burnt and destroyed’.<sup>6</sup> Hence David Stevenson noted that ‘Any document relating to [the] Aberdeen commissary court before 1721 is given particular interest’.<sup>7</sup>

Further insight into the workings of this court is made possible by two more recently identified manuscripts. When preparing his three-volume census of Scottish legal manuscripts, *Scotland under Jus Commune*, Gero Dolezalek discovered two manuscripts which were witnesses to the text of a set of ‘practique bookes gathered befor the Lords and uthers famous inferiour Judicatories’ compiled by ‘Alexander Spalding Advocat befor the Commissar off Aberdein’.<sup>8</sup> Practicks were collections of legal material compiled by practitioners of the law. Legal writing in the first half of the seventeenth century was largely concerned with the compilation of practicks. Some of the best-known are probably those collections by the King’s Advocate, Sir Thomas Hope,<sup>9</sup> and by the Lords of Council and Session, Sir Robert Spottiswoode

<sup>2</sup> M. C. Meston and A. D. M. Forte (eds), *The Aberdeen Stylebook 1722* (Stair Society Publications Series vol. 47, Edinburgh, 2000); A. D. M. Forte and M. C. Meston, ‘Legal Life in Aberdeen in the Late Seventeenth and Early Eighteenth Century – the Aberdeen Stylebook of 1722’, *Aberdeen University Review*, 59 (2002), 197–208. They also acknowledge the earlier involvement of their then colleague Michael Christie [Meston and Forte (eds), *The Aberdeen Stylebook*, 1].

<sup>3</sup> *Ibid.*, 14–15.

<sup>4</sup> *Ibid.*, 17.

<sup>5</sup> *Ibid.*, 12–18.

<sup>6</sup> An Act for Supplying the Records of the Commissary Court of Aberdeen, Burnt or Lost in the Late Fire There, 8 Geo I (1721), c.28; Meston and Forte (eds), *The Aberdeen Stylebook*, 3; Forte and Meston, ‘Legal Life in Aberdeen in the Late Seventeenth and Early Eighteenth Century’, 197.

<sup>7</sup> David Stevenson, ‘The Commissary Court of Aberdeen in 1650’ in David Sellar (ed.), *Miscellany Two* (Stair Society Publications Series vol. 35, Edinburgh, 1984), 144–7, 145.

<sup>8</sup> Gero Dolezalek, *Scotland under Jus Commune: Census of Manuscripts of Legal Literature in Scotland, Mainly Between 1500 and 1660* (3 vols, Stair Society Publications Series vols 55–7, Edinburgh, 2010), I, 136, 140 and III, 17–21, 301–3. Quotations from the Aberdeen MS., fol. i. On the foliation of this manuscript, see below.

<sup>9</sup> Printed as: James Avon Clyde (ed.), *Hope’s Major Practicks 1608–1633* (2 vols, Stair

of Pentland,<sup>10</sup> Sir Alexander Gibson of Durie,<sup>11</sup> and Sir Thomas Hamilton, 1st Earl of Haddington.<sup>12</sup> John Ford has also shown the significance of the manuscript versions of Stair's *Institutions of the Law of Scotland* circulating in the 1660s and 1670s under the title of his practicks.<sup>13</sup> These and other lesser-known collections of practicks allow significant insight into the administration of justice in the Court of Session during this period. However the focus of these collections of practicks on the business of the Session means that they show little of practice in the courts of the localities. Spalding's collection, however, offers insight into the method of a parochial compiler of practicks, and into the business of some of the courts of the North East of Scotland during the period – including the Aberdeen Commissary court from which so little material survives. However, before this collection of practicks can be used as a source for this kind of information, it is necessary first to understand the identity of its compiler, the nature of and relationship between the two known extant manuscript texts, the character of the collection of practicks itself, its purpose, and its later use and circulation among the legal community in Scotland.

### Alexander Spalding

No details about Alexander Spalding's early life are known. That he was probably born in the 1580s is suggested by the fact that he entered the Society of Advocates in Aberdeen in 1609.<sup>14</sup> Admission to the profession appears to have been, at least by the mid-seventeenth century, by consent of

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Society Publications Series vols 3–4, Edinburgh, 1937–8); Sir Thomas Hope of Craighall, *Minor Practicks, or, a Treatise of the Scottish Law* (Edinburgh, 1726).

<sup>10</sup> Printed as Sir Robert Spotiswoode of Pentland, *Practicks of the Law of Scotland* (Edinburgh, 1706).

<sup>11</sup> Printed as Sir Alexander Gibson of Durie, *The Decisions of the Lords of Council and Session in Most Cases of Importance, Debated, and Brought Before Them; from July 1621, to July 1642* (Edinburgh, 1690).

<sup>12</sup> Unprinted, but on the extant manuscript copies see: Sara Brooks, 'The Decision Practicks of Sir Thomas Hamilton, First Earl of Haddington', *Edinburgh Law Review*, 8 (2004), 206–30; Dolezalek, *Scotland under Jus Commune*, I, 141–2.

<sup>13</sup> J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007), 85–8.

<sup>14</sup> John Alexander Henderson, *History of the Society of Advocates in Aberdeen* (Aberdeen University Studies vol. 60, Aberdeen, 1912), 338. Unfortunately, no record of the birth of an Alexander Spalding (or similar) has been found after 1560 in the online database of the National Records of Scotland and the Court of the Lord Lyon, *Scotland's People*, [www.scotlandsppeople.gov.uk](http://www.scotlandsppeople.gov.uk), accessed 8 April 2014.



both the Sheriff and the current procurators. John Henderson found that a petition in 1656 by an Aberdonian notary public named Andrew Thomson to the Sheriff Principal asked the latter to, “with the advice and consent of the procurators of his judicatory, admit the petitioner to be an ordinary procurator before the *samen judiciary*.”<sup>15</sup> Henderson suggested that this was indicative of more than mere rhetoric: ‘by the middle of the sixteenth century the procurators [...] in practice in Aberdeen acted in concert for the defence of their interests as well as for the maintenance of the dignity and standing of their profession. Only those of good character, education and ability were admitted as members’.<sup>16</sup> The education referred to here should probably not be understood to be the same university learning in Roman law generally undertaken by those aspiring to audience in the College of Justice. John Cairns has noted that rather ‘Local faculties and societies of procurators and writers in Scotland, including such leading bodies as the Writers of the Signet in Edinburgh, the Faculty of Procurators in Glasgow, and the Society of Advocates in Aberdeen, required those seeking admission to their ranks to serve an apprenticeship for a number of years.’<sup>17</sup> Henderson’s list of advocates in Aberdeen does not provide a full biographical record for each man entered, but does in many cases indicate the method by which they were educated or trained. Of the fifty-two men recorded as having entered as an advocate in the sixteenth century, fourteen are recorded by Henderson as having (or ‘probably’ having) undertaken education in a university;<sup>18</sup> another can be presumed to have done so because he had held the position of Civilist at King’s College before entering the profession.<sup>19</sup> Three of the men who entered as advocates in Aberdeen in the sixteenth century are recorded as having served apprenticeships.<sup>20</sup> Of the sixty-eight men recorded as having entered as an advocate in the seventeenth century, twenty-four are recorded as having undertaken university education<sup>21</sup> – again another two can be presumed to have done so because they were respectively the Civilist

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<sup>15</sup> Henderson, *History of the Society of Advocates in Aberdeen*, xii.

<sup>16</sup> *Ibid.*, ix.

<sup>17</sup> John W. Cairns, ‘Lawyers, Law Professors, and Localities: the Universities of Aberdeen, 1680–1750’, *Northern Ireland Legal Quarterly*, 46 (1995), 304–31, 305.

<sup>18</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 85, 91, 116, 118, 125, 152, 229 (twice), 241, 289, 301, 304, 311, 364.

<sup>19</sup> *Ibid.*, 219.

<sup>20</sup> *Ibid.*, 125, 150, 304.

<sup>21</sup> *Ibid.*, 77, 85, 104, 144, 182, 189, 198, 207, 228, 229, 235, 242, 255, 289, 290, 301, 302, 303, 307, 315–16, 317, 353, 357, 360.

at King's College<sup>22</sup> and Dean of Faculties at Marischal College<sup>23</sup> – and seventeen are recorded as having served apprenticeships.<sup>24</sup> Ten of these 120 advocates are recorded as both having attended a university and undertaken an apprenticeship, two in the sixteenth century and probably eight in the seventeenth century.<sup>25</sup> The entries for these ten men might be indicative of a pattern of professional education which was not uncommon in Aberdeen during the wider period. Alexander Spalding's entry in Henderson's list makes no reference to his having undertaken either a university education or an apprenticeship. That he was not university educated is suggested by there being no references to Spalding with the title 'Mr' found in official, contemporary records.<sup>26</sup> Nor does his name appear in the graduation lists of either King's College or Marischal College,<sup>27</sup> although this does not necessarily mean that he did not attend either institution, and he may alternatively have attended one outwith the local area. Nonetheless, it seems plausible that Spalding entered the Society in 1609 on the basis of having completed an apprenticeship.

Although speaking about the 1680s, Cairns has shown that 'Admission [to the Society of Advocates in Aberdeen] was linked to admission to practice as a procurator before the Commissary Court.'<sup>28</sup> Henderson suggested that, once

<sup>22</sup> Ibid., 318–19; on James Scougal, see below.

<sup>23</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 351.

<sup>24</sup> Ibid., 77, 93, 144, 185, 207, 267, 289, 290, 301, 302, 303 (twice), 316, 351, 353, 357, 361.

<sup>25</sup> Ibid., 125, 304 and 77, 289, 290, 301, 302, probably 351, 353, 357 respectively.

<sup>26</sup> Perhaps one of the most telling examples of such a lack is in an entry in the burgh's records, in which Spalding is the third man mentioned in a list of three and the only one not given the title 'Mr': 'Mr Thomas Sandelandis Mr Johne Lundie and Alexr Spalding' [Alexander MacDonald Munro (ed.), *Records of Old Aberdeen MCLVII–MCMIII* (2 vols, New Spalding Club, Aberdeen, 1899–1909), I, 75]. Later references by historians to Spalding as 'Mr' can presumably be dismissed, e.g. William Orem, *A Description of the Chanorrie, Cathedral, and King's College of Old Aberdeen in the Years 1724 and 1725* (Aberdeen, 1791), 122.

<sup>27</sup> Peter John Anderson (ed.), *Officers and Graduates of University and King's College Aberdeen MVD–MDCCCLX* (New Spalding Club, Aberdeen, 1893); Peter John Anderson (ed.), *Roll of Alumni in Arts of the University and King's College of Aberdeen 1596–1860* (Aberdeen, 1900); Peter John Anderson (ed.), *Fasti Academiae Mariscallanae Aberdonensis: Selections from the Records of the Marischal College and University MDXCIII–MDCCCLX* (3 vols, New Spalding Club, Aberdeen, 1898), II; Peter John Anderson (ed.), *Fasti Academiae Mariscallanae Aberdonensis: Selections from the Records of the Marischal College and University MDXCIII–MDCCCLX*, III (an index by James Fowler Kellas Johnstone, New Spalding Club, Aberdeen, 1898), 168.

<sup>28</sup> Cairns, 'Lawyers, Law Professors, and Localities', 314.

admitted to the profession, Spalding practised only or substantially in Old Aberdeen,<sup>29</sup> which is where the Commissary court sat at this time.<sup>30</sup> It will be argued in this article that Spalding was the original reporter of all or most of the contemporary decisions in the collection of practicks attributed to him. If this is correct, it would seem that his practice was based substantially in the Commissary courts, largely that in Old Aberdeen but also, for a period in the late 1620s and 1630s, that in the neighbouring county of Moray. There are also, however, eight notes on cases heard in the Aberdeen Sheriff court, most of which are said to have been heard in the early 1620s thus making them some of the earliest of the contemporary cases recorded. There is also an entry in the diet books in the printed Sheriff court records for 22 March 1620 which names an Alexander Spalding as the ‘procurator’ for an Andrew Downie in Maynis of Kyntor, who had been acquitted by the Baillie court of Kintore for assaulting a William Cowper in Bogheids and now defended a Sheriff court action on the basis of that acquittal.<sup>31</sup> Pleading before the Sheriff court in New Aberdeen would have required Spalding to undertake additional trials.<sup>32</sup> It seems that he did so and was admitted to the Sheriff court in the early years of his career, but, as his practice became more established, he undertook work in the Commissary courts in preference to that in the Sheriff courts. It certainly appears that he built up a successful practice. He rose to become Clerk Depute in the Aberdeen Commissary court, although it is not clear when this appointment was made.<sup>33</sup> He also accumulated sufficient wealth to acquire ‘a good lodging, well slated, with a timber-fore-stair’ on College Wynd in Old Aberdeen.<sup>34</sup>

Spalding’s personal life has been the subject of more interest than his professional life. The parish records note that on 7 February 1608 he married his first wife, ‘Christan Hervie’.<sup>35</sup> However he was a serial adulterer,<sup>36</sup> which,

<sup>29</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 338.

<sup>30</sup> Stevenson, ‘The Commissary Court of Aberdeen in 1650’, 144.

<sup>31</sup> David Littlejohn (ed.), *Records of the Sheriff Court of Aberdeenshire* (3 vols, New Spalding Club, Aberdeen, 1904–7), II, 127.

<sup>32</sup> Cairns, ‘Lawyers, Law Professors, and Localities’, 314.

<sup>33</sup> Orem, *A Description of the Chanorrie, Cathedral, and King’s College of Old Aberdeen*, 122; Henderson, *History of the Society of Advocates in Aberdeen*, 338.

<sup>34</sup> The house is no longer extant, as it ‘became ruinous, and at last was demolished to build the yard-dyke, and to help to build the kiln and malt-barn in the end of said yard’ [Orem, *A Description of the Chanorrie, Cathedral, and King’s College of Old Aberdeen*, 122].

<sup>35</sup> Available on *Scotland’s People*, [www.scotlandspeople.gov.uk](http://www.scotlandspeople.gov.uk), accessed 8 April 2014.

<sup>36</sup> Old Machar Cathedral Archive, kirk session records volume one (1621–39), e.g. 42,

as David Stevenson has noted, 'made him notorious'.<sup>37</sup> Towards the end of April 1623 his then mistress, Euphame Lillie, fell pregnant.<sup>38</sup> Spalding was convicted at the kirk session the following January of adultery and of trying to secure an abortion, and spent the next three months in public penitence.<sup>39</sup> Stevenson has speculated that the abortion was unsuccessful, and that the child born to Euphame was John Spalding, the historian after whom were named the three successive historical societies called the Spalding Club.<sup>40</sup> If this is correct, John would have been subsequently legitimized by his father's later marriage to Euphame.<sup>41</sup> Alexander Spalding also had at least three daughters; Stevenson has noted that '[o]ne was disciplined for fornication with a covenanter, and after the English conquest of Scotland two of them married members of the Cromwellian garrison'.<sup>42</sup>

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69–73.

<sup>37</sup> David Stevenson, 'The Inappropriate Fate of John Spalding', *Scottish Historical Review*, 75 (1996), 98–100, 98.

<sup>38</sup> Old Machar Cathedral Archive, kirk session records volume one (1621–39), 69.

<sup>39</sup> *Ibid.*, 69–73; Stevenson, 'The Inappropriate Fate of John Spalding', 98.

<sup>40</sup> Stevenson, 'The Inappropriate Fate of John Spalding', 98, 100. John Spalding was Commissary Clerk during the reign of Charles I as well as a royalist and Episcopalean [James Bruce, *Lives of Eminent Men of Aberdeen* (Aberdeen, 1841), 262]. He is best known for his historical account of his own time. This was first printed as *The History of the Troubles and Memorable Transactions in Scotland, from the year 1624 to 1645 [...] from the Original MS. of John Spalding, then Commissary Clerk of Aberdeen* (2 vols, Aberdeen, 1792). However a new edition was prepared shortly thereafter for the Bannatyne Club on the basis of three other manuscripts and was printed as *The History of the Troubles and Memorable Transactions in Scotland and England from MDCXXIV to MDCXLV* (2 vols, Bannatyne Club, Edinburgh, 1828–9). The editors of the latter edition believed that the manuscript on which the former edition was based – which was apparently destroyed by the printer – was misidentified, and that it was 'merely a garbled copy of' a manuscript which was at the time owned by Lord Forbes [*History of the Troubles* (Bannatyne Club edn), I, v]. The next edition which could be said to advance the text was that published by the Spalding Club as the *Memorials of the Trubles in Scotland and in England. A.D. 1624 – A.D. 1645* (2 vols, Spalding Club, Aberdeen, 1850–1). This version was a printing of a single manuscript, which the editors suggested might be Spalding's authorial holograph and certainly 'the most authentic version' of the text [*Memorials of the Trubles*, I, xii–iv]. References below are to the Bannatyne Club and Spalding Club editions.

<sup>41</sup> Stevenson, 'The Inappropriate Fate of John Spalding', 98; David Stevenson, *King or Covenant? Voices from Civil War* (East Linton, 1996), 97. Unfortunately, no entry for this marriage has been found in the records of the parishes of Aberdeen and Old Aberdeen on *Scotland's People*.

<sup>42</sup> David Stevenson, 'Spalding, John (b. 1624?, d. in or after 1669)' in H. C. G. Matthew and Brian H. Harrison (eds), *Oxford Dictionary of National Biography* (Oxford, 2004), <http://www.oxforddnb.com/view/article/26078>, accessed 28 July 2014; *idem*, 'The Inappropriate Fate of John Spalding', 99.

Stevenson has found that 'After his disgrace in 1624 there is a twenty-year gap in Alexander's life. There is no record of his presence in Old Aberdeen, suggesting that he may have moved away for a period, perhaps in the aftermath of the 1623–4 scandal.'<sup>43</sup> The evidence of Spalding's practicks suggests that at least most of this period he spent in Moray, moving back to the Aberdeen area in 1637–8.<sup>44</sup> It seems likely that his final years were spent there. No record of Spalding's death has been found. However it is probable that he died – or at least stopped practising – in the second half of the 1640s. On 27 September 1644 he, a Thomas Sandilands and a John Lundie were 'ellectit nominat and chuisit'<sup>45</sup> as bailties; Lundie declined on the grounds that he was already the Humanist and 'maister of the gramer schwill' and Spalding 'refuisit to accept the said office in respeck of his inhabilitie and weiknes greiwet with the gutt in his seit kneis and legis and that he may not walk vp nor doun stairis'.<sup>46</sup> The latest mention of him found in the records of the burgh is in an item dating from 11 June 1647; although the record mentions his house rather than his own activities, the wording makes it likely that he was still alive at this time.<sup>47</sup> The latest cases which were subject to a full note in Spalding's practicks were heard in the mid-1640s and the latest date found is 1648.<sup>48</sup> If it is correct that he was born in the 1580s, he would have been in his mid-to-late fifties or sixties at this time.

Spalding practised during a difficult period of national history. At the time when he began to record his practicks – the late 1610s – King James VI was absent, having relocated to England after receiving that crown. In 1625 James VI died and his son became Charles I. Tensions between the new king and his people led to the Bishops' Wars of 1638–9, and eventually to the British Civil Wars in the 1640s;<sup>49</sup> Spalding appears to have stopped adding to his practicks during the civil war period. The thirty years during which Spalding's practicks were compiled also represent a period of extremes for the North East region.

<sup>43</sup> Stevenson, *King or Covenant*, 97.

<sup>44</sup> See below.

<sup>45</sup> Munro (ed.), *Records of Old Aberdeen*, I, 75.

<sup>46</sup> *Ibid.*, I, 76.

<sup>47</sup> *Ibid.*, I, 78.

<sup>48</sup> Aberdeen MS., fos 34r–v (modern foliation).

<sup>49</sup> On which, see e.g. Stuart Reid, *Crown, Covenant and Cromwell: the Civil Wars in Scotland, 1639–1651* (London, 2012); Trevor Royle, *Civil War: the Wars of the Three Kingdoms, 1638–1660* (London, 2004), parts 1–3; Maurice Lee, *The Road to Revolution: Scotland under Charles I, 1625–37* (Urbana and Chicago, 1985), especially chapters 4–7; David Stevenson, *The Scottish Revolution, 1637–1644: The Triumph of the Covenanters* (Newton Abbot, 1973).

From the later 1610s to 1638, Aberdeen prospered. During this period, the population of Old Aberdeen was probably fewer than 1,000 and that of New Aberdeen somewhere around 8,000.<sup>50</sup> Valuation rolls are not available for these decades, but it is likely that there were no more than 100 heritors within the parishes of Aberdeen. Robin Callander has shown that most of the land in the shire was held by the various branches of a small number of powerful families, although there were many who owned small holdings (including members of these families).<sup>51</sup> This was a period of significant trade, with expansion of national and international trade between 1615 and 1624, and again between 1630 and 1638.<sup>52</sup> Around fifty men graduated each year in Aberdeen – either from King's College or from Marischal College – 'fully a quarter of the output of all of Scotland's universities'.<sup>53</sup> It was also generally a period of increased industry and wealth, and consequently of luxury, charity, and expansion and lavish improvement of the city.<sup>54</sup> However, in 1637, Aberdeen failed to declare itself in favour of the rebellion after the St Giles Riots in Edinburgh;<sup>55</sup> by May 1638, Aberdeen was the only royal

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<sup>50</sup> Gordon DesBrisay, "'The civill wars did overrun all': Aberdeen, 1630–1690" in E. Patricia Dennison, David Ditchburn and Michael Lynch (eds), *Aberdeen Before 1800: A New History* (East Linton, 2002), 238–66, 239; Kennedy suggested that the population was around 7,800 in 1615 [William Kennedy, *Annals of Aberdeen, from the Reign of King William the Lion, to the End of the Year 1818; with an Account of the City, Cathedral, and University of Old Aberdeen* (2 vols, London, 1818), I, 186–7]; Macniven has suggested that, based on the birth rate, there were between '6,000 to 12,000 inhabitants, though the outer limits of that range are implausible' [Duncan Macniven, 'Merchants and Traders in Early Seventeenth Century Aberdeen' in David Stevenson (ed.), *From Lairds to Louns: Country and Burgh Life in Aberdeen, 1600–1800* (Aberdeen, 1986), 57–69, 69 fn. 2]. A list of inhabitants of Old Aberdeen from 1636 lists just over 800 persons [Munro (ed.), *Records of Old Aberdeen*, I, 347–55]. On an analysis of the professions of these people, see Grant G. Simpson, *Old Aberdeen in the Early Seventeenth Century: A Community Study* (Friends of St Machar's Cathedral Occasional Papers, series one, 3, 1975 rept 1995), 5–6.

<sup>51</sup> This is certainly the pattern of landholding found in the valuation rolls of the 1660s, on which see Robin Callander, 'The Pattern of Land Ownership in Aberdeenshire in the Seventeenth and Eighteenth Centuries' in David Stevenson (ed.), *From Lairds to Louns: Country and Burgh Life in Aberdeen, 1600–1800* (Aberdeen, 1986), 1–9, especially 2–4.

<sup>52</sup> Macniven, 'Merchants and Traders in Early Seventeenth Century Aberdeen', 60, 63.

<sup>53</sup> E. Patricia Dennison, David Ditchburn and Michael Lynch, 'Preface' in idem (eds), *Aberdeen Before 1800: A New History* (East Linton, 2002), xxv–xxviii, xxvi.

<sup>54</sup> Macniven, 'Merchants and Traders in Early Seventeenth Century Aberdeen', 60, 63, 67; DesBrisay, "'The civill wars did overrun all'", 239–40.

<sup>55</sup> DesBrisay, "'The civill wars did overrun all'", 242.

burgh which had not subscribed to the National Covenant.<sup>56</sup> Thus, 'In the evening of Friday 29 March 1639, Old Aberdeen became the first town in the Scottish wars to come under military occupation' by a force of 2,000 men under the command of Lord Fraser and the Master of Forbes.<sup>57</sup> The following day, New Aberdeen was occupied by an army of 9,000 men led by Montrose.<sup>58</sup> The burghs were then successively invaded, plundered, and fined by the two opposing sides. The next period of relative peace in the region began in February 1642, but burgh life would nonetheless have been hard. The burghs were in debt,<sup>59</sup> and were pressed for men.<sup>60</sup> Alexander Spalding's son, the historian John Spalding, noted in 1642 that there was also a 'gryte skarsitie of white fishes on our hail costis [...] so long hes scarslie beine sein heir in Scotland';<sup>61</sup> there was a drought in June of that year, and a late harvest, so much of which was sent to Ireland that food 'becam scarce and deir'.<sup>62</sup> After the signing of the Solemn League and Covenant in August 1643, the burghs were again pressed for men for the Covenanting army.<sup>63</sup> Aberdeen's short period of peace ended in March 1644, when a royalist host under the command of Sir John Gordon of Haddo seized New Aberdeen, captured prominent Aberdonian Covenanters, and took them to Strathbogie; occupation of the burgh by Huntly followed shortly thereafter. The burgh was then captured by the Covenanting forces under the command of the Marquis of Argyll on 2 May, but was not subjected to the normal penalties. The burghs (or at least the Covenanters within the burghs) again enjoyed a period of relative peace and favour. In September 1644, however, Montrose marched a royalist, Irish force of 1,500 men on Aberdeen.<sup>64</sup> The burghs tried to resist, but a breach of the rules of war on the burghs' part – the shooting of the drummer who accompanied the messenger calling for surrender – led to a rout of the local forces, many of whom were killed by the invaders; John

<sup>56</sup> Ibid., 243; Spalding, *History of the Troubles*, I, 64; idem, *Memorials of the Trubles*, I, 100.

<sup>57</sup> DesBrisay, "The civill wars did overrun all", 249.

<sup>58</sup> DesBrisay, "The civill wars did overrun all", 249; *Extracts from the Council Register of the Burgh of Aberdeen 1625–1642* (Scottish Burgh Records Society, Edinburgh, 1871), 154–5.

<sup>59</sup> Spalding, *History of the Troubles*, II, 40; idem, *Memorials of the Trubles*, II, 137; DesBrisay, "The civill wars did overrun all", 256.

<sup>60</sup> Spalding, *History of the Troubles*, II, 42; idem, *Memorials of the Trubles*, II, 140.

<sup>61</sup> Spalding, *History of the Troubles*, II, 54; idem, *Memorials of the Trubles*, II, 154. Spelling of the quotation is correct to the earlier printed edition.

<sup>62</sup> Spalding, *History of the Troubles*, II, 55; idem, *Memorials of the Trubles*, II, 155.

<sup>63</sup> DesBrisay, "The civill wars did overrun all", 256.

<sup>64</sup> Ibid., 256–8.



Spalding commented that 'horribill wes the slauchter in the flight'.<sup>65</sup> Four days of violence, rape and plunder of the burgh followed; John Spalding noted the events in graphic detail.<sup>66</sup> Gordon DesBrisay has suggested that 'No Scottish burgh had suffered like Aberdeen, and none would again until the English sack of Dundee in 1651'.<sup>67</sup>

## Spalding's Practicks

### (1) The Extant Manuscripts

Only two copies of Alexander Spalding's practicks are known to survive, and are held by the University of Aberdeen and the Royal Faculty of Procurators in Glasgow respectively. Unfortunately, neither of the extant manuscripts is Spalding's own authorial holograph. Rather, both are copies which were apparently completed around thirty to forty years after Spalding finished his work.

#### (a) *The Aberdeen Manuscript*

The Aberdeen manuscript is the more complete copy, or, at least, it contains more material said to have been drawn from Spalding's practicks. A flyleaf designed as a title page describes the contents of the manuscript as a copy of the 'authentick practiq[ue] bookes gathered befor the Lords and uthers famous inferiour Judicatories wher Regiam Majestatem and divers acts of Parliament is also often Quoted Be Alexander Spalding Advocat befor the Commissar off Aberdein'.<sup>68</sup> If this attribution of the content to Spalding is correct – and the text of the collection suggests that it is – then his practicks had three parts: an extensive index called the 'Table' which extends to eighty folios; a systematic digest comprising more than 100 folios described as 'the first pairt'; and a ca.180-folio collection of notes on cases interspersed with legal miscellany called 'the second pairt'. The use of the terms 'Table' and 'pairts' will be followed here.

The Aberdeen manuscript records on the front flyleaf that its content was 'Collected and coppied out of' Spalding's 'authentick practiq[ue] bookes'. This description might indicate that it is a first-generation copy, made directly from Spalding's authorial holograph. The title page also notes that the copy

<sup>65</sup> Spalding, *History of the Troubles*, II, 264; idem, *Memorialls of the Trubles*, II, 406.

<sup>66</sup> Spalding, *History of the Troubles*, II, 264–5; idem, *Memorialls of the Trubles*, II, 406–8.

<sup>67</sup> DesBrisay, "'The civill wars did overrun all'", 259.

<sup>68</sup> Aberdeen MS., fol. i (modern foliation).



was started on 19 November 1673; no date of completion is provided in the manuscript. However it is likely that the manuscript was completed in a reasonably timely manner, if only because one scribe appears to have written all, or at least the significant majority of, the text. The front flyleaf, which is styled as a title page, records that the manuscript was 'wreiten with the hand off Patrick Whyt'. He is identified on the *recto* of folio eighty-one, which is also styled as a title page, as having entered as a notary public on 16 December 1673.<sup>69</sup> If this date is correct,<sup>70</sup> this means that Whyt had not yet been admitted to the profession when he began this copy. The Notaries Act 1587 required applicants to 'have served and been in company with one of the lords of session, commissaries, writers to the signet or some of the

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<sup>69</sup> Unfortunately, it has not been possible to learn more of Patrick Whyt. His name does not appear in the lists of graduates in the arts from either King's College or Marischal College for twenty years prior to his admission as a notary [Anderson (ed.), *Officers and Graduates of University and King's College*; Anderson (ed.), *Roll of Alumni in Arts of the University and King's College*; Anderson (ed.), *Fasti Academiae Mariscallanae Aberdonensis*]. No record of his birth or death has been found in the parish records of Aberdeen or Old Machar, as digitized and available on the website *Scotland's People*, [www.scotlandsppeople.gov.uk](http://www.scotlandsppeople.gov.uk), accessed 18 April 2014. The parish records of Aberdeen include a record of the marriage of a Patrick Whytt to a Bessie Muir in 1682, but it is not clear that this is the same man: other Patrick Whites were prominent in the area at the time, including the hookman who was Deacon of the Hammermen Trade and was several times Deacon-Convener of the Crafts in the 1690s and 1710s [Ebenezer Bain, *Merchant and Craft Guilds: A History of the Aberdeen Incorporated Trades* (Aberdeen, 1887), 45]. However Whyt does appear to have remained in the area: what has been identified as a roll of court from 1680 held by the University of Aberdeen Special Collections Centre [MS. 3175/813/1] contains on the last folio of the document, which has now become detached, the phrase: 'In witness whereof [?] be Patrick Whyt notar public in aberdeine'. The 'Witnesses to the subscription of the said' are then listed as 'Maister Robert Scott Maister Alexander davidson of Newtoun Alexr forbes of Ballogie and the said Patrick Whyt'. The signatures of these men – as well as those of a Will[iam] Urquhart and a Hugh Murray – follow at the end of the document. The forms of some of the letters in Whyt's signature in this later document are visually distinct from those in the signatures in the Aberdeen manuscript – particularly the letter 'y' – but this does not necessarily defeat the suggestion that this might be the same man.

<sup>70</sup> The author is most grateful to Professor John Finlay, who very kindly responded to an enquiry about Whyt by searching for a record of his admission in two volumes of the Register of Admissions of Notaries which together cover the years 1667 to 1680 [National Records of Scotland, NP2/10–11]. However no record of Whyt's admission could be found. Nor is Whyt's admission recorded in the repertory associated with Lord Pitmedden in Adv. MS. 25.2.5. Indeed the only business recorded therein for that December was the admission of two advocates, Alexander Campbell and James Borthwick, in the weeks commencing Tuesday 2 December and Tuesday 9 December respectively [Adv. MS. 25.2.5, II, pp.180–1]. The implications of the absence of Whyt's name in the admission records have not been investigated further.

sheriff, steward or bailie clerks of the shire or common clerks of the head burghs of this realm and have served them truly the full space of seven years' before they might be admitted as a notary, and also to present to the Lords of Session a competent copy of a legal document such as a charter, instrument, or contract.<sup>71</sup>

The Aberdeen manuscript was written on folio bundles which consistently comprised six leaves; the order in which they were to be bound was recorded on the first page of each bundle in the upper left hand corner. A recent hand has added foliation in pencil on every tenth leaf of the manuscript.<sup>72</sup> The copyist, or at least a contemporary hand, had numbered only the folios on which the first and second parts were written; those leaves on which the Table was copied were not foliated at that time. There are some problems with the seventeenth-century series of foliation which cannot be attributed to the binding, including: the omission of the numbers eight and seventy-five to seventy-seven; the original mis-numbering of what should have been folios 234–7, 249–53 and 255 as 334–7, 229–33 and 235;<sup>73</sup> and a disruption to the order of content.<sup>74</sup> It may be that such problems are attributable to Whyt's inexperience as a notary. However, overall, the Aberdeen manuscript generally appears to be a competent and careful copy.

### (b) *The Glasgow Manuscript*

The flyleaves of this manuscript are extensively annotated and decorated, so

<sup>71</sup> RPS, 1587/7/39. On notaries in the eighteenth century, and on the admission of notaries during that period, see John Finlay, *Admission Register of Notaries Public in Scotland, 1700–1799* (2 vols, Scottish Record Society Publications, New Series vols 36–7, Edinburgh, 2012), especially 1–25.

<sup>72</sup> There are problems with this modern foliation. That the numbers appear on only every tenth page does not make it easy to use. The twelfth folio is numbered as if it were the tenth, so here the first twelve folios have been referred to as folios i, ii, and one to ten. There are only eight folios between those numbered 290 and 300, so here the foliation has been interpreted to run consistently from folio numbers 290 to 298 then to 300. These issues aside, the modern foliation is more useful as a method of reference to the whole manuscript than the contemporary foliation so will be used here.

<sup>73</sup> Aberdeen MS., fos 326–9, 341–6 respectively (modern foliation).

<sup>74</sup> Ibid., fos 345r–7v (modern foliation). Here the scribe erred by turning two folios in the first instance then attempted to use up the resulting blank space when the error was noticed; the contemporary foliation seems to then have been added subsequently in a manner which tried to take account of the localised rearrangement of the text. Had the manuscript been paginated rather than foliated, this might have been successful, but in fact the insertion of the folio numbers out of order actually makes reading the manuscript more difficult.

provide significant information about its provenance. The most important of the annotations is found on the *recto* of the third flyleaf at the front of the manuscript: 'Ane Booke Containing Some Practiques Belonging To Master James Scougall Comissar of Aberdein and wrytin Be Mr Robbert Rose his servitor Begun May the 20 1681'; later the words '1682 Aberdein' have been added, presumably recording Rose's completion of the copy.

Scougall's signature appears numerous times on the flyleaves, often with his office as Commissary of Aberdeen. Scougall was described by George Brunton and David Haig as the son of John Scougall, Lord Whitekirk.<sup>75</sup> However it appears that James was actually a son of John's brother, Patrick.<sup>76</sup> James was likely born in 1651 in Saltoun, where Patrick was parson at the time. In 1664 Patrick was made Bishop of Aberdeen and Chancellor of King's College, so the family relocated to Aberdeen.<sup>77</sup> James cannot have been older than fourteen at this time.<sup>78</sup> He matriculated at King's College in the arts under the regent William Johnston in 1665, and graduated in 1669.<sup>79</sup> He was then admitted as a Guild Burgess of Aberdeen in February 1672, and to the Society of Advocates in 1676. He received the office of Commissary in March 1681 in succession to his oldest brother, John. He was thereafter the Rector and Civilist of King's College, and the Provost of Old Aberdeen.<sup>80</sup> He passed as an advocate in Edinburgh without trial in 1687,<sup>81</sup> and became a Commissary of Edinburgh in 1693.<sup>82</sup> If his biographers are correct, it would appear that Scougall held the office of Commissary in both Aberdeen and Edinburgh from 1693 until 1698 when he sold the northern office. In 1696 he was elevated as a Lord of Session, taking the name Lord Whitehill. He died without issue in December 1702.<sup>83</sup>

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<sup>75</sup> George Brunton and David Haig, *An Historical Account of the Senators of the College of Justice, from its Institution in MDXXXII* (Edinburgh, 1832), 464.

<sup>76</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 318–19; Brunton and Haig, *Historical Account*, 375.

<sup>77</sup> David George Mullan, 'Scougal [Scougall], Patrick (1607–1682)', *Oxford Dictionary of National Biography* (Oxford, 2004), <http://www.oxforddnb.com/view/article/24943>, accessed 18 January 2014; Kennedy, *Annals of Aberdeen*, II, 401.

<sup>78</sup> His older brother, Henry, was said to be fourteen when the family relocated [Bruce, *Lives of Eminent Men of Aberdeen*, 271].

<sup>79</sup> Anderson (ed.), *Roll of Alumni in Arts of the University and King's College of Aberdeen*, 28.

<sup>80</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 318; Kennedy, *Annals of Aberdeen*, II, 403.

<sup>81</sup> Brunton and Haig, *Historical Account*, 464.

<sup>82</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 319.

<sup>83</sup> *Ibid.*, 318–19.

The signature of the servitor and scribe Robert Rose (or Ross) appears with the description 'witness' on the *recto* of the first flyleaf, and twice more on the *verso* of the last flyleaf. Little is known of Robert Rose. He was made an Honorary Burgess in Aberdeen on 8 August 1681, and is described in that record as 'servitor to Mr James Scogall'.<sup>84</sup> Rose is also here described as 'Mr', which indicates that he was university-educated. This might be the same 'Robertus Rose' who graduated in the arts from King's College on 24 August 1680, and who is described in the *fasti* of graduates as 'Invernessensis'.<sup>85</sup>

The Glasgow manuscript contains partial copies of two collections of practicks.<sup>86</sup> The first seven paginated pages contain a copy of chapters sixty-seven to ninety-five of Hope's *Minor Practicks*, which comprise the substantial part of the title 'Of testaments'. The copy appears to be reasonably close to the text as printed in 1726, with the addition of what could be described as headings or explanations of topics in the margin. The scribe has not acknowledged this as a copy of Hope, although it was not unusual for scribes to fail to do so.<sup>87</sup>

There then follows a partial copy of Spalding's first pairt. Many titles of the first pairt are included here, out of order but preserving the title numbers which are seen in the Aberdeen manuscript. Thus Rose would have been aware that he was making only a partial copy. The copy was apparently made

<sup>84</sup> Munro (ed.), *Records of Old Aberdeen*, I, 276.

<sup>85</sup> Anderson (ed.), *Officers and Graduates of University and King's College*, 211. Rose is not mentioned further in Henderson, *History of the Society of Advocates in Aberdeen* or in the printed Sheriff court records. There is on the penultimate flyleaf of the Glasgow manuscript an inscription which could be read as 'Commiss: of Abd Roby Ross Ought this booke', which might normally indicate that he achieved this office. However this does not appear to be the case. Scougall sold the office of Commissary to Robert Paterson, who was in turn succeeded by his son, also called Robert Paterson [on these two men, see Henderson, *History of the Society of Advocates in Aberdeen*, 291; Forte and Meston, 'Legal Life in Aberdeen in the Late Seventeenth and Early Eighteenth Century', 199]. In February 1745 Peter (aka Patrick) Duff of Premnay was confirmed as Commissary [Henderson, *History of the Society of Advocates in Aberdeen*, 156; 'Preferments', *The Scots Magazine. Containing a General View of the Religion, Politics, Enterntainment, &c. in Great Britain: and a Succinct Account of Publick Affairs Foreign and Domestic*, VII (February 1745), 98]. Although not certain, it is likely that Duff inherited this office directly from Robert Paterson the younger, who died the same year. Duff held this office until at least shortly before his own death in 1763 [*Memorial for Patrick Duff of Premnay, Esquire, Commissary of Aberdeen* ([Edinburgh], 1762); *Memorial for the Commissaries of Edinburgh, relative to a Bill of Advocation presented for Patrick Duff of Premnay, Esq; Commissary of Aberdeen* ([Edinburgh], 1762)].

<sup>86</sup> Cf. Dolezalek, *Scotland under Jus Commune*, III, 301–3.

<sup>87</sup> See, for example, Dolezalek, *Scotland under Jus Commune*, II, 11, 156.

at the instruction of Scougall,<sup>88</sup> so it is plausible that he specified the number and order of the titles. The new arrangement runs as follows: testaments and executors appear first; then the titles on process in their original order; then those on pursuers, defenders and procurators; then libels and summons as well as messengers; then sentences; then those that can broadly be regarded as being on obligations; then heirs; then prescription; and, finally, improbation and probation. The titles which appear in the Aberdeen manuscript but not in the Glasgow manuscript relate to property law and family law, broadly construed. But the titles on property and family law were not completely ignored by Rose: Spalding's title on prescription is copied into this manuscript. This selection is perhaps counter-intuitive: the titles on family law particularly would have been relevant to Scougall's practice as a judge in the Commissary courts. It is plausible that he had access to or preferred to consult different material for these matters, or perhaps he had these titles of Spalding's practicks copied into a different volume which has not survived or has not yet been identified.

Rose's practice was to write the substantive text on the right-hand side of the page, and thus leave a substantial margin on the left, presumably for annotations. On the page which should be paginated p.170 begins a three-page 'Table of the titles contained in this book'.

(c) *The Relationship between the Two Manuscripts*

It is possible to discern something of the relationship between the two manuscripts. The Aberdeen manuscript, which is the older of the two, does not appear to be an ancestor of the Glasgow manuscript. Spalding borrowed from the practicks of Sir James Balfour of Pittendreich a citation of the case *Merchants of Avinzeon v the heirs of Falcastel* (1532). The Aberdeen manuscript omits the name of the town (which might correctly have been Avignon); the Glasgow manuscript includes it as 'Avinyeane'.<sup>89</sup> Certain conclusions can be drawn on the basis of this (admittedly slim) evidence. It does not seem to have been Rose's normal practice to check the citations found in his model manuscript: none of the other errors in the citations which Spalding borrowed from Balfour have been corrected. Thus it seems likely that the Aberdeen manuscript's omission of 'Avinzeon' precludes it from having been an ancestor text of the Glasgow manuscript. Rather it seems that both descend independently from Spalding's authorial holograph. It is plausible (given the

<sup>88</sup> Glasgow MS., iii *recto*.

<sup>89</sup> Aberdeen MS., fol. 148v (modern foliation); Glasgow MS., 120.

similarity of the texts and the wording of the Aberdeen manuscript's title page) that they may both have been copied directly from Spalding's manuscript.

Indeed there is evidence to suggest that they both descend from the same ancestor, which contained a copy of the Table and both 'pairts' and was foliated. Spalding's authorial holograph (or an intermediate ancestor shared by both extant manuscripts) must have contained extensive cross-referencing within the text: the first pairt alone seems to have contained more than 200 cross-references. The cross-references which appear in the Aberdeen manuscript are almost all correct to the contemporary foliation of that manuscript. The Glasgow manuscript also gives all the cross-references found in the Aberdeen manuscript (including those which refer to sections of text which were not copied into the former) and gives the same numbers for the folios, titles and chapters as the Aberdeen manuscript. Thus the cross-references in the Glasgow manuscript seem to refer to the foliation of the Aberdeen manuscript rather than to its own pagination. The most logical explanation for this is that the cross-references were received into both extant manuscripts from a common ancestor in which the text was generally contained on the same pages as it is in the Aberdeen manuscript. If this is correct, it would suggest that Whyt was careful to adhere to the spacing of the text of his model manuscript, probably as an expression of a more general concern to provide as accurate a copy as possible. This also raises questions about the Glasgow manuscript. These cross-references would have been useless to Scougall or another reader of this manuscript unless he also had on-going access to the complete collection of Spalding's practicks. It is plausible that Rose was also highly concerned about making an accurate copy of the model manuscript, so included cross-references which would be unhelpful if the copy was separated from its parent text.

The conclusion that both scribes may have been highly concerned with providing a faithful copy, to the extent of pedantry, is reassuring to the modern reader: the two extant copies might be presumed to be close enough to Spalding's authorial holograph to allow some conclusions to be drawn about it.

## (2) The First Pairt

Spalding's first pairt broadly adheres to Hector McKechnie's description of the so-called digest practicks: 'collections of "rollments of court" [...] some of the later ones [of which] were elaborated by the inclusion of abstracts

of statutes and other sources, such as the *Regiam Majestatem* and the “auld laws”, and of “practical observations” [...] digested under subject heads [...] constituting a digest or encyclopaedia of law’.<sup>90</sup> There are sixty-seven titles in Spalding’s first pairt, although errors in the numbering of the titles (preserved in both extant copies so plausibly attributable to the authorial holograph) mean that the final title is wrongly identified as the sixty-fourth.<sup>91</sup> Spalding’s first pairt is quite short: the sixty-seven titles are contained on only around 100 folios in the Aberdeen manuscript. There is considerable variation in the length of Spalding’s titles,<sup>92</sup> but more than half of them are around two pages or less of continuous text, and around twenty-five are closer to a single page, of the Aberdeen manuscript. The first pairt owes much to earlier works of Scots law.

(a) *Spalding’s Use of the Practicks of Sir James Balfour of Pittendreich*

Dolezalek has noted of the Aberdeen manuscript, ‘I take it that the author used Balfour’s Practicks.’<sup>93</sup> This conclusion was based on two observations: that ‘Several series of chapter headings correspond to parallel series in Balfour’, and that some of the citations which he sampled appeared in both works.<sup>94</sup> Dolezalek’s conclusion is undoubtedly correct. Indeed there is evidence that Spalding used Balfour extensively and probably compiled the first pairt of his practicks with a copy of Balfour in front of him. Spalding drew from Balfour: the order in which he arranged many of the titles, the names of titles, the structure of material within titles, much of the text, and many of the citations therein. Thus much of Spalding’s first pairt can to some extent be regarded as an abridged, updated version of sections of Balfour’s practicks. But Spalding does not appear to have been uncritical in his use of Balfour. Rather, he was selective about the material he borrowed, reordered some of that material, and reworked passages for conciseness. This assumes, of course, that Spalding

<sup>90</sup> Hector McKechnie, ‘Practicks, 1469–1700’ in *An Introductory Survey of the Sources and Literature of Scots Law* (Stair Society Publications Series vol. 1, Edinburgh, 1936), 25–41, 28.

<sup>91</sup> The titles ‘Moveable airshipe pertayneing to male or female’ and ‘Of the aith, and first the aith De Calumnia seu de Malitia’ are not numbered; ‘Of Testaments and letter willes’ and ‘Of executors’ are both numbered as title twenty-seven.

<sup>92</sup> Notably long titles include ‘The ordour of proponeing of exceptiones emergent and de novo ad aures dilator and peremptor’ (title forty-nine) and ‘Of warrand’ (title forty-two), both of which amount to approximately nine pages of continuous text.

<sup>93</sup> Dolezalek, *Scotland under Jus Commune*, III, 18.

<sup>94</sup> *Ibid.*.



worked from a complete copy, but it is also possible that he worked from a copy of Balfour which was already so abridged.<sup>95</sup>

Around sixty manuscripts containing copies of Balfour's practicks have been identified by Dolezalek; the specific copy which Spalding owned, or at least used, has not been identified as such. In the eighteenth century, Walter Goodal completed an edited text of Balfour's practicks, which took account of 'all the Manuscript Copies we could find';<sup>96</sup> unfortunately, Goodal did not identify which manuscripts he used, or how many he examined. Peter McNeill's assessment of this work in 1963 was 'that Goodal was a careful and meticulous scholar', and that a new edition based on a fresh consultation of the manuscripts did 'not appear to be justified by the extra usefulness of such treatment'.<sup>97</sup> The Stair Society thus reprinted Goodal's earlier edition, with new appendices, indices, and so on. This printed text has necessarily been relied upon here as the principal reading of Balfour, as a comprehensive comparison between Spalding and the manuscripts of Balfour's practicks has been outwith the scope of this research. Balfour's text as it is printed does appear to have been at least reasonably close to the manuscript version used by Spalding.

Spalding's method was to summarise, often in a single sentence, selected chapters (i.e. paragraphs) within a title of Balfour and, generally, to retain his citations.<sup>98</sup> Selective copying from Balfour was relatively common practice in

<sup>95</sup> N.L.S. MS. 2941, which dates from the mid-1640s, has been discussed by both McNeill and Dolezalek as an example of an abbreviated copy of Balfour's practicks. See Peter G. B. McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich, Reproduced from the Printed Edition of 1754* (2 vols, Stair Society Publications Series vols 21–2, Edinburgh, 1962–3), I, xxxv; Dolezalek, *Scotland under Jus Commune*, II, 31–2.

<sup>96</sup> Walter Goodal (ed.), *Practicks: or, A System of the More Ancient Law of Scotland. Compiled by Sir James Balfour of Pettindreich* (Edinburgh, 1754), xi.

<sup>97</sup> McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, lvi–lvii.

<sup>98</sup> The two compilers' titles 'Of Conjunctie' provide a typical example [McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 101–5; Aberdeen MS., fos 91r–v (modern foliation)]. Spalding's first paragraph summarises Balfour's extensive fourth chapter and retains the citations of the acts later given the short titles of the Liferent Caution Acts 1491 and 1535 [RPS, 1491/4/10, 1535/23]. Spalding's second paragraph summarises Balfour's lengthy first chapter, retaining (and possibly attempting to correct) the citation of *Regiam Majestatem*. both compilers cite *Regiam Majestatem* at the end of this passage, Balfour citing 2,16 and Spalding citing 2,18 [McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 101, cap.1; Aberdeen MS., fol. 91r (modern foliation)]. Neither citation is correct, at least to Skene's edition, in which the relevant text is *Regiam Majestatem*, 2,15,10–11. Spalding's third paragraph abridges Balfour's second, but ignores the repeat citation of *Regiam Majestatem* and adds a brief comment. Spalding's fourth paragraph condenses into a single sentence Balfour's



the early-seventeenth century. Thus, for example, the Tinwald manuscript<sup>99</sup> contains a copy of Balfour's practicks about which Dolezalek has remarked: 'the present MS merely selects text passages from Balfour, shortening many of them and omitting many references.'<sup>100</sup>

Spalding's practice of selective copying of material within a title is also seen on a broader scale by comparing the order of their titles. Spalding's first pairt does not contain titles or any large quantity of material on what can broadly be regarded as matters of public law. He thus appears to have ignored the first twelve titles of Balfour's practicks, which focus on such issues. Again, this was not uncommon: these titles were also excluded from the copy in Adv. MS. 25.3.6.<sup>101</sup> But thereafter Balfour supplies titles on what might be considered to be matters of private law, broadly construed. The content and order of the first twelve titles of Spalding rely to a significant extent on these titles in Balfour.<sup>102</sup>

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sixth chapter, retaining Balfour's citation of *John Graham v Christian Forsyth* (1527) but omitting the parties' forenames. Spalding's fifth paragraph similarly abridges Balfour's seventh chapter, but corrupts Balfour's citation of *Janet Dunbar v Gilbert Kennedy* (1530). Spalding's sixth paragraph reworks Balfour's eighth chapter, retaining only a citation of the date 1533 from Balfour's two citations of cases which provided the dates 1534 and 1553 but not the parties' names. Spalding's seventh paragraph summarises Balfour's ninth chapter, retaining the citation of *Malcolm, Lord Fleming v Janet Home* (1534) but omitting the lord's forename. Spalding's eighth paragraph summarises Balfour's tenth and eleventh chapters, retaining the citation of the Wife's Ratification Act 1482 but not that of a case heard in 1505. Spalding here adds: a citation of *Regiam Majestatem*, 2,16,16; a citation of chapter twenty of *Quoniam Attachamenta*; a reference to a case said to have been heard in Edinburgh in 1636; two cross-references to title one of his first pairt ('Of the husband and the wife'); and a reference to a separate volume belonging to Spalding which he called his stylebook. It is worth noting that this is a different stylebook to that which was edited by Forte and Meston [on which, see above]. Spalding's final paragraph summarises Balfour's fourteenth chapter, retaining but corrupting the citation of *MacNathane v Lamond* (1554), after which Spalding adds a cross-reference to his Table.

<sup>99</sup> Adv. MS. 22.3.4, which has been dated to the early-seventeenth century by Dolezalek, *Scotland under Jus Commune*, II, 139.

<sup>100</sup> Dolezalek, *Scotland under Jus Commune*, II, 140. When copying the title on conjunctie, the scribe of the Tinwald manuscript included only chapters one, five to ten, and twelve to fourteen [Adv. MS. 22.3.4, 6–7]. Similarly, the copy in Adv. MS. 25.3.6, which Dolezalek has dated to the early-seventeenth century [Dolezalek, *Scotland under Jus Commune*, II, 291–4], drew only on chapters one, two, and four to seven [Adv. MS. 25.3.6, fos 49r–v].

<sup>101</sup> Adv. MS. 25.3.6, fos 33r–65v.

<sup>102</sup> Spalding's first title, 'Of the husband and wife', draws on the corresponding title in Balfour, 'Materis concerning the husband and the wife', borrowing citations from at least its first, third, fifth, and ninth to fourteenth chapters, as well as possibly the

Indeed a pattern of heavy reliance on Balfour's practicks continues for much of Spalding's first pairt, and there is generally one title in Spalding for most of the titles in Balfour. However this pattern of borrowing does break down in places. Spalding sometimes drew material from more than one title in Balfour into a single title in his own collection.<sup>103</sup> Conversely, Spalding divided into two titles Balfour's examinations of minors, of probation by oaths, and improbation. He also reversed Balfour's order of the titles on probation and exceptions. Additionally, as has already been seen, Spalding continued to ignore certain titles, specifically Balfour's titles on: hire and herezeld, buying and selling, fairs and markets, money, parliament, the College of Justice, ambassadors, assize, attachments, and so forth. He also appears to have taken little, if anything, from Balfour's titles on homage and fealty,

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fifteenth chapter of Balfour's title 'Of the wife's dowrie and tierce'. Both compilers then discuss marriage, with Spalding borrowing from the first, second, fifth, sixth and seventh chapters of the relevant title in Balfour. Both then have short titles on tocher-goods, with Spalding borrowing from the fifth and sixth chapters of that title in Balfour as well as the thirteenth chapter of his title on conjunctie which follows. Spalding, too, gives a title on conjunctie after that on tocher-goods; a comparison of the two compilers' titles on this subject has already been provided [see above, fn. 98]. Both follow their discussion of conjunctie with a title on terce, Spalding borrowing from at least Balfour's second to sixth, thirteenth to fifteenth, eighteenth, nineteenth, twenty-fifth, and twenty-seventh to thirty-third chapters. Their next titles are on tutors, Spalding borrowing from at least Balfour's third, fifth to tenth, twelfth, thirteenth, fifteenth to eighteenth, and thirty-sixth chapters. Both compilers then discuss curators, Spalding seemingly borrowing from all but the sixth of Balfour's seventeen chapters. Balfour then gives one title, 'Of superiouris and vassallis', whereas Spalding gives two short titles, 'Of superiors' and 'Of vassals', drawing on Balfour's first, fourth and tenth chapters. Spalding then ignored Balfour's titles on beggars, hostleries, policies, schools, the king's patrimony, the forest laws, and kirk patrimony. He borrowed a citation of the Manses and Glebes Act 1563 for his title on feus, but otherwise he seems to have also ignored Balfour's title 'Anent benefices'. Both then have a title on teinds, with Spalding borrowing from at least Balfour's first and eighth chapters. Both compilers then discuss prescription, Spalding borrowing from at least Balfour's first, second, and fourth to ninth chapters. Both then examine possession, with Spalding apparently borrowing from all but Balfour's first and fifth chapters.

<sup>103</sup> Material from Balfour's titles 'Anent payment' and 'Of generall discharge' was drawn into a single title addressing both issues; material from Balfour's titles 'Of alienatioun and infetment' and 'Anent alienatioun of heritage and landis' was drawn into a single title in Spalding, called 'Of alienation and infetment'; material from Balfour's titles 'Anent covenant and paction', 'Of borrowing and lending', 'Anent pledgis and cautioneris', 'Anent thingis laid in wad' and 'Anent a lenne' was drawn into a single title, 'Of pactione, borrowing, lending and pledges & cautioners'; material from Balfour's titles 'Of courtis' and 'Anent jugeis' was drawn into a single title on both; and material from Balfour's titles 'Anent probatioun be witnessis' and 'Anent probatioun be confessioun' was drawn into a single title.

non-entry of heirs, repledging, and sentence and execution, and less than one might otherwise expect from the titles on testaments and wills and on executors.

Spalding's method in using Balfour has meant that his pattern of citation also owes much to that collection of practicks. There are between 1,300 and 1,400 citations and general references to authority in Spalding's first part. More than 650 of these appear to have been borrowed from Balfour. Around 580 of these references are to cases, and forty-five are to statutes. Spalding also borrowed from Balfour at least one general reference to the 'practick' of the Lords of Council and Session as well as references to the Synod of Perth in 1540 and the 'King's register'. Spalding also drew from Balfour references to the medieval law books, including almost twenty citations of *Regiam Majestatem*, three of the *Leges burgorum*, three of *Quoniam Attachiamenta*, three of *De exceptionibus*, one of the Forest Laws and one of *De Bastardia*; these are Spalding's only references to the latter three of these works.

Sir John Skene's Latin edition of the medieval law books and statutes of the early kings first appeared in print in 1609, and a second Latin edition was printed in 1613.<sup>104</sup> A Scots translation of the volume was also printed in 1609.<sup>105</sup> Balfour collected his practicks when the medieval law books still circulated only in manuscript, and the different copies did not always divide the text in the same places.<sup>106</sup> However Spalding's references to these texts which were borrowed from Balfour generally adhere to Skene's 1609 Scots edition; one even supplies the relevant folio number therein.<sup>107</sup> As will be shown in the following section, it was this edition (rather than either Latin edition) of Skene's work that Spalding himself used. This makes it plausible that it was he who checked these borrowed references in the printed text, but it is also possible that the citations had already been so updated in the manuscript copy of Balfour from which he worked.

<sup>104</sup> Sir John Skene, *Regiam Majestatem Scotiae veteres leges et constitutiones* (1st edn, Edinburgh, 1609; 2nd edn, Edinburgh, 1613).

<sup>105</sup> Sir John Skene, *Regiam Majestatem, The Auld Lawes and Constitutions of Scotland* (Edinburgh, 1609).

<sup>106</sup> This was also noted by Goodal in the preface to his edition of Balfour's practicks [Goodal (ed.), *Practicks: or, A System of the More Ancient Law of Scotland, Compiled by Sir James Balfour of Pettindreich*, ix]. Goodal noted that the index to Skene's edition was useful for identifying citations of these older collections [Goodal (ed.), *Practicks*, x] and there is an implication here that the references in his printed edition of Balfour were brought into line with Skene's edition.

<sup>107</sup> Aberdeen MS., fol. 97v (modern foliation); McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 125.

The extent of Spalding's reliance upon Balfour means that McNeill's observations regarding Balfour's structure can also be applied, at least to some extent, to the first pairt: "The work is lacking in organisation: neither the work as a whole nor the topics mentioned are treated in any systematic or generalized way. [...] The paragraphs within each title have less organization than the titles."<sup>108</sup> However because Spalding ignored Balfour's titles on public law (broadly construed), as well as those which McNeill calls the titles on 'miscellaneous matters', there is a broad general arrangement.<sup>109</sup> Spalding first examines the law of persons in seven titles, then property law (broadly construed) in nineteen titles, then succession in ten titles, then procedural law in the remaining titles.

However Spalding's titles on procedural law do not adhere to this same pattern of borrowing from Balfour's practicks, which did not have titles on many of the topics of procedural law discussed in the first pairt.<sup>110</sup> Rather, here Spalding used a different text as his principal source.

(b) *Spalding's Use of Sir John Skene of Curriehill's Regiam Majestatem, The Auld Lawes and Constitutions of Scotland (1609), Lawes and Acts (1597) and De verborum significatione (1597)*

Included towards the back of Skene's 1609 Scots edition of the medieval law books was his *Ane Short Forme of Proces Presentlie Used, and Observed Before the Lords of Counsell, and Session*.<sup>111</sup> This tract spans almost twenty folios in the printed edition, and is divided into thirty-six titles called chapters. A second version of this text was started by Skene and developed by the Writer to the Signet, Habbakuk Bisset.<sup>112</sup> Skene's *Forme of Proces* was Spalding's second most important source for the first pairt. That his citations of it sometimes include folio numbers which are correct to the printed edition shows that it was this first printed version, rather than the later revision by Skene and Bisset, which he used.

Skene's first two chapters set out introductory matters and explain that the judicial process could be divided into three stages: "The first, is the summons:

<sup>108</sup> McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, xli–xlii.

<sup>109</sup> *Ibid.*, I, lviii, lxiii.

<sup>110</sup> For example, messengers, *de jure litem*, probation of the reply, circumdiction, conclusion, and improbation of writs.

<sup>111</sup> On which, see Ford, *Law and Opinion*, 52, 507–9.

<sup>112</sup> Ford, *Law and Opinion*, 52, 508; Sir Philip J. Hamilton-Grierson, 'Introduction' in *idem* (ed.), *Habbakuk Bisset's Rolment of Courtis* (3 vols, Scottish Text Society, Edinburgh and London, 1920–6), III, 1–3.

The second, is *litiscontestation*: The third, is the sentence definitive.<sup>113</sup> Skene discusses the first of the three stages of process in chapters three to fourteen; his fifteenth chapter, ‘Of *litiscontestation*’, is on the second stage; the remaining chapters address the third stage and ancillary matters. Spalding makes around fifty explicit references to Skene’s *Forme of Proces*,<sup>114</sup> most of which are to the chapters on the latter two stages. Spalding refers to only five of the fourteen chapters relating to the first stage of process: the fourth, ‘Execution of the summons’; the ninth, ‘Of procurators’; the tenth, ‘The calling of ane warrant’; the eleventh, ‘The order of proponing of exceptions’; and the thirteenth, ‘Exceptions dilatours’. Spalding cites Skene’s chapter ‘Of *litiscontestation*’ on the second stage. He relied upon all of Skene’s chapters which discuss the third stage of process, and explicitly cites all but chapters thirty and thirty-one, ‘The indirect maner of improbation’ and ‘Of the sentence’.

Indeed Spalding’s use of the chapters relating to Skene’s third part was considerable. From his title on *litiscontestation* onward, Spalding’s structure no longer adheres to that of Balfour’s practicks but rather owes more to Skene’s *Forme of Proces*. Both Spalding and Skene examine probation after *litiscontestation*, whereas Balfour first examines exceptions. Spalding then examines the order of proponing of exceptions, explicitly drawing on Skene’s chapters eleven to fourteen and twenty-one to twenty-five. Spalding then gives a short title, ‘Of *essongzies*<sup>115</sup> and excusationes’, on the failure of either party to attend court or send a representative, which seems to owe nothing to Skene and little to Balfour. However, from the next title, ‘Of probatione and diverse kinds thereof’, Spalding’s structure matches Skene’s exactly, with Spalding’s first pairt concluding with ‘Of the sentence’, which is the thirty-first of Skene’s thirty-six chapters.

Spalding’s use of Skene’s work in some of these later titles was extensive, and his practice was to borrow both sections of text and citations from his source.<sup>116</sup> Indeed he borrowed from Skene citations of various sources,

<sup>113</sup> Sir John Skene of Curriehill, ‘Ane Short Forme of Proces Presentlie Used, and Observed, Before the Lords of Counsell, and Session’ in idem, *Regiam Majestatem, The Auld Lawes and Constitutions of Scotland* (Edinburgh, 1609), chapter 2, fol. 109v (second series of foliation).

<sup>114</sup> This total counts citations such as ‘Sie the samen in the forme of proces used befor the Lords at the 11. 12. 13 & 14 chapdors theroff’ [Aberdeen MS., fol. 168r (modern foliation)] as four references, as it contains references to four sections of the text.

<sup>115</sup> Correctly ‘*essoiners*’. On the marginal notes and the possibility that these were authored by Spalding, see below.

<sup>116</sup> Spalding’s title ‘Probatione of the lybell be witness’ is a good example of his use of Skene. Here Spalding borrows almost verbatim the first two sections of Skene. He

specifically: fifteen citations of legislation, five citations of acts of sederunt, citations of five texts of *Regiam Majestatem*, citations of five texts of *Quoniam Attachiamenta*, and a citation which refers to two texts of *Modus tenendi curias*. He also borrowed three references to Roman law and another to a source which has not been identified.<sup>117</sup> All the references to or borrowed from Skene appear in the second half of Spalding's first pairt, specifically from title thirty-nine ('Of procurators') onwards.

Spalding's method in using Skene was thus in keeping with his practice when using Balfour. It seems that Spalding drew what he wanted from Skene and then turned to Balfour to take what – if anything – was relevant. His title 'Of probatione be wreit' opens with a paragraph which copies Skene's *Forme of Proces*, 21,1 almost verbatim, borrows Skene's citations of *Regiam Majestatem*, 1,25 and *Quoniam Attachiamenta*, cap.81, then cites the relevant

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then paraphrases the third, adds an (erroneous) citation of Skene, refers to 'the order observit befor the Commissaries of Edinburgh', includes a cross-reference to a later title of his first pairt, and cites his separate stylebook. Spalding did not return to Skene's fourth and final section, but rather discusses a case of 1642 and provides another reference to the first pairt. Spalding then gives two very short titles, 'Probatione of ane exceptione be witnesses' and 'Probatione of the replee be witnesses'. In the former, Spalding borrows almost verbatim Skene's entire chapter, but disregards the lengthy Latin statement in the middle of the first section and condenses Skene's citation which follows ('*l.1. et ibi gl. ff. de probationib.*') to just 'lib. 1. De probationibus'. Spalding also adds, after the text of section three, a note that a defender cannot call witnesses beyond those 'contained in the summonds of the day of the peremptor'. Having copied the full entry of Skene's *Forme of Proces*, he adds a citation to that chapter. He then briefly notes in a new paragraph that the Commissaries of Edinburgh and Aberdeen differ from each other and from the Session in 'ther forme of granting of diligence', and provides a cross-reference to another title of the first pairt. In 'Probatione of the replee be witnesses', Spalding again receives Skene's text almost in its entirety. He shortens Skene's first citation – '*l.2. ff. de exceptionib.*' – to 'lib.2. de exceptionibus', omitting the siglum which indicates that it is a citation of Justinian's Digest; he disregarded the citation of the Codex which immediately follows in Skene. Spalding was relatively free with his copying of the middle of Skene's second section, and his text gives a citation of the chapter as a whole at the end of his title.

<sup>117</sup> The citation in Spalding reads, 'lib. 3. cap. 87.' [Aberdeen MS., fol. 189r (modern foliation); Glasgow MS., 165]. This is certainly borrowed from Skene's *Forme of Proces*, 30.1 [fol. 122r] where there is a compound citation, 'lib. 3. c. 87. c. inter. 6. de fid. instr. extr. l. comparationes. 19. cum. Authent. seq. C. de fid. instr.' The citation 'lib. 3. c. 87.' is styled in the manner in which Skene normally cites *Regiam Majestatem*, but there is not an eighty-seventh title in the third book of that collection. Nor does this appear to relate to the other works cited here by Skene, specifically the *Liber Extra* of Canon law and the *Codex* of Roman law and the *Authenticum* thereon. [*Corpus juris canonici emendatum et notis illustratum*. Gregorii XIII. pont. max. iussu editum (4 vols, Rome, 1582), II, 2,22,6; the modern reference for the Roman law passage is C.4,21,20].

chapter of Skene.<sup>118</sup> The next paragraph draws on Balfour's second chapter, and borrows (if corrupts) the citation of *Gibson v Money Penny* (1488).<sup>119</sup> For the rest of this seven-page title, Spalding's text is highly reminiscent of Balfour, until at the end he provides a cross-reference to his second pairt and a short comment without any authorities. This same practice is found in the other titles for which Spalding used both sources: Spalding borrowed from Skene then from Balfour.

Spalding's extensive copying from Skene's *Forme of Proces* is interesting because this is a printed work. However copying from a printed book was not uncommon. Bawcutt has noted of literary manuscripts: 'Many items in these Scottish miscellanies were copied from printed books [...] scholars are becoming increasingly aware of how common it was, throughout this period, to copy not only extracts, but sometimes whole books.'<sup>120</sup> The justification which Bawcutt has given for this practice is that these persons 'were unable to acquire the printed texts that they desired'.<sup>121</sup> This may have been Spalding's motivation: it is plausible that Spalding did not own a copy of Skene but borrowed it.<sup>122</sup> However he draws upon Skene's *Forme of Proces* with sufficient frequency to allow the conclusion that he was highly familiar with its contents.

Indeed Spalding also makes frequent reference to the medieval law books and early Scottish statutes, and it is clear that he used Skene's 1609 Scots edition to access these too. Spalding does not always acknowledge that this was his source for these texts, and where he does do so he refers to it not by its printed title but as 'the book of the Majestie'. This was a common moniker in the early-modern period for *Regiam Majestatem*, after which Skene's edition is named.

Thus Spalding gives four citations of the collection of the laws of the Baron courts, one of which acknowledges that the version used was 'wreitine in the book of Majestie'.<sup>123</sup> The *Leges burgorum* is cited by Spalding twelve times

<sup>118</sup> A marginal addition beside this text summarises Skene's second section, and cites Skene's chapter and the folio number. On the marginal notes and the possibility that these were authored by Spalding, see below.

<sup>119</sup> A marginal annotation beside this paragraph cites *Quoniam Attachiamenta*, 81, 24 and a different title of Spalding's first pairt.

<sup>120</sup> Priscilla Bawcutt, 'Scottish Manuscript Miscellanies from the Fifteenth to the Seventeenth Century' in Peter Beal and A. S. G. Edwards (eds), *English Manuscript Studies, 1100–1700: Scribes and Transmission in English Manuscripts 1400–1700* (London, 2005), 46–73, 57.

<sup>121</sup> Bawcutt, 'Scottish Manuscript Miscellanies', 57.

<sup>122</sup> Ford, *Law and Opinion*, 40.

<sup>123</sup> Aberdeen MS., fol. 142r (modern foliation).



(plus once in the annotations, on which see below); six of these citations state that the collection is 'contayned within the Majestie' and three of these six give the folio number within Skene's collection. Spalding also used this version of *Quoniam Attachiamenta*, which is cited thirty times by him and is also said to be 'in the book of the Maj[es]tie'.<sup>124</sup> Of his eighteen citations to early Scottish statutes included in Skene's volume, four state that the source is 'in the book of the Majestie' (or similar).<sup>125</sup> The Table to Skene's volume is also cited twice in the first pairt, as 'the table of the book of Majestie'.<sup>126</sup> *Regiam Majestatem* itself is cited by Spalding around fifty times.

Many of Spalding's citations of the medieval law books and early statutes include folio numbers as well as title or chapter numbers. The folio numbers provided are correct only to Skene's 1609 Scots edition. Thus, for example, both the Aberdeen and Glasgow manuscripts give the citation 'Quoniam attachiamenta fol. 81. cap. 24 at the end of the fourt vers'.<sup>127</sup> Chapter twenty-four is contained on folio 81v of the 1609 Scots edition of Skene's work, but on folio 112v in the 1609 and 1613 Latin editions. It appears to have been Spalding's usual practice to cite the folio on which the relevant title or chapter begins, rather than the folio on which a specific paragraph or verse is found. For example, a citation of *Regiam Majestatem*, again found in both manuscripts, reads: 'Sie the first book of the Matie fol. 6. cap. 6. at the xiiij & xv vers'.<sup>128</sup> *Regiam Majestatem*, 1,6 does indeed begin on folio 7r of the Scots edition, but the fourteenth and fifteenth verses are found on folio 7v; in the Latin editions the chapter begins on folio 12r and the verses are found on the *verso*.

As Spalding relied upon Skene for his citation of older statutes, so he seems to have done so for more recent statutes. Spalding makes quite extensive reference to legislation passed in the reigns of the Stewart monarchs. Generally he gives the name of the monarch, the parliament number, and the chapter. However on two occasions he gives more detail. Thus in title thirty-six, 'Of Regalitie', Spalding explains that 'the first attacker is judge frae whome ther is no replegiatione', after which he gives a citation, '[a. 6. par. 11. cap. 29. fol.

<sup>124</sup> Aberdeen MS., fol. 150v (modern foliation); Glasgow MS., 128.

<sup>125</sup> Aberdeen MS., fos 103v, 119v, 143r, 157v (modern foliation); Glasgow MS., 10. Spalding also once refers to a statute of Malcolm II as being 'of Regiam Majestatem', which seems to refer to the copy of the statutes of Malcolm II printed in Skene's volume [Aberdeen MS., fol. 142v (modern foliation)].

<sup>126</sup> Aberdeen MS., fos 111r, 158r (modern foliation).

<sup>127</sup> Aberdeen MS., fol. 166r (modern foliation); Glasgow MS., 47.

<sup>128</sup> Aberdeen MS., fol. 152r (modern foliation); Glasgow MS., 133.



81.<sup>129</sup> This citation seems to relate to Skene's *Lawes and Actes of Parliament, maid be King James the First and His Successours Kings of Scotland* (1597). The relevant act – which is quite long – is printed in this volume from folio 76v. However it is at folio 81r that the statute discusses issues of replegation of offenders by Regality courts. If the suggestion that Spalding used this volume is correct, then his citation of the folio on which the relevant passage is found appears to deviate from his previously-discussed practice of citing the folio on which the start of the relevant chapter of Skene's edition of the medieval law books is found. It is possible that he changed his practice because of the length of the act or simply because he was using a different source and his previously-discussed practice did not survive the change. Spalding must also have used supplementary collections of later statutes: he makes reference to legislation of James VI passed after his twentieth parliament as well as acts of Charles I.<sup>130</sup>

Finally, Spalding also made use of Skene's *De verborum significatione*. There are seven citations of Skene's work in the text of Spalding's first pair; another is added in the marginal annotations. Of these citations, two are of the entry 'Curialitas' while the entries 'Eneya' (on heirs), 'Bastardus', and the acts of council included in the entry 'Feodum' are each cited once. Two of the references cite only letters within the dictionary: that to the letter 'E' probably refers to 'Eneya' again and that to the letter 'F' should probably be interpreted as referring to 'Felonia'. The marginal citation is of the letter 'C' and again refers to the content of the entry 'Curialitas'.

### (c) *Spalding's References to Other Scottish Lawyers*

Spalding also makes references to the legal opinions of contemporary Scottish advocates. On several occasions he draws on such opinions, mentioning notable lawyers as having 'resolved' cases or the legal issues discussed therein. It seems clear that Spalding is using the term 'resolved' here in the sense of settling a legal question,<sup>131</sup> which would be in keeping with the practice of

<sup>129</sup> Aberdeen MS., fol. 144v (modern foliation).

<sup>130</sup> See e.g. Aberdeen MS., 98v for citations of the statutes later given the short titles the Teinds Act 1612 [RPS, 1612/10/12] and the Church Lands Act 1621 [RPS, 1621/6/27], which were passed in James VI's twenty-first and twenty-third parliaments respectively, and fol. 101r for a citation of the Act in Favour of Orphans, Fatherless and Others 1641 [RPS, 1641/8/201], which was passed during the reign of Charles I.

<sup>131</sup> On the various contemporary definitions of 'resolved', see 'Resolve, v.' in *Dictionary of the Scots Language* (2004), available at [www.dsl.ac.uk/entry/dost/resolve](http://www.dsl.ac.uk/entry/dost/resolve), accessed

many of his contemporaries of treating the opinions of prominent lawyers as a source of law.<sup>132</sup> What is less clear, however, is how Spalding became aware of these opinions.

First, Spalding often refers to Thomas Nicolson. Mr Thomas Nicolson of Cockburnspath was the King's College Civilist from 1619 and the Commissary in Aberdeen until his death, probably in 1625.<sup>133</sup> Spalding makes several references in the second pairt to a Thomas Nicolson which are clearly to this man in his capacity as Commissary. However there are also references to a Thomas Nicolson in the first pairt in the context of cases which were heard after Cockburnspath's death. There was in the seventeenth century another relevant Thomas Nicolson: the compiler of practicks and Lord Advocate, Sir Thomas Nicolson of Carnock.<sup>134</sup> Spalding appears to refer to this Thomas Nicolson twice in the text of the first pairt, specifically as having 'resolved' the cases *Laird of Glengarrie v certain tenants* (1628) and *Robert Innes of Drany v Christen Innes* (1635).<sup>135</sup> There are only three extant manuscript copies of the practicks of Sir Thomas Nicolson of Carnock.<sup>136</sup> The Advocates' Library manuscript seems to have been a careful copy, does not appear to have been abridged, and does not give any dates after 1646, when Nicolson died.<sup>137</sup> However neither of the cases cited by Spalding appears in this manuscript. Nor does it seem that any of Spalding's other case descriptions could have been drawn from Nicolson's practicks.<sup>138</sup>

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24 November 2014.

<sup>132</sup> Ford, *Law and Opinion*, passim.

<sup>133</sup> Anderson (ed.), *Officers and Graduates of University and King's College*, 31; Francis J. Grant, 'Nicolson of that ilk, Lasswade and Lochend' in idem, *The County Families of the Shetland Islands* (Lerwick, 1893), ii.2; Act in favour of Maister James Nicolsone of Colbrandspeith 1633 [RPS, 1633/6/159].

<sup>134</sup> Ford has stressed the importance of not confusing the two men and of attributing the practicks to Carnock: Ford, *Law and Opinion*, 469.

<sup>135</sup> Spalding's use of the title 'Mr' (rather than 'Sir') in relation to these two cases is correct: Nicolson was promoted to the Baronetcy in 1637 [*The Present State of Great Britain and Ireland* (5th edn, London, 1723), part II, 158; John Burke, *A General and Heraldic Dictionary of the Peerage and Baronetage of the British Empire* (4th edn, London, 1833), 226–7].

<sup>136</sup> Adv. MS. 24.3.3, Signet Library, MS. 36, and E.U.L., Dc.4.13. Dolezalek has noted that the copy held by the Signet Library includes various insertions made by later lawyers and that the Edinburgh University Library copy is heavily abridged [Dolezalek, *Scotland under Jus Commune*, III, 167, 188–9].

<sup>137</sup> Dolezalek, *Scotland under Jus Commune*, II, 219; Ford, *Law and Opinion*, 469.

<sup>138</sup> Thus, for example, Nicolson records a case between William Wood of Colpnay and Andrew Mair in Cookstoun, heard on 24 February 1620, in which Wood complained that Moir had failed to give his oath 'in the terme assigned' and had failed to respond

Similarly, Spalding refers to Sir Thomas Hope, who was also a compiler of practicks and was the Lord Advocate from 1626 until his death in 1646.<sup>139</sup> Spalding referred to Hope three times in the first pairt. First, the fullest of Spalding's three citations is in the context of a discussion of an heir's power to make assignations before he is served as heir, a point which is said in the Aberdeen manuscript to have been 'resolved in Edinburgh be the kings advocat Sir Thomas Hope betwixt Sir Robert Gordone and Robert Innes of Drany in October 1636 years'; the Glasgow manuscript gives the year as 1639.<sup>140</sup> It is likely that these dates are broadly correct: James Gordon has recorded that in '1636, Sir Robert [Gordon] bought the Lands of Drany in Murray from Robert Innes of Drany'.<sup>141</sup> The other two references to Hope are made in the context of inhibitions of teinds of fish. In the title 'Of teynds', Spalding states that: 'Inhibitiones upon teynd fisches could be srved yeerlie in Januar whilk will serve to that tyme tuelff moneth Resolvit in Edinburgh be Sir Thomas Hope advocat Sie fol. 25. tit.'. <sup>142</sup> The citation here is a cross-reference to Spalding's title 'Of interdictione and Inhibitione', specifically to a paragraph in which he summarises several rules about inhibitions, then states: 'And Inhibitiones upon teynd wheat fisches could be srvit yeerlie in Januar Resolvit be Sir Thomas Hope advocat in October 1536'.<sup>143</sup> Finally, there is also a reference in an annotation to a case about payment of debts by a tutor which is described as having been 'resolved be Sir Thomas Hope advocat in Edinburgh in causa Issobell forbes ane of the exrs of umple Gorge forbes in Craigy Tarves against Thomas forbes of Wattertoun her Tutor of Law before the Commissaries of aberdeine feb. 1642';<sup>144</sup> again, it is likely that this date is at least broadly correct.<sup>145</sup>

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to citations to do so [Adv. MS. 24.3.3, entry 220]. This appears to be a later hearing in the on-going litigation between these parties than that which was recorded by Spalding in the second pairt, which was heard 'febr. 20.' and in which it was found that Moir could not be bound by a contract which had been signed by a notary on his behalf – but not by the notary whom he had authorized to do so – and so had to give his oath [Aberdeen MS., fol. 198v (modern foliation)].

<sup>139</sup> David Stevenson, 'Hope, Sir Thomas, of Craighall, first baronet (1573–1646)' in *Oxford Dictionary of National Biography* (Oxford, 2004), online edn of May 2009, <http://www.oxforddnb.com/view/article/13736>, accessed 27 July 2014.

<sup>140</sup> Aberdeen MS., fol. 126r (modern foliation); Glasgow MS., 148.

<sup>141</sup> James Gordon, *History of Scots Affairs from MDCXXXVII to MDCXLI* (3 vols, Spalding Club, 1841), I, xxxvii.

<sup>142</sup> Aberdeen MS., fol. 98v (modern foliation).

<sup>143</sup> Ibid., fol. 112r (modern foliation).

<sup>144</sup> Ibid., fol. 94r (modern foliation).

<sup>145</sup> The family's papers record that in 1639 'Isabel Forbes, daughter of George Forbes

These references are somewhat puzzling. A date of 1536, if correct, would make the case too early to have been recorded by Hope. Nor does the case description seem to have been borrowed by him from an earlier source and included in either his *Major practicks* or *Minor practicks* in any relevant title. However it seems likely that the date is not correct. The paragraph before the one in which Spalding cites Hope refers to inhibitions and the arrestment of goods. Here Spalding cites another action in the on-going litigation between Innes of Drany and Gordon, which was heard in Edinburgh in 1637. It is conceivable that the case said to have been heard in 1536 was actually heard in 1636 as part of this on-going litigation between these two parties; this would make sense as Drany is coastal so the property may have included the right of teinds of fish. If this is correct, it seems likely that Whyt simply erred in copying the date in the relevant citation.

However neither *Gordon v Innes* (ca.1636) nor *Forbes v Forbes* (1642) appears in the printed edition of Hope's *Minor Practicks*. Hope stopped compiling his *Major Practicks* in 1633, so the cases are too late to have been recorded by him therein. Hope's son, Lord Kerse, updated Hope's latter work with references to cases in the later 1630s and early 1640s.<sup>146</sup> However these particular cases do not appear to have been among these updates.<sup>147</sup> Nor do they appear in the (admittedly incomplete) 'Short not of the decisions and interloquitors givine be the Lords of Counsell and Sessione', which was explicitly drawn from Hope's *Major Practicks*, rearranged and extensively updated with cases from the

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of Craigie' was given a liferent over her husband's property 'conform to the Marriage Contract between him and Thomas Forbes of Watertoun, her guardian' [*Memoranda Relating to the Family of Forbes of Waterton* (Aberdeen, 1857), 4].

<sup>146</sup> Ford, *Law and Opinion*, 44–5, 250.

<sup>147</sup> Adv. MS. 6.1.2 is described as a 'Law Repertorie [...] Collected by the Lord Kerse, who was a Lord of Session in the Reign of King Charles the ist. and Son to Sir Thomas Hope of Craighall [obscured] then Lord Advocate' [fol. 1v]. On the nature of this manuscript as an updated version of Hope's *Major Practicks*, see Dolezalek, *Scotland under Jus Commune*, II, 97–8. On Kerse's updates generally, see Ford, *Law and Opinion*, 44–5. The references in Spalding do not appear to correspond to the text of the relevant titles, specifically: for the 1636/1536 case(s): 'Of interdctions' [Adv. MS. 6.1.2, fos 61v–62v], 'Of inhibitions' [Adv. MS. 6.1.2, fos 59r–61r], 'Of fishings' [Adv. MS. 6.1.2, fol. 93r], or any of the titles in the fourth part [Adv. MS. 6.1.2, fos 126r–150r]; and for the 1642 case: 'Of payment and discharge' [Adv. MS. 6.1.2, fos 57v–59r] and 'Of tutors and curators' [Adv. MS. 6.1.2, fos 147r–150r]. These titles were updated by Kerse. See e.g. the citation of *Bower and others* (1642) [Adv. MS. 6.1.2, fol. 131r].

1630s and 1640s<sup>148</sup> – possibly by Thomas Veatch, Hope's god-son, whose own practicks follow thereafter in this manuscript.<sup>149</sup>

It thus seems that Spalding's references to Nicolson and Hope could not have been drawn from their practicks. It is, of course, possible that notes on these cases were added as annotations to manuscript copies of these practicks which have not been found, or that Spalding was working from manuscript collections which were wrongly attributed to Nicolson and Hope. However it is at least equally plausible that Spalding was involved in these cases, or at least that he had an interest in their conclusion, and so monitored the progress of the cases and the discussions thereupon. One of the references to Nicolson and at least one (but possibly more) of those to Hope are given in the context of litigation pursued by Robert Innes of Drany. The lands of Drany are in Moray, where Spalding was probably practising during the relevant years. There are several cases recorded in Spalding's practicks in which Robert Innes of Drany was a party,<sup>150</sup> so it is plausible that Spalding was his regular counsel. The same might be said of Spalding's reference to Nicolson in the context of *Laird of Glengarrrie v certain tenants* (1628). The description of this case in his first pairt accords very closely with the description of a case in his second pairt which was 'Resolvit in Edinburgh in the Laird of Glengaries cause in anno 1628.'<sup>151</sup> Although there is no mention of Nicolson in this latter entry, it seems plausible that this refers to the same hearing or to a hearing in the same on-going litigation. If this is correct, then it seems likely that Spalding was involved in the case. Indeed the Laird of Glengarrrie is named as a party litigant

<sup>148</sup> MS. 2935, fos 37r–41v. On which, see Ford, *Law and Opinion*, 45 fn. 187; Dolezalek, *Scotland under Jus Commune*, II, 27–8. The latest date found in this copy is 1646 on fol. 41v. This manuscript is a legal miscellany, compiled over many decades by different hands. The 'Short not' is copied in a seventeenth-century hand on paper with a watermark of a one-handled pot topped with a crescent, which was a design common in the seventeenth century [See e.g. POT.003.1 (date: 1640), POT.411.1 (date: 1645), POT.124.1 (date: 1649), &c in Daniel W. Mosser and Ernest W. Sullivan II (eds), *The Thomas L. Gravell Watermark Archive*, available at [www.gravell.org](http://www.gravell.org), accessed 1 July 2014].

<sup>149</sup> Ford, *Law and Opinion*, 45 fn.187; Dolezalek, *Scotland under Jus Commune*, II, 28.

<sup>150</sup> See e.g. an action in 1630 over the right to payments from the tenants on lands held in liferent by Innes' mother in law, Margaret Meldrum [Aberdeen MS., fol. 109r (modern foliation)]; an action of divorce against his wife, Christen Innes [Aberdeen MS., fos 171r, 180r–v, 225r–v (modern foliation)]; an action against James Geddes in 1636 [Aberdeen MS., fos 198r–v (modern foliation)]; and an action possibly against 'Mr William Rait, the common procurator for the Kings College off auld aberdeine' in 1623 [Aberdeen MS., fos 257v–8r (modern foliation)].

<sup>151</sup> *Ibid.*, fol. 296r (modern foliation).

later in the second pairt in relation to a case heard in 1629.<sup>152</sup> It is plausible that, as with Innes of Drany, Spalding was involved in litigation relating to Glengarrie with some regularity.

There is even some evidence in the second pairt of Spalding's practicks to suggest that the expert lawyers said to have 'resolved' these legal issues may also have been themselves involved in the relevant cases. For example, chapter 399 is a very detailed entry about the several actions pursued by and against: Walter Barclay, Laird of Towie and widower of Anna Drummond, Lady Fraser; Elizabeth Barclay, their daughter; William Innes of Kinnermonie, Elizabeth's spouse; and Margaret Innes, Kinnermonie's daughter. In relation to one of the actions brought before the Aberdeen Commissary court, Spalding sets out the various alledgences and answers then concludes the relevant paragraph by saying 'this wer the reasones of the advocaciones and ansres maide to ilk reasone by Resolutione of Sir Thomas Nicolsone advocat 14 Januar 1642'.<sup>153</sup> There is an implication here that Nicolson was somehow involved in the case and gave his opinion in that context. Similarly chapter 418 notes a case in which William Conn 'craves to be s[e]rvit aire' to the lands of Artroquhy, which were held by his grandfather and uncle, with the Laird of Delgatie as superior. After setting out Delgatie's answer, Spalding notes 'It was found and resolvit so in Edinburgh be Sir Thomas Nicolsone in August 1642',<sup>154</sup> which may imply that Nicolson was counsel for Delgatie or at least supported the interpretation of the law put forward by Delgatie's counsel. Chapter 436 is another long entry, which sets out several actions which arose from the marriage contract of William Ammand of Catterline and Isobel Forbes, daughter of George Forbes of Craigie, Tarves. One of these actions was pursued by the executor of Ammand, John Kennedy of Kermuckes, against Forbes' tutor-of-law, Thomas Forbes of Watterton. Here Spalding sets out Kennedy's arguments and states: 'It was also resolvit be Sir Thomas Nicolsone that the contract of marriage past betwixt the said umple William Ammand and Issobell forbes (nottit in the words above within) will carrie the right of the hail soumes perteyneing to the wiff whidder heretable or moveable and the soume will perteyne to the husbands aires and exrs'. Spalding gives significant detail as to the rationale of this argument. At the end of the entry, Spalding concludes by noting that the executors were successful on the basis of *jus mariti*, and that the case was 'resolvit be Sir Thomas Nicolsone Junij 1644'. Two of the annotations provide

<sup>152</sup> Ibid., fol. 309r (modern foliation).

<sup>153</sup> Ibid., fol. 343r (modern foliation).

<sup>154</sup> Ibid., fol. 355v (modern foliation).

further resolutions set out by Nicolson in the case. The wording here suggests that Nicolson's opinion was expressed on these specific facts as well as on the point of law more generally, and as such he may have been directly involved with the litigation or at least consulted in anticipation of the hearing.<sup>155</sup> None of these three cases seem to correspond to the entries in Nicolson's practicks.

Spalding also describes cases as having been 'resolved' by another seventeenth-century advocate, Sir Lewis Stewart of Kirkhill. Stewart is now obscure but was prominent in the seventeenth century.<sup>156</sup> His father, William Stewart, was a clerk in Edinburgh but his maternal grandfather is recorded as having been the Lord of Session, Sir John Bellenden of Auchinoull.<sup>157</sup> Stewart was educated in the civil law in France, before being admitted as an advocate in 1613.<sup>158</sup> Although he initially struggled to adjust to practising Scots law,<sup>159</sup> he nonetheless became a successful advocate who was spoken of highly by Sir George Mackenzie,<sup>160</sup> Robert Burnett,<sup>161</sup> and Alexander Spalding's son, the historian John Spalding.<sup>162</sup> Stewart was knighted in 1633,<sup>163</sup> and did work

<sup>155</sup> There are several other entries in the text of the second pairt (and annotations alongside it) which refer to Nicolson, but all of these appear to be cross-references to one of these three cases [Ibid., fos 323r, 339v, 340v, 341v, 348r, 356r modern foliation]. The dozen references to 'Sir Thomas Nicolson' in the Table also refer to these three cases [Ibid., fos 3v, 4r, 14r, 15r, fol. 30r (twice), 33r, 38v, 43v, 66r, 67v, 69v, 75r, (all modern foliation)]. Similarly there are annotations alongside the first pairt which refer to 'Sir Thomas Nicolsone' having 'resolved' cases which are identifiable by their description as those recorded in chapters 418 and 436 [Ibid., fos 94v, 125v modern foliation].

<sup>156</sup> *The Critical Review, or Annals of Literature, Extended and Improved by a Society of Gentlemen, New Arrangement* (London, 1792), IV, 58 noted that the editors were 'convinced that he must have uncommon learning who has ever heard of' Stewart.

<sup>157</sup> A. W. Cornelius Hallen (ed.), *The Scottish Antiquary, or Northern Notes & Queries* (Edinburgh, 1891), V, 4–5.

<sup>158</sup> Ford, *Law and Opinion*, 46.

<sup>159</sup> James Crabb Watt, *John Inglis, Lord Justice-General of Scotland. A Memoir* (Edinburgh, 1893), 39 fn. 1; Ford, *Law and Opinion*, 46.

<sup>160</sup> Sir George Mackenzie, *Jus Regiam: or, the Just and Solid Foundations of Monarchy in General; and More Especially of the Monarchy of Scotland: maintain'd against Buchannan, Naphtali, Dolman, Milton, &c* (London, 1684), 192 where Sir Lewis Stewart is described as 'the Learned Sir Lewis Stewart, one of the most famous Lawyers we ever had'. This cannot be regarded as an objective statement, however, as Mackenzie here was citing Stewart as authority against the views put forward by George Buchanan.

<sup>161</sup> Thomas Craig of Riccarton, *Jus feudale tribus libris comprehensum* (Edinburgh, 1655), 'Ad Lectorum', 3 where Stewart is lauded by Burnett as '*Viri Clarissimi, mihi amicissimi & plurimum colendi D. Ludovici Steuart de Kirkhill Equitis*'.

<sup>162</sup> Spalding, *The History of the Troubles*, I, 261; idem, *Memorials of the Troubles*, I, 345.

<sup>163</sup> Hallen (ed.), *The Scottish Antiquary*, 5.



on behalf of King Charles I in the late 1630s and early 1640s.<sup>164</sup> Probably as a result of this, he was fined £1,000 by the interregnum government's Ordinance of Pardon and Grace.<sup>165</sup> Stewart is not known to have collected practicks,<sup>166</sup> and his legal and historical papers largely relate to the sixteenth century or earlier and contain no notes which seem to derive from Stewart's own practice.<sup>167</sup>

Nonetheless, Spalding makes two references to cases having been 'resolved' by 'Sir Lues Stewart advocat' in the first pairt; another is added in an annotation. One of these is particularly interesting in identifying Spalding's practice. This reference to Stewart appears to be part of a long discussion of a case pursued by Elspet Douglas, relict and executrix to the late Mr Patrick Dumbarr, parson of Duffes, and her new husband, Mr John Gray, minister at Dornoch. This case was initially pursued against Marie Innes, relict and executrix of the late Alexander, Bishop of Moray, and her new spouse, John Urquhart of Leathers. The pursuers received a decree for payment from the Commissary of Moray. The defenders attempted to suspend that decree, but Urquhart died before 'the discussing wherof'.<sup>168</sup> Innes subsequently married William Hay of Fetterletter, and a new action was lodged in the same Commissary court against Innes and Hay, which was heard in March 1635. After setting out the first alledgences and answers, Spalding stated 'Sir Lues Stuart advocat resolved that the persewars might pass frae ther first decreit' and provided some expansion of this point.<sup>169</sup> He then stated 'Upon the whilk resolution the Comisir of Murray decernit of new agayne the said Marie Innes exrix and William hay now her spous for his entress to pay the said obligatione debt restand be the said Bischope March

<sup>164</sup> Spalding, *The History of the Troubles*, I, 261; idem, *Memorialls of the Trubles*, I, 345; *A Diary of the Public Correspondence of Sir Thomas Hope of Craighall, Bart., 1633–1645, from the Original, in the Library at Pinkie House* (Bannatyne Club, Edinburgh, 1843), 73, 76.

<sup>165</sup> *Diary of the Public Correspondence of Sir Thomas Hope*, 126; '12 April 1654: An Ordinance for Pardon and Grace to the People of Scotland' in C. H. Firth and R. S. Rait (eds), *Acts and Ordinances of the Interregnum, 1642–1660* (London, 1911), II, 875–83.

<sup>166</sup> Dolezalek did not find a collection of practicks which could be attributed to him when compiling *Scotland under Jus Commune*.

<sup>167</sup> Adv. MS. 22.1.14. Several of these documents were printed in eighteenth- and nineteenth-century volumes. See, for example, Patrick Fraser Tytler, *History of Scotland* (9 vols, Edinburgh, 1828–43), IV, 401–3; Hugo Arnot, *A Collection and Abridgement of Celebrated Criminal Trials in Scotland, from AD 1536 to 1784 with Historical and Critical Remarks* (Glasgow, 1812), 420–6; J. A. Carmichael, *Various Tracts concerning the Peerage of Scotland, Collected from the Public Records, Original Instruments, and Authentic Manuscripts* (Edinburgh, 1791), 119–24.

<sup>168</sup> Aberdeen MS., fol. 89r (modern foliation).

<sup>169</sup> Ibid..



1635.<sup>170</sup> Spalding's wording here implies that Stewart may have been somehow involved in the case on behalf of the pursuers, whether that be as their counsel or in a consultative capacity. The second reference to Stewart is found in the context of litigation between the same parties: 'Resolved in Ed[inbur]gh be Sir Lues Stuart advocat in Edinburgh in december 1635 in causa douglas dumbarr contra Marie Innes & Wm Hay now her spous'.<sup>171</sup> It seems highly probable that this was a later hearing in the same series of litigation between these four parties. It thus seems likely that Spalding was also involved or was at least aware of this case when it was litigated in Moray, where he appears to have been practising at the time,<sup>172</sup> and seems to have retained some interest in the case when it was relocated to Edinburgh.

It is thus plausible that Spalding recorded the names of Hope, Nicolson and Stewart in cases in which he was involved or at least in which he had an interest. Somehow he became aware of these experts' legal opinions, whether that was through their direct involvement as counsel in the case, consultation in anticipation of litigation, or some less formal context.<sup>173</sup> Unfortunately, none of the relevant cases have been found for the said months in either the Court of Session's general or particular minute books or in the Edinburgh Commissary Court's diet books;<sup>174</sup> thus it has not been possible to confirm this theory with reference to the paper processes. However it is perhaps more important to acknowledge that Spalding drew on expert legal opinion in this manner than to identify specifically how he became aware of that opinion. It is also important to note that Spalding's understanding of expert lawyers was not restricted to the most prominent practitioners and office-holders in Edinburgh. Other less well-known advocates and legal practitioners are occasionally noted by him as having resolved or contributed to the resolution of cases. For example, he said of a case heard in 1642 – in the Table<sup>175</sup> but not

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<sup>170</sup> Ibid.

<sup>171</sup> Ibid., fol. 93r (modern foliation).

<sup>172</sup> On which, see below.

<sup>173</sup> On consultations by advocates, albeit in a later period, see John Finlay, 'Consulting Counsel in Eighteenth-Century Scotland' (presented at the Scottish Legal History Group Annual Conference, Edinburgh, 4 October 2014); idem, 'Pettyfoggers, Regulation, and Local Courts in Early Modern Scotland', *Scottish Historical Review*, 87 (2008), 42–67, 44, 57–8; idem, 'The Lower Branch of the Legal Profession in Early Modern Scotland', *Edinburgh Law Review*, 11 (2007), 31–61, 39–40, 52.

<sup>174</sup> CS8/18, 21; CS9/7–8; CS10/5–6; CS11/8–9; CC8/1/45–6, 49, 51–2. The Edinburgh Commissary court's minute books for this period have been lost.

<sup>175</sup> Aberdeen MS., fol. 51v (modern foliation).

in the entry in the second pairt<sup>176</sup> – that it was resolved by Roger Mowat, who had demitted the office of King's College Civilist two years before.<sup>177</sup> Spalding also recorded in the second pairt that he himself successfully 'resolvit' a case pleaded in the courts in Edinburgh in July 1633.<sup>178</sup>

### (3) The Second Pairt

The second pairt of Spalding's practicks is longer than the first, comprising 448 entries (called 'chapters') contained on 180 folios of the Aberdeen manuscript. Most chapters consist of notes on single cases, but: some record more than one case; some set out legislation or other regulations; some are very general in their nature; and some record a mixture of general and case-specific information. Thus the second pairt is somewhat akin to a collection of decisions practicks and somewhat akin to a legal miscellany or commonplace book.

#### (a) *The Notes on Cases Heard in the Seventeenth Century*

Around 260 of the cases recorded in the second pairt are said to have been heard between the second half of the 1610s and the mid-1640s. More than half of these appear to relate to the North East region. One hundred and twenty-three are explicitly said to have been heard in the courts in Aberdeen. Another forty-three were litigated by or against persons whose territorial designation relates to a place in the environs of the city; it seems plausible that these cases might also have originated in the regional courts or have been of interest to a local lawyer. Thus of the nine cases recorded in Spalding's practicks which were heard in the second half of the 1610s, all but one relate to Aberdeen. More than ninety of the cases recorded are said to have been heard between 1620 and 1624,<sup>179</sup> sixty of which relate to Aberdeen and one of which relates to the neighbouring county of Moray. There are no cases recorded for 1625 to 1627. Seventeen are then recorded for the years 1628 and 1629, which can be associated with courts or persons from Edinburgh, Aberdeen, Moray and

<sup>176</sup> Ibid., fos 362r–3r (modern foliation).

<sup>177</sup> Anderson (ed.), *Officers and Graduates of University and King's College*, 32; Francis J. Grant (ed.), *The Faculty of Advocates in Scotland, 1532–1943* (Scottish Record Society, Edinburgh, 1944), 157.

<sup>178</sup> Aberdeen MS., fol. 305r (modern foliation).

<sup>179</sup> Chapter 70 is said to have been heard in 1602, but given the Commissary who heard the case (James Sandilands) was not then born, it is likely that this should have read '1620'. On Sandilands, see the following footnote.

Invernesshire. Sixty-five of the cases recorded are said to have been heard in the 1630s: most of those heard in the first three quarters of this decade relate to the Moray area; there is a slight dip in the number of cases recorded in 1637 to 1638; and the cases heard in the last part of that decade relate instead to the Aberdeen area. Finally, there are notes on seventy-five cases which were heard in the first half of the 1640s, sixty of which appear to be related to Aberdeen. It is plausible that many of the other hundred or so cases recorded as having been heard during the seventeenth century may also relate to the courts or inhabitants of the North East region, even though this is not mentioned explicitly in the entry. Additionally, another twenty-two cases which appear to relate to Aberdeen are given no date, but at least some also appear to have been heard during this time. For example, three of these were said to have been heard by James Sandilands, who was Commissary in Aberdeen between at least 1620 and 1642.<sup>180</sup> Thus there is here a significant corpus of cases that: (a) were heard during this thirty-year period, and (b) relate to legal practice in the Aberdeen, and to a lesser extent the Moray, areas.

It seems probable that Spalding was the original reporter of these cases. First, the dates accord with what is known of his life. The recording of cases seems to have started around a decade after Spalding's admission to the Society of Advocates in Aberdeen in 1609,<sup>181</sup> which is consistent with Ford's observation that some copyists or writers of epitomes and compendia began their work around ten years after admission.<sup>182</sup> The reporter worked in

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<sup>180</sup> Sandilands succeeded John Leith of Blairton, who died in 1620 [Henderson, *History of the Society of Advocates in Aberdeen*, 241]. There is clear evidence that Sandilands initially held his appointment jointly with Thomas Nicolson of Cockburnspath: Spalding notes that in September 1621 a decision was made by 'Mr Thomas Nicolsone and Mr James Sandilands Commiss[a]ries of aberdeine' [Aberdeen MS., fol. 241v (modern foliation)], and on 8 February 1622 they are again recorded as hearing a case together as 'Mr Thomas Nicolsone and Mr James Sandilands Commissaries of aberdeine' [Aberdeen MS., fol. 242r (modern foliation)]. Nicolson probably died in 1625 [see above], after which Sandilands held the office alone for some time. However, from at least January 1640, he apparently shared the office jointly with his second son: Spalding records both 'Mr James Sandilands and Thomas Sandilands Commissa' deciding a case in that month [Aberdeen MS., fos 330r–v (modern foliation)] and refers to commissaries or judges in the plural in several cases thereafter [Aberdeen MS., fos 330v–1r, 332r–v, 332v–3r, 338v, 339r–v, 339v–40r (all modern foliation)]. It seems that they continued to share the office until at least July 1642 [Aberdeen MS., fol. 352v (modern foliation)], after which Spalding makes reference to only Thomas hearing cases.

<sup>181</sup> Henderson, *History of the Society of Advocates in Aberdeen*, 338.

<sup>182</sup> Ford, *Law and Opinion*, 83.

the Moray area between 1628 and 1636, before resettling in Aberdeen in the late 1630s for the final part of his career. There is evidence that this was also true of Spalding. The editors of the historical account written by Alexander's son, John Spalding, believed that the family resided in Moray 'for a time';<sup>183</sup> comments within John Spalding's account which indicate this can be found for at least dates from 1635 to 1637.<sup>184</sup> The Register of the Privy Council has a record for 1642 which mentions an 'Alexander Spaldie, notary in Elgine, now in old Aberdene'.<sup>185</sup> The Aberdeen manuscript contains notes on cases heard up until the year in which Spalding complained that his health was failing.<sup>186</sup> Secondly, Spalding seems to have been involved in at least some of the cases, either as a litigant or as counsel. Chapter 442 records an action pursued by an Alexander Spalding in 1644 in the Aberdeen Commissary court. Chapter 350 includes a case 'raised in my owne name' against William Gordon of Arradoull in 1642. It is likely that this phrasing indicates that the case was pursued by or on behalf of Spalding, and indeed the aforementioned Register of the Privy Council record from 1642 mentions both Spalding and Gordon of Arradoull.<sup>187</sup>

Certainly the entries contemporary with Spalding's practice do not appear to have been copied from the well-known collections of practicks of the time. There is no correspondence between the cases reported here and those noted in the practicks of Nicolson,<sup>188</sup> Hope or Haddington.<sup>189</sup> Only one of the entries in Spalding is directly comparable with the entries in the printed edition of the practicks of Sir Alexander Gibson of Durie. Spalding gives an entry for a case heard in 1636 pursued by Archibald Stewart in Elgin, son and assigney of Robert Stewart, against Colin Lawson. The Lords of Session are said to have heard this case further to a decreet made in favour of Robert Stewart by the Commissary court of Moray. Durie made an entry for a case heard on the same day, which does not give the names of parties; this case is certainly the one described in more detail by Spalding.<sup>190</sup> The difference in the

<sup>183</sup> Spalding, *Memorialls of the Troubles*, I, xviii–ix.

<sup>184</sup> Spalding, *History of the Troubles*, I, e.g. 32, 45, 49, 50; idem, *Memorialls of the Troubles*, I, e.g. 57, 76, 80–1, 83.

<sup>185</sup> P. Hume Brown (ed.), *The Register of the Privy Council of Scotland* (second series, Edinburgh, 1906), VII, 338.

<sup>186</sup> Munro (ed.), *Records of Old Aberdeen*, I, 76.

<sup>187</sup> Brown (ed.), *The Register of the Privy Council of Scotland*, VII, 338.

<sup>188</sup> Adv. MS. 24.3.3.

<sup>189</sup> Adv. MS. 24.2.1, II, fos 141r–238r; N.L.S., MS. 3170, 121–200.

<sup>190</sup> Durie, *Decisions*, 809.

detail provided in the entries indicates that Spalding could not have taken this case description from Durie, or at least from a version close to the text as it was later printed. Rather, it seems that Spalding recorded this case because it was relevant to his provincial practice, which during that time appears to have been based in Moray.<sup>191</sup> That Spalding did not make use of these collections of practicks is in keeping with current understanding of when they began to circulate: those of Hope began to circulate after 1643, even though he had stopped recording cases a decade earlier,<sup>192</sup> and those of Durie began circulating in the 1650s.<sup>193</sup>

If Spalding did record the seventeenth-century cases noted in the second pairt, then this gives some insight into his professional activities, such as the number and type of cases in which he was involved each year, and the frequency with which his clients pursued multiple actions, either within the same court on different aspects of the relevant point or on appeal to higher courts. It might also be possible to deduce something of his method when compiling his second pairt. It is plausible that Spalding originally recorded these cases around the time of their hearing, so the content of the second pairt might have been compiled chronologically. If this is correct, then it would suggest that the copying of the chapters comprising miscellaneous material can generally be dated to around the time of the cases entered in the surrounding chapters.

(b) *The Notes on Cases Heard in the Sixteenth Century, and Spalding's Use of Maitland's Practicks*

Spalding also relied on older collections of practicks when compiling the second pairt, including the sixteenth-century collection attributed to Sir Richard Maitland of Lethington. The textual tradition of Maitland's manuscripts is not yet fully understood. However Dolezalek's *Scotland under Jus Commune* has examined in detail seventeen manuscript copies; this present research is much indebted to his printed work, and to his unprinted notes on these manuscript volumes, which he was kind enough to share. Dolezalek's examination of the Elchies manuscript<sup>194</sup> has allowed him to conclude (in keeping with the

<sup>191</sup> Further to this, Spalding has an entry for *George Cumming v James Cumming*, said to have been heard in June 1628; Durie has an entry for 14 November 1628 which is probably a later hearing of the on-going litigation between those same parties [Durie, *Decisions*, 396–7].

<sup>192</sup> Ford, *Law and Opinion*, 44, 54.

<sup>193</sup> *Ibid.*, 80.

<sup>194</sup> Adv. MS. 31.2.2 (i).

earlier suggestions of Athol Murray and the eighteenth-century owner of this manuscript, Patrick Grant of Elchies)<sup>195</sup> that this manuscript might have been Maitland's authorial holograph. Dolezalek's comparison of this manuscript with the texts of the other extant manuscripts allows tentative conclusions to be drawn about the textual tradition of Maitland's practicks. He has shown, for instance, that some copies of Maitland's practicks appear to be incomplete, ending with cases heard in 1566;<sup>196</sup> Spalding had access to a more complete copy (or copies) than this. Other extant manuscripts have entries which are not in the Elchies manuscript. Dolezalek identifies these entries as later insertions.<sup>197</sup> These additions may have been added to one manuscript and then intercalated into the copies which descended from it. Scribes or annotators of manuscripts which were not thus descended might also add these to their copy, meaning the additions could also become perpetuated through other branches of the manuscript tradition. Notes on particularly important cases might be added independently to more than one manuscript, although some differences in the texts of the entries would then be likely. Manuscripts without these additions may have descended from a different ancestor, or perhaps their copyists omitted them.<sup>198</sup> Only a critical and comprehensive study of the extant manuscripts will reveal their interrelationships, but this is outwith the scope of this present study.

Rather it is important for this research to get a reasonable impression of what the text (or texts) of Maitland's practicks comprised in those manuscript copies which were circulating in the seventeenth century. The Orr manuscript<sup>199</sup> was recently transcribed and edited by Sutherland and printed by the Scottish Record Society,<sup>200</sup> so is probably now the best known version of the text.<sup>201</sup> Sutherland has not found a record of this manuscript's date of completion, but has suggested that scribal slips in entries 164–9 which give the date 1661

<sup>195</sup> Dolezalek, *Scotland under Jus Commune*, II, 356; Signet Library, MS. 34, fol. 1r which is now lost but is transcribed in Dolezalek, *Scotland under Jus Commune*, III, 150.

<sup>196</sup> E.g. E.U.L., La.III.411 [Dolezalek, *Scotland under Jus Commune*, III, 250].

<sup>197</sup> Dolezalek, *Scotland under Jus Commune*, III, especially 45–6, 315.

<sup>198</sup> On manuscript transmission of legal texts in Scotland, see Adelyn L. M. Wilson, "The Textual Tradition of Stair's *Institutions*, with Reference to the Title "Of Liberty and Servitude"" in Hector L. MacQueen (ed.), *Miscellany VII* (Stair Society Publications Series vol. 62, Edinburgh, 2015), 1–124, 32–45.

<sup>199</sup> G.U.L., MS. Gen. 1333.

<sup>200</sup> Robert Sutherland, *The Practiques of Sir Richard Maitland of Lethington, from December 1550 to October 1577* (Scottish Record Society, Edinburgh, 2007).

<sup>201</sup> The entries of Maitland's practicks will here be referred to by their item number in the Orr manuscript unless otherwise stated.

rather than 1561 are ‘not conclusive [evidence], albeit suggestive’ of a date after 1661.<sup>202</sup> Further, watermarks found in the volume by Dolezalek are of a style which was common in the seventeenth century,<sup>203</sup> so would tend to support a dating of the manuscript to that century. Another manuscript copy, the Tinwald manuscript,<sup>204</sup> has been dated by Dolezalek to the first half of the seventeenth century, and has been described by Sutherland as ‘the most orderly and consistent of the MSS’ which he examined.<sup>205</sup> Both Dolezalek and Sutherland identify it as being ‘closely related to the Orr MS’, but note that the Tinwald manuscript provides headings for the entries whereas the Orr does not.<sup>206</sup> The Hailes manuscript<sup>207</sup> has been dated to around the turn of the sixteenth to seventeenth centuries by Dolezalek.<sup>208</sup> Both Dolezalek and Sutherland have noted that this manuscript copy heavily abridges the text, and Sutherland has noted that its text is somewhat distinct from that of the Orr manuscript.<sup>209</sup> The Gilmour manuscript<sup>210</sup> has been dated to around the middle of the seventeenth century by Dolezalek,<sup>211</sup> who has also found that there are two ‘overlapping’ copies of Maitland’s practicks in the volume (possibly resulting from part of the text being misplaced, a replacement text being made, and then the former being found and both copies being bound into the manuscript).<sup>212</sup> He has also suggested that the text of this manuscript is an ancestor of Adv. MS. 24.1.8<sup>213</sup> and may itself descend from EUL, La.III.429<sup>214</sup> – as may Signet Library,

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<sup>202</sup> Sutherland, *The Practiques of Sir Richard Maitland*, 4.

<sup>203</sup> Dolezalek, *Scotland under Jus Commune*, III, 314. The description of the watermark with the pot and initials ‘P|PL’ seems particularly close to a watermark found in a volume from London dating from 1653 [POT.126.1 in the *Gravell Watermark Archive*], but for the latter being topped with a crescent and that in the Orr manuscript being topped with a fleur-de-lis.

<sup>204</sup> Adv. MS. 22.3.4.

<sup>205</sup> Dolezalek, *Scotland under Jus Commune*, II, 139; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>206</sup> Dolezalek, *Scotland under Jus Commune*, II, 146; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>207</sup> Adv. MS. 25.4.11.

<sup>208</sup> Dolezalek, *Scotland under Jus Commune*, II, 303.

<sup>209</sup> Dolezalek, *Scotland under Jus Commune*, II, 311; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>210</sup> Adv. MS. 24.1.11.

<sup>211</sup> Dolezalek, *Scotland under Jus Commune*, II, 178.

<sup>212</sup> *Ibid.*, II, 180–1.

<sup>213</sup> *Ibid.*, II, 171.

<sup>214</sup> *Ibid.*, III, 264.



MS. 37<sup>215</sup> and Adv. MS. 24.1.4.<sup>216</sup> Finally, Adv. MS. 24.1.5 has been dated by Dolezalek to the late-seventeenth or early-eighteenth centuries.<sup>217</sup> Although a late copy, this has been consulted here because Dolezalek has shown that its 'text is much better than in the Orr MS [...] it is less shortened, and in particular fewer references to *Jus Commune* are left out' and because Sutherland has suggested that it also 'includes many items not in [the] Orr' manuscript.<sup>218</sup>

Spalding included entries drawn from Maitland's practicks at two points when compiling the second pairt. First, the thirty-one entries which appear at the start of Spalding's second pairt were drawn from Maitland, and correspond to items 296–316 and 318–26 of the Orr manuscript. These entries relate to cases heard between 1568 and 1570, although the order in which these case notes are presented in Spalding's practicks is only roughly chronological.<sup>219</sup> This borrowing from Maitland was interrupted only once. Entry eighteen in Spalding's second pairt is partly drawn from Maitland's practicks (Orr item 313) but starts with a brief discussion of *Robert Innes of Drany v James Geddes* (1636). It is probable that this first part of the entry was originally added to Spalding's practicks as a later annotation (whether on a looseleaf insert, in the margin, or in a space above the item borrowed from Maitland) and was intercalated at the start of the entry by the copyist of the Aberdeen manuscript or an intermediate ancestor, if there was one. The order in which Spalding gives these entries of Maitland's practicks has not been found in any of the other manuscript copies of Maitland examined for this research. A small change to the order of these entries in the Gilmour manuscript – the relocation of the entry known as Orr item 305 to after that known as Orr item 306 in both the once-misplaced and replacement texts – is much less significant than the changes to the order seen in Spalding. But the omission of entries was not uncommon: the entries known as Orr items 304 and 318 were omitted by

<sup>215</sup> Ibid., III, 171.

<sup>216</sup> Ibid., II, 161 and III, 264.

<sup>217</sup> Ibid., II, 165.

<sup>218</sup> Ibid., II, 166; Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>219</sup> The first four cases discussed by Spalding were heard during the summer session of 1568 (Orr items 298–300, 302), then he discusses three cases heard in the summer session of 1569 (Orr items 303–5), then five from the winter session of 1569–1569/70 (Orr items 306–11), one heard in July 1568 (Orr item 301), another nine heard during the winter session of 1569–1569/70 (Orr items 308, 312, 314–15, 313, 316, 318–20), three heard in November to December 1570 (Orr items 321–2), one heard in July 1570 (Orr item 324), another heard in December 1570 (Orr item 325), one said to have been heard in the year 1570 (Orr item 326), then finally two heard during the summer of 1568 (Orr items 296–7).



the copyist of the Hailes manuscript, and there are two entries in the Elchies manuscript – therein numbered 316 and 317 – which are not present in the Orr, Tinwald or Spalding manuscripts.

An examination of these thirty-one entries reproduced by Spalding gives some indication of the place of his text within the textual tradition of the manuscripts of Maitland. Orr items 314–16, 321–4 and 326 do not appear in the Elchies manuscript; if the latter was the authorial holograph, it would follow that these entries may have been additions which became perpetuated through the textual tradition. These entries are also found in the Tinwald and Spalding manuscripts in the same place as they appear in the Orr manuscript. They are found much further on in the text and out of chronological order in Adv. MS. 24.1.5, the Hailes manuscript and both texts of the Gilmour manuscript.<sup>220</sup> These entries comprise part of what Dolezalek in his unpublished notes on the Gilmour manuscript has identified as a series of around eighty entries which were additions to the text.<sup>221</sup> There are several possible reasons why the location of these entries might differ in the manuscripts. It is plausible that these entries were initially added on looseleaf inserts, and the text was intercalated into different parts of the manuscript in its first generation descendants.<sup>222</sup> Perhaps there was a deliberate conflation by one copyist of entries which he found in another model manuscript, but that their discovery came too late for them to be incorporated into his text in chronological order. Perhaps they were originally incorporated as a miscellany of notes as an appendix, and the copyist of an intermediate ancestor manuscript rearranged them into chronological order. This is all, however, entirely speculative. What is perhaps clearer is that the location of the added entries might suggest that

<sup>220</sup> Hailes MS., fos 178v, 181r–v; Adv. MS. 24.1.5, fos 114v–15r, 118v–120r; Gilmour MS., once-misplaced text, entries 380–2, 405–8, 410; Gilmour MS., replacement text, entries 387–9, 412–15, 417.

<sup>221</sup> The eighty additional entries in the Hailes and Gilmour manuscripts and Adv. MS. 24.1.5 also include a second, rather different entry for the case which is the subject of the entry known as Orr item 325, *Alexander Home of Manderstone v certain tenants* (1570) [Hailes MS., fos 172v, 181v; Gilmour MS., replacement text, entries 325, 416; Gilmour MS., once-misplaced text, entries 319, 409; Adv. MS. 24.1.5, fos 103v, 119v–120r]. The copyist of the replacement text of the Gilmour manuscript observed this repetition and numbered this second entry as both 416 and 325. This second entry for *Home of Manderstone* (but not the first) gives the reference to a sixteenth-century case pursued by a John Leslie of Waughtone, which is cited at the end of the (only) entry for this case in the Orr and Tinwald manuscripts [Orr MS., item 325; Tinwald MS., 369–70]. This reference is not given in Spalding's text.

<sup>222</sup> Dolezalek tentatively noted this possibility in his unpublished notes on the Gilmour manuscript.

the text in Spalding's practicks is related more closely to those in the Orr and Tinwald manuscripts than to those in the Hailes and Gilmour manuscripts and in Adv. MS. 24.1.5.

This inference is supported by a comparison of the manuscripts' texts of Orr items 299–301. Both Dolezalek and Sutherland have noted the similarity of the Orr and Tinwald manuscript copies, in terms of the correspondence of the entries,<sup>223</sup> as well as their content and the similarity of their texts.<sup>224</sup> It seems that Spalding's text here is also similar to those in these two manuscripts.<sup>225</sup> However the text of the Spalding manuscript seems to be somewhat further removed from the text in the Elchies manuscript than those in the Orr and Tinwald manuscripts. This suggests that either Spalding was relatively free in his copying of the text, or that his model manuscript was less closely related to the Tinwald and Orr manuscripts than they may have been to each other. There are also sufficient variants shared by the Hailes, Gilmour and Adv. MS. 24.1.5 texts to presume that they, too, share a common ancestor more recent than the Elchies manuscript.<sup>226</sup> It may be that the Gilmour texts and Adv. MS. 24.1.5 are more closely related again, but this is difficult to assess because the text of the Hailes manuscript was short-copied and so it often omits or abridges phrases which may have had a variant reading in an ancestor text.

There is also some evidence for these interrelationships in the headings given for each of the thirty entries. Dolezalek has suggested that the headings of the entries on the first thirty-five folios of the Elchies manuscript were added separately to the margins after the entries themselves were completed. However, from folio thirty-six, the headings 'now figure in separate lines

<sup>223</sup> Dolezalek, *Scotland under Jus Commune*, II, 146.

<sup>224</sup> Sutherland, *The Practiques of Sir Richard Maitland*, 7.

<sup>225</sup> The Spalding, Orr and Tinwald texts add 'peaceable and' to 'continual possession' to Orr item 299. All three give 'the infetment' rather than 'any infetment' and give 'decerned' rather than 'ordained' later in the passage. In Orr item 300, all three give 'principal donator' whereas the Elchies and other manuscripts give 'who was donator'. All three give 'constitute by the king' rather than 'to the king'. In Orr 301 they give 'warrandice of certain lands set in tack' whereas the Elchies and other manuscripts give rather 'certain warrandice of tacks of lands set' (although the Hailes manuscript omits 'certain'). All three also omit 'to the pursuer his'.

<sup>226</sup> In Orr item 299, for example, the phrase 'of their mailles and duties' is omitted in the Hailes manuscript and is only 'of their duties' in the Gilmour texts and in Adv. MS. 24.1.5. These texts also omit the territorial designation of Sir Robert Carnegie of Kinnaird, the father of the defender. All also describe the defender as 'bound' to his father rather than 'heir' to him. All give 'and the tenents to pay their duties' instead of 'be the said lords and the saids tenents ordained to pay the mailles and duties'. All also omit 'for the causes forsaid' at the end of the entry.

between the items of the main text, and their colour of ink no longer differs from the main text.<sup>227</sup> The Hailes manuscript does not preserve these headings, but instead gives distinct, generally short headings in the margins beside the text. Nor are the headings of these thirty entries present in the Orr manuscript. But headings are given in the other manuscripts consulted; Dolezalek has noted that this was one of the main differences between the Orr and Tinwald manuscripts.<sup>228</sup> The headings of Orr items 296–310 are broadly consistent in the Elchies, Tinwald and Spalding manuscripts, in Adv. MS. 24.1.5, and in both texts of the Gilmour manuscript, subject to minor variations and orthographical fluctuation. However, for Orr items 311–12, 318–20 and 325, the headings present in the Tinwald and Spalding manuscripts seem to be quite close to each other but quite distinct from those found in the Elchies and other manuscripts. Rather, the headings in the Spalding and Tinwald texts are generally fuller and more detailed than those provided in the other manuscripts. Thus, for example, the Elchies manuscript gives as the heading for Orr item 311: ‘Off ane tennentis fermes that may poyndit for his masteris dett’.<sup>229</sup> However the Tinwald manuscript gives ‘fermis of tennetis may be poyndit for thair maisteris debt, becaus the tennentis fermis ar comptit the maisteris proper debt’;<sup>230</sup> the Spalding manuscript gives the same but for substituting the word ‘gear’ for the final occurrence of ‘debt’.<sup>231</sup>

Thus it seems likely from this limited textual comparison that the text in this part of Spalding’s manuscript can be located in the same family group as those of the Tinwald and Orr manuscripts. It is plausible, however, that the Orr and Tinwald manuscripts may be more closely related to each other than to Spalding’s text. For example, both omit from Orr item 322 the territorial designation of the laird pursuing the case;<sup>232</sup> Spalding gives this as Blenerne, as do the Hailes manuscript and both texts in the Gilmour manuscript,<sup>233</sup> while Adv. MS. 24.1.5 shortens the name to ‘B’.<sup>234</sup> This difference might suggest that Spalding copied from a parent manuscript which included the name, but that

<sup>227</sup> Dolezalek, *Scotland under Jus Commune*, II, 358.

<sup>228</sup> *Ibid.*, 146.

<sup>229</sup> Elchies MS., fol. 83r.

<sup>230</sup> Tinwald MS., 361–2.

<sup>231</sup> Aberdeen MS., fos 196v–7r (modern foliation).

<sup>232</sup> Tinwald MS., 367–8.

<sup>233</sup> Hailes MS., fol. 181r; Gilmour MS., replacement text, entry 413; Gilmour MS., once-misplaced text, entry 406.

<sup>234</sup> Adv. MS. 24.1.5, fol. 119r.

the Orr and Tinwald manuscripts descend through an intermediate ancestor which omitted it.

Spalding appears to have copied from Maitland's practicks somewhat selectively, ignoring the citations which appear at the end of certain entries. First, Spalding omitted a citation of a sixteenth-century case pursued by a John Leslie of Waughtone, a citation of which often appears in Orr item 325 in the other manuscripts.<sup>235</sup> He may have done so because the citation omits the name of the defender and the date on which the case was heard. Secondly, it seems that he ignored the three citations of the Digest which appear at the end of Orr item 321 in the Tinwald, Gilmour, Hailes and apparently the Orr manuscript (although Sutherland has misidentified these as 'appear[ing] to refer to other practicks'<sup>236</sup>).<sup>237</sup> Spalding's practicks generally lacks citations of learned and civilian law, and it has already been shown that (with limited exceptions) he ignored the citations of learned authority in Skene.<sup>238</sup> Therefore, his practice would generally indicate that he was uninterested in these types of citations so deliberately omitted them. That said, he did retain the citations of C.3,32,15 and C.3,32,17 found in Orr item 326.

The second place where Spalding appears to have borrowed from Maitland is roughly 100 entries further into the second pairt, in a place which suggests that the copy was made between the end of the summer session of 1620 and the end of the winter session of 1620–1. Spalding's chapter 131 refers to litigation brought in 1636 by Robert Innes of Drany, this time against Christen Innes, his spouse. After this, Spalding gives a series of entries relating to cases which appear to have been drawn from the manuscripts of Maitland's practicks. If it is correct that this section of Maitland's text was copied by Spalding some time later than the aforementioned entries, it may have been copied from a different manuscript of Maitland than that which he had previously used. Indeed it was not uncommon for early-modern lawyers to use more than one manuscript copy of a text, as is also seen in Balfour's practicks.<sup>239</sup>

<sup>235</sup> See above, fn. 221.

<sup>236</sup> Sutherland, *The Practiques of Sir Richard Maitland*, 234.

<sup>237</sup> Tinwald MS., 367; Gilmour MS., replacement text, entry 412; Gilmour MS., once-misplaced text, entry 405; Hailes MS., fol. 181r.

<sup>238</sup> See above, especially fn. 116.

<sup>239</sup> Goodal notes that Balfour's use of different manuscript copies of *Regiam Majestatem* 'obliged him to refer to particular Copies, such as *lib.* Carneg. Ersk. Galbraith. Kintor. Purves, Scon. and *liber meus*' [Goodal (ed.), *Practicks: or, a system of the more ancient law of Scotland, compiled by Sir James Balfour of Pettindreich*, x].

The first ten chapters here are an assorted miscellany of case notes drawn from various parts of Maitland's practicks. Spalding's chapters 132–4 note three cases which were heard in January to February 1569/70: *Margaret Sutherland v Laird of Carden*, *George Meldrum v Laird of Balcomy* and *Maxton v Maxton*. The first two of these cases do not appear in the Elchies manuscript for the dates provided. However the case of *Maxton v Maxton* is present in that manuscript and is described at some length.<sup>240</sup> None of these three entries appear in the Tinwald or the Orr manuscripts, but all three appear in both texts of the Gilmour manuscript as well as in the Hailes manuscript and Adv. MS. 24.1.5.<sup>241</sup> However there are four notable differences between the texts of these entries in Spalding and those in the other manuscripts. First, Spalding's entries are much shorter and are generally abbreviated even more than those in the Hailes manuscript. Secondly, the headings (if any) in Spalding accord only very approximately with those in the other manuscripts. Thirdly, the other manuscripts consistently give the parties' names in Spalding's entry 132 as *Margaret Sandilands v Forrester of Carden*, and in entry 133 'Balcomy' was corrupted in the two texts of the Gilmour manuscript and in the Hailes manuscript and abbreviated to 'B' in Adv. MS. 24.1.5. Finally, the other manuscripts have two entries for *Maxton v Maxton*, both on the same date, whereas Spalding appears to have ignored the first entry and paraphrased the second. This all suggests that either Spalding (or the copyist of an intermediate ancestor text) heavily short-copied and was generally quite free with the copying of these entries.

Thereafter, Spalding provides entries for four cases, heard in May 1574, December 1554, March 1554/5 and January 1551/2. These entries are present in the Elchies manuscript, but it and the Gilmour, Tinwald and Orr manuscripts and Adv. MS. 24.1.5 give different headings and generally fuller accounts of the cases than Spalding;<sup>242</sup> the Hailes manuscript provides different headings again,<sup>243</sup> and abridges the entries but not in the same way or generally to the same extent as Spalding.<sup>244</sup> Thereafter, Spalding gives an entry for *Drummond v*

<sup>240</sup> Elchies MS., fos 84r–v.

<sup>241</sup> Gilmour MS., replacement text, entries 376, 382, 384–5; Gilmour MS., once-misplaced text, entries 370, 375, 377–8; Hailes MS., fos 177r–8r; Adv. MS. 24.1.5, fos 112v, 113r–v, 113v–14r.

<sup>242</sup> Elchies MS., fos 19r, 22r, 25r, 91r–v; Tinwald MS., 260, 263, 267, 382; Gilmour MS., non-duplicated text entries 88, 98, 118; Gilmour MS., replacement text entry 437; Gilmour MS., once-misplaced text entry 430; Adv. MS. 24.1.5, fos 61r, 62r, 64r–v, 124r; Orr MS., entries 89, 99, 116, 346.

<sup>243</sup> With the exception of the December 1554 case for which it gives the same heading as the other manuscripts.

<sup>244</sup> Hailes MS., fos 148r–v, 149r–v, 150v, 183v.

*Drummond* (1551). The corresponding entry in the Elchies manuscript is very short but gives a postscript reference to a case of *Hamilton* (no date) and the heading 'of witness'.<sup>245</sup> This entry is found, somewhat rephrased in places but with the same heading, in the other manuscript copies, although only the Gilmour manuscript gives the cross-reference to *Hamilton*.<sup>246</sup> Spalding's text differs slightly in the wording from the others, gives a much longer heading, and omits the reference to *Hamilton*. Spalding then gives entries for the cases *Hew Cunningham v Lord Simple* and *Elizabeth Balfour v Lord Lindsey*, which he recorded as having been heard in May 1554 and February 1558/9 respectively. These two cases are found in the Elchies and other manuscripts, but with some differences in the entries. The other manuscripts generally give these cases as having been heard in May 1553 and March 1561/2, although both dates are omitted in the Gilmour manuscript, as is typical of the entries at the front of that collection. The other manuscripts also generally provide fuller accounts of the cases, although the Hailes manuscript abridges particularly the latter entry but with different wording to Spalding. They generally give 'Isobel Balfour' rather than Elizabeth. Finally, with the exceptions of the Tinwald and Orr manuscripts, the other manuscripts give the defender's title as 'Lady' rather than 'Lord'.<sup>247</sup> It is unclear why these ten entries appear together and in this order in Spalding. There does not seem to be a common theme to these entries, which are on diverse matters. It is plausible that he used on this occasion an incomplete manuscript copy of Maitland which had been selectively updated by means of an appendix at the front of the manuscript.

After writing out this miscellany of case notes, Spalding copied most of the fifty-seven entries at the beginning of Maitland's practicks. However he omitted those entries known as Orr items two, six, twenty, twenty-six, thirty-six, thirty-nine to forty-two, forty-six, forty-seven, fifty-one, fifty-four and fifty-five. This same pattern of omission has not been found in any of the other manuscript copies of Maitland, but some do fail to preserve the original order of the entries: the Hailes manuscript omits the first and fifth entries; the Hailes and Gilmour manuscripts and Adv. MS. 24.1.5 relocate entry nine to after entry two.

<sup>245</sup> Elchies MS., fol. iiii [*sic*] *recto*.

<sup>246</sup> Tinwald MS., 241; Gilmour MS., entry 26; Hailes MS., fol. 142v; Adv. MS. 24.1.5, fol. 53v; Orr MS., item 26.

<sup>247</sup> Elchies MS., fos 15v, 41v; Tinwald MS., 255–6, 286; Hailes MS., fos 147r, 154v; Gilmour MS., entries 69, 176; Adv. MS. 24.1.5, fos 59r, 72r; Orr MS., items 69, 174.

As was his previous practice, Spalding here intersperses the entries drawn from Maitland with more recent case law. Between Orr items seventeen and eighteen, Spalding gives a general chapter about determining the price of corn. Between Orr items thirty-three and thirty-four, he gives a general chapter about the reduction of decreets. He adds references of more recent cases to Orr item fifty-six, and includes a chapter on a case about pupils heard in 1621 before Orr item fifty-seven. These interrupting chapters are not relevant to the topics under discussion in the entries immediately preceding. It may be that these notes resulted from events in his own practice which occurred around the time he was copying out these sections of Maitland.

A comparison of the manuscripts' texts of Orr one, three, four and five shows that the text in Spalding's copy is somewhat distinct from those in the other manuscripts. The difference is particularly noticeable in entries one and four, for which Spalding gives sections of text which either read differently or appear to be additional to what is found in the other manuscripts. Spalding's headings, too, are much fuller in their description of the cases than those of the other manuscripts. Thus it would seem that the second time Spalding copied out sections of Maitland's practicks, either the text on which he relied was quite different to these other manuscripts in terms of its headings and the wording of the entries, or he was now freer and more pragmatic when copying from his model manuscript. That two of the cases described are not in the Elchies, Orr or Tinwald manuscripts but were in the Gilmour and Hailes manuscripts and in Adv. MS. 24.1.5 might suggest that the model manuscript used in this place by Spalding was more closely related to the latter three manuscripts than to the others.

Overall, Spalding's reliance on Maitland was significant. Almost eighty chapters in the second pairt appear to have been drawn wholly or partially from Maitland's practicks. It is not clear why Spalding borrowed only these entries; it is plausible that the entries found at the beginning of the second pairt were borrowed because their dates roughly accord with the end of Balfour's practicks. Nor is it clear why Spalding copied out entries of Maitland's practicks at these points in the compilation of his second pairt. It could be that he had the time to do so: these borrowed entries (as well as some general entries) appear between those notes on cases heard in the summer session of 1620 and two entries for March 1621; it is plausible that his practice was relatively quiet in the intervening months so he returned to copying out Maitland's practicks. It is clearer why Spalding chose Maitland's practicks particularly: this was likely the most recent collection of notes on



cases which was readily available.<sup>248</sup> One further (very tentative) observation can be made about Spalding's borrowing from Maitland. Spalding (or at least the copyist of the Aberdeen manuscript) provided headings for each chapter in his second pairt. It is possible that he adopted this practice from Maitland, either because he believed that the headings would be a useful tool when later identifying entries or because he wished there to be a consistency in the styling and format of the entries in his collection.

(c) *Spalding's Use of Balfour's Practicks*

It seems that Spalding also relied upon Balfour's practicks in the second pairt in much the same way as he did in the first pairt. Spalding's chapters 313, 315–20 and 322 appear to have been drawn almost entirely from Balfour. Chapter 313 discusses a case said to have been heard on 29 April 1540. The text of this entry appears to have been drawn from Balfour, specifically chapter fifteen of his title, 'Alienation of heretage'.<sup>249</sup> Spalding's chapter 314 comprises a note about *Andrew Fairnie v John Walker* (1555); its context within Spalding's practicks would suggest that the case was found in his manuscript of Balfour, although it has not been found in the printed edition or in what would seem to be the relevant sections of those manuscript copies consulted.<sup>250</sup> However Spalding's chapter 315, on *James Henderson v William Henderson* (1568), seems to have been taken substantially from Balfour's twelfth chapter of the same title on alienation of heritage, although there are minor differences and Spalding adds a comment at the end of the entry. Chapter 316, on *William Silver v Oliver Silver* (1542), was also drawn from that same chapter and title of Balfour's practicks, which records the surname as 'Symmer'. Chapter 317 in Spalding has notes on five cases, which were borrowed from Balfour's title 'Of fraudfull and doubill alienatiounis' chapters three, four, six, one and seven respectively, with some minor differences which can be attributed to errors in copying. Chapter 318 discusses a case heard in Moray in 1633. This was probably recorded by Spalding contemporaneously with the compiling of his collection, interrupting the process of copying from Balfour. Chapter

<sup>248</sup> See above.

<sup>249</sup> Sinclair's practicks also provides a note on this case, but dates it to 19 April [See the provisional text of Sinclair's practicks by Athol L. Murray, entry 8, available at <http://www.uni-leipzig.de/~jurarom/scotland/dat/sinclair.htm>, accessed 13 November 2014].

<sup>250</sup> N.L.S., MS. 2941, fos 38v–41v; Adv. MS. 22.3.4 [Tinwald MS.], 13–19; Adv. MS. 25.3.6, fos 33r–8v; Adv. MS. 24.1.10, fos 112r–14r, 115v–21r; Adv. MS. 24.2.4b, fos 105v–7r, 107v–11v.



319 comprises notes on twelve cases. The first eleven of these items were borrowed from Balfour's title 'Anent Arbitrie', again with minor differences which can be attributed to errors in copying. The twelfth case note appears to have been drawn from chapter two of this same title of Balfour. However the citation of *Regiam Majestatem* found at the very end of this chapter in Spalding (and repeated in the margin alongside) does not appear in the printed edition of Balfour. Rather, it seems plausible that this citation was added by Spalding himself, as it refers specifically to the folio number within Skene's edition. Chapter 320 borrows notes on six cases and a general item from Balfour's title 'Anent arresitment', chapters two, three, six, ten, one and nine respectively, again with some minor differences in the entries. The copying from Balfour is then interrupted again by the addition of a note on a case heard in Moray in 1632 (chapter 321) which again is likely to have been contemporary or nearly contemporary with the copying from Balfour. Finally, chapter 322 includes three notes on two cases borrowed from chapter three of Balfour's title 'Anent skaith and damage done be beistis or done to beistis'. Again, however, there are some minor differences between their accounts of the cases.

The first two titles drawn on here, 'Alienation of heretage' and 'Of fraudfull and doubill alienatiounis', were also used by Spalding in the first pairt. Indeed all five of the cases found in the second pairt which were drawn from 'Of fraudfull and doubill alienatiounis' are cited in his first pairt, which also makes further use of this title of Balfour. The rest of the content, added after the first of the two entries on recent cases heard in Moray, was from the latter part of Balfour's practicks, the part that was ignored after Spalding began copying instead from Skene's *Forme of Proces*.

(d) *Spalding's Chapters and Items which Are Not Case Notes*

Around 100 of Spalding's chapters in the second pairt do not explicitly relate to cases. Many of these seem to set out general points of law, often with cross-references to other parts of the manuscript or to Scottish legal authorities. Some are very brief, with the most notable examples hardly expanding upon the title of the heading, such as chapters thirty-seven and sixty-three. Some such chapters add a citation to this repetitive text, including chapter 207 (which cites an act of parliament and Skene's *Forme of Proces*) and chapter 209 (which provides a cross-reference to chapter thirty-three of the second pairt and a note on *Thomas Gordon of Grandholme v Thornton* (1620), which was heard in the Aberdeen Commissary court).

Some of these 100 chapters, however, relate quite explicitly to statutory authorities or other regulations. Chapter 344, 'Forme of ane edict of executrie usit befor the Commissares of Edinburgh', appears to be a command from the Edinburgh Commissary to the inferior Commissary courts. The heading of chapter 130, 'Ane act made at Edinburgh the 12. July 1620 agaynes Dyvors and Bankrupts unlawfull dispositione Not set doune heire in this booke because it is ratified and set doune in the 23 parliament of King James the sixth cap 18',<sup>251</sup> is on an otherwise blank page. It is plausible that Spalding originally intended to write out the text of the 1620 act, but changed his mind after the latter act was passed. Whyt, it seems, preserved this blank space in his copy.

(e) *Spalding's Overall Citation and Use of Authority*

The citation and use of authority in the second pairt is generally consistent with what has already been observed of the first pairt. Spalding's borrowing of entries from Maitland meant that he received the two citations of Roman law present in the entry known as Orr item 326 as well as an opaque reference to 'all lawes' in Orr item 297. Spalding's chapter 370 refers to a large quantity of authority, including the 'daylie practique of this kingdome', a case heard in Edinburgh in 1638, *Regiam Majestatem*, and the 'cannon and civill law' generally. There are also rather opaque references to 'the books of Rome' in chapter 366 and an 'act of canone' in chapter 292; the latter is probably a reference to canon law, but the former might be a reference to the canonist courts or to court books in Rome or to the books of Roman law, the *Corpus iuris civilis*. No further references to the learned laws or laws of foreign jurisdictions have been found.

However there are many references to Scottish legal sources. Most refer to the activities or regulations of the courts. There are more than thirty citations of cases in this pairt. Also related to the activity of the courts, there are an additional three references to the books of Counsel and Session, three to the various Commissary books, two to injunctions addressed to the Commissaries from Bishops, one to an Act of Sederunt, and one to an act (possibly meaning a decret) of the local court in Geight. Legislative authorities are the next most cited source, including thirty-five citations of acts of parliament (some of which do not cite the act specifically but assume that the reader will himself know which act is relevant) as well as a reference to a decision of the General Assembly. There are also several citations of medieval law books, including

<sup>251</sup> The Bankruptcy Act 1621, RPS, 1621/6/30.

six of *Regiam Majestatem* (one in an entry borrowed from Maitland), three of the *Leges burgorum* (one of which was borrowed from Balfour), one of *Quoniam Attachiamenta*, and one of the Forest laws (which was also borrowed from Maitland). Skene's works are also cited: the *Forme of Proces* is cited five times and *De verborum significatione* is cited three times. There are also ten more general references to the 'practick' or common law of Scotland (two of which are in entries borrowed from Maitland), and one discussion of customary law specific to the town of Elgin in Moray. It may well be that these citations are indicative of the use of authority by the advocates who were working in these courts during the period.

(f) *Spalding's Method when Compiling the Second Pairt*

It is possible to speculate as to Spalding's method when compiling this second pairt of his practicks. It seems that he began by copying thirty-one entries from Maitland. He does not appear to have selected entries which were particularly related to his practice, but rather he seems to have chosen a specific starting point and copied the entries which followed. Perhaps this process of copying from Maitland inspired him to maintain his own collection of notes on cases. It seems likely that he wrote his notes shortly after the relevant cases were heard, and that he added various other materials to his manuscript between court appearances. Some of this material was borrowed from other collections of practicks, and may have been copied out by Spalding at these times because his professional business was not then demanding on his time. Some of these entries are of a more general nature and probably related to matters arising from his on-going practice if not to a specific (or at least explicitly-named) case. He would sometimes go back and add extra items to existing chapters, thus interrupting the original, roughly-chronological order of items.

(4) The Subsequent Annotation of Spalding's First and Second Pairts

Mention has already been made of the annotations which were added to Spalding's practicks. Many of the annotations provide cross-references within the text; the Table as well as the first and second pairts are cited. Sometimes the cross-references found in the annotations are simply repetitions of those cross-references already provided in the text of the entry, such as that alongside chapter 109 of the second pairt. Sometimes these cross-references are to material which contradicts the substance of the current discussion, such as the annotation alongside chapter 107 which notes that the reader might 'sie

this practique changed fol. 264. cap. 440' (later corrected to '420'). Similarly, the annotation alongside chapter 218 states 'contrair to this practique resolvit in Februar 1643', which is almost certainly a reference to chapter 425 of the second pairt even if not acknowledged as such.

There is some evidence to suggest that the annotations were added by Spalding. First, all of the annotations found in the Aberdeen manuscript can be found in the Glasgow manuscript where it includes that title, with one exception which can be explained as a minor scribal error: a citation which reads 'fol. 136. cap. 96. cap. 97.' in the Aberdeen manuscript is instead 'fol. 136. cap. 99.' in the Glasgow manuscript.<sup>252</sup> Thus it seems clear that the annotations were present in the text of the common ancestor, which was plausibly Spalding's authorial holograph. Secondly, sometimes the annotations add information about the case which is the subject of the main entry. This would indicate that these annotations were made by a lawyer who was suitably familiar with the case to supply these details. Thirdly, none of the citations in the annotations update the text with later sources but again date only up to the mid-to-late 1640s.<sup>253</sup> Thus there are no annotations which can be dated to a time after Spalding probably stopped practising. Fourthly, there are references in the annotations to 'my uther practique book' or 'my styill book',<sup>254</sup> presumably the same volume or volumes mentioned frequently by Spalding in the main body of the text. If this is correct, it indicates that either he made these annotations or that they were made by someone who received both volumes. Fifthly, there are some self-referencing comments. The annotator notes that a case was 'practized in anno 1644 at my owne instance contrari Thomas Mersr' alongside chapter 399, and again alongside chapter 295 that a case was 'practized at my own instance' in the Aberdeen Sheriff court in November 1642 and subsequently in Edinburgh. Neither of these cases have been found in the first or second pairs of Spalding's practicks, but they are again during the period of his practice and at least the latter was heard in Aberdeen. Further, there is a note made alongside chapter 443 that 'I have the coppie of the compt immesit amongst my wreits' in relation to an Aberdeen case probably heard in 1645. Again, this locates the annotator of at least this remark to Aberdeen during the period, with access to the papers

<sup>252</sup> Aberdeen MS., fol. 170v (modern foliation); Glasgow MS., 65.

<sup>253</sup> The latest date found in the annotations is in a note which states that a rule was 'daylie practised before the Commissr of Aberdeen in anno 1647' [Aberdeen MS., fos 317r–v].

<sup>254</sup> *Ibid.*, fos 226v, 253v (modern foliation).

led in evidence in a case which might plausibly have been litigated by Spalding. Finally, the annotations include citations drawn from the same sources and editions as Spalding has previously been shown to have used: Skene's *De verborum significatione*,<sup>255</sup> the 1609 Scots edition of Skene's *Regiam Majestatem*,<sup>256</sup> and Balfour's practicks.<sup>257</sup>

If it is correct that these marginal annotations were made by Spalding, then the question arises as to why he would have annotated his text in this manner. It has already been shown that Spalding updated some of the entries by adding items about cases heard sometimes many years after that which was the subject of the original entry. It is plausible that some of these annotations were initially added in a manner which meant that they became intercalated into the text of the descendant copies, perhaps written into spaces between the existing entries. It is also plausible that Spalding then annotated the margins when the space between entries was used. The copyists of the Aberdeen and Glasgow manuscripts then continued to present these as marginal annotations rather than intercalating them into the text.

### (5) The Table

The first eighty folios of the Aberdeen manuscript preserve what is aptly called 'ane table qrin ilk practique is to be found after the order of the Alphabet'.<sup>258</sup> There are more than 200 entries in the Table. The entries vary considerably in length, with some comprising only a couple of sentences and others occupying more than a folio; the entry for 'Executors', for example, comprises almost eleven pages. The copyist of the Aberdeen manuscript usually left considerable space between titles in the table, presumably so that additional notes could be added later. Indeed some entries (such as those on 'Bankrupts' and 'Interrogators') appear to have been later additions, and there were later annotations made to the entry 'Executors'.

The general style of the entries is a series of statements or propositions

<sup>255</sup> Ibid., fol. 193r (modern foliation).

<sup>256</sup> The citation '2 book of the Matie, fol. 38. cap. 48, 49.' [Aberdeen MS., 194v (modern foliation)] corresponds to that edition; it is highly probable that this volume was also used to access the statutes of King Alexander II, also cited in the annotation of the same chapter.

<sup>257</sup> McNeill (ed.), *The Practicks of Sir James Balfour of Pittendreich*, I, 206 is the source of the citation of '3 June 1538 Kinghorne v Lamington' which is cited in the annotation alongside the seventh chapter in the second part [Aberdeen MS., fol. 194v (modern foliation)].

<sup>258</sup> Ibid., fol. i.

about the law, each of which is cross-referenced within Spalding's practicks or to other domestic legal sources such as statutes, cases and medieval legal treatises.<sup>259</sup> Occasional folio references in the Table's citations of *Regiam Majestatem*, *Quoniam Attachiamenta*, the *Leges burgorum*, *Form of Process before the Baron courts*, and statutes of the early kings again allow the identification of Skene's 1609 Scots edition as the source used for these references.<sup>260</sup> However in the Table Spalding also refers to the *Statutes of Guild*,<sup>261</sup> which

<sup>259</sup> The entry for 'Alienations', the first in the Table, provides a good example of this. The entry is, as is typical, written in two columns; this entry spans a column and a half. It is almost 440 words in length, including twenty-three citations. The entry first cites a specific folio of the corresponding title of the first pairt, 'Of alienatione and infeftment'. There are also another four citations of the first pairt, namely: another two of 'Of alienatione and infeftment'; one (which errs in its citation) of the title 'Of pertinentis of lands'; and one of the title 'Of restitutione of minors in integrum'. All five of the citations of the first pairt give the title number and the folio of the section that is relevant; this is in keeping with Spalding's method of citation of Skene's *Laves and Actes*, but not of his 1609 Scots edition of *Regiam Majestatem*, seen in the first pairt [on which, see above]. There are also nine citations of the second pairt, seven of which cite single chapters and two of which cite three chapters of this collection. The choice of chapters cited here is rather puzzling. Chapter 130 is the entry which refers to (but does not copy out) the 1620 act 'agaynes Dyvors and Bankrupts unlawfull dispositione'. Chapters fifteen and 160 were two of those borrowed from Maitland, and chapters 313 and 315–17 included eight items drawn from Balfour; chapter 314 was also probably drawn from Balfour but has not been found therein. Only five of the cited chapters comprised cases which were probably recorded by Spalding himself, specifically chapters 312, 309, 355, 376 and 415. Further to these cross-references within Spalding's volume, there are also eight citations of statutes. Four of these are of the older statutes of Kings William, Robert II, and David II, including a general reference to the statutes of 'K. William and King Robert'. These references were almost certainly drawn from Skene's *Regiam Majestatem*, and that of a sixteenth-century statute (the Fraud Act 1540 [RPS, 1540/12/77]) was probably drawn from Skene's *Laves and Actes*. The other three citations of statutes (of the Bankruptcy Act 1621 [RPS, 1621/6/30], Feuing of Wardlands Act 1605 [RPS, 1605/6/40], and another which is also probably of the Feuing of Wardlands Act 1605) must have been consulted in a different collection. Spalding's only other citation in this section is to 'the 117 chapter of the burrow laws'. This was again almost certainly consulted in Skene's 1609 Scots edition of *Regiam Majestatem*. Other, longer entries of the Table inevitably have a greater number and range of sources cited.

<sup>260</sup> For example, at 'Arbiters', Spalding states, 'ane judge ordinar sould not be ane arbi-ter judge yet be consent of pairtie he may be judge arbi-ter 2 book of the Mâtie fol. 20. cap. 4.' [Aberdeen MS., fol. 6r (modern foliation)]; the relevant passage (*Regiam Majestatem*, 2,4) appears on folio 20r of Skene's 1609 Scots edition.

<sup>261</sup> For example, at 'Arles' Spalding states, 'Arles or earnest given and taken makes the bargane good Sie the 3d book of the Mâtie cap. 10. and statuts of gild cap. 22 & 4.' [Aberdeen MS., fol. 2r (modern foliation)]. This refers to *Regiam Majestatem*, 3,10,6 and the *Statutes of Guild*, 22,4, both of which are relevant. Another reference to the *Statutes*

were contained in Skene's volume but are not cited in the first or second pairts. This suggests that the Table partly supplements the information in the first and second pairts; indeed there is sometimes little correspondence between the patterns of citation in the Table and first pairt.<sup>262</sup> Thus it seems that the Table was not merely supposed to serve as an epitomised version of Spalding's first and second pairts, or as an annotated index of their citations. Rather, it may have been intended to be more akin to an alphabetical commonplace book which might be supplemented over time. If this is correct, it is perhaps no coincidence that the latest dates found in the Aberdeen manuscript – of 1648 – are found in the Table.<sup>263</sup>

### **Conclusion: Spalding's aim in writing, when he did so, and the later distribution of his work**

The question remains as to why Spalding compiled these practicks. It seems credible (and will be suggested below) that Spalding began by compiling the second pairt. Here he drew together sections of Maitland and Balfour with his own, more recent experiences of practice. In the 1620s and 1640s these sources had not yet been eclipsed by more recent collections: most of those collections which are now thought of as being early-to-mid-seventeenth century collections did not circulate until much later. The practicks of Sir Thomas Hope began to circulate after 1643, even though he stopped recording cases a decade earlier.<sup>264</sup> The earliest manuscript of Spottiswoode's practicks dates from 1657, indicating that it was circulating around this time.<sup>265</sup> The practicks of Sir Alexander Gibson of Durie also began circulating in the 1650s.<sup>266</sup> Thus none of these would have been available when Spalding practised and so, it would seem, he collected his own decisions for his later use and reference. However

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of *Guild* indicates that this collection was consulted in Skene's 1609 Scots edition: the citation under 'Burdessis' [Aberdeen MS., fol. 12v] of 'statuts of gild fol. 147. cap. 46' corresponds to folio 147r of that edition.

<sup>262</sup> Indeed, returning to the example of the entry entitled 'Alienations', none of the chapters of the second pairt cited in the Table here were also cited in the corresponding title of the first pairt. Of the statutes cited in the Table, only three are cited in the first pairt in either this or the subsequent title on fraudulent alienations. The first pairt and the Table also cite different chapters of the *Leges burgorum*: the Table cites chapter 117 whereas the first pairt twice cites chapter 119.

<sup>263</sup> Aberdeen MS., fos 34r–v.

<sup>264</sup> Ford, *Law and Opinion*, 44, 54.

<sup>265</sup> Ford, *Law and Opinion*, 53; N.L.S., MS. 2712.

<sup>266</sup> Ford, *Law and Opinion*, 80.



the length and lack of coherent structure of the second pairt would have meant that it would have become difficult to use. It is plausible that Spalding began the first pairt with the intention of providing a form of index to the decisions in the second pairt, locating his case notes within the context of the available literature. He obviously found the practicks of Balfour very useful, but it was clearly not all relevant to his practice and was much out of date. Thus rather than simply annotate Balfour with more recent citations and commentary, Spalding more pragmatically began a new digest which was initially arranged in the same way as Balfour and received what was relevant from it but also provided access to the second pairt. That the first pairt was quite short and the items terse might indicate that this was not intended to be a full reference work, but an expanded index which would allow one to identify easily the relevant sources and citations on each topic. As time passed, it became increasingly voluminous and could be recognised as a collection of digest practicks in its own right, hence the addition of the Table, and the further layer of cross-referencing to it.

However, although it is possible to speculate as to how and why Spalding wrote his work, it is very difficult to determine with any level of certainty when he compiled the first pairt. There are two pieces of evidence which might suggest that much of the first pairt was written in the later 1630s and was subsequently updated. First, there are only a couple of cases entered in the second pairt for the years 1637 and 1638. This might suggest that Spalding's practice was quiet during these years, for whatever reason. There is an indication in the history by John Spalding that there was a disruption in the administration of justice in the Sheriff courts of both Aberdeen and Inverness in the latter part of 1637, and a 'hindering of justice' in the Session, but there is no discussion of the local Commissary;<sup>267</sup> there is nothing in the printed records of the burghs' councils (or at least the sections extracted) which would indicate that this court had stopped sitting.<sup>268</sup> Thus it might be that his practice was affected by some personal issue or by the broader political circumstances of the time, being the period of the Bishops' Wars. Previous spells of relative inactivity in Spalding's practice appear to have been used to copy sections of Maitland and Balfour into the second pairt. However no such addition was made during these years. Perhaps this is because he began a new work at this

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<sup>267</sup> Spalding, *History of the Troubles*, I, 49, 52; idem, *Memorialls of the Troubles*, I, 81, 84. Spelling of quotation correct to the earlier printed edition.

<sup>268</sup> *Extracts from the Council Register of the Burgh of Aberdeen 1625–1642*, 105–44; Munro (ed.), *Records of Old Aberdeen* provides no extracts from the council minutes for these years.



time, instead copying sections of Balfour and Skene's *Forme of Proces* into a new work which became the first pairt.

Secondly, there are only nine references in the first pairt to the last hundred-or-so entries in the second pairt, which relate mainly to cases heard after 1636; there are also only around a dozen cases cited independently of the second pairt which date from this period. Many of the references to cases heard in the late 1630s and 1640s are found at or towards the end of the titles of the first pairt.<sup>269</sup> This might indicate that these citations were added as appendices to the texts of titles which had already been written. The citations of cases heard in the late 1630s or early 1640s which appear to be integrated into the middle of titles tend to be found in titles which are at the end of Spalding's work – those in which the material is drawn from Skene's *Forme of Proces* in preference to or in addition to Balfour's practicks.<sup>270</sup> Only four citations of cases heard in the 1630s or 1640s appear in the middle of titles earlier in the work.<sup>271</sup> Thus it is possible to speculate (very tentatively) that Spalding may have used the period when his practice was quieter in 1637 and 1638 to begin to write the new work which became the first pairt. He copied large sections of Balfour at that time, updating it with references to other works and with reflections from his own practice. It is possible that the titles based more on Skene's work were added later, hence the citations of cases heard in the 1640s seem to have

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<sup>269</sup> A case heard in 1643 is the last citation in 'Of payment'; cases heard in 1637 and 1638 are the final two citations in 'Of tutors'; a case heard in 1638 is the final citation in 'Probationes'; a case heard in 1636 is cited at the end of 'Of husband and wife'; a case heard in 1636 is cited in the penultimate paragraph of 'Of conjunctive'; chapter 384 of the second pairt (relating to a case heard in March 1641) is cited at the very end of 'Of curators'. The titles on testaments and executors seem to have been particularly heavily updated. Thus chapters 364, 393 and 394 (relating to cases heard in 1639, 1641 and 1642) are cited consecutively at the end of 'Of executors'; chapters 352 (probably relating to a case or cases heard in 1636) and 431 (on a case heard in 1643) and a case of 1636 are also cited in this title, again probably as additions but not at the end of the title. At the end of 'Of testaments' is cited chapters 352 relating first a case heard in 1636 and items relating to cases heard in 1620, 1640 and 1641, which were probably additions; Spalding appears to then have updated an earlier part of this title with a reference to chapter 416 (a case of December 1642) to contradict the dicta of the previous passage.

<sup>270</sup> Title forty-one has the citation of the latest case cited, said to have been heard in 1647; title forty-nine has a citation of a case heard in 1644; title fifty-five has citations of three cases heard in 1638 and two cases heard in 1641; and title fifty-six has a citation of a case heard in 1642.

<sup>271</sup> A case of 1636 is cited in the middle of the title 'Of airs'; a case of 1637 is cited near the start of 'Of terce'; a case of 1637 is cited in the middle of 'Of interdiction'; and a case of 1638 is cited in the middle of the title 'Of tutors'.

been integrated into the text of the entries rather than added as appendices. It is, however, impossible to be certain of this given the loss of the authorial holograph. But the hypothesis that Spalding may have continued to revise and edit the text of the first pair is consistent with the suggestion above that he updated his second pair.

Spalding appears to have used relatively few sources when compiling his practicks, but relied upon these heavily. He had a copy of Balfour's practicks, a copy of the 1609 Scots edition of Skene's collection of the old laws, and may have consulted two different manuscript copies of Maitland's practicks. However he appears to have made no use of the practicks of Sinclair or Colville, which is surprising given that Colville included material relevant to the Commissary courts and that these two collections were often bound with copies of Balfour's practicks.<sup>272</sup> Nor did Spalding make explicit use of Craig's *Jus feudale*, despite the prominence of that work in the education of new advocates in the Court of Session.<sup>273</sup> Perhaps Spalding misunderstood the work as being relevant only to the practise of feudal law, even though some of Craig's titles would have been relevant to him (especially those at the end of the second book on curators, tutors, marriage, terce, courtesy, and conjunctie). Alternatively, perhaps his Latin was not of a sufficient standard to read Craig properly – there is no evidence that he was university educated, and he favoured the Scots translation of Skene's *Regiam Majestatem* – and maybe he did not have access to one of the epitomes of Craig's work in Scots translation.

It is possible to speculate as to why there was apparently only a limited circulation of copies of Spalding's practicks. First, most lawyers who could have afforded a copy of Spalding would likely already have had a copy of Balfour or Maitland, or would have prioritised attaining one of these over attaining one of Spalding's practicks. Many would also have had access to a copy of

<sup>272</sup> Dolezalek has found all three collections in the following manuscripts: Adv. MSS 22.3.4, 24.1.4, 24.1.5, 24.1.8, 24.1.11, 25.4.11; Signet Library, MS. 34; E.U.L., La.III.338a, La.III.429. On these manuscripts, see Dolezalek, *Scotland under Jus Commune*, II, 139–49, 159–68, 170–5, 178–91, 303–15 and III, 149–63, 212–20, 262–7.

<sup>273</sup> Cairns has suggested that 'reducing that law to an ordered science, thereby making it easier for students to learn' was Craig's intention [John W. Cairns, 'Craig, Thomas (1538?–1608)' in *Oxford Dictionary of National Biography* (Oxford, 2004), <http://www.oxforddnb.com/view/article/6580>, accessed 28 July 2014]. The compendia indicate that *Jus feudale* was used in this way. For a list of extant copies of such compendia, see Dolezalek, *Scotland under Jus Commune*, I, 184–5; J. H. Baker, 'Migrations of Manuscripts', *Journal of Legal History*, 21 (2000), 123–8, 123. On the importance of the epitomes, see John W. Cairns, 'The Breve Testatum and Craig's *Jus feudale*', *Tijdschrift voor Rechtsgeschiedenis*, 56 (1988), 311–32, 331–2.

Skene's collection, which was anyway criticised by some contemporaries for not distinguishing between what was applicable and what was in desuetude.<sup>274</sup> The discussion drawn from Skene's *Forme of Proces* did not provide a comprehensive overview of procedural law, so reference to the original would still have been necessary. Spalding's practicks could thus conceivably have been perceived by many lawyers as superfluous to their requirements. Secondly, the recent material in Spalding's practicks was focused on the provincial Commissary courts, and by the time that it probably began to circulate in the mid-seventeenth century, the practicks of Hope, Durie, Nicolson, Haddington and Spottiswoode were also available. These compilations would have been more relevant to the practice of most lawyers than Spalding's practicks, and their compilers (two King's Advocates and three Lords of Session) were more prominent within the profession than a lawyer whose career peaked as a Clerk Depute in a provincial Commissary court.<sup>275</sup> Finally, Ford has shown that in the mid-seventeenth century there was an increasing focus on drawing together Scottish sources with the civil law.<sup>276</sup> However explicit engagement with the learned laws is almost completely lacking in Spalding's work. Thus, overall, it seems likely that Spalding's practicks failed to meet the standards of intellectual rigour of the period, was too reliant on works which were widely available and increasingly out of date, and too specific to the provincial Commissary courts to be widely regarded by his contemporaries as worth the investment required to make or procure a copy.

However, for legal historians working today, Spalding's compilation is a significant source. It allows insight into certain aspects of legal practice of the period, such as how provincial lawyers gathered authorities and materials on which to draw in their pleadings. It also allows insight into how a set of practicks which might be identified as 'digest practicks' might be compiled around and used in conjunction with a set of decisions. Spalding's work is also a unique source as to the operation of the Aberdeen Commissary court, the records of which were destroyed in a fire in the early-eighteenth century, and to the social history of the North East region more generally. Thus Spalding's work may indeed be more useful to legal historians today than it was to the practising lawyers of his day.

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<sup>274</sup> Ford, *Law and Opinion*, 38, 40.

<sup>275</sup> Cf. James Oldham, 'The Indispensability of Manuscript Case Notes to Eighteenth-Century Barristers and Judges' in Anthony Musson and Chantal Stebbings (eds), *Making Legal History: Approaches and Methodologies* (Cambridge, 2012), 30–52.

<sup>276</sup> Ford, *Law and Opinion*, 45–6.

# Scottish Marine Insurance before the Mid-Eighteenth Century

*Scott Crichton Styles*

## A Biographical Prologue

I knew Angelo Forte as a teacher, a colleague and a friend for over thirty years. I first encountered Angelo Forte in the mid-1980s when he was a lecturer at the University of Edinburgh teaching Mercantile Law, and I was an accelerated graduate LLB student. The Mercantile Law classes were held at 5 p.m. in the mirk of a Scottish winter in Lecture Room 175 of Old College, and I can well remember his stout diminutive black-bearded figure striding back and forth on the raised rostra<sup>1</sup> of the lecture theatre, with his black academic gown billowing behind him<sup>2</sup>, like a captain pacing on the bridge of his ship as he attempted to steer us, an unwilling conscript crew, through the stormy seas of commercial law. Forte was an excellent teacher; his lectures were well-structured, his delivery clear, his anecdotes amusing.<sup>3</sup> However, some of his teaching techniques would not meet with approval today. For example, whilst lecturing on s.14 of the Sale of Goods Act 1893, c.71, he illustrated the issue of merchantable/satisfactory quality by using the case of *Wilson v Rickett Cockerell & Co. Ltd*,<sup>4</sup> by explaining the homely everyday facts of that case, concerning Mrs. Wilson and a ton of Coalite for her fire, in an ever lower voice, until he got to the moment where the coal exploded in

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<sup>1</sup> Appropriately for a civilian-minded ship-lover like Angelo Forte, the word rostra, meaning a speaker's platform, has origins that are both naval and Roman because its usage is derived from the Forum in Republican Rome, where the original Roman speakers' platform got its name from the fact that it rested on the prows of captured Carthaginian ships.

<sup>2</sup> Historians of academic sartorial fashions may want to note that in the mid-1980s most of the private law staff at Edinburgh still wore gowns whilst lecturing.

<sup>3</sup> He took a particular delight in pronouncing the case name 'Sidebottom', from the company law case of *Sidebottom v Kersham, Leese & Co. Ltd* [1920] 1 Ch. 154, which he assured the class was pronounced 'seedy-bow-tem'.

<sup>4</sup> [1954] 1 Q.B. 598.

the grate, because it contained a detonator, at which point he discharged a starter pistol, which he had concealed under his gown, with a loud bang, to the fear and alarm of the listening lieges, but we did remember the case!<sup>5</sup> What most impressed me about him was the enthusiasm with which he taught. This enthusiasm was especially marked in the case of insurance, which might seem to many a rather dull subject, but which Forte made clear was a matter of vital importance. In this case the anecdote that sticks in my mind was that of Forte justifiably, almost angrily, denouncing the unfairness of ‘basis of contract’

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<sup>5</sup> The facts were described by Denning L.J. [ibid., 605] in his usual, memorable manner and I believe these were the very words read out to the class by Forte:

In June, 1951, Mrs. Wilson ordered one ton of Coalite from Rickett Cockerell & Co. Ltd., and it was delivered and paid for. In November, 1951, she took from the bin some of the material which they had delivered to her and which she thought was Coalite. She made up the fire with it on November 26 at about 7.30 p.m., because she and her husband wanted to listen to an item on the wireless which lasted from 7.30 p.m. until 8 p.m.. Shortly before eight o'clock there was an explosion in the grate. A thick cloud of black smoke came out, the whole basket which held the Coalite was shot forward, the heavy curb was pushed forward, and most of the Coalite was scattered about the room, some of it falling on to Mrs. Wilson's dress. Bits of Coalite were found sticking to the wallpaper. The damage was considerable: it cost £117 4s. 1d. to put right. Fortunately, the plaintiffs were themselves uninjured. They now claim from Messrs. Rickett Cockerell & Co. Ltd. for the damage done to the room and the furniture.

At first instance, the defendants won for reasons explained by Denning L.J. [ibid. 606]: The judge for himself would have held that the plaintiffs could have recovered, but he felt that he ought to follow a decision of the Court of Session in Scotland, *Duke v. Jackson*. In that case a bag of household coal purchased from a coal merchant contained a detonator which exploded while the coal was being burned in the kitchen fire. The householder lost his eye, but the Court of Session held that, on the facts alleged in the pleadings, there was no breach of the condition implied under section 14 (1) of the Sale of Goods Act, 1894. The reasoning of the Court of Session was after this wise: the coal, as coal, was all right; it was fit for its purpose; the trouble was that there was something in it which the householder did not purchase, namely, a detonator; and as he did not purchase it, he could not complain of it as a breach of contract under section 14 (1); but only for negligence, if there was any.

With all respect to the Court of Session, I must confess that I do not understand this line of reasoning. Coal is not bought by the lump. It is bought by the sack or by the hundredweight or by the ton. The consignment is delivered as a whole and must be considered as a whole; not in bits. A sack of coal, which contains hidden in it a detonator, is not fit for burning, and no sophistry should lead us to believe that it is fit.

I suspect that even the staunchest advocate of Scottish legal nationalism would have to admit that Denning was right to disregard the Scottish case!

clauses in insurance contracts and urging the entire class to imagine that we had daggers in our hands and to shout aloud demanding that such clauses be ‘destroyed!’ but it took a further thirty years for this to happen.<sup>6</sup>

## Introduction

In terms of substantive law one of the subjects that most interested Angelo Forte was that of insurance law, but he was also passionately interested in legal history, as befitted one whose first degree was in history, and most of whose later academic work was primarily historical, and he did on occasion combine these two interests by exploring the history of insurance law in Scotland. In his 1987 article, ‘Marine Insurance and Risk Distribution in Scotland before 1800’,<sup>7</sup> Forte considered two main issues: the probable extent of the use of insurance in Scotland pre-1800, and secondly the doctrinal influences on Scots insurance law in the late-eighteenth century. This paper will consider only the first of those two issues: *viz* the factual question of the extent of the use of insurance by Scots merchants.

All law is a struggle between continuity and change, between principle and pragmatism. By ‘principle’ I mean primarily legal principle in the sense of legal doctrine, and by ‘pragmatism’ I mean situations where the law consciously seeks to accommodate the realities of daily life. But sometimes a legal system lacks the necessary legal doctrines to solve a real problem and this, I believe, is what happened in Scotland between the sixteenth and eighteenth centuries. Scottish merchants were faced with the challenge of managing the considerable risks which they took when trading by sea. Scots law *per se* has offered only rather primitive methods of managing that risk, described by Forte, with a Shakespearean flourish, thus: ‘more antique methods of risk distribution, such as the division of the cargo into shares or ensuring that at any one time several of [... a merchant’s...] ships would be at sea, so that like Antonio he could say: “My ventures are not in one bottom trusted, nor to one place”’.<sup>8</sup>

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<sup>6</sup> Basis of contract clauses were abolished for consumer contracts by the Consumer Insurance (Disclosure and Representations) Act 2012, c.6, s.6 and for non-consumer contracts by the Insurance Act 2015, c.4, Part 3.

<sup>7</sup> A.D.M. Forte, ‘Marine Insurance and Risk Distribution in Scotland Before 1800’, *Law and History Review*, 5 (1987), 393–412, hereafter cited as Forte, ‘Marine Insurance’.

<sup>8</sup> Forte, ‘Marine Insurance’, 402, quoting *The Merchant of Venice*, 1, i: 42–3.

## The Use Of Insurance Pre-1750 In Scotland

### 1 *Forte's Arguments Against the Regular Use of Insurance in Scotland pre-1750*

The question to be addressed in this article is the extent to which insurance was used by Scots merchants prior to the mid eighteenth century.<sup>9</sup> Insurance policies were not litigated in the Court of Session before the mid-eighteenth century<sup>10</sup> but it is the present author's contention firstly that this does not mean that Scottish merchants were not taking out insurance policies to protect their seaborne commercial interests long before then, and, secondly, that they did so with greater frequency than the eighteenth century court record would seem to imply. In particular, although insurance does not appear before the Court of Session with any regularity until the second half of the eighteenth century, it did appear with increasing regularity in the High Court of Admiralty of Scotland from the beginning of the century (discussed further below).

Forte begins his 1987 article 'Marine Insurance and Risk Distribution in Scotland before 1800' (hereafter referred to simply as 'Marine Insurance') by reviewing the late eighteenth and early nineteenth century sources in Scots law regarding insurance: Hume's *Lectures*,<sup>11</sup> the fifth edition of Bell's *Commentaries*<sup>12</sup> and John Millar's 1787 work *Elements of the Law relating to insurances*,<sup>13</sup> noting the apparent lack of insurance law in Scottish legal literature before the late eighteenth century and also giving a useful overview of the case law:

The earliest case mentioned in Morison's *Dictionary of Decisions* under the heading "Insurance", is dated from 1755. Of the forty-four cases reported, forty date from 1776 onward and thirty-four of these occur in the period 1780–1808. Thus, almost 90 percent of all the reported

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<sup>9</sup> For a useful, if dated, summary of the early history of insurance see W. S. Holdsworth, 'The Early History of the Contract of Insurance', *Columbia Law Review*, 17 (1917), 85–113.

<sup>10</sup> With the notable exception of *Lutwidge v. Gray* (1734) 1 Pat. 119 which went all the way to the House of Lords.

<sup>11</sup> G. Campbell H. Paton (ed.), *Baron David Hume's Lectures Vol. III* (Stair Society 15, Edinburgh, 1952).

<sup>12</sup> George Joseph Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence* (5th edn, Edinburgh, 1826).

<sup>13</sup> John Millar, *Elements of the law relating to insurances* (Edinburgh, 1787). He considered this work in more detail in 'John Millar junior - a Biographical Sketch of a Minor Jurist of the Eighteenth Century' in A. J. Gamble (ed.), *Obligations in Context: Essays in Honour of Professor D. M. Walker* (Edinburgh, 1990), 67–78.

cases on insurance, found in this collection belong to the last quarter of the eighteenth and first decade of the nineteenth centuries.<sup>14</sup>

The paucity of the eighteenth century insurance case law and commentary leads Forte to make a tentative suggestion which he immediately rejects:

The foregoing evidence from the late eighteenth and early nineteenth centuries suggests two hypotheses: (1) that prior to this period insurance was rarely used as a means of risk distribution in Scotland; and (2) that it must have developed, even in its earliest stages, from the Anglo-Scottish connection. Neither hypothesis turns out to be correct. This can be shown by investigating the earliest time at which contracts of insurance were being used and also the period just before this time.<sup>15</sup>

Forte then considers *Welwood's Sea Laws* of 1590,<sup>16</sup> which covers bottomry contracts,<sup>17</sup> and also notes that some style books include bottomry and lastly he notes that this apparent ignorance of the topic of insurance by Scots legal authors continued well into the eighteenth century: 'John Erskine of Carnock does not mention insurance in any of his three editions [from 1754, 1757, 1764 respectively] of the *Principles*',<sup>18</sup> although Forte notes in a footnote that insurance is acknowledged in the second edition of Erskine's *Institute of the Law of Scotland* at 3.3.17.<sup>19</sup> But in his survey of the eighteenth century sources Forte appears to have overlooked the treatment of insurance by Bankton, who in Volume I of his *Institutes* of 1751 gives a concise but informative two and a half pages to the subject of insurance,<sup>20</sup> which shows the increasing awareness

<sup>14</sup> Forte, 'Marine Insurance', 395.

<sup>15</sup> *Ibid.*, 398.

<sup>16</sup> W. Welwood, *The Sea-Law of Scotland* (Edinburgh, 1590).

<sup>17</sup> The present author recalls that when attending Forte's lectures on insurance law he took great glee in mentioning 'Bonds of Bottomry' and explaining that the said items were not as risqué as they might at first sound to the modern student, being an obsolete method by which a ship's master could pledge the bottom or keel of the ship as security for an emergency loan.

<sup>18</sup> Forte, 'Marine Insurance', 399.

<sup>19</sup> Erskine, *An Institute of the Law of Scotland* (2nd edn, Edinburgh, 1785), 3.3.17. See Forte, 'Marine Insurance', 399, fn. 37.

<sup>20</sup> Bankton, *An Institute of the Laws of Scotland in Civil Rights* (Edinburgh, 1751), I, XIX, ii. The authority most frequently cited by Bankton is C. Molloy, *De Jure Maritimo et Navali, or a Treatise of Affairs Maritime and of Commerce* (London, 1690).



of insurance among at least some lawyers by the mid-eighteenth century. In the light of the apparent lack of mention of insurance Forte remarks that:

One would expect to find in any economy with a significant maritime sector a number of methods of risk distribution. One would also expect some overlap, that is to say a period, when older, more primitive forms of risk distribution coexist with insurance. The evidence from the legal literature of the seventeenth and mid-eighteenth centuries suggests that this had not yet taken place in Scotland. Indeed, with the single exception of a Scottish appeal to the House of Lords in 1734, where insurance had been effected by a number of Glasgow merchants on a cargo bound from Virginia to Glasgow, possibly with insurers in Bristol, there is no evidence in the legal record of insurance. It is, however, the very presence of such a case which suggests that the legal record is insufficient to determine the existence of insurance in the early eighteenth century. In other words, the absence of insurance in works on Scots law before the mid-eighteenth century does not establish that contracts of insurance were not in existence or even relatively common at an earlier date.<sup>21</sup>

I entirely agree with the remark that absence from the legal record is not proof that insurance was not being used, but strangely later in the article Forte seems to depart from that view.<sup>22</sup> In any case Forte was mistaken in his belief that *Lutwidge v Gray* (1734)<sup>23</sup> was the earliest appearance of insurance in the Scots legal record. It is mentioned earlier in the reports of the Court of Session and also in the reports of the Scottish Admiralty Court.<sup>24</sup> Insurance appears in the legal record in the context of four reported cases on prize (i.e. of the seizure of enemy ships in time of war) in 1673: *Simpson v Ludke*, January 7, 1673,<sup>25</sup> which case comes before the Session again *sub nom*, *Captain contra the Owners of the Fortune of Trailsound [Stralsund]*, July 22, 1673<sup>26</sup> and two other prize cases mention insurance: *The Master of the White Dove v Captain Alexander*

<sup>21</sup> Forte, 'Marine Insurance', 399–400.

<sup>22</sup> Forte, 'Marine Insurance', from 404 onwards.

<sup>23</sup> 1 Pat. 119.

<sup>24</sup> Though the records of the Admiralty Court had not been published when Forte wrote his 1987 article and so were a source that was unavailable to him.

<sup>25</sup> Mor. 11888.

<sup>26</sup> James Dalrymple, first Viscount Stair, *The Decisions of the Lords of Council and Session*, (2 vols, Edinburgh, 1683–1687), vol.2, 218; Mor. 11923.

February 28 1673<sup>27</sup> and *Master of the Golden Falcon v Buchanan* July 17 1673.<sup>28</sup> The significance of this appearance of insurance on the legal record is a topic which I will discuss further below.

Next in 'Marine Insurance' Forte goes on, very usefully, to consider the 1715–1752 correspondence of the Inverness merchant Baillie John Stewart, which includes 'twenty-seven items of correspondence about insurance.'<sup>29</sup> Forte rightly concludes that 'Baillie John Stewart's correspondence is important because it illustrates that the practice of insuring against marine losses was becoming widespread in Scotland in the early years of the eighteenth century.'<sup>30</sup> Forte also observes that it is very noticeable that:

On only one occasion does the Baillie appear to have insured through an Edinburgh merchant, named Sawden, acting as underwriter. On all the other occasions, he instructs his agents or factors in Amsterdam, Rotterdam, Danzig, Bordeaux, and London to arrange insurance coverage on his behalf. This reliance on foreign underwriting, particularly in the Netherlands and in London, suggests a lack of such facilities in Scotland. Indeed, on one occasion, a wholly domestic voyage from Inverness to the West Coast of Scotland was insured in Holland.<sup>31</sup>

The significance of this need for Scots merchants to use foreign underwriters is a point I will return to below but at present we may simply note that this information rightly leads Forte to the conclusion that:<sup>32</sup>

Baillie John Stewart's correspondence is important because it illustrates that the practice of insuring against marine losses was becoming widespread in Scotland in the early years of the eighteenth century.

So far, the present author has entirely agreed with Forte's analysis but where I start to part company with him is in the next section, V (at pages 404–6), where Forte downplays the use of insurance in the fifteenth and sixteenth centuries.<sup>33</sup>

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<sup>27</sup> Mor. 11906.

<sup>28</sup> Mor. 11922.

<sup>29</sup> Forte, 'Marine Insurance', 400.

<sup>30</sup> *Ibid.*, 402.

<sup>31</sup> *Ibid.*, 400.

<sup>32</sup> *Ibid.*, 402.

<sup>33</sup> *Ibid.*, 404–5. Note that here Forte quotes *Ridolphye c. Nunez*.

Although there was a framework of risk distribution techniques available to the sixteenth-century Scottish merchant, none of the methods described above can be described as insurance. Thus, one must tentatively conclude that the contract of insurance was not made by those merchants before at least the very end of the sixteenth century. One difficulty with this conclusion, however, is the fact that marine insurance policies were the subject of litigation in the English Court of Admiralty in the mid-sixteenth century and depicted as being relatively commonplace:

“The use and custome of makynge bills of assurance in the place commonly called Lombard Strete of London, and likewyse in the Burse of Antwerp, and is and tyme out mynde hath byn emongst merchants usinge and frequenting the sayde severall places [...] .”

To suggest that the absence of insurance in Scotland is curious when it was present in England, is to assume that the degree of trade between the two countries was fairly high and also to take the above statement at face value, which, as I hope to show, would be misconceived. A more cogent argument for believing that one should find insurance in Scotland at this time would rely on the international character of mercantile law and the brisk trade conducted between Scotland and the Netherlands. At least for the sixteenth and some part of the seventeenth centuries such an argument would be without substance.

Forte's understanding of the extent of the use of insurance in early modern Europe seems largely to follow that of Violet Barbour's influential 1929 study, 'Marine risks and insurance in the seventeenth century',<sup>34</sup> which he cites in 'Marine Insurance':<sup>35</sup>

Violet Barbour's study of marine insurance during the seventeenth century suggests that merchants were not yet fully convinced by insurance and tended only to insure when there was a real danger of war.

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<sup>34</sup> V. Barbour, 'Marine risks and insurance in the seventeenth century', *Journal of Economic and Business History*, [1929], 561-596.

<sup>35</sup> Forte, 'Marine Insurance', 405. Forte also cites this article in footnotes, e.g. fnn. 70, 74 and 75.

I think it is likely that Barbour's very influential work on insurance understandably formed a conceptual 'lens' through which Forte viewed the empirical evidence that he considered, but unfortunately that lens gave Forte a very distorted view of the facts, as has been shown by more recent scholarship. Barbour's views against the extensive use of insurance in northern Europe in the sixteenth and seventeenth centuries have been challenged in recent years: a more recent study by Henry de Groote argues that marine insurance was relatively common in Antwerp by the 1560s<sup>36</sup> and this view is shared by Hilario Casado Alonso<sup>37</sup> showing that insurance was in use in Bruges at the same period. Sabine Go, in chapter 3 of her magisterial *Marine Insurance in the Netherlands 1600–1870: A comparative institutional Approach*, shows that insurance was a major industry in the Netherlands from the mid-sixteenth century:

The Amsterdam insurance market, the dominant market in Europe for the largest part of the seventeenth and eighteenth centuries, consisted of a variety of individuals coming together at the Amsterdam Exchange: merchants and shipowners sought insurance coverage for their transports and vessels, underwriters offered their excess capital to write the necessary sums. Brokers facilitated the transactions by bringing together the two – or more – parties.<sup>38</sup>

Go notes that by 1578 the insurance brokers in Amsterdam were so numerous as to have established their own guild,<sup>39</sup> and later proceeds to describe the massive scale of insurance broking in Amsterdam around 1600:

At the beginning of the seventeenth century, the Brokers' Guild included almost 290 members. It is estimated that about twice as many unauthorised brokers were by then active in Amsterdam, which indicates the magnitude of the problem of unaccredited broking. It

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<sup>36</sup> Henry L. V De Groote, *De zeeassurantie te Antwerpen en te Brugge in de zestiende eeuw* (Antwerp, 1975).

<sup>37</sup> Hilario Casado Alonso, 'Los seguros marítimos de Burgos. Observatorio del comercio internacional portugués en el siglo XVI', *Revista da Faculdade de Letras. História*, Porto, III Série, vol. 4, 2003, 213–42.

<sup>38</sup> Sabine Go, *Marine Insurance in the Netherlands 1600–1870: A comparative institutional Approach* (Amsterdam, 2009), 68.

<sup>39</sup> Go, *Marine Insurance in the Netherlands 1600–1870 : A comparative institutional Approach*, 76.

has been suggested that if the municipality had increased the number of authorised brokers drastically, or had even doubled their number, it would have been easier to deal with the remaining outside brokers. The *Heren van de Gerechte*, however, chose to increase the number of brokers only slightly: the total number of accredited brokers was set at 360, of whom ten were to be of Jewish descent. The number of accredited brokers most probably reached its peak in the first quarter of the seventeenth century whereas the number of unauthorised brokers continued to increase [...]. In 1700 there were officially 395 sworn brokers, of whom approximately 195 were either sick, retired or inactive for some other reason. At that time it was estimated that 700 to 800 unauthorised brokers were active.<sup>40</sup>

A collection of essays published in late 2015, *Marine Insurance: Origins and Institutions, 1300–1850*, edited by Adrian Leonard,<sup>41</sup> confirms the modern scholarly understanding of instance as a flourishing business throughout Europe by the sixteenth century. But whatever the actual percentage of goods and ships which were insured at any given time (and because it was an extra expense, it may have been quite low) the point to stress is that I do not believe that insurance would have been used any less frequently by Scots merchants than by English merchants, Dutch merchants or those of other nationalities, for reasons which I will explore below.

## (2) The Term ‘Assurance’

Under what I believe to be the influence of Barbour’s views Forte consistently underplays the evidence which he himself finds for the existence of insurance, such as the existence of insurance litigation in the English Admiralty Court cited above. In a similar vein Forte notes that ‘according to Lodovico Guicciardini,<sup>42</sup> an Italian resident of Antwerp about the middle of the sixteenth century, ‘mutual assurance’ was practised by Dutch merchants at that time’ but Forte is not convinced that this ‘assurance’ is the same thing as modern ‘insurance’:

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<sup>40</sup> Ibid., 80.

<sup>41</sup> Adrian Leonard (ed.), *Marine Insurance: Origins and Institutions, 1300–1850*, (London, 2016) (though actually published late 2015).

<sup>42</sup> Lodovico Guicciardini, *Descrittione di tutti i Paesi Bassi* (Antwerp, 1581).

It is by no means clear, however, that this expression should be taken to refer to the modern contract of insurance. It is far more likely to refer to the practice of dividing property in a ship into shares, or splitting cargoes among several vessels.<sup>43</sup>

With all due respect to the late and learned professor, I am afraid that Forte is quite simply wrong to assert that ‘assurance’ did not mean ‘insurance’ and there is considerable evidence that the terms were used as synonyms even in the mid-sixteenth century. Out of the nine insurance cases or example policies reported *Select Pleas in the Court of Admiralty. Volume II, the High Court of Admiralty (A.D. 1547–1602)*<sup>44</sup> the first eight use the terms ‘assurance’ or ‘assurer’ (in various spellings) and it is only in the ninth case, which is a style policy which is a translation of a Dutch policy, that we see the term ‘insurance’ being used. If we consider the evidence in more detail, the oldest English policy reported in *Select Pleas in the Court of Admiralty*, found in the report of *Broke c. Maynard* dated September 20, 1547,<sup>45</sup> set forth in both Italian and English, uses the term ‘assured’ and this term, like most other insurance terms of art, is clearly simply an Anglicisation of an Italian word, in this case *assicurare*, as can be seen from the comparison of the Italian text, which was the actual contract, and the contemporary English translation which accompanies it. See also the policy dated November 1548, mentioned in the case of *Calvalchant c. Maynard*,<sup>46</sup> which uses the terms ‘*assiquare*’ and ‘assured’ respectively. But these policies do not set out extensively what is meant by ‘assurante’. For that we need to go to the slightly later case of *Ridolphye c. Nunez*, which contains a policy dated March 1562:<sup>47</sup>

The use and custome of makynge bylls of assuraunce in the place commonly called Lumbard Strete of London, and likewyse in the Burse of Antwerpe; is and tyme out of mynde hath byn emongst merchants usinge and frequentinge the sayde severall places, and assuraunces used and observed, that the partie, in whose name the bill of assuraunce is made, ys not bounde to specifie in the same whether the good any mysfortune chaunce to the same goodes in such sort assuryd, the sayde

<sup>43</sup> Forte, ‘Marine Insurance’, 405.

<sup>44</sup> Reginald G. Marsden (ed.), *Select Pleas in the Court of Admiralty* (London, 1897, Selden Society vol. 11), vol. II, 45–59 (hereafter cited as *Select Pleas in the Court of Admiralty*).

<sup>45</sup> *Select Pleas in the Court of Admiralty*, 47.

<sup>46</sup> *Select Pleas in the Court of Admiralty*, 45.

<sup>47</sup> *Select Pleas in the Court of Admiralty*, 52–3.

partie, in whose name the byll of assuraunce ys made, maye demande and oughte to recover them againste the assurers by vertue of the sayd custome as his owne propre gooddes, although they pertheyne to some other [...] And further he doothe alledge that commonly merchaunts, by all the tyme above declared, have and doo cause ther gooddes to be assured from porte to porte by ther factors and other ther frends having noo interest or propertie in the gooddes assured, and yet thassuraunce goodd and thassurers bounde tanswere the losse of such gooddes yf any happen.

Despite the archaic spelling this shows that ‘assurance’ in 1562 meant ‘insurance’ in the modern sense. Likewise, if we look at the example of the ‘Dutch Policy’ of 1638 printed in Seldon,<sup>48</sup> it is interesting to note that although the largely pre-printed text of the body of the document consistently uses terms such as ‘insure’, ‘insuroance’ and ‘insurors’, at the very end of the document, where the underwriter accepts liability by subscribing the document, he writes ‘I Leonard van Langenberch am content with this assurance’.

Further confirmation that ‘assurance’ was the usual term for ‘insurance’ in the sixteenth century can be seen in the fact that the City of London created an Assurance Chamber consisting of seven merchants in 1577 to hear insurance disputes<sup>49</sup> and a code of insurance law, *The Booke of Orders of Assurances*, was compiled to help this court in its deliberations.<sup>50</sup> And at around the same time in the Netherlands, ‘the municipal authorities of Amsterdam issued their first insurance ordinance in 1598. One of the most important features of this ordinance constituted the initiation of a Chamber of Insurance’,<sup>51</sup> which I shall refer to by its Dutch style of *Kammer van Assurantie*. The term ‘assurance’ was also used in 1601 when by Act of Parliament the Court of Assurances was established to deal with insurance cases (discussed further below).<sup>52</sup>

<sup>48</sup> *Select Pleas in the Court of Admiralty*, 57–59.

<sup>49</sup> For a discussion see D. Ibbetson, ‘Law and Custom: Insurance in Sixteenth-Century England’, *The Journal of Legal History*, 29 (2008), 291–307, 297–298.

<sup>50</sup> For a full account of this attempt to codify the principles of insurance law see, G. Rossi, ‘The booke of orders of assurances: a civil law code in 16th century London’, *Maastricht Journal of European and Comparative Law*, 19 (2012), 240–61 (hereafter cited as Rossi, ‘The booke’).

<sup>51</sup> Sabine Go, *Marine Insurance in the Netherlands 1600–1870: A comparative institutional Approach* (Amsterdam, 2009), 95 (hereafter cited as Go, *Marine Insurance*).

<sup>52</sup> 43 Elizabeth (1601), c.12. For a discussion see Ibbetson, ‘Law and Custom’, 305–7.

Another illustration of the identity of meaning between insurance and assurance can be found in 1592 when another Italian merchant writing about insurance in London is clearly writing about insurance in its modern form: 'there would be no lack of insurers, but in case of damages it is painful to try and collect the claim, and, as the in faith practice is not suitable for us, we advise you to insure there [in Venice] and spend rather one or two percent more and feel sure that you can recover in case of disaster.'<sup>53</sup>

All of the above evidence shows that the terms 'assurance' and 'insurance' were as interchangeable in the seventeenth century as they have been in subsequent centuries and Forte was wrong to argue they could have meant something else. Indeed, by the late sixteenth century insurance policies in England had largely assumed their modern form as Rossi remarks:<sup>54</sup>

But if we move on a few decades and take a London policy of the late 16th century, we shall see that its wording is almost identical to a twentieth century Lloyd's insurance policy.

Having argued that 'assurance' did not necessarily mean 'insurance' in the sixteenth century, Forte then goes on to argue that insurance was not much used in England or Scotland in the seventeenth century because:<sup>55</sup>

For example, in an essay published in 1644 on conducting foreign trade, Thomas Mun enumerates *The Qualities which are required in a perfect Merchant of Foreign Trade* and enjoins him to "ensure his adventures" and know about the laws of insurance both domestic and foreign. The character of this and other texts is hortatory and suggests that the value of insurance was not as well appreciated as it ought to be. So too, though Pufendorf mentions insurance as does Grotius, the treatment is brief. It is true that the latter in his work on the private law of Holland, the *Inleidinge*, gave a more detailed account of the law but it was still largely descriptive of the Ordinances and the local *keuren*. No cases or accounts of disputes are noted. The impression conveyed is reminiscent of the treatment of the topic by the mid-eighteenth century Scottish

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<sup>53</sup> Letter from Bartolomeo Corsini to Stefano Patti, 29 April 1592, quoted by G. Stefani, *Insurance in Venice from the Origins to the End of the Serenissima* (Trieste, 1958), 104.

<sup>54</sup> Rossi, 'The booke', 241.

<sup>55</sup> Forte, 'Marine Insurance', 405–6.



writers; there is a new topic and the scholar must note its existence but he cannot say much more.

To take the fact that a text is 'hortatory' as evidence that this 'suggests that the value of insurance was not as well appreciated as it ought to be' seems to the present author to be a very strained interpretation. If a modern textbook enjoins that contracts for land must be in writing, that is not evidence that paper contracts are unusual for land, quite the contrary. As for the cursory treatment of insurance by Pufendorf and Grotius, I will consider that issue further below; but it is certainly evidence of the *existence* of insurance rather than its *non-existence*. Forte then quotes a 1941 article by Christiansen that 'the contemporary Dutch record reveals only "a few notarial entries from about 1600 and a couple of policies from 1637 and 1672"<sup>56</sup> to argue against the common use of insurance even in the Netherlands, which, given the prominence of the Netherlands in insurance, is a very strange line to take. But in fact insurance was a booming business in the seventeenth century Netherlands: 'In 1635 a contemporary estimated the annual total of insurance premiums registered in the Amsterdam Chamber at 434,700 guilders.'<sup>57</sup> Sabine Go, in her recent monograph *Marine Insurance in the Netherlands 1600-1870*, gives a vivid account of the thriving insurance business in Amsterdam in the seventeenth and eighteenth centuries.<sup>58</sup>

A little later Forte then himself notes a Scottish counter-example, which evinces to the use of insurance:<sup>59</sup>

The earliest evidence thus far for the use of insurance by a Scottish merchant is a reference in the Edinburgh Dean of Guilt (*sic*) Court Records of 7th March 1621. The record narrates that William Cochrane who had chartered the Marie of Leith, to sail to Plymouth and from there to Cadiz, had insured the vessel for £600 sterling with Samuel Forte in London.

To my eyes this is clear evidence of the use of insurance by Scots merchants and it is only the poor state of our records which hides the extent

<sup>56</sup> Ibid., 407, quoting Aksel Christiansen, *Dutch Trade to the Baltic about 1600: Studies in Sound Toll Register and Dutch Shipping Records* (Copenhagen, 1941), 173.

<sup>57</sup> Jan de Vries & Ad van der Woude, *The First Modern Economy: Success, Failure, and Perseverance of the Dutch Economy, 1500-1815* (Cambridge and New York, 1997), 137.

<sup>58</sup> Go, *Marine Insurance in the Netherlands*, ch. 3.

<sup>59</sup> Forte, 'Marine Insurance', 407.

of that use. But again Forte sees this as evidence against the use of insurance in Scotland that: 'In sum, it appears that the use of marine insurance in Scotland was very much in its embryonic phase during the seventeenth century and did not really come into widespread use much before the beginning of the following century'.<sup>60</sup> But if we were to follow that logic, even on the evidence cited by Forte, it would follow that insurance was also in an embryonic phase in the Netherlands and England, which it most certainly was not, for reasons partially given above and for further reasons which I will give below. On the basis of the evidence considered so far in his article Forte argues that:<sup>61</sup>

It seems that insurance was not in use prior to 1600 and was fairly well established by 1715. This leaves a grey period, 1600–1700 or so, in which one finds only a few isolated references to insurance. There is some evidence from this grey period which indicates that insurance cannot have then been widely employed by Scottish merchants.

The further evidence which Forte then advances for the infrequent use of insurance by Scottish merchants in the seventeenth century is that of Scottish notarial protocol books in which 'although protests are in fact found in some sixteenth century protocol books, they are not numerous, and do not provide any evidence for the use of insurance'.<sup>62</sup> Forte understands the reference to protest and affidavits as mainly evidential procedures associated with non-insurance risks such as general average. But the fact that the protests do not specially mention insurance does not seem to me to be evidence against their use in insurance claims. After all, a protest is a purely evidential device to establish the facts and there was no need to state what purposes that evidence was to be used for, and protests may have been used just as much in an insurance case as in a general average case. Even the most unimaginative Scots notary would surely have been capable of replacing the words 'general average' in a style protest with the word 'insurance' if needed, and so would hardly have needed a separate style to copy out. That styles for actual insurance policies are absent from Scottish notarial protocol books of the seventeenth and indeed eighteenth centuries<sup>63</sup> *is only evidence that there were no underwriters based in Scotland,*

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<sup>60</sup> Ibid..

<sup>61</sup> Ibid., 407–8.

<sup>62</sup> Ibid., 409.

<sup>63</sup> M. C. Meston and A. D. M. Forte (eds), *The Aberdeen Style Book, 1722* (Stair Society

*not that Scottish merchants were not making use of insurance*, insurance they could easily obtain abroad in London or Antwerp or elsewhere.

Lastly, but not least, we may note the comparatively small size of the Scots merchant fleet in 1656, admittedly in the wake of General Monck's devastation of the Scots ports and an especially severe storm which wrecked many vessels. A report by Cromwell's agent, Thomas Tucker, estimated the number of Scottish vessels as between 139 and 143. With such a comparatively small fleet it follows that, even if policies were regularly taken out by Scots merchants, there would be a comparatively small number of them.<sup>64</sup>

Now it is always difficult to argue anything from an absence of evidence, but it seems to the present author that Forte was too quick to dismiss the possibility that insurance was widely used in seventeenth century Scotland (or indeed the rest of Europe). There are three arguments that I wish to advance for the assertion that it is likely that insurance was in widespread use in the seventeenth century and even earlier than that. These are: the example of England, economic utility and Forte's over-reliance on legal sources.

### **The Example of Insurance in England: Insurance without the Benefit of the Common Law**

If we consider the example of England,<sup>65</sup> it is clear that absence from the courts' records is no proof of the absence of the use of insurance where there is no doubt that insurance had been in use to some extent even in the fifteenth century. Insurance as a concept seems to have been introduced into English commerce by the Germanic merchants of the Steelyard<sup>66</sup> and the

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47, Edinburgh, 2000).

<sup>64</sup> See Eric J. Graham, *A Maritime History of Scotland 1650-1790* (East Linton, East Lothian, 2002), 13 for a table of Tucker's results.

<sup>65</sup> For an excellent concise overview of the history of English insurance see, Adrian Leonard, 'Gresham and Defoe (underwriters): The Origins of London Marine Insurance', [http://www.gresham.ac.uk/sites/default/files/13mar14adrianleonard\\_greshamanddefoe.docx](http://www.gresham.ac.uk/sites/default/files/13mar14adrianleonard_greshamanddefoe.docx), accessed 11 August 2015. A more detailed version of this paper was published as A. Leonard, 'Contingent commitment: The development of English marine insurance in the context of New Institutional Economics 1577-1720' in D'Maris Coffman, Adrian Leonard and Larry Neal (eds), *Questioning Credible Commitment: Perspectives on the Rise of Financial Capitalism* (New York, 2013), but for convenience I will quote from the online paper.

<sup>66</sup> F. Martin, *The History of Lloyd's and of Marine Insurance in Great Britain* (London, 1876), ch. 1.

Italian merchants<sup>67</sup> of Lombardy,<sup>68</sup> who gave their name to the eponymous street,<sup>69</sup> which is synonymous with insurance.<sup>70</sup> The Germans seem to have insured the northern routes and the Italians the southern.<sup>71</sup> Insurance policies were being granted by Italian merchants in London by the early fifteenth century.<sup>72</sup>

The prize for the oldest surviving record yet found must go to an entry in the Plea Rolls of the City of London. In 1426, Alexander Ferrantyn, a Florentine merchant resident in London, took his insurance dispute to the Lord Mayor and Aldermen. He had purchased insurance from some other resident Italians.

Ferrantyn's case was heard in the Guildhall. He was refused a claim for his vessel, the "Seint Anne of London", which was carrying a cargo of wine to England from Bordeaux. Both the vessel and the cargo were covered for £250 by seventeen Italian merchants resident in London. The assets had been seized by Spaniards, but Ferrantyn, through

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<sup>67</sup> Ibid., ch. 2.

<sup>68</sup> Modern scholars generally assert the importance of the Italian connection and seldom mention the possible Hanseatic influence. But it would seem that, given the Hanse was based on seaborne trade, they would quickly have seen the advantages of marine insurance.

<sup>69</sup> Lombard Street took its name when King Edward I (1272–1307) made a grant to goldsmiths from the part of northern Italy known as Lombardy and subsequently Italian merchants in that area specialised in offering insurance. Although the Italians departed at the end of the sixteenth century the connection with insurance was renewed in the seventeenth century when Lloyd's Coffee House, which grew into Lloyd's of London, moved to Lombard Street in 1691 where it remained until 1774.

<sup>70</sup> Such was the fame of Lombard Street that from the earliest of times insurance policies made reference to it. In *Brooke v. Maynard* (1547) [*Select Pleas in the Court of Admiralty*, 47–48] the policy states: 'And the assuerers be content that this wrytinge be of as moch forse and strength as the best that was made or myghte be made in this Lombardestreet of London according to the order and customes wherof'. There is a similar reference to Lombard Street in *Ridolphy v. Nunex* (1562) [see extract quoted above] and such references continued to be a feature of English insurance policies in succeeding centuries being incorporated in the stated Lloyd's policy and given the legislative *imprimatur* by being included in the style insurance policy contained in the Appendix to the Marine Insurance Act 1906, c.41.

<sup>71</sup> 'In the thirteen and fourteen hundreds, Italians were the masters of world trade. The Germans of the Hanseatic league controlled the lucrative business of bringing goods from the Baltic Sea region to the rest of Europe, but it was Italian merchants, with their Mediterranean access to the luxury goods from Asia and North Africa, who set the standards.' Leonard, 'Gresham and Defoe (underwriters): The Origins of London Marine Insurance', 1 (see footnote 65).

<sup>72</sup> Ibid., 3.

an agent, had managed to buy-back the vessel and cargo, which the privateers – the licensed pirates of this age of plunder – had sold to Flemish merchants.

The policy specified that the “order, manner, and custom of the Florentines” was to govern the contract. Ferrantyn asked his insurers to pay up, citing “the law merchant”, and the clause about Florentine custom. Clearly, in these early days of London insurance, accepted local practice was undeveloped, or carried little weight [...]

Ferrantyn’s insurance-buying was not isolated. Filippo Borromei & Co. of Bruges and London was just one bank of many in the extensive network of the eponymous Italian merchant-banking family. Its surviving ledgers show that the London branch of the bank made regular and routine insurance transactions in London in the 1430s. For example, on 10 January 1438, a clerk in the London office recorded a transaction with its parent, the Bruges bank, as follows: “credited to their conto a parte [their account], for cloth, for 50 pieces of Essex streits [a broadcloth one yard wide], bought for £st 31.5.0; insurance at £st 1.16.8”.

Leonard observes that ‘It is safe to conclude from this evidence that the community of Italian merchants in London insured regularly in the early fifteenth century, and did so primarily amongst themselves. They comprised London’s earliest generations of merchant-insurers, and their practice was typical of its time.’<sup>73</sup> So insurance was thriving in fifteenth-century London and continued to do so in the sixteenth century. According to Martin<sup>74</sup> in a work written in 1400 by Uzzano of Florence, *The Treaty of Commerce*, there are several mentions of insurances effected between London and Florence and there is apparently a document of 1512 in the Venetian archives which refers incidentally to insurances effected in London by the Venetians. *Select Pleas in the Court of Admiralty* discloses several insurance cases which came before the Admiralty Court. The earliest insurance policy in an English court record is found in *Brooke v. Maynard* (1547).<sup>75</sup> This policy was written in Italian, with an accompanying English translation, but the party who was insured, one John Brook, and the underwriters, William Maynard and Thomas Lodge, were

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<sup>73</sup> Ibid., 4.

<sup>74</sup> F. Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, (London 1876), 27.

<sup>75</sup> *Select Pleas in the Court of Admiralty*, 47–8.

clearly English. In a case noted by Forte himself, *Ridolphye v. Nunez* (1562),<sup>76</sup> insurance is referred to as being ‘is and tyme out of mind’ in use, which statement makes it clear that insurance is no novelty, but Forte is rather dismissive of this (see quote above).<sup>77</sup> We also know from the letters of Sir Thomas Gresham<sup>78</sup> that he was insuring goods shipped to England in Hamburg. In 1566 the Royal Exchange was opened to facilitate insurance business, which seems to have marked the move of insurance from Italian into English hands. As regards the numbers involved in insurance at the time Leonard estimates that:<sup>79</sup>

Together the petitions tell us that in the 1570s roughly thirty brokers and sixteen notaries operated in London’s marine insurance market. The former group facilitated the introduction and interaction between buyers and sellers of insurance, and managed financial relationships. The latter drew up policies, kept registers of their details, and managed client monies. However, merchants and their insurers sometimes dealt directly with one another, without the intermediation of third parties. In many ways, the division of responsibilities in the market, although it was smaller, appears to have been much the same then as it is today.

Moreover, insurance is so important a matter that the English Council considered making regulations for it in the 1570s. In January 1575 Richard Candeler was granted a patent giving Candeler the exclusive right to register insurance policies in what became known as the Office of Assurances. In 1577 the City of London established a court, the Chamber of Assurance, to deal with insurance disputes.<sup>80</sup> The Chamber does not seem to have been a success and so in 1601 an Act of Parliament, now known as the Assurance Act, was passed,<sup>81</sup> creating a court specifically for dealing with insurance disputes. The 1601 Act was passed only four years after the closure of the Steelyard by the English Crown and according to Martin was modelled on the insurance legislation of the Hanseatic league,<sup>82</sup> although presumably the

<sup>76</sup> See above, *Select Pleas in the Court of Admiralty*, 52–3.

<sup>77</sup> See text accompanying notes 33–44 above.

<sup>78</sup> Quoted in Martin, *ibid*, 17

<sup>79</sup> Leonard, ‘Gresham and Defoe (underwriters): The Origins of London Marine Insurance’, 6.

<sup>80</sup> For a discussion see Ibbetson, ‘Law and Custom’, 295–9

<sup>81</sup> 43 Elizabeth (1601), c.12.

<sup>82</sup> F. Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain* (London, 1876),

establishment in 1598 of the *Kammer van Assurantie* in Amsterdam was also a big influence.<sup>83</sup> Ibbetson has recently argued that a ‘Crisis of the 1590s’ arising out of a life assurance case, *Adderley v Symonds* (1599–1601), may have been the immediate impetus for legislative reform on the grounds that the Chamber of Assurance was ineffective.<sup>84</sup> In any case I submit that the English Parliament would not have gone to the trouble of enacting a statute unless insurance was both common and commercially very important in a way Forte seemed to underestimate. Moreover, the preamble of the 1601 Act is very significant as it provides us with a very clear definition of insurance and shows that the Elizabethan conception thereof had very few differences from conceptions of modern insurance:

(2) And whereas it hath been time out of mind an usage amongst merchants, both of this realm and of foreign nations, when they make any great adventure, (especially into remote parts) to give some consideration of money to other persons (which commonly are in no small number) to have from them assurance made of their goods, merchandizes, ships and things adventured, or some part thereof, at such rates and in such sort as the parties assurers and the parties assured can agree, which course of dealing is commonly termed a policy of assurance; (3) by means of which policies of assurance it cometh to pass upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely [...]

This statutory preamble is fascinating for the way in which clause (2) stresses that insurance is *long established* and for the excellent account given by clause (3) of the reasons why merchants would wish to use insurance as a risk man-

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14. On the Steelyard, see also A. Wijffels, ‘Legal authorities as instruments of conflict management: the long endgame of Anglo-Hanseatic relations (1474–1603)’, in Mark Godfrey (ed.), *Law and Authority in British Legal History, 1200–1900*, (forthcoming, Cambridge, 2016).

<sup>83</sup> The regulations governing the *Kammer* were passed in 1598 and the *Kammer* was formally established in 1612 but it seems to have been in operation from the earlier date. See Go, Sabine, *Marine Insurance in the Netherlands, 1600–1870*, 97–8.

<sup>84</sup> For a brief account see Ibbetson, ‘Law and Custom’, 303–6. For a fuller account see F. Martin, *The History of Lloyd’s and of Marine Insurance in Great Britain*, ch. 3.

agement tool. Admittedly, the insurance court did not flourish for a variety of reasons,<sup>85</sup> of which the restriction of its jurisdiction to registered insurance policies, the competing claims of the Common law courts<sup>86</sup> and the appeal of arbitration to merchants were probably the most important. Ibbetson in his recent review of the role of the Chamber and Court of Assurance, 'Law and Custom: Insurance in Sixteenth-Century England',<sup>87</sup> stresses the importance of the existence in the Common Law courts of the alternative remedy of *assumpsit*.<sup>88</sup>

The principal hole in the legislation was that it did not fully prevent litigation at common law independent of the Court of Assurances. It had, it is true, gone a step further than the settlement of the 1570s in giving an effective exclusive jurisdiction to the court in actions arising out of registered policies; but there was no formal requirement of registration, and unregistered policies could be sued on elsewhere. This may not have been a problem at first, though the point was immediately raised in litigation. The common law action of *assumpsit* was still available, but it had the very considerable disadvantage that the claim might only succeed if the defendant insurer was alive. Within a few years, however, the rules of *assumpsit* had changed, allowing claims to be brought against executors. *Assumpsit* still had

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<sup>85</sup> 'The failure of this special court seems to have discouraged any further attempts to better an almost intolerable situation, for the hundred and fifty years intervening between the enactment of 43 Eliz. and the appointment of Mansfield as Chief Justice of the Court of King's Bench are almost a barren waste as far as the history of the development of insurance law is concerned. The common law judges did not grow in wisdom or in the favor of those having insurance causes. The merchants and underwriters continued to submit their disputes to arbitrators and commissions, sedulously avoiding the common law courts. It is said that, all told, the reported insurance cases determined at law prior to Lord Mansfield's time did not exceed sixty in number, nor among these can there be found one that clearly establishes a great principle or that can be fairly considered a leading case.' W. R. Vance, 'The Early History of Insurance Law', *Columbia Law Review*, 8 (1908), 1–17, 15–16.

<sup>86</sup> 'Thus a commercial tribunal of the continental type was for the first time established in England by statutory authority. But it suffered from two grave defects. Firstly, its jurisdiction was confined to policies registered in the London Office of Insurances, so that it did not extend to insurances made in other sea port towns. Secondly, it did not exclude specifically the jurisdiction of the courts of common law and the Court of Admiralty. It is possible that, if the King and Council had continued to exercise the control over the courts which they exercised in the Tudor period, these defects might have been remedied.' W. S. Holdsworth, 'The Early History of the Contract of Insurance', *Columbia Law Review*, 17 (1917), 85–113, 103.

<sup>87</sup> Ibbetson, 'Law and Custom' 291–307.

<sup>88</sup> *Ibid.*, 306.



its disadvantages – a separate action had to be brought against each insurer; pleadings were more formal; the jury, as decision-maker, might have little or no understanding of merchant practices – but once the liability of executors had been established *assumpsit* was a more potent remedy than it had been before. Charles Molloy, writing in the second half of the seventeenth century, could point clearly to the choice between registering a policy and going to the Court of Assurances in the event of any dispute, and not registering it and going to common law.

But, clearly even developing the remedy of *assumpsit* was not attractive enough to merchants to overcome the manifest disadvantages of the Common Law courts, as in fact the insurance disputes went to arbitration for resolution. For although insurance flourished in England, or more especially London, in the late seventeenth and early eighteenth centuries, it barely appears in the law reports. Fifoot<sup>89</sup> can find only eight cases on marine insurance for the period 1689–1712 in the first two volumes of Salkeld<sup>90</sup> and a further forty for the period from 1690 to 1750;<sup>91</sup> and yet by contrast Pepys in his *Diaries*<sup>92</sup>, which cover the period from 1660 until 1669, makes several references to insurance, some as an underwriter<sup>93</sup> and once when he attends an insurance case in at the King's Bench for the entertainment value<sup>94</sup> and so, *mutatis mutandis*, I would argue is the case in Scotland: the absence of insurance from the courts does not prove that insurance was not being widely used.

### Economic Utility: The Need For Insurance

To the present author it is simply not credible that Scottish merchants from the late sixteenth century onwards did not use insurance as widely as the English, the Dutch or the other trading nations of Europe. The *advantage* in spreading risk through insurance would have been instantly obvious to hard-headed businessmen, but it is quite likely that the *supply*, i.e. the presence of wealthy men willing to act as underwriters, could at first only be found abroad, especially in London and Amsterdam (see further discussion on this point below) where there was a sufficient concentration of capital. Although Lord

<sup>89</sup> C. H. S. Fifoot, *Lord Mansfield*, (Oxford, 1936), 13.

<sup>90</sup> *Reports of Cases Adjudged in the Court of King's Bench 1689–1712* (London, 1717–1718).

<sup>91</sup> *Ibid.*

<sup>92</sup> Published in numerous editions and readily available online; see, for example, <http://www.pepysdiary.com/diary/>, accessed 16 December 2015.

<sup>93</sup> See entry for 23 November 1663.

<sup>94</sup> See entry 1 December 1663.

Hailes stated in the 1774 case of *Stevens v Douglas*<sup>95</sup> that Scotland was in ‘the helpless infancy of commerce’, we must be careful to understand what he meant by ‘commerce’. In its most basic meaning commerce means trade and shipping, but even in the eighteenth century Scottish trade and shipping were by no means in their infancy. The inhabitants of Scotland have been trading by sea for centuries, indeed at least since the Bronze Age, and in the Middle Ages and early modern period Scotland had flourishing sea trade with England, Europe and eventually the Americas and other parts of the world. On the other hand, if by ‘commerce’ we mean ‘industry’, i.e. manufacturing, then as matter of fact there can be no doubt that industrial commerce in late-eighteenth century Scotland was in its infancy, but the bairn was growing up fast as the industrial revolution took hold in Scotland. The late-eighteenth century saw the industrial revolution taking effect in Scotland and with this boom in industry there would have been a further increase in commerce as manufacturers in the pre-steam age had to import and export all their goods and materials by sea. Indeed, the seaborne trade grew in advance of the industrial revolution on account of the boom in the tobacco and sugar trade.<sup>96</sup> ‘Foreign trade, especially the Atlantic sector in general and Glasgow commerce in particular, experienced precocious growth from the 1740s.’<sup>97</sup> This increase in shipping would have resulted in an increase in the demand for insurance, but the need for insurance had long pre-dated this period, as the need flows from the inherently great risks of travel and trade by sea: storm, weather, war, piracy etc.. This need was made all the more acute in the early modern period when merchants were personally liable for their debts in the way few modern businessmen are today, sheltered from liability as they usually are by the corporate veil. That sixteenth and seventeenth century Scottish merchants would have known about insurance cannot be doubted given that, by definition as international traders, they were in constant contact and conversation with the merchants of London, the Low Countries, the Baltic and the Mediterranean: areas where insurance was long in use. Indeed in the Amsterdam Market they would have encountered insurance and underwriters all the time, due to the physical layout of central Amsterdam, where the *Kammer*

<sup>95</sup> (1774) Mor. 7096; Fol. Dic., III, 328; Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791* (Edinburgh, 1826), 16 December 1774, 622, 622.

<sup>96</sup> See T. M. Devine, *Scotland's Empire 1600–1815* (London, 2003) chs, 3, 4 and 5 for a concise overview.

<sup>97</sup> T. M. Devine, *Exploring the Scottish Past: Themes in the History of Scottish Society* (East Linton, East Lothian, 1995), ch.7 (‘The Making of Industrial and Urban Society: Scotland 1780–1840’), 107.

*van Assurantie*, the body established in 1598<sup>98</sup> to register insurance policies and provide a tribunal to deal with Amsterdam's insurance disputes,

exercised its jurisdiction in the *Stadhuys* within a stone's throw of the other great institution on the Dam, the Bourse. The latter, established in 1611, grew in prestige and flourished in commercial dominance. During the allotted hours of business, dealers found their customary places under the arcades, or near one of the forty-six numbered pillars [...] The prestigious *Heeren Assuradeurs*<sup>99</sup> appeared at three named locations:

- (a) In the north-east arcade between pillars 4 and 5, alongside dealers in bullion, tobacco and the West Indian Trade.
- (b) In the centre courtyard at the level on one side of pillar 8 and on the other of 40, close to the groups of ship-brokers or cargadors and the merchants dealing with Hamburg/Bremen, France Archangel, and whaling.
- (c) In the north-west arcade between pillars 43 and 44, next to the merchants concerned with Norway and part of the Baltic – Riga, Reval, Lubel, Courlan.<sup>100</sup>

Spooner mentions that in 1621 the *Heeren Assuradeurs* offered regular quotations for insurance policies for ten destinations, which had increased to twenty-one destinations one hundred years later.<sup>101</sup> So in their regular visits to the Bourse to do a deal to buy and sell cargoes, Scottish merchants would have encountered insurance and underwriters on a regular basis. Another possible source of knowledge of insurance among Scottish merchants was the practice of sending young Scots merchants to the Netherlands to study at an early form of commercial college: 'In the later seventeenth century Scots enrolled in mercantile "school" in the great Dutch commercial centres of Amsterdam,

<sup>98</sup> The regulations governing the *Kammer van Assurantie* were passed in 1598 and the *Kammer* was formally established in 1612, but it seems to have been in operation from the earlier date. See Go, *Marine Insurance in the Netherlands*, 97–8.

<sup>99</sup> These were sworn dealers in insurance. They frequented the Bourse in order to obtain business. See Jan de Vries & Ad van der Woude, *The First Modern Economy: Success, Failure, and Perseverance of the Dutch Economy, 1500–1815* (Cambridge and New York, 1997), 137.

<sup>100</sup> F. C. Spooner, *Risks at Sea: Amsterdam Insurance and Maritime Europe, 1766–1780* (Cambridge and New York, 1983), 18–19.

<sup>101</sup> *Ibid.*, 19.

Rotterdam and Dort where the arts of cyphering, accounting and languages were taught.<sup>102</sup> It is hard to believe that insurance was not also on the syllabus at these mercantile schools.<sup>103</sup> In 1682 a Scottish merchant in London, John Dunlop, pressed his bother William (who had just completed his training 'in cyphering, writing and book holding' in Rotterdam) 'to secure personal insurance against ransom before sailing for Venice via Cadiz.'<sup>104</sup> This indicates an awareness of the benefits of insurance by a Scots merchant, albeit one based in London, which I believe would have been the norm.

Of course there were other ways of spreading risk: one could split one's cargo over more than one ship; one could enter into a partnership or joint adventure for a voyage with other merchants; and, as regards the ship itself, one could split the ownership into 64 shares<sup>105</sup> and take whatever proportion one thought appropriate. But none of these methods has the flexibility of insurance and the economic advantages of using insurance are so strong and so obvious that I find it hard to believe that canny Scots merchants would not instantly have perceived the advantages in lowering their risks, and availed themselves of the indemnity afforded by insurance when they saw fit. The exchange of ideas in the Amsterdam Bourse (and elsewhere) was doubtless as easy as the exchange of money and goods and Scots merchants must surely have appropriated the concept of insurance to their store of intellectual capital as soon as they became aware of it.

### Forte's Overreliance On Legal Sources

Although, as mentioned above, Forte himself comments that the absence of insurance in works on Scots law before the mid-eighteenth century 'does not

<sup>102</sup> T. M. Devine, *Exploring the Scottish Past*, ch. 27 ('The Merchant Class of the larger Scottish Towns in the later Seventeenth and Early Eighteenth Centuries'), 21.

<sup>103</sup> In the late eighteenth century guide for *businessmen*: Wyndham Beawes, *Lex mercatoria rediviva: or, a complete code of commercial law. Being a general guide to all men in business, whether as Traders, Remitters* (London, 1792) a knowledge of insurance and other legal matters is listed in fourth place (the first three are writing, arithmetic and bookkeeping) under the essential things which "The general merchant should learn". See Beawes, *Lex mercatoria*, 33.

<sup>104</sup> Eric J. Graham, *A Maritime History of Scotland 1650–1790* (East Linton, East Lothian, 2002), 36.

<sup>105</sup> This medieval pattern of dividing up the ownership of ships into sixty-four parts is still the pattern today for sharing the ownership of a vessel. See, The Merchant Shipping (Registration of Ships) Regulations 1993, S.I. No. 3138, reg. 2(5): 'Entries in the Register shall be made in accordance with the following provisions:—  
(a) the property in a ship shall be divided into sixty-four shares'.

establish that contracts of insurance were not in existence or even relatively common at an earlier date',<sup>106</sup> he does not consistently follow that principle and on the contrary places too much reliance on the absence of insurance from the legal sources (including the notarial protocol books) and too little reliance on the merchant evidence which he himself examines. Forte's reliance on legal sources as evidence, and especially Scots legal sources, misled him as to the probable extent of the use of insurance by Scots merchants and I believe that it is likely that insurance was in quite extensive use by Scottish merchants in the seventeenth century and very probably long before. Whilst Forte, correctly, shows that the use of insurance seems to have been well established only by the eighteenth century he rather understates the position, in that he fails to make a clear distinction between the *use* of insurance by Scots merchants and the *existence of a Scots law or doctrine* governing insurance. Indeed, as Forte points out, the novelty of insurance law is repeatedly referred to by the courts and by other authors, but the absence of insurance cases in the Court of Session does not prove that Scots merchants were not taking out insurance; all it proves is that disputes about those policies were not resolved before the higher Scots courts. Here again we need to stress the distinction between the *use* of a special type of contract, the insurance policy, by Scots merchants and its *recognition by the Scottish courts as a distinct legal concept*. Indeed it is clear, from the evidence Forte himself considers about William Cochrane who uses insurance in 1621,<sup>107</sup> Baillie John Stewart of Inverness, 1715–1752,<sup>108</sup> and also the Scottish Admiralty records (which were unavailable to Forte) that insurance contracts were in use by Scots merchants during the seventeenth and eighteenth centuries, but what is also clear is that they were not being considered by the Court of Session. The absence of any Court of Session cases before 1734 is not evidence that these contracts were not being used by Scots merchants but rather that they were being resolved outwith the Court of Session by being resolved abroad in foreign courts, or by arbitration or before the Scots Admiralty Court. Let us explore these points further.

1 *Absence of Insurance Cases: Furth Scotland and Furth the Higher Courts – Forte Looking in the Wrong Place*

Even if insurance policies were being taken out by Scottish merchants, as I

<sup>106</sup> Forte, 'Marine Insurance', 400.

<sup>107</sup> Cited by Forte, *ibid.*, 407

<sup>108</sup> W. McKay, ed., *The Letter Book of Baillie John Stewart of Inverness, 1715–1752*, Scottish History Society, 2nd ser., ix (Edinburgh, 1915) cited by Forte, *ibid.*, 400ff.

believe they were, they would tend not to leave much of a legal documentary trace. This is, firstly, because most voyages would conclude without incident and there would be no need to go to dispute resolution at all. Secondly, even where an insured loss occurred in the majority of cases the underwriters would pay up so again there would be no litigation. Thirdly, the underwriters were outwith Scotland.

## 2 *Evidence for Underwriters outwith Scotland*

As soon as they encountered the very idea of managing their risk through insurance I believe Scots merchants would have wished to avail themselves of that protection in appropriate circumstances. However, even if there was probably a demand for insurance from Scots merchants there are unlikely to have been any Scots willing or able to provide that service locally. Underwriting needs a reasonably large group of wealthy individuals who are willing to share the risk of indemnifying the insured in return for the potential profit of the policy. Scotland in the sixteenth and seventeenth centuries is unlikely to have had a sufficient number of merchants with sufficient wealth to engage in underwriting. Moreover the constant disruption to business caused by the civil wars in the seventeenth century can hardly have been conducive to encouraging Scots merchants to become underwriters. This will have meant that when a Scots merchant wanted his goods or ships insured he would almost certainly have turned to the insurance markets in either Amsterdam, Rotterdam or London, the three major centres of commercial wealth in early modern Europe, though other centres such as Antwerp or Hamburg were also possibilities. When Scottish underwriters do finally appear in the legal record of the higher courts in the 1734 House of Lords case of *Lutwidge v Gray*,<sup>109</sup> it is no surprise to find the underwriters based in Glasgow not Edinburgh and engaged in the Atlantic trade.

However if we consult the records of the Scottish Admiralty Court as recorded in the High Court of Admiralty Scotland Records 1620–1750<sup>110</sup> is a surprise to note that in the earliest recorded Scottish insurance case, *Watson v Gordon*<sup>111</sup> of 1706 the goods were indeed insured in Scotland by one Edward

<sup>109</sup> (1734) 1 Pat. 119.

<sup>110</sup> The records of the Admiralty Court were never published in printed form but in 2005 thanks to the herculean labours of Sue Mowat and Eric J. Graham a portion of the legal records were made available to modern scholars on a DVD entitled the High Court of Admiralty Scotland Records 1620–1750 (hereafter cited as HCASR 1620–1750).

<sup>111</sup> HCASR 1620–1750 AC8/62.

Burd, merchant of Edinburgh, for a voyage from Lisbon to the Clyde or Leith, which shows that by 1706 at least some Scottish merchants were acting as underwriters. However in the next recorded Admiralty case with an insurance aspect, *Gray v Dubois* of 1707<sup>112</sup> the ship was insured at Rotterdam, and this was more typical pattern. The High Court of Admiralty Scotland Records 1620-1750 contain 45 cases involving or mentioning insurance and the distribution of the location of the underwriters in those cases is compelling evidence as to both the widespread *use* of insurance by Scots merchants and the overwhelming *use of foreign underwriters*, mainly those in the Netherlands or London to act as insurers. The breakdown of the domicile of the underwriters is as follows:

Rotterdam 12 cases  
 London  $11\frac{2}{3}$  cases<sup>113</sup>  
 Amsterdam 6 cases  
 Scotland (Edinburgh or Glasgow)  $4\frac{1}{3}$   
 Hamburg 2  
 Unknown 8

So the vast majority of ships or cargo belonging to Scots merchants were insured furth of Scotland. Further, support for the argument that most insurers were foreign insurers can be seen from three further pieces of evidence covering 150 years, two of which Forte himself gives, all of which indicate that Scottish merchants insured with non-Scottish underwriters.

The first piece of evidence, which is given by Forte, is the record of the insurance taken out by William Cochrane in the Edinburgh Dean of Guild Court Records of 7 March 1621 which makes it clear that this Scottish merchant insured his ship's voyage to Plymouth and onto Cadiz with a London underwriter.<sup>114</sup> It seems highly unlikely, especially in the light of the admiralty records for the early eighteenth century given above, that this was the only such policy taken out by a Scottish merchant with English or Dutch underwriters in the early-seventeenth century.

<sup>112</sup> HCASR 1620–1750 AC9/284.

<sup>113</sup> The reference to a fraction is caused by the fact that in one case, *Fall and Bros* 1727, HCASR 1620–1750 AC/1016, one third of the cargo of Tobacco was insured in Glasgow and two thirds in London.

<sup>114</sup> Forte, 'Marine Insurance', 407.

The second piece of evidence is *The Letter Book of Baillie John Stewart of Inverness, 1715–1752*,<sup>115</sup> as described by Forte:<sup>116</sup>

Baillie John Stewart was an Inverness merchant who engaged in extensive domestic and foreign commerce and whose letter book, covering the period 1715-1752, provides valuable information about trading methods during the first half of the eighteenth century. *This book includes some twenty-seven items of correspondence about insurance. On only one occasion does the Baillie appear to have insured through an Edinburgh merchant, named Sawden, acting as underwriter. On all the other occasions, he instructs his agents or factors in Amsterdam, Rotterdam, Danzig, Bordeaux, and London to arrange insurance coverage on his behalf. This reliance on foreign underwriting, particularly in the Netherlands and in London, suggests a lack of such facilities in Scotland. Indeed, on one occasion, a wholly domestic voyage from Inverness to the West Coast of Scotland was insured in Holland.* (Emphasis added by the present author).

As Forte rightly remarks, Baillie John Stewart's correspondence is evidence of the use of insurance by Scots merchants, but the lack of Scottish underwriters in Stewart's correspondence, apart from the solitary example of Mr Sawden, shows that the Scots normally went to London, Amsterdam or elsewhere abroad for their insurance and in this respect it is broadly similar to the pattern disclosed in the Scottish Admiralty Records (discussed above) where out of forty-five insurance policies mentioned only four and one third of the policies were granted by Scots insurers. Likewise, the comparatively frequent use of insurance made by Stewart fits well with the evidence of the Scottish Admiralty Records, that by the first half of the eighteenth century insurance had become quite common in Scotland. If we assume, as we must, that these forty-five cases are merely a fraction of the total number of policies taken out by Scottish merchants, then it can be seen that its uses were really quite extensive by the early eighteenth century. The delay and inconvenience which Inverness-based Stewart must have encountered in arranging a Dutch insurance for a domestic voyage also highlights where the demand for domestic underwriters may have first arisen: it would be much quicker to arrange cover from a Scots agent that

<sup>115</sup> W. McKay (ed.), *The Letter Book of Baillie John Stewart of Inverness, 1715–1752* (Scottish History Society, 2nd ser., ix) (Edinburgh, 1915).

<sup>116</sup> Forte, 'Marine Insurance', 400.



a Dutch one. And the fact that the case *Watson v Gordon* of 1706<sup>117</sup> involved an Edinburgh underwriter shows how that demand gradually began to be met.

Thirdly, there are a couple of remarks by Lord Hailes which make it clear that Scottish insurance policies were a relative novelty to the judiciary in the 1770s. In the 1774 case of *Steven v Douglas* he observed that ‘Our Scottish insurances are copied from the English’<sup>118</sup> and in the 1777 case of *Captain John Dalrymple v James Johnston*, regarding the liability of the owner for short insurance, Lord Hailes made it clear that Glasgow (and one presumes Edinburgh) underwriters were a new development by observing that: ‘The opinion of the London insurers does not bind us, but it is of great weight, for it is founded on long experience; *whereas the people of Glasgow are novices in the trade of insurance*, and, on that account, cannot be supposed to have the same liberality of sentiments that the London insurers have.’<sup>119</sup> (Emphasis added). Given that there appear to have been only a few Scottish underwriters before the mid-eighteenth century then the absence of insurance from the Scottish legal record of the higher courts becomes easily explicable. Almost all legal disputes over an insurance policy take the form of the insured suing the insurer for payment, and so naturally the action would have to be raised in the jurisdiction of the defender, i.e. the forum of the underwriter not the insured, which in between the sixteenth and early eighteenth centuries, would have tended to be in London or the Low Countries, as the main locations of underwriters at that time, so no trace would have been found in the records of the Court of Session, although as we have seen it did leave some trace in the Admiralty Records. Moreover, insurance policies would have often been kept as strictly confidential documents between the parties, partially for the eternal commercial concerns with confidentiality over price, but also because in between the sixteenth and eighteenth centuries there was fear of piracy and, in war, of ships being taken as prizes. Writing on insurance in Amsterdam,

<sup>117</sup> HCASR 1620–1750 AC8/62.

<sup>118</sup> *John Steven v John Douglas*, 16 December 1774. Reported in Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791* (Edinburgh, 1826), 622. The case is also reported in Mor. 7096; Fol. Dic., III, 328. Further material is found in the National Archives of Scotland under reference *John Steven and Company v John Douglas*, 1775, reference CS235/S/7/7.

<sup>119</sup> *Captain John Dalrymple v James Johnston*, 29 January 1777. Reported in Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791* (Edinburgh, 1826), 746, 747. Further material is found in the National Archives of Scotland under reference *John Dalrymple v James Johnston and others*, 1772, reference AC9/2679.

Spooner comments on a disadvantage of public registration of insurance policies: 'But once on the book, details could filter out and attract the attention of pirates and privateers to try the main chance. Such fears of loss were often enough to make insurance a private affair'.<sup>120</sup>

So with policies granted by London or Dutch underwriters it is no surprise that we can see no trace of insurance in the Court of Session record, as they would have been governed by English or Dutch law. But in fact there is very little trace of insurance litigation in Holland or England either, because insurance disputes were mainly dealt with either by specialist tribunals or by arbitration, which had been the preferred method of resolving disputes over insurance policies from the earliest of times.

### **Specialist Insurance Tribunals: A Short-Lived Experiment In England; A Long-Lived Institution In Amsterdam**

In England, as mentioned above, there were two attempts in the late-sixteenth century to set up specialist tribunals to deal with insurance disputes. The City of London created an Assurance Chamber consisting of seven merchants in 1577 to hear insurance disputes and the Court of Assurance was established by Act of Parliament.<sup>121</sup> This was a court specifically designed for dealing with insurance disputes, the need for such a court being succinctly stated by Francis Bacon M.P. in the Commons:<sup>122</sup>

First, Because a Suit in Chancery is too long a course, and the Merchant cannot indure delays.[...] Secondly, Because our Courts have not the knowledge of their Terms, neither can they tell what to say upon their Cases, which be Secrets in their Science, proceeding out of their Ex'perience.

Admittedly, the English Court of Assurance did not flourish for a variety of reasons of which its restricted jurisdiction, the competing claims of the other English courts and the preference of merchants for arbitration were

<sup>120</sup> F.C.Spooner, *Risks at Sea: Amsterdam Insurance and Maritime Europe, 1766-1780* (Cambridge and New York, 1983), 23.

<sup>121</sup> 43 Elizabeth (1601), c.12.

<sup>122</sup> 'Proceedings in the Commons, 1601: December 6th - 10<sup>th</sup>' in H. Townshend, *Historical Collections: Or, An Exact Account of the Proceedings of the Four Last Parliaments of Q. Elizabeth* (London, 1680), 288-310, <http://www.british-history.ac.uk/no-series/parliament-proceedings-eliz1/pp.288-310>, accessed 15 July 2015.

probably the most important<sup>123</sup> and this court seems to have died out early in the seventeenth century.<sup>124</sup> Given the delays in Chancery (and Common Law) and the lack of expertise in the Courts referred to by Bacon the merchants returned to settling their insurance disputes via arbitration until Lord Mansfield brought insurance, indeed commercial law generally, into the Common Law fold in the mid-eighteenth century.<sup>125</sup> By contrast, in Amsterdam, the *Kammer van Assurantie*, established in 1598, flourished throughout the next two centuries and provided a means of resolving insurance disputes without going to the Dutch courts.<sup>126</sup>

### 1 *Importance of Arbitration*

Arbitration has been the preferred method of resolving disputes over insurance policies from the earliest of times. From its earliest days in Italy onwards insurance seems to have been a contract where disputes were primarily resolved extra-judicially.<sup>127</sup>

At first, the enforcement of insurance contracts was almost entirely informal. Indeed, in fifteenth-century Venice, although most policies were issued in writing, some insurances were simply verbal agreements, relying entirely on the reputation of the participants and the broker who mediated the transaction [...] In the event of a dispute, it was usual for each party to choose a reputable merchant as an arbitrator; the two arbitrators would choose a third; and both parties would agree to abide by a majority decision of the three thus chosen. This was a

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<sup>123</sup> 'Thus a commercial tribunal of the continental type was for the first time established in England by statutory authority. But it suffered from two grave defects. Firstly, its jurisdiction was confined to policies registered in the London Office of Insurances, so that it did not extend to insurances made in other sea port towns. Secondly, it did not exclude specifically the jurisdiction of the courts of common law and the Court of Admiralty. It is possible that, if the King and Council had continued to exercise the control over the courts which they exercised in the Tudor period, these defects might have been remedied.' W. S. Holdsworth, 'The Early History of the Contract of Insurance', *Columbia Law Review*, 17 (1917), 85–113, 103.

<sup>124</sup> For a recent study of the reason for the failure of the Chamber and Court of Assurance see D. Ibbetson, 'Law and Custom', 291–307.

<sup>125</sup> See eg. H. S. Fifoot, *Lord Mansfield*, (Oxford, 1936), ch. 1 and 4.

<sup>126</sup> See Go, *Marine Insurance in the Netherlands*, ch. 3.

<sup>127</sup> C. Kingston, 'Governance and institutional change in marine insurance, 1350–1850', *European Review of Economic History*, 18 (2014), 1–18, 6, citing W. J. Jones, 'Elizabethan Marine Insurance: the judicial undergrowth', *Business History*, 2(2) (1960), 53–66, 55 and 59.

cost-effective and expeditious way to deal with disputes according to mercantile custom, whereas using formal courts might be costly, slow, and arbitrary (as the judges lacked expertise in mercantile matters). In England, early policies contained a clause stating that any disputes would be referred to impartial merchants “without going to any lawe,” and in any case, insurance policies had no legal standing and technically there could be no remedy at law [...]

Arbitration clauses can be seen in the policies recorded in the *Select Pleas in the Court of Admiralty*, published by the Selden Society. See for example the 1566 arbitration clause in *Ridolphye v. Nunex*<sup>128</sup> or that recorded in the ‘Dutch Policy’ 1638.<sup>129</sup>

Yf any difference shall happen the parties are content to submit themselves unto three indifferent merchants of this exchange what they or any two of them shall award shall be held by the parties of as much force as yf the same were decreed by his imperial supreme court so that the parties shall not go there against neither use suite of law.

Accordingly, there is very little trace of insurance litigation in England because most insurance policies contained arbitration clauses and merchants seem to have preferred to have their disputes resolved swiftly and informally by their mercantile peers who understood the principles of insurance rather than entrust them to the slow and complex processes of courts manned by judges who were learned in procedure and the land law but ignorant of mercantile law, including insurance.<sup>130</sup> Indeed, after the failure of the Court of Assurances, it was not until the mid-eighteenth century that insurance law cases were raised with any frequency before the English common law courts. Describing the situation in eighteenth century England, Vance wrote of how such disputes were seen as beneath the notice of the Common Law:<sup>131</sup>

<sup>128</sup> *Select Pleas in the Court of Admiralty*, 59.

<sup>129</sup> ‘Dutch Policy’ in *Select Pleas in the Court of Admiralty*, 52–3.

<sup>130</sup> See C. H. S. Fifoot, *Lord Mansfield* (Oxford, 1936), ch. 1 (‘Prologue’) for a concise account of the failures of the English Courts as a method of dispute resolution for seventeenth and early-eighteenth century merchants.

<sup>131</sup> W. R. Vance, ‘The Early History of Insurance Law’, *Columbia Law Review*, 8 (1908), 1–17 at 12.

It is evident that prior to the time of Lord Mansfield's accession to the bench,<sup>132</sup> the development of insurance law in England followed the same lines as that of the other branches of the law merchant. It was generally understood that the common law courts, which did not recognize the quasi-international customs of merchants, afforded no fit forum for the determination of causes between merchants. Hence all early insurance disputes must have been settled by conventional merchant courts or arbitrators, who, it seems, might be appointed, upon petition, by the Privy Council, the Lord Mayor of London, or by the Court of Admiralty.

There is every reason to assume that the policies taken out by Scottish merchants, which would have most commonly been with English or Dutch underwriters, would have also contained arbitration clauses, as such clauses appear to have been very common. When Scottish underwriters did finally appear in the eighteenth century<sup>133</sup> it was presumably as a result of the wealth brought in from the tobacco trade with America: a lucrative trade,<sup>134</sup> which both created the wealth and the risks to allow some Scots merchants to invest their surplus capital in acting as underwriters. Indeed, it is surely no coincidence that the number of Scottish underwriters seems to increase through the eighteenth century, in much the same way as Glasgow increased its share of the tobacco trade with America from 10 per cent of the U.K. tobacco imports in 1738 to 40 per cent by 1765.<sup>135</sup>

These new Scots underwriters would have undoubtedly used insurance policies based on the earlier English and Dutch styles. This conjecture is confirmed by considering the style 'Glasgow insurance policy' given in John Millar's *Elements of the law relating to insurances* (1787),<sup>136</sup> which follows the early styles verbatim. Significantly the Glasgow insurance policy contains an arbitration clause,<sup>137</sup> unlike the English style policy which he gives in the appendix, which is the Lloyd's standard policy of 1779 which has no

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<sup>132</sup> In 1756 William Murray was appointed chief justice of the King's Bench and was made Baron Mansfield, becoming Earl of Mansfield in 1776.

<sup>133</sup> Which appearance we can see traces of in the eighteenth-century Court of Session reports, beginning with *Lutwidge v Gray* (1734) 1 Pat. 119.

<sup>134</sup> T. M. Devine, *Scotland's Empire 1600–1815* (London, 2003), ch. 4 gives a good overview of this.

<sup>135</sup> See *ibid.*, ch. 3 for an overview. The figures given above are cited at *ibid.*, 71.

<sup>136</sup> John Millar, *Elements of the law relating to insurances* (Edinburgh, 1787), 30–4.

<sup>137</sup> *Ibid.*, 33.

arbitration clause.<sup>138</sup> In explaining the arbitration clause Millar remarks that: 'In foreign, and in many British policies, there is a clause by which parties bind themselves to submit any questions that may arise, to the decision of arbiters. But this in Britain is not understood to exclude an application to the judicial establishments of the country.'<sup>139</sup>

Accordingly, it is fair to presume that the majority of insurance disputes involving Scottish merchants would have been settled by arbitration and hence left no trace on the legal record. If I might give a parallel from contemporary Scotland we might consider the case of the offshore oil industry. This has been one of the largest and most profitable industries in Scotland since the 1970s but has left a remarkably small footprint in the reports of the Court of Session. The reason for this is not that there are never any disputes in the oil industry but rather, firstly, that the oil industry prefers to resolve its disputes through negotiation, A.D.R. and arbitration rather than the courts which have many disadvantages not least their slowness, and secondly that the vast majority of offshore contracts are governed by English law and so in the unlikely event of litigation the cases will be heard in London not Edinburgh. There is one further possibility to be considered in explaining the absence of insurance from the Scots legal record, and that is the role of the High Court of Admiralty of Scotland.

## 2 *The Admiralty Court*

If for some reason the parties to an insurance policy written by a Scottish underwriter were unable to resolve their dispute by arbitration it was not to the Court of Session or even the Sherriff Court that they would have turned but rather to the High Court of Admiralty of Scotland. The Scottish Admiralty Court was governed by the Act of 1681 c.16, which specified the Court's jurisdiction in rather vague terms but it was clear that the Admiralty Court's jurisdiction was distinguished into a privative maritime jurisdiction and a non-exclusive mercantile jurisdiction which it shared with the other civil courts.<sup>140</sup> The Admiralty Court was the court of first instance for all maritime causes, to the exclusion of the Court of Session and the Sheriff Court. Marine insurance is obviously a contract closely connected with the sea and so it naturally fell

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<sup>138</sup> This 1779 policy was virtually identical to the first printed English policy from 1680 and it was given the legislative *imprimatur* by being included as the style policy in the Marine Insurance Act 1906.

<sup>139</sup> Millar, *Elements of the law relating to insurances*, 36.

<sup>140</sup> Erskine, *Institute*, I.iii.33 and Bell, *Commentaries*, vol. 1, III.I.iv.

within the jurisdiction of the Admiralty Court; in Scotland it was always treated as a maritime cause, and not a mercantile cause. As marine insurance was recognised in Scots law as a maritime case it fell within the *exclusive* purview of the Admiralty Court at first instance and it is clear from the decisions of the Court of Session in the late-eighteenth and early-nineteenth centuries that the normal court of first instance for insurance disputes was indeed the Admiralty Court, with the Court of Session having only an appellate jurisdiction. It is therefore clear that those insurance cases which reached the Court of Session in the eighteenth century were always on appeal, the case at first instance having been heard by the Judge Admiral or one of the many deputy admiral courts which covered the whole of Scotland. The rather rudimentary nature of Scots eighteenth century reports means that they do not always tell us in which court the case commenced but in every report of an insurance case which does mention the first instance court that court is invariably that of the Judge Admiral or his deputies.

As already mentioned above the records of the Scottish Admiralty Court were never published in printed form but in 2005 were made available to modern scholars on a DVD entitled the *High Court of Admiralty Scotland Records 1620-1750*<sup>141</sup> and disclose forty-five cases involving or mentioning insurance. This shows that the Admiralty Court was a popular forum for the resolution of insurance disputes. However, even these records will underreport the litigation with an insurance dimension as many of the cases will have been heard before the many local deputy admiral courts and so have been lost to posterity.

In 1780 in *James Wilson & Co. v Henry Ritchie*, the Court of Session, on a split decision, decided to extend its jurisdiction over insurance to certain first instance cases, but it is expressly made clear that this was a novelty, as one of the judges, Lord Covington, commented: 'This is the first instance of a case of insurance being brought originally before the Court of Session. *The nation and, and all our lawyers, suppose it a maritime cause*'<sup>142</sup> (emphasis added). But this decision proved to be the exception rather than the rule and the Court of Session continued to respect the Admiralty Courts' role as a maritime and commercial court of first instance in subsequent years right up until the Admiralty Court was abolished and its jurisdiction transferred to the Court of Session and Sheriff Court by the Court of Session Act 1830, c.69, ss21–29.

<sup>141</sup> Available for purchase from <http://www.ericgraham.co.uk/high-court>.

<sup>142</sup> *James Wilson & Co. v Henry Ritchie*, 4 July 1780, as reported in Lord Hailes, *Decisions of the Lords of Council and Session from 1766 to 1791* (Edinburgh, 1826), 862, 863 per Lord Covington.



The advantages of using the Admiralty Court seem to have been the facts that it was readily accessible, that one did not need to employ expensive counsel, that there were lower court fees and a more speedy procedure. Where cases were heard by the local Burgh Courts in their role as Admiral Deputes there will have been the advantage that the judges will have invariably been merchants themselves (given that the Scots Burgh Councils were composed of local merchants) and so such courts may have combined the advantages of commercial arbitration: swift judgement by fellow merchants with a working knowledge of insurance and a minimum of court formalities, with the advantage that the decision was enforceable by law like any other court decree. Such a court, one may speculate, would have been highly attractive to merchants. But for present purposes, *viz* the extent of the use of marine insurance in Scotland, the important point to note is that those few cases on insurance which were litigated will have mostly been litigated before the Admiralty Court, most likely in the local courts of the Admiral deputies, and therefore do not appear on the Scots legal record, which is concerned mainly with the Court of Session, unless they were appealed to the Court of Session. The number of appeals from Admiralty to Session will have inevitably been small. Some idea of the volume of such Admiralty appeals can be found in the Appendix to the *Report of Royal Commissioners on Courts of Law in Scotland*, 1824,<sup>143</sup> where an official return of the Depute-Clerk of the High Court of Admiralty gives the statistics for the business of the Admiralty Court between 1808 and 1822, admittedly 100 years later than the period under discussion here but which nevertheless may be said to give some idea of the business of the Admiralty Court. The Admiralty Court was clearly a busy court as during that fifteen-year period; for Ordinary Actions there were 3,158 decrees

<sup>143</sup> See the *Report of the Commissioners Appointed by His Majesty's Warrant of the 29th July 1823, For Enquiring into the Forms of Process in the Courts of Law in Scotland, and the Course of Appeals from the Court of Session to the House of Lords; Together with an Appendix...* (1824), particularly at 260, <https://books.google.co.uk/books?id=Y7JbAAAAQAAJ&pg=PA260&dq=2,902+admiralty+scotland+1808+1822&source=bl&ots=dgrbRnldgn&sig=9WZdV7w2ugMZdTfiacPXM8p0mo0&hl=en&sa=X&ved=0ahUKEwjGr7rLvudJAhVGORoKHb3GAWEQ6AEIIJAB#v=onepage&q=2%2C902%20admiralty%20scotland%201808%201822&f=false>, accessed 16 December 2015; see also the discussion in *The Scots Law Chronicle or Journal of Jurisprudence and Legislation* 1 (1829), lxxi-lxxiv, <https://books.google.co.uk/books?id=yj1HAQAAMAAJ&pg=PR73&dq=%22Report+of+Royal+Commissioners+on+Courts+of+Law+in+Scotland%22&hl=en&sa=X&ved=0ahUKEwiThv3fs-DJAhUBxxoKHcKJByMQ6AEILTAA#v=onepage&q=%22Report%20of%20Royal%20Commissioners%20on%20Courts%20of%20Law%20in%20Scotland%22&f=false>, accessed 16 December 2015.



in absence and 2,902 appearances, i.e. contested cases. Over the same period only sixty-seven advocations (appeals) were taken from the Admiralty Court to the Court of Session. Thus, during a period of fifteen years, an average of only between four to five appeals were made each year, and only a few of those would have been insurance cases. The use of the Admiralty Court by merchants as the main judicial forum to resolve insurance disputes seems to go a long way to explaining the paucity of Court of Session insurance case law before the 1760s even if, during the eighteenth century, insurance policies were increasingly frequently issued by Scottish underwriters rather than by English or foreign ones.

### 3 *Stair's Strange Lack of Knowledge of Insurance*

In the *Institutions* Stair classified insurance as one form of the 'contract of society', a strange category which might best be summarised as a pooling of resources. After listing several diverse types of 'society' contracts Stair concludes this brief account with insurance, defining it 'as the contract of assurance where money or things are given, for the hazard of anything that is in danger, whether it be goods or persons.'<sup>144</sup> This definition, according to Forte,<sup>145</sup> follows Grotius and is puzzling because of its inadequacy,<sup>146</sup> as half

<sup>144</sup> Stair, *Institutions*, I.10.12.

<sup>145</sup> Forte, 'Marine Insurance', 407.

<sup>146</sup> This inadequate definition is in striking contrast to the definitions found in the English case-law over one hundred years earlier, for example the definition given in *Ridolphy v. Nunez* (1562), 52–3:

The use and custome of makyng bylls of assuraunce in the place commonly called Lumbard Strete of London, and likewise in the Burse of Antwerpe, is and tyme out of mynde hath byn emongst merchants usinge and frequentinge the sayde severall places, and assuraunces used and observed, that the partie, in whose name the bill of assuraunce is made, ys not bounde to specife in the same whether the goods assured are for his owne or for any other man's accompte [...] And yf any mysfortune chaunce to the same gooddes in such sort assuryd, the sayde partie, in whose name the byll of assuraunce is made, maye demande and oughte to recover them againste the assurers by vertue of the sayd custome as his owne propre gooddes, although they pertyne to some other. [...] And further he doothe alledge that commonly merchants, by all the tyme above declared, have and doo cause ther gooddes to be assured from porte to porte by ther factors and other ther frends having noo interest or propertie in the gooddes assured, and yet thasuraunce goodd, and thassurers bounde tanswere the losse of such gooddes yf any happen.

a sentence can hardly be seen as an adequate definition of insurance, but the ignorance is only puzzling if we assume insurance disputes were being dealt with by the Court of Session. The minimal mention of insurance by Stair and its absence from notarial protocol books is not, as Forte thinks, evidence of a lack of the *use* of insurance in Scotland but rather it is evidence that insurance disputes were dealt with further the Scottish courts in the sense that they were dealt with either outside of Scotland, or, if dealt with within Scotland, they were heard outwith the Court of Session.

That Stair knew about the existence of insurance, and indeed its legal nature, can be found in *Morison's Dictionary*, hidden away, like buried juridical treasure, on the cases on prize and also in the section on prize in the *Institutions* itself. In 1673 there are four reports of prize cases where insurance is mentioned because it might afford grounds for confiscation of a ship as a prize: *Simpson v Ludke*, 7 January 1673,<sup>147</sup> which case comes before the Session again a few months later *sub nom*, *Captain — contra the Owners of the Fortune of Trilsound*, 22 July 1673,<sup>148</sup> where a Swedish ship was insured in Amsterdam 'albeit there be an insurance office in Stockholm'; *The Master of the White Dove v Captain Alexander*, 28 February 1673,<sup>149</sup> where a Swedish ship and 'loading' (i.e. goods) were insured in Hamburg; and *Master of the Golden Falcon v Buchanan*, 17 July 1673, where a Norwegian ship was insured 'in Holland' (probably Amsterdam). All of these were cases which Stair himself would have decided when he was presiding in the Court of Session during the first of his two terms as Lord President and unsurprisingly he discusses them in his *Institutions* when considering the grounds of jurisdiction for the confiscation of a ship as a prize.<sup>150</sup>

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<sup>147</sup> Mor. 11888.

<sup>148</sup> Mor. 11923.

<sup>149</sup> Mor. 11906.

<sup>150</sup> Stair, *Institutions*, II.2.26. The case *Master of the Golden Falcon v Buchanan*, 17 July 1673, was decided only days before *Fortune of Trilsound*. The court considered the effect of insurance a ground for jurisdiction but did not have to decide the point as there were other grounds which sufficed to establish prize jurisdiction in this particular case. But it is interesting because it expressly states in the averments of the defender that 'the ship was insured in Holland, and so the risk lay upon the King's enemies.' In other words, it was argued that it would be good if the King's enemies, the Dutch, suffered a loss! The report is also interesting because the owners' averments expressly declare that the insured-against risk was the weather not capture: that '[a]s to the insurance, it doth not change the property, and state it in the insurers, but is only a personal obligation upon him to make up the hazard, upon which pretext the King cannot justly confiscate the property of his allies, because they have taken warrandice of his enemies; and that the allies remain proprietors is clear, that in case of stress of

neither did the insurance of ship or loading in Holland infer a sufficient ground of confiscation alone, although it might concur with others as an adminicle, albeit the insurance was alleged to put the risk and hazard of the capture upon the King's friends, without detriment to his enemies; yet the Lords found, that seeing the property of the goods insured did remain in the King's allies, the same ought not to be confiscated, neither was it alleged, that the insurance was expressly against capture, but only against hazard at sea in general, July 22, 1673, Captain \_\_*contra* the Owners of the Fortune of Trailsound, July 17 1673<sup>151</sup> *master of the Golden Falcon*<sup>152</sup>

This passage in Stair is interesting for three reasons. Firstly, the prize case law shows us that insurance was being used by Swedish and Norwegian merchants in the 1670s, one hundred years before the 'boom' in Scottish insurance case law in the 1770s. If Scandinavian merchants were taking out insurance with underwriters Holland or Hamburg in the 1670s it seems likely that their North Sea neighbours, the Scots, were doing likewise. Turning to the actual reports we can glean some further information about seventeenth century insurance. In *Simpson* it is explained that Dutch insurers had been chosen 'albeit there be an insurance office in Stockholm.'<sup>153</sup> This is interesting because it seems to imply that one cannot easily find an insurance office outwith the major commercial centres of London, Amsterdam and Hamburg, and I believe it is likely that at this time there were no Scottish underwriters.

Secondly, in this passage Stair expressly declares that the policy here was not against capture but only against the hazard at sea in general. This argues against Barbour's assertion, followed by Forte, that 'merchants were not yet fully convinced by insurance and tended only to insure when there was a real danger of war.'<sup>154</sup> Yet in the policy covering the *Golden Falcon*, taken out in the midst of the Third Anglo-Dutch Sea War 1672-7, the insured risk was not war or capture but 'that in case of stress of weather they might throw out the

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weather they might throw out the loading' Mor. 11922.

<sup>151</sup> Mor. 11923.

<sup>152</sup> Mor. 11922.

<sup>153</sup> Mor. 11888, 11888.

<sup>154</sup> Forte, 'Marine Insurance', 405, referring to V. Barbour, 'Marine risks and insurance in the seventeenth century', *Journal of Economic and Business History*, [1929], 561-96, 561.

loading'.<sup>155</sup> Admittedly, in *Simpson v Ludke* the insurance was against capture: 'the loss will fall upon the King's enemies, albeit she was declared prize'.<sup>156</sup> But the point is that merchants were insuring against non-war risks even in 1673. The report of *Simpson* also reveals a commercial incentive to insure in Amsterdam which would undoubtedly have influenced any Scottish merchant seeking to insure at a time when Scotland was not at war with Holland: 'it appears, that this is a very cheap insurance at Amsterdam'.<sup>157</sup>

Thirdly, this passage shows that Stair himself must have had at least some knowledge of how insurance contracts worked, because he had clearly seen the policy in the pleadings and it is this fact of Stair's knowledge of insurance which makes Stair's gnomic explanation of insurance at I.10.12 so striking. The question is how to explain this almost wilful ignorance by Stair? I believe that there is a strong parallel here with Stair's attitude with the similar treatment of insurance by the Dutch jurists. As mentioned above, Forte considered the cursory mention of insurance by Pufendorf and Grotius as evidence of the unimportance of insurance.<sup>158</sup>

though Pufendorf mentions insurance as does Grotius, the treatment is brief. It is true that the latter in his work on the private law of Holland, the *Inleidinge*, gave a more detailed account of the law but it was still largely descriptive of the Ordinances and the local *keuren*. No cases or accounts of disputes are noted. The impression conveyed is reminiscent of the treatment of the topic by the mid-eighteenth century Scottish writers; there is a new topic and the scholar must note its existence but he cannot say much more.

But with respect, this cursory treatment of insurance, whether by eminent Dutch jurists or the august Viscount Stair, is not evidence, as Forte argues, that insurance 'is a new topic and the scholar must note its existence but he cannot say much more.' There is another explanation for this cursory treatment, viz it was simply that insurance disputes were beneath the dignity of the higher courts of Holland or Scotland to be noticed. Insurance disputes in Holland were being resolved by arbitration or in the *Kammer van Assurantie* of Amsterdam and so did not come to the attention of higher court-centric

<sup>155</sup> Mor. 11922.

<sup>156</sup> Mor. 11888.

<sup>157</sup> Mor. 11888, 11889.

<sup>158</sup> Forte, 'Marine Insurance', 406.

scholars such as Pufendorf and Grotius, and in Scotland (as discussed above) they were being dealt with abroad, because the underwriter was foreign, or, even if the underwriters were Scots, by arbitration or the Scots Admiralty Court.

## Conclusion

To sum up I believe that Forte's chronology for the use of insurance in Scotland was mistaken. Forte concluded that:<sup>159</sup>

It seems that insurance was not in use prior to 1600 and was fairly well established by 1715. This leaves a grey period, 1600–1700 or so, in which one finds only a few isolated references to insurance.

By contrast I believe that this chronology needs to be pushed back in time by at least one hundred years. I see no reason to presume that insurance was not used at least occasionally by Scottish merchants in the mid- to late-sixteenth century, given that insurance was already well established in London and Amsterdam (and we might add the Antwerp, Rotterdam and Hamburg) ports by the mid-sixteenth century and these were ports with which Scottish merchants traded constantly. The economic advantages of using insurance were so obvious that Scottish merchants would soon have started to use them to cover their risks. I further believe that insurance would have been reasonably common in the seventeenth and early-eighteenth centuries, as is shown by the evidence regarding William Cochrane and Baillie John Stewart, discussed above, and the use of insurance in fellow northern peripheral countries Norway and Sweden as evidenced by the Scottish prize case law of the late seventeenth century, and above all by the forty-five insurance policies disclosed by the records of the Scots Admiralty Court in the period 1706 to 1750. The paucity of entries about insurance in the Court of Session reports before the mid-eighteenth century indicates not that Scottish merchants did not *use* insurance policies but rather that they did not commonly act as *underwriters* before the mid-eighteenth century. Furthermore, even when Scottish merchants began to act as underwriters the use of arbitration and the Scots Admiralty Court to resolve disputes over insurance means that the Court of Session reports and the writing of institutional writers primarily concerned with the Court of

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<sup>159</sup> Ibid., 407.

Session inevitably under-reports the likely extent of the usage of insurance by Scottish merchants. Unlike Forte, who saw Scotland as a 'late adopter' of insurance, I believe that insurance policies would have been used to the same extent as they were in the rest of maritime Europe, that is to say as a risk-management tool for merchants used regularly, but certainly not invariably. Where Scotland was a 'late developer' was in the sense that it was not until the mid to late eighteenth century that Scottish underwriting developed to a significant extent and so was available to Scots merchants. That late developer however did grow in the nineteenth century to become a significant factor in the Scottish economy, a role which it retains to this day.

# The Rationale and Fundamental Structure of the *Conditio Si Testator Sine Liberis* *Decesserit* in Scots Law

Roderick R. M. Paisley

My good friend and colleague Angelo Forte had an admirable view of Scots law. He relished historical detail but he could always see the bigger picture and recognized that law must serve contemporary needs. He had a concern for Scots law as a whole and his interest was not limited to the subject of his own immediate researches. Angelo's approach to law comprised a love of principle moderated by pragmatism. He had a clear vision of the workings of private law and a strong interest in law reform. In our discussions on many areas of law he often came back to a simple but powerful idea: 'It is much more difficult to know where you are going in the future if you do not know where you are now'. It is in that spirit and in honour of my good friend and colleague that I offer this essay on the *conditio si testator sine liberis decesserit*.

## Introduction<sup>1</sup>

The article will examine the rationale and fundamental structure of the Scottish common law rule or principle known as the *conditio si testator sine liberis decesserit*.<sup>2</sup>

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<sup>1</sup> The writer thanks Professors Marius de Waal, David Carey Miller and John Ford, Doctors John Stannard and Andrew Simpson and Sheriff Douglas Cusine for incisive comments on an earlier draft. The remaining faults are those of the writer.

<sup>2</sup> The detailed rules of its operation are addressed in Roderick R. M. Paisley, 'The Mechanics of Operation of the *Conditio Si Testator Sine Liberis Decesserit* in Scots Law', *Juridical Review*, [2014], 187–235 (hereinafter referred to as 'Paisley, 'Conditio Mechanics)'). The separate *conditio si institutus sine liberis decesserit* is a rule importing into a testamentary provision to a descendant an implied destination over to the descendant's child in the event of the descendant's predecease. For a thoughtful and thought provoking modern comparative account see Alan R. Barr, 'The *Conditio Si Institutus Sine Liberis Decesserit* in Scots and South African Law' in K. G. C. Reid, M. J. de Waal and R. Zimmermann (eds), *Exploring the Law of Succession: Studies National, Historical and*

A feminized version of the name – *conditio si testatrix sine liberis deceaserit* – is the invention of one writer and has appeared in only one recent summary of the law.<sup>3</sup> This rule or principle provides for the reduction or deemed revocation of a will upon the subsequent birth of a child of the testator where that child is not provided for in the will. For convenience it will be referred to in this article as the *conditio si testator*.

A legal scholar is not normally encouraged to find the subject of his enquiry described as ‘undefined’, ‘unsettled’, ‘anomalous’ and accompanied by ‘great confusion’. These, however, are descriptions that have been applied by judges, legal commentators and law reformers to the Scottish *conditio si testator*. An optimist might observe that obscurity in this area has led to considerable opportunities for pragmatic development of the law enabling just and precise judicial solutions to be applied to the knotty factual problem immediately at hand. A pessimist, on the other hand, might reflect on the continuing theoretical muddle, lament the lack of a systematic overview and predict a probable reduction in the ability of lawyers to foretell the application of the law to new factual situations. Whatever the view one takes on those points, there certainly has been freedom for this aspect of Scots law to grow into a rather large tree casting too many shadows. For over three centuries the *conditio si testator* has persistently held on to many mysteries whilst a mass of detail has been accumulated. The rule has tenaciously evaded a full theoretical explanation even after the best efforts of existing academic study and repeated judicial examination.

To complete this introduction, two particular features of this article are worthy of note. First, to provide a more complete picture, reference will be made to material never before published. This includes *Session Papers* in the Advocates’ Library,<sup>4</sup> pleadings contained in the National Archives of Scotland, a previously unreported and overlooked decided case<sup>5</sup> and unpublished

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*Comparative* (Edinburgh, 2007), 177–92.

<sup>3</sup> Alan Eccles, ‘Scotland’ in Louis Garb and John Wood (eds), *International Succession* (3rd edn, Oxford, 2010), 621–38, 630, para. 40.68. Apart from this single example the name *conditio si testator sine liberis deceaserit* is universally applied whether or not the *de cuius* is female: Paisley, ‘Conditio Mechanics’, 191.

<sup>4</sup> In this regard the author thanks Denis Garrity, advocate, for his invaluable assistance.

<sup>5</sup> *Anderson v Anderson’s* JF unreported but noted at [1950] C.L.Y. 5449, Lord Macintosh, November 21, 1950. This case appears in the Minute Book of the Court of Session (held by National Archives of Scotland), 1950–1, Vol. 170, General Department, Tuesday 21 November 1950, 119. The full title of the case is *Barbara Ann McCracken or Anderson (Widow of John Anderson) as tutrix of Janet Anderson and Jane Anderson v Fergus Dunnet Halcrow Judicial Factor on the trust estate of said John Anderson, and others*



professorial lectures. Secondly, significant features in the development of Scots law are the multiplicity of rejected explanations and the qualification and re-qualification of detail as the law has moved on. Thus in the text of this article there is a considerable amount of quotation and critique of earlier views. This article seeks to remove the clutter, to present an overall picture and to clarify many of the remaining obscurities in the law: *Ecce mysterium vobis dico*.<sup>6</sup>

### Revocation By Force Of Law

It is worthwhile, first of all, to outline briefly the international and comparative context. In a number of legal systems, including Scotland, an express testamentary provision linking the revocation of a will with the subsequent birth of a child is, to some extent, emulated by a rule of law. In some American common law jurisdictions such rules are known as the rule protecting the 'pretermitted child'.<sup>7</sup> This terminology has not been adopted in Scotland but the closely related phrase 'omitted child' is readily understood. The usual effect of each of the various rules is that, by one of several means, a testamentary deed ceases to have effect upon the birth of an afterborn child for which no testamentary provision has been made in that deed.<sup>8</sup>

This last broad statement hides numerous differences. It cannot be assumed that all such rules have the same rationale or operate in a similar way. Various possibilities are available. The aim could be to promote and give effect to the presumed intentions of a testator<sup>9</sup> who, albeit inadvertent and

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including *Stothart Anderson*, *Frank Anderson*, *Edna Mary Anderson or Carter*, *William Anderson (otherwise Alasiter)* [sic] *Anderson*. Material is located in the National Archives under reference *Decree of declarator; Barbara Ann McCracken or Anderson v Fergus Dunnet Halcom; Judicial Factor on the trust estate of the late John Anderson and others* August 1951, CS46/1951/8/70.

<sup>6</sup> 1 Corinthians, 15, 51 (Vulgate translation which is largely the work of St. Jerome commissioned in 382 AD). The original Greek reads *δο μυστήριον μ ν λέγω*.

<sup>7</sup> See, e.g., Jan Ellen Rein, 'A More Rational System For the Protection of Family Members Against Disinheritance: A Critique of Washington's Pretermitted Child Statute and Other Matters', *Gonzaga Law Review*, 15 (1979), 11–64; Steven C. Krueger, 'Wills – The Pretermitted Heir in Missouri', *Missouri Law Review*, 41 (1976), 143–52.

<sup>8</sup> For the common law rule in England, abolished by Wills Act 1838, c.26, s.19, see *Overbury v Overbury* (1682) 2 Show K.B. 242, 89 Eng. Rep. 915; *Doe on the Demise of Lancashire* (1792) 5 T.R. 49, 101 Eng. Rep. 28 and *Johnston v Johnston* (1817) 1 Phill. Ecc. 447, 161 Eng. Rep. 1039, the last of which is noticed in *Elder's Trustees v Elder* (1894) 21 R. 704, 706 per Lord (Ordinary) Low and also cited to the court in argument in *Smith's Trustees v Grant* (1897) 35 S.L.R. 129, 130.

<sup>9</sup> This is the case, e.g., with Venezuela: Civil Code, Art. 951; Cyprus: Wills and

perhaps careless, is perceived as being morally good and responsible and who would have wished to make provision for the child if he had thought about it. Alternatively, the purpose of the rule might be to protect the child and operate as a limitation on the testamentary freedom of a testator who is, or is perceived to be, morally bad and irresponsible and who wishes to disinherit that child. The rule could operate as a revocation or deemed revocation; it could be based on the doctrine of lapse, fundamental change of circumstances, obsolescence, equitable adjustment or it may simply give the afterborn child a right in limited circumstances to challenge the will and, if successful, to avoid it or to have it reduced.

The lack of a consistent rationale for the various rules has restricted the usefulness of modern comparative study, although a historical analysis to identify common roots is potentially more productive.<sup>10</sup> There are, however, a few occasions where foreign rules have been noted by Scottish judges<sup>11</sup> and law reformers.<sup>12</sup> So too the Scottish *conditio si testator* has been noticed at least once by a foreign court<sup>13</sup> and has received the attention of some foreign commentators.<sup>14</sup> Unfortunately all of this comparative comment has been

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Succession Act 1959 cap. 195, s.38. See also pre codal French law: Robert Joseph Pothier, 'Traité des Donations Testamentaires' in M. Bugent (ed.), *Oeuvres*, vol. VIII (Paris, 1864), 307, paras 294–5.

<sup>10</sup> For a historical analysis of the Scottish version of the rule see Roderick R. M. Paisley, 'The Roman and Civilian Origins of the *Conditio Si Testator Sine Liberis Deceaserit* in Scots Law', *Edinburgh Law Review*, 19(1) (2015), 1–35 (hereinafter referred to as 'Paisley, 'Conditio Civilian Sources'').

<sup>11</sup> See the reference to the English statute in *Leipper v Leipper* (1884) 2 Guth. Sel. Sh. Ct. Cases. 586 and to the English common law in the cases noted at footnote 8.

<sup>12</sup> Scottish Law Commission, *The Making and Revocation of Wills* (Scot. Law Com. Consultative Memorandum No. 70, 1986), 35–48; idem, *Report on Succession* (Scot. Law Com. No. 124, 1990) 54, para. 4.47.

<sup>13</sup> E.g. *Allard the Wife v Widow Lagesse* (1871) 11 Decisions of the Supreme Court, Vice Admiralty Court and Bankruptcy Court of Mauritius Reports 20 (Mauritius Supreme Court), 20 and 21, further appealed and decided by the Privy Council, without the reference to the *conditio si testator*, at *Bouche otherwise Lagesse v Allard and Lagesse* [1872] 17 Eng. Rep. 564; 9 Moo.PC.NS. 399. One may surmise that the cross reference to Scots law arose because of the personal knowledge of the Mauritian judges who originated in Scotland. The judges were Mr (later Sir) John Gorrie (1829–1892), originally from Kettle, Fife, who was educated at Edinburgh University, and His Honour Sir Charles Farquhar Shand (1810–1889), from Marykirk and later Kintore in Aberdeenshire, who was educated at the universities of Aberdeen and Edinburgh (LLD). He was involved in trust litigation (*Shand v MacDonald* (1862) 24 D. 829; (1862) 34 Sc. Jur. 465) and wrote *The Practice of the Court of Session* (Edinburgh, 1848).

<sup>14</sup> E.g. Ralph A. Newman (ed.), *Equity in the World's Legal Systems, A Comparative Study* (Brussels, Hastings College of Law, 1973), 198.

rather superficial largely because the Scottish sources have been unable to present scholars, domestic or foreign, with a consistent and coherent analysis of the rationale and fundamental structure of the *conditio si testator* as developed in Scotland. One purpose of this article is therefore to enable such a comparative study to begin.

## The Scottish Version

The Scottish version of the rule or principle is traditionally regarded by Scottish writers as a form of implied revocation<sup>15</sup> or as a method of revocation by operation of law.<sup>16</sup> It is comprised in what is known as the *conditio si testator sine liberis decesserit* or, as more infrequently stated, ‘the implied condition, *Si sine liberis testator decesserit*?’<sup>17</sup> Published academic analysis of the Scottish rule began in the nineteenth century<sup>18</sup> and there is now a reasonably large body

<sup>15</sup> Bell, *Principles* (4th edn and 10th edn), s.1777; *Stuart-Gordon v Stuart-Gordon* (1899) 1 F. 1005, 1010 per Lord McLaren; M. C. Meston et al., ‘Wills and Succession’, *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 25 (Edinburgh, 1989), para. 748; M. C. Meston, ‘The Conditiones Si Sine Liberis Decesserit’, *J.L.S.S.*, [1981] (Workshop), W 203. See Hilary Hiram, *The Scots Law of Succession* (2<sup>nd</sup> edn, Haywards Heath, 2007), 207, heading prior to para. 5.19.

<sup>16</sup> Michael C. Meston, *Succession (Scotland) Act 1964* (5th edn, Edinburgh, 2002), 99; David Bartos, *Bartos and Meston on the Succession (Scotland) Act 1964*, (6th edn, Edinburgh, 2015) 63, para 6–44.

<sup>17</sup> E.g. *George Dempster and Others v Sophia Willison and others*, 15 November 1799, M. 16947, 16948 per counsel. See also John T. Mowbray (ed.), *John Hendry, Manual of Conveyancing* (2<sup>nd</sup> edn, Edinburgh, 1867), 415, para. 881; Macvey Napier (First Professor of Conveyancing in the University of Edinburgh), ‘Lectures on Conveyancing’, (1843–44), Vol. 1, 311, Lecture 25 ‘Testaments’. These lectures were typed from a manuscript copy in the possession of the Faculty of Procurators of Glasgow, 1939. The typed volumes remain unpublished and the quotation is from the present author’s own copy. This is hereinafter referred to as ‘Macvey Napier, ‘Lectures’’. I thank Brian Hamilton for donating the volumes to me.

<sup>18</sup> Anonymous, *A Treatise on Legacies and Provisions Mortis Causa* (Edinburgh, 1861), 27–28; James Paterson, *A Compendium of English and Scotch Law* (2nd edn, Edinburgh, 1865), 225; John Craigie, *Conveyancing: Moveable Rights* (Edinburgh, 1894), 538–9; John McLaren, *A Treatise on Trusts and Trust Settlements, Vol. 2* (Edinburgh, 1863), 340–2; idem, *The Law of Scotland in Relation to Wills and Succession, Vol. 1* (Edinburgh, 1868), 257–60, paras 502–7; idem, *The Law of Wills and Succession as administered in Scotland, Vol. 1* (3<sup>rd</sup> edn, Edinburgh, 1894), 403–6, paras 732–7; Alexander Montgomerie Bell, *Lectures on Conveyancing, Vol. 2*, 1st Ed., (1867), 914–15; Henry Johnston, ‘Conditio Si Sine Liberis’, *Green’s Encyclopaedia of the Law of Scotland*, Vol. III (Edinburgh, 1896), 171–4; John Burns, *A Handbook of Conveyancing* (Edinburgh, 1889), 111–12; George Watson (ed.), *Bell’s Dictionary and Digest of the Law of Scotland* (7th edn, Edinburgh, 1890, reprinted by Edinburgh Legal Education Trust, Edinburgh, 2012), 218; John

of modern literature on the matter comprising both books<sup>19</sup> and articles<sup>20</sup> but much of this is purely descriptive. The Scottish Law Commission has twice

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Trayner, *Latin Maxims and Phrases* (4th edn, 1894, reprinted in Edinburgh, 1986), 576–7.

<sup>19</sup> James S. Sturrock (ed.), *Menzies: Conveyancing According to The Law of Scotland* (Edinburgh, 1900), 420–1, 427; A. Williamson (ed.), *W. R. Herkless: Jurisprudence or the Principles of Political Right* (Edinburgh, 1901), 154–5; Oswald Dykes, *McLaren on Wills and Succession: Supplementary Volume* (Edinburgh, 1934), 105–7; John Rankine (ed.), *Bell, Principles* (21st edn, 1911), 3, 9, 2, 591; A. J. P. Menzies, *Trustees* (2nd edn, Edinburgh, 1913), 508, para. 827; William Mitchell, ‘Conditio Si Sine Liberis’ in J. Wark (ed.), *Encyclopaedia of the Laws of Scotland*, Vol. 4, (Edinburgh, 1927), 330–42; C. de B. Murray, *The Law of Wills in Scotland* (Edinburgh, 1945), 49–52; T. B. Smith, *Scotland, The Development of Its Laws and Constitution* (London, 1962), 420, published also as T. B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962), 420; D. M. Walker, *Principles of Scottish Private Law, Vol. 4* (4th edn, Oxford, 1989), 160–1; John M. Halliday, *Conveyancing Law and Practice in Scotland, Vol. 4* (1st edn, Edinburgh, 1990) 64–5, paras 47-05 – 47-06; Ian J. S. Talman (ed.), *John M. Halliday: Conveyancing Law and Practice in Scotland* (2nd edn, Edinburgh, 1996), 908–9, para. 20–05; Michael C. Meston, *Succession (Scotland) Act 1964* (5th edn, Edinburgh, 2002), 99–100; David Bartos, *Bartos and Meston on the Succession (Scotland) Act 1964*, (6th edn, Edinburgh, 2015) 63–4, paras 6-44 – 6-49; H. Hiram, *The Scots Law of Succession* (2nd edn, Haywards Heath, 2007), 207–9, para. 5.20; *Stair Memorial Encyclopaedia*, vol. 25, paras 751–754; D. R. Macdonald, *Succession* (3rd edn, Edinburgh, 2001), 84, paras 7.32–7.36; John Kerrigan, *Drafting for Succession* (2nd edn, Edinburgh, 2010), 209–11, paras 9-16 and 9-18; A. Barr, J. Biggar, A. Dagleish and H. Stevens, *Drafting Wills in Scotland* (2nd edn, Haywards Heath, 2009), 368–9, para. 6.138, and 434, para. 8.7; Eilidh M. Scobie (ed.), *James G. Currie, The Confirmation of Executors in Scotland* (9th edn, Edinburgh, 2011), 75–8, paras 3.101–3.114; Hector L. MacQueen et al., *Gloag and Henderson, The Law of Scotland* (13th edn, Edinburgh, 2012), 998–9, para. 39.12, which retains unaltered substantial portions of Gloag and Henderson, *Introduction to the Law of Scotland* (1st edn, 1927), 467–468, para. 5; George L. Gretton and Andrew J. M. Steven, *Property, Trusts and Succession* (2nd edn, Haywards Heath, 2013), 420, para. 27.16; A. B. Wilkinson and K. Mck. Norrie, *The Law Relating to Parent and Child in Scotland* (3rd edn, Edinburgh, 2013), 37–8, para. 2.19; William M. Gordon, ‘Donation’, *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 8 (Edinburgh, 1992), para. 645; Frankie McCarthy, *Succession Law*, 2013, Dundee University Press, pages 49–50.

<sup>20</sup> William Jardine Dobie, *Some Reflections on the Conditio Si Testator Sine Liberis Decesserit*, (1930) *SLT (News)* 9–10; Anonymous, *Will – Conditio Si Testator – Right to Challenge* (1933) 45 *JR* 76–77; Anonymous, ‘The Pleader’, *S.L.Rev.*, 49 (1933), 9–12, 11–12; M. C. Meston, ‘The Conditiones Si Sine Liberis’, *J.L.S.S.*, (1981) (Workshop) W, 203; Hilary Hiram, ‘The Conditio Si Testator as Family Policy: *Greenan v Courtney*’, *E.L.R.*, 11(3) (2007), 431–5; Roderick R. M. Paisley, ‘The Succession Rights of the Unborn Child’, *E.L.R.*, 10(1) (2006), 28–59, 51–55; Robert Hunter, ‘The Conditio Si Testator Sine Liberis Decesserit: Retention or Abolition?’, *SLT (News)*, [2012], 107–111; Nicholas W. Holroyd, ‘The Disappointed Beneficiary’, *STEP Journal*, 2008 (January), 31–3, 33.

recommended the abolition of this *conditio si testator* but its recommendations have not been acted upon.<sup>21</sup>

The rule in Scotland is a common law provision with its roots in Roman law and Civilian jurisprudence.<sup>22</sup> It was first presented in argument in Scottish litigation in the seventeenth century<sup>23</sup> and formed the basis of judgments in the eighteenth century.<sup>24</sup> Further statements of the operation of *conditio si testator* came in the analysis of several of the Scottish institutional writers<sup>25</sup> and, over time, these were incrementally developed by more case law.<sup>26</sup> It has

<sup>21</sup> Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 124, 1990), paras 4.46–4.49; *idem*, *Report on Succession* (Scot. Law Com. No. 215, 2009), paras 6.21, 6.29 and 7.418 and Clauses 30, 33 and 51 of the draft Succession (Scotland) Bill annexed to the Report.

<sup>22</sup> Paisley, 'Conditio Civilian Sources'.

<sup>23</sup> *Chrystie v Chrystie*, 13 July 1681, 2 Stair 889, reported *sub nom. Christie v Christie*, 13 July 1681, M. 8197 with further proceedings at *Christy v Christy*, December 1682, 2 B.S. 26; *David Christy v James Christy*, 22 December 1682, 4 B.S. 444; *Petrie v Petrie*, July 1733. There appear to be no surviving pleadings for this case and the material held in the National Archives of Scotland under reference *Petrie and others v Petrie and others: Reduction*, 1738, CS 226/7288 does not relate to this matter.

<sup>24</sup> *Bethia Yule v Joseph Yule*, 20 December 1758, M. 6400; *Next in Kin of Isobel Watt v Isobel Jervie*, 30 July 1760, M. 6401. This misreports the name of the deceased as 'Joseph Yule'. It should be 'John Yule': see the report in the Faculty Cases, 20 December, 1758, 267, case no. 150.

<sup>25</sup> Bankton, *Institute*, Vol. 1 (Edinburgh, 1751. Reprinted by the Stair Society: Edinburgh 1993), 1, 9, 6, 227–8; Erskine, *Institute*, 3, 8, 46; Bell, *Principles* (2nd edn Edinburgh, 1830; 4th edn, Edinburgh, 1839), ss1776–1780.

<sup>26</sup> *Colquhoun v Campbell* (1829) 7S. 709, case no. 365; 5 June 1829, 1 Sc. Jur. 249; 4 Fac. 979 case 145. For material in National Archives see *Decree of certification, contra non producta, and of reduction etc. Flora Ann Colquhoun v Elly McMillan or Colquhoun and others* 1823, CS44/36/88; *Act and decree authorizing the Lord Clerk Register and his deputies to transmit a process of reduction at the instance of Flora Ann Colquhoun and her factor loco tutoris against Elly McMillan or Colquhoun and others to the office of Mr Thomas Manners, Depute Clerk of Session* June 1826, CS44/106/34; *Decree of Reduction, Flora Ann Colquhoun v Duncan Campbell and others, and decree for expenses, Andrew Clason WS v Duncan Campbell*, 1829, N.A.S. CS44/182/5. Relevant Session Papers are located in the Advocates' Library 1820 General Collection of Session Papers 2 June–9 June 1829, Vol. 189, 355–72; *As Executors v B* (1874) 11 S.L.R. 259; *Elder's Trs v Elder* (1894) 21R. 704; (1895) 22R. 505 with material in National Archives at *Interim decree in action of multiplepounding and exoneration, John Stewart Smith, and others, Thomas Elder's trustees v Ms Margaret Blair or Blair, and others*, September 1895, CS46/1895/9/37; *Decree of Exoneration and Discharge in Multiplepounding and Exoneration, John Stewart Smith and others, Thomas Elder's trustees v Mrs Margaret Blair or Elder and others*, Jan 1897, CS46/1897/1/28; *Smith's Trs v Grant* (1897) 35 S.L.R. 129; (1897) 5 S.L.T. 190; *McKie's Tutor v McKie* (1897) 24R. 526; 4 S.L.T. 308; *Stuart-Gordon v Stuart-Gordon* (1899) 1F. 1005; 7 S.L.T. 79. For material in National Archives see *Decree in Special Case for Charles Stuart-Gordon, and others, trustees and executors of Mrs Margaret Elizabeth Sangster Chalmers or Stuart-Gordon, and others for the*

been judicially observed that the doctrine received its 'proper shape' only in the last quarter of the nineteenth century.<sup>27</sup> Despite this, some major issues remained to be judicially established in the twentieth century.<sup>28</sup> The rule has been recognized and extended, to a small extent, by a twentieth century statute.<sup>29</sup> The case law has continued into the new millennium.<sup>30</sup> The rule has never properly been considered by the House of Lords or by its successor, the Supreme Court, and in the only two cases where the *conditio si testator* was presented in argument before the House of Lords it was determined that it had no bearing on the matter at issue.<sup>31</sup>

The constant judicial tinkering with the rule without substantial legislative intervention could suggest that pragmatism has run rampant. Alternatively, it could be a manifestation of a certain amount of judicial dissatisfaction as to the application of the *conditio si testator*. On the other hand the fact that the matter has come before the Courts so often might be explained more simply. The phenomenon demonstrates nothing more than the remarkable ability of clients to stumble across obscurities in the application of the *conditio*

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*opinion and judgement of the Court of Session*, December 1899, N.A.S. CS46/1899/12/9; *Adamson's Trustees v Adamson's Executors* (1891) 18R. 1133.

<sup>27</sup> *Stevenson's Trustees v Stevenson* 1932 S.C. 657, 660 per Lord (Ordinary) Mackay.

<sup>28</sup> E.g. *Rankin v Rankin's Tutor* (1902) 4F. 979; (1902) 10 S.L.T. 181 and material in National Archives at *Decree in special case for Mrs Margaret McConell or Rankin and another for the opinion and judgement of the Court of Session*, July 1902, CS46/1902/7/82; *Crow v Cathro* (1903) 5F. 950; *Rankine v Rankine's Trustees* (1904) 6R. 581; 11 S.L.T. 813; *Knox's Trustees v Knox* 1907 S.C. 1123; (1907) 15 S.L.T. 282; *Milligan's Judicial Factor v Milligan* 1910 S.C. 58; *Chrysal v Mackinlay* 1919 1 S.L.T. 250 (relevant material is indexed in the National Archives under reference CS46/1920/5/2 but not held); *Nicolson v Nicolson's Tutrix* 1922 S.C. 649 with material in National Archives at *Edith J. Henderson or Nicolson & others: Special Case*, 1923, CS251/1967; *Stevenson's Trustees v Stevenson* 1932 S.C. 657; 1932 S.L.T. 510. For material in National Archives see *William Gibb & another (Trustees of William Stevenson) v William Stevenson & others; Multiplepointing & Exoneration*, 1934, CS257/3706; *Anderson v Anderson's JF* (1950) unreported.

<sup>29</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, c.70, s.6(2), repealed by Law Reform (Parent and Child) (Scotland) Act 1986, c.9, s.10(2) and Sched. 2.

<sup>30</sup> *Greenan v Courtney* 2007 S.L.T. 355 with subsequent proceedings on expenses at *Greenan v Courtney* [2007] C.S.O.H. 200; Hilary Hiram, 'The Conditio Si Testator as Family Policy: *Greenan v Courtney*', *E.L.R.*, 11(3) (2007), 431–5. For material in National Archives see *Arlene Greenan v Amanda Courtney*, 2008 reference CS348/2008/5376.

<sup>31</sup> *Jean Allan and Donald Smith, her Husband v Arthur Sinclair, Esq. and Isaac Grant*, 13 November 1776, (1776) 2 Pat. 403; *Hughes v Edwardes* (1892) 19R. (H.L.) 33. The issue was not properly raised in the pleadings in the latter case and was not argued in the Court of Session: (1890) 18R. 319. For material in National Archives see *Decree of exoneration and discharge in multiplepointing and exoneration, Frederick Robert Hughes and another, Dr and Mrs Edwardes' marriage contract trustees v Henry Frederick William Edwardes, and others*, July 1895, reference CS46/1895/7/99.



*si testator*. This they do without knowing of its existence because the rule is often overlooked in practice.<sup>32</sup> What Scots law has is an overlooked rule for an overlooked child. However, the rule is an example of an interventionist approach where the legal system seeks to deal with an out of date will in a manner consistent with the presumed intention of a testator. Arguably this is of particular importance where testators seek to set up their own testamentary arrangements without the benefit of legal advice.

### Confusion As To The Nature Of The Rule

Despite the volume of writing on the *conditio si testator* during the last century and a half and the multiplicity of cases on the topic the Scottish Law Commission in its *Consultative Memorandum on The Making and Revocation of Wills* (1986) observed:<sup>33</sup>

The present law on this point gives an impression of great confusion as to the nature of the rule in question.

Not only is the nature of the rule regarded as uncertain but there has been judicial concern expressed as to the form of the rule and when it applies. At the end of the nineteenth century Lord McLaren expressed his views thus:<sup>34</sup>

One cannot but feel that the state of the law in regard to the doctrine of implied revocation of a will executed before the birth of children is unsatisfactory, as it leaves to the arbitrament of the Court a question which ought to be in the domain of positive law. The rule as it has

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<sup>32</sup> Gretton and Steven, *Property, Trusts and Succession* (2nd edn, 2013), 420, para. 27.16; W. J. D., 'Conveyancing Complexities', *Sh.Ct.Rep.*, 47 (1931), 257–60, 259. See also the comment that the *conditio si testator* is 'rarely invoked' in John Kerrigan, *Drafting for Succession* (2nd edn, 2010), 211, para. 9.18, referring to Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 124, January 1990), 163, Note to Draft Succession (Scotland) Bill, Clause 30. That, however, is not quite the experience of the present writer. The frequency of invocation of the *conditio si testator* must depend somewhat on the familiarity of both testators and solicitors with that rule as also with the nature of the testamentary settlement actually made. An acquaintance of the writer, who practises in the North east of Scotland, indicated that she frequently has to advise her clients of the effect of the *conditio si testator* as a number of her clients were footballers and fishermen.

<sup>33</sup> Scottish Law Commission, *The Making and Revocation of Wills* (Scot. Law Com. Consultative Memorandum No. 70, September 1986) 44, para. 5.9.

<sup>34</sup> *Stuart-Gordon v Stuart-Gordon* (1899) 1F. 1005, 1010 per Lord McLaren.

been judicially interpreted leaves the conditions for determining its application in a very undefined and unsettled condition. At the same time it is probably better – I mean as representing the probable intention of the testator – that the rule should exist with its limitations, than that there should be no rule at all, which would have the effect (in the case of a will made by a man before marriage was contemplated<sup>35</sup>) of disinheriting his subsequent issue in favour of collateral legatees.

The confusion arguably starts with the very name of the principle. To a contemporary eye the Latin phrase, when taken in isolation, is potentially misleading and hard to connect with the doctrine.<sup>36</sup> A literal translation – the condition that the testator dies without children – gives the impression that it deals with a situation where a testator dies without surviving children. In Scots law, it actually deals with the reverse situation where the testator dies with an unexpected surviving child.<sup>37</sup>

Another criticism of the Latin name is that it might be taken to suggest an absolute rule of revocation which applies as if the testator had provided in his will that his testamentary provision is to have effect only if he died childless.<sup>38</sup> However, the *conditio si testator* is not an absolute rule of revocation flowing from the occurrence of a single event – the birth of a child. The *conditio si testator* is regarded as enshrining a principle to the effect that an afterborn child, in certain circumstances, may be afforded an option to avoid or seek the reduction of a will which makes no provision for that particular child. In one of the few modern instances in which Latin is used in a modern Scottish statute<sup>39</sup> the principle is referred to as:<sup>40</sup>

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<sup>35</sup> Marriage of the parent is now no longer relevant in the application of the *conditio*. See Paisley, 'Conditio Mechanics', 191–2. There is no separate Scottish rule providing for automatic revocation of a will upon the testator's subsequent marriage.

<sup>36</sup> *Stair Memorial Encyclopaedia*, vol. 25, para. 751; Gretton and Steven, *Property, Trusts and Succession* (2nd edn), 420, para. 27.16, footnote 45.

<sup>37</sup> M. C. Meston, *The Honorary Graduates: Sheriff Principal Gimson, The Aberdeen University Review*, Vol. 49 (1981) 187.

<sup>38</sup> Scottish Law Commission, *The Making and Revocation of Wills* (Scot. Law Com. Consultative Memorandum No. 70, September 1986), 44–5, para. 5.9.

<sup>39</sup> See also Clause 15 of the Succession (Scotland) Bill attached to Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 124, January 1990) 160. Another example of Latin use is Prescription and Limitation (Scotland) Act 1973, c.52, Schedule 3, paras (c) and (d).

<sup>40</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, c.70, s.6(2). See also recommendation 18 at para. 4.49 and Clause 15 attached to Succession (Scotland) Bill attached to Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 124,



[T]he principle known as the *conditio si testator sine liberis decesserit* (in accordance with which a testamentary writing may in certain circumstances be held to be revoked by the birth of a child to the testator after the execution of the testamentary writing).

This statutory formula is incomplete as it leaves out reference to the essential feature of the *conditio si testator* that affords an option to the afterborn child to avoid or seek the reduction of the will: instead, the formula suggests that, if the attendant circumstances are appropriate, the revocation of the will flows directly from the birth of the child. This inaccuracy is also to be found in judicial *dicta*<sup>41</sup> explaining the rule and has been the source of some considerable confusion in the analysis of the *conditio si testator* for over a century. The lack of precision is also repeated in much of the legal literature and judicial *dicta* as a brief survey indicates.

### Survey Of Prior Comments

One must be careful not to be too critical of the lack of detail in statements that are generally intended to indicate the essence of the *conditio si testator* or to refer to its operation only in outline. However, a survey of various academic and judicial comments reveals that the will is stated as being ‘revoked’ by the subsequent birth of a child,<sup>42</sup> or that the birth of the child renders the will ‘of no effect’.<sup>43</sup> Even more loosely is it sometimes stated that ‘the *conditio* revokes the will’<sup>44</sup> or that there is or may be a ‘revocation of the will by the *conditio*’.<sup>45</sup> In

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January 1990) 160. The word used there is ‘rule’ rather than ‘principle’.

<sup>41</sup> E.g. *McKie’s Tutor v McKie* (1897) 24R. 526, 527–528; (1897) 4 S.L.T. 308, 309 per Lord Adam.

<sup>42</sup> *McEwen (Dobie’s Tr.) v Pritchard* (1887) 15R. 2, 8 per Lord Justice-Clerk Moncreiff, Lord Young, and Lord Craighill; *Nicolson v Nicolson’s Tutrix* 1922 S.C. 649, 653 per Lord Justice-Clerk Scott Dickson; *Elder’s Trustees v Elder* (1895) 22R. 505, 507 per Lord Low and 509 per Lord Adam; *Stair Memorial Encyclopaedia*, vol. 25, paras 751–4; D.R. Macdonald, *Succession* (3rd edn), para. 7.32.

<sup>43</sup> *Elder’s Trustees v Elder* (1895) 22R. 505, 511 per Lord McLaren. See also Macvey Napier, ‘Lectures’, Vol. 1, 311, Lecture 25 ‘Testaments’, quoted more fully in the text at footnote 54.

<sup>44</sup> D. R. Macdonald, *Succession* (3rd edn), para. 7.36. See also Hiram, *The Scots Law of Succession* (2nd edn), 207, heading prior to para. 5.20.

<sup>45</sup> Barr, Biggar, Dalgleish and Stevens, *Drafting Wills in Scotland* (2nd edn, 2009), 77, para. 3.5. See also T. B. Smith, *Scotland, The Development of Its Laws and Constitution* (London, 1962), 420 published also as T. B. Smith, *A Short Commentary on the Law of Scotland* (Edinburgh, 1962), 420.

some modern analyses of the Scots law of succession reference is made to a form of revocation of wills entitled ‘revocation [...] by operation of law’<sup>46</sup> or ‘implied revocation’<sup>47</sup> with one Victorian writer suggesting in somewhat loose language:<sup>48</sup> ‘the birth of a child is an implied revocation of the deed or will’. This was echoed half a century later by the Lord Justice-Clerk:<sup>49</sup>

In my opinion the sound view is, that the birth of the child operates as a revocation of the will previously made. That seems to be the undoubted law.

At least when considered in isolation, such wording unfortunately tends to suggest that the *conditio si testator* operates as an independent rule of law and that its application is automatic.<sup>50</sup> So too, in one special case of 1891, the question put to the Court of Session (and answered in the negative) was: ‘Is the will of 21<sup>st</sup> May 1889 revoked by the birth of said child?’<sup>51</sup> This wording suggests automatic revocation upon the birth of the child, at least in suitable attendant circumstances. Similarly, in an important unreported Outer House case from the mid twentieth century<sup>52</sup> the pursuer sought declarator that a will and separate holograph writing ‘have been revoked by the birth of a daughter [...] on 1<sup>st</sup> September 1942’. The Court granted declarator in such terms as regards the will but not the codicil.<sup>53</sup> Even more suggestive of an independent

<sup>46</sup> *Stair Memorial Encyclopaedia*, vol. 25, para. 751; A. E. Anton with Paul R. Beaumont, *Private International Law: A treatise from the Standpoint of Scots Law* (2nd edn, Edinburgh, 1990), 694; P. R. Beaumont and P. E. McElevay, *A. E. Anton, Private International Law* (3rd edn, Edinburgh, 2011), 1053, para. 24.89.

<sup>47</sup> See the sources referred to in Paisley, ‘Conditio Mechanica’, 187.

<sup>48</sup> James Paterson, *A Compendium of English and Scotch Law* (2nd edn, Edinburgh, 1865), 225. See also James S. Sturrock, *Menzies: Conveyancing According to the Law of Scotland* (Edinburgh, 1900), 420–1, 427.

<sup>49</sup> *Rankin v Rankin’s Tutor* (1902) 4F. 979, 981 per Lord Justice-Clerk Macdonald.

<sup>50</sup> See George Watson (ed.), *Bell’s Dictionary and Digest of the Law of Scotland* (7th edn, Edinburgh, 1890, reprinted by Edinburgh Legal Education Trust, 2012), 218.

<sup>51</sup> *Adamson’s Trustee v Adamson’s Executor* (1891) 18R. 1133, 1135 (Question 3). See also *Rankin v Rankin’s Tutor* (1902) 4F. 979; (1902) 10 S.L.T. 181 and *Nicolson v Nicolson* 1922 S.C. 649, 651 (Question 1). In *McEwen (Dobie’s Tr.) v Pritchard* (1887) 15R. 2, 3 the references are to two events: the birth and survivance of the child: see the text below at footnote 137.

<sup>52</sup> *Anderson v Anderson’s JF* (1950) unreported; *Decree of declarator, Barbara Ann McCracken or Anderson v Fergus Dunnet Haleron, Judicial Factor on the trust estate of the late John Anderson and others* August 1951, CS46/1951/8/70.

<sup>53</sup> See the material in the National Archives of Scotland at the source noted in the immediately preceding footnote, Conclusion 1 sought by the Pursuer and the

rule of law causing revocation is the following statement in the *Lectures* of Professor Macvey Napier:<sup>54</sup>

A Testament in favour of a stranger will not be allowed effect if the Testator should afterwards chance to have lawful children of his own – the condition *si sine liberis decesserit* is here always to be implied.

To similar effect is a judicial observation that ‘the birth of a child operates to revoke all previously executed wills’<sup>55</sup> and a professorial statement to the effect that: ‘A will is revoked by the birth of a child to the testator, either shortly before his death or posthumously’.<sup>56</sup>

Similar confusion is inherent in the judicial *dicta* that confirm the invalidation of a will by means of the *conditio si testator* is a matter of circumstances including the birth of an unprovided for child without the further clarification that if the appropriate circumstances exist the result is that there is merely conferred on that child an option, exercisable only after the testator’s death, to seek the invalidity or reduction of the will.<sup>57</sup> This error is most obvious in doubts expressed by one judge as late as the end of the nineteenth century as to whether a will, duly revoked by the *conditio si testator*, may be set up again by mere lapse of time ending with the testator’s death.<sup>58</sup>

All of these formulae are open to critique: a closer analysis indicates that the effect of the operation of *conditio si testator* is truly not a species of revocation at all but, instead, is an option to avoid or seek reduction of a deed afforded to the afterborn child. This is noticed by a few writers.<sup>59</sup> The Scottish

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interlocutor of 21 November 1950.

<sup>54</sup> Macvey Napier, ‘Lectures’, Vol. 1, 311, Lecture 25 ‘Testaments’.

<sup>55</sup> *Rankine v Rankine’s Trustees* (1904) 6F. 581, 584 per Lord Kinnear.

<sup>56</sup> John Rankine (ed.), Erskine, *Principles of the Law of Scotland* (18th edn, 1890), 444; idem (21st edn, Edinburgh, 1911), 591. This is not contained in any editions prepared by Erskine himself.

<sup>57</sup> E.g. *McKie’s Tutor v McKie* (1897) 24R. 526, 528 per Lord Adam; *Rankine v Rankine’s Trs* (1904) 6F. 581, 583 per Lord McLaren; *Milligan’s J.F. v Milligan* 1910 S.C. 58, 60 per Lord Low.

<sup>58</sup> *McEwen (Dobie’s Tr.) v Pritchard* (1887) 15R. 2, 4 per Lord Rutherford Clark, approved in *Rankin v Rankin’s Tutor* (1902) 4F. 979, 981 per Lord Justice-Clerk MacDonald.

<sup>59</sup> E.g. Gretton and Steven, *Property, Trusts and Succession* (2nd edn), 420, para. 27.16. Here the authors note that the deed is ‘voidable at the instance of’ the child. See also the reference to reduction in Barr, Biggar, Dalgleish and Stevens, *Drafting Wills in Scotland* (2nd edn), 434, para. 8.7; Robert Hunter, ‘The Conditio Si Testator Sine Liberis Decesserit: Retention or Abolition?’, *S.L.T.*, [2012] SLT (News), 107–11. See also Alan Eccles, ‘Scotland’ in Louis Garb and John Wood (eds), *International Succession*

Law Commission came close to the true position but the recognition of the doctrine as involving the avoiding of a deed or the seeking of a 'reduction' was strangely absent in its consideration of the matter. In its opening remarks on the *conditio si testator*, in both its *Report on Succession* (1990)<sup>60</sup> and in its preceding *Consultative Memorandum on The Making and Revocation of Wills* (1986),<sup>61</sup> the Commission avoids express reference to the notion of revocation and states the matter thus:

Under the present law of Scotland the birth of a child to the testator after the date of a will gives that child the right to challenge the will by invoking the so-called *conditio si testator sine liberis decesserit*.

Elsewhere the Scottish Law Commission indicates the effect of a successful challenge is that the will is 'treated as revoked'.<sup>62</sup> As we shall see,<sup>63</sup> this is a partial acknowledgement of a legal fiction at the heart of the operation of the *conditio si testator*. However, the critical step of recognizing the key device of reduction or avoiding of a deed was not expressly taken. Nor was there any express recognition of the fact that the option to seek the reduction of the will can be exercised by the omitted child only after the death of the testator. So too was there no examination of whether the operation of the *conditio si testator* could be classified as a form of lapse.

### A Modern Analysis Of The Conditio

To escape from the persistent obscurity that has attended the description of the rationale and fundamental structure of the *conditio si testator* in Scotland over the centuries, a new, more comprehensive, analysis is offered below. This

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(3rd edn, Oxford, 2010), 621–38, 630, para. 40.68.

<sup>60</sup> Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 124, January 1990), 53, para. 4.46.

<sup>61</sup> Scottish Law Commission, *The Making and Revocation of Wills* (Scot. Law Com. Consultative Memorandum No. 70, September 1986), 44, para. 5.9. Elsewhere in the same larger paragraph there is the passage quoted in the text at footnote 86 below.

<sup>62</sup> Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 124, January 1990), 54, para. 4.46. See also the 'treated as revoked' expression coupled with a recognition the *conditio si testator* must be invoked in Barr, Biggar, Dalgleish and Stevens, *Drafting Wills in Scotland* (2nd edn), 77, para. 3.5 and 368, para. 6.138.

<sup>63</sup> See text at footnotes 72 and 73.

is intended to complement the analysis of the mechanics of operation of the *conditio si testator* set out elsewhere by the present writer.<sup>64</sup>

In its substance the mechanism to give effect to the principle enshrined in the *conditio si testator* is truly an option to avoid or to seek the reduction of a testamentary deed that is afforded to an overlooked afterborn child in certain circumstances.<sup>65</sup> Put another way, in terms of the principle, in certain circumstances, a valid testamentary deed becomes voidable at the instance of the afterborn child.<sup>66</sup> Strictly speaking, it is not a right of revocation because it is operated not by the testator but by a survivor of the testator who has been inadvertently omitted from his testamentary provision. It is also exercisable by the omitted child only after the death of the testator. Although they have been somewhat lost sight of in the following centuries, both these points were recognized, the first expressly and the second implicitly, in one of the earliest Scottish cases on the *conditio si testator*.<sup>67</sup> The published report describes a discussion of the effect of the presumed alteration of the intention of the testator on the birth of a child not provided for in the settlement:<sup>68</sup>

Supposing an intention to alter in that case, yet this supposed intention could not have the effect to void the settlement *ipso jure*. It could only have the effect to privilege the child in equity, to bring a reduction of the settlement.

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<sup>64</sup> See Paisley, 'Conditio Mechanics'.

<sup>65</sup> The action taken on behalf of the omitted child is framed as an action of reduction and declarator in *Flora Ann Colquhoun and her Factor Loco Tutoris v Duncan Campbell* (1829) 7S. 709; 4 Fac. 979 case 145; 1 Sc. Jur. 248. It is framed as a reduction in *Chrystal v MacKinlay* 1919 1 S.L.T. 250. For material in the National Archives of Scotland see *Interim decrees of reduction etc. William Yair Chrystal, Factor Loco Tutoris to George Ian Parnig Dixon v William McKinlay, trustee of the deceased George Clifford Dixon and others*, May 1920, CS46/1920/5/2; *W Y Chrystal (Tutor to George I P Dixon) v William McKinlay & Others: Reduction*, 1921, CS254/794. In a Sheriff court case an attempt to reduce the testamentary deed *ex ope exceptionis* was rejected in the Sheriff Court as the court lacked jurisdiction: *Bradford Equitable Building Society v Thomson* 1965 S.L.T. (Sh.Ct.) 54.

<sup>66</sup> Gretton and Steven, *Property, Trusts and Succession* (2nd edn), 420, para. 27.16.

<sup>67</sup> *Next of Kin of Isobel Watt v Isobel Jervie*, 30 July 1760, M. 6401, 6402 quoted in *Stevenson's Trustees v Stevenson* 1932 S.C. 657, 660 per Lord (Ordinary) Mackay and 666 per Lord Justice-Clerk Alness.

<sup>68</sup> The words may be a record of the reasons for the decision of the court or merely a note of the arguments of counsel. In *Stevenson's Trustees v Stevenson* 1932 S.C. 657, 666, adopting the words of the Dean of Faculty, Lord Justice-Clerk Alness described the words as not the decision of the Court but an 'ingredient in that decision'. See also William M. Gordon, 'Roman and Scots Law – *The Conditiones Si Sine Liberis Decesserit*', *Juridical Review*, [1969], 109–27, 122, footnote 68.

In the twentieth century these elements were re-emphasized as being at the core of the rationale of the modern form of the *conditio si testator* in Scots law.<sup>69</sup>

The law relative to the *conditio si testator* in Scotland has been judicially described as being 'in a somewhat artificial condition'.<sup>70</sup> The aptness of this description is underscored by a recognition that the option to avoid or seek the reduction of the will afforded to the afterborn child operates in an indirect and dog-legged way. In particular, the avoiding or reduction is given effect to in many respects as if it were a revocation.<sup>71</sup> When the right afforded by the *conditio si testator* arises and the afterborn child operates that right, the setting aside of the will, by virtue of a legal fiction,<sup>72</sup> can be regarded not as the *post mortem testatoris* act of the child but as the *pre-mortem* testamentary act of the testator. In addition, by virtue of another legal fiction, the testator can be deemed to have revoked the will at the date of the birth of the afterborn child except in the case of a posthumous child where the revocation is deemed to take place immediately prior to the death of the testator.<sup>73</sup> Thus, by this extended collection of legal fictions, the revocation following upon a proper exercise of the *conditio si testator* can be argued to comply with a number of requirements generally applicable to all testamentary revocations. These are as follows: (a) that the revocation is carried out by the testator himself; (b) that it is deemed to arise from the testamentary intention of the testator and is not a doctrine of lapse;<sup>74</sup> (c) that the revocation is carried out by the testator before his death; and (d) that the revocation has effect before the vesting of any testamentary gift.

<sup>69</sup> *Stevenson's Trustees v Stevenson* 1932 S.C. 657.

<sup>70</sup> *Knox's Trustees v Knox* (1907) 15 S.L.T. 282, 284 per Lord President Dunedin. This was referred to in *Stevenson's Trustees v Stevenson* 1932 S.C. 657, 672 per Lord Hunter.

<sup>71</sup> This is indicated in Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, c.70, s.6(2). Given the abolition of the distinction between legitimate and illegitimate children that provision is now repealed by Law Reform (Parent and Child) (Scotland) Act 1986, c.9, s.10(2) and Sched. 2.

<sup>72</sup> See Paisley, 'Conditio Mechanics', 190, 230.

<sup>73</sup> A third possibility of revocation occurring upon the legitimation *per subsequens matrimonium* of an afterborn illegitimate child was countenanced in comment on *Crow v Cathro* (1903) 5F. 950. See William Mitchell, 'Conditio Si Sine Liberis', *Encyclopaedia of the Laws of Scotland*, Vol. 4 (Edinburgh, 1927), 330–42, 332, para. 755. This, however, cannot now occur in respect of a testamentary deed executed on or after 25th November 1968: Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s.6(2) and (3) and now Law Reform (Parent and Child) (Scotland) Act 1986, s.1.

<sup>74</sup> However, a better theory is that the rule does indeed operate as a qualified doctrine of lapse: see text at footnotes 105–11.

However, there are limits to the solution provided by these legal fictions. Although the reduction in terms of the *conditio si testator* at the instance of the child operates in some respects as if it were a revocation by the testator, it is not such a revocation in all respects. First of all, the testator is not required to have the testamentary capacity to have effected a revocation voluntarily. So, for example, a testator who has made a will omitting all reference to an afterborn child may suffer a serious illness or accident depriving him of all testamentary capacity. He may even lose all ability to be aware of the extent of his close family. Let us assume that, unknown to the testator, at the date of his illness or accident, his wife (or other partner) was pregnant and she later gives birth to a child. In such a case that child may have the benefit of the *conditio si testator* and may seek reduction of the will after the testator's death even though, as at the birth of the child and at all times thereafter up to his death, the testator lacked testamentary capacity to revoke the same will. Secondly, an ordinary revocation effected by the testator in the usual manner, for example, by means of a new will can always be undone by later testamentary provision made at any time prior to the testator's death. However, a deemed revocation following an avoiding or reduction in terms of the *conditio si testator* is always a final revocation and it cannot be undone by new testamentary provision given that, by the time the option to seek reduction of the will is operated by the child, the testator is already dead and cannot make a new will to undo the deemed revocation. That said, one should recall that a testator who does not wish this deemed revocation to occur can always make a will prior to his death expressly or impliedly excluding the operation of the *conditio si testator*.<sup>75</sup> That these points remain unexplained even by the full extent of the combined legal fictions noticed above suggests that a true understanding of the *conditio si testator* is to be found not in the law of revocation but in another doctrine such as lapse.<sup>76</sup>

Although the right to avoid or seek reduction of the will in terms of the *conditio si testator* is afforded to the afterborn child only in certain circumstances (establishing effectively a limited number of pre-conditions for the presumption of the emergence of the child's right to seek a reduction<sup>77</sup>), once it arises and his right is successfully operated, the reduction is unconditional. So too, assuming one accepts the traditional taxonomy of deemed revocation, is the deemed revocation effected by the operation of the *conditio si testator* deemed

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<sup>75</sup> Paisley, 'Conditio Mechanics', 200–2.

<sup>76</sup> See text below at footnotes 105–11.

<sup>77</sup> See Paisley, 'Conditio Mechanics', 190–202.



to be unconditional: nothing more needs to occur before it has effect. Where the testator survives the birth of the child, the unconditional revocation is deemed to have effect as at the date of that birth.<sup>78</sup> So too where the testator dies before the birth of the child and the child is a live-born posthumous child, the deemed revocation, once again, is unconditional but it is backdated, by virtue of another legal fiction, so that it is deemed to have been carried out by the testator immediately prior to his death and it is given effect to as of that same date.

In all of this there is this further oddity. Whether or not there are circumstances giving rise to the application of the *conditio si testator* is always judged in retrospect. It is judged after, sometimes long after, the date at which the revocation is deemed to have occurred and at which it is deemed to have effect. As indicated above, that date of revocation is the birth of the child, except in the case of a posthumous child when it is immediately prior to the testator's death. In deciding whether a will is to be regarded as revoked by the child's exercise of the option to avoid or seek reduction of the deed afforded to him in terms of the *conditio si testator* one must assess not only whether the presumption arises that the child has such an entitlement but also whether that presumption has been rebutted. The former can be determined at the latest at the birth of the child but the latter involves an assessment of the actings of the testator not only before but after he became aware of the birth of the child and those actings may continue, perhaps for years, right up to the death of the testator. It is therefore no surprise, as shall be shown below,<sup>79</sup> that the *conditio si testator* cannot be invoked until after the death of the testator.

Furthermore, the avoiding or reduction permitted by the *conditio si testator* is not effected immediately and automatically upon the afterborn child's survival of the death of the testator but, instead, the surviving afterborn child must take a positive step to seek that avoiding or reduction.<sup>80</sup> This means that at the moment of death the testator dies testate but that may alter if the will is avoided.<sup>81</sup> What then occurs as regards vesting of testamentary gifts in the gap period between date of death and the successful exercise of the option conferred by the *conditio si testator*? The possibilities comprise two basic alternatives. First, the rights of the beneficiaries under the will may vest

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<sup>78</sup> See *ibid.*, 230–3.

<sup>79</sup> See text after footnote 99. See also Paisley, 'Conditio Mechanics', 190.

<sup>80</sup> See Paisley, 'Conditio Mechanics', 222–4.

<sup>81</sup> It is not the case that one does not know if the testator dies testate or intestate: cf. *Smith's Trs v Grant* (1897) 35 S.L.R. 129, 131 per Lord Stormonth Darling.



on the testator's death<sup>82</sup> and be subject to defeasance if the after-born child operates the option conferred by the *conditio si testator*. This defeasance could be fortified by a legal fiction to the effect that, if the child exercises his right to avoid the will, the rights of other beneficiaries will be deemed never to have vested. This would be consistent with a classification of the *conditio si testator* as a rule of lapse. Secondly, the vesting of the same rights could be regarded as suspensively conditional upon the afterborn child not operating the *conditio si testator*. If the option to seek reduction of the will is then exercised, the testator may be regarded always to have died intestate or, at most, testate to the extent of any unreduced will or settlement.<sup>83</sup> The latter alternative suffers from one major drawback. Short of eventual negative prescription of the right to operate the *conditio si testator*, there is, under the present law, no clear mechanism to force the child to decide one way or the other within any set time limit. It may be that this would be worthy of reform.<sup>84</sup>

### Court Action

As will be further explored below,<sup>85</sup> in their *Consultative Memorandum on The Making and Revocation of Wills* (1986), the Scottish Law Commission observed that the *conditio si testator* is 'a rule whereby an after-born child can apply to a court to have the will "treated as revoked"'.<sup>86</sup>

This should not be taken as an indication that a court process is inevitable if an afterborn child wishes to avoid a will that omits any provision for him. The vast majority of instances which might involve the application of the *conditio si testator* are settled without litigation. Of course no application to court is required if all parties who would lose upon the avoiding of the will agree as to the operation of the *conditio si testator*.<sup>87</sup> But the matter may be put more strongly. It is not a precondition of giving effect to the exercise of the option to avoid a will afforded by the *conditio si testator* that a Court declare that the will is reduced. Where an executor is confident as to the application

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<sup>82</sup> Or, as otherwise provided in the will itself.

<sup>83</sup> See Paisley, 'Conditio Mechanics', 226–7.

<sup>84</sup> See text at footnote 256.

<sup>85</sup> See text below at footnote 141.

<sup>86</sup> Scottish Law Commission, *The Making and Revocation of Wills* (Scot. Law Com. Consultative Memorandum No. 70, September 1986), 44, para. 5.9.

<sup>87</sup> There may be an issue as to how that agreement should properly be evidenced. The parties who would gain do not have to agree as they can simply refuse to accept any increased gift.

or non-application of the *conditio si testator*<sup>88</sup> he may proceed to distribute the estate accordingly without reference to any court. Prior to doing this, the prudent executor will seek to intimate to all concerned his interpretation of the law and give the concerned parties an opportunity to make representations prior to the distribution being made. To adopt the vernacular, this is effectively a ‘put up’ or ‘shut up’ approach in relation to anyone with an interest who might seek to contest the executor’s interpretation of the law. However, an executor has no power to put a beneficiary to silence and the approach carries the risk that a disappointed beneficiary (perhaps the omitted child or those who would lose if the omitted child gains) may bring court action to clarify the matter. Many executors prefer to preclude that possibility, with all its attendant hazards, by having disappointed beneficiaries express their agreement, in writing, as to the proposed distribution, thus personally barring themselves from future disputation of the distribution. Failing this, an executor may raise court proceedings or encourage the representatives of the omitted child or another beneficiary to raise court proceedings to put the matter beyond doubt.

In case of dispute and also in cases where dissatisfied beneficiaries have not stated their assent to the proposed distribution, the right to exercise the option to avoid the will in terms of the *conditio si testator* may be asserted by means of an action of declarator,<sup>89</sup> reduction and declarator<sup>90</sup> or reduction<sup>91</sup> brought on behalf of the afterborn child. In an action brought by the testamentary trustees or another beneficiary and defended on behalf of the child the matter of reduction may be raised *ope exceptionis*.<sup>92</sup> In addition, the matter of whether a will remains operative upon the birth of an afterborn child who claims an entitlement to avoid the will may be determined in a multiplepounding brought by the trustees of the *de cuius*<sup>93</sup> or his executors or by a potential beneficiary<sup>94</sup>

<sup>88</sup> If the executor takes the view that the *conditio si testator* is applicable, the executor will also require to be satisfied as to whether the child wishes to exercise the option to seek reduction.

<sup>89</sup> E.g. *Greenan v Courtney* 2007 S.L.T. 355; *Anderson v Anderson’s JF* (1950) unreported.

<sup>90</sup> E.g. *Flora Ann Colquhoun and her Factor Loco Tutoris v Duncan Campbell* (1829) 7S. 709.

<sup>91</sup> E.g. *Chrystal v MacKinlay* 1919 1 S.L.T. 250 brought by the factor *loco tutoris* of the child.

<sup>92</sup> This generally means a defence without a denial of the right of action. The Sheriff court lacked jurisdiction for this matter in *Bradford Equitable Building Society v Thomson* 1965 S.L.T. (Sh.Ct.) 54.

<sup>93</sup> E.g. *Stevenson’s Trustees v Stevenson* 1932 S.C. 657; *Elder’s Trustees v Elder* (1894) 21R. 704; (1895) 22R. 505; *Smith’s Trs v Grant* (1897) 35 S.L.R. 129; (1897) 5 S.L.T. 190 (multiplepounding and exoneration).

<sup>94</sup> *Millar’s Trustee v Millar* (1893) 20R. 1040 (multiplepounding brought by trustee and executor of widow who had survived the testator but had since died).

in which the various interested parties lodge claims. Where the facts are not disputed, the questions of law including whether a will remains operative may be settled in a special case brought by such trustees<sup>95</sup> or executors,<sup>96</sup> or a judicial factor on the estate<sup>97</sup> and the other parties potentially entitled in the succession<sup>98</sup> to determine matters relating to the appropriate distribution. In the course of such litigation the trustees or executors may also seek an exoneration.<sup>99</sup> To that, it would seem, they are not entitled unless the matter is successfully litigated or unless an agreement with the beneficiaries provides for such exoneration.

In all reported cases the action, however procedurally framed, has been raised (or defended) on behalf of a surviving omitted child after the death of the *de cuius*. This reflects the underlying rule that the afterborn child cannot exercise the option afforded to him under *conditio si testator* to avoid or seek the reduction of the will of a testator (even one who has lost all testamentary capacity) whilst the latter is still alive. Thereby is marked a signal difference with what might be termed ordinary voluntary revocations as a testator, even when represented by and acting through his executor, regarded as *eadem persona cum defuncto*, cannot revoke his own will after he is dead. However, in an application to have a new will made for an adult with incapacity who lacks testamentary capacity,<sup>100</sup> one reason for the Court

<sup>95</sup> E.g. *Stuart-Gordon v Stuart-Gordon* (1899) 1F. 1005; *Nicolson v Nicolson's Tutrix* 1922 S.C. 649. See also *McKie's Tutor v McKie* (1897) 24R. 526; (1897) 4 S.L.T. 308; *McEwen (Dobie's Tr.) v Pritchard* (1887) 15R. 2; *Knox's Trs v Knox* (1907) 15 S.L.T. 282.

<sup>96</sup> E.g. *Adamson's Trustees v Adamson's Executors* (1891) 18R. 1133.

<sup>97</sup> *Milligan's J.F. v Milligan* 1910 S.C. 58.

<sup>98</sup> E.g. *Munro's Executors v Munro* (1890) 18R. 122; *Rankine v Rankine's Trustees* (1904) 6F. 581; *Rankin v Rankin's Tutor* (1902) 4F. 979; (1902) 10 S.L.T. 181.

<sup>99</sup> E.g. *A's Executors v B* (1874) 11 S.L.R. 259; *Elder's Trs v Elder* (1894) 21R. 704; (1895) 22R. 505 with material in National Archives at *Interim decree in action of multiplepounding and exoneration, John Stewart Smith, and others, Thomas Elder's trustees v Ms Margaret Blair or Blair, and others*, September 1895, CS46/1895/9/37; *Decree of Exoneration and Discharge in Multiplepounding and Exoneration, John Stewart Smith and others, Thomas Elder's trustees v Mrs Margaret Blair or Elder and others*, Jan 1897, CS46/1897/1/28; *Smith's Trs v Grant* (1897) 35 S.L.R. 129; (1897) 5 S.L.T. 190 (multiplepounding and exoneration); *Stevenson's Trs v Stevenson* 1932 S.C. 657. For material in the National Archives of Scotland see *William Gibb and another (Trustees of William Stevenson) v William Stevenson & others: Multi-pounding & Exoneration* 1934 reference CS257/3706.

<sup>100</sup> Adults With Incapacity (Scotland) Act 2000, asp. 4, s.1(4); *Ward, Appellant* 2014 S.L.T. (Sh. Ct.) 15 (intervention order); *P's Guardian, Applicant* 2012 G.W.D. 39–771; available on Westlaw at 2012 W.L. 5894489; *Application in respect of H* 2011 S.L.T. (Sh. Ct.) 178; *G, Applicant* 2009 S.L.T. (Sh. Ct.) 122; *T, Applicant* 2005 S.L.T. (Sh. Ct.) 97. See text at footnote 252.

making new testamentary provision could be the fact that that since the existing will was made an unexpected omitted child has been born and it is now open to question whether the existing will, after the future death of the testator, might be liable to reduction by operation of the *conditio si testator*. That, however, is merely the recognition that there is a risk that the existing will could be avoided or reduced at some time in the future if the unprovided for child were to survive the testator.

### Two Possibilities for the Form of the *Conditio Si Testator*

The Scottish debate as to the broad structure of the *conditio si testator* centered on two basic forms found in similar rules in various other legal systems. Was the rule intended to protect the child and operate irrespective of the will of the testator or was it intended to reflect the presumed intentions of the testator in the light of changed circumstances? Put another way, did it foster or limit testamentary freedom?<sup>101</sup>

Although he did not identify the legal systems considered for the purposes of his comparison,<sup>102</sup> in the late nineteenth century Lord Kinnear stated the matter thus:<sup>103</sup>

Two different views have been taken in different systems of jurisprudence of the principle on which a will may be displaced by the subsequent birth of children. One is that it is a condition implied by law that in case of the subsequent birth of a child the will shall become void. In that view the will is ineffectual in consequence of an absolute rule of law irrespective of any change of intention on the part of the testator which may be inferred from a change of circumstances. The other view is that it is a question of intention to be presumed from a change of circumstances; because if the birth of a child in the circumstances of a particular case alters the testator's condition so as to give rise to new interests and new moral obligations which he had not in view when he made his will, the law will presume a change of intention corresponding to the change of circumstances.

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<sup>101</sup> See text at footnote 9.

<sup>102</sup> No English or foreign authorities were cited by counsel at least according to the reports at *Elder's Trustees v Elder* (1895) 22R. 550; (1895) 2 S.L.T. 579 and (1895) 32 S.L.R. 365.

<sup>103</sup> *Elder's Trustees v Elder* (1895) 22R. 505, 512.

It was indeed the latter of these two approaches that Scots law took. Yet, this basic recognition is just one step in any overall analysis of the fundamental structure of the *conditio si testator*. Even if one accepts that the *conditio si testator* is intended to reflect the change of intention of the testator upon changed circumstances, the question remains: how is this presumed change of intention given effect to? In particular, is it grafted into the testamentary provision itself by means of a legally implied condition or, alternatively, is it an external device in the form of a legal principle operating on the will from outwith its terms such as occurs with a rule of lapse? This issue has troubled Scots law and there is unsatisfactory guidance to be obtained in the Roman or Civilian sources as it remains unclear how the equivalent rule operated in those legal systems.<sup>104</sup> Furthermore, one must ask the even more basic question: is the *conditio si testator* recognized by Scots law really a sophisticated rule of lapse?

### A Rule Of Lapse

The *conditio si testator* may be compared to rules of lapse to see if it fits within the class of rules that may be so categorized.<sup>105</sup> On balance, this is the most appropriate taxonomy, although there are some quirks.

The legally implied *conditio si testator* is similar to a rule of lapse in the following respects. First, a rule of lapse applies on the occurrence of particular circumstances which effectively operate as pre-conditions for the application of the relevant rule. It is permitted to prove the occurrence of these circumstances by reference to evidence extrinsic to the testamentary deeds. So too the presumption that an afterborn child has an option to seek reduction of the will arises only when certain pre-conditions are complied with and such may be proved by extrinsic evidence.<sup>106</sup> Second, rules of lapse in some respects are subject to the expressed intentions of the testator. In respect of some rules of lapse a testator may insert into his testamentary deeds an

<sup>104</sup> See Paisley, 'Conditio Civilian Sources' and William M. Gordon, 'Roman and Scots Law – *The Conditiones Si Sine Liberis Decesserit*', *Juridical Review*, [1969], 109–27 (herein-after 'Gordon, *The Conditiones*'); idem, 'The Interpretation of C 8.55.8' in A. Giuffrè (ed.), *Studi in onore di Edoardo Volterra*, vol. 4 (Milan, 1971), 413–18. The latter two articles were republished respectively in Gordon, *Roman Law, Scots Law and Legal History: Selected Essays* (Edinburgh, 2007) 87–106 and 107–11. For Civilian writers who embraced the implied condition theory see text at footnotes 114–15.

<sup>105</sup> E.g. a bequest failing on the destruction of the thing bequeathed, a variant of ademption, and a bequest failing on the predecease of, or non-acceptance by, the beneficiary.

<sup>106</sup> Paisley, 'Conditio Mechanics', 190–202.

anti-lapse provision that precludes the operation of the rule by disclosing his wish that a legal outcome other than lapse should occur even if the relevant circumstances occur. So too, the testator may state in his testamentary deeds that the *conditio si testator* is not to apply.<sup>107</sup>

However, the operation of the *conditio si testator* may be distinguished from other rules of lapse in a number of respects. First, with the *conditio si testator*, when the relevant circumstances occur, the testamentary provision is not automatically rendered void but is merely voidable at the instance of the omitted child. Secondly, unlike other rules of lapse which can be relied on by all parties interested in the succession, the *conditio si testator* may be relied on only by the omitted child. Thirdly, the *conditio si testator* operates in respect of an entire deed and not, as is usual with other rules of lapse, in respect of individual testamentary provisions. Fourthly, the operation of other rules of lapse cannot be excluded by a contrary intention on the part of the testator implied from evidence arising outwith the terms of the testamentary deeds and no such evidence is required to fortify the application of other rules of lapse. With other rules of lapse the position is that the testamentary provision fails automatically upon the satisfaction of the preconditions relevant to the applicable rule of lapse. In contrast to this, in relation to the *conditio si testator*, extrinsic evidence may be admitted as regards the intentions of the testator to rebut or fortify the presumption that the omitted child has an option to seek the reduction of the will. Fifthly, with some<sup>108</sup> but not all<sup>109</sup> rules of lapse, the circumstances causing the testamentary provision to lapse must occur before the death of the testator. Where a particular rule of lapse permits the circumstances causing lapse to occur after the testator's death, the lapse is backdated and is deemed to have effect as at the date of the testator's death. With the *conditio si testator*, the will is usually deemed to be revoked as at the date of birth of the relevant child unless the child is posthumous in which case the date of revocation is deemed to be immediately prior to the death of the testator.<sup>110</sup> However, such deemed revocation arises only if the omitted child

<sup>107</sup> Ibid., 200–2.

<sup>108</sup> E.g. lapse on predecease by the beneficiary.

<sup>109</sup> E.g. lapse where the beneficiary declines to accept a bequest after the testator's death consonant with the principle *invito beneficium non datur*. Another example of lapse backdated to the date of the testator's death due to an event after the testator's death, such as a failure of trustees to exercise discretion, is seen in *Landale's Tr. v Nicol* (O.H.) 1918 2 S.L.T. 10; *Wright's Trustees v Smith and others*, 11 June 1829, 4 Fac. 1003, case no. 149 reported *sub nom. Burnsides v Smith* (1829) 7S. 735.

<sup>110</sup> See Paisley, 'Conditio Mechanics', 231.

exercises its option to avoid or seek reduction of the will and that exercise is possible only after the death of the testator.<sup>111</sup> There is no such fictional backdating to a date prior to the testator's death in normal rules of lapse, albeit the backdating of lapse to the very date of death in respect of declinature by a beneficiary comes close.

In the light of these differences and similarities, the conclusion is that the *conditio si testator* is probably best categorized as follows. It is a rule of lapse tempered, expanded and rendered more complex. It is tempered as to outcome - voidability at the instance of a particular party as contrasted to outright voidness. The rule is expanded in its effect to complete testamentary deeds rather than restricted to particular testamentary provisions. It is rendered more complex both as regards the backdating of its effect and also in its applicability by the potential to admit extrinsic evidence of the wishes of the testator to confirm or restrict the rule's application.

### The Theory Or Doctrine Of The Implied Condition

A competing taxonomy of the *conditio si testator* is to classify it as based on an implied condition. At first blush the possibility that the *conditio si testator* is a condition implied into the terms of the will itself appears attractive. The analysis seems to be justified by reference to one of the possible rationales of the *conditio* itself: it reflects the presumed or deemed testamentary intentions of the testator.<sup>112</sup> However, the link is not inevitable and one should make a distinction between the mechanics of the operation of the *conditio si testator* and its rationale.<sup>113</sup> The theory or doctrine of the 'implied condition' is almost certainly not the solution that fits best the operation of the Scottish *conditio si testator*. However, although it is not universally encountered in that tradition, it appears quite often as a theory in Civilian writings.<sup>114</sup> One may quote as an example a passage from the Roman Dutch writer Simon van Leeuwen (1626–

<sup>111</sup> See text after footnote 66.

<sup>112</sup> See text at footnotes 142–75.

<sup>113</sup> See text at footnotes 139–41.

<sup>114</sup> E.g. the Spanish jurist Ludovicus Molina (1500–1599), *Disputationes De Contractis* (Venice, 1601), 79, *Disputatio* 282; the Italian jurists Julius Clarus (1525–1575), *Opera Omnia* (Geneva, 1666), Book 4, § *Donatio*, *Quaestio* XXII, 152 and Franciscus Mantica (1534–1614), *Tractatus de Conjecturis Ultimarum Voluntatem* (Lyon, 1695), Lib. X, Tit. VII, 458, para. 1; and the French jurist Jaques Cujas (1522–1590), *Opera ad Parisiensem Fabrotianam Editionem, Pars Quarta, Vol. 7* (Prati, 1864), 1056, comment *ad* Tit. XXV, Lib. VI *Codicis*.



1682) who, in his discussion of the variant of the rule known to the European *Ius Commune*, observed:<sup>115</sup>

*eo casu haec conditio tacite ipsi donationi inesse videatur.*

in this case this condition seems tacitly annexed to the gift itself.

With this historical pedigree it is little wonder that the attraction of a doctrine or theory of an ‘implied condition’ in Scots law has proved very persistent despite its limitations.

A volume of Scottish sources does indeed utilize the vocabulary of ‘implied condition’ but one must wonder if these words were clearly intended in all cases to denote a legal doctrine in terms of which the *conditio si testator* applied as if it were a term implied into a will. The phrase ‘implied condition’ is used by Bankton.<sup>116</sup> Similarly Erskine<sup>117</sup> noted the Roman position, which he indicated seemed to be accepted in Scots law, to the effect that ‘this condition, *si sine liberis decesserit*, was implied in all settlements by testament’. The analysis of the type of condition was further refined by Professor Bell who stated that it was ‘a presumed *condition* resolutive of the settlement, and operating *ipso jure*’.<sup>118</sup> Elsewhere,<sup>119</sup> however, Bell, hedges his bets by referring to the rule as ‘a legal presumption or implied condition’.<sup>120</sup> Even if one were to accept the general theory of a doctrine of an implied condition, this particular refinement is to be rejected in that it is clear that the *conditio si testator* does not operate automatically in this way.<sup>121</sup> In relation to the *conditio si testator* other references to an ‘implied condition’ or a settlement ‘qualified by the condition’ are to be found in the assertions of counsel,<sup>122</sup> the writings and a judgement of Lord

<sup>115</sup> Simone van Leeuwen, *Censura Forensis* (Leiden, 1662), 2,8,16. See Simon van Leeuwen, *Censura Forensis*, trans. W. P. Schreiner (1662; Cape Town, 1883), 2,8,16, 51.

<sup>116</sup> Bankton, *Institute*, Vol. 1 (1751), 1, 9, 6, 228.

<sup>117</sup> Erskine, *Institute*, 3, 8, 46.

<sup>118</sup> Bell, *Principles* (4th edn and 10th edn), s.1779. See also J. P. Wood (ed.), *John Hendry, A Manual of Conveyancing* (4th edn, Edinburgh, 1888), 431, para. 921.

<sup>119</sup> Bell, *Principles* (4th edn and 10th edn), s.1776.

<sup>120</sup> The confusion in Bell, *Principles* is most charitably treated in Gordon, ‘*The Conditiones*’ at 123: ‘Possibly he [i.e. Bell] meant no more than that the question is not really one of revocation by the testator; the law will allow a reduction; whether the child himself must sue is left open’.

<sup>121</sup> *Stair Memorial Encyclopaedia*, vol. 25, para. 752.

<sup>122</sup> E.g. *George Dempster and Others v Sophia Willison and others*, 15 November 1799, M. 16947, 16948. See also *Next in Kin of Isobel Watt v Isobel Jervie*, 30 July 1760, M. 6401. The relevant Session Papers held in the Advocate’s Library, Pitfour Collection Vol. 21, contain a copy of the *Petition of John Watt and Thomas Watt* dated 13 November 1760



McLaren,<sup>123</sup> the lectures of Professor Herkless<sup>124</sup> and the writing of various other commentators.<sup>125</sup>

Despite this frequency of use of the term ‘implied condition’, it has been judicially recognized that the doctrine of an ‘implied condition’ has never been carried so far so as to deal with all cases as if the deed in question contained an express condition *si testator sine liberis decesserit*.<sup>126</sup> The limitations of a doctrine of ‘implied condition’ comprise the following:

(a) First of all, if indeed the *conditio si testator* is a condition implied into the will, then to allow extrinsic evidence of the testator’s contrary intention to exclude the operation of that condition causes some tension with the rules of evidence and the requirements of formal validity for testamentary deeds. The general rule is that a testamentary deed can be varied only by means of a subsequent properly executed testamentary deed and not merely by the admission of extrinsic evidence. To accommodate the ‘implied condition’ doctrine of the *conditio si testator* with the rules of formal validity, the proponents of the doctrine must identify an exception to the general rule prohibiting the use of extrinsic evidence not only to introduce the implied term into the deed but also to contradict that term after it has been implied. This exception was not put forward in any analysis until the latter half of the twentieth century when Sheriffs Walker and Walker identified a rule applicable to contracts and extended it to testamentary writings as follows:<sup>127</sup>

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prepared by the advocate Alexander Lockhart. On page 10 thereof the application of the *conditio si testator* is analysed as an implied condition by reference to a passage on conditions of institutions in Voet, *Pandects*, 28,7,3 and 4, now translated in Percival Gane, *The Selective Voet*, Vol 4, Durban, 1956, 773–5.

<sup>123</sup> McLaren, *Wills and Succession*, Vol. 1 (3rd edn, Edinburgh, 1894), 403–5, paras 732–4; *Millar’s Trustee v Millar* (1893) 20R. 1040, 1043 per Lord McLaren. The latter passage is more fully quoted in the text below at footnote 171.

<sup>124</sup> A. Williamson (ed.), *W. R. Herkless: Jurisprudence or the Principles of Political Right* (Edinburgh, 1901), 163. Herkless was Professor of jurisprudence and Scots law in St Mungo’s College, Glasgow.

<sup>125</sup> E.g. George Ross, *Bell’s Dictionary and Digest of the Law of Scotland* (Edinburgh, 1861), 209; James Paterson, *A Compendium of English and Scotch Law* (2nd edn, Edinburgh, 1865), 225; John T. Mowbray (ed.), *John Hendry, Manual of Conveyancing* (2nd edn, Edinburgh, 1867), 415, para. 881; David M. Walker, *Principles of Scottish Private Law*, Vol. 4 (4th edn, Oxford, 1989), 160.

<sup>126</sup> *Flora Ann Colquhoun and her Factor Loco Tutoris v Duncan Campbell* (1829) 7S. 709, 711 per Lord (Ordinary) Newton.

<sup>127</sup> A. G. Walker and N. M. L. Walker, *The Law of Evidence in Scotland* (Glasgow, 1964), 293–4. Margaret L. Ross and James Chalmers, *Walker and Walker, The Law of Evidence in Scotland* (3rd edn, Haywards Heath, 2009), 534, para. 26.21 and 4th edn, Bloomsbury Professional, 2015, 530, para 26.21.4 maintains the original text but adds a translation

When it is averred that the facts giving rise to the implied condition existed, proof of them is admissible.<sup>128</sup> Similarly, in the case of a testamentary writing, the question of whether it is impliedly revoked by the subsequent birth of a child, in virtue of the child, in virtue of the *conditio si testator sine liberis decesserit*, is “one wholly dependent upon the circumstances of the case,”<sup>129</sup> and the extrinsic circumstances may therefore be proved.<sup>130</sup>

However, this is an incomplete solution. It accounts for the admission of extrinsic evidence of those facts from which one may imply a term into a deed. As such, it merely confirms that one may prove the satisfaction of the limited number of preconditions for the emergence of the presumption of voidability of the will at the option of the omitted child.<sup>131</sup> Similar proof is competent in respect of the circumstances giving rise to any other rule of lapse leading to a will being regarded as void. However, the speciality of the *conditio si testator* is not in relation to proof of facts to demonstrate the emergence of the presumption that the child has an option to seek reduction of the will: rather, it is the admission of further extrinsic evidence to rebut that presumption by showing that even though the preconditions have been complied with and the presumption has emerged, the testator did not wish the child to be entitled to the option.<sup>132</sup> As the extrinsic evidence relevant to proof of the latter is wholly different from that relevant to proof of the former,<sup>133</sup> the solution proffered by Sheriffs Walker and Walker is illusory.

(b) Secondly, the operation of the option to reduce the deed is personal to the overlooked child in question.<sup>134</sup> If a *conditio si testator sine liberis decesserit* were expressly contained in the deed then, unless it were otherwise specially qualified, it could be relied on by any person having interest in the proper distribution of the estate.

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of the Latin.

<sup>128</sup> Here is cited *Jacobs v Scott & Co* (1899) 2F. (H.L.) 70, 78 and 80 respectively per Lords Shand and Davey.

<sup>129</sup> Here is cited *Hughes v Edwardes* (1892) 19R. (H.L.) 33, 35 per Lord Watson.

<sup>130</sup> Here is cited *Stuart-Gordon v Stuart Gordon* (1899) 1F. 1005; *McKie's Tutor v McKie* (1897) 24R. 526; *Elder's Trs v Elder* (1895) 21R. 704; *Millar's Trs v Millar* (1893) 20R. 1040.

<sup>131</sup> These preconditions are identified at Paisley, ‘Conditio Mechanics’, 189.

<sup>132</sup> This applies *mutatis mutandis* to proof of circumstances to fortify the presumption.

<sup>133</sup> See Paisley, ‘Conditio Mechanics’, respectively at 189–202 and 203–22.

<sup>134</sup> See *ibid.*, 224–5.

c) Thirdly, the nature of the implied condition requires further specification to be considered a viable theory. The suggestion put forward by Professor Bell that the condition is a resolutive condition does not reflect Scots law.<sup>135</sup> No other Scottish writers indicate this or any other particular refinement in their suggested taxonomy of the implied condition.

d) Fourthly, the use of the analysis of the ‘implied condition’ has led to unnecessary complexities in the explanation of the mechanics of the rule. For example, one mid nineteenth century commentator, adopting the implied condition theory, wrote:<sup>136</sup>

The condition [...] is ambulatory until the death of the settler; for if the child do not survive him, the disposition or will remains good.

It was a similar logic that led to the pleadings in a special case of 1887 where the question put to the Court of Session (and answered in the affirmative) was:<sup>137</sup>

Whether the said [AB’s] last will and testament, [...], was revoked by the birth and survivance of her said daughter, [...]?

This reference to two events, however, tends to confuse not only the date of the deemed revocation which is also the date upon which there emerges a presumption that the omitted child has a right to seek reduction of the will but also the wholly separate date upon which that option first becomes exercisable by the child.<sup>138</sup>

It is submitted that there is sufficient in the above to merit the rejection of any general theory that the *conditio si testator* is a condition implied into the will of the testator.

### Distinguishing the Mechanics and the Rationale

Past analysis of the *conditio si testator* has been hindered by a failure to distinguish between the rationale of the *conditio* and the mechanics of its operation. This

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<sup>135</sup> See text at footnote 118 and Paisley, ‘Conditio Civilian Sources’.

<sup>136</sup> James Paterson, *A Compendium of English and Scotch Law* (2nd edn, Edinburgh, 1865), 225.

<sup>137</sup> *McEwen (Dobie’s Tr.) v Pritchard* (1887) 15R. 2, 3.

<sup>138</sup> See Paisley, ‘Conditio Mechanics’, 189–90.

is further complicated by a divergence, or at least a development, of judicial views as to what its rationale actually is. Over the years, various formulae for the policy behind the *conditio si testator* have been advanced judicially and by commentators.<sup>139</sup> Only a brief selection is offered below.<sup>140</sup> In reading these one caveat is important. The policy underpinning the existence of the *conditio si testator* is what is taken to justify the existence of the rule but it is not a statement of the mechanics of how the *conditio* operates. In particular, an assertion that the *conditio si testator* is justified on a presumed change of intention on the part of the testator does not lead to the conclusion that when the appropriate circumstances arise the testator is presumed merely to have altered his intention and his will is thereby revoked. The mistake of confounding the underlying policy with the mechanics implementing that policy is repeated by the Scottish Law Commission, writing in 1986, when they appear to criticize the rationale of the rule as if it were the method of its operation:<sup>141</sup>

The common description of the rule as a presumption is also misleading. It is totally unrealistic to say that there is a rebuttable presumption that the will has been revoked by the testator. The whole point of relying on the *conditio* is that the will has not been revoked by the testator. The presumption can only be that the testator intended to revoke the will but never got round to it. However, this is a pointless presumption because a mere intention to revoke a will achieves nothing. The truth is that the *conditio*, as it now applies in Scots law, is neither a rule of revocation by operation of law nor a presumption of revocation by the testator but a rule whereby an after-born child can apply to a court to have the will “treated as revoked” on the ground that there was no provision for him in it and no indication that the testator intended the will to stand notwithstanding his birth.

However, it is clear that one can justify the conferral of an option on an omitted afterborn child to seek reduction of a will (i.e. the actual mechanics) on the basis that the testator is presumed to have altered his testamentary

<sup>139</sup> E.g. *Elder's Trs v Elder* (1894) 21R. 704, 705–706 per Lord (Ordinary) Low, 708 per Lord Adam.

<sup>140</sup> See text at footnotes 142–79.

<sup>141</sup> Scottish Law Commission, *The Making and Revocation of Wills* (Scot. Law Com. Consultative Memorandum No. 70, September 1986), 44, para. 5.9. Part of this passage has already been quoted in the text at footnote 86 above.

intentions (the accepted policy). In addition, that same policy may be used to underpin the legal fiction that the successful reduction of the will at the instance of the child is deemed to be a backdated revocation by the testator. Furthermore, whether the *conditio si testator* is classified as a rule of lapse or deemed revocation, the same rationale may justify the rebuttal of the presumption that the child has an option to seek reduction of the will if it can be shown that the testator did indeed wish the will to remain effective.

### The Policy or Rationale Behind the *Conditio Si Testator*

The preference of a parent for his or her child to succeed when compared to the possibility that the estate might pass on death to a more remote relative or a complete stranger to the family has been testified in literature for millennia. Witness the sentiment expressed in the Greek poet Pindar's tenth Olympian Ode written as a celebration of the victory of Hagesidamus of Epizephrian Locri in the boys' boxing at the Olympics in 476 BC. In the poem Pindar apologized to the athlete for the delay in writing the celebratory work and added that the poem would be welcome even though late:<sup>142</sup>

χλιδῶσα δὲ μολπὰ πρὸς κάλαμον ἀντιάξει μελέων,  
 85 τὰ παρ' εὐκλείῃ Δίρκα χρόνῳ μὲν φάνεν:  
 ἀλλ' ὥτε παῖς ἐξ ἀλόχου πατρὶ  
 ποθεινὸς ἵκοντι νεότατος τὸ πάλιν ἦδη, μάλα δέ οἱ θερμαίνει φιλότατινόν:  
 ἐπεὶ πλοῦτος ὁ λαχὼν ποιμένα  
 ἐπακτὸν ἀλλότριον,  
 90 θνάσκοντι στυγερῶτατος:

And there shall answer to the pipe the swelling melody of songs, which at last have come to light beside the famous stream of Dirce. But even as a son born of a wife is welcome to a father who hath already reached

<sup>142</sup> Pindar came from Thebes in Boeotia and his approximate dates are 522–443 BC. 'Dirce' was a famous fountain in Thebes. When Alexander the Great destroyed Thebes in 335 BC, out of respect, he spared the structure of the house of Pindar and sold the Thebans into slavery except for the descendants of Pindar. See Arrian the Nicomedian, *De Expeditione Alexandri*, 1,9,10 translated in E J Chinnock, *The Anabasis of Alexander*, Hodder and Stoughton, London, 1881, 32–3; Plutarch, *Life of Alexander*, 11,12 translated by Bernadotte Perrin, *Plutarch Lives: Alexander*, Loeb Classical Library, London, 1919, 256. The translation is from *The Odes of Pindar*, by Sir John Sandys, Loeb Classical Library, 2nd edn., 1919, pages 117–19.

the reverse of youth, and maketh his heart to glow with happiness, since, for one who is dying, it is a hateful sight to see his wealth falling to the lot of a master who is a stranger from another home.<sup>2</sup>

It is likely that a similar if not identical sentiment has consistently informed the development of the *conditio si testator* in Scots law and, despite variations in emphasis, remains at its heart to this very day. Certainly the likely preference of the testator for his child to succeed as compared to the estate passing to a stranger to the family is put forward in the Civilian literature as the basis of the *conditio si testator* in the European *Ius Commune*.<sup>143</sup> What then is the rationale or policy of the *conditio si testator* as recognized by Scots law? It has been judicially acknowledged that there has been a controversy as to the true principle upon which the Scottish *conditio si testator* is founded.<sup>144</sup> Various justifications have been put forward, first by the institutional writers and then by counsel and judges in litigation.

Consistent with the reference to *conjectura pietatis* and the preference of a child to strangers observed in the Roman sources,<sup>145</sup> Bankton was unequivocal:<sup>146</sup>

The reason of this doctrine is plain, because such settlement truly wants the determinate will of the granter, and must be presumed to have been made upon the implied condition of his dying without children; this tacit consent is founded on the parental affection.

So too, abiding by the approach seen in the Civilian sources,<sup>147</sup> Erskine was to similar effect:<sup>148</sup>

This rule arises from a presumption, founded in nature itself, that the granter would have preferred his own issue, if he had had their existence in view.

It would be fair to say that this remained the standard view despite the appearance of a wholly new perspective in the writings of Lord Kames. In his

<sup>143</sup> Paisley, 'Conditio Civilian Sources' at 9 and 10 examining the views of Accursius and Petrus Nicolaus Mozius.

<sup>144</sup> *Rankine v Rankine's Trustees* (1904) 6F. 581, 584 per Lord Kinnear.

<sup>145</sup> *Digest*, 35,1,102 (Papinian). See Paisley, 'Conditio Civilian Sources'.

<sup>146</sup> Bankton, *Institute*, Vol. 1, (1751), 1,9,6, 227–8.

<sup>147</sup> Paisley, 'Conditio Civilian Sources'.

<sup>148</sup> Erskine, *Institute*, 3,8,46.

*Principles of Equity*, first published in 1760, Henry Home, Lord Kames typically presented his own idiosyncratic interpretation of the rule, centered on the error or oversight of the testator, as follows:<sup>149</sup>

A man's will occasioned by error or oversight, ought not to be regarded in opposition to what evidently would have been his will had all the circumstances been in view. [...] it is neither humanity with respect to the deceased, nor justice with respect to the living, to enforce a settlement in an event which the maker would avoid with horror were he alive. Equity therefore will never interpose in favour of such a deed.

Within six months of the publication of this edition,<sup>150</sup> one of the most important early cases on the *conditio si testator* was decided by the Court of Session.<sup>151</sup> Kames was involved as one of the judges in the hearing.<sup>152</sup> Kames proceeded to include the case in his own set of law reports<sup>153</sup> and in there set out the reasons for the judgement within the framework of his own analysis. It remains open to question whether the other judges present would have presented the reasoning of the decision in the same way. In particular, the report of the case contains a striking reference to 'a court of equity' giving relief in respect of rules of 'the common law' suggesting, on the face of it, the dichotomy recognized in English law.<sup>154</sup> This reference, however, is far more likely to denote some idea of natural equity, a concept recognized in the Civil law<sup>155</sup> and particularly emphasized by Lord Kames although presented by him with his own particular spin. This becomes clear when one looks at the second edition of *Principles of Equity* which was published in 1767 in a form which took account of the decision.<sup>156</sup> The passage immediately quoted above

<sup>149</sup> Henry Home, Lord Kames, *Principles of Equity* (1st edn, Edinburgh, 1760), 93.

<sup>150</sup> The first edition seems to have been published very early in 1760 and was reviewed in *The Scots Magazine*, Edinburgh, January 1760, Vol. 22, 52–3 and *The Monthly Review or Literary Journal*, London, April 1760, Vol. 22, 265–81.

<sup>151</sup> *Next in Kin of Isobel Watt v Isobel Jervie*, 30 July 1760, M. 6401.

<sup>152</sup> *Stevenson's Trustees v Stevenson* 1932 S.C. 657, 669 per Lord Ormisdale. For material in the National Archives of Scotland see *William Gibb and another (Trustees of William Stevenson) v William Stevenson & others: Multi-poinding & Exoneration*, 1934 reference CS257/3706.

<sup>153</sup> Lord Kames, *Select Decisions of the Court of Session from the year 1752 to the year 1768* (Edinburgh, 1780), 228, case no. 167.

<sup>154</sup> *Next in Kin of Isobel Watt v Isobel Jervie*, 30 July 1760, M. 6401, 6401.

<sup>155</sup> See Gordon, 'The Conditiones', 127, footnote 1.

<sup>156</sup> He wrote extensively of the powers of a Court of equity to remedy the imperfections of common law in Henry Home, Lord Kames, *Principles of Equity* (2nd edn,

was deleted and, instead, the second edition contained the following more extensive treatment:<sup>157</sup>

[I]t would be a conclusion in law extremely harsh, to exheredate this favourite child, upon no better ground than a mere oversight of his father, and to inforce a settlement in an event which the maker would avoid with horror if he were alive. [...] The will of the maker in favour of the disponent, is not absolute to take place in all events; but only on supposition of what he took for granted, that he was to have no issue. Therefore in the event that has happened the disponent cannot say that the will of the maker is for him: consequently the settlement gives him no right.

Another reason in equity concurs for voiding this settlement. The omission of the condition, “failing heirs of the granter’s body,” was plainly an oversight; and the disponent ought not in conscience to take advantage of that oversight *ad lucrum captandum*.<sup>158</sup> This follows from the rule above laid down, That *in damno evitando*<sup>159</sup> one may take advantage of an error, but not *in lucro captando*.

As can be seen from the last paragraph in this quotation from the 1767 edition of *Principles of Equity*, the development in the reasoning of Kames had led to a sophistication not previously seen in the Scottish writings: the identification of a duty falling on the third party disponent to refuse the bequest where a child had been disinherited. Although mirroring, without acknowledgement, a much older tradition in the Civil and Canon law,<sup>160</sup> this development of legal analysis was never to gain wider appeal in Scots law. That said, the views of Kames were not wholly ignored. One lasting impact of this analysis has been the frequent references to ‘equity’ in later Scottish cases concerning the *conditio si testator*.<sup>161</sup> However, none of this should be

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Edinburgh, 1767) and discusses *Watt v Jervey* in that edition at 136–8.

<sup>157</sup> Henry Home, Lord Kames, *Principles of Equity* (2nd Edition), 136–7.

<sup>158</sup> To gain an advantage.

<sup>159</sup> To avoid a loss.

<sup>160</sup> See Paisley, ‘Conditio Civilian Sources’ identifying the origin of the doctrine in a sermon of Saint Augustine of Hippo (354–430).

<sup>161</sup> See the various references to ‘equity’, an ‘equitable remedy’, ‘equitable nature of the doctrine’ and ‘equitable doctrine’ in *Stevenson’s Trustees v Stevenson* 1932 S.C. 657, 658, 659, 660, 661, 662 and 663 per Lord Mackay and 665 per Lord Justice-Clerk Alness, and 671 and 672 per Lord Hunter and to an ‘equitable presumption’ at 667 and 670 per Lord Ormisdale. See also *Smith’s Trustees v Mary Smith or Grant and others* (1897) 5 S.L.T. 190, 190 per Lord Stormonth Darling; *John Stewart Smith and others* (Thomas



taken as suggesting any more than that the *conditio si testator* is intended to be a rule of fairness that secures a more just result than if the will were allowed to stand. Apart from this there are only minor indications of a wider acceptance of the analysis of Kames as to the rationale of the *conditio si testator*. One such instance may be the notion that the *conditio si testator* operates to correct a material error or oversight and one may seek to apply this reasoning if one accepts that the testator has framed his will under the mistake that he would thereafter have no more children. An aspect of this type of thinking may be seen where, shortly after the publication of Kames' works, the *conditio si testator* arose for consideration in a case before the Court of Session. Counsel asserted that the rule could not apply where a marriage contract made express provision for children because its basis was as follows:<sup>162</sup>

The condition *si sine liberis* rests on a presumption that the children have been altogether forgotten.

There are a few other traces of this type of assertion elsewhere in Scottish litigations<sup>163</sup> but, although it has proved persistent, it is probably fair to conclude that it has remained, at its highest, a secondary and marginal theme.

The litigation in which Lord Kames had been involved was a two part affair. The losing parties in the first stage of the dispute involving the *conditio si testator* came back to court to settle a closely related matter, a legitim claim from the same estate, only eighteen months after the first decision.<sup>164</sup> There is no clear evidence whether or not Lord Kames participated in the second decision but he did not report it and it is not mentioned in any editions of *Principles of Equity*. However, the pleadings in the second part of the litigation were

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*Elder's Trustees v Mrs Elizabeth Reid and another* (1895) 22R. 505, 511 and 512 per Lord McLaren; 'equitable remedy' in *Colquhoun v Campbell* (1829) 7S. 709, 711 per Lord Newton. See also *Stair Memorial Encyclopaedia*, vol. 25, para. 752 stating the *conditio* is based on 'equitable principles'.

<sup>162</sup> *Anne, Margaret and Sarah Patons, Heirs at law of the late Captain Lockhart Nasmyth v John Hamilton, and others, his Trustees and Legatees*, 16 May 1797, F.C. 52, case no. 22; M. 11376, 11378 per counsel. See also *George Dempster and Others v Sophia Willison and others*, 15 November 1799, M. 16947, 16948 per counsel who asserted the rule 'proceeded entirely on presumed intention'.

<sup>163</sup> *Speirs v Graham*, 18 December 1829, 5 Fac. 222, 225 per counsel for the pursuer who sought to justify the argument by reference to the *conditio si testator*. The final decision was made on other grounds. None of this argument appears in the report (1829) 8S. 268. See Paisley, 'Conditio Civilian Sources'.

<sup>164</sup> *Next in Kin of Isobel Watt v Isobel Jervie*, 30 July 1760, M. 6401; *Isobel Jervie v John and Thomas Watt*, 7 January 1762, M. 8170.

probably the first opportunity for the legal profession to react to Lord Kames' published analysis of the earlier stage of the case. The *Session Papers* relating to the second part of the dispute disclose that counsel, Alexander Lockhart of Craighouse,<sup>165</sup> addressed the issue of the will that omitted a subsequently born child. In the petition prepared by him it was argued:<sup>166</sup>

from whatever causes this unnatural and irrational settlement shall be supposed to have proceeded, [...] in all such cases the law interposes in favours of the child, *et ex praesumpta voluntate*, annuls every deed of this kind from the implied condition, *si sine liberis deceaserit*, a presumption so much founded in human nature, that every individual must feel the weight of it.

The wording is a remarkable testament to sophistication in pleading or at least legal diplomacy. No doubt with an eye as to who could have been deciding the case, the petition is skillfully crafted to offend neither the more traditional formulations of the rationale of the *conditio si testator* nor the new variant promoted by Lord Kames. Thus was navigated the narrow channel between the Scylla and Charybdis of possible judicial criticism from the innovative Lord Kames on one side and traditionalists on the other. Whether the wording was a mere temporary expedient or not, it achieved its immediate aim. Counsel was able to argue legitim had a basis wholly different from the *conditio si testator* and, although his clients had failed in the former, the legitim claim was successful.

A century later, it became clear that the judicial approach to the *conditio si testator* had reverted to a more traditional analysis when Lord Low distilled the rationale from a review of the prior cases:<sup>167</sup>

The decisions appear to me to have proceeded on presumed intention. Where the position of the testator has been entirely changed, and new

<sup>165</sup> (1701–1782). He was admitted advocate in 1722, made Dean of Faculty in 1764 and was raised to the bench as Lord Covington in 1775. He was described, along with Lord Pitfour, as amongst 'the greatest lawyers of the day' by Lord Meadowbank in *Harvie v Buchanan*, 12 December 1811, F.C. 394, case no. 120, 403.

<sup>166</sup> The relevant Session Papers, held in the Advocate's Library, Pitfour Collection, Vol. 21 contains a copy of the Petition of 13th November 1760 of John Watt and Thomas Watt. The quotation appears on pages 4–5 thereof.

<sup>167</sup> *Elder's Trustees v Elder* (1894) 21R. 704, 705–706 per Lord Low. Although the interlocutor of the Lord Ordinary was reversed by the First Division there was no adverse comment on this statement of the rationale.

moral obligations have come into existence by the birth of children, there is a strong presumption that a settlement which amounts to a disinheritance of the children no longer expresses the intention of the testator.

On appeal in the same case Lord Adam set out his view similarly:<sup>168</sup>

It is the duty of a father to provide for his children, and the law presumes that he must intend to do so, and therefore if there be a will in existence which has the effect of disinheriting subsequently born children, the presumption is that it was not his intention that the will should continue valid.

This was further refined at the tail end of the nineteenth century. In an allusion to some of its peculiarities as well as indicating what he perceived to be its underlying rationale, Lord McLaren, judicially and extra-judicially, variously described the rule and its effects in the ways set out below. These comprised both the traditional analysis and also that part of the analysis of Lord Kames dealing with the testator's oversight although Lord McLaren never went so far as to recognize a moral duty on the part of the third party legatee to decline the bequest. The relevant passages are as follows:<sup>169</sup>

a somewhat arbitrary rule of law intended to prevent injustice to families.

an arbitrary condition imported by law into settlements.

the foundation of the rule is a supposed inadvertence on the part of the testator.

there arises a very strong presumption that the disinheritance was unintentional.

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<sup>168</sup> *Elder's Trustees v Elder* (1894) 21R. 704, 708 per Lord Adam. See also *Elder's Trustees v Elder* (1895) 22R. 505, 510 per Lord Adam.

<sup>169</sup> The quotations come respectively from *Millar's Trustee v Millar* (1893) 20R. 1040, 1042 and 1043 per Lord McLaren; *Stuart-Gordon v Stuart-Gordon* (1899) 1F. 1005, 1011 per Lord McLaren; McLaren, *Wills and Succession*, Vol. 1 (3<sup>rd</sup> edn, Edinburgh, 1894), 403, para. 733. See also *Elder's Trustees v Elder* (1895) 22R. 505, 511 per Lord McLaren.

The nineteenth century ended with the identification by Lord Stormonth-Darling of what he described as:<sup>170</sup>

the principle underlying the whole rule, *viz*, that a father is under a natural obligation to make provision for a surviving child.

When coupled with the proposition that most parents are reasonable people who would wish to make provision for their child it became 'almost impossible to suppose that total disinheritance of a child born after the execution of the deed is intended'.<sup>171</sup> This, again, falls largely within the traditional analysis.

Some of the same broad themes are discernible in judicial comments handed down in the twentieth century, albeit with some variation of emphasis. Adjusting the focus of the envisaged injustice from that of the family to that of the afterborn child, but repeating the reference to 'equity', Lord Justice-Clerk Alness stated the rationale of the *conditio si testator* to be as follows:<sup>172</sup>

I have always understood that the doctrine of the *conditio* was founded on equity, and that it operated for the amelioration of the hardship created to a *post-natus* by reason of the provisions of a settlement which was executed before his birth and which did not contemplate his existence. The theory underlying the doctrine, I apprehend, is that the testator would not have made the will which he did had he contemplated the subsequent birth of issue.

In the same case Lord Ormidale sought to reflect almost all of the various formulae of the rationale for the *conditio si testator* and opined:<sup>173</sup>

When a testator dies leaving a universal settlement in which he makes no provision for children who may be, and are, born subsequent to its date, there is a presumption that his omission to do so was unintentional, and the settlement will be treated as revoked. The *conditio si testator sine liberis decesserit* will take effect. It is an equitable presumption founded

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<sup>170</sup> *Smith's Trustees v Grant* (1897) 35 S.L.R. 129, 131 per Lord Stormonth-Darling.

<sup>171</sup> Alexander Montgomerie Bell, *Lectures on Conveyancing*, Vol. 2, 914.

<sup>172</sup> *Stevenson's Trustees v Stevenson* 1932 S.C. 657, 665 per Lord Justice-Clerk Alness.

<sup>173</sup> *Ibid.*, 667.

on the doctrine of *pietas paterna*,<sup>174</sup> and accordingly it may be rebutted by special circumstances.

More straightforwardly, the policy doctrine underpinning the *conditio si testator* has been classified as a doctrine of testamentary adjustment on account of supervening changed circumstances or a method by which the law seeks to deal with an out of date will. Thus, it has been described as:<sup>175</sup>

a rule of law which presumes a change of intention on the testator's part, in the altered circumstances, with regard to the disposition of his estate and nothing else.

John Girvan, Professor of Conveyancing of the University of Glasgow (1927–1946) pithily summarized the last of these judicially identified rationales as follows:<sup>176</sup>

The [...] reason for the will failing is that the testator takes too short a view.

That too is the rationale identified by Michael C. Meston, Professor of Scots Law at the University of Aberdeen (1971–1994) who regarded the *conditio si testator* as an example of amendment of wills on the ground of obsolescence.<sup>177</sup>

It is clear that although a common core of themes may be identified, over time, various writers and judges have placed their own subtle distinct emphasis on different elements of the perceived rationale. A critic might observe that this variation has tended to cloud the arena of debate and has contributed in some measure to the difficulty in establishing a convincing modern analysis of the *conditio si testator*. However, the phenomenon may better be regarded as the pragmatic attempt of the various writers and judges to update the *conditio*

<sup>174</sup> This is a doctrine that comprises both sentimental affection and natural obligation: *Devlin's Trustees v Breen* 1945 S.C. (H.L.) 27, 34 per Lord Thankerton. It also would also extend to *pietas materna*.

<sup>175</sup> *Nicolson v Nicolson's Tutrix* 1922 S.C. 649, 655 per Lord Ormisdale. See also *Stevenson's Trustees v Stevenson* 1932 S.C. 657, 671–2 per Lord Hunter.

<sup>176</sup> Professor J. Girvan, 'Lectures on Conveyancing' (1932–33), Vol. 2, Lectures 46–88, Lecture 84, 533. The lectures discuss the relevant law at pages 533–7. The typed volumes remain unpublished and the quotation is from the present author's own copy.

<sup>177</sup> Professor M. C. Meston, 'The Conditiones Si Sine Liberis', *J.L.S.S.*, [1981] (Workshop), W 203.

*si testator* to fit the concerns of their own particular age. As such, it is a classic example of judicial and juristic re-interpretation to retain the relevance of a useful rule. It is an approach that could be used today.

### Changes in the Underlying Policy

It seems clear that the *conditio si testator* in its Roman and Civilian origins<sup>178</sup> was conceived as a means to preclude an estate being diverted to strangers in terms of an out of date will made at a time when a testator had no issue.<sup>179</sup> This notion also seems to have informed Scots law until the nineteenth century.<sup>180</sup> However, even accepting that was indeed the case, the policy behind the Scottish rule has mutated. It is now not necessary that the afterborn child be the only child of the testator albeit this remains sufficient.<sup>181</sup> Although some *dicta*, handed down as recently as the start of the twentieth century, indicated the proper application of the *conditio si testator* to be where the testator is childless as at the date of the making of the will,<sup>182</sup> this should not be taken to be a modern requirement. The *conditio si testator* operates even if the testator already has another child or children as at the date of the making of the will or at his death.<sup>183</sup> The effect is that the afterborn child may find

<sup>178</sup> E.g. the Italian jurist Julius Clarus (1525–1575), *Opera Omnia* (Antwerp, 1616), Book 4 § *Donatio Quaestio XXII*, 91, para. 3.

<sup>179</sup> That appears to be the supposition upon which the remarks as to the original logical basis of the rule were made in *Knox's Trustees v Knox* (1907) 15 S.L.T. 282, 284 per Lord President Dunedin. See also Anonymous, *A Treatise on Legacies and Provisions Mortis Causa* (Edinburgh, 1861), 28.

<sup>180</sup> *Douglas's Executors (Special Case)* (1869) 7M. 504, 508 per L.J.-C. Patton and 510 per Lord Neaves; Macvey Napier, 'Lectures', Vol. 1, 311, Lecture 25 'Testaments'.

<sup>181</sup> E.g. *Millar's Trustee v Millar* (1893) 20R. 1040; (1893) 1 S.L.T. 172; *Stuart-Gordon v Stuart-Gordon* (1899) 1F. 1005; *Colquhoun v Campbell* (1829) 7S. 709.

<sup>182</sup> *Flora Ann Colquhoun and her Factor Loco Tutoris v Duncan Campbell* (1829) 7S. 709, 711 per Lord (Ordinary) Newton; *Crow v Cathro* (1903) 5F. 950, 954 per Lord Young. In *Rankin v Rankin's Tutor* (1902) 4F. 979, 981 Lord Young went so far as to opine that the supposed rule was applicable only to cases where the testator was a bachelor when he made his will, or at least was childless. See also *Leipper v Leipper* (1884) 2 Guth. Sel. Sh.Ct. Cases 586.

<sup>183</sup> Bell, *Principles* (10th edn), s.1779 (this does not appear in the 4th edition); *Nicolson v Nicolson's Tutrix* 1922 S.C. 649, 653 per Lord Justice-Clerk Scott Dickson, 654 per Lord Ormisdale and 655 per Lord Hunter. E.g. a second child in *Chrystie v Chrystie*, 13 July 1681, 2 Stair 889 reported sub nom. *Christie v Christie*, 13 July 1681, M. 8197. See also *Greenan v Courtney* 2007 S.L.T. 355; *Stevenson's Trs v Stevenson*, 1932 S.C. 657; *Nicolson v Nicolson's Tutrix* 1922 S.C. 649; *Elder's Trs v Elder* (1894) 21R. 704; *Chrystal v MacKinlay* 1919 1 S.L.T. 250. For a third child see *Smith's Trs v Smith* (1897) 5 S.L.T. 190 sub nom. *Smith's Trs. v Grant* (1897) 35 S.L.R. 129. For a fourth child see *Elder's Trustees v Elder*

himself considering the exercise of his option to seek reduction of the will in terms of the *conditio si testator* in the context of a competition for inheritance with his or her elder siblings of the full or half blood.<sup>184</sup> The exercise of the *conditio si testator* usually leads to intestacy<sup>185</sup> and, as the present rules of intestacy relating to legitim<sup>186</sup> and free estate<sup>187</sup> treat all children of the full and half blood equally, the exercise of the *conditio si testator* can have the effect of placing all children in an equal position where they had previously been the subject of inequality in terms of a long forgotten will that did not foresee the birth of additional children. This remains one of the great merits of the *conditio si testator*.

Many modern legal systems, including Scots law,<sup>188</sup> seek to provide protection for the testator's children born after the date of his will and, should they be omitted whether inadvertently or deliberately, to secure for them a minimum provision. Although forced shares often reflect a Civilian pedigree, some Common Law systems have restricted testamentary freedom by legislative reform. The actual mechanics to ensure the provisions differ considerably across the various legal systems. In some jurisdictions the child's share is a fixed fraction calculated by reference to a part of the net estate and in others the provision is calibrated according to what the child would receive on intestacy.<sup>189</sup> The *conditio si testator* has once been applied in an eighteenth century Scottish case to secure for an omitted and overlooked child a provision equivalent to that which had been expressly provided by the testator for his other children.<sup>190</sup> That case is to be regarded as an anomaly and is not how the *conditio si testator* would now be applied in Scots

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(1894) 21R. 704; 1 S.L.T. 307; *Elder's Trustees v Elder* (1895) 22R. 505; (1895) 2 S.L.T. 579. Cf. the doubt expressed in *Stuart-Gordon v Stuart-Gordon* (1899) 1F. 1005, 1011 per Lord McLaren.

<sup>184</sup> *Elder's Trustees v Elder* (1894) 21R. 704; 1 S.L.T. 307; *Elder's Trustees v Elder* (1895) 22R. 505; (1895) 2 S.L.T. 579; *Smith's Trs v Smith* (1897) 5 S.L.T. 190. *Greenan v Courtney* 2007 S.L.T. 355.

<sup>185</sup> Paisley, 'Conditio Mechanics', 227.

<sup>186</sup> This is a common law rule: the child is entitled to legitim out of the estate of his parent no matter who the other parent is. The consequence is that children do not need to have both parents in common to share a legitim claim in the estate of their common parent.

<sup>187</sup> Succession (Scotland) Act 1964, c.41, s.2(2).

<sup>188</sup> By means of legitim.

<sup>189</sup> E.g. Saul Touster, 'Testamentary Freedom and Social Control – After-Born Children', *Buffalo Law Review*, 6 (1957), 251–82; *Buffalo Law Review*, 7 (1958), 47–61.

<sup>190</sup> *Margaret Oliphant v John Oliphant*, 19 June 1793, F.C. 138 no. 63, 139; Mor. 6603. See Paisley, 'Conditio Civilian Sources'.

law. Furthermore, the *conditio si testator* in Scots law is not a device to restrict testamentary freedom: rather, the operation of the *conditio si testator* is based on, and is designed to give effect to, the presumed intention of the testator. It seeks to promote rather than hinder testamentary freedom. It is sometimes referred to as a rule which protects the afterborn child<sup>191</sup> but it protects only the child who is inadvertently but not deliberately omitted. Even if the parent is regarded as being under a ‘natural’ obligation to make provision for a surviving child, the *conditio si testator* does nothing to preclude a deliberate ‘unnatural’ settlement.<sup>192</sup>

Given that intestacy is the usual<sup>193</sup> consequence of the omitted child exercising his option to avoid a will in terms of the *conditio si testator*, it is important that the underlying policy of the law of intestate succession coincide with the policy underpinning the *conditio si testator*. This was certainly the case when the *conditio si testator* was originally introduced into Scots law at which time a primary purpose of the law of intestate succession was to transmit the property of the *de cuius* to the next generation of his family.<sup>194</sup> However, from the early twentieth century onward, it has become clear that there has been a sustained and marked progression away from this notion in relation to the priorities of intestate succession. The modern balance of preference in intestate succession is away from relationships of blood and towards surviving adult partners to whom the *de cuius* is perceived to have a primary responsibility.<sup>195</sup> Commenting on this priority of the life partner, Gretton and Steven have observed incisively:<sup>196</sup>

That leads to a paradox. In testate succession the idea of disinheriting one’s children is regarded as so shocking that the law forbids it. But in intestate succession such disinheritance is (except in larger estates) not only permitted but indeed compulsory – by force of the law itself.

<sup>191</sup> Professor M. C. Meston, *The Conditiones Si Sine Liberis Decesserit*, J.L.S.S., [1981] (Workshop), W 203.

<sup>192</sup> This tends to undermine the formulation of the rationale of the rule offered in *Smith’s Trustees v Grant* (1897) 35 S.L.R. 129, 131 per Lord Stormonth-Darling. This is quoted above in the text at footnote 172.

<sup>193</sup> Paisley, ‘Conditio Mechanics’, 227.

<sup>194</sup> Stair, *Institutions*, 3,4,pr; 3,8,pr.

<sup>195</sup> Hilary Hiram, ‘The Conditio Si Testator as Family Policy: Greenan v Courtney’, *Edin.L.R.*, 11(3) (2007), 431–435, 435.

<sup>196</sup> George L. Gretton and Andrew J. M. Steven, *Property, Trusts and Succession* (2nd edn, Haywards Heath, 2013), 405, para. 26.10.



In this context, the *conditio si testator*, arguably, does not fit well. Depending on the precise make up of the estate, its operation by the child may even occasion a benefit not to the child exercising the option to avoid the will or to any of his or her siblings but to the testator's surviving life partner.<sup>197</sup> Unless the estate is very large, it therefore requires a child to act altruistically and not selfishly when exercising the option to seek reduction of a will under the *conditio si testator*. However, this difficulty can be somewhat overstated and, in the context of the operation of the *conditio si testator*, the overstatement is somewhat blind to a very common situation. It is no surprise that a child finds it easy to be altruistic when the surviving life partner is the child's very own mother or father. It is that parent who will look after the child and, perhaps, eventually provide it with an inheritance to an estate that might even contain elements of the estate of the predeceasing parent.

### Circumstances of Application of the *Conditio Si Testator*

It would be convenient to apply a rule that the birth of a child to the testator automatically revokes any prior testamentary deed of a parent where the deed omits provision for the afterborn child. On occasions there has been some judicial approbation, or at least consideration, of an absolute rule on the basis that it would be straightforward, 'perhaps [...] more convenient'<sup>198</sup> or a 'good principle'.<sup>199</sup> At least in the eyes of one judge, this would have the added merit of being the form of the rule found in Roman law:<sup>200</sup> however, that comment is probably made by reference to the wrong Roman sources.<sup>201</sup> If indeed such a bright line rule were to be adopted, the price of the attendant clarity and convenience would be that it might sometimes fail to give effect to the true

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<sup>197</sup> This is because of the entitlement of a surviving spouse or civil partner to prior rights under Succession (Scotland) Act 1964, ss8 and 9; Paisley, '*Conditio Mechanics*', 228–30. Except in relation to crofts (Succession (Scotland) Act 1964, s.8(2A) and 4(b)) a surviving cohabitant is not entitled to prior rights but the maximum discretionary award made to a cohabitant can be of such value as could have been made to the survivor if the surviving cohabitant had been the spouse or civil partner of the deceased. That potentially could extend to the value of prior rights. See text below at footnote 222.

<sup>198</sup> *Rankine v Rankine's Trustees* (1904) 6F. 581, 583 per Lord McLaren.

<sup>199</sup> *McKie's Tutor v McKie* (1897) 24R. 526, 528 per Lord Adam. Cf. *McEwen (Dobie's Tr.) v Pritchard* (1887) 15R. 2, 4 per Lord Young.

<sup>200</sup> As noticed in *McKie's Tutor v McKie* (1897) 24R. 526, 528; (1897) 4 S.L.T. 308, 309 per Lord Adam.

<sup>201</sup> See Paisley, '*Conditio Civilian Sources*'.

intentions of the testator<sup>202</sup> and, indeed, depending on the operative rules of intestacy, it may not improve the position of the child. That automatic application upon the birth of a child is not how the *conditio si testator* has ever been applied in Scots law.<sup>203</sup> Instead, Scots law provides that the testamentary provision of the testator will not be open to reduction if the circumstances for the application of the *conditio si testator* are absent. This is implicit in the following observations of Lord Watson:<sup>204</sup>

According to the law of Scotland the question whether the testament of a parent is revoked by the subsequent birth of a child is one wholly dependent on the circumstances of the case.

At the very least this confirms that the birth of the child *per se* does not automatically revoke the will but, in addition, something else is required.<sup>205</sup> The issue of what indeed are the requisite circumstances has been the subject of judicial development over a period of time and, as this development is ongoing, some matters remain unclear. The level of obscurity can be overstated and it would be unfair to assign all responsibility to the judiciary or the institutional writers. Perhaps a more significant feature of the lack of clarity on the matter has been the absence, until recently,<sup>206</sup> of a detailed modern academic analysis of the workings of the *conditio si testator*. Whatever the case, any obscurity

<sup>202</sup> *Rankine v Rankine's Trustees* (1904) 6F. 581, 583 per Lord McLaren.

<sup>203</sup> Cf. the interpretation placed on *Dobie's Tr v Pritchard* (1887) 15R. 2 per Lord Rutherford Clark in *McKie's Factor and another, Special Case* (1897) 24R. 526, 528; (1897) 4 S.L.T. 308, 310 per Lord Adam and the interpretation placed on Bankton, *Institute*, 1,9,6 by Robert F. Hunter, 'The *Conditio Si Testator Sine Liberis Deceaserit*: Retention or Abolition?', *S.L.T. (News)*, [2012], 107. However, Bankton, although referring to the will being 'void' and also to 'this nullity', clearly envisages that the rule will not apply if the pregnancy or birth is known to the testator and he does nothing to alter his will.

<sup>204</sup> *Hughes v Edwards* (1892) 19R. (H.L.) 33, 35 per Lord Watson. This comprises the sentence quoted in the various editions of Walker and Walker, *The Law of Evidence in Scotland* as discussed above in the text at footnote 127. See also *Nicolson v Nicolson's Tutrix* 1922 S.C. 649, 653 per Lord Justice-Clerk Scott Dickson. Cf. *McKie's Factor (Special Case)* (1897) 24R. 526, 528; (1897) 4 S.L.T. 308, 309 respectively per Lord McLaren.

<sup>205</sup> However, this quotation may still be criticized for not indicating sufficiently clearly that the appropriate circumstances do not automatically revoke the will but merely confer on the child the right to seek reduction of the will: see Paisley, 'Conditio Mechanics', 222–4.

<sup>206</sup> This has now been provided in Paisley, 'Conditio Mechanics'.

that now remains is not of such measure as to make the *conditio si testator* unworkable or the giving of advice impossible.

### The Testator's Intention and the Scottish Law Commission

A key feature of the Scottish development of the *conditio si testator* has been a calculated attempt to link the deemed revocation effected thereby to the presumed intentions of the testator. However, it is clear that this also results in a degree of imperfection and cannot be guaranteed to match the true intention of the testator.<sup>207</sup> The *conditio si testator*, it is clear, is not a perfect mirror of the actual mind of the testator. It is that imperfection which has formed the primary basis for the Scottish Law Commission's most recent recommendation (2009) to abolish the *conditio si testator*.<sup>208</sup> Referring back to their earlier report in 1990<sup>209</sup> they indicated that:

the application of the *conditio*, may, on occasion, produce unfortunate results.

To support their recommendations in both 2009 and 1990 they referred to the effect on a surviving cohabitant of the testator in whose favour the entire estate had been left in his will. Reflecting their view in 1990,<sup>210</sup> the Scottish Law Commission concluded in 2009:<sup>211</sup>

If a child were subsequently born to the couple, and the father were to die, the effect of the *conditio* would result in the estate being treated as intestate and the child inheriting everything. This, it could be assumed, would not be in accordance with the testator's wishes.

This is unconvincing. The criticism of the *conditio si testator* by the Scottish Law Commission is overstated because the *conditio si testator* would not always have the result suggested as regards a cohabitant in the circumstances stated. In particular, even if the child were omitted, if the testator left any indication

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<sup>207</sup> *Rankine v Rankine's Trs* (1904) 6F. 581, 584 per Lord Kinnear.

<sup>208</sup> Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 215, 2009), 89, para. 6.20.

<sup>209</sup> Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 124, 1990), 54, para. 4.48.

<sup>210</sup> *Ibid.*, 54, para. 4.48.

<sup>211</sup> Scottish Law Commission, *Report on Succession* (No. 215, 2009) 89, para. 6.20.

in terms of his will that the *conditio si testator* was not to apply, the cohabitant would inherit as per the terms of the will and the child would be restricted to a legal rights claim. Even if such an indication were not contained in the will or in any other testamentary document of the testator it would still be possible for the cohabitant to demonstrate by extrinsic evidence that the testator did not wish the will to be avoided at the instance of the child. If successful in proving the case by such extrinsic evidence, the cohabitant would again inherit as per the terms of the will. Thus it can be seen that there are therefore two entirely different methods built into the very mechanism of the Scottish *conditio si testator* by which it is applied with subtlety to protect and effectuate the real intentions of the testator.<sup>212</sup> The passage from the Scottish Law Commission's Report, quoted above,<sup>213</sup> appears to be flawed in giving the impression that the birth of the child automatically leads to the revocation of the will. As has been shown above,<sup>214</sup> that is incorrect.

In addition, in terms of the overall position, the approach of the Scottish Law Commission could be said to have been out of date even as it was re-packaged and re-presented in 2009. Since May 2006 a surviving cohabitant may apply to the court for a discretionary provision payable out of the intestate estate of the *de cuius*.<sup>215</sup> Nowhere in the passages of the 2009 Report dealing specifically with the *conditio si testator* is this possibility acknowledged by the Scottish Law Commission although they extensively review the cohabitant's claim elsewhere in the same Report.<sup>216</sup> Total intestacy is the usual result of the child's success in seeking reduction of the will in terms of the *conditio si testator*.<sup>217</sup> Let us assume this has occurred and the cohabitant applies in time for a discretionary award out of the deceased's net intestate estate. In determining the size of the payment to be made to the cohabitant, the court, in terms of the legislation as presently framed, is to have regard, *inter alia*, to:<sup>218</sup>

<sup>212</sup> See Paisley, 'Conditio Mechanics', 200–2 and 203–22.

<sup>213</sup> To be fair to the Scottish Law Commission, they do not make the same mistake two paragraphs earlier in para. 6.18 but the issue has slipped out of focus in para. 6.20.

<sup>214</sup> See text above at footnote 80. See also Paisley, 'Conditio Mechanics', 222–4.

<sup>215</sup> Family Law (Scotland) Act 2006, asp.2, s.29; Hiram, 'The Conditio Si Testator as Family Policy: Greenan v Courtney', *E.L.R.*, 11(3) (2007), 431–435, 435. See also Paisley, 'Conditio Mechanics', 229–230.

<sup>216</sup> Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 215, April 2009), Part 4, 66–77. Analysis of the *conditio si testator* is wholly absent from the prior discussion paper: Scottish Law Commission, *Discussion Paper on Succession* (Scot. Law Com. D.P. No. 136, August 2007).

<sup>217</sup> Paisley, 'Conditio Mechanics', 227.

<sup>218</sup> Family Law (Scotland) Act 2006, asp. 2, s.29(3)(c) and (d). As to the difficulty of

the nature and extent of any other rights against, or claims on, the deceased's net intestate estate; and [...] any other matter the court considers appropriate.

These factors are sufficiently wide to allow a court to have regard to the terms of any will reduced in terms of the *conditio si testator*. Thereby the court can ascertain what the testator would have wished had his will remained valid. In addition, the court can consider whether the reduction of the will and consequent intestacy really reflects the testator's intentions, although the very fact that the will has been reduced in terms of the *conditio si testator* by definition, means that there is no evidence within the will and no extrinsic evidence that the testator wished the *conditio si testator* not to apply.<sup>219</sup> The wide statutory factors appear also to allow the court to have regard to the fact that the cohabitant would be prejudiced and lose out by reduction of the will in terms of the *conditio si testator* even if the testator did indeed wish the *conditio si testator* to apply. In all such cases, depending on the merits of the case, the court can award the surviving cohabitant a discretionary payment ranging from no value at all up to the maximum award. This award could comprise both heritage and moveables but, at present, would be limited to a maximum value of:

the amount to which the survivor would have been entitled had the survivor been the spouse or civil partner of the deceased.

The maximum amount capable of being awarded to the cohabitant on such intestacy could be equivalent to the total composite value of a spouse's or civil partner's prior rights and legal rights. As with a spouse or civil partner<sup>220</sup> this could potentially swallow the entire property of the testator in all but the largest of estates. It appears to be payable ahead of any claim to legitim on the part of the child.<sup>221</sup> In short, in all but the largest of estates the example cited

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achieving fairness between the various beneficiaries see *Kerr v Mangan* [2014] C.S.I.H. 69; 2014 S.L.T. 866, 873, para. 41 per Lady Smith.

<sup>219</sup> Paisley, 'Conditio Mechanics', 197, 203–22.

<sup>220</sup> For civil partners the relevant amendments to Succession (Scotland) Act 1964, ss8 and 9 were inserted by Civil Partnership Act 2004, c.33, Sched. 29(1), paras 4 and 5 with effect from 5 December 2005.

<sup>221</sup> Gretton and Steven, *Property Trusts and Succession* (2nd edn, 2013), 404–5, para. 26.10. See the definition of 'net intestate estate' in Family Law (Scotland) Act 2006, asp. 2, s.29(10).

by the Scottish Law Commission will lead to prejudice to the cohabitant only if the court does not award him or her a discretionary provision as large as that he or she would have received under the will. It is even possible in many cases that the cohabitant could gain. Although avoidance of prejudice to the cohabitant is not guaranteed, this is far from the stark case of unfairness to the cohabitant set out in the Scottish Law Commission's Report.

One possible flaw in the present position, again not noticed by the Scottish Law Commission, is that, in terms of the relevant legislation,<sup>222</sup> the cohabitant is obliged to apply for a discretionary provision within six months of the death of the *de cuius*. Arguably, a child, hostile to the cohabitant, may entirely defeat the cohabitant's claim simply by not seeking to reduce the will in terms of the *conditio si testator* until after that time limit has expired.<sup>223</sup> That difficulty, however, arises because the relevant legislation was enacted without any clear view of the existence or method of operation of the *conditio si testator*. It is a flaw that can easily be remedied by suitable legislative provision. In any event, such reform is unnecessary if, as is suggested below, new provision is enacted to exclude exercise by the child of any right to seek reduction of the will where a surviving cohabitant is benefited by that will.<sup>224</sup>

This criticism of the Scottish Law Commission's 2009 recommendation as being outdated will remain valid even if future legislation implements their proposals to afford to a cohabitant succession rights applicable to testate as well as intestate estates.<sup>225</sup> Under the scheme the maximum the surviving cohabitant could receive is what would have been available to him or her if he or she had been the surviving spouse or civil partner.<sup>226</sup> However, if the

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<sup>222</sup> Family Law (Scotland) Act 2006, asp. 2, s.29(6).

<sup>223</sup> There is a counter argument to this. Admittedly, the surviving cohabitant's right to apply for a discretionary provision arises only if the deceased dies intestate and is payable out of the net intestate estate: Family Law (Scotland) Act 2006, asp.2, s.29(1) (a) and (2). Admittedly, if a will leaving the entire estate to a surviving cohabitant is left the testator will not be regarded as dying intestate unless that will is successfully reduced at the instance of the omitted child in terms of the *conditio si testator*. However, whenever the will is reduced in terms of the *conditio si testator*, the testator, by legal fiction, is deemed to die intestate as at the point of his death: see text at footnote 83. Thus, it seems possible that the surviving cohabitant could make a potentially valid application within the 6 month period after the testator's death and the absence of actual intestacy as at the time of death is cured by the backdating of the intestacy caused by the reduction of the will. The matter remains undecided.

<sup>224</sup> See text at footnote 236.

<sup>225</sup> Scottish Law Commission, Report on Succession (Scot. Law Com. No. 215, April 2009), 69, para. 4.9, recommendation 37; Draft Bill, clauses 22–6 and schedule 2.

<sup>226</sup> *Ibid.*, 71, para. 4.15.

*conditio si testator* is to be retained in cases involving a cohabitant there is a further defect in the recommendations of the Scottish Law Commission. They indicated that, after it is established that the party claiming is indeed a cohabitant, in determining what amount the cohabitant is entitled to the court should have regard only to the quality of the relationship of cohabitation.<sup>227</sup> There would be a 'veil of ignorance' as regards other matters such as the claims of other parties to the succession, the reason for the intestacy and, in particular, whether intestacy was occasioned by reduction of a will in terms of the *conditio si testator*. If indeed the *conditio si testator* is to be retained, this narrow focus is perhaps not suitable. However, the narrow focus of the Scottish Law Commission is indeed perfectly acceptable if, as is suggested below, legislation is enacted to the effect that the *conditio si testator* is to be excluded where the will leaves any provision in favour of a surviving cohabitant, a civil partner or spouse.

### The Continued Relevance of an Original Rationale

Given the relative weakness of the single example provided by them, it would perhaps have been better if the Scottish Law Commission had sought to recommend the abolition of the *conditio si testator* on the basis that one or all of its stated rationales is no longer consonant with one of the primary contemporary underlying policies of the law of intestate succession.

Reasoned support for such a recommendation could have been set out as follows. The Scottish *conditio si testator* was originally developed to protect an omitted child from the possibility of a 'stranger' to the family inheriting under an out of date will. In much of the time frame during which the development of the Scottish *conditio si testator* took place the spouse<sup>228</sup> and cohabitant of the testator were regarded as 'strangers' to the family for the purposes of the law of intestate succession. Societal change has made this view unacceptable, first of all as regards the spouse (and, by statutory extension, the civil partner<sup>229</sup>) and, later, the surviving cohabitant. All are now regarded as individuals having such a close relationship with the *de cuius* as to deserve some form of special benefit in a situation of intestacy. The effect of the child's obtaining of a

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<sup>227</sup> Ibid., 71, para. 4.19.

<sup>228</sup> A civil partner was not contemplated by the law for most of this period as the status was introduced by Civil Partnership Act 2004, c.33.

<sup>229</sup> See the various amendments to the Succession (Scotland) Act 1964, ss1, 2, 5, 8, 9, 9A, 15, 16, 31 and 35 made by Civil Partnership Act 2004.

reduction of a will in terms of the *conditio si testator* today still could be to deprive the surviving spouse, civil partner or cohabitant of any value over and above that to which the spouse, civil partner or cohabitant would be entitled under the law of intestacy.

Even so phrased, the reasoned criticism of the effect of the child obtaining reduction of a will in terms of the *conditio si testator* is still somewhat overstated. The present provision for a surviving spouse or civil partner in terms of statutory prior rights<sup>230</sup> and *ius relictæ* and *ius relict*<sup>231</sup> payable on intestacy is of such measure as to render it unlikely that a surviving spouse or civil partner would lose out except in the largest of estates. This would not be materially altered even if the present recommendations of the Scottish Law Commission were implemented by legislation.<sup>232</sup> The related, albeit not identical, position of the cohabitant has already been described above<sup>233</sup> and this indicates that it is far from inevitable that a surviving cohabitant would lose out.

However, even if these residual concerns collectively amount to the identification of a flaw in the operation of the *conditio si testator*, they also identify the possible solution. One original rationale of the *conditio si testator*, the preference of the surviving omitted child in comparison to ‘strangers’,<sup>234</sup> remains valid even in contemporary society provided the law is re-framed so that a surviving spouse, civil partner or cohabitant is not regarded as a ‘stranger’ to the family. It would be simple to adapt the present form of the *conditio si testator* to retain the benefit of preferring a surviving child to a ‘stranger’ to the family whilst dealing with any concern about prejudice to the testator’s surviving spouse, civil partner or cohabitant. All this would require is for a statutory provision to enact a new precondition for the exercise by the omitted child of the option to seek reduction of the will in terms of the *conditio si testator*. Sufficient would be a simple statement that a will may not be avoided or reduced in terms of the *conditio si testator* if, as at the date of death of the testator, there is a surviving spouse, civil partner or cohabitant entitled to succeed in terms of the testator’s will. Another, more sophisticated

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<sup>230</sup> Succession (Scotland) Act 1964, ss8-9A: dwelling house (current maximum value £473,000), furniture (current maximum value £29,000) and a cash sum (current maximum value £50,000).

<sup>231</sup> For surviving spouses this is a common law provision extended to civil partners by Civil Partnership Act 2004, s.131.

<sup>232</sup> Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 215, April 2009), Part 3.

<sup>233</sup> See text at footnotes 209–29.

<sup>234</sup> See Paisley, ‘Conditio Civilian Sources’.



version, but to general similar effect, would be to exclude the operation of the *conditio si testator* only if its operation would worsen the position of the testator's surviving spouse, civil partner or cohabitant on the assumption that such an individual did indeed claim his or her entitlement or applied for a discretionary provision.<sup>235</sup> In the latter version of the reformed rule, the *conditio si testator* would remain available if the position of that party were to be improved which is exactly what occurred in relation to a spouse in the most recent decided case on the operation of the *conditio si testator*.<sup>236</sup> In the present writer's opinion the simpler reform is the better one.

In short, there is a strong argument that the *conditio si testator* should not be abolished but reformed. It should be updated by taking it back in time to effectuate its original rationale in the context of modern society. The reform is simple to achieve and fits easily into the existing structure of Scots law. The reform also achieves all of the aims of the Scottish Law Commission as regards surviving cohabitants.

### **Benefits In The Absence Of A Surviving Spouse Etc.**

What has been stated above has shown that the *conditio si testator*, when slightly reformed, can avoid the drawbacks which its critics claim to have identified. However, the reformed *conditio si testator* will not merely benefit from an absence of these alleged flaws: it will also continue to have the advantage of protecting the likely intention of the testator where a long forgotten and out of date will comes to light after his death.

In various publications issued in a period stretching back almost three decades,<sup>237</sup> the Scottish Law Commission, when considering what were perceived to be the defects of the reduction of a will in terms of the *conditio si testator*, focused exclusively on the effect on the surviving spouse or cohabitant. No-where does the Scottish Law Commission appear to have addressed the benefits of the *conditio si testator* where a surviving cohabitant or spouse (or civil

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<sup>235</sup> In such a case the timelimit for a cohabitant applying for a discretionary payment may need to be extended as it presently is a six month period from the date of death: Family Law (Scotland) Act 2006, asp. 2, s.29(6).

<sup>236</sup> *Greenan v Courtney* 2007 S.L.T. 355.

<sup>237</sup> This focus dates back to Scottish Law Commission, *The Making and Revocation of Wills* (Scot. Law Com. Consultative Memorandum No. 70, September 1986), 46–7, para. 5.11. There is no consideration at all in that Consultative Memorandum of the effect of the *conditio si testator* where the testator dies and is survived by an omitted child where the testator has no cohabitant or spouse.

partner) does not exist. A number of examples will be set out below to prove that there are indeed such benefits. The writer has encountered all of these situations when in practice as a solicitor. In each case the *conditio si testator* has played a central role in the distribution of the estate and in giving effect to what the testator is likely to have wanted. There is no clear evidence that these examples have ever been the subject of public consultation by the Scottish Law Commission or any other body.

**Example One** - Imagine the situation of an unmarried testator who is also not in cohabitation with another person. At this stage of his life,<sup>238</sup> the testator realizes he has no dependents and makes a will leaving all his property to a deserving but unrelated third party such as the cat and dog home. The will is stored and forgotten about. Years later the testator marries (or enters into cohabitation) and the couple have a child (or a number of children). Disaster then strikes and the testator's cohabitant (or wife) dies followed shortly thereafter by the testator himself. This is not a wholly unlikely scenario dreamed up by an examiner in the law of succession. Sadly, it is a possibility of modern life as there may have been a car accident resulting in both of their deaths.

**Example Two** - Another situation could involve a similar testator who has made a will to similar effect benefiting the cat and dog home. The testator thereafter marries or enters into cohabitation with a partner who already has a child (or children) where that child was born after the date of the will. The partner becomes terminally ill and the testator adopts the child: it matters not whether the adoption is complete prior to the partner's death.<sup>239</sup> The testator then dies and is survived by the child.

**Example Three** - Similar concerns arise where the child is predeceased by a parent who has never been married and has never been in cohabitation. Imagine a testatrix, not in any sexual relationship, who makes a will giving all her estate to the very fortunate cat and dog home. Again, the will is stored and forgotten about. Years later, as a result of a sexual encounter short of cohabitation, she falls pregnant and a child is born. If the testatrix then dies,

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<sup>238</sup> Or 'her life' – the same applies to a testatrix.

<sup>239</sup> For adoption of a child and the *conditio si testator* see Paisley, 'Conditio Mechanics', 193–4.

the existing but long forgotten will permits the cat and dog home to inherit the testatrix's entire estate subject to the child's claim to legal rights.

**Example Four** - The same effect observed in example three would apply if the testatrix had made the will prior to marriage and the child was the offspring of the marriage which was thereafter terminated by divorce. If the testatrix then dies, the long forgotten will confers the benefit of the entire estate on the cat and dog home and the child requires to make a legal rights claim to obtain any part of the estate of the testatrix.

In each of the above examples the testator's forgotten will remains valid and the cat and dog home is entitled to inherit as per its terms. The surviving, omitted and, at least in the first two examples, now orphaned child<sup>240</sup> will receive nothing under the testator's will and requires to claim legal rights, restricted, at present, to one half of the moveables of the testator.<sup>241</sup> Does this really coincide with what the testator is likely to have wanted? Probably not. In such cases the *conditio si testator* presently enables the omitted child to seek reduction of the will so that he<sup>242</sup> can inherit everything in terms of the law of intestacy, whether as legal rights or free estate. If the *conditio si testator* is abolished, as recommended by the Scottish Law Commission, all of these situations will result in the stranger to the family – the cat and dog home – inheriting the entire estate of the testator (duly augmented in examples one and two by anything the testator inherited from his predeceasing wife or cohabitant) subject only to the legal rights claim or the child (or children).<sup>243</sup> The bulk of the estate will pass outside the family.

The original rationale of the *conditio si testator* was to preclude this. The Scottish version of the *conditio si testator* achieves this end but it does so in a way that is not outrageously unjust as regards the stranger named as the beneficiary named in the will. If suitable evidence is available from within or outwith the

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<sup>240</sup> Or children.

<sup>241</sup> In the absence of a surviving spouse or civil partner, if there is one child he will receive one half of the moveables. If there are two children each child will be entitled to a quarter of the moveables only; if there are three children, each child is entitled to a sixth of the moveables only. The collective share of the children, despite their number, remains the same.

<sup>242</sup> Or he and his siblings.

<sup>243</sup> In Examples One and Two, the predeceasing partner might also have left a will in similar terms resulting in a double loss to the surviving omitted child. I thank Dr. Andrew Simpson for alerting me to this point.

will, the stranger (the cat and dog home in the various examples given above) may prove the omission of the child was deliberate. In such a case the will would not be reduced and the cat and dog home would inherit according to its terms. There is therefore a very useful subtlety to the application of the *conditio si testator* enabling an avoidance of the frustration of the testator's actual intention.

**Example Five** – Beneficiaries such as the cat and dog home are not the only potential ‘stranger’ when one considers the succession to a testator. At least until the reforms in the Succession (Scotland) Act 2016, asp. 7 come into force (in terms of which divorce, dissolution or annulment of a marriage terminate an ex-spouse's entitlement under the testator's will),<sup>244</sup> an ex-spouse may also fill the role and is perhaps the least likely person a testator would wish to inherit. Imagine the situation of a testator who is married and makes a will bequeathing his entire property to his spouse whom failing a child of the marriage. The bequest is made in favour of the named spouse and is not conditional on the continuing status of being the testator's spouse. A child is born of the marriage. The marriage founders and the parties are divorced. The testator has no continuing close relationship with the child. However, the will is completely forgotten about and no rights in succession are renounced in a separation agreement. The testator then meets a new life partner and enters into cohabitation. A child is born of this relationship and the testator has a close relationship with this child. The testator then dies. The ex-spouse, although now a stranger to the family, under the present state of the law, is entitled to inherit the testator's entire estate under the subsisting will subject only to the children's legal rights claims. The cohabitant is entitled to nothing under the present law and cannot seek a discretionary payment where the will deals with the entire estate.<sup>245</sup> Is this really what the testator is likely to have wished after a divorce? Under the present law the child of the cohabitant can seek reduction of the will in terms of the *conditio si testator* and, if the will is reduced leading to intestacy, both that child and the cohabitant will collectively inherit the entire estate. The child will benefit under the fixed rules of intestate succession<sup>246</sup>

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<sup>244</sup> The 2016 Act, s.1 follows upon the Succession (Scotland) Bill [as introduced], SP Bill 75 (Session 4 (2015)), s.1.

<sup>245</sup> Family Law (Scotland) Act 2006, asp. 2, s.29. This would be altered and the right of a cohabitant extended to testate estates under a new statutory regime recommended in the Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 215, April 2009), Part 4.

<sup>246</sup> Succession (Scotland) Act 1964, ss2 and 11 and the common law rules of legitim.

and the cohabitant may benefit if the court awards a discretionary payment out of the intestate estate.<sup>247</sup> Under the recommendations of the Scottish Law Commission as enacted in the Succession (Scotland) Act 2016 Act, asp. 7 (yet to come into force) noticed above, divorce will have the effect of revoking any testamentary provision by one of the spouses or civil partners in favour of the other but it does so by deeming, for the purposes of the will, that the surviving (and now divorced spouse or civil partner) has failed to survive the testator.<sup>248</sup> This admits the child of the now dissolved marriage to the full benefit under the will as a substitute for the parent deemed to be deceased if there is a suitable destination-over clause.<sup>249</sup> Unless the will is reduced by operation of the *conditio si testator* that child of the dissolved marriage may end up far better off than the child of the cohabitation because the latter is entitled only to legal rights (or whatever forced provision is eventually substituted for such rights). This probably does not coincide with the testator's intentions nor with the general policy of the law, applicable to the law of intestate succession, that children should be treated equally.

The common thread in all the above examples is the absence of a surviving spouse, civil partner or cohabitant entitled to succeed under the testator's will. The examples collectively indicate the *conditio si testator* would continue to serve a valuable role even if legislation were enacted to exclude the operation of the *conditio si testator* in cases where a surviving spouse, civil partner or cohabitant received a benefit under the will.

**Example Six** – A testator without a family makes a will leaving all his property to the cat and dog home. The will is stored and forgotten about. He then is married (or enters into cohabitation). His wife or cohabitant is not aware of the will. A few years after the relationship starts the testator is informed of the glad tidings that his wife (or cohabitant) is expecting their first child. Shortly thereafter the testator is involved in a very serious accident which injures his brain and renders him wholly incapable of dealing even with the simplest of

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<sup>247</sup> Family Law (Scotland) Act 2006, asp. 2, s.29.

<sup>248</sup> 2016 Act, s.1 (2). See further, Scottish Law Commission, *Report on Succession* (Scot. Law Com. No. 215, April 2009), 88, para. 6.17; Succession (Scotland) Bill [as introduced], SP Bill 75 (Session 4 (2015)), s.1.

<sup>249</sup> Unless the survivorship clause is very specific and states that the child will inherit only in case of the parent's actual decease but not the parent's deemed decease or the parent's deemed failure to survive. This specification is quite rare in the writer's experience.

legal affairs. The child is born and the testator dies soon thereafter. The will is then discovered and the cat and dog home claim their entitlement to the whole estate subject to the legal rights of the surviving spouse and child. Under the present law, if there were a surviving cohabitant, that person would be entitled to nothing. Under the present law, however, the omitted child would be entitled to seek reduction of the will in terms of the *conditio si testator* and, if successful, this would probably result in the surviving spouse receiving the bulk of the estate, with any remainder shared with the child. The same reduction would open the door to a discretionary claim by the surviving cohabitant. If the *conditio si testator* is abolished the cat and dog home, depending on the makeup of that estate, would receive the bulk of the value of that estate subject to any forced provisions afforded to the child, spouse or cohabitant. This is not likely to coincide with what the testator would have wished. The added benefit of the *conditio si testator* in this particular example is that it enables steps to be taken after the death of the testator to have the will reduced and treated as revoked. It is only after the death of the testator that the long forgotten will is likely to emerge and, at that time, it is too late for any revocation or amendment of testamentary affairs of a testator lacking testamentary capacity even in terms of the Adults with Incapacity (Scotland) Act 2000.<sup>250</sup> An intervention order or guardianship order of an adult ceases to have effect on the adult's death.<sup>251</sup>

### The Duty To Decline

It is worth exploring whether the 'stranger' named as the beneficiary in the will in all of the examples stated above, might decline the bequest or assign it to the family members who are likely to be disappointed if the long forgotten will remains effective. That frequently is the solution where the 'stranger' is a family friend or relative (such as the testator's parent or sibling) who has a care for the surviving child.<sup>252</sup> This phenomenon of generous and altruistic 'strangers' will probably continue even if the *conditio si testator* is abolished because such parties are free to do what they like with their own property including vested bequests. However, where the 'stranger' is an entity such as a charity or a trust, matters are otherwise. Such bodies have no legally enforceable moral duty to

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<sup>250</sup> Adults With Incapacity (Scotland) Act 2000, asp. 4, s.1(4). See text at footnote 100.

<sup>251</sup> *Ibid.*, s.77.

<sup>252</sup> It might even be possible where the beneficiary such as the testator's parent has an incapacity in terms of Adults With Incapacity (Scotland) Act 2000, asp. 4; *M, Applicant* 2007 S.L.T. (Sh. Ct.) 24.

decline bequests. Despite some exploration of the notion in the early years of development of the *conditio si testator*<sup>253</sup> no such legally enforceable obligation arises in Scots law just because a child of the testator would be disappointed by a long overlooked will. Instead, a trust or charity such as the cat and dog home named as a beneficiary in such a will is probably under a duty in terms of its constitutive documents to insist upon payment of a bequest even where it would lead to the child being left destitute. A legal obligation to seek payment frequently assuages any moral qualms about doing so. Such indeed has been the experience of the present writer in his dealings as a solicitor with charities and trusts.

### Time Limit

If the *conditio si testator* is to be retained, consideration should be given to restricting the time within which a child may decide to exercise the option to seek reduction of the will or otherwise seek to have the will avoided. An absence of such a timelimit has not prevented the *conditio si testator* from working reasonably well to date<sup>254</sup> but the matter could be examined to see if a timelimit would improve matters. Given the likely tender age of such children, a reasonably generous timelimit may be required so that they, or their representatives, could receive suitable legal advice in a time of considerable family grief. In addition, given the association of the *conditio si testator* with long overlooked wills surfacing some time after the testator's death, it would perhaps not be appropriate for that timelimit to begin at the point of the testator's death. It may be the case that the timelimit would require to run from the later of (a) the date of the testator's death and (b) the date upon which the discovery of the long lost will omitting the child was intimated in writing to the child or his representatives together with sufficient indication that the child may have an entitlement to seek its reduction. It is, of course, accepted that under the present law the executor has a duty to ascertain if such a long lost will does indeed exist.

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<sup>253</sup> See Paisley, 'Conditio Civilian Sources'.

<sup>254</sup> Although, as indicated above in the text at footnotes 224–6 there is what seems to be a previously unidentified difficulty in the interaction between this lack of a timelimit and the existence of a timelimit for the surviving cohabitant making a claim for a discretionary payment. That will cease to have any relevance if the operation of the *conditio si testator* is excluded where a surviving cohabitant is benefited in the will.

### Proposed Abolition of the *Conditio Si Testator*

In August 2014 the Scottish Government issued a Consultation Paper welcoming comments on the proposal of the Scottish Law Commission to abolish the *conditio si testator*.<sup>255</sup> The Consultation Paper bears to deal with technical issues and seeks to leave more complex policy issues to a later consultation.<sup>256</sup> The inclusion of the *conditio si testator* in the first paper was somewhat odd in that the reform of the *conditio si testator* is no mere technical issue. Instead, as the varied formulations of the rationale of that rule, identified above, have shown, it should involve consideration of the policy of the law of succession and of the *conditio* itself. The latter was never focused in the work of the Scottish Law Commission. A late draft of this article was submitted as part of the consultation when the author put forward the argument that there required to be consultation on the benefits of the continued existence of the *conditio si testator* where there is no surviving life partner of the testator who benefits in terms of the will. In June 2015 an Analysis of the Consultation was published.<sup>257</sup> The Scottish Government confirmed that the comments of those who disagreed with the original recommendation to abolish the *conditio si testator* had persuaded them that further discussion with stakeholders was required before a decision could be taken on whether to implement it or not. It was decided not to include a provision to abolish the *conditio si testator* in the Scottish Government Programme for Government 2015–2016.<sup>258</sup> Consequently, there is no provision in the 2016 Act dealing with *conditio si testator*. Some legislation dealing with the *conditio si testator* is likely in a subsequent government programme.

### Conclusion

In considering any future legislation, one might wish that the Scottish Government will evidence a degree of pragmatism in development of the law of succession but couple this with a principled approach. If they do so they will continue what is best in the *conditio si testator* and abolish only what is now regarded as capable of producing unfortunate results. In the

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<sup>255</sup> The Scottish Government, *Consultation Paper on Technical Issues Relating to Succession* (Thursday, August 14, 2014), <<http://www.scotland.gov.uk/Publications/2014/08/1185>>, paras 3.15–3.17.

<sup>256</sup> See *Ibid.*, Ministerial Foreword, 3.

<sup>257</sup> [www.gov.scot/Resource/0047/00478965.pdf](http://www.gov.scot/Resource/0047/00478965.pdf)

<sup>258</sup> Consultation on Technical Issues Relating to Succession, June 2015, paras 3.33–3.37. See the list of respondents on page 37.



development of the basic structures of the *conditio si testator* Scots law has evidenced considerable flexibility and a degree of pragmatism. However, as the *conditio si testator* now stands a relatively simple policy aim of benefiting an afterborn child is secured only by the interaction of a number of legal devices. This interaction is complex albeit by no means incoherent. Until recently a persistent lack of clarity in legal analysis has too often made this complexity appear as little more than a confused jumble of ideas. The basic policy behind the *conditio si testator* has been subject to a number of interpretations over the centuries not least because societal attitudes to succession have changed. At all times, however, the policy has comprised to some extent a desire to emulate the presumed intentions of what could be regarded as a morally responsible testator. The concept of what such a person would do has also altered over the centuries. Perhaps certain aspects of the *conditio si testator* are now anachronisms in a legal landscape in which the interests of the surviving life partner have been augmented and those of the next generation relegated in importance. However, this does not leave the *conditio si testator* with no room for application. It does potentially have a continued relevance and importance where there is no competing testamentary interest of a surviving life partner and, as described by the Greek poet Pindar almost two and a half thousand years ago, the choice for potential beneficiary is between the unexpected child on the one hand and a more remote relative or a stranger to the family on the other. As such, the *conditio si testator* is a candidate for reform rather than outright abolition. That reform begins best by an identification of the rationale and fundamental structure of the *conditio si testator*. In that regard it is hoped this article will be of some service.

# The Presumption Arising from Possession of Corporeal Moveable Property: Questioning Received Wisdom

*David Carey Miller*

## Angelo

It is a privilege and a pleasure to contribute to a volume in memory of Angelo Forte. We met first when I was his tutor in Civil Law and Elementary Jurisprudence at Edinburgh University in the winter term of session 1967/68. After that we met from time to time at conferences and events when Angelo worked at Glasgow, Dundee and Edinburgh. Only after he came to the Aberdeen Chair of Commercial Law in 1993 did we get to know one another well. We became good friends and went trout fishing together on the Don. The quality of our friendship was demonstrated when Angelo told me that as his tutor in Edinburgh I had asked questions which had no answer. I think we agreed that it must have been in the jurisprudence rather than the civil law part of the course. The 2013 Aberdeen conference was a unanimous affirmation of the very high regard and warm affection in which Angelo is held in the memory of friends.

## Scope and Focus

This chapter investigates the operation of the presumption that the possessor of a moveable thing is its owner. Earlier work<sup>1</sup> challenged a position limiting the scope of the presumption taken by the Scottish Law Commission (S.L.C.) in a recent report concerned with prescription applying to moveable property.<sup>2</sup> The focus in that piece was the situation in which a claimant to ownership of a moveable thing is barred from recovering it from a possessor who has

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<sup>1</sup> D. L. Carey Miller, 'Lawyer for All Time' in Andrew Burrows, David Johnston and Reinhard Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013), 383.

<sup>2</sup> Scottish Law Commission, *Report on Prescription and Title to Moveable Property* (Scot. Law Com. No. 228, 2012), para. 2.1.

successfully invoked the twenty year negative prescription provision under section 8 of the Prescription and Limitation (Scotland) Act 1973, c.52. The S.L.C. say that at this point the thing concerned is owned by the Crown.<sup>3</sup> The reasoning applied, supported by juristic opinion,<sup>4</sup> is that a decree in terms of section 8 terminates the owner's right but something previously owned can never be ownerless because the Crown acquires in accordance with the maxim *quod nullius est fit domini regis*.<sup>5</sup> On this basis, the S.L.C. contend that the *ipso facto* effect of the decree is to vest ownership in the Crown.<sup>6</sup> The concept of ownership as a unitary 'all or nothing' one<sup>7</sup> is fundamental to the argument that the possessor is left in the position of being only a possessor with no right capable of being transferred.

The S.L.C.'s proposals for positive prescription applying to moveable property may, in general, be seen as sound and sensible. At the same time, however, it seems that the position taken regarding the effect of a successful defence under section 8 is flawed in failing to recognise the efficacy of the presumption. The report is dismissive of the presumption in terms of a possible role in the recognition of title: 'There is an evidential presumption that the possessor of a corporeal moveable is owner, but ultimately this is only a presumption.'<sup>8</sup>

The theme of this chapter is that the presumption is the default position which is displaced only by one able to establish a right of ownership in the thing concerned and – critically – show that this right was not lost in the circumstances of a loss of possession. Failure on the part of a claimant, who proves a right of ownership, also to show that possession was lost in a way which could not be associated with a loss of ownership – but, for example, through theft or by loan – will leave the possessor protected by an assumption that possession was indeed lost or parted with on a basis consistent with derivative transfer. It will be argued that the policy basis of this position, clearly recognised in the institutional writings, is consistent with recognition that the ownership of corporeal moveable property can pass on the basis of an inference that transfer was intended – something which the law allows in

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<sup>3</sup> Ibid., paras 2.3 and 3.35–6.

<sup>4</sup> See, e.g., David Johnston, *Prescription and Limitation* (2nd edn, Edinburgh, 2012), para. 20.04.

<sup>5</sup> David M. Walker (ed.), Stair, *Institutions of the Law of Scotland* (1693; Edinburgh, 1981), 2,1,5 and 3,3,27.

<sup>6</sup> S.L.C. Report (n.2), para. 3.36.

<sup>7</sup> See below, n.12.

<sup>8</sup> S.L.C. Report (n.2), para. 2.1.

certain other specific situations in which an owner has parted with possession. The possessor in this situation should not need to obtain a declarator of ownership. The circumstances of grounds for believing that he or she is owner would make this counter-intuitive. Moreover, any such requirement would undermine the driving policy that the ready traffic of goods should be facilitated by, as far as possible, limiting requirements of form.

Founding on the inferential factor it seems that the common law position is clear in recognising that where the presumption is successfully invoked against a true owner the result is that the possessor is not left as the mere possessor of an ownerless thing but, on the contrary, is owner. An important, but neglected, aspect of this argument is the contention that the presumption functions only in the relatively limited context of possession in the strongest sense of the possessing party's justifiable belief in his or her position as owner. This limiting factor, it will be contended, is consistent with the emphasis upon a policy justification for the presumption found in the institutional and other learned writings. This is because a case for the presumption giving a right of title can only be made in respect of one who has obtained possession on a basis consistent with acquisition – most usually in the sale and purchase chain which, for sound commercial policy reasons, needs to be as far as possible secure, something emphasised by Stair and Hume in writings quoted.

The chapter will follow the following headings: premise position; common position of sources; form of possession protected; diligence application; structure argument; substantive or evidentiary?; Mr Sharp's Porsche; concluding comment.

### **Premise Position**

The starting point must be that in the law of Scotland ownership and possession are distinct concepts in respect of all forms of property. What Buckland and McNair say in contrasting English law's degrees of possession and 'the sharp distinction of the Roman law between ownership and possession'<sup>9</sup> could equally be a summary statement of the difference between English law and Scots law. In the latter the difference in kind between the right of ownership in, or 'title' to, a thing, and the possession of it which may, but does not necessarily, signify a right is succinctly conveyed in Stair's statement that

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<sup>9</sup> F. H. Lawson (ed.), *W. W. Buckland and Arnold D. McNair, Roman Law and Common Law: A Comparison in Outline* (2nd edn, Cambridge, 1952; reprint 1965), 67.

‘[p]ossession, as distinct from right, is ascribable only to that title by which it did begin.’<sup>10</sup>

A trite aspect of Scots property law is the clarity of the distinction between a right of title and the strongest possible possessory right; this distinction is made clear in the accepted position that the right of ownership is ‘unititular’. In the Court of Session decision in *Sharp v Thomson*<sup>11</sup> Lord President Hope, as he then was, adopted Professor Kenneth Reid’s statement: ‘[t]hat Scots law, following Roman law, is “unititular”, which means that only one title of ownership is recognised in any one thing at any one time.’<sup>12</sup> This feature of ownership means that the right is not known in any ‘lesser or competing forms’<sup>13</sup> which must necessarily be something different in kind. In the present context this unititular factor means that if the presumption has substantive effect, that can only be on the basis of recognition that property passed. In this regard, a key factor is that an intention to transfer property can be inferred from the circumstances. Of course, if the thing was stolen the *vitium reale* of theft precludes any passing of property<sup>14</sup> and the owner will always be able to rebut the presumption by proving the theft.

### Common Position Of Sources

There is no doubt whatsoever as to recognition of the presumption in Scots law. David Sellar’s contribution on the general role of presumptions points to the relative prominence of the presumption in question in three separate references to it.<sup>15</sup> The sources – case law, institutional authority and later and modern writings – all recognise that to rebut successfully the presumption a claimant must establish both a right of ownership and that the circumstances of the loss of possession were not consistent with loss of ownership. In this short contribution only a selection of the source material can be considered.

The functioning of the presumption in terms of what a claimant must show in rebuttal is generally agreed upon. The dubiety arises, it is suggested, in the view taken in more modern law as to the position and role of the

<sup>10</sup> *Institutions* (n. 5), 2,1,27.

<sup>11</sup> 1995 S.C. 455, 469.

<sup>12</sup> K. G. C. Reid *et al*, *The Law of Property in Scotland* (Edinburgh, 1996), para. 603.

<sup>13</sup> D. L. Carey Miller with David Irvine, *Corporeal Moveables in Scots Law* (2nd edn, Edinburgh, 2005), para. 1.13.

<sup>14</sup> Stair, *Institutions* (n. 5), 2,12,10.

<sup>15</sup> W. David H. Sellar, ‘Presumptions in Scots Law’ in *idem* and R. H. Helmholz (eds), *The Law of Presumptions: Essays in Comparative Legal History* (Berlin, 2009), 203, 206–7, 210, 221.

presumption in terms of its effect in the contextual structure of property law. In particular, what is the position of a possessor when a claimant able to prove ownership cannot recover possession because it cannot be established that possession was lost in circumstances inconsistent with transfer?

The opinion in a seventeenth century case shows the presumption as an established part of the common law. As assignee of his father Sir John of Scotstarvet, Walter Scot raised an action against Sir John Fletcher<sup>16</sup> for delivery of ‘six volumes of Atlas Major,<sup>17</sup> which the said Sir John [Scot] caused reprint, and made some voyages to Holland for that effect’.<sup>18</sup> While the pursuer was clearly in a position to establish title it was nonetheless required that a basis – not consistent with a transfer of ownership – under which possession was lost or parted with, be demonstrated. The Lords accordingly upheld the position of the defender as to the process by which the pursuer must proceed.<sup>19</sup>

The defender answered, *Non relevat*, unless it were condescended *quo titulo*; for if it came in the defender’s hands by emption or gift, it is his own; and *in mobilibus possessio praesumit titulum*; seeing, in these, writ nor witnesses use not to be interposed; and none can seek recovery of such, unless he condescend *quo modo desiiit possedere*; else all commerce would be destroyed; and whoever could prove that once any thing was his, might recover it *per mille manus*, unless they instruct their title to it.

Both the reason for having the presumption and its operation as an integral part of the law controlling the right to recover moveable property, which has come to be in the hands of another, are made clear in this quotation. Stair’s report of the decision refers to the defender’s submission ‘*in mobilibus possessio praesumit titulum*’ carrying the clear implication of proprietary effect.<sup>20</sup>

At the end of the seventeenth century, in a decision concerned with the more frequently litigated subject of livestock, the Lords are not only clear as to the functioning of the presumption but appear also to recognise its role as proprietary.<sup>21</sup> A mare in the possession of young Russel of Elrig was pointed

<sup>16</sup> *Scot v Fletcher* (1665) Mor. 11616–7.

<sup>17</sup> On Sir John Scot’s role in the *Blaeu Atlas* project see J. D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007), 550–5.

<sup>18</sup> See the Newblyth report printed in Morison’s Dictionary after the main report.

<sup>19</sup> *Scot v Fletcher* (1665) Mor. 11616–7.

<sup>20</sup> *The Decisions of the Lords of Council and Session, vol. I* (Edinburgh, 1683), 258. (I am indebted to Dr Andrew Simpson for this reference.)

<sup>21</sup> *Russel of Elrig v Campbell of Kilpont* (1699) 4 Brown’s Supp. 468.

by his creditor Campbell of Kilpont. The debtor's father pursued Campbell for a spuilzie on the basis that he was owner of the mare. While the Lords found that the mare did belong to old Russel of Elrig, they deemed that not to be sufficient, seeing that,<sup>22</sup>

at the time of the poinding, she was in the son's custody and possession, and grazing with his horses; which possession in moveables both presumes and proves property, unless old Elrig had likewise proven *quomodo desiderat possidere*, that either he had lent her to his son for a time, or had only sent her to graze in his ground.

What follows in the opinion supports the role of the presumption as proprietary in that if a claimant able to prove ownership cannot establish the circumstances under which possession was lost the assumption is that it came to the possessor on a derivative basis:<sup>23</sup>

And it is not enough that he was once *dominus* of the mare; for law presumes that, being in the son's possession [at] the time of the poinding, she was his; and he might either have bought her, or got her in gift from his father some days before the poinding.

The opinion concludes with an example which strengthens the implication of obtaining possession on a derivative basis:

If I have a watch, it is not relevant for the watchmaker to say, I offer to prove that watch was mine last week, to give him *rei vindicationem*; but he must also prove *quomodo* he lost the possession, else it is presumed to be mine who now have it; for the dominion of moveables transmits without writ, and oftentimes without any witnesses present; and therefore, ere you can recover them, you must first prove that you lost the possession, *clam vi*, or *precario*, or by some title not alienative of the property, as loan or the like.

The significant feature of this part of the opinion is the statement that, to rebut the presumption, a claimant must establish facts to exclude alienation. It follows that, failing exclusion, alienation is assumed or, put another way, the

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<sup>22</sup> Ibid..

<sup>23</sup> Ibid..

possessor is taken to have acquired on a derivative basis. This is consistent with the strong statements in *Stair* and *Hume*, considered later in this section, as to the policy basis of the presumption – in terms of the commercial interest in a free flow of corporeal moveables, subject only to established property rights.

The opinion in *Russel v Campbell*<sup>24</sup> has been influential in the natural – and so, naturally, to some degree *ad hoc* – development in an area of law manifesting the continuity factor as well as the interplay of case law and juristic comment which occurs in the development of Scots law. In the particular development concerned the opinion in the *Russel* case is given prominence in W. G. Dickson's book on evidence,<sup>25</sup> an influential late Victorian text. The entire '[i]f I have a watch' concluding passage is quoted in a chapter devoted to presumptions from possession in the context of an entire section dealing with presumptions.<sup>26</sup> Almost a century after publication of the work on evidence, the *Russel* decision opinion is taken on and adopted – via Dickson's book – in a decision of the Second Division.<sup>27</sup> The opinion of Lord Hunter in this case, an appeal from the sheriff court, in a dispute over rights to moveables in the context of the breakdown of a cohabiting couple's relationship, adopts Dickson's statement of the method by which the presumption may be rebutted:<sup>28</sup>

In overcoming the presumption by proving the property, it must be shown not only that the moveables once belonged to the person seeking to recover them, but that his possession terminated in such a way that the subsequent possessor could not have acquired a right of property in them.

Lord Hunter, observing that in Dickson's book this passage is followed by quotation of the concluding passage from *Russel* (the '[i]f I have a watch' passage), states that, in his opinion, the account 'embodies a correct statement of the law' in demonstrating 'in particular, that the party seeking to rebut the presumption must surmount two obstacles.'<sup>29</sup>

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<sup>24</sup> (1699) 4 Brown's Supp. 468.

<sup>25</sup> W. G. Dickson, *A Treatise on the Law of Evidence in Scotland* (Edinburgh, 1887).

<sup>26</sup> s.150.

<sup>27</sup> *Prangnell-O'Neill v Lady Skiffington* 1984 S.L.T. 282.

<sup>28</sup> Dickson (n.25), s.150, quoted at 284.

<sup>29</sup> *Prangnell-O'Neill v Lady Skiffington* 1984 S.L.T. 282, 284.



An important passage from Stair seems to support the understanding that this presumption has a structural role in the sense that its successful invocation confirms the position of the possessor as owner. Stair emphasises that the device is applicable only in the context of corporeal moveable property which does not know any formal badge of title:<sup>30</sup>

In immoveables the constitution or transmission of property, is expressed in writ, and is parted in many instances; but in moveables, property is simple and full without servitude, and there is no other interest in them, unless they be impledged; neither needs the title, constitution, or transmission, of property in moveables, be instructed by writ, but is presumed from possession; and therefore, for the restitution or recovery of moveables from the possessor thereof, it is not sufficient to instruct that the pursuer had a right thereto, as by the birth or fruit of his ground or cattle; or as being bought by him, and in his possession; but he must instruct the manner how his possession ceased, as being either taken from him by violence, or by stealth, or having strayed, and being lost or the like; and the reason thereof is, because moveables pass without writ, and oft-times without witness; and therefore, whatever right parties once had to moveables, it is presumed to be transmitted by donation, sale, or otherwise, unless it be proven by the defender's oath, that when he acquired right, he knew the thing in question to be the pursuer's proper goods; for in that case, even his private knowledge will not prejudge him, though he bought at a competent rate; though it be not so in heritable rights, to whose constitution and transmission, writ and solemnities are necessary

This passage shows that Stair saw the presumption as integral to ownership questions in respect of moveable things and capable of proprietary effect in that the thing is presumed 'to be transmitted.' The critical point of a presumption of transmission is explained in Stair's recognition that the *raison d'être* is as a device functioning to bring certainty and security into transactions in corporeal moveable property which are not subject to any form of title documentation.

In Stair's title on dispositions there is another detailed treatment of the presumption; here, also, the presumption is presented as having a central

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<sup>30</sup> Stair, *Institutions* (n.5), 2,1,42.

role in the context of property rights in corporeal moveables. The discussion is introduced with a strong statement which could hardly be clearer in its recognition that a disposition of property is presumed.

In moveables possession is of such efficacy, that it doth not only consummate the disposition thereof, but thereupon the disposition is presumed without any necessity to prove the same.<sup>31</sup>

After providing examples from the case law Stair explains the working of the presumption and makes the case for it in terms of policy:<sup>32</sup>

so that it will not be sufficient to any claiming right to moveable goods, against the lawful possessor, to allege he had a good title to these goods, and possession of them, but he must condescend, *quomodo desiit possidere*, as by spuilzie, stealth, etc., or that he gave them only in grazing and custody, and continued to use acts of property;<sup>33</sup> the reason whereof is, because in the commerce of moveables, writ useth not to be adhibited, and it would be an insuperable labour, if the acquirers thereof behoved to be instructed by all the preceding acquirers, as if one should instruct that he bought or bred such goods some years ago, the present possessor behoved either to instruct a progress of them, through all the hands they passed from the first owner, or lose them, which being destructive to commerce, custom hath introduced this way, that possession being present and lawful, presumeth property without further probation, unless the pursuer condescend upon and clear the way of the goods passing from him, not by alienation, as if they were spuilzied, stolen, strayed, etc.

The words ‘possession being present and lawful’ are significant in signalling the limited role of the presumption in being available only to one who can claim to ‘possess as owner’. This important qualification will be explored in the next section.

Hume’s valuable treatment of the presumption was referred to in some detail in my contribution to the volume dedicated to the memory of Alan

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<sup>31</sup> Stair, *Institutions* (n.5), 3,2,7.

<sup>32</sup> Ibid..

<sup>33</sup> I.e. demonstrate an *animus domini* position.

Rodger.<sup>34</sup> Because of the importance of Hume's account it is largely repeated here. Alluding to an era in which litigation over corporeal moveables was common, as demonstrated by frequent recourse to spuilzie,<sup>35</sup> Hume refers to the presumption as a 'notorious, and well established article of our common law' sanctioned in many judgements, 'the better authorities for being old'.<sup>36</sup>

The circumstances of trade in moveable property, not involving any controlling system of recording of title, but facilitating successive transactions as a matter of normal and everyday commerce, is seen by Hume, in his full account, as the basis for a rule protecting the possessor. Taking the usual situation of transmission through predecessors as the starting point before 'the thing may have at least come rightly and fairly down to the present possessor',<sup>37</sup> Hume sees the ultimate justification for the presumption as follows:<sup>38</sup>

Now, in these circumstances, that the present possessor should prove his own *modus acquirendi*, and how his author came by it, and his author again, and that he should thus trace back the progress of the thing through all its successive transmissions, up to this claimant himself, the present complainer, this would be to require what is very seldom possible to be complied with and it would put an end to all sort of security or facility in the traffic of moveable subjects.

Hume's articulation of a device with the potential to provide for the recognition of a right of title in the possessor appears from the detail of his description:<sup>39</sup>

For these expedient reasons our practice lays the burden of proof on the former owner, vindicating his subject. We do not require of the present possessor to show, even how he himself acquired the moveable, much less how it came to any intermediate person between him and the pursuer: we presume in his favour from his possession alone, *qua dominus*, in the character of owner, that the thing came fairly to him on some just and lawful title of acquisition; and this presumption it lyes upon the pursuer or complainer, to overcome. Which to do he must

<sup>34</sup> See Carey Miller, 'Lawyer for All Time' (n.1), 392-394.

<sup>35</sup> See below text to nn.73-8.

<sup>36</sup> G. C. H. Paton (ed.), *Baron Hume's Lectures 1786-1822* (Edinburgh, 1939-58), III, 229-30.

<sup>37</sup> *Ibid.*, 228-9.

<sup>38</sup> *Ibid.*, 229.

<sup>39</sup> *Ibid.*.

prove, not only that the thing once belonged to him, but also *quomodo desiit possedere* – the manner of the departure of the thing out of his hands. He must show, that the thing passed from him either utterly without his consent (as by stealth, or robbery or being lost); or, at least, without any intention on his part to transfer the property of the thing, as by loan or pledge, on deposit, or on some other the like limited and defeasible title of possession consistent with the right of property remaining in him.

This description is hardly consistent with the notion of a ‘mere presumption’, leaving the defending possessor in no better position after successful invocation than before any issue of a competing right to the thing arose. Rather, the account describes a device intended to resolve issues of title in respect of moveables; to provide for and promote certainty as to ownership of a thing which has come to be possessed by one who is assumed to have acquired on a legitimate basis in a market context.

For Hume any strict requirement that the possessor must always ‘prove his own *modus acquirendi*’<sup>40</sup> by establishing a conclusive chain of prior transactions would demand ‘what is very seldom possible to be complied with and it would put an end to all sort of security or facility in the traffic of moveable subjects.’<sup>41</sup> Referring to Stair,<sup>42</sup> Hume offers an example to illustrate the handicap to commerce in any requirement of an intact chain of transmission:<sup>43</sup>

The unreasonableness of this will appear if we take the case of a horse which has been bought five or six times. How unjust it would be if the first owner were entitled to recover it from the last purchaser, if the latter did not prove all the different bargains which may have taken place!

Presenting the presumption as a device protecting the good faith purchaser, albeit on a limited basis, is consistent with various situations – recognised by common law and provided in statutory provision<sup>44</sup> – in which property,

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<sup>40</sup> Ibid..

<sup>41</sup> Ibid., 229.

<sup>42</sup> Stair (n.5), 3,1,7.

<sup>43</sup> Hume (n.36), 229.

<sup>44</sup> See Carey Miller with Irvine (n.13), paras 10.15-10.23.

no longer in the owner's possession, may pass to a *bona fide* party despite the absence of any active intention to transfer by the owner.

The presumption does not function in favour of a *bona fide* purchaser regardless. As Hume says it does not 'serve to defend the present holder against the right owner's claim of restitution, that he purchased the thing *bona fide*, and paid a fair price for it'.<sup>45</sup> Title trumps where the pursuer can show ownership and that possession was not lost in circumstances consistent with transfer. It is important to accept that the presumption prevails only where there is some basis for recognition of a process of derivative acquisition in terms of the circumstances in which the owner parted with possession. The *vitium reale* of theft is an overriding factor in the sense that, in principle, an owner can always recover a thing taken without his or her consent.<sup>46</sup> The presumption still applies in this situation to protect a possessor, regardless of good faith, but it will be readily rebuttable by a deprived owner. To this extent, the device is not an overt protection of good faith acquisition because its focus is on the circumstances in which the claimant to ownership parted with or lost possession. This aspect of the presumption is considered further in the following section.

### Form of Possession Protected

A somewhat neglected aspect of the presumption is a limitation of its scope which, on any informed reflection, should be an obvious requirement. Because the presumption requires the party who claims a thing held by another to demonstrate his or her right and exclude the passing of that right in the loss of possession, the presumption might seem to be an unqualified protection of holding when the claimant cannot discharge this onus. But the second leg requirement which determines whether the presumption's protection is available in a given case imports a correlative position. On this basis it can be said that access to the presumption is only open to one who has possession in the sense of being in a position to hold the thing for her or himself. This interpretation of the scope of the presumption follows from the second leg's engaging the derivative process in its focus on the possibility that the original owner may be taken to have intended transfer by his conduct. As regards the possessor, potentially protected by the presumption, it must necessarily be

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<sup>45</sup> Hume (n.36), 232.

<sup>46</sup> See Carey Miller with Irvine (n. 13), para. 10.15.

that he or she has possession on some basis consistent with acquisition – in practice usually good faith purchase.

Stair's 'possession' in the sense of the essential 'act of the body' and 'the inclination or affection to make use of the thing detained'<sup>47</sup> is what the presumption protects. One need hardly say that it would not make any sense for the presumption to be available to one who holds the thing concerned on a basis acknowledging the right of another. Accepting this, there is in fact no imprecision – arising from the generality of the word 'possession' – in the usual statement that 'the possessor of a moveable is protected by the presumption that he is owner'. No rational interpretation would extend this protection to circumstances in which it would be impossible for the possessor to be owner. Accordingly, the possession referred to in this statement is necessarily possession in the full sense of holding on the basis of belief in a right to the thing. That the *animus* element of the right of possession in Scots law is satisfied on a holding for use basis (*animus sibi habendi*) – without necessarily requiring a holding as owner (*animus domini*)<sup>48</sup> – does not have implications for the presumption.

Dickson's work on evidence, already referred to,<sup>49</sup> gives appropriate prominence to the possession factor in stating that the presumption 'may be overcome by proof or by contrary inference from the facts of the case'.<sup>50</sup> The writer goes on to deal in his following two sections with i/ overcoming the presumption by proof (i.e. proof, by the claimant, of ownership and 'that his possession terminated in such a way that the subsequent possessor could not have acquired a right of property'<sup>51</sup>) or by, ii/ 'contrary inferences from the known position and relation of the parties,<sup>52</sup> or from the facts of the case'.<sup>53</sup> The writer goes on to refer to the case of the holding of a carrier or shipper to which, of course, the presumption would not apply.<sup>54</sup> Dickson refers to the case of an executor being able to rebut the presumption and recover goods

<sup>47</sup> Stair (n.5), 2,1,17.

<sup>48</sup> See Reid (n.12), para. 125.

<sup>49</sup> Dickson (n.25).

<sup>50</sup> Ibid., s.149.

<sup>51</sup> Ibid., s.150.

<sup>52</sup> Referring to the opinion of Lord Neaves in *Orr's Trustee v Tullis* 1970 8M. 936, 950 in which, observing that '[m]uch here depends upon the known position and relation of the parties', he refers to the situation of a shipbuilder as 'a *locator operarum* on a ship belonging to the man for whom it is destined'; the point being that it could not be presumed that a shipbuilder was owner of a ship he was building.

<sup>53</sup> Dickson (n.25), s.151.

<sup>54</sup> *Warrander v Thomsons* 1710 Mor. 10609.

which were in the possession of the deceased at the time of his death.<sup>55</sup> This decision will be commented on in the context of the argument in section 5 that the presumption is structural.

Dickson also refers to the case of *Ramsay v Wilson*<sup>56</sup> in support of the position of the presumption. This decision, reflecting facts easily interesting enough to be the subject of theatre,<sup>57</sup> is primarily an authority on prescription but relevant in its recognition of the presumptive title arising from possession of moveables.

In the definitive modern general property text the position is stated as follows: 'For the presumption [...] to operate the property must first be possessed in the strict sense of the term. Mere custody is insufficient.<sup>58</sup> Possession here means natural possession.'<sup>59</sup> To support the presumption possession must necessarily be in terms of a factual basis compatible with an intention to hold the thing as owner; the most generally applicable situation is that of good faith purchase which, in terms of policy, is the rationale for the presumption.<sup>60</sup>

Hume contends for a limit to the operation of the presumption on the basis of the apparent circumstances of the possessor rather than by reference to the known position in terms of which the thing is held. In the passage concerned Hume says that 'a weaker and less pointed proof of the manner of parting with possession may suffice in certain cases, in which from their nature the presumption in favour of the possessor is not so strong.'<sup>61</sup> This point is supported by the example of a valuable jewel which makes its appearance in the possession of a common beggar. The modern definitive general property text notes modern authority<sup>62</sup> supporting the proposition that '[t]he strength of the presumption is not constant but varies with the length and nature of the possession held.'<sup>63</sup> The text goes on to refer to Hume's example of the beggar

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<sup>55</sup> *Inglis v Inglis* 1670 Mor. 12727.

<sup>56</sup> 1665 Mor. 9114.

<sup>57</sup> See A. Murray, "'The Monuments of a Family': A Collection of Jewels Associated with Elizabeth of Bohemia", *Proceedings of the Society of Antiquaries of Scotland*, 131 (2001), 327; see also Andrew R. C. Simpson, 'Positive Prescription in Scots Law', *Edinburgh L. R.*, 13 (2009), 445, 467–70.

<sup>58</sup> A footnote to Reid (n.12), para. 130 refers to para. 125: 'a thing held exclusively for another is not possessed: the detentor in such a case has custody and not possession.'

<sup>59</sup> Reid (n.12), para. 130.

<sup>60</sup> See Hume (n.36), 229.

<sup>61</sup> *Ibid.*, 231.

<sup>62</sup> *George Hopkinson Ltd v Napier and Sons* 1953 S.C. 139, 147.

<sup>63</sup> Reid (n.12), para. 130.

with a jewel. As argued in the Rodger contribution<sup>64</sup> this perceived limitation seems to be problematic because it introduces uncertainty into a presumption which otherwise operates in a clear and straightforward way. The presumption functions by putting the onus on the claimant to demonstrate a right to recover from a remote possessor; there should not be any 'second guessing' based on the apparent circumstances of possession. That the presumption fits the relevant structure in its rational sphere of operation supports the argument that it should not be weakened by allowing an inarticulate application of judicial discretion to limit its application.

The presumption does not apply in circumstances in which the thing is held by P who has obtained possession from O on a basis inconsistent with the holding of a right of ownership. In the case of a claim by O from a remoter party (P1, P2, P3 etc.), who has obtained possession from or via P, the presumption does apply. This position is consistent with the lecture room example of property not passing to P on the basis of her belief that the book was a gift from O who maintains that he only lent it to her. The presumption will not be available to P but, of course, in an action for delivery of the book O must still show that he intended a loan if she (P) insists that the transaction was a gift. P2 who has bought the book from P will be protected by the presumption. Against P2 claimant O will have to show his ownership and establish that he parted with possession of the book on the basis of a loan to P. Going back to the starting point of misunderstanding between P and O a distinguishable scenario must be considered. In the case of P again believing that she received a gift but O asserting a sale on credit, property will pass to P because, in this case, applying the abstract system, a transfer of ownership is intended by O and, of course, P receives intending to acquire. In this situation O will have to reduce the transfer before he can recover. The critical difference is that if P transfers to *bona fide* party P2 before reduction of the transfer to her by O, P2 will be in a position to defeat O's claim on the basis of the presumption because O will not be able to show that he parted with possession in a manner inconsistent with the passing of ownership. It is submitted that this illustrates the role of the presumption as a part of the structure of the law controlling the process of derivative acquisition in respect of corporeal moveable property. This point will be developed further in the final section.

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<sup>64</sup> Carey Miller, 'Lawyer for All Time' (n.1), 394.



### Diligence Application

The role of the presumption has arisen in the diligence context where moveables poulded by a creditor from the possession of a debtor are claimed by a third party asserting a right of ownership.<sup>65</sup> The question whether the presumption can be relied on by the poulding creditor will depend upon whether the debtor had possession or held the property on some basis inconsistent with the assertion of a right of ownership. In *Russel v Campbell*<sup>66</sup> the Lords held that the poulding creditor was entitled to recourse to the presumption to the extent that the claimant must demonstrate that his parting with or loss of possession had not been in circumstances consistent with a transfer of ownership. In that case the Lords saw the debtor's possession of the mare as a trigger for the presumption that 'she was his' with the consequence that the claimant was required to show a loss of possession inconsistent with transfer. In the absence of anything to indicate that the mare was not owned by the debtor the poulding creditor had recourse to the presumption which put the onus on the claimant to show that ownership had not been parted with on a basis consistent with transfer.

A modern decision<sup>67</sup> contrasts with the earlier case insofar as it treats the poulding scenario as a distinct situation. By the mid-twentieth century the factor of credit purchase of various forms of moveable property had become commonplace and this position was reflected in legal development. A statement in Bell's *Principles*<sup>68</sup> was quoted by the court as reflecting the 'crystallised' position of the law:

Possession alone is not a ground on which moveables shall be made to answer for the debt of the possessor, or on which creditors are entitled to rely: for the goods in their debtor's possession may be with him, not as owner, but under some contract requiring temporary possession. Hence, every legitimate cause of possession makes an exception to the credit of apparent ownership.

It may be noted that this statement is made in a section concerned with the limits of 'reputed ownership' in the context of 'the force of the above

<sup>65</sup> The case-law discussed below pertains to poulding. However, the same principles would seem to apply to attachment as introduced by the Debt Arrangement and Attachment (Scotland) Act 2002 (a.s.p. 17).

<sup>66</sup> *Russel of Elrig v Campbell of Kilpont* (1699) 4 Brown's Supp. 468; see above n.21.

<sup>67</sup> *George Hopkinson Limited v Napier & Son* 1953 S.C. 139.

<sup>68</sup> W. Guthrie (ed.), George Joseph Bell, *Principles of the Law of Scotland* (10th edn, Edinburgh, 1899), para. 1315.

presumption,<sup>69</sup> and its effect in raising credit in a commercial country.' It may also be noted that this dictum is consistent with the assertion of the previous section that only possession 'as owner' is protected by the presumption.

Having referred to a range of forms under which moveables may be held on a basis incompatible with a right of ownership – life-rent, hire, hire-purchase, deposit, pledge – Lord President Cooper goes on to say that:<sup>70</sup>

[I]t is notorious that the furnishings and plenishings now acquired by a very large section of the population are so acquired under some form of hire-purchase or instalment contract. I do not think that it is an overstatement of the position today to say that any creditor proposing to poind the furniture in an average working-class dwelling is put on his inquiry as to whether the furniture is the property of his debtor or only held by him on some limited title of possession.

Lord President Cooper's dictum is not a re-definition of the presumption but, rather, an acknowledgement and reminder of its limits.

The doctrine of reputed ownership, referred to above, functions in favour of the creditor in the poinding context. In circumstances of the owner's collusion or negligence giving the impression – the 'reputation' – that the possessing debtor is owner, the latter is deemed to be owner for the purposes of an effective poinding by a creditor. This device seems to be a specific application of the thinking of the presumption. Put at its most general, both devices control the position of an owner who allows moveable property to be held by another with potential implications for third parties who come to have an interest in the property concerned.

Bell links the presumption and reputed ownership in a passage which clarifies the role of the latter:<sup>71</sup>

Considering the force of the above presumption,<sup>72</sup> and its effect in raising credit in a commercial country, collusive possession of anything is a natural ground on which the creditors of the person allowed so to possess may attach it for debt; creditors trusting to the apparent

<sup>69</sup> Referring to the premise position of a 'legal presumption of property from possession' (para. 1314) as described in paras 1313-1314.

<sup>70</sup> *George Hopkinson Limited v Napier & Son* (n.66), 147.

<sup>71</sup> Bell, *Principles* (10th edn) (n.68) para. 1315.

<sup>72</sup> Referring to para. 1313: 'Possession (provided it be actual) presumes property in moveables – *in pari casu potior est conditio possidentis*.'

ownership to their debtor, and giving credit accordingly. It is necessary, however, carefully to distinguish between such possession as is required in the course of legitimate contracts, and such as may be needlessly, carelessly or fraudulently given to, or left with, one who is not the owner.

Appreciation that the presumption applies only in the context of the possessor being able to assert a position of possession 'as owner' appears to be key. On this basis it is open to question whether the diligence situation is in any way distinct. In the poiding scenario it is unexceptionable that O should be able to recover her bicycle, lent to B, from good faith party P2 who purchased it from P following P's poiding from his debtor B. P2 is protected by the presumption but only until it is rebutted by O proving her ownership of the bicycle and showing that she parted with it on the basis of loan – so excluding any possible inference that an intention to transfer ownership could be associated with O's delivering the bicycle to B.

### Structure Argument

Does the well understood difference between title and possession mean that even a possessor who sees himself or herself as owner cannot be owner without some identifiable active process of acquisition, derivative or original? If this were the case would there be a presumption that the possessor of a moveable is its owner? The answer to the second question must surely be, only a presumption that did no more than protect the *status quo* in being always open to rebuttal by one able to establish ownership. But in fact the presumption proceeds on the basis that the protected possessor may have acquired on a derivative basis and this is confirmed if the claimant able to show that he did own the thing cannot also show that possession was lost on a basis excluding possible acquisition.

The exclusion of alienation feature of the presumption is, it is submitted, a critical factor concerning the question whether it is structural; arguably if the presumption functions as a basis of recognition that property must be taken to have passed then it is structural in the sense of being a part of the complete position as to the passing of property in moveables. As an established specific device, it does not need to be explained in terms of any other doctrine; perhaps more significantly, the prominence of the presumption in the primary sources suggests that general analysis of structure should seek to find a place for the presumption. Arguably, in the structure of any narrative as to the transfer of

corporeal moveable property the presumption has a place in the ‘circumstances in which the law recognises the passing of ownership in the absence of any positive act of transfer on the part of the owner.’<sup>73</sup> The better view would appear to be that, in its function in favour of a possessor who has acquired ‘as owner’, the presumption operates within the process of derivative acquisition on the basis of inferred intention. Seen in this way, it would appear to belong with the diverse range of inferred ‘intention to transfer’ situations which are exceptions to the *nemo dat quod non habet* principle.<sup>74</sup> Against this argument, however, a well supported view would limit the scope of any category of instances of an owner’s inferred ‘intention to transfer’ on the basis that this position is essentially driven by English equity and is alien to principles of Scots law.<sup>75</sup>

The presumption, in its role contended for in this piece, would function as a generalised exception largely covering the specific exceptions developed in Victorian mercantile law to allow acquisition in the context of a loss of possession in circumstances in which an intention to transfer may be inferred. One important difference is that the presumption operates in favour of the possessor in requiring the claimant to exclude any inferred intention to transfer, while the various devices traditionally seen as exceptions to *nemo dat* must be brought into play by proof by the party seeking to rely on the provision concerned. An intriguing question is whether the presumption was considered in the development of the nineteenth century statutory reforms. This and how the various particular exceptions to *nemo dat* fit with the presumption must be left to further work.

The case for the presumption being a structural device applying inferred *animus* commences in its involving the respective roles of disponor and disponent. If the owner cannot show that he or she parted with or lost possession of the property on some basis inconsistent with transfer, it is presumed that an intention to allow property to pass can be inferred. Assuming intention on the basis of an unexplained loss of possession is a reasonable and rational position in the context of corporeal moveables not subject to any formal requirement or token of title. That, it is submitted, is the position taken in the sources.

The disponent aspect in the derivative structure is satisfied by the party in possession claiming the property by resorting to the presumption. The only

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<sup>73</sup> Carey Miller with Irvine (n.13), para. 10.15.

<sup>74</sup> Ibid., paras 10.15–10.23.

<sup>75</sup> See Reid (n.12), para. 680.

limit to this exercise of intention to have the property is that this is possible in the circumstances concerned; or, put in the negative, is not ruled out by the circumstances under which the thing is held.

The seventeenth century decision in *Inglis*,<sup>76</sup> referred to in Dickson's work,<sup>77</sup> can be interpreted to support the contention that the presumption has a role in the structure of property law in its fit as an aspect of derivative acquisition – one of the diverse range of particular situations in which a loss of possession gives a loss of ownership. The Lords held that if it could be proved that the pair of organs subject to litigation had been in the possession of their owner at the time of his demise, then the heir or executor could recover unless the possessor could establish acquisition. Rejecting an '*inter mobilia*' argument, 'The Lords considering this as a general case, did find, that it was a sufficient title for an heir executor to pursue for moveables, they offering to prove, that they were in the possession of the defunct, whom they represent, [at] the time of his death; which being proved, the possessors were liable to restore the same, unless they could allege, and prove, that they had acquired the same by a legal right.'<sup>78</sup> The ruling out of the presumption is implicit in this opinion. A margin note reference to the pursuers being 'entitled to pursue a *rei vindicatio*' confirms the point that the presumption does not apply; rather, what applies in this case is the general position of a vindictory claim in which the possessor does not benefit by requiring the claimant to establish the second leg of the presumption – hence the pursuer's entitlement to a form of action more favourable to his position. The unstated position is that recourse to the presumption is not open to the possessor because the organs were still in the possession of the owner at the time of his death. In the circumstances, there could be no question of his having parted with possession in some manner consistent with a transfer of ownership.

Savigny's nineteenth century analysis question whether derivative acquisition operates on a causal or abstract basis has only been an issue in Scottish property in modern times.<sup>79</sup> The clear tendency to accept that an abstract analysis fits the common law system of derivative acquisition may be seen to support recognition that the presumption is structural because the abstract system puts the emphasis on the intention to transfer factor. A late 1980s contribution of mine sought to argue this link. The abstract system requires an agreement that

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<sup>76</sup> *Inglis v Inglis* 1670 Mor. 12727.

<sup>77</sup> Dickson (n.25), s.151.

<sup>78</sup> *Inglis v Inglis* (n.76) 12727.

<sup>79</sup> Reid (n.12), paras 608–9.

property should pass as a concomitant of the act of delivery, without the need for a valid underlying contract. Accepting this it was submitted that: '[i]f the facts support the inference of an intention to pass ownership, policy dictates that a bona fide subsequent party should have the benefit of a presumption that title passed when the claimant originally parted with the thing.'<sup>80</sup>

It may be noted that in the most important property text of modern law the presumption is seen as supporting an abstract system analysis:<sup>81</sup>

Once the transferee is in possession he is presumed to be owner and anyone taking from him will have the benefit of the same presumption. It would seem that only if the purported transferee's taking could be characterised as theft would the original transferor be able to follow the property into the hands of a bona fide acquirer from the transferee. In accordance with its principles, therefore, Scots law should favour an abstract system of transfer.

This comment is not directed to the issue of structure but if the presumption is relevant as a factor determining the essential nature of the system it seems open to argument that it has an integral role.

The authors of a national report on European systems of transfer of moveables see the abstract system approach as fitting with the presumption in an appropriate manner: '[w]here an underlying contract is void, perhaps because of confusion as to the underlying causa of the transfer, but a subsequent conveyance is valid, ownership will be transferred. This view sits well with the presumption of ownership that Scots law affords to the possessor of a moveable. This presumption, which remains of great importance even in the present day, would mean anyone that has delivered property in a way that could feasibly have transferred ownership would be unable to re-acquire possession.'<sup>82</sup>

Another, separate, strand of the structure argument is the close link between spuilzie and the presumption. That the two are associated has been demonstrated in Dr Andrew Simpson's historical development work. In an

<sup>80</sup> D. L. Carey Miller, 'The Owner's All-Conquering Right? The Scottish Version' in Coenraad Visser (ed.), *Essays in Honour of Ellison Kahn* (Cape Town, 1989), 87, 100.

<sup>81</sup> Reid (n.12), para. 609.

<sup>82</sup> 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* (Munich, 2009), II, para. 5.3.1.

unpublished paper<sup>83</sup> he makes the case for Stair's influence in the evolution of the action of spuilzie as a support for the presumption. Stair, indeed, is clear in observing that '[i]n spuilzies the pursuer needs no other title but possession, from whence in moveables a right is presumed.'<sup>84</sup> Dr Simpson, having analysed the development leading to this position, summarises: 'A series of legal trends and debates within the fabric of Scots law had finally resulted in the establishment of a new rationale for the Scottish action of spuilzie. It was now a mechanism for the protection of a presumptive right.'<sup>85</sup>

The presumption's efficacy is enhanced by spuilzie which allows a possessor to recover possession on proof of an unauthorised removal and so restore the position of protection afforded by the presumption. The relevance of the link has been noted in the context of an evaluation of the position of spuilzie; the point made being one which, arguably, holds good in past and present circumstances: '[t]he existence of the presumption that the possessor of a moveable thing is its owner makes it unsurprising that there is a quick and easy remedy applicable to unauthorised dispossession.'<sup>86</sup> Akin, it is suggested, to the spuilzie situation, the incidence of the application of the presumption has declined with the development of the law but, of course, this does not mean that the associated devices of spuilzie and the presumption have ceased to be a part of the structure applying to the assertion of rights in corporeal moveable property. In modern law the presumption's role is reduced because of a greater number of legal relationships in terms of which a thing is held on a basis acknowledging another's ownership – put another way, 'there has been in recent times a marked decline in the coincidence of ownership and possession.'<sup>87</sup> This, of course, does not mean that the presumption's role and function has changed but, rather, that the likelihood of rebuttal by a claimant owner is greater.

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<sup>83</sup> Andrew R. C. Simpson, 'A Remedy for a "Wrang" or a Protection for a Presumptive Right? Debating the Rationale of the Action of Spuilzie in Early Modern Scots Law' (University of Stellenbosch, 25 March 2013).

<sup>84</sup> Stair (n.5), 1,9,17.

<sup>85</sup> Simpson, 'Wrang' paper (n.83), 9.

<sup>86</sup> D. L. Carey Miller, 'Spuilzie – dead, dormant or manna from heaven? Issues concerning the protection of possessory interests in Scots law' in H. Mostert and M. J. de Waal (eds), *Essays in Honour of C G van der Merwe* (Durban, 2011), 127, 136.

<sup>87</sup> Reid (n.12), para. 130.

### Substantive or Evidentiary?

David Sellar, drawing attention to the possibility of a shift over time in the standing of presumptions, notes that ‘there has been continuing uncertainty as to whether the presumption of ownership arising from the possession of moveables should be classed as a presumption of law (*juris tantum*) or a presumption of fact (*judicis vel hominis*), Stair and the older authorities opting for the former, but more recent authority tending towards the latter.’<sup>88</sup> The predominant strand of modern thinking classifies the presumption as a rule of the law of evidence rather than something integral to the structure of property law. This position is stated in a section, already referred to,<sup>89</sup> in the principal text of modern property law which, in its general tenor, affirms that, in the context of corporeal moveable property, possession has a natural association with ownership.<sup>90</sup> Nonetheless, the operation of the presumption is seen to be evidentiary rather than substantive: ‘[t]he presumption of ownership is a rule of the law of evidence only and the substantive law of property is left untouched: ownership is presumed of the possessor but whether he is really owner continues to be determined by the normal rules of property law.’<sup>91</sup> This passage is consistent with the position, adopted in the recent S.L.C. Report referred to, that the presumption only protects the *status quo* of possession without any role or function recognising a right of ownership.<sup>92</sup> A possible source of the analysis is a dictum of Lord President Cooper stating, in the context of a question of reputed ownership arising from a debtor’s possession of goods, that the possession of moveables ‘can create no more than a presumption of fact, more or less strong according to the circumstances, but capable of being redargued.’<sup>93</sup> Professor Kenneth Reid cites the learned Lord President in support of the statement that the

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<sup>88</sup> See Sellar (n.15), 221.

<sup>89</sup> Above, n.87.

<sup>90</sup> Reid (n.12), para. 130: ‘Ownership may be, and usually is, transferred without recourse to writing. The exercise of possessory rights is therefore the easiest, and sometimes the only, way of showing that ownership is held.’

<sup>91</sup> *Ibid.*

<sup>92</sup> S.L.C. (n.2), para. 2.1.

<sup>93</sup> *George Hopkinson Limited v Napier & Son* 1953 S.C. 139, 147; Lord President Cooper’s dictum is referred to thirty years later by Lord Hunter in *Prangnell-O’Neill v Lady Skiffington* 1984 S.L.T. 282, 284.



‘strength of the presumption is not constant but varies with the length and nature of the possession held’.<sup>94</sup>

It seems that this influential position of judicial and juristic authority may be flawed in confusing two separate issues: first, whether the presumption applies in the circumstances of the position as to possession – what might be called the incidence issue – and, secondly, its efficacy when it does apply. Dickson’s treatment recognises this distinction but presents the position in reverse order from the above: ‘[t]his presumption may be overcome by proof or by contrary inferences from the facts of the case.’<sup>95</sup> ‘Proof’ refers to the situation in which the incidence issue is satisfied and the presumption applies. That, of course, is the only situation relevant to the question whether the presumption has substantive effect or is merely a rule of evidence.

Lord President Cooper’s obiter ‘presumption of fact’ designation, apparently denying any structural role for the presumption, contrasts with Stair’s *iuris presumptio* classification. A long passage in Book IV, concerned with actions and procedure, commences with the commercial policy justification for not requiring proof of title to moveables possessed in circumstances consistent with ownership. A notable aspect of this description of the operation of the presumption is how Stair sees the justification for the second leg in requiring that the claimant ‘must condescend and prove, that he so ceased to possess, that it could not be presumed to be by commerce.’<sup>96</sup> This sensible compromise achieves a balance between allowing an owner to recover and – if not explicitly but in its operation – protecting the commercial interest of good faith purchase. In setting this compromise position the presumption has clear substantive effect and can hardly be demoted to a mere rule of evidence.

A difference arising from whether Scots law classifies the presumption as substantive or procedural could apply in the context of private international law. In answering the question whether the law of a foreign state should apply the private international law of most legal systems will distinguish between the substantive and procedural law of the foreign state. The usual position is that while a substantive foreign rule may be applied a procedural rule will not. It is true that the *lex situs* factor tends to be dominant in private international questions concerning moveables<sup>97</sup> but there could be circumstances in which

<sup>94</sup> Reid (n.12), para. 130.

<sup>95</sup> Dickson (n. 25), s.149.

<sup>96</sup> Stair (n.5), 4,45,17,8.

<sup>97</sup> See *Winkworth v Christie Mason and Woods Ltd* [1980] Ch. 496.

the possible application of Scots law, by a foreign court, turned on the question whether the presumption was a rule of substantive law or one of evidence.<sup>98</sup>

### Mr Sharp's Porsche

The multiplepoiniding matter of *Chief Constable, Strathclyde Police v Sharp*<sup>99</sup> arose from an owner's claim that his Porsche car had been stolen from the driveway of his residence. Following a report of the alleged theft by owner S, the car came into the possession of cash purchaser M. The vehicle was taken into police custody after M reported concern that it might be stolen property. Meantime, a charge of attempted insurance fraud against S was not proceeded with by the procurator fiscal. In reversing the Sheriff's decision, the Sheriff Principal decided the matter on the basis of the presumption and found for M on the conclusion that S had 'failed to prove that the property was stolen and, in consequence, had not established that his possession terminated in such a way that the second defender [M] could not have acquired a right of ownership.'<sup>100</sup> The case is a classic modern application of the presumption. The critical aspect of the decision was the determination that, on the balance of probabilities,<sup>101</sup> the claimant to ownership had not been able to show that his loss of possession was inconsistent with an intention to pass ownership. On this basis the default position of an assumption of legitimate derivative acquisition by the possessor prevailed.

The circumstances of M's purchase of the car raised the issue of his good faith. The Sheriff Principal took the view that the presumption did not only apply to the circumstances of good faith possession.<sup>102</sup> Support was found in Erskine's observation that possession based on the strongest good faith must necessarily give way to an owner who 'makes good his claim.'<sup>103</sup> The better view would appear to be that, for the purposes of the operation of the presumption, the issue of good faith does not come into the reckoning.

<sup>98</sup> For an example of the position of Scots law on this difference see P. R. Beaumont and P. E. McEleavy, *Private International Law*, A. E. Anton (3rd edn, Edinburgh, 2011), para. 27.15.

<sup>99</sup> 2002 S.L.T. (Sh. Ct.) 95.

<sup>100</sup> Ibid. [15].

<sup>101</sup> Sufficient in the civil context; insufficient, of course, in respect of a charge of insurance fraud in setting up a 'theft'.

<sup>102</sup> *Chief Constable, Strathclyde Police v Sharp* (n.99), [14].

<sup>103</sup> John Erskine, *An Institute of the Law of Scotland* (Edinburgh, 1871), 2,1,25.

Provided the circumstances of the possessor's holding are such that the presumption is applicable, a claimant able to prove ownership will be denied recovery only if he is unable to show that the thing was lost or parted with in circumstances inconsistent with transfer. If the claimant cannot so prove, the possessor has the benefit of any doubt regarding the circumstances of his or her acquisition. Of course acquisition in bad faith may have other implications, as, for example, in an 'offside goal' situation.<sup>104</sup> In this regard the distinction between 'on the one hand, the absence of an active requirement of good faith and, on the other, vulnerability to proof of bad faith'<sup>105</sup> seems to follow, *a fortiori*, from Stair's recognition that, in derivative acquisition, while commercial interests may deny any taint transmitting from an author's fraud an acquirer may be vulnerable on the basis of being 'a partaker' in the fraud.<sup>106</sup>

### Concluding Comment

Part of the theme of this chapter is that there has been a tendency in modern accounts of the law to relegate the presumption to a peripheral role,<sup>107</sup> probably because it is seen to be in conflict with the clear differentiation in civilian thinking between ownership and possession. Explaining the presumption as a rule of evidence without a role in the structure of property is plausible to the extent that it accords a certain relevance to the presumption while denying that it plays any full part in the determination of property rights in the corporeal moveable context.

In my earlier writing a decline in the relevance and role of the presumption in the development of the law is accepted. Some twenty five years ago, in a contribution which included a comment on the role of the presumption, it was accepted that 'the law has moved away from any hard-and-fast doctrine of a presumption of ownership arising from possession.'<sup>108</sup> But is this acknowledgement of a change in the position of the law through legal development correct or should my statement have questioned the notion of

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<sup>104</sup> My interest in the 'offside goal' analysis problem developed as a consequence of Angelo's invitation and encouragement to write on 'Good Faith in Scots Property Law' in Angelo D. M. Forte (ed.), *Good Faith in Contract and Property Law* (Oxford, 1999), 103.

<sup>105</sup> See my analysis note: Carey Miller, 'Title to Moveables: Mr Sharp's Porsche', *Edinburgh L.R.*, 7 (2003), 221, 224.

<sup>106</sup> See Stair (n.5), 4,40,21–22.

<sup>107</sup> See, e.g., S.L.C. Report (n.2), paras 6.6–6.7.

<sup>108</sup> 'The Owner's All-Conquering Right? The Scottish Version' (n.80), 101.

a weakened presumption? The better view seems to be that, in common with the linked concept of *spuilzie*,<sup>109</sup> the presumption may have a diminished incidence but nonetheless continues to be structural and not in the least weakened when it applies. A critical point in this regard is that it does not apply where the thing concerned is held on a basis inconsistent with a right of ownership. In the development of the law over a considerable period the likelihood of corporeal moveables being possessed – in the general sense of the word – on some basis which excludes the assertion of a right of ownership has increased but the presumption nonetheless continues to have a role and potential substantive effect.

The ‘unbridgeable division’<sup>110</sup> between real and personal rights is a primary, if not the primary, feature of Scottish property law dogma. But is that controlling distinction part of a trinity also involving the distinction between ownership and possession and the unititular factor, as integral aspects of a structure? If so, perhaps the question is whether the presumption, as a substantive rule, would be a step too far in terms of the governing regime of these doctrinal criteria?

This paper has tried to show that, properly understood, the presumption functions as part of the derivative process in being tied to an essential inquiry whether the owner lost possession in a manner consistent with an intention to transfer. The fact that the onus is on the claimant to demonstrate that possession was lost in a manner incompatible with transfer does not detract from the substantive derivative transfer issue which the second leg addresses. In this regard we need to distinguish, on the one hand, a device which might be seen as a matter of the law of evidence – the two-leg onus of proof rule of the presumption – and, on the other, its substantive effect as part of the structure and substance of property law. What we seem to have is a matter of substantive law given effect to by an evidentiary rule. It may seem trite to urge the differentiation of form and substance but that, it seems, is what we need to do to be in a position to recognise that, properly understood, the presumption functions within, and as part of, the derivative acquisition structure applying to corporeal moveables.

The subject of this chapter in a book dedicated to the memory of Angelo Forte reflects certain themes represented in his work. One is the continuity of

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<sup>109</sup> See above, text to nn. 83–85.

<sup>110</sup> Lord Rodger of Earlsferry, in his speech in *Burnett's Trustee v Grainger* 2004 S.C. (H.L.) 19, [87], adopts this unqualified statement from the classic work of Barry Nicholas, *An Introduction to Roman Law* (Oxford, 1962), 100.

legal development – present in many parts of Scots law – which may mean that legal history is important to proper understanding. Angelo's interest in – indeed, love of – legal history was much more than the private lawyer's appreciation that the history is frequently indispensable but, of course, it included that acknowledgement. It is trite to say that history is only important because the law changes. Of course, the continuity and change factors play out differently in different areas of the law, even in different topics within areas. The subject of this essay is an example of that. If my thesis is correct regarding the possessory presumption, the continuity factor is stronger than most modern commentators tend to suggest; the change has been in a reduction of the sphere of operation rather than a change of substance. This points to the need to keep an open mind, something very much a feature of Angelo's approach to answering legal questions. Wearing the hat of a modern private lawyer, one should be open to change even if it is going to mean that the appealing continuity of common law development becomes legal history. But any such transition should not be undertaken lightly and, as already suggested, certainly not without proper appreciation of the *status quo*. Where change is justified, what criteria should be applied to a possible new solution? Angelo's writing suggests that a pragmatic approach should rate highly. The priority should be to find the right solution. Angelo, one feels, would have agreed with the policy arguments of Stair and Hume which justify the presumption that the possessor of a corporeal moveable is its owner. In this particular matter one hopes that he might also have seen some force in the argument that continuity is preferable and, indeed, unproblematic if the change factor is properly understood.<sup>111</sup>

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<sup>111</sup> Grateful thanks are due to David Sellar M.V.O. who kindly read and commented on a draft but, of course, responsibility for errors and failings is entirely mine. Thanks also to the anonymous referee for comments taken account of in this final version.

# Ships as a Branch of Property Law

*George L. Gretton*

## Introduction

The literature on property rights in ships is slight.<sup>1</sup> Property law texts have little or nothing on the subject.<sup>2</sup> The same is true of texts on the sale of goods (for ships are ‘goods’).<sup>3</sup> The same is true of texts on shipping law. There exist specialist texts on ship sale, ship registration and ship mortgage.<sup>4</sup> But such texts do not wrestle with the property law issues.<sup>5</sup> They are like texts on conveyancing which, however valuable, do not wrestle with basic concepts of land law. And perhaps the neglect is reasonable. From the stand-

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<sup>1</sup> I refer here to the U.K.. What the position is elsewhere I do not know.

<sup>2</sup> For instance, Michael Bridge, Louise Gullifer, Gerard McMeel and Sarah Worthington, *The Law of Personal Property* (London, 2013) has little (paras 13–101 to 105). Duncan Sheehan, *The Principles of Personal Property Law* (Oxford and Portland, Oregon, 2011) mentions ships only in connection with salvage. The same is true north of the border. There is almost nothing in Kenneth G. C. Reid, *The Law of Property in Scotland* (Edinburgh, 1996).

<sup>3</sup> For instance, Michael Bridge (ed.), *Benjamin’s Sale of Goods* (8th edn, London, 2010) has only one paragraph (para. 1:082). Ewan McKendrick (ed.), *Sale of Goods* (London and Hong Kong, 2000) has nothing. P. S. Atiyah, John Adams and Hector L. MacQueen, *Atiyah’s Sale of Goods* (12th edn, Harlow, 2010) has half a sentence (at 47).

<sup>4</sup> See such texts as Iain S. Goldrein, Matt Hannaford and Paul Turner, *Ship Sale and Purchase* (6th edn, London, 2012); Richard Coles and Edward Watt, *Ship Registration: Law and Practice* (2nd edn, London, 2009); Graeme Bowtle and Kevin McGuinness, *The Law of Ship Mortgages* (London, 2001). See also general works such as Yvonne Baatz, *Maritime Law* (3rd edn, Oxon., 2014). I would add that shipping law texts are often rather sloppy on the property law issues. An example: the Institute of Chartered Shipbrokers textbook, *Shipping Law* (no author stated) (London, 2011–12 edn), 9, says that sections 31 ff (mortgages) of the M.S.A. 1984 are in force. They were repealed in 1995.

<sup>5</sup> The only study that I know of that treats the property law angle at the highest level is Alison Clarke, ‘Ship Mortgages’ in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (2nd edn, London, 1998) – cited hereinafter as ‘Clarke’.

point of general property law, ships are a small subject, and the same is true of the law of sale of goods. As for shipping lawyers, they are practical people, understandably not consumed by interest in the underlying theory of the subject.

Anyway, the existing law probably works well enough, a fact reflected by the scarcity of case law,<sup>6</sup> and by the fact that there has been little substantive change in the legislation for a long time, certainly since the legislation of 1894, and really back much further into the nineteenth century.<sup>7</sup> So perhaps the legislation, whatever its theoretical problems, can be said to be successful in a pragmatic sense, and perhaps legal commentators are pragmatic in paying this area of law so little attention. Ships enter and leave the harbours of property law with few collisions and usually avoiding underwater rocks. So, on the whole, did real ships before the age of hydrographic surveying arrived. Yet nobody would cry down hydrography as pointless, in the name of pragmatism. Shipping property law is a largely unsurveyed area: this paper is an attempt at a survey.

Four more introductory notes should be made. (i) The subject is large, and indeed would merit treatment at book length – something that has never happened. (ii) The second point is perhaps already implied by the first: this paper is provisional and incomplete. (iii) The approach is from a Scottish standpoint. I hope that this paper would make sense to English scholars, but I cannot be sure. Scots property law thinking, with its *ius commune* roots, is so different from English property law thinking that the gap sometimes seems unbridgeable.<sup>8</sup> (iv) Lastly, there are a few issues regarding scope, apart from the selectivity of the coverage. Some of this paper is elementary in the sense of covering material well-known to anyone who knows anything about shipping law – but such material is often unknown to property lawyers. And some of the paper is not elementary, but addresses difficult issues.

## Sources of the Law

Ships, regarded as objects of property rights, are covered by special legislation,

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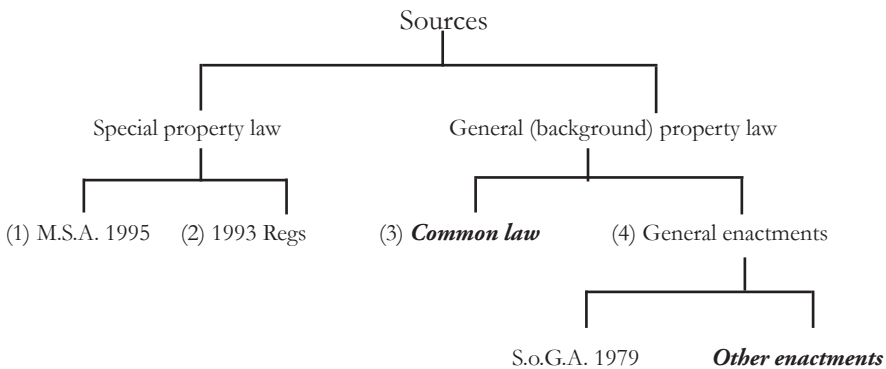
<sup>6</sup> But the paucity of case law may merely reflect the dominance of arbitration in this area.

<sup>7</sup> For a review of the current and older legislation, see below.

<sup>8</sup> Scots property law cannot be summarised here, but some of its themes are (i) no division between legal and equitable title, (ii) the view that a right passes at a definable point in time, and does not ooze across, (iii) a sharp distinction between ownership and possession and (iii) a sharp distinction between ownership and the limited real rights (subordinate real rights, *iura in re aliena*).

currently (i) the Merchant Shipping Act 1995, c.21 ('M.S.A. 1995'<sup>9</sup>) and (ii) the Merchant Shipping (Registration of Ships) Regulations 1993, S.I. 1993/3138 ('the 1993 Regulations').<sup>10</sup> These enactments deal, of course, with many things as well as property rights; indeed, the great bulk of the M.S.A. 1995 is about other things, such as health and safety, environmental protection, insurance, lighthouses, salvage and so on. The provisions relevant to property law in the M.S.A. 1995 are mainly in parts 1 and 2, and in schedule 1.

Even for property rights in ships, these two enactments are far from being a complete code. To the extent that the special legislation is silent, therefore, one has to look to the background law. Ships are corporeal moveable property, and the background law is therefore the general law applicable to corporeal moveable property, which is to say chiefly (i) the common law, and (ii) enactments of a general character affecting property law in corporeal moveables. Of these the most important for present purposes is the Sale of Goods Act 1979, c.54 ('S.o.G.A. 1979'), which of course deals with property questions as well as contract law. But there are of course many other enactments that affect property rights in corporeal moveables, such as the legislation on insolvency law. Here is a chart:



(Those areas of general law where there may be important differences on the two sides of the border are marked in bold/italic on the chart.)

The M.S.A. 1995, the 1993 Regulations and the S.o.G.A. 1979 are almost uniform across the U.K.. But the common law of corporeal moveables is far

<sup>9</sup> In this paper 'M.S.A.' stands throughout for 'Merchant Shipping Act.'

<sup>10</sup> The 1993 Regulations were made under the Merchant Shipping (Registration etc.) Act 1993, c.22. That Act was repealed by the M.S.A. 1995, c.21, but the 1993 Regulations remain in force.



from being uniform, and the same is true of certain enactments. 'It may be a theoretical question what is the proper law of a ship registered in Glasgow and sailing from the Clyde. The British ensign is no more English than Scots or Irish [...] The practical answer is that the modern maritime law of the two jurisdictions is identical' wrote Sir Frederick Pollock.<sup>11</sup> He merits praise for having considered the issue when almost everyone else has ignored it. But is his 'practical answer' right? Is the background law the same? In fact it is not.

## Registration

As in other countries, there is a register.<sup>12</sup> Indeed, a registration system is required under international law.<sup>13</sup> The M.S.A. 1995 and the 1993 Regulations leave the register nameless, merely speaking of 'a register of British ships'.<sup>14</sup> Sometimes it is called the Registry of Shipping, sometimes the Registry of British Ships, sometimes the Shipping Registry, and so on. It is kept, says the legislation,<sup>15</sup> by the Registrar General of Shipping and Seamen, but the actual organisation is the Maritime and Coastguard Agency which itself is part of the Department for Transport. The name currently used by the Agency for the register is 'the U.K. Ship Register'.

Ships have a port of registry (Aberdeen, Bristol etc.), the name of which, together with the ship's name, is painted on the hull.<sup>16</sup> Until recently, each port of registry had its own registrar. It is arguable whether they were local

<sup>11</sup> Sir Frederick Pollock, *The Genius of the Common Law* (New York, 1912), 84–5.

<sup>12</sup> There is a history which cannot be entered into here. Registration was first introduced in England by 12 Charles II (1660), c.18, s.10 and in Scotland by 1661 c.44 (A.P.S. vii, 257, c.277). The registration system in its current form was established by the Merchant Shipping (Registration, etc.) Act 1993, though that Act itself was repealed and replaced by the M.S.A. 1995. The story is one of evolution, not revolution: much of the current law is very similar to the law to be found in the M.S.A. 1894, c.60, and indeed earlier legislation. I do not know that the history has ever been the subject of a scholarly study.

<sup>13</sup> 'Every State shall [...] maintain a register of ships': United Nations Convention on the Law of the Sea (U.N.C.L.O.S.), article 94(2).

<sup>14</sup> 1995 Act, s.8(1), and, before that, the Merchant Shipping (Registration, etc.) Act 1993, s.1. Nor did the M.S.A. 1894 name the register. The tendency of Westminster legislation not to name registers is strange. One of the most important registers, that kept by the Registrar of Companies, is also unnamed.

<sup>15</sup> 1995 Act, s.8(2).

<sup>16</sup> The current list of ports of registry is set out in schedule 2 to the 1993 Regulations. This has in fact two separate lists, the first being the main list and the second the list for fishing vessels. The rules about painting the name and port of registry are in schedule 3 to the 1993 Regulations.

agents running a single register, or whether there were as many registers as there were ports of registry. Perhaps it does not matter. In practice it worked as a system of separate registers. All these registrars, and separate registers (if such they were), were swept away by the Merchant Shipping (Registration, etc.) Act 1993, c.22, and replaced by a single register and single registrar. Port of registry is a requirement of international law concerning ship registration,<sup>17</sup> so it would not have been possible, after 1993, for ships to be identified solely as U.K. ships. In theory all U.K. ships could have had one and the same port of registry, such as Aberdeen, but no doubt that was regarded as unacceptable. So the rule that was adopted in 1993 was that the shipowner can choose the port of registry. There are no constraints on that choice, apart from the fixed list of ports.<sup>18</sup> A U.K.-registered ship has many links to the U.K., as its flag state, but it has no links to its port of registry – with one possible exception, discussed below. When the central system was introduced, the term ‘port of registry’ was deleted from the legislation and ‘port of choice’ substituted, but this paper uses the older and still normal term.

It used to be the case that (i) *only* U.K.-connected ships could be registered in the U.K., and (ii) *all* U.K.-connected ships *had* to be registered in the U.K..<sup>19</sup> But the current position<sup>20</sup> is that only (i) applies. Thus a ship unconnected with the U.K. cannot be registered here, but a ship that is, say, owned by a U.K. company and that never even leaves U.K. waters, does not have to be registered here.<sup>21</sup> It could be registered in another country (e.g. Panama) provided that that country offers a ‘flag of convenience’, i.e. it has no restrictions as to the acceptance of foreign ships for registration.<sup>22</sup> As far as U.K. law is concerned, a ship does not have to be registered at all, though in practice that is not really an option for shipowners (except transitionally, for a ship constructed in a UK shipyard begins its life as an unregistered ship, albeit this period of non-registration will be brief.).

<sup>17</sup> U.N.C.L.O.S. does not seem have an express statement that ships must have names and ports of registry, but both are presupposed in a variety of its articles, so there is an implied requirement.

<sup>18</sup> Why there needs to be a fixed list is unclear to me. Aberdeen and Bristol have today the same role in ship registration as do, say, Kirkcudbright and Conwy, which is to say, no role. So why should a ship not have ‘Kirkcudbright’ or ‘Conwy’ painted on its side?

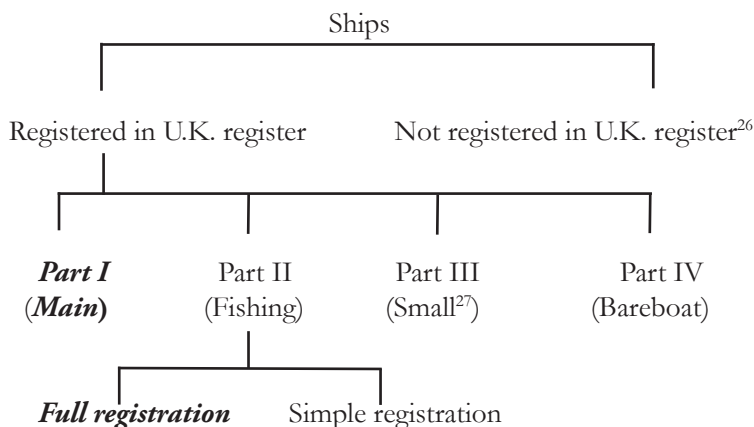
<sup>19</sup> For what counts as a U.K. connection, see the 1993 Regulations, reg. 7 ff.

<sup>20</sup> Since the M.S.A. 1988.

<sup>21</sup> This paper avoids the terms ‘British ship’ and ‘U.K. ship’, which have special statutory meanings (M.S.A. 1995, s.1).

<sup>22</sup> Often such ships never in their lives even visit their port of registry.

The U.K. Ship Register has four parts. They are (to quote the 1993 Regulations<sup>23</sup>): '(a) Part I for ships [...] which are not: (i) fishing vessels, or (ii) registered on that Part which is restricted to small ships, (b) Part II for fishing vessels, (c) Part III for small ships, and (d) Part IV for [...] bareboat charter ships.'<sup>24</sup> This fourfold division is really a fivefold division, because fishing vessels can have either 'simple' registration or 'full' registration.<sup>25</sup> The following chart shows the position.



### Full Registration And Simple Registration

There are two types of registration, 'full' and 'simple'. (Full registration is marked by bold/italic typeface on the chart above.) 'Part I' registration is full. Fishing vessels can be registered either on the full basis or the simple basis. Small vessels are subject to simple registration. Simple registration does not entail any special property law rules: from a property law standpoint, a ship with simple registration is in the same position as an unregistered ship. But

<sup>23</sup> Reg. 2. The legislation has an unfortunate linguistic muddle about the word 'part'. The 1993 Regulations set out the four 'parts'. But in the M.S.A. 1995 one finds such sentences as: 'A ship is a British ship if the ship is registered in the United Kingdom under Part II' (section 1). Here the reference is not to 'part II' registration, but to registration under part II of the M.S.A. 1995.

<sup>24</sup> See M.S.A. 1995, s.17: 'Ships bareboat chartered-in by British charterers'. This concerns ships that are registered elsewhere than the U.K.. Such ships then have two registrations, U.K. and foreign.

<sup>25</sup> 1993 Regulations, reg. 3.

<sup>26</sup> Either wholly unregistered, or registered abroad. Some foreign-registered ships *could* have been registered in the U.K., but their owners chose otherwise.

<sup>27</sup> 'Small' = under 24 metres. (M.S.A. 1995, s.1(2).)

full registration does entail property law consequences – what in this essay are called ‘the special property law rules’.

### What Appears In The Register?

The register contains such information as the ship’s name, number, radio call sign, port of registry, year of build, method of propulsion, where built, length, breadth, depth and so on.<sup>28</sup> It also gives the owner’s name. Although the information about ownership involves private law, its recording may or may not have a private law function. For some types of ship, the information is mere information, which may or may not be accurate (like the information about, say, length). For other types of ship (those subject to the special property law rules), the information as to ownership is more than mere information, having in itself a private law function, as will be seen below.

The other private law information on the register concerns mortgages. Here, however, the position is different from the registration of ownership. The register always offers an answer to the ‘who is owner?’ question, though whether that answer has private law *consequences* depends on which part of the register the ship is registered in. But mortgages are shown *only* for ships that are registered in part I or for fishing vessels with full registration.

For ships with full registration, the register is both (i) a place where bills of sale and mortgages<sup>29</sup> are registered, i.e. a register of deeds, and (ii) a register of title. Thus if X sells *The Fair Fiona* to Y, and Y then grants a mortgage to Z, the register will not only (i) contain the X/Y bill of sale and the Y/Z mortgage, but (ii) it will also say that Y is owner and Z holds a mortgage. ‘Any person shall be entitled on application to the Registrar to obtain a transcript, certified by an authorised officer, of the entries in the Register.’<sup>30</sup> Naturally anyone buying a ship will wish to see an up-to-date transcript.

### Trusts

Regulation 6 of the 1993 Regulations says:

<sup>28</sup> Sch. 4 to the 1993 Regulations sets out what is to appear in the register. The rules are different according to the type of ship.

<sup>29</sup> Also registered are discharges of mortgages and priority notices for mortgages. See in particular M.S.A. 1995 sch. 1 paras 2 and 7, and the 1993 Regulations, regs 45 and 58.

<sup>30</sup> 1993 Regulations, reg. 2(3). For an example see Bowtle and McGuinness, *The Law of Ship Mortgages*, 361 ff.

- (1) Subject to paragraph (2) no trust, express, implied or constructive may be registered [...]
- (2) Where, on the bankruptcy (or in Scotland, sequestration) of a registered owner or mortgagee his title is transmitted to his trustee in bankruptcy (or in Scotland his permanent trustee<sup>31</sup>), that person, if a qualified person, may be registered as the owner or mortgagee of a British ship or share in a ship.

This provision probably does not have much practical importance, which is just as well, because its meaning is obscure. Para. 1 is unclear, but a reasonable guess would be that it means that if the owner, Angelo Academical Shipping Co. Ltd, owns *The Bold Buccleugh* as trustee, that fact is not to appear in the register, so that all that appears in the register is the name of Angelo Academical Shipping Co. Ltd, just as if the company had not held as trustee. But if that is the meaning, what is the purpose of para. 2? If it is only *insolvency* trustees who can be registered, and not *other* trustees, what is to happen in those other cases? The implication is that no registration at all is possible, which would be absurd.

### The Special Statutory Property Rules

‘Schedule 1 (which makes provision relating to the title to, and the registration of mortgages over, ships) shall have effect’, says s.16 of the M.S.A. 1995. To which types of ship do those statutory provisions apply? A reasonable guess would be that they apply to all registered ships. After all, when one turns to schedule 1, one finds statements about ‘registered ships’. For instance, para. 2 says that ‘any transfer of a registered ship [...] shall be effected by a bill of sale’, and para. 7 says that ‘a registered ship [...] may be made a security for the repayment of a loan or the discharge of any other obligation’ (i.e. a mortgage). But this language is misleading. The special property rules do not apply to all registered ships. They apply only to (a) ‘part I’ ships and (b) those ‘part II’ ships that have ‘full’ registration. To other ships the special property law rules do not apply. That is to say, the special property rules do not apply to (c) such

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<sup>31</sup> This term is now inaccurate. It was introduced by the Bankruptcy (Scotland) Act 1985, c.66, but disappeared again following the Bankruptcy and Diligence etc. (Scotland) Act 2007 (a.s.p. 3).

‘part II’ ships as have only ‘simple’ registration,<sup>32</sup> or to (d) ‘part III’ ships,<sup>33</sup> or to (e) part IV ships<sup>34</sup> or to (f) unregistered ships.

The property law regime that applies to such other ships is therefore solely the general property law, as it applies to other corporeal moveable property such as, say, bicycles. In the chart above, the bold/italic typeface shows the types to which the special property rules apply. This paper focuses on these two categories.

### **Is The Background Law English Law?**

Potential differences in background property law would not matter if the background law were more or less the same – as would be the case, for instance, as between England/Wales on the one hand and Northern Ireland on the other. But Scots and English general property law are significantly different. For example: suppose that X owns a ship, and grants to Y a non-possessory mortgage that is not registered in the U.K. Ship Register. Can that be valid? English background law says ‘Yes’: a non-possessory, unregistered security over a ship is a good equitable security. But Scots background law says that such a security is invalid.<sup>35</sup>

The wording of the legislation shows an assumption that the background law is indeed English, and this is a feature not only of the current legislative texts but also of their predecessors. For example, paragraph 1(2) of schedule 1 to the M.S.A. 1995 says that paragraph 1(1), which deals with the rights of the owner of a fully registered vessel, ‘does not imply that interests arising under contract or other equitable interests cannot subsist in relation to a ship [...] in the same manner as in respect of any other personal property.’<sup>36</sup> Here are two indicators that the background law is English: the references to ‘equitable interests’ and to ‘personal property’ (not a term of Scots law). In some statutes, where special terms of English law are used there are translations for

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<sup>32</sup> M.S.A. 1995, s.10(4) and 1993 Regulations, reg. 3.

<sup>33</sup> M.S.A. 1995, s.10(4) and 1993 Regulations, reg. 91.

<sup>34</sup> M.S.A. 1995, s.17(7). Of course, ‘part IV’ ships are of necessity foreign-registered ships and so subject to the property law regime of another country.

<sup>35</sup> Non-possessory unregistered security is competent under English common law, and whilst regulation of such security is required by statute, that requirement does not apply to ships: Bills of Sale Act 1878, c. 31, s.4. Under Scots common law non-possessory security is in general not competent.

<sup>36</sup> Comparable material is to be found in the 1993 Regulations, such as ‘beneficial ownership’, ‘beneficial interest’ etc..

Scotland, but here one does not find anything of that sort: for instance there is nothing in the legislation on the lines of ‘references to personal property include references to moveable property’.<sup>37</sup>

Hence it could be that it is always *English* background law that is applicable.<sup>38</sup> That would certainly be the simple solution, bringing about a unitary system of property rights. Having said that, there is nothing in the legislation that actually says ‘English property law applies’. Separate property law obviously applied before the Union, and if one looks for legislation since 1707 that extended English law one looks in vain.

The text about ‘equitable interests’ could be read thus: ‘*if* there are equitable interests in a ship *then...*’, in other words leaving the ‘which background law?’ issue untouched, and merely regulating what is to happen in so far as it is English background law that applies. A similar approach could be taken to certain other passages, but some are harder to treat in that way. For instance, consider the following extract from the 1993 Regulations: ‘Every application for registration [...] shall include [...] in respect of an application to register a fishing vessel, a statement of the beneficial ownership of any share which is not beneficially owned by its legal owner.’<sup>39</sup> This sentence is hard to make sense of in the context of Scots law, so one could argue that it implies that fishing vessels are subject to English background property law.

Is light to be gained, on the background law issue, from the literature or from the case law? The books on maritime law always assume, without discussion, that English law applies. These works are from the hands of English lawyers. The specifically Scottish literature, such as it is, is mixed. A. R. G. McMillan’s

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<sup>37</sup> The only qualification to this – and it does not amount to much – is that the official forms (prescribed under M.S.A. 1995, sch. 1, para. 2) for bills of sale and for ship mortgages have *separate* notes about how the document is to be executed. These notes are odd in a number of respects, one being that they presuppose that the granter is not a natural person. Another is that it is unclear whether these notes are *prescribing* how execution must be done, or whether they are merely *narrating* the general execution rules of each jurisdiction. The former view is hard to reconcile with the word ‘may’, while the latter view runs into the problem that it is far from clear (see below) that formal execution is needed under general law, yet in relation to Scotland the notes say: ‘Note that signature by one authorised signatory and either a director or the secretary of the company *is not valid*’ (Emphasis added). The notes do not cite the legislation on execution of deeds (for Scotland, the Requirements of Writing (Scotland) Act 1995, c.7).

<sup>38</sup> There are actually two versions of this theory: that English background law applies to all registered ships, and, secondly and more narrowly, that English background law applies to all ships will full registration.

<sup>39</sup> Reg. 22(1).

1926 work<sup>40</sup> does not address the issue, but the general tenor of the treatment is hard to distinguish from treatments in English texts. For instance he says<sup>41</sup> that there can be an unregistered ‘equitable charge’ over a ship, i.e. a security right that exists outwith the legislation, and whose validity depends solely on background general law. Thus for McMillan it is English property law that applies. But in the *Stair Memorial Encyclopaedia*,<sup>42</sup> Colin Mackenzie takes a different view on the same issue, thus implying that it is Scottish property law that applies by way of background.<sup>43</sup> As against that, there are passages in Mackenzie’s text that are not easy to reconcile with Scots property law.<sup>44</sup>

One can find the same thing in the case law, though there is little of it that is relevant. First, the issue is never specially addressed. Then there is a rather divided approach in practice, with English law sometimes being accepted and sometimes Scots law. An example of the latter is *McConnachie v Geddes*<sup>45</sup> where one of the questions for the Inner House was whether a contract for the sale of a ship (a contract for sale, not a bill of sale) must be in writing.<sup>46</sup> This was an issue on which the shipping legislation was silent.<sup>47</sup> In holding that writing is not required, the court treated the matter as purely one of Scots general law, citing Stair, Erskine etc.. A case pointing, albeit uncertainly, the other way is *Watson v Duncan*.<sup>48</sup> Here there the conveyance had been delivered but not registered. Possession had been given. At this point the seller became bankrupt, and the question was whether the ship belonged to the seller’s trustee, on behalf of the creditors, or to the buyer. The Inner House held in favour of the buyer. Why? Lord Inglis says that it was because equitable ownership passed

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<sup>40</sup> A. R. G. McMillan, *Scottish Maritime Practice* (Edinburgh and Glasgow, 1926).

<sup>41</sup> *Ibid.*, 150.

<sup>42</sup> Mackenzie wrote both the first edition and the reissue: Colin Mackenzie, ‘Shipping and Navigation’, *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 21 (Edinburgh, 1991); *idem*, ‘Shipping and Navigation’, *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue 11 (Edinburgh, 2005). References here are to the reissue (‘Mackenzie, S.M.E.’). The value of this contribution is great, a point that should be stressed not least because on some matters my views differ from his. In such an understudied subject differences of opinion are inevitable and indeed healthy.

<sup>43</sup> Mackenzie, S.M.E., para. 60, fn. 1.

<sup>44</sup> E.g. *ibid.*, para. 25, including footnotes. At footnote 2 it is said: ‘This terminology has been accepted in Scotland: see Bell *Commentaries* I,161–4.’ The text referred to is not Bell’s, but an editor’s.

<sup>45</sup> 1918 S.C. 391 (Inner House).

<sup>46</sup> Strictly this is not a question of property law as such. But it is nearly allied.

<sup>47</sup> As it is today.

<sup>48</sup> (1879) 6R. 1247.



when the bill of sale was delivered.<sup>49</sup> But that approach appears neither in the opinions of the other judges, nor in the terms of the decree.<sup>50</sup>

The focus thus far has been on the common law background. But statutory background law may also be relevant. For instance, those provisions about mortgages in the Law of Property Act 1925, c.20, except those that are specifically about land, probably apply to ships.<sup>51</sup> Yet s.209 of that Act says 'This Act extends to England and Wales only.' So on the 'background property law is English' view, does the 1925 Act apply or not?

What should we conclude? Is the background law English law? No confident conclusion can be offered. In interpreting legislation a natural question is always 'What was in fact intended?' but sometimes the answer is 'There never was any clear intention', and that has surely been the case in the successive merchant shipping statutes. The question about applicable background law probably (I merely speculate) never passed through the mind of any minister or civil servant. There are certainly strong *practical* arguments for the view that the background law should be the same in England and Scotland, but that does not prove that it *is* the same, and in any event if the decision were to be taken to legislate<sup>52</sup> to ensure that property law as applied to ships was henceforth to be the same in both these jurisdictions, not everyone would agree that English law would be the ideal.

### The I.P.L. Dimension

If the background law is always English law, the problem of ascertaining in which cases Scots background property law is applicable never arises in a practical sense. But if the other conclusion is reached, that problem does arise. So what are the rules of international private law as to property rights in ships? The subject is too large, and too mired in uncertainty, to be treated fully here,

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<sup>49</sup> (1879) 6R. 1247, 1251.

<sup>50</sup> Those were the happy days in which the terms of decrees were generally given in the law reports. Their absence from the modern law reports all too often subverts attempts to understand precisely what was decided.

<sup>51</sup> This is the view taken in Graeme Bowtle and Kevin McGuinness, *Law of Ship Mortgages*. In *Fletcher and Campbell v City Marine Finance* [1968] 2 Lloyd's Rep. 520, 535, Roskill J. commented that 'it is broadly true that the general law relating to mortgages is equally applicable to ships' mortgages.'

<sup>52</sup> The 'subject matter' of the M.S.A. 1995 is reserved under the Scotland Act 1998, c.46, sch. 5, part II, head E. So legislation amending or replacing that Act would have to be Westminster legislation. Presumably, to the extent that Scots background law can apply to ships, such law is not reserved.

but something may be said. There is the awkward fact that the conflicts rules of different states are not uniform.<sup>53</sup> Then there is the fact that ‘applicable property law’ is not a single category. One can divide it roughly into (i) the M.S.A. 1995 and 1993 Regulations dealing with sales and mortgages, (ii) the law applicable to arrest,<sup>54</sup> (iii) the law applicable to maritime liens (e.g. salvor’s lien) and (iv) background property law. The issue can be divided in more than one way. One division is between (a) the various categories of U.K.-registered ships, (b) unregistered ships, and (c) foreign-registered ships. For simplicity I deal with fully registered ships.

The predominant view internationally is that the law applicable to sales and mortgages of registered ships is the law of the flag state, and not the law of the place where the ship happens to be at the time.<sup>55</sup> Thus if *The Gloomy Roger*, a ship flying the flag of Concordia, has a mortgage granted over it, or a bill of sale, while sailing within Ruritania’s territorial waters, most legal systems would take it for granted that the law applicable to the mortgage or bill of sale is the law of Concordia. Few would suggest any requirement to register in the Ruritanian shipping register. Indeed, the latter’s shipping registrar would almost certainly reject any such application, while the Concordian shipping registrar would almost certainly accept the application, notwithstanding that the ship was furth of the jurisdiction at the time. Not only is the ‘Where to register?’ question answered by ‘In the flag state’ regardless of where the ship is at the time, but the same is true for questions such as ‘Does a ship mortgage need to be notarised?’<sup>56</sup> If the law of Ruritania requires bills of sale to be notarised, few would suggest that when I buy *The Gloomy Roger*, sailing in Ruritania’s

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<sup>53</sup> Attempts have been made at harmonisation, notably (i) the Brussels Convention on Maritime Liens and Mortgages 1926, (ii) the Brussels Convention on Maritime Liens and Mortgages 1967, and (iii) the International Convention on Maritime Liens and Mortgages 1993. The U.K. is party to none of them.

<sup>54</sup> With which this paper is not concerned, though it should be noted that English and Scots law are not the same. See further Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (Oxford, 2011).

<sup>55</sup> There is a third view, that the governing law is that of the place where the mortgage was signed. This was asserted, probably *obiter*, in *The Colorado* [1923] P. 102. Bankes L.J. said, ‘This question must be determined according to French law, as the contract was made in France’, thus muddling contract and property. I can find no case in which this approach has been followed.

<sup>56</sup> To be clear, it is assumed that the ship is a registered ship. In *Dornoch Ltd v Westminster International Besloten vennootschap* [2009] E.W.H.C. 889, [2009] 1 C.L.C. 645, one aspect of the case was that the ship, which had been registered in the Netherlands before the collision in Chinese waters, was deregistered, and not registered elsewhere, after being towed to a Thai port and there sold.

territorial waters, my title will be bad because of lack of notarisation. Thus Article 1 of the International Convention on Maritime Liens and Mortgages 1993 provides that ‘mortgages, hypothèques and registrable charges of the same nature [...] effected on seagoing vessels shall be recognized [...] provided that [...] such mortgages, hypothèques and charges have been effected and registered in accordance with the law of the State in which the vessel is registered’. Probably most states accept that principle, even though they are not parties to the Convention.

The U.K. is not a party to that Convention. What the English conflicts rule is may be open to debate. There is weighty authority that the applicable law is the law of actual *situs*. Thus Dicey/Morris begins by saying, truly enough, that ‘chattels are situate in the country where they are at the relevant time’,<sup>57</sup> and then notes that ‘there are *dicta* indicating that a ship is situate at her port of registry’, citing a 2005 Australian case in which it was said that ‘there seem to us to be powerful reasons for giving effect to the law of the country of register as the *lex situs* in relation to questions of title, property and assignment.’<sup>58</sup> But Dicey/Morris dissents, saying that ships are like other chattels, except that ‘a merchant ship may at some times be deemed to be situated at her port of registry.’<sup>59</sup> What are these ‘some times’? The plural seems a mistake, for it is said that there is just one case, namely ‘when the vessel is upon the high seas’.<sup>60</sup> So for Dicey/Morris the applicable property law alters, like the chameleon’s skin, as the ship steams through the territorial waters of coastal states. *The Chirpy Cheryl*, registered at Felixstowe,<sup>61</sup> sails across the Baltic, changing from Danish, to Swedish, to German and to Polish property law, and reverting

<sup>57</sup> L. Collins (ed.), *Dicey, Morris and Collins on the Conflict of Laws*, Vol. 2 (15th edn, London, 2012), (hereinafter ‘Dicey/Morris’), para. 22-053. In *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 W.L.R. 287, 330, Lord Diplock put it thus: ‘The proper law governing the transfer of corporeal moveable property is the *lex situs*. A contract made in England and governed by English law for the sale of specific goods situated in Germany, although it would be effective to pass the property in the goods at the moment the contract was made if the goods were situate in England, would not have that effect if under German law (as I believe to be the case) delivery of the goods was required in order to transfer the property in them.’

<sup>58</sup> See Dicey/Morris para. 22-058; *Tisand (Pty) Ltd v The Owners of the Ship M.V. ‘Cape Moreton’ (ex ‘Freya’)* [2005] F.C.A.F.C. 68. The expression ‘title, property and assignment’ is regrettably scatter-gun.

<sup>59</sup> Dicey/Morris, para. 22E-057. The Scottish I.P.L. texts do not seem to address the question. P. R. Beaumont and P. E. McEleavy, *A. E. Anton, Private International Law* (3rd edn, Edinburgh, 2011) has one or two references to ships, but no general discussion.

<sup>60</sup> That is to say, outwith the territorial waters of any state.

<sup>61</sup> Where is Felixstowe? At the end of his foot.

from time to time to English property law when it happens to be more than 12 nautical miles from the Baltic shore. This approach has some support in English case law.<sup>62</sup>

But can this really be English law? It does not seem to reflect everyday practice.<sup>63</sup> And there are many sources indicating that English law adopts a flag state approach. For instance Lord Donaldson once said that ‘a ship is in effect a floating piece of the nation whose flag it wears and there is, therefore, an analogy between foreign land and foreign ships [...] accordingly I hold that the mortgage itself was governed by Panamanian law.’<sup>64</sup> Clarke’s view is that ‘all questions relating to property in a ship, including all matters relating to mortgages, charges and liens over it, will be determined by [...] the law of the country of original registration.’<sup>65</sup> The view of Bowtle/McGuinness is that ‘the creation of a mortgage against a ship is governed by the law of the ship’s registration, that law extending to the substantive rights conferred by that law. Generally speaking, the rights of a mortgage do not [...] expand and contract depending on whether the ship is within or outside the jurisdiction.’<sup>66</sup> I cannot identify relevant reported cases in Scots law.<sup>67</sup>

So, with respect to Dicey/Morris, the English conflicts law must involve some element of *dépeçage*, as one sees in other jurisdictions, with the flag state law playing a prominent but not exclusive role, with voluntary transfers and mortgages being governed by flag state law.<sup>68</sup> And even if English conflicts law

<sup>62</sup> Such as *Dornoch* (see above). For further references see Dicey/Morris.

<sup>63</sup> Including judicial practice. *Keith v Burrows* (1876) 1 C.P.D. 722; *The Arosa Kulm* [1959] 1 Lloyd’s Rep. 212; and *The Pacific Challenger* [1960] 1 Lloyd’s Rep. 99 are examples of cases where the law of the flag state was taken as determinative of a mortgage’s validity or invalidity.

<sup>64</sup> *The Angel Bell* [1979] 2 Lloyd’s Rep. 491, 495.

<sup>65</sup> Clarke, 668. (The reason for ‘original’ is that the comment is made in the context of ‘part IV’ ships, which have two registrations, one in the U.K., and the other in another state (the ‘original’ registration).)

<sup>66</sup> Bowtle and McGuinness, *Law of Ship Mortgages*, 240. This work has a valuable chapter (chapter 10) entitled ‘Private International Law Considerations’. (Of course, the chapter’s focus is on mortgages.) Nigel Meeson, *Ship and Aircraft Mortgages* (London, 1989), 130, takes the same view.

<sup>67</sup> Though *Schultz v Robinson* (1861) 24 D. 120 has some interest. Here a Prussian ship was arrested in a Scottish port, for a debt unconnected with the ship. The defence was that the debtor had, before the arrestment, transferred the ship to someone else, at a time when she was sailing outwith territorial waters. It was held that the transfer was governed solely by Prussian law. There was no suggestion in the case that the location of the ship at the time of transfer was of any relevance.

<sup>68</sup> Curiously, precisely this view was taken by Dicey in earlier editions. To trace the changes in that work over time would be in itself a research project, but an example

were what Dicey/Morris suggests it to be, it may be doubted whether such a view would be followed by the Scottish courts.

The issue just covered, however briefly, is about the special property law regime for sales and mortgages. But whatever the answer is, it presumably also applies to general background law. Take, for instance, the rule of English general property law: ‘once a mortgage, always a mortgage.’<sup>69</sup> This is not to be found in the special property regime of the shipping legislation, but undoubtedly applies to ship mortgages that are governed by English law. Thus there can hardly be *dépeçage* at this point.

If the law applicable to sales and mortgages of registered ships, and to the relevant background property law, is the law of the flag (as to which see above) then the issue arises as to what happens where the law of the flag is non-unitary. This is of course a familiar issue in international private law. The answer is that one has to identify the relevant sub-national legal system. It is difficult to see how that could be done other than by port of registry.<sup>70</sup> Thus a Bristol-registered ship would be subject to English background property law, and an Aberdeen-registered ship would be subject to Scots background property law. On this view, for example, if a fully-registered British-flagged ship has an unregistered mortgage granted over it when sailing in British waters, the validity of the mortgage does not depend on whether the ship happens, at that moment, to be sailing in English waters or Scottish waters, but, depends, rather, on the port of registry.

But all this is subject to three large caveats. The first is that the English conflicts law about ships is unclear; the second is that it is unclear whether the Scottish courts would follow it anyway; and, thirdly, there is always the possibility that English property law, both statutory and common law (including equity), applies to all ships. (Subject only to a limited *dépeçage* in matters such as arrest).

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would be the 5<sup>th</sup> edn: Arthur Berriedale Keith, *Dicey's Conflict of Laws* (5th edn, London, 1932), 996 ff.

<sup>69</sup> W. Clark (ed.), *Fisher and Lightwood's Law of Mortgage* (14th edn, London, 2014) para. 47.8; J. McGhee (ed.), *Snell's Equity* (33rd edn, London, 2015) para. 38.07.

<sup>70</sup> The U.K. Ship Register is nominally in Southampton, though substantively in Cardiff. It might be argued that the result is to make all ships subject exclusively to English law, and that if it had been located at Aberdeen the result would have been to make all ships subject to Scots law. This argument is hardly persuasive. In any event the legislation itself does not specify Southampton (or Cardiff), but simply gives the role to the Registrar General of Shipping and Seamen, whose home is a matter of administrative, not legislative, decision.

The complex and deeply uncertain picture becomes more complex when one moves away from fully registered ships to (i) ships with simple registration and (ii) unregistered ships. The answer(s) could be almost anything, especially given that such a vessel may sometimes be in international waters.

### The Concept Of Ownership

In the civilian tradition, and in Scots law, ownership is – subject to some ‘if’s and ‘but’s – a fairly clear and unitary conception. But that has never been the position in the Common Law tradition. That is true for property in general, but particularly true for ships. Thus in English law, if a ship is chartered, both the registered owner and the charterer are regarded as owners.<sup>71</sup> And the Anglo-American influence on international shipping law has produced a similar fuzziness in international instruments. For instance, the Convention on Limitation of Liability for Maritime Claims 1976 says that ‘the term “shipowner” shall mean the owner, charterer, manager and operator of a seagoing ship.’<sup>72</sup> Here is a New Zealand statute:<sup>73</sup>

Owner, in relation to a ship

- (a) Means every person who owns the ship or has any interest in the ownership of the ship;
- (b) In any case where the ship has been chartered, means the charterer;
- (c) In any case where the owner or charterer is not responsible for the navigation and management of the ship, includes every person who is responsible for the navigation and management of the ship.

In the Scottish literature comparable statements can sometimes be found.

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<sup>71</sup> In *Baumwoll Manufactur Von Scheibler v Furness* [1893] A.C. 8, 17, Lord Herschell stated that: '[T]here may be two persons at the same time in different senses not improperly spoken of as the owner of a ship. The person who has the absolute right to the ship, who is the registered owner, the owner (to borrow an expression from real property law) in fee simple, may be properly spoken of, no doubt, as the owner; but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a limited time to some other person, who, during that time, may equally properly be spoken of as the owner.'

<sup>72</sup> Article 2. (The French version, which is also authentic, says the same: '*L'expression "propriétaire de navire" désigne le propriétaire, l'affréteur, l'armateur et l'armateur-gérant d'un navire de mer.*') Almost identical language can be found in article 1(3) of the International Convention on Civil Liability for Bunker Oil Pollution Damage 2001.

<sup>73</sup> Maritime Transport Act 1994, s.84.

‘When he [the mortgagee] takes possession he becomes the master or owner of the ship’,<sup>74</sup> and, in the same work, it is also stated that ‘It is often a difficult question what amount of interference with a ship will render the mortgagee the owner thereof.’<sup>75</sup>

Some of these usages can be classified as being merely odd drafting decisions, and after all words can have unlikely meanings where the text so requires.<sup>76</sup> But at all events it is evident that shipping lawyers, or lawyers when writing about shipping law, seldom work with any clear and definite concept of ownership.

### To What Extent Does The S.o.G.A. Apply?

Ships are corporeal moveable property. The Sale of Goods Act 1979 has no exclusion for ships, so ‘all vessels afloat, from the giants measuring several hundred thousand tons down to the cockleshell or coracle, are “goods” within the meaning of the S.o.G.A 1979.’<sup>77</sup> The S.o.G.A. provisions about contract law and about remedies apply to all ships.<sup>78</sup> Its property law provisions apply to unregistered ships, and ships with simple registration, because the special property rules of the M.S.A. 1995 and 1993 Regulations do not apply to such ships. But do the S.o.G.A. property rules apply to ships with full registration? There is no easy answer: the S.o.G.A. has no provision saying ‘subject to the shipping legislation’, and the shipping legislation has nothing saying ‘This legislation trumps the S.o.G.A.’ (These facts show poor drafting.) How is the conflict to be resolved?

There is no clear authority. Most shipping texts say that the S.o.G.A. applies *and* that the special legislation applies, without saying how this can be.<sup>79</sup> The

<sup>74</sup> W. M. Gloag and J. M. Irvine, *Law of Rights in Security* (Edinburgh, 1897), 296. Master? Or owner? Does ‘or’ signify an alternative (in which case one would wish to know which is the case) or does it mean that ‘master’ and ‘owner’ are interchangeable words?

<sup>75</sup> *Ibid.*, 297. Since passages of this sort make little sense in the context of Scots property law, they could be adduced as evidence (see above) that the background property law for ships is English law.

<sup>76</sup> Thus in *Evans v Ewels* [1972] 2 All E.R. 22 the word ‘person’, as used in a particular statute, was held to mean ‘penis’.

<sup>77</sup> R. S. T. Chorley et al., *Chorley and Giles’ Shipping Law* (8th edn, London, 1987), 38.

<sup>78</sup> E.g. *MacDonald v Pollock* 2012 S.L.T. 462, [2012] 1 Lloyd’s Rep. 425 (Inner House); *Dalmare S.p.A. v Union Maritime Ltd* [2013] 1 Lloyd’s Rep. 509.

<sup>79</sup> See e.g. Alexandra Mandaraka-Sheppard, *Modern Maritime Law and Risk Management* (3rd edn, Oxon., 2013) volume 2, 321-322, and Nigel Meeson, *Ship and Aircraft Mortgages* (1989), 31-34. A curious case is *Naamlooze Vennootschap Stoomvaart Maatschappij Vredobart v European Shipping Co. Ltd* 1926 25 Ll. L. Rep. 210 (H.L.). In considering



books on sale of goods and on property law generally say little or nothing.<sup>80</sup> The solution must be that both sets of rules apply, but that since *lex specialis* trumps *lex generalis*, the shipping legislation trumps the S.o.G.A. to the extent of the inconsistency. Thus the S.o.G.A. property transfer rules are in general inapplicable, but with qualifications. Thus in *The Bineta*<sup>81</sup> a ship was sold; a bill of sale was granted; and the buyer was registered as owner. But the seller was to remain in possession until payment, and payment never happened. In the end the seller resold, granting a bill of sale to the new buyer. It was held that this second sale was valid. Although ownership had passed to the first buyer, in accordance with the M.S.A.,<sup>82</sup> and although there was nothing in the special legislation about a vendor's lien, the seller had such a lien under the S.o.G.A.,<sup>83</sup> which also gave a power of sale.

The overlap between the S.o.G.A. and the shipping legislation applies only to ships with full registration. The special property rules apply neither to ships with simple registration, nor to unregistered ships. To such ships the property rules of the S.o.G.A. apply without modification.

The S.o.G.A. applies in both England and Scotland, with few differences.<sup>84</sup> But it is not an exhaustive code,<sup>85</sup> and in the sphere of property law the Act cannot be understood in quite the same way on the two sides of the border, though the differences are probably more theoretical than practical.<sup>86</sup>

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whether ownership had passed (and holding that it had not), only the Sale of Goods Act 1893, c.71, was considered. But there were specialities, including the fact that the buyer was foreign so that the sale would not be registrable in the U.K.. The only discussion of the possible relevance of bills of sale seems to have been when the case was in the Court of Appeal: 1924 20 Ll. L.R. 296, 303.

<sup>80</sup> Bridge (ed.), *Benjamin's Sale of Goods* (8th edn), para. 1:082 says that the S.o.G.A. 1979 'may not be applicable' and leaves it at that. The same author's *Sale of Goods* (3rd edn 2014), para. 2.02 says: 'Ships [...] are [...] dealt with by the Act, from whose provisions special statutes may depart', citing the M.S.A. 1995, but says no more. Ewan McKendrick (ed.), *Sale of Goods*, is silent.

<sup>81</sup> [1966] 2 Lloyd's Rep. 419, [1967] 1 W.L.R. 121.

<sup>82</sup> Then the M.S.A. 1894.

<sup>83</sup> Then the Sale of Goods Act 1893.

<sup>84</sup> Such as s.11.

<sup>85</sup> This is stated expressly in s.62(2).

<sup>86</sup> This subject cannot be explored here. But a glance at the well-known article, G. Battersby and A. D. Preston, 'The Concepts of Property, Title and Owner used in the Sale of Goods Act 1893', *M.L.R.*, 35 (1972), 268, is all that is necessary to show that the Act looks very different according to whether one reads it on the northern or on the southern bank of the fair Tweed.



### How Is Ownership Of A New Ship Acquired?

If a shipbuilder simply builds a ship,<sup>87</sup> without an immediate buyer, the shipbuilder will be the first owner, and can then register it, and later sell it, and no special issues arise. If a shipbuilder builds a ship for a particular buyer, the ship will, while still on the stocks, be unregistered, and so if ownership is to pass to the buyer it will pass under general law, without reference to the shipping legislation. (Because the special property law rules can apply only to registered ships.) In principle, therefore, the position here is the same as for anyone, such as a tailor or a cabinet-maker, who makes something for a particular customer.<sup>88</sup>

### How Is Ownership Of An Existing Ship Acquired? (I) Ships Without Full Registration

The property law rules of the shipping legislation apply only to 'part I' vessels and to those fishing vessels as have full registration. The other categories (fishing vessels with simple registration, small ships, and unregistered ships) are unaffected. Thus they are subject solely to the background law, which includes in particular the property rules of the Sale of Goods Act 1979.

### How Is Ownership Of An Existing Ship Acquired? (II) Ships With Full Registration

The special transfer rules are contained in sch. 1 to the M.S.A. 1995.<sup>89</sup> It distinguishes, in the traditional English manner, between 'transfer' and 'transmission'. A 'transfer' is a transfer by means of an *inter vivos* juridical act (transfer on sale being the typical case) whereas a 'transmission' is a transfer

<sup>87</sup> Ships under construction are called newbuilding ships or simply newbuildings.

<sup>88</sup> At common law the rule was 'that if the price of a vessel in the building-yard be payable by instalments, as the vessel proceeds, payment of the first instalment will suffice to transfer the property without farther delivery, on the principle of specification, the shipbuilder holding thereafter for the true owner.' (*McBain v Wallace & Co* (1881) 8R. 360 (Inner House), 368 per L.J.C. Moncreiff). The correctness of this view is probably not affected by the fact that when the case went to the House of Lords it was affirmed, on a different basis, namely s.1 of the Mercantile Law Amendment (Scotland) Act 1856, c.60: *McBain v Wallace* (1881) 8R. (H.L.) 106, (1881) 6 App. Cas. 588. That section was repealed by the Sale of Goods Act 1893. Given that under that Act, and its 1979 successor, delivery is not necessary to pass ownership in a contract of sale of goods, the common law rule is presumably now of no, or only marginal, significance.

<sup>89</sup> This is headed 'Private Law Provisions for Registered Ships', a misleading title, given that not all registered ships are subject to sch. 1.

that happens in any other way, such as transfer *mortis causa* or transfer by court order. Transmissions are considered below: here transfers are discussed. The M.S.A. 1995 says:<sup>90</sup>

Any transfer of a registered ship [...] shall be effected by a bill of sale<sup>91</sup> [...] Where any such ship [...] has been transferred [...] the transferee shall not be registered [...] unless [...] he has made the prescribed application to the registrar [...] If an application under sub-paragraph (2) [...] is granted by the registrar, the registrar shall register the bill of sale<sup>92</sup>

The first question is: how does the provision just quoted interact with the S.o.G.A. 1979? Special legislation trumps general legislation (see above), so, even if the conditions of the S.o.G.A. as to transfer have been satisfied, if there is no bill of sale the seller will be undivested.<sup>93</sup> Mackenzie writes: ‘a lesser beneficial interest such as a sale not followed by a bill of sale would be enforceable against a trustee in bankruptcy or a liquidator because so long as the property in the ship has passed, in the sense of the beneficial interest in the ship passing, the matter does not depend on the degree of the beneficial interest.’<sup>94</sup> This could not reflect Scots property law. Moreover even English law does not normally consider that a contract of sale of personalty (as opposed to realty) can give the vendee an equitable right.

The only case of difficulty that occurs to me is where there is a clause in the sale contract suspending the passing of ownership until some condition is satisfied – a retention of title clause. Would such a condition be effective even if there is a delivered and registered bill of sale? The special legislation has nothing about that issue. In practice the issue seems not to arise, for bills

<sup>90</sup> Sch. 1, para. 2.

<sup>91</sup> There is a problem for donative transfer. (Of course, donations of ships are rare.) Not only is the term ‘bill of sale’ a misnomer in such cases, but the prescribed form cannot be adapted for donation since it requires the consideration to be entered. I do not know what happens in practice. Perhaps a nominal consideration is inserted.

<sup>92</sup> The wording is much the same as under earlier legislation. For example s.24 of the M.S.A. 1894 says that ‘a registered ship [...] shall be transferred by bill of sale.’

<sup>93</sup> Cf. a New South Wales case, *Household Financial Services Ltd v Island & River Trading Pty Ltd (The Sea Horse)*, noted in Martin Davies, ‘Australian maritime law decisions 1993’, *L.M.C.L.Q.*, [1994], 407, 419. The Australian legislation (Shipping Registration Act 1981) is similar to the U.K. legislation.

<sup>94</sup> *S.M.E.*, para. 25, fn. 7.

of sale are in practice delivered unconditionally.<sup>95</sup> But in theory the question could arise. If it did I do not know what the answer would be.

The second question is whether delivery of the bill of sale is enough, or whether registration is also necessary, and, if so, in what sense. And is delivery of the ship relevant? The official form for a bill of sale says in prominent typeface near the top: 'Warning: A purchaser of a British registered ship does not obtain complete title until the appropriate Bill(s) of Sale has been recorded with the Registry, and a new Certificate issued.' This is no doubt good advice, but what is the precise legal position? There is little authority, and little discussion in the literature. Between 1823 and 1845 four statutes all said: no registration, no title.<sup>96</sup> But when the great Merchant Shipping Act 1854<sup>97</sup> arrived the provision was silently dropped. The 1854 Act did not say that registration was *not* needed for title to pass: it simply left the matter open, as did the M.S.A. 1894, and as does the M.S.A. 1995.

In a case of 1864, *Stapleton v Haymen*,<sup>98</sup> a bill of sale was delivered but not registered. The buyer took possession of the ship. The seller became bankrupt and the litigation was between the seller's creditors and the buyer. The buyer prevailed. To quote the headnote, the decision was on 'the ground that either as against them the property passed by the bill of sale, or the bankrupt was a trustee for the plaintiff,<sup>99</sup> and that the action was maintainable in the latter case by virtue of the plaintiff's possessory title.' It is uncertain whether the buyer's victory was at law or in equity. When *Stapleton* is cited, *The Two Ellens*,<sup>100</sup> is also usually cited, in which case Sir Robert Phillimore explained *Stapleton* as having held that 'the property in a ship passes, as between the vendor and the vendee, by a bill of sale, although the transfer be not registered pursuant to the Merchant Shipping Act, 1854.' This perhaps does not clarify matters much. Shortly afterwards there was a similar case in Scotland, *Watson v Duncan*,<sup>101</sup> mentioned above. Here too the buyer prevailed against the seller's creditors, and here too the *ratio* is not clear. Mackenzie interprets the decision thus:

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<sup>95</sup> The standard forms of ship sale contracts do not, as far as I can see, have any provision as to passing of ownership. As with the typical contract for the sale of heritable property in Scotland, they say simply that the bill of sale will be delivered in exchange for payment.

<sup>96</sup> 4 Geo. IV (1823), c.41, s.35; 6 Geo. IV (1825), c.110, s.37; 3 & 4 Will. IV (1833), c.55, s.34; 8 & 9 Vict. (1845), c.89, s.37.

<sup>97</sup> 17 & 18 Vict. (1854), c.104. The short title was given later.

<sup>98</sup> 159 E.R. 380; (1864) 2 Hurl. & C. 918.

<sup>99</sup> The plaintiff was the buyer.

<sup>100</sup> (1869–72) L.R. 3 A. & E. 345.

<sup>101</sup> (1879) 6R. 1247.

‘it was held that the beneficial interest was enforceable against the registered owner’s trustee in bankruptcy.’<sup>102</sup> Lord Inglis indicated that property had passed in equity though not at law,<sup>103</sup> while the other judges, and also the decree, indicated simply the ownership had passed, full stop. This case was mentioned above as an example of a case which may or may not have proceeded on the basis that the background property law for ships is English law.<sup>104</sup> Modern authority seems absent.<sup>105</sup> One other case, decided just after *Stapleton*, is worth citing, because of a clearly-expressed dictum: ‘the execution of the bill of sale entirely divests the title of the vendor [...] Registration is but the record of a fact done – a record of the sale, not the sale itself.’<sup>106</sup> This approach also fits in with the view taken in another case about the same time, *Keith v Burrows*,<sup>107</sup> in which it was held that a statutory mortgage transfers legal title, even though unregistered. Although that case is now regarded as unsound because the modern view is that a statutory mortgage of a registered ship does not operate as a transfer,<sup>108</sup> it is still good authority that registration is not a requirement of transfer.

As for delivery of the ship, that was originally necessary, as for all corporeal moveables. Thus in the 4th edition of the *Commentaries* (1821) Bell wrote: ‘besides the written instrument, accompanied by the requisites of the registry acts, delivery is necessary to complete the sale of a ship. Those acts were not made to alter the common law relative to the mode of transferring ships.’<sup>109</sup> But this passage is not to be found in the 5th edition (1826). The change was the result of the Act of 1823,<sup>110</sup> since when it has been clear that transfer of a fully-registered ship is effected by bill of sale, with delivery playing no role.<sup>111</sup>

<sup>102</sup> *S.M.E.*, para. 25, fn. 7.

<sup>103</sup> *Watson v Duncan* (1879) 6R. 1247, 1251.

<sup>104</sup> Mackenzie’s valuable *S.M.E.* text (above) is unclear on this issue, for elsewhere he applies Scottish background property law to mortgages.

<sup>105</sup> Though see *696113 Ontario Ltd v Commissioner of Stamps* [1990] 53 South Australian State Reports 274, noted in Martin Davies, ‘Australian maritime law decisions 1990’, *L.M.C.L.Q.*, [1991], 326, 340.

<sup>106</sup> *The Spirit of the Ocean* (1865) 12 L.T. 239, 240. The quoted passage is omitted from the version at 167 E.R. 388.

<sup>107</sup> (1876) 1 C.P.D. 722, affirmed, without comment on this issue, in (1877) 2 App. Cas. 636.

<sup>108</sup> See below.

<sup>109</sup> George J. Bell, *Commentaries on the Laws of Scotland and on the Principles of Mercantile Jurisprudence*, Vol. 1 (4th edn, Edinburgh, 1821), 87. This shows, by the way, that at this period it was accepted that the background property law was Scottish.

<sup>110</sup> 4 Geo. IV (1823), c.41, s.36.

<sup>111</sup> The last attempt to assert a delivery-of-the-ship requirement seems to have been in

(In the case of an unregistered ship or a ship with simple registration, transfer on sale is subject to the S.o.G.A., which does not require delivery for transfer.)

What can be concluded? A delivered bill of lading is effective (as against the seller's creditors) if the seller becomes bankrupt before registration, but the reason is uncertain. The simplest solution would be that ownership passes when the bill of lading is delivered. It also seems the best reading of the actual wording of the M.S.A. 1995, which, though it attributes consequences (see below) to registration or non-registration, does not suggest that registration is a necessary condition for the passing of property. My tentative conclusion is that ownership passes on delivery of the bill of sale.<sup>112</sup> It may be added, though this is not a conclusive argument, that if it were merely an equitable title that passed on delivery of the bill of lading, sch. 1 para. 1 of the M.S.A. 1995, discussed below, would hardly have been necessary. But it must be stressed that the conclusion is far from certain. It is also possible to take the view that, under English law, legal title passes only on registration, though before that the grantee may have an equitable title. (On this view, the Scottish result would be the grantee has no title before registration,<sup>113</sup> though this is subject to the possibility that Scots property law never applies to ships.)

### **Bills Of Sale: Significance Of Registration**

If, since the M.S.A. 1854, registration of the bill of sale is not a requirement for ownership to pass, what is the significance of registration? Is registration merely a matter of information? That is the position for ships that do not have full registration: transfers of ownership are registered but this is for the purpose of information: the registration is merely a consequence of a transfer that has already happened,<sup>114</sup> and has of itself no private law significance. But for ships with full registration, the registration or non-registration of the bill of sale does have private law consequences. The M.S.A. 1995 says:<sup>115</sup> 'Subject to any rights and powers appearing from the register to be vested in any other person, the registered owner of a ship or of a share in a ship shall have power

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*Schultz v Robinson* (1861) 24D. 120. The court did not take it seriously.

<sup>112</sup> Clarke's view, which must be allowed great weight, is that 'it is registration itself that perfects title, both for owners and for mortgagees': Clarke, 672. But I am not sure what she means by 'perfects'.

<sup>113</sup> Because equitable ownership does not exist in Scots law. Of course a grantee would have a personal right prior to registration.

<sup>114</sup> And for such vessels no bill of sale is required, though one is commonly used.

<sup>115</sup> Sch. 1, para. 1.

absolutely to dispose of it provided the disposal is made in accordance with this Schedule and registration regulations.’

Thus if Serafina is the owner, and registered as such, of *The Serene Selene*, and delivers a bill of sale to George, who fails to register, and if, in a fit of absence of mind, she then grants another bill of sale to Ziggy, who does register, Ziggy prevails over George. What seems to happen here is that ownership first passes to George (by virtue of the delivered bill of sale) and then from George to Ziggy (when Ziggy registers). To that extent, registration is a condition of transfer, but only in this specific situation, in favour of Ziggy. Good faith is perhaps an implicit requirement.<sup>116</sup>

This interpretation is reasonable in the sense that one finds similar rules elsewhere, both in our own law and abroad. For example, in many legal systems, such as French law, ownership of land passes without registration, but the title of an unregistered buyer is precarious, in a similar way.<sup>117</sup> In our own law, s.24 of the S.o.G.A. 1979 works in a comparable manner: if X sells to Y but Y does not take possession, ownership passes,<sup>118</sup> but Y’s title is precarious, so that if X then sells to Z, who does take possession, ownership passes from Y to Z. This is the same as the position for bills of sale, substituting ‘registration’ for ‘possession’.

An alternative interpretation of the provision<sup>119</sup> is that ‘[t]he legal title to a registered ship is always vested in the person who appears on the register as

<sup>116</sup> Cf. *The Horlock* (1876–77) L.R. 2 P.D. 243, dealing with the equivalent M.S.A. 1854, s.43, and *Lombard North Central v Lord Advocate* 1983 S.L.T. 361 (Outer House), dealing with the equivalent M.S.A. 1894, s.56. Whilst the need for good faith is probable, (i) these authorities are not strong, (ii) the silence of the provision as to good faith is striking, and (iii) good faith is not an across-the-board requirement in shipping property law: for instance a statutory mortgage taken in the knowledge of a prior equitable mortgage is not subject to that mortgage: *Black v Williams* [1895] 1 Ch. 408.

<sup>117</sup> Here and elsewhere the parallels between shipping property law and land law are evident. For instance, the question of whether a contract of sale gives a buyer some sort of equitable ownership was considered in *Gibson v Hunter Home Designs Ltd* 1976 S.C. 23 (Inner House) (answer: no). The question of whether a delivered but unregistered deed of transfer of land gives a buyer some sort of equitable ownership was considered in another Scottish case, *Short’s Trustee v Keeper of the Registers of Scotland* 1996 S.C. (H.L.) 14 (answer: no). In some jurisdictions ships are understandably classified as quasi-immovable property. To quote Wikipedia (entry for *Schiffsregister*, <https://de.wikipedia.org/wiki/Schiffsregister>, accessed 21 June 2015), ‘*Schiffe werden in Deutschland [...] sachenrechtlich wie unbewegliche Sachen behandelt*’. And the merchant shipping legislation was one of the influences leading to the creation of Torrens title registration, which has spread widely round the world.

<sup>118</sup> Assuming that the other requirements have been satisfied.

<sup>119</sup> M.S.A. 1995, sch. 1, para. 1.

owner.<sup>120</sup> (This ties in with the view that a delivered but unregistered bill of sale gives the transferee an equitable but not a legal title.) In terms of Scottish land law, this position corresponds to the Keeper's 'Midas touch' that existed under the Land Registration (Scotland) Act 1979, c.33.<sup>121</sup> It is not a position that I would favour, in part because it does not represent a natural reading. The provision could have said that, but does not: it speaks only of power to alienate, which is not the same thing as ownership.<sup>122</sup>

Finally, the provision speaks of power of 'disposal'. Does that include power to mortgage? As a matter of policy, the answer should presumably be 'yes'. If a buyer is protected, why should a mortgagee not be protected too? The provision has been applied to mortgages,<sup>123</sup> but its applicability was assumed rather than argued. The statutory wording is not readily to be understood that way: when a mortgage is granted one does not say that the owner has *disposed* of the property.

## Transmission

The shipping legislation says how 'transfer' – i.e. transfer by *inter vivos* juridical act – is effected. It says nothing about 'transmission' – i.e. other types of transfer, notably transfer *mortis causa* and transfer by court order. It says only that where there *has* been transmission, the Registrar is to give effect thereto on the register.<sup>124</sup> The law about transmission of property is different on the two sides of the border, so here at least the background law is obviously different. For instance, if James, domiciled in Scotland, owns a ship, and dies, or becomes bankrupt, the Scots law of succession, or the Scots law of bankruptcy, applies. But these areas of law are engaged through the identity of the person, *ratione personae*, and not *ratione rei*, i.e. they are not attached to the

<sup>120</sup> Mackenzie, *S.M.E.*, para. 25. Whilst there are points in Mackenzie's account that I disagree with, his text is a most valuable contribution to the literature.

<sup>121</sup> For the Midas Touch, see Scottish Law Commission, *Discussion Paper on Land Registration: Void and Voidable Titles* (Scot. Law Com. D.P. No. 125, 2004) and idem, *Report on Land Registration* (Scot. Law Com. No. 222, 2010). The Midas touch disappeared following the Land Registration etc. (Scotland) Act 2012 (a.s.p. 5). English land law has an equivalent of the Midas touch: Land Registration Act 2002, c.9, s.58.

<sup>122</sup> As a matter of general property law, ownership and power to alienate usually coincide, but not invariably: owners do not always have the power to alienate, while non-owners sometimes do have that power.

<sup>123</sup> *Lombard North Central v Lord Advocate* 1983 S.L.T. 361 (Outer House), dealing with the predecessor provision, M.S.A. 1894, s.56.

<sup>124</sup> M.S.A. 1995, sch. 1, para. 3; 1993 Regulations, reg. 46.

vessel. So these facts are not really part of ship property law. Scots succession law or bankruptcy law would be equally applicable to an unregistered ship, where its owner was Scottish. One point of uncertainty, however, may be mentioned: where there is a transmission, does ownership pass on registration, or before? This seems unclear.

### Shares In Ships

'The property in a ship shall be divided into sixty-four shares'.<sup>125</sup> This provision is of little significance nowadays,<sup>126</sup> except for pleasure craft. Merchant ships are today almost invariably owned by a single company. If the interests of more than one investor are involved, that is arranged at the corporate level. Still, the idea of shares is deeply embedded. Thus if X Ltd sells a ship to Y Ltd, the bill of sale does not simply transfer the ship, but transfers 64 shares in the ship.<sup>127</sup> The separate shares are thought of as existing even though all are in the same hands. This is a different way of thinking from that pertaining to other types of property. If Janet owns a house, and sells it to Fergus, she would not transfer all her shares in the house. She is not thought of as having shares: shares in land exist only if there is more than one owner:

A person shall not be entitled to be registered as owner of a part of a share; but any number of persons not exceeding five may be registered as joint owners of a ship or of any share or shares in a ship; joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share in a ship in respect of which they are registered.<sup>128</sup>

This provision, though not important in modern practice, raises the question of what is meant by 'joint owners.' This term does not mean the same thing on the two sides of the border, so we have here the familiar issue of what is the relevant background property law. Even apart from that, the 'one person only' provision is not free from difficulty.

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<sup>125</sup> 1993 Regulations, reg. 2(5). The choice of number is odd. For instance three people cannot be equal co-owners.

<sup>126</sup> The older law reports show that shared ownership of merchant ships was once common.

<sup>127</sup> See the official form, currently M.S.F. 4705.

<sup>128</sup> 1993 Regulations, reg. 2(5)(c) and (d).



## Mortgages

‘There is not a great deal of law regarding ships’ mortgages’ said one judge in 1968.<sup>129</sup> Whilst authorities are not plentiful, the subject is nevertheless large<sup>130</sup> and here only certain key property law aspects can be considered. Inevitably the subject has to be divided between (i) fully registered ships and (ii) unregistered ships and ships with simple registration only. The reason for this distinction is of course that the special property rules of the shipping legislation apply to the former but not to the latter. Before discussing the statutory ship mortgage, it should be noted that under English law an equitable security (an equitable mortgage or an equitable charge) can be created over any ship, registered or unregistered.

### Fully Registered Ships: Effect Of A Statutory Mortgage

This subject has to be treated historically. Originally the only way of granting security over a ship<sup>131</sup> was by transferring ownership to the lender, for the purpose of security. The debtor was thus divested, retaining only a right to a re-transfer on repayment.<sup>132</sup> In English law this right to a re-transfer involved an equity of redemption. As a title transfer,<sup>133</sup> a bill of sale was necessary. Thus in 1821 Bell wrote: ‘every mortgage [...] of a ship [...] is effectively an alienation in the sense of the registry acts.’<sup>134</sup> But when Bell published the next edition, in 1826, this passage disappeared. Why? Bell does not explain, nor does he give any new explanation of the effect of a mortgage. But the reason for the change was presumably the major new development in 1823.

The M.S.A. 1823 said that ‘when any transfer [...] shall be made only as a security’ the entry in the register is to ‘state [...] that such transfer was made only as a security’ and the grantee ‘shall not [...] be deemed to be the owner [...] any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship [...] available by sale [...]

<sup>129</sup> *Fletcher and Campbell v City Marine Finance* [1968] 2 Lloyd’s Rep. 520, 535 per Roskill J..

<sup>130</sup> The main text on the subject is Bowtle and McGuinness, *Law of Ship Mortgages* (2001), but the quality of its handling of the property law dimension cannot be compared with that of Clarke (above). Neither text deals with Scots law.

<sup>131</sup> Leaving aside, for the moment, the possibility of equitable security.

<sup>132</sup> In a Scottish case in the House of Lords, *Alston v Campbell* (1779) 2 Paton 492, it was held that the debtor still had an insurable interest after granting a mortgage. The case is intriguing, but there is no clear ratio, and the focus was on insurance law.

<sup>133</sup> In civilian language, *fiducia cum creditore*.

<sup>134</sup> Bell, *Commentaries*, vol. 1 (4<sup>th</sup> edn, 1821), 82. Admittedly the words after ‘alienation’ make the statement open to more than one interpretation.

for the payment of the debt.<sup>135</sup> With minor verbal changes, and also with one more significant change about to be discussed, this provision has remained part of the law ever since.<sup>136</sup> The current version says: 'Where a ship or share is subject to a registered mortgage then (a) except so far as may be necessary for making the ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be treated as owner of the ship or share; and (b) the mortgagor shall be treated as not having ceased to be owner of the ship or share.'<sup>137</sup>

These provisions are obviously poorly drafted, but the conclusion has to be that since 1823, the effect of a ship mortgage is not to transfer ownership, but only to give the grantee what in the civilian tradition is called a limited (subordinate) real right, or *ius in re aliena*.<sup>138</sup>

Clarke<sup>139</sup> dates the change not to 1823 but to 1854, when the M.S.A. 1854 set out a statutory form of mortgage that was overtly a security document, without word of transfer.<sup>140</sup> 'Until 1854', she writes, 'the ship mortgage undoubtedly was a property transfer mortgage.'<sup>141</sup> My own view is as above: that the new (1854) statutory form merely reflected the substantive change that had already happened.<sup>142</sup>

The view that a statutory ship mortgage does not divest the granter seems to be universally accepted nowadays. But its acceptance, particularly in England, took a long time. Even after 1854 (let alone 1823), consensus was slow to emerge. In an 1876 case, *Keith v Burrows*,<sup>143</sup> it was held that the mortgagee takes 'the whole ownership in the ship.'<sup>144</sup> Indeed, that decision has

<sup>135</sup> 4 Geo. IV (1823), c.41, s.43.

<sup>136</sup> 6 Geo. IV (1825), c.110, s.45; 3 & 4 Will. IV (1833), c.55, s.42; 8 & 9 Vict. (1845), c.89, s.45; M.S.A. 1854, s.70; M.S.A. 1894, s.34; M.S.A. 1995, sch. 1, para. 10.

<sup>137</sup> M.S.A. 1995, sch. 1, para. 10.

<sup>138</sup> One sees the same in land law at the same period; a bond and disposition in security involved a deed that was nominally a transfer deed but which actually gave only a subordinate real right. In both cases (land and ships) the fact of security appeared on the face of the deed.

<sup>139</sup> Clarke, 675.

<sup>140</sup> M.S.A., s.66.

<sup>141</sup> Clarke, 675.

<sup>142</sup> Thus I do not share her concern (*ibid.*, 681) that whereas in the 1854 and 1894 statutes the form was in the legislation itself, now it is set by administrative act (see 1993 Regulations, reg. 57), thereby (in her view) rendering the 'no title transfer' concept precarious.

<sup>143</sup> *Keith v Burrows* (1876) 1 C.P.D. 722, affirmed, without comment on this issue, by (1877) 2 App. Cas. 636.

<sup>144</sup> *Keith v Burrows* (1876), 733 per Lord Lindley, giving the judgment of the court.

never been overruled: it has merely come to be disregarded. (Of course, it was never binding in Scotland.)

The modern understanding is much more workable than the title transfer idea. It leaves ownership where it should be. It means that the owner can grant more than one statutory mortgage, and so on. In that case they rank by date of registration,<sup>145</sup> which makes sense, but raises the question whether a statutory mortgage comes into being on delivery of the deed or on registration. The legislation is unclear. According to Clarke, 'it appears to be the case the unregistered mortgages of registered ships are necessarily equitable.'<sup>146</sup> So the conclusion must be that the statutory mortgage as such arises only on registration. If Scots law can ever apply, the result would be that an unregistered mortgage would be like an unregistered security over land, which is to say, no security at all.

### Security Over Ships That Do Not Have Full Registration

The special property rules, including the provisions about statutory mortgages, apply to fully registered ships, but not to ships with simple registration, or to unregistered ships. Such vessels can be used as collateral only by virtue of the general background law.<sup>147</sup> In Scots law that would mean possessory pledge, and nothing else. In English law (which may also be Scots law – see above) there are two additional possibilities. The first is a common law title transfer mortgage, leaving the debtor with an equitable right.<sup>148</sup> The second is equitable security, leaving the debtor with legal ownership, such equitable security itself being either by way of equitable mortgage or equitable charge. A functional problem with the common law mortgage is that it binds third parties even though it is secret.<sup>149</sup> This is a breach of the publicity principle.<sup>150</sup> (The Bills of Sale Acts do impose a certain measure of publicity on

<sup>145</sup> M.S.A. 1995, sch. 1, para. 8. But a statutory mortgage taken in the knowledge of a prior equitable mortgage is not subject to it: *Black v Williams* [1895] 1 Ch. 408. Thus what in Scots law is called the 'offside goals rule' does not apply. Moreover, maritime liens can rank above prior mortgages. See D. R. Thomas, *Maritime Liens* (London, 1980), ch. 9.

<sup>146</sup> Clarke, 684.

<sup>147</sup> Ships unregistered in the U.K. may be registered elsewhere, but that is another story.

<sup>148</sup> *The Shizelle* [1992] 2 Lloyd's Rep. 444. But Clarke (above) disagrees, arguing (at 685) that mortgages of unregistered or simply registered ships are equitable not legal.

<sup>149</sup> See *The Shizelle* [1992] 2 Lloyd's Rep. 444.

<sup>150</sup> In England this principle is weaker than in Scotland. Indeed, even its name is unknown.

secured transactions, but they do not apply to ships.)<sup>151</sup> The Scottish Law Commission is currently considering a new form of non-possessory security. This would not be available for ships with full registration, but would be available for other ships.<sup>152</sup>

### Other Property Rights In Ships

The special property regime in the merchant shipping regime covers ownership and mortgage. Other property rights may exist in ships, whether fully registered, simply registered, or unregistered. There are the various types of maritime lien, which all arise *ex lege* rather than *ex voluntate*. There is the bond of bottomry, which no longer exists in actual maritime practice, and whose survival in the books is perhaps due to its splendid name. There is also the possibility of sale with retention of title, and various types of hire-purchase.<sup>153</sup> Finally there is the charterparty. Does a charterparty have real effect? In particular, does it bind a buyer? The law is unclear,<sup>154</sup> and since it is non-statutory there is the problem of what is the applicable background law. There are parallels here with the law of leases of land and of moveables.

### Conclusion

I will offer just two thoughts as a conclusion to this too-brief study. First, whilst the special property rules in the merchant shipping legislation are attractive in their brevity, and their straightforward language, they leave gaps and uncertainties that could easily be put right. The German legislation on property rights in ships shows that precise and lucid legislation is perfectly possible.<sup>155</sup> Secondly, the international private law of ships is a mess, both between the U.K. and other states, and within the U.K., the latter creating problems about the applicable background property law. This too needs to be resolved.

<sup>151</sup> At any rate, this is the standard interpretation of s.4 of the Bills of Sale Act, 41 & 42 Vict. (1878), c.31.

<sup>152</sup> Scottish Law Commission, *Discussion Paper on Moveable Transactions* (Scot. Law Com. D.P. No. 151, 2011), para. 17.1.

<sup>153</sup> As in *Lombard North Central v Lord Advocate* 1983 S.L.T. 361 (Outer House).

<sup>154</sup> See B. Eder (ed.), *Scrutton on Charterparties and Bills of Lading* (22nd edn, London, 2011), paras 2-059 and 2-060, and the valuable discussion in Clarke (above) at 693-694.

<sup>155</sup> The *Gesetz über Rechte an eingetragenen Schiffen und Schiffsbauwerken* (SchRG), passed at an unpropitious time (15 November 1940).

# Certainty and Security

*Malcolm Clarke*

## Certainty and Security

### (1) *Better Safe than Sorry?*

In 2011 Peter bought accident insurance, mainly for a holiday to New Zealand in 2011.<sup>1</sup> Peter went and there discovered the thrills of bungee jumping. When he hit the water and was hurt he also discovered that it is a dangerous pastime. When he entered an insurance claim for his injury, he discovered that his insurer also thought it was dangerous; so much so that it was excluded from Peter's accident cover.

Petra also bought accident insurance as part of a package holiday to New Zealand. She jumped safely, but when she came home to London and fell on the stairs and claimed, she was told by her insurer that bungee jumping may not have broken her neck but it had broken something called a warranty in her insurance policy; and that when she jumped, weeks before she slipped on the stairs, her insurance cover ended automatically at the time she jumped.

She went to High St. lawyers and after much delay and head scratching they came up with a case about a ship called 'The Good Luck'<sup>2</sup> and told her, 'No chance'. Petra might have gone to the Financial Conduct Authority (FCA),<sup>3</sup> which takes a rather different view of these 'warranties', and, eventually, perhaps after many months of reconsideration by the insurer, her claim might have been paid.

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<sup>1</sup> The original version of this paper was presented in Aberdeen at the event held to honour the life of Angelo Forte. I first met Angelo in the southern hemisphere but I have no reason to think that he was there for bungee jumping. Nor am I sure that he would have agreed with the drift of this paper. Of one thing I am sure: regret that I have missed the chance to debate it with him.

<sup>2</sup> *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd (The Good Luck)* [1992] 1 A.C. 233.

<sup>3</sup> Until 2013 she would have gone to the Financial Ombudsman Service (F.O.S.).

People want freedom, freedom of action which includes freedom to risk their necks in New Zealand. Policyholders want peace of mind and security: the certainty of cover against the slings and arrows of outrageous fortune.<sup>4</sup> But, as has been observed, until they have an accident people don't think of the holes in their underwear – or any other kind of cover.<sup>5</sup>

(2) *Certainty in Contract Law?*

It was the celebrated American judge, Cardozo J, who wrote<sup>6</sup> in 1921 that he was

much troubled in spirit, in my first years on the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience [...] As the years have gone by, and as I have reflected more and more upon the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable

If absolute certainty cannot be reached, it is nonetheless the end of a road that the law should take as far as it reasonably can. 'It is the province of the law of contract to draw the future into the present.'<sup>7</sup> To ring fence the future requires firm points of reference and clear lines. 'The 'great object in every branch of law, but especially in mercantile law, is certainty'.<sup>8</sup> These words of Lord Mansfield have been echoed down the years. Whether in business or in the affairs of consumers, uncertainty of law means cost – in drafting to provide against what the law might mean and, ultimately, in lost opportunities because of what it might not mean, or in litigation to settle what it does mean.

<sup>4</sup> See H. Cousy, 'About Sanctions and the Hybrid Nature of Modern Insurance Contract Law', *Erasmus Law Review*, 5 (2012), 123–31, 123.

<sup>5</sup> When people do respond to risk by buying insurance, frequently they do not understand what they are buying. The persistence of some complainants to the Ombudsmen in the teeth of the wording of their policies shows a stubborn devotion to perceptions of what cover ought to be, rather than what it is. However, evening classes in the interpretation of insurance policies, side by side with scale modelling and Spanish for beginners, are not a serious option.

<sup>6</sup> B. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921), 166.

<sup>7</sup> J. Kohler, *Philosophy of Law*, trans. A. Albrecht (1914; New Jersey, 1969), 136.

<sup>8</sup> J. A. Park, *A System of the Law of Marine Insurance* (6th edn, London, 1809), 202.

In 1992 Lord Goff observed that for businessmen ‘in the end certainty is more important than justice’.<sup>9</sup>

In 2005 Lord Bingham wrote that the general contract lawyer who strays into reinsurance could well feel that he (or of course she) ‘has entered a different world, one where the controversial currency of the natives is to do with fronting and retrocession, treaties and quota shares [...] and scratching of slips. All very baffling. In reinsurance, as in other fields of law, it is of course essential to understand the terms in which business is transacted in the market [...] [But soon] the familiar landscape of contract becomes quickly recognizable: there must be an offer and an acceptance, the terms of the contract must be interpreted, and so on.’<sup>10</sup>

### (3) *Certainty in Insurance Contract Law*

What is true of reinsurance is no less true of primary insurance. The theme of this paper is that insurance contract law is contract law and that it has served some to overemphasise the differences. In the last century or so, many core concepts of law developed new branches. This is partly the complexity that comes with growth; but it is also partly the result of the associated concentration of human time and energy – and the associated ignorance of wider perspectives of law – the ‘high priest syndrome’, that revels in legal mystique, that elevates a narrow view and the associated vice of ignorance into the virtue of specialization. A sub-theme of this paper is that the law is better applied if it is better understood, and that that is more likely to occur if some of the traditional doctrine is kept in its place or, at least in perspective.

Policyholders want peace of mind and security: the certainty of cover against outrageous fortune, on the roads or in the hills. As cover, insurance contract law is neither (sufficiently) certain nor secure. Law is better applied if it is better understood. Insurance contract law should be something which the legal profession recognizes and to which it can relate. At its core the concept remains contract law. The presumption should always be against those who assert that it is or should be different.

Some of us are old enough to recall Lord Denning, his controversial doctrine of fundamental breach, and with it the dictum that a car that will ‘not go is not a

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<sup>9</sup> Opening Address, Second Annual J.C.L. Conference September 1991, *J.C.L.*, 5 (1992), 1–5.

<sup>10</sup> Lord Bingham in his ‘Foreword’ to C. Edelman, A. Burns, D. Craig and A. Nawbatt, *The Law of Reinsurance* (Oxford, 2005).

car at all'.<sup>11</sup> Embellishments there may be, from polished chrome to the massive tyres rolling around circuits such as Monza and Melbourne; but unless they are on something recognisable as a space for the transport of a human being they are not cars. Likewise insurance contracts should be recognisable and, where necessary repairable as contracts by the regular mechanic of the law.

(4) *Lawyers, Mechanics of the Law*

The law, said Williston,<sup>12</sup>

must be applied by men engaged in practical affairs and by so many of them that, to be useful, legal doctrine must be capable of being understood and stated by men who are neither profound scholars nor interested in abstract thought

Insurers are specialists in insurance and some of them know a lot about insurance litigation. Mostly, solicitors are not; and in the field of insurance litigation some are no match for insurers and their legal departments. For most solicitors (and barristers too) insurance law is at best a dim recollection of a chapter tucked away at the end of a course on 'commercial law'. In the current edition of a leading textbook,<sup>13</sup> in a total of just over 1,400 pages there are about 8 pages on the law of insurance, scattered in four different places.

In the UK, for students heading for legal practice, general (non-marine) insurance law is taught in fewer than a handful of university courses.<sup>14</sup> In France, however, there are three institutes of insurance law, the largest in Paris, teaching French insurance law to hundreds of students.<sup>15</sup> In the UK the position is unlikely to change. With diminishing resources to meet the increasing demands of other, often more novel and more fashionable, options, more space in the university syllabus for insurance law is unlikely.

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<sup>11</sup> *Karsales (Harrow) Ltd v Wallis* [1956] 2 All E.R. 866, 869 per Birkett L.J. (C.A.), quoted with approval by Holroyd Pearce L.J. in *Yeoman Credit Ltd v Apps* [1962] 2 Q.B. 508, 517.

<sup>12</sup> S. Williston, *Some Modern Tendencies in the Law* (New Haven, 1929), 127.

<sup>13</sup> E. McKendrick (ed.), *Goode on Commercial Law* (4th edn, London, 2009).

<sup>14</sup> At undergraduate (LLB) level, in early 2013, Sheffield University had 25 students but the number has increased since; at Manchester University, the number is about 60. At postgraduate (LLM) level programmes exist at Queen Mary (London) and Southampton University.

<sup>15</sup> In Frankfurt, however, the number is about 30.



Lawyers in practice have to make do with what training they have got; and as regards insurance disputes, that means, mainly, the law of contract. How well equipped they are for the task depends significantly on what we mean by insurance contracts and to what extent insurance contracts really require special skills.

(5) *The Special Nature of Insurance Contracts*

There is an element of insurance in any measure taken or promised against any kind of adverse event. This is true of any promise to compensate a loser or even to help with repair or maintenance of a house; this is what the law recognizes as an assumption of risk. Clearly, all insurance involves assumption of risk but not all contractual promises dealing with adverse events are insurance, so what is insurance?

An experienced judge of yesteryear once referred sweepingly to 'those who are generally accepted as being insurers'.<sup>16</sup> An experienced commercial judge of the same era thought definition undesirable because 'definitions tend sometimes to obscure and occasionally to exclude that which ought to be included'.<sup>17</sup> In any event definition has proved very difficult,<sup>18</sup> and the inevitable question is, is definition really necessary?

<sup>16</sup> *Medical Defence Union Ltd v Dept of Trade* [1980] Ch. 82, 97 per Megarry V.C.

<sup>17</sup> *Department of Trade & Industry v St Christopher Motorists' Assn* [1974] 1 Lloyd's Rep. 17, 18 per Templeman J..

<sup>18</sup> E.g. if a policyholder's computer 'goes down', a business interruption insurer may provide computer back-up so that the business can continue, as well as cash indemnity for business lost nonetheless. Alternatively, the business may call on the computer supplier to pay compensation for breach of contract. Why is that not insurance?

To distinguish the secondary promise of a contractor to pay damages, one answer is that the archetypal insurance promise must concern an adverse event outside the control of either party, something which neither party, notably the policy-holder, has in any sense brought about. That is correct but still not enough, because that is also true of some ordinary contracts. The failure of the computer, for which the supplier is liable, may well be due to components defectively assembled many thousands of miles away for which the promisor (supplier) has assumed responsibility.

An alternative and more helpful answer to the question is found in the U.S.A. (to draw a line between insurance and product guarantees). This is the 'principal object' test, which is also referred to as the primary or dominant purpose test. Clearly, a product guarantee is ancillary to the sale of the product which is what characterises the transaction and distinguishes it from insurance. Moreover, the test has been applied there to distinguish health insurance from the provision of medical services. Inevitably there will be some argument (and hence uncertainty) about what is primary; in England see *Fuji Finance Inc. v Aetna Life Ins. Co. Ltd* [1997] Ch. 173 (C.A.).

The Financial Services and Markets Act 2000, c.8, purported to define insurance for the purposes of the Act but arguably does not do so: M. A. Clarke, *The Law of*

(6) *Similarities with Contract Law*

Arguably, a number of similarities are in place.

(a) *Formation*

Insurance contracts are concluded like other contracts. Acceptance meets offer or counter-offer in the usual way. Even at Lloyd's the customary market rituals have been squeezed into the template of offer and acceptance.<sup>19</sup> Apart from marine contracts, no special form is required.

(b) *Performance*

Sooner or later the performance on each side involves the payment of money. The policyholder pays premium; apart from special rules about the recovery of premium, the rules applying to the payment of premium are the general rules of law on the payment of money.<sup>20</sup> When the courts have sought to soften the consequences of non-payment, such as property forfeiture, they have done so with general rules of law such as waiver.<sup>21</sup>

The insurer too pays money – but only sometimes: performance by insurers is mainly the provision of ‘cover’ – a promise of payment in the event of a stated contingency. However, if insurers do pay and pay too much, they can recover the excess, and mostly the rules of recovery are rules of the law of contract or of the law of restitution.<sup>22</sup>

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Insurance Contracts (6th edn, London, 2009), chs 1-1(b).

<sup>19</sup> See e.g. *General Reinsurance Corp. v Forsak Fennia Patria* [1983] Q.B. 856 (C.A.).

<sup>20</sup> Clarke (above note 18), ch. 13.

<sup>21</sup> These rules are not clear and entire books have been published on them: e.g. S.Wilken and T. Villiers, *Waiver, Variation and Estoppel* (London, 1998).

Unsurprisingly, the rules have given rise to doctrinal division. According to Lord Diplock waiver arises when a person is entitled to alternative rights inconsistent with one another, typically to rescind or affirm a contract, and that person chooses one rather than the other. In contrast, estoppel debars a person from raising a defence to a claim: *Kammins Ballrooms Co. Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850, 882–3.

Speaking of waiver (or election) Lord Goff said that the principle ‘applies when a state of affairs comes into existence in which one party becomes entitled to exercise a right, and has to choose whether to exercise that right or not’ (*The Kanchenjunga* [1990] 1 Lloyd’s Rep. 391, 399 (H.L.)) or, as Rix L.J. put it more recently, the issue ‘arises where the parties to a contract have to know where they stand’: *Kosmar Villa Holiday v The Trustees of Syndicate 1243* [2008] E.W.C.A. Civ. 147, [38]. When, however, at a time *before* the party must choose one right or the other, that party indicates that it *will* not insist on a right, that is a case of estoppel. For discussion of the issue in the context of insurance contract law see Clarke (above note 18), ch. 26–4.

<sup>22</sup> If insurers provide services or things in lieu, they are liable under the general law

(c) *Product description*

Cover, as an insurance ‘product’, is different from what is sold in a supermarket, but one important similarity in the law lies in the specification: the kind of product, its quality, and contents, a matter of interpretation. Insurance contracts are interpreted like other contracts.<sup>23</sup> Thus, presumptively, words that are used to describe cover are used in their ordinary sense; they are given their natural meaning,<sup>24</sup> their primary meaning in ordinary speech.<sup>25</sup>

(7) *Differences*(a) *Context*

One exception to the similarities in the application of rules of interpretation (above 6c)) can be seen in the context in which they are used. The ‘meaning of words is so sensitive to syntax and context’ that ‘the natural meaning of words in one sentence may be quite unnatural in another’.<sup>26</sup>

(b) *Causation*

Another difference might be found in the insurance rule of causation, which is often regarded as a rule of interpretation. For an event to be covered by insurance, the event must be the ‘proximate cause’ of the loss; the two must be closely connected;<sup>27</sup> in the background here is the desire of insurers for predictable levels of exposure to risk.<sup>28</sup>

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applicable, for example, to shops that sell goods or dealers that sell motor vehicles.

<sup>23</sup> E.g. *Charter Re. Co. Ltd v Fagan* [1996] 1 Lloyd’s Rep. 261, 266 (C.A.). In particular, construction must give effect to the intention of the parties: *M’Cowan v Baine & Johnson* [1891] A.C. 401, 403; see also *Deutsche Genossenschaftsbank v Burnhope* [1996] 1 Lloyd’s Rep. 113, 122 (H.L.). As regards the interpretation of insurance contracts see Clarke (above note 18), ch. 15.

<sup>24</sup> *Thomson v Weems* (1884) 9 App. Cas. 671, 687. As regards contracts in general see K. Lewison, *The Interpretation of Contracts* (5th edn, London, 2011), para. 5.01

<sup>25</sup> *Charter Re. Co. Ltd v Fagan* [1997] A.C. 313. However, there is a presumption that any word that has an established meaning in some other part of the law is used in the same sense in insurance contracts; in this sense in Australia, taking into account the law of England and of the U.S.A.: *Johnson v American Home Assurance Co.* [1998] H.C.A. 14, [19].

<sup>26</sup> *Charter Reinsurance Co. Ltd v Fagan* (above), 391 per Lord Hoffmann. In particular see *Investors Compensation Scheme Ltd v West Bromwich B.S.* [1998] 1 W.L.R. 896 (H.L.); and the importance attached to the particular ‘commercial context’ in e.g. *The Kleovoulos of Rhodes* [2003] E.W.C.A. Civ. 12, [38].

<sup>27</sup> The connection must be closer than, e.g., the reasonable foreseeability of tort law.

<sup>28</sup> In this connection Clarke (above note 18), ch. 25 argues, by reference to *Leyland Shipping Co. Ltd v Norwich Union Fire Ins. Sy Ltd* [1918] A.C. 350, that the proximate cause is the event, whether peril or exception, which, in all the circumstances prevailing at the

(c) *Insurance Risks*

Some key concepts, risks covered, such as ‘fire’ and ‘all-risks’ have acquired a crust of case law which gives them their own colour, and this, of course, is the colour of the insurance context.<sup>29</sup> On the other hand, it is a general rule of interpretation that words take colour from their context, and that trade meanings are respected.<sup>30</sup>

## 8. Grey Areas

(a) *Intermediaries*

The work of insurance intermediaries, whether they act for insurers or for buyers of insurance, is governed by the general law of agency. Although the law is sometimes ignored in practice, it has been supplemented recently by regulation, which looks strange<sup>31</sup> at first but in substance much of this brings practice back in line with the general law.

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time of the event, led inevitably to the kind of loss in question; and that, if so, the full extent of that kind of loss will be recoverable, if although not inevitable at the time, it was not unlikely to result, a natural consequence in the circumstances: *Reischer v Borwick* [1894] 2 Q.B. 548 (C.A.) and *Leyland* (above), 362.

An alternative view is that causation is simply a matter of common sense. Indeed, although ‘it is impossible to characterise any principles on which common sense proceeds’ (H. L. A. Hart and T. Honore, *Causation in the Law* (2nd edn, Oxford, 1985), 26) causation based on common sense has become popular with some senior judges such as Lord Saville in *Global Process v Syarikat Takaful Malaysia Berhad* [2011] U.K.S.C. 5, [46]. On the other hand, Lord Mustill once pointed out that common sense for one person may be uncommon sense for another ([1997] L.M.C.L.Q. 488, 500) and the approach of Lord Mance in *The Kos* [2012] U.K.S.C. 17, [48] was essentially analytic rather than reliant on common sense.

<sup>29</sup> Particular problems are posed by certain categories of insurance term which are (or were) confusing in their apparent similarity. Notably, ‘warranties’ have been understood quite differently in insurance contracts. Even so, as regards warranty breach the House of Lords brought insurance law back into the broad line of general contract law in *The Good Luck* [1992] 1 A.C. 233. Moreover, there are moves to change the law. As regards consumers see the Consumer Insurance (Disclosure and Representations) Act 2012, c.6; as regards non-consumers see Law Commission and Scottish Law Commission, *Insurance Contract Law: The Business Insured’s Duty of Disclosure and the Law of Warranties: A Joint Consultation Paper* (Law Com. C.P. No. 204, 2012; Scot. Law Com. D.P. No. 155, 2012). In Europe the English insurance warranty is completely unacceptable: see the ‘Principles of European Insurance Contract Law’ (P.E.I.C.L.), Art. 4:101 and the Comments on Art. 4:101: <http://www.restatement.info/>, accessed 16 May 2015.

<sup>30</sup> E. Peel (ed.), *Treitel: The Law of Contract* (13th edn, London, 2011), para. 6.006 ff; Clarke (above note 18), chs 15–2B.

<sup>31</sup> I.C.O.B.S. (*Insurance: New Conduct of Business Sourcebook*): <http://fshandbook.info/FS/html/FCA/ICOBS>, accessed 16 May 2015.

(b) *Reasonable Expectations*

One obstacle to the argument for common concepts might be a rule of construction that refers to the 'reasonable expectations' of the weaker party, here the policyholder. Such a rule can be found in nineteenth century Scotland<sup>32</sup> and once flourished in the U.S.A..

In England courts have been slow to take this line as it leads to uncertainty. The 'weakness of the reasonable expectation principle is its dependence on the notion of reasonableness. Despite many judicial expeditions to find him, the reasonable man has not been reduced to captivity. In truth, as any man on the Clapham omnibus could tell us, the reasonable man does not exist at all'.<sup>33</sup> Whereas the rule has faded in the U.S.A., there are cases in England, cases from general contract law, that might converge to produce such a rule.

There are cases where a contractual document is taken to say what it is represented as saying.<sup>34</sup> So, if an insurance intermediary leads an applicant to expect a policy with term X, when in reality it contains term Y, it may be enforced as if it contained X rather than Y, for that is what the applicant might (reasonably) expect.<sup>35</sup>

The profferor of contract terms is not allowed to rely on clauses misleadingly presented by the document itself,<sup>36</sup> to take an insurance case, 'tucked away at the end of the policy' on offer.<sup>37</sup>

Some expectations cases, groundbreaking in the USA,<sup>38</sup> resemble the dated Denning doctrine of fundamental breach operative when a seller delivers something fundamentally different from what was contracted for, which survives

<sup>32</sup> *Sangster's Trustees v General Accident Assurance Corp. Co. Ltd* (1896) 24 R. 56; (1896) 4 S.L.T. 163.

<sup>33</sup> J. H. Baker, 'From Sanctity of Contract to Reasonable Expectation', *C.L.P.*, 32 [1979], 17, 33; see also *Lavarack v Woods* [1967] 1 Q.B. 278, 294 per Diplock L.J. (C.A.). More recently Mustill L.J. raised doubts about a contention of this kind: if 'traces of such a doctrine can be discerned it is because [...] certain sorts of insurance are "sold like any other product and should be subject to the same rules of law." Anything further from the present case would be hard to imagine': *Smit Take Offshore Services Ltd v Youell* [1992] 1 Lloyd's Rep. 154, 159 (C.A.); the case concerned umbrella liability insurance in respect of marine salvage and towage services.

<sup>34</sup> *Curtis v Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805 (C.A.); Treitel (above note 30), para. 7.040.

<sup>35</sup> Clarke (above note 18), ch. 8.3C.

<sup>36</sup> *Ryan v Oceanic S.N. Co. Ltd* [1914] 3 K.B. 731, 747–8 per Vaughan Williams L.J. (C.A.); e.g. inconspicuously: *Stephen v International Sleeping-Car Co. Ltd* (1903) 19 T.L.R. 621.

<sup>37</sup> *Woolfall & Rimmer Ltd v Moyle* [1942] 1 K.B. 66, 73 per Lord Greene, M.R., (C.A.).

<sup>38</sup> E.g. *Kieviet v Loyal Protective Life Ins. Co.*, 170 A. 2d. 22 (N.J., 1961); in the U.S.A. the doctrine has waned: Clarke (above note 18), chs 15–5B1

in substance today as a rule of construction.<sup>39</sup> It is sometimes known as the doctrine of repugnancy,<sup>40</sup> under which name its possible application has been accepted by a prominent member of the Court of Appeal in an insurance case.<sup>41</sup>

Last but not least, Lord Steyn once reminded us that a ‘theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract’.<sup>42</sup> This may be why Lord Lloyd said in *Cook*<sup>43</sup> that a certificate of insurance ‘must be construed in the sense in which it would have been reasonably understood by him as the consumer’. When speaking of the reasonable expectations of honest men, however, Lord Steyn did not tell us who they were or how to recognise them. Nonetheless judges today should be equal to the task.

Judges have sought with some success for the reasonable man in the law of tort. On the question of breach of duty, ‘it is well established law’, said a senior judge in a medical negligence case, that it is sufficient if a person ‘exercises the ordinary skill of an ordinary competent man exercising that particular art’.<sup>44</sup> In tort different standards are applied, not to individuals (one for Dr Jekyll another for Mr Hyde) but to different types of person – according to the type

<sup>39</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827

<sup>40</sup> A related and perhaps more general notion is that an exemption clause will be construed so as not to defeat the main purpose of the transaction: *Neuchatel Asphalte v Barnett* [1957] 1 W.L.R. 356, 360 (C.A.). In the world of insurance it has been held that a reinsurance contract must be construed so as not to be inconsistent with the concept of reinsurance: *Forsik Vesta v Butcher* [1989] 1 A.C. 852, 895; reinsurance is one of the most specialised realms of insurance but essentially it is nonetheless contract law and contract interpretation applied in a special market context. *Idem* as regards accident insurance: *Cornish v Accident Ins. Co.* (1889) 23 Q.B.D. 452, 456 per Lindley L.J. (C.A.).

<sup>41</sup> Longmore L.J. in *Great North Eastern Ry v Aron* [2001] All E.R. (Comm.) 526, [31], with whom the other members of the Court of Appeal agreed. The argument, that an exception was so extensive as to deprive the insured of any cover for breakdown under an insurance (of material damage) that was intended to cover breakdown, was said to be potentially applicable but rejected on the proper interpretation of the policy.

<sup>42</sup> *First Energy (U.K.) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd’s Rep. 194, 196 (C.A.), a banking case; see also Johan Steyn, ‘Contract Law: Fulfilling the Reasonable Expectations of Honest Men’, *L.Q.R.*, 113 (1997), 433. Moreover, The Insurance Ombudsman Bureau approached insurance contracts with these words as its ‘guiding light’ I.O.B. Report 1993.6.1.

<sup>43</sup> *Cook v Financial Ins. Co.* [1998] 1 W.L.R. 1765, 1768 per Lord Lloyd. Lord Steyn and Lord Hope agreed. The case concerned a self-employed builder with disability insurance and a certificate of that insurance.

<sup>44</sup> Glidewell L.J. in *Wilsher v Essex Area Health Authority* [1987] Q.B. 730, 774 (C.A.), citation omitted; appeal allowed but on different grounds: [1988] A.C. 1074.

of person defendants purport to be.<sup>45</sup> English courts are well accustomed to this exercise, and in the insurance context might well be required to consider what is to be expected of the ‘reasonable applicant’ of *the kind in question*. Thus higher standards might be expected of doctors contracting health insurance, plumbers buying house insurance, solicitors and their professional indemnity insurance, and indeed of any kind of person who is advised by a qualified broker or insurance intermediary.<sup>46</sup>

### (c) *Vitiation*

What vitiates other contracts, notably mistake and misrepresentation, also vitiates insurance contracts, and in the same way. Strikingly, however, insurance contracts are also vitiated by non-disclosure of information material to the risk at the time of assessment of the risk by the insurer; historically this is a very special rule of insurance law.<sup>47</sup> The rule is an aspect of the insurance duty of good faith. In theory the duty is mutual; in practice the insured is the party most burdened by the duty and often has little idea about what it entails and what should have been done to perform the duty.<sup>48</sup>

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<sup>45</sup> Such as a surgeon (*Whitehouse v Jordan* [1980] 1 All E.R. 650 (H.L.)), a professional footballer (*Condon v Basi* [1985] 1 W.L.R. 866 (C.A.)), an amateur carpenter (*Wells v Cooper* [1958] 2 Q.B. 265 (C.A.)) and so on.

<sup>46</sup> If so the idea might well be not unacceptable to the legal profession. In a ‘keynote’ speech at a conference on insurance law reform (at 2 Temple Place, London, 18 May 2007) Sir Bernard Rix observed that ‘one great advantage, among others, of a principle of materiality that depends in part on the expectations of the reasonable insured is that it is sensitive to different groups of insureds’.

<sup>47</sup> Spencer Bower’s treatise, *The Law Relating to Actionable Non-disclosure and Other Breaches of Duty in relations of Confidence, Influence and Advantage* (London, 1915) set out a general principle of disclosure on the basis that it applied to most kinds of contract. In the second edition of that work, not published until 1990, the authors had retreated from such a general view of the impact of non-disclosure: A. K. Turner (ed.), *The Law Relating to Actionable Non-Disclosure and Other Breaches of Duty in relations of Confidence, Influence and Advantage* (2nd edn, London, 1990).

<sup>48</sup> People tend to sign application papers and ‘hope for the best’. Although Clauson L.J. once referred to the ‘duty’ of a motor insurer to make clear any term adverse to the insured (*English v Western* [1940] 2 K.B. 156, 165 (C.A.)) any such doctrine appears to have sunk with the rise of insurance brokers and insurance intermediaries and their duty to advise customers about such matters. Cf., however, P.E.I.C.L. (above note 29), Article 202 (1) whereby insurers are obliged to warn applicants about ‘any inconsistencies between the cover offered and the applicant’s requirements of which the insurer is or ought to be aware, taking into consideration the circumstances and mode of contracting and, in particular, whether the applicant was assisted by an intermediary’.



In this situation policies often contain clauses more or less concerned with alteration of the risk, which, if applied, make the duty yet more burdensome. Some require disclosure, for example, of ‘any alteration after the commencement of this insurance [...] whereby the risk of destruction or damage is increased’, perhaps by stipulating for termination of the contract unless the requirement be met.<sup>49</sup> Courts construe these strictly.<sup>50</sup> Alternatively, policies may require notice in writing to the insurer of, for example, ‘any alteration likely to increase the risk of loss or damage to the property insured’. Here too construction has been strict.<sup>51</sup>

The insurance rule of good faith is not that which is beginning to emerge in the general law of contract; the latter is more general and goes beyond disclosure.<sup>52</sup> However, it may well be that the absorption of the narrow insurance rule in a wider rule for all contracts is a real prospect.<sup>53</sup>

#### (d) *Liability*

When insurers raise defences to claims, such as non-disclosure on the part of the policyholder, that is often countered by legal argument based on waiver or estoppel<sup>54</sup> – a response often heard in relation to other kinds of contract.

To enforce claims for money, in the case of contingency insurance such as life insurance, the action is the ordinary action in debt. Claims for money due under indemnity insurance,<sup>55</sup> however, are another matter. Insurance

<sup>49</sup> E.g. *Exchange Theatre Ltd v Iron Trades Mutual Ins. Co. Ltd* [1984] 1 Lloyd’s Rep. 149 (C.A.).

<sup>50</sup> E.g. *Scottish Coal Co. v Royal & Sun Alliance Ins. P.l.c.* [2008] E.W.H.C. 880 (Comm.).

<sup>51</sup> See *Hussain v Brown* (No. 2) (1997) 9 I.L.M. 4, as reviewed in *Kausar v Eagle Star Ins. Co. Ltd* [1997] C.L.C. 129 (C.A.). Cf. however *Qayyum Ansari v New India Assurance Ltd* [2009] E.W.C.A. Civ. 93, [2009] Lloyd’s Rep. I.R. 562; also P.E.I.C.L. (above note 29) in which Articles 4:201 ff provide for the possibility of alteration of risk.

<sup>52</sup> See *Socimer v Standard Bank London* [2008] E.W.C.A. Civ. 116, [2008] 1 Lloyd’s Rep. 558, [116], where Gloster J. stated that the ‘requirements of good faith and rationality are a sufficient protection’; *Compass Group v Mid Essex Hospital Services N.H.S. Trust* [2013] E.W.C.A. Civ. 200, [2013] B.L.R. 265, [82]; *Charles Stanley v Adams* [2013] E.W.H.C. 2137 (Q.B.); and *Yam Seng Pte Ltd v Int. Trade Corp. Ltd* [2013] E.W.H.C. 111 (Q.B.), [2013] 1 Lloyd’s Rep. 526. A similar view has been expressed in Australia by the President of the New South Wales Court of Appeal, James Allsop, ‘Good faith and Australian contract law’, *A.L.J.R.*, 85 (2011), 341.

<sup>53</sup> In England orthodoxy still maintains that there is no general doctrine of good faith: Treitel (above note 30), 7.102.

<sup>54</sup> M. Clarke, *Policies and Perceptions of Insurance in the 21<sup>st</sup> Century* (Oxford, 2005), 110 ff.

<sup>55</sup> The assessment of loss under the basic rule of indemnity, according to which policyholders recover no more than their actual loss, is very similar to the principle of indemnity in tort; in *Scottish Coal Co. v Royal & Sun Alliance Ins. p.l.c.* [2008] Lloyd’s



contract law was eccentrically out of line – until the question of damages under the general law, damages payable for failure to pay money, came before the House of Lords in 2007. In *Sempra*<sup>56</sup> the House held, in the words of Lord Nicholls,<sup>57</sup> ‘that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth’.

However, this welcome reform of the general law does not, without more, touch failure to pay insurance money; but from August 2016, the blot will have been erased by the insertion of an amendment to the Insurance Act 2015 in the Enterprise Act 2016: s.13A of the 2015 Act will read: it is an ‘implied term of every contract of insurance that if the insured makes a claim under the contract, the insurer must pay any sums due in respect of the claim within a reasonable time.’ It also refers to remedies for breach which include damages.

### The Role of Contract Law

The general law, for present purposes mostly the law of contract, provides a frame of reference from which, by education, inclination, and tradition, the common lawyer proceeds. The general law also provides a substratum from which the judge can draw where a rule of ‘insurance law’ is not apparent. This is not a weakness of insurance law but a source of strength. It is not sticking plaster; it is a standard procedure because it is desirable ‘that the same legal principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law’.<sup>58</sup>

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Rep. I.R. 718, for example, in respect of an indemnity claim for material damage to equipment in a coal mine, David Steel J. referred to *Leppard v Excess* [1974] 1 W.L.R. 512 and said (at [119]) the ‘starting point must be the market value of the equipment’ and sought to apply that rule to the facts. See also *Dominion Mosaics & Tile Co. Ltd v Trafalgar Trucking Co. Ltd* [1990] 2 All E.R. 246 (C.A.).

<sup>56</sup> *Sempra Metals Ltd v I.R.C.* [2007] U.K.H.L. 34, [2008] 1 A.C. 561; M. Clark, ‘Compensation for Failure to Pay Money Due: a “Blot on English Common Law Jurisprudence” partly removed’, *J.B.L.*, [2008], 291.

<sup>57</sup> *Sempra*, [93]–[94]. Lord Nicholls was delivering the leading judgment of the majority on this point.

<sup>58</sup> *The Hansa Nord, Cehave N.V. v Bremer Handelsgesellschaft m.b.H.* [1976] 1 Q.B. 44, 71 (C.A.) per Roskill L.J.

It is desirable because the common law tradition, surely, is the promotion of certainty in commerce, albeit one that is never to be perfectly achieved. The doubts of the celebrated American judge, Cardozo J., were mentioned at the beginning, together with the realistic hesitation of Lord Mansfield.<sup>59</sup> Whether in business or in the affairs of consumers, uncertainty of law means cost – cost in drafting to provide against what the law might mean or in litigation to settle what it does mean. No surprise that, speaking in Australia, Lord Goff once observed that for businessmen ‘in the end certainty is more important than justice’.<sup>60</sup>

Be that as it may, certainty is sought and sought in various ways. For example, Lord Steyn once stated that ‘the objective of the construction is to give effect to the intention of the parties. But our law of construction is based on an objective theory. The methodology is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention [. . .] It is therefore wrong to speculate about the actual intention of the parties in this case’.<sup>61</sup> Similarly, a leading Australian judge, Mason, was reported as saying that the actual intention of the parties is not taken into account because ‘an actual investigation of these matters would not only be time consuming but would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the contract’,<sup>62</sup> and, we may add, the effect on others.

According to a writer in the *Financial Times* (early 2013) an economist is someone ‘who will explain to you tomorrow why what they forecast yesterday didn’t happen, today’.<sup>63</sup> Persons playing the markets are not the only ones who want some kind of (relative) certainty; they are joined in this by people concerned about risk. However, Lord Diplock once (famously) said that ‘The beauty of the common law is that it is a

<sup>59</sup> Recorded by J. A. Park in *A System of the Law of Marine Insurance* (6th edn, London, 1809), 202.

<sup>60</sup> ‘Opening Address (Conference in Australia 9/1991)’, *J.C.L.*, 5 (1992), 1, 3. The cricketer Shane Warne did not comment. See also in this sense ‘Good faith and Fairness in Commercial Contract Law’, *J.C.L.*, 7 (1994), 193, 194 per Staughton L.J..

<sup>61</sup> *Deutsche Genossenschaftsbank v Burnhope* [1996] 1 Lloyd’s Rep. 113, 122 (H.L.).

<sup>62</sup> *Codefca Construction Pty Ltd v State Rail Authority of N.S.W.* (1982) 149 C.L.R. 337, 353 per Mason J.. Thus a clause common in professional indemnity policies, will be interpreted as applicable to ‘a reasonable person in the Insured’s professional position’: *C.G.U. v Porthouse* [2008] H.C.A. 30, [74].

<sup>63</sup> Mr Robin Lustig, Letter to F.T. (5 January 2013), available via <http://www.ft.com/cms/s/0/5a872d24-542b-11e2-9d25-00144feab49a.html#axzz38wz4lFCt>.

“maze and not a motorway”. A telling observation. Given that most people regard beauty as being in the ‘eye of the beholder’ and, I suggest, that lawyers should not regard his view as one with which to be content, not least lawyers in the world of insurance.

# Economic Frustration Revisited

*Ewan McKendrick*

## Introduction

In an article published in the *Juridical Review* in 1986, Angelo Forte examined the law relating to the economic frustration of commercial contracts.<sup>1</sup> While reluctant to define economic frustration, he did provide the following working definition: ‘the event alleged to constitute economic frustration must be more radical or fundamental in nature than the sort of risk normally run when contracting.’<sup>2</sup> His aim in writing the article was not to ‘provide a detailed analysis of the theoretical basis of frustration.’<sup>3</sup> His concern was rather more pragmatic, namely that the doctrine of frustration at that time did ‘not readily meet the needs of commercial men.’<sup>4</sup> Given his view that ‘it is the avowed objective of the law not to put difficulties in the way of businessmen’,<sup>5</sup> it is not surprising to find that he argued in that article for changes to be made to the doctrine of frustration in order to bring it into line with his perception of the needs of the world of business. He suggested that the doctrine of frustration should be developed in two principal respects. The first was a broadening of the scope of the doctrine so as to recognise ‘in principle that economic distortion of a contractual obligation can justify adjustive judicial intervention.’<sup>6</sup> This was not to suggest that every change in economic circumstances should warrant judicial intervention. But he did suggest that there comes a point, and that point may be difficult to identify with precision, where the event which has occurred or the consequences of that event are ‘more radical or

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<sup>1</sup> A. Forte, ‘Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom’, *Juridical Review*, [1986], 1–24.

<sup>2</sup> *Ibid.*, 4.

<sup>3</sup> *Ibid.*, 1.

<sup>4</sup> *Ibid.*, 3.

<sup>5</sup> *Ibid.*, 20.

<sup>6</sup> *Ibid.*, 18.

fundamental in nature than the sort of risk normally run when contracting.<sup>7</sup> The second point related to the form of that judicial intervention. It was not to be confined to the termination of the contract, still less its automatic termination. Rather, the courts should have broader powers to adjust or adapt the contract to the changed circumstances. The two points are closely linked. The utility of broadening the doctrine of frustration, but retaining the current rule of automatic termination of the contract, is dubious and it was not a proposal which Forte supported.

Thirty years after the publication of that article, it is perhaps timely to revisit the issue of the ‘economic frustration of commercial contracts’. Much water has passed under the bridge since then. Two developments are worthy of particular note by way of introduction. First, the world has been through a major recession which has been both deeper and longer than many had anticipated and certainly greater than would have been anticipated in the 1980s, even after account is taken of the financial challenges faced by the UK in the 1970s and 1980s. Long-established companies, many of them retailers on the high street, have recently disappeared. More surprising has been the financial difficulties experienced by major banks and currencies, difficulties which were not on the horizon in 1986. The recession has brought before the courts a small handful of cases in which the courts have been required to consider whether to set aside, or to adjust, commercial contracts which have turned out to be losing bargains for one of the parties to the contract. Second, the comparative landscape has been altered by the publication of the Principles of European Contract Law, the Unidroit Principles of International Commercial Contracts, the Draft Common Frame of Reference and the proposed Common European Sales Law. These have been notable times for European private lawyers. No longer are we confined to comparisons drawn between the laws of various nation states, as was the case when Forte wrote his article. We now have transnational legal instruments on which we can draw in the development of domestic as well as transnational contract law.

In order to illustrate some of the themes of this essay, I will consider the decision of the Supreme Court in *Lloyds T.S.B. Foundation for Scotland v Lloyds Banking Group p.l.c.*<sup>8</sup> and also the judgements given in that litigation in both

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<sup>7</sup> Ibid., 4.

<sup>8</sup> [2013] 2013 S.C. (U.K.S.C.), 169. See further, Man Yip and Yihan Goh, ‘Dealing with Unforeseen Circumstances – Contractual Construction and Equitable Adjustment’, *Journal of Business Law*, [2014], 83. For comment on the decisions of the Outer and Inner House of the Court of Session respectively, see L. Macgregor ‘Long-Term Contracts, the Rules of Interpretation and “Equitable Adjustment”’, *Edinburgh Law*

the Outer and the Inner House of the Court of Session. The analysis will proceed in four stages. At the first stage I will deal with the demise of equitable adjustment in Scots law, if demise is the right word for a doctrine which may never have existed. At the second stage I will consider the current state of the law relating to frustration in general and economic frustration in particular. Third, I will consider the rise of what I term ‘alternative techniques’, in particular the development of broader principles which the courts can deploy when seeking to interpret commercial contracts, the effect of which may be very similar to that produced by the application of a doctrine of economic frustration as envisaged by Forte. Finally, I shall consider developments in comparative law in general and European private law in particular.

### The Demise Of Equitable Adjustment

The case which is sometimes cited in support of the proposition that Scots law gives to the court a more flexible power to adapt a contract which has become unexpectedly burdensome to perform is the old case of *Wilkie v Bethune*.<sup>9</sup> The pursuer was employed by the defender, a farmer. Under the terms of his contract, payment to the pursuer was to be made in money and in the form of a specified quantity of potatoes. The pursuer sought to enforce the defender’s promise to supply him with the promised quantity of potatoes. The defender had not supplied the pursuer with the potatoes after the failure of the potato crop and instead offered him payment of a sum which was sufficient to enable the pursuer to purchase substitute food which was not in such scarce supply (and therefore not as expensive). It was held that the pursuer was not entitled to enforce the defender’s promise to supply him with potatoes, nor was he entitled to be paid by reference to the then market price of potatoes. Instead, he was held to be entitled to be paid a sum which would enable him to purchase an equivalent amount of substitute food.

To the extent that the existence of a doctrine of equitable adjustment is based on the authority of the decision in *Wilkie v Bethune*, the case cannot carry the weight of that expectation. The reasoning in the case is both divergent and lacking in clarity and the judgements contain references to the unsatisfactory procedural history of the case. Thus, in *Lloyds T.S.B. Foundation for Scotland v*

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*Review*, 16 (2012), 104; S. Bogle, ‘Where Sympathy Lies in Contractual Interpretation: “But What’s Puzzling You, is the Nature of my Game”’, *Edinburgh Law Review*, 16 (2012), 242.

<sup>9</sup> (1848) 11 D. 132.

*Lloyds Banking Group*,<sup>10</sup> Lord Glennie stated that ‘each of the judges [in *Wilkie*] seems to have decided the case on different grounds’,<sup>11</sup> while in the Inner House of the Court of Session Lord President Hamilton described *Wilkie* as ‘an extraordinary case’<sup>12</sup> from which no general principle could be derived.

It would, however, appear that the doctrine of frustration was before the court in *Wilkie*. Evidence for this can be derived from the reference to the third edition of *Chitty on Contracts* where the topic under discussion was ‘of excuses of performance in general’.<sup>13</sup> But it is important to note that the doctrine of frustration there discussed was not the one that English law now recognises. *Wilkie* was decided in 1848 and the leading English authority at that time was *Paradine v Jane*,<sup>14</sup> according to which a change of circumstances did not in general excuse a party from its obligation to perform its contractual obligations, even in the case where performance had become impossible. It was not until 1863, in the case of *Taylor v Caldwell*,<sup>15</sup> that English law recognised a more liberal doctrine of frustration (albeit one that continued to operate within relatively narrow bounds). Thus, when Lord McKenzie in *Wilkie* stated that Mr Chitty’s doctrine was ‘too unqualified’,<sup>16</sup> his reference was to a doctrine which would not have given the farmer a defence to the pursuer’s claim but would have held the defender to his promise to supply the pursuer with the promised quantity of potatoes. Lord McKenzie’s reference to *Chitty* would therefore seem to imply that he was unhappy with the proposition that the parties were to be held to their bargain (as would have been the case in English law) and that he wished to find a more flexible outcome. The court found that more flexible outcome in its conclusion that the defender was not obliged to supply the pursuer with the promised amount of potatoes but could fulfil that obligation by providing him with payment to obtain an alternative food supply.

On what basis did the court conclude that the obligation to supply potatoes could be performed by the payment of a sum of money which was not calculated by reference to the market value of potatoes? The answer is not entirely clear. Forte recognises that *Wilkie* is ‘not, strictly speaking, a

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<sup>10</sup> [2011] C.S.O.H. 105, 2012 S.L.T. 13.

<sup>11</sup> *Ibid.*, [90].

<sup>12</sup> [2011] C.S.I.H. 87, 2012 S.C. 259, [27].

<sup>13</sup> *Chitty on Contract* (3<sup>rd</sup> edn, London, 1841), 735.

<sup>14</sup> (1647) Ayleyn 26. See more generally, G. H. Treitel, *Frustration and Force Majeure* (London, 3<sup>rd</sup> edn, 2013), ch. 2.

<sup>15</sup> (1863) 3 B. & S. 826.

<sup>16</sup> (1848) 11 D. 132, 138. See to similar effect the judgement of Lord Jeffrey at 139.

decision on frustration as such.<sup>17</sup> He states that it ‘concentrates on the ambit of specific performance’<sup>18</sup> but at the same time concludes that in his view the case ‘establishes the principle that economic distortion of a contractual obligation can justify adjustive judicial intervention.’<sup>19</sup> But that ‘adjustive judicial intervention’ did not take the form of the invocation of the doctrine of frustration as we would understand it today (according to which the parties would have been discharged from their obligations to perform under the contract). Rather, the court was concerned to identify the nature of the obligation which the defender had assumed in the changed circumstances. This could be understood either as an exercise in adjustment, where the court took upon itself the obligation to recast the terms of the parties’ contract in the changed circumstances, or as an exercise in interpretation where the task of the court remained one of giving effect to the substance of the parties’ contract (or, if one prefers, advancing the parties’ underlying purpose in entering into the contract).

*Wilkie* is therefore an unsatisfactory case and it provides an insecure foundation for a general doctrine of ‘equitable adjustment’. Nevertheless, suggestions that Scots law is somehow more flexible or ‘equitable’ than the equivalent English law have never been entirely banished. Thus Forte himself suggests that the Scottish version of the doctrine of frustration is ‘inherently more equitable and, consequently, more flexible than its English counterpart’.<sup>20</sup> The notion that Scots law adopts a more flexible approach than that to be found in English law re-surfaced in *Lloyds T.S.B. Foundation for Scotland v Lloyds Banking Group*,<sup>21</sup> in which the submission was made to Lord Glennie that ‘in circumstances not amounting to frustration, where performance of a provision in an ongoing contract would, as a result of unforeseen circumstances, no longer bear any realistic resemblance to the performance originally contemplated, and would produce a manifestly inequitable result, the courts would intervene.’<sup>22</sup> Counsel continued by submitting that ‘on occasion, and in unusual circumstances’, Scots courts ‘have been astute to recognise that

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<sup>17</sup> Forte, ‘Economic Frustration of Commercial Contracts’, 18. To similar effect, see W. McBryde, *The Law of Contract in Scotland* (Edinburgh, 3rd edn, 2007), para. 21-21, although he notes that it is possible that the outcome of the case is ‘consistent with the modern approach to frustration.’ For a fuller account see *idem*, ‘Frustration of Contract’, *Juridical Review*, [1980], 1, esp. 10–11.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, 12.

<sup>21</sup> [2011] C.S.O.H. 105, 2012 S.L.T. 13.

<sup>22</sup> *Ibid.*, [85].



some form of equitable adjustment of the contractual provisions should be ordered for the purpose of avoiding a windfall and quite unanticipated gain to one or other party.<sup>23</sup>

Lord Glennie rejected this submission and held that there was no such doctrine in Scots law. He so concluded for a number of reasons. First, he stated that, if such a doctrine did exist, he found it difficult to accept that it was ‘a doctrine peculiar to Scots law.’<sup>24</sup> With reference to other legal systems, he noted that he had been ‘shown no case law, text book, treatise or article suggesting in terms the existence of such a doctrine in those other legal systems.’<sup>25</sup> In relation to Scots law, the authority cited to him was *Wilkie v Bethune*,<sup>26</sup> but, as we have noted, Lord Glennie was dismissive of its authority. Second, Lord Glennie noted that the suggested doctrine bore a significant resemblance to the doctrine of frustration but that it had not been mentioned or applied in the ‘many cases where parties have unavailingly advanced a frustration argument in such circumstances.’<sup>27</sup> He therefore concluded that there was no such doctrine. The doctrine of frustration was held not to leave any room for ‘an additional doctrine of equitable adjustment where a contract is nearly frustrated but not quite.’<sup>28</sup>

The Inner House reached the same conclusion. The court could find no general doctrine of ‘equitable adjustment’ which would allow the court to moderate the obligation contractually owed by the bank to the foundation.<sup>29</sup> Lord Hope in the Supreme Court adopted a similar stance. Thus he concluded that ‘the proposition that the court can equitably adjust a contract on the basis that its performance, while not frustrated, is no longer that which was originally contemplated is not part of Scots law.’<sup>30</sup>

It is suggested that the courts were correct to reach this conclusion. This is so for three principal reasons. First, as we have noted, the doctrine is not supported by authority. Second, the term ‘equitable adjustment’ is itself a vague term which can be used in different senses and so can be said to be an unstable foundation on which to erect a legal rule. The phrase ‘equitable adjustment’ has been used in a least two different contexts in the literature on Scots law. The

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<sup>23</sup> Ibid..

<sup>24</sup> Ibid., [90].

<sup>25</sup> Ibid..

<sup>26</sup> (1848) 11 D. 32.

<sup>27</sup> [2011] C.S.O.H. 105, 2012 S.L.T, 13.

<sup>28</sup> Ibid..

<sup>29</sup> [2011] C.S.I.H. 87, 2012 S.C. 259, [28].

<sup>30</sup> 2013 S.C. (U.K.S.C.) 169, [47].

first is to describe a process which operates after the frustration of a contract. The second arises in the case where the contract has not been frustrated but one of the litigants seeks a remedy in the form of an 'equitable adjustment'. It is the latter form of equitable adjustment which was rejected by the Supreme Court in *Lloyds T.S.B. Foundation for Scotland v Lloyds Banking Group*. But the former may have survived in that Lord Hope expressly recognised that there is scope for equitable adjustment in the case 'where the future performance of a contract is frustrated'.<sup>31</sup> The Law Reform (Frustrated Contracts) Act 1943 does not extend to Scotland and so it is for the Scottish courts to develop rules to regulate the consequences of the frustration of a contract. Rather than leave the loss to lie where it falls, it is sometimes stated that 'there must be an equitable adjustment'.<sup>32</sup> Yet even here the language of 'equitable adjustment' may be unhelpful in so far as it fails to explain the principle upon which the courts seek to adjust the rights and obligations of the parties following the frustration of a contract.<sup>33</sup> It is one thing to say with Lord Cooper that 'the Scottish courts have all the requisite powers',<sup>34</sup> but it is another to say what these powers are and when they will be exercised. While Scots law appears to recognise that the frustration of a contract may confer upon the parties a right in unjust enrichment to recover enrichments which have been conferred in the performance of the contract,<sup>35</sup> it is less likely to engage in loss allocation where expenditure has been incurred but that expenditure has not resulted in the conferral of a benefit upon the other party to the contract.<sup>36</sup> Given the

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<sup>31</sup> *Ibid.*, [40].

<sup>32</sup> McBryde, *The Law of Contract in Scotland*, para. 21–47, citing *Cantiere San Rocco v Clyde Shipbuilding and Engineering Co.* 1929 S.C. (H.L.) 105.

<sup>33</sup> A number of remedial responses are possible in such a case. The first is to let the loss lie where it falls; the second is to reverse any unjust enrichments which have arisen as a result of the frustration of the contract; the third is to engage in some form of loss sharing; and the fourth is to confer a general discretion upon the court to reach a just outcome in the changed circumstances. See generally, E. McKendrick, 'Frustration, Restitution and Loss Apportionment' in A. Burrows (ed.), *Essays on the Law of Restitution* (Oxford, 1991), 147.

<sup>34</sup> Lord Cooper of Culross, 'Frustration of Contract in Scots Law' in *Selected Papers 1922–1954* (Edinburgh, 1957), 124, 128. This approach is approved by McBryde, *The Law of Contract in Scotland*, para. 21–48.

<sup>35</sup> *Robert Purvis Plant Hire Ltd v Brewster* [2009] C.S.O.H. 28, [14]. See also Hector L. MacQueen and Joe Thomson, *Contract Law in Scotland* (Haywards Heath, 3rd edn, 2012), paras 4.82–4.84; McBryde, *The Law of Contract in Scotland*, para. 21–48.

<sup>36</sup> *Robert Purvis Plant Hire Ltd*, [14] where the question of whether the court has a wide power to apportion losses between the parties was described by Lord Hodge as 'a matter of academic controversy'. See also MacQueen and Thomson, *Contract Law in Scotland*, para. 4.85.

confusion which appears to surround the term ‘equitable adjustment’ and the lack of a clear meaning to the phrase, it is suggested that confusion is best avoided by ceasing to use the term ‘equitable adjustment’ and by finding an alternative phrase to describe the basis upon which the courts seek to adjust the rights and obligations of the parties to a contract following its frustration.

The third objection is that it would overlap with the doctrine of frustration and to have two doctrines covering similar ground would seem to be unwise. Either the law should liberalise the doctrine of frustration or it should adhere to the current narrow doctrine of frustration. But to attempt at the same time to retain the current doctrine of frustration, while seeking to graft onto it a more liberal but amorphous doctrine of ‘equitable adjustment’ would seem to be a recipe for confusion which is best avoided. To the extent that equitable adjustment should retain a role in Scots law, it must be kept in its proper place, namely as a response to the frustration of a contract, but even there it could do with some examination and a fresh title in order to make clear the function and aim of the doctrine.

### The Development Of The Doctrine Of Frustration

The period since Forte wrote his article has seen significant turbulence in the financial markets, a banking crisis on a scale that few could have foreseen in 1986 and a world-wide recession which, particularly in Europe and the US, has been both long and deep. As Forte perceptively pointed out, the ‘optimum ambient conditions for the emergence of any theory of economic frustration must, of course, be those of economic and fiscal chaos.’<sup>37</sup> While we have seen a considerable amount of economic and fiscal turbulence in recent years, thus far it has not been reflected in any significant change to the doctrine of frustration either in Scotland or in England. On the contrary, the courts have continued to affirm that the doctrine of frustration operates within narrow limits. That this is so can be demonstrated by a number of cases decided since the publication of Forte’s article.

The leading modern English authority on the doctrine of frustration is the decision of the Court of Appeal in *J. Lauritzen A.S. v Wijsmuller B.V. (The ‘Super Servant Two’)*.<sup>38</sup> In setting out ‘certain propositions’ relating to the

<sup>37</sup> Forte, ‘Economic Frustration of Commercial Contracts’, 15.

<sup>38</sup> [1990] 2 Lloyd’s Rep. 1. Other recent English cases include: *C.T.I. Group Inc. v Transclear S.A.* [2008] E.W.C.A. Civ. 856, [2008] 2 Lloyd’s Rep. 526; *North Shore Ventures Ltd v Anstead Holdings Inc.* [2010] E.W.H.C. 1485 (Ch.), [310]; *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] E.W.H.C. 2661

doctrine of frustration which were ‘not open to question’, Bingham L.J. stated that ‘since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine of frustration is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended.’<sup>39</sup> To similar effect is the judgement of Coulson J. in *Gold Group Properties Ltd v B.D.W. Trading Ltd (formerly known as Barratt Homes Ltd)*,<sup>40</sup> in which he affirmed that ‘in the modern day, the Courts have repeatedly said that the doctrine of frustration operates within narrow confines.’<sup>41</sup> Further, in *Robert Purvis Plant Hire Ltd v Brewster*,<sup>42</sup> Lord Hodge, after referring to the judgement of Bingham L.J. in *The Super Servant Two*, confirmed that in Scotland the doctrine of frustration must also be ‘kept within very narrow limits.’<sup>43</sup>

It should not, however, be thought that the modern doctrine of frustration is entirely devoid of any element of flexibility. While the doctrine operates within narrow limits, the courts do take account of a range of circumstances when deciding whether or not a contract has been frustrated. This approach was described by Rix L.J. in *Global Tradeways Ltd v. Tsaviris Russ (Worldwide Salvage & Towing) Ltd (The ‘Sea Angel’)*<sup>44</sup> as a ‘multi-factorial approach’.<sup>45</sup> The range of factors taken into account by a court when deciding whether or not a contract has been frustrated include ‘the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.’<sup>46</sup> These factors can be divided into two broad groups. The first three (namely, the terms of the contract, its matrix or context and the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk) have been described

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(Comm.), [2011] 1 Lloyd’s Rep. 195, [105]; and *Bunge S.A. v Kyla Shipping Co. Ltd* [2013] E.W.C.A. Civ. 734. Case law in Scotland has been more sparse and includes: *The Scottish Coal Company Ltd v Trustees of Fim Timber Growth Fund III* [2009] C.S.O.H. 30, 2009 S.C.L.R. 630; and *Robert Purvis Plant Hire Ltd*.

<sup>39</sup> *J Lauritzen AS*, 8.

<sup>40</sup> [2010] E.W.H.C. 323 (T.C.C.), [2010] B.L.R. 235.

<sup>41</sup> *Ibid.*, [68].

<sup>42</sup> [2009] C.S.O.H. 28.

<sup>43</sup> *Ibid.*, [19].

<sup>44</sup> [2007] E.W.C.A. Civ. 547, [2007] 2 Lloyd’s Rep. 517.

<sup>45</sup> *Ibid.*, [111]. See also *Bunge S.A.*, [71] where Longmore L.J. observed that the ‘tendency in the modern application of the law of frustration has been to move away from inflexible rules, such as cost versus value, to a multi-factorial approach.’

<sup>46</sup> *Ibid.*.

as ‘*ex ante* factors’ given that they relate to circumstances prevailing at or before the time of entry into the contract, while the remaining factors operate post-contractually.<sup>47</sup>

Why have the courts not taken advantage of this economic and fiscal turbulence to re-fashion the doctrine of frustration? A number of reasons can be given. First, the courts have continued to stress the importance of certainty in commercial transactions and the existence of a more liberal doctrine of frustration would potentially undermine that pursuit of certainty. Second, the consequences of the invocation of the doctrine remain drastic, namely automatic discharge of the contract for the future with very limited financial relief in respect of work done or payments made prior to the termination of the contract. In short, frustration is the nuclear option designed for use in the exceptional case. This was a point made effectively by Forte in his article. He correctly pointed out that ‘in the main, the attitude of our courts towards the remedies available poses the largest problem.’<sup>48</sup> A more liberal doctrine of frustration would require the development of a more flexible remedial menu and the courts have so far shown no inclination to reconsider the remedial consequences of the frustration of a contract.<sup>49</sup> Third, contracting parties can make their own provision for the consequences of events which make performance significantly more difficult or more expensive. This is typically done through the inclusion of a *force majeure* clause or, possibly, a hardship clause in the contract. The ability of parties to make their own provision for the occurrence of events which render contractual performance significantly more difficult has been a factor which has been relied upon by the courts when seeking to justify the narrow scope of the doctrine of frustration.<sup>50</sup> As Hobhouse J. observed at first instance in *The Super Servant Two*, if a party wishes to obtain protection in the event of a partial failure of supplies which does not operate to frustrate the contract between the parties ‘he must bargain for the inclusion of a suitable force majeure clause in the contract.’<sup>51</sup> The

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<sup>47</sup> *Islamic Republic of Iran Shipping Lines*, [105].

<sup>48</sup> Forte, ‘Economic Frustration of Commercial Contracts’, 15.

<sup>49</sup> The ability of the English courts to refashion the remedial regime following the frustration of a contract is more limited as a result of the intervention of Parliament in the form of the Law Reform (Frustrated Contracts) Act 1943, c.40. The courts obviously have no power to depart from the terms of the legislation and it is unlikely that Parliament would find the time to reconsider the issue, even if it were thought that the Act was in need of fresh consideration.

<sup>50</sup> See generally E. McKendrick, ‘*Force Majeure* Clauses: the Gap between Doctrine and Practice’ in A. Burrows and E. Peel (eds), *Contract Terms* (Oxford, 2007), 233.

<sup>51</sup> [1989] 1 Lloyd’s Rep. 148, 158.

greater the use that is made of *force majeure* clauses by contracting parties, the less room there is for the doctrine of frustration to operate given that a contract cannot be frustrated where provision has been made in the contract for the event which has occurred.<sup>52</sup> In short, where the event which has occurred falls within the scope of a *force majeure* clause, the consequences of the event will be regulated by the *force majeure* clause and not by the doctrine of frustration. Finally, while the recession has been both deep and long, it has not been of the severity of that seen in, for example, Germany in the 1930s where the catastrophic nature of the financial collapse almost necessitated judicial intervention. Although the consequences in individual cases have been dire, they have not been sufficiently dire to persuade the courts of the need to develop a new, more liberal doctrine of economic frustration. Although it cannot be said that a change in economic circumstances will never frustrate a contract,<sup>53</sup> it would, I think, be correct to say that a court would only reach this conclusion on wholly exceptional facts of a type or on a scale not yet seen in either Scotland or England.

But the fact that the doctrine of frustration has not been developed does not mean that the courts have not developed other techniques which they can deploy when considering the unanticipated consequences of future events on the obligation of the parties to perform their contractual obligations.

### The Development Of Alternative Techniques

Although the courts have shown no inclination to develop a more liberal doctrine of frustration, there is the occasional sign of a greater willingness to use other techniques which may result in an outcome not dissimilar to that which would be produced by the development of a more liberal doctrine of frustration. An excellent illustration of this process can be seen in *Lloyds T.S.B. Foundation for Scotland v Lloyds Banking Group p.l.c.* itself. In 1997 the defenders, Lloyds Banking Group p.l.c., covenanted to pay to the pursuers, Lloyds T.S.B. Foundation for Scotland, the greater of '(a) an amount equal to one-third of 0.1946% of the pre-tax profits (after deducting pre-tax losses for the relevant accounting period) and (b) the sum of £38,920.' For this purpose, 'pre-tax profit' and 'pre-tax loss' were defined as the 'group profit before taxation' and

<sup>52</sup> *Metropolitan Water Board v Dick, Kerr and Co.* [1918] A.C. 119.

<sup>53</sup> See generally, J. Beatson 'Increased Expense and Frustration' in F. D. Rose (ed.), *Consensus ad Idem: Essays in the Law of Contract in Honour of Guenter Treitel* (London, 1996), 121.

the 'group loss before taxation' as 'shown in the Audited Accounts for such period.' The particular difficulty which gave rise to the litigation was caused by an unexpected turn of events after the parties entered into the deed. In 2005 a change was made to accounting practice as a result of the coming into force on 14 September 2002 of E.C. Regulation No. 1606/2002 on the application of international accounting standards, which required that negative goodwill be shown immediately as a gain on acquisition in consolidated income statements. The significance of this new requirement for the parties was that in 2009 the Lloyds Bank Group acquired H.B.O.S. as part of the rescue of the latter. The negative goodwill of H.B.O.S. amounted to some £11 billion and the effect of the acquisition was to turn what would otherwise have been a loss to the Lloyds Banking Group of over £10 billion into a profit before taxation of over £1 billion. In these circumstances, the pursuers claimed that they were entitled to recover their percentage of the £1 billion profit (which amounted to £3,543,333), whereas the defenders submitted that the pursuers were entitled to recover only £38,920. There were essentially two issues before the court. One of these issues was whether it was open to the court to engage in a process of equitable adjustment. As we have seen, the answer to that question was in the negative. It is now time to consider the other issue in the case, namely the proper interpretation of the disputed term of the covenant.

In England, the principles applied by the court when seeking to interpret a commercial contract were re-stated by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society*.<sup>54</sup> While these principles are now regularly cited and applied in England, the courts continue to be troubled by difficult cases where the issue which divides the parties is one relating to the proper interpretation of a term or terms of their contract.<sup>55</sup> It is no easy task to reconcile the modern case-law, although the degree of reconciliation that can be achieved does have its limits given that many of the difficulties arise from the application of the relevant legal principles to the facts of the individual case so that the precedent value of many of the cases is not high.<sup>56</sup> Nevertheless, one might reasonably have hoped for a greater degree of

<sup>54</sup> [1998] 1 W.L.R. 896, 912–13.

<sup>55</sup> See, for example: *B.M.A. Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] E.W.C.A. Civ. 416; *Scottish Widows Fund and Life Assurance Society v B.G.C. International* [2012] E.W.C.A. Civ. 607, (2012) 142 Con. L.R. 27; *Rainy Sky S.A. v Kookmin Bank* [2011] U.K.S.C. 50, [2011] 1 W.L.R. 2900; *Oceanbulk Shipping and Trading S.A. v T.M.T. Asia Ltd* [2010] U.K.S.C. 44, [2011] 1 A.C. 662; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] U.K.H.L. 38, [2009] 1 A.C. 1101.

<sup>56</sup> Thus the precedent value of case-law on the interpretation of specific contract clauses



convergence in terms of legal principle, in particular in relation to the weight to be given to matters such as the natural and ordinary meaning of the words and the extent to which a court can depart from that meaning in favour of one which promotes the commercial purpose of the parties. At times the appellate courts seem to have given greatest emphasis to the promotion of certainty and the adoption of the natural and ordinary meaning of the words used,<sup>57</sup> while at other times they have been willing to depart, in some cases significantly, from the natural and ordinary meaning in order to give effect to what has been perceived to be the intention of the parties and so to achieve their intended purpose.<sup>58</sup>

Lord Hoffmann's re-statement has not been as influential in Scotland as it has been in England but it has been cited to, and considered by, Scottish courts on a number of occasions.<sup>59</sup> The Scottish courts have developed their own summaries of the applicable principles<sup>60</sup> but these do not appear to differ significantly from Lord Hoffmann's re-statement. That this is so is evidenced by the fact that authorities from both Scotland and England were cited at all levels in the Lloyds Bank litigation and Lord Glennie recorded that there was 'little dispute between the parties as to the general principles applicable to the question of construction.'<sup>61</sup> Scottish cases have also exhibited the same struggle to find the right balance between giving effect to the natural and ordinary meaning of the words and giving effect to the parties' perceived intention or the commercial objective which they had in mind when entering into the contract.

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is limited: *Surrey Heath B.C. v Lovell Construction Ltd* (1990) 48 Build. L.R. 113, 118.

<sup>57</sup> The leading example in this category is, perhaps, the decision of the Supreme Court in *Arnold v Britton* [2015] U.K.S.C. 36, [2015] A.C. 1619..

<sup>58</sup> See, for example, *Chartbrook Ltd*.

<sup>59</sup> See, for example, *Trygort (No. 2) v U.K. Home Finance Ltd* [2008] C.S.I.H. 56, 2009 S.C. 100; *Credential Bath Street Ltd v Venture Investment Placement Ltd* [2007] C.S.O.H. 208, [14]-[28]; *City Wall Properties (Scotland) Ltd v Pearl Assurance p.l.c.* 2004 S.C. 214; and *Bank of Scotland v Dunedin Property Investments Co. Ltd (No. 1)* 1998 S.C. 657.

<sup>60</sup> These summaries are referred to by Lord Glennie in *Lloyds Bank* at [2011] C.S.O.H. 105, 2012 S.L.T. 13, [58].

<sup>61</sup> *Ibid.*, [60]. Further support for this proposition can be gleaned from the fact that judgement on the construction issue in the Supreme Court in *Lloyds Bank* was given by Lord Mance, an English lawyer, with Lord Hope confining himself to the question of equitable adjustment which was a pure question of Scots law. Lord Hope acknowledged (at [33]-[34]) that he found the question of interpretation to be a difficult one (as did Lord Clarke at [48]-[49]) but these difficulties would appear to relate to the application of agreed principles to the facts of the case rather than differences of view as to the legal principles themselves.



The difficulty in striking this balance was apparent in two earlier Scottish appeals which made their way to the Supreme Court<sup>62</sup> and which have been the subject of critical academic commentary.<sup>63</sup> The same difficulty was apparent in the present case. Thus in the Outer House of the Court of Session Lord Glennie noted that the parties did not agree on the point of departure for the legal analysis. Counsel for the pursuers submitted that the starting point should be the natural and ordinary meaning of the words used by the parties before consideration was given to the relevant background,<sup>64</sup> while counsel for the defenders submitted that the point of departure should be the relevant background knowledge.<sup>65</sup> Lord Glennie held that the starting point should be the natural and ordinary meaning of the words used<sup>66</sup> and that the natural meaning of these words pointed in the direction of the interpretation contended for by the pursuers.<sup>67</sup> But he held that this was not ‘the end of the matter’<sup>68</sup> and that this interpretation had to be ‘cross-checked against the evidence the court has before it as to the circumstances in which the agreement in the Deed was made.’<sup>69</sup> Having examined this evidence, he concluded that the parties did not anticipate such a dramatic change to accountancy practice at the time of entry into the Deed and that they did not intend that the pursuers ‘should receive a percentage of profits which included a figure for negative equity which was neither realised, subject to tax nor capable of distribution.’<sup>70</sup> He therefore concluded that the court should identify the ‘purposes and values’ expressed or implicit in the wording of the deed and then ‘attempt to reach an interpretation which applies the wording of the Deed to the changed circumstances in the manner most consistent with them.’<sup>71</sup> He held that this could be done by disregarding the words ‘shown in the Audited Accounts’ in

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<sup>62</sup> *Multi-Link Leisure Developments v North Lanarkshire Council* [2010] U.K.S.C. 47, 2011 S.C. (U.K.S.C.) 53; *Aberdeen City Council v Stewart Milne Group Ltd* [2011] U.K.S.C. 56, 2012 S.C. (U.K.S.C.) 240.

<sup>63</sup> See, for example, D. W. McLauchlan, ‘A Construction Conundrum?’, *L.M.C.L.Q.*, [2011], 428 (where the focus is on the decision in *Multi-Link Leisure*) and M. Hogg, ‘Fundamental Issues for Reform of the Law of Contractual Interpretation’, *Edinburgh Law Review*, 15 (2011), 406 (where the focus is upon the decision in *Aberdeen City Council*).

<sup>64</sup> [2011] C.S.O.H. 105, 2012 S.L.T. 13, [59].

<sup>65</sup> *Ibid.*, [67].

<sup>66</sup> *Ibid.*.

<sup>67</sup> *Ibid.*, [72].

<sup>68</sup> *Ibid.*, [73].

<sup>69</sup> *Ibid.*.

<sup>70</sup> *Ibid.*, [75]–[76].

<sup>71</sup> *Ibid.*, [80].

the definition of pre-tax profit and loss in the deed. In his judgement this did not amount to 're-writing the contract so as to alter the bargain the parties have made.'<sup>72</sup> While this did 'some slight violence' to the wording of the deed this was necessary because in the 'changed circumstances, the drafting gives a result which neither party could have intended.'<sup>73</sup> He therefore held that the pursuers were only entitled to recover £38,920.

The Inner House took a different approach and placed much more emphasis on the natural and ordinary meaning of the words used in the deed. There was no support for Lord Glennie's proposition that the words 'shown in the Audited Accounts' should be disregarded and instead attention was focused on the natural and ordinary meaning of the words used in the deed. The consolidated group accounts for 2009 contained the figure £1,042 million against the line carrying the description 'group profit before taxation' and it was held that it was not open to the court to create an ambiguity by reference to the perceived 'purposes and values' of the contract in order to deny giving effect to the plain and unambiguous wording of the deed.<sup>74</sup> The parties had agreed that the figure in the line 'group profit before taxation' was to be definitive in terms of the calculation to be made. The figure in that line was £1,042 million so that the pursuers were entitled to recover the higher figure and their appeal was allowed.

The Supreme Court in turn allowed the defenders' appeal. The leading judgement on the question of the interpretation of the disputed clause was given by Lord Mance who stated that the proper approach to interpretation is 'contextual and purposive', not 'mechanical'.<sup>75</sup> This is not to say that the mechanics are irrelevant; they are not but 'the value of machinery depends upon its being correctly directed towards the right end.'<sup>76</sup> He continued:

the proper approach as a matter of construction is to identify and use the figures in the consolidated income statement which show the group profit or loss before taxation in the sense intended by the deed. That means realised profit or loss before taxation, and it excludes a wholly novel element which was included in the income statement by a change which was neither foreseen nor foreseeable and which, had it been

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<sup>72</sup> Ibid., [81].

<sup>73</sup> Ibid..

<sup>74</sup> [2011] C.S.I.H. 87, 2012 S.C. 259, [20].

<sup>75</sup> 2013 S.C. (U.K.S.C.) 169, [21].

<sup>76</sup> Ibid..

foreseen when the deeds were executed, would not have been accepted as part of the computation of profit or loss. The unrealised “gain on acquisition” thus falls out of account and the balance is the relevant group profit or (on the facts of this case) loss before taxation. In respect of the accounting reference period to which the 2009 accounts relates, it follows that the Foundation receives only the minimum sum of £38,920, rather than the £3,543,333 which on their case results from the unrealised gain (after taking into account £135m attributable to minority interests in the group).<sup>77</sup>

In reaching this conclusion, Lord Mance adopted a different approach from that taken both by Lord Glennie and by the Inner House of the Court of Session. He disagreed with Lord Glennie and held that there was no justification for disregarding the words ‘shown in the Audited Accounts’. While in some contractual contexts a court may be justified in disregarding some words in a contract, a radical step of this nature was not necessary in the present case once the deed was ‘understood in its context and properly construed.’<sup>78</sup> Lord Mance also differed from the Inner House to the extent that it had adopted ‘an entirely literal approach’ which failed sufficiently to appreciate ‘the significance of the legal and accounting context in which the deeds were made.’<sup>79</sup>

The effect of the adoption by the Supreme Court of a contextual or purposive approach to the interpretation of the deed was to reach a result very similar to, if not identical with, that which might have been achieved by the application of a principle of equitable adjustment. There may be nothing new in this. *Wilkie v Bethune*<sup>80</sup> could be said to be an example of a court adopting an ‘equitable construction’ of the contract which enabled the court to understand an obligation expressed in the form of an obligation to supply potatoes as an obligation to pay a sum of money in order to enable the pursuer to purchase alternative food. A striking feature of the Lloyds Bank litigation is that the factors relied upon by Lord Glennie and the Supreme Court to justify this approach to the interpretation of the deed bore some resemblance to those which would have been taken into account by a court when considering whether or not the deed had been frustrated. Thus reference

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<sup>77</sup> Ibid., [25].

<sup>78</sup> Ibid., [30].

<sup>79</sup> Ibid., [31].

<sup>80</sup> (1848) 11 D. 132.

was made to the ‘changed circumstances’<sup>81</sup> which had not been foreseen by the parties<sup>82</sup> and which had produced an outcome the parties had not envisaged and for which they would not have provided. Thus Lord Mance referred to the ‘fundamentally changed and entirely unforeseen circumstances’<sup>83</sup> in which the deed had to be interpreted. While he noted that ‘no one suggests or could suggest that the change meant that the 1997 deed was frustrated’,<sup>84</sup> the radical changes which occurred in the legal and accounting context provided the principal justification for departing from the literal meaning of the words used by the parties. To the extent that courts in subsequent cases follow the approach adopted by the Supreme Court,<sup>85</sup> they will have to handle it with some care in order to ensure that it is not used by a contracting party in order to escape from what has turned out to be a bad bargain. It does not suffice for one party to show that the deal has turned out to be a bad one for it. Rather, to the extent that this approach is to be adopted, the emphasis must be placed on achieving the original intentions and purposes of both parties in the radically changed circumstances in which they find themselves.

### The Development Of Comparative Law

The final point relates to the developments in comparative law which have taken place since Forte wrote his article. In the article he analysed the law of France, Germany and the U.S.A. in addition to the laws of Scotland and England (which he referred to, perhaps rather curiously, as the law of the United Kingdom). This country-specific comparison now seems rather dated given that today more emphasis would be placed on transnational documents such as the Principles of European Contract Law (‘P.E.C.L.’), the Unidroit Principles of International Commercial Contracts (‘P.I.C.C.’), the Draft Common Frame of Reference (‘D.C.F.R.’) and the proposed Common European Sales Law (‘C.E.S.L.’).

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<sup>81</sup> [2011] C.S.O.H. 105, 2012 S.L.T. 13, [81].

<sup>82</sup> Ibid..

<sup>83</sup> 2013 S.C. (U.K.S.C.) 169, [23]. See to similar effect Lord Hope at [34] and Lord Clarke at [50].

<sup>84</sup> Ibid..

<sup>85</sup> There has in fact been remarkably little citation of, or reliance upon, the case. Apart from a reference to it by Leggatt J. in *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] E.W.H.C. 111 (Q.B.), [2013] 1 All E.R. (Comm.) 1321, [139], it has been referred to in a handful of cases, such as *Peel Land and Property (Ports No. 3) Ltd v T.S. Sheerness Steel Ltd* [2014] E.W.H.C. 39 (Ch.), [74].

In the Inner House of the Court of Session, in the context of the court's consideration of whether Scots law recognised a general doctrine of 'equitable adjustment', reference was made<sup>86</sup> to the Feasibility Study by the Expert Group on European Contract law on a possible Future Instrument in European Contract Law which, at the time, included at Article 92 a provision which dealt with the case in which a contract of sale had become excessively onerous because of an exceptional change of circumstances. Noting that the Scottish Law Commission had concluded that it was 'not convinced of the utility'<sup>87</sup> of this provision and its observation that Scots law did not recognise a doctrine of equitable adjustment,<sup>88</sup> the court stated that it 'would be beyond the proper scope of judicial power to develop it in any way'<sup>89</sup> which would assist the defenders on the facts of the case. No other reference was made to these transnational documents in the judgements of the courts in the Lloyds Bank litigation and, in many ways, the conclusion of the Supreme Court on the interpretation of the deed removed the need for the Justices to engage in a broader comparative survey in search of a doctrine which equated to equitable adjustment and would have permitted the adjustment of a contract in a wider range of circumstances than Scots law (or English law) currently permits.

However, had the courts wished to engage in such a comparative survey, there is now considerable material on which they could have drawn. Article 92 of the Feasibility Study by the Expert Group has now become Article 89 of the proposed C.E.S.L.. Similar provisions are to be found in Article 6:111 of P.E.C.L., Article 6.2.3 of P.I.C.C. and Book III Article 1:110 of the D.C.F.R.. All of them adopt a more flexible approach to the adjustment of a contract following an exceptional change in circumstances than that currently to be found in either Scots or English law. In order to demonstrate the possible impact of these provisions on a case such as the Lloyd's Bank litigation, I shall use Article 1:110 of the D.C.F.R. by way of illustration.

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<sup>86</sup> [2011] C.S.I.H. 87, 2012 S.C. 259, [29].

<sup>87</sup> Scottish Law Commission, *Scottish Law Commission response to the Publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and legal practitioners' feedback*, 6. <http://www.scotlawcom.gov.uk/search-results?cx=016763244782809811531%3Aivkcm7iww&cof=FORID%3A10&ie=UTF-8&q=Scottish+Law+Commission+response+to+the+Publication+of+the+results+of+the+feasibility+study+carried+out+by+the+Expert+Group+on+European+contract+law+for+stakeholders%27+and+legal+practitioners%27+feedback>, accessed 18 May 2015.

<sup>88</sup> Where the reference was to the first instance decision of Lord Glennie in the Lloyds Bank litigation.

<sup>89</sup> [2011] C.S.I.H. 87, 2012 S.C. 259, [29].

Article 1:110(1) opens by providing that an obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. This may be said to be the general rule. An exception to this general rule is then created in Article 1:110(2) which provides that 'if [...] performance of a contractual obligation [...] becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court.' However, in order for paragraph (2) to be applicable, (i) the change of circumstances must have occurred after the time when the obligation was incurred; (ii) the debtor must not have taken into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; (iii) the debtor must not have assumed, and it must not be possible reasonably to regard him as having assumed, the risk of the change of circumstances; and (iv) the debtor must have attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.<sup>90</sup>

How would Article 1:110 have applied to the Lloyds Bank litigation? Given the conclusion reached by the Supreme Court, it could not have had any application.<sup>91</sup> But matters might have been otherwise had the Supreme Court concluded that the defenders were obliged to pay £3,543,333 to the pursuers. In such a circumstance, the defenders might have sought to invoke the assistance of Article 1:110. In order to do so they would have first had to demonstrate that the change of circumstances was 'exceptional'. The example given in the comments to Article 1:110 of a case where a change is not exceptional is where the price of the goods drops by 50 per cent.<sup>92</sup> A purchaser in such a case is not entitled to invoke the assistance of Article 1:110. In the present case, the impact on the defenders would have been much more substantial, albeit not enormous in relation to the overall turnover of the bank. However, it might have amounted to an 'exceptional' case of circumstances. Second, the defenders would have had to establish

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<sup>90</sup> Article 1:110(3).

<sup>91</sup> Although it could be argued that the principles relating to the interpretation of contracts to be found in the D.C.F.R. could have been of assistance to the Supreme Court in terms of providing further support for the conclusion it reached on the facts.

<sup>92</sup> D.C.F.R., Art 1:110, Comment D, Illustration 2.

that performance had become unjustly onerous or ‘so onerous that it would be manifestly unjust to hold the debtor to the obligation’. This is a question of degree and so difficult to assess. But it would appear to be arguable that it would have been unjust to hold the defenders to their obligation to pay in such circumstances. Third, the defenders would have had to prove that the change occurred since the obligation was incurred and this they could have done. Fourth, they would have had to establish that the circumstances could not have been taken into account by them. While they could have foreseen that statements of accountancy practice would change over the lifetime of the deed, it seems clear from the judgements in the Supreme Court that the change was one which had not been anticipated by the parties and could not have been foreseen by the defenders. Fifth, the defenders would have had to prove that they had not assumed the risk of the change of circumstances and here again it seems clear that the Supreme Court formed the view that the defenders had not assumed this risk. Finally, the defenders would have had to prove that they had attempted reasonably and in good faith to reach a negotiated settlement.

What would have been the outcome if the defenders had been able to successfully invoke Article 1:110? The courts are given substantial discretionary powers in the event that the provision is triggered. The court can modify the terms of the contract or can terminate the contract but, as is stated in the comments to Article 1:110, the assumption which underpins the provision is that ‘the risks of unforeseen events are to be shared.’<sup>93</sup> This suggests that the effect of the application of Article 1:110 might have been to achieve a different outcome from that reached by the Supreme Court in that the defenders might have been required to pay more to the pursuers than they were required to pay by the Supreme Court. How much more they might have been required to pay is impossible to tell, given the substantial discretion which Article 1:110 confers upon the court. It is this uncertainty which lies at the root of the Scottish Law Commission’s concerns about a provision of this type.

Article 1:110 does not of course have the force of law and so it could not have been directly applied either by the Court of Session or by the Supreme Court. But one of the possible functions of these modern re-statements of transnational contract law is that they can encourage domestic legal systems to reconsider their law and, if thought appropriate, develop it in the light of the experience of other legal systems. Thus Article 1:110 could have been

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<sup>93</sup> D.C.F.R., Art 1:110, Comment E.

invoked in order to introduce, alongside the narrow doctrine of frustration, a broader power in the courts to adapt contracts where there has been a change of circumstances but that change has not been sufficiently fundamental to amount to a frustrating event. This was in essence the course of action for which Forte argued back in 1986. But it was not a solution that was to find favour with the Court of Session or the Supreme Court. The solution was too uncertain for Scottish and English tastes. But one of the ironies of the decision of the Supreme Court is that it can be said to have introduced a degree of uncertainty into the law of contract, albeit in the context of the principles applicable to the interpretation of commercial contracts rather than in the context of the powers of the court to adjust a contract which has become unexpectedly burdensome for one of the contracting parties. I suspect that this outcome would not have appealed to Forte's pragmatic approach to the development of the law of contract in order to meet the needs of business people. If we can tolerate uncertainty in the context of the interpretation of contracts, why object to a further principle which introduces into the law a structured discretion which can be exercised in defined circumstances to enable a court to adjust the contract where, as a result of an exceptional change of circumstances, the obligation to perform a contract has become so onerous that it would be manifestly unjust to require the contracting party to perform the obligation that it has assumed? The answer given by Scots and English law remains that this is a step too far and that there is no need to confer upon the courts such a substantial amount of discretion. International re-statements of contract law demonstrate that this is now a minority view and that there is substantial support for the proposition that courts should be given greater flexibility to deal with exceptional change of circumstances which cause substantial hardship for a contracting party. Given this level of international support, the arguments advanced by Forte in 1986 may yet win the day.



# The Exclusion of Consequential Loss in the Piper Alpha Case: A Study of Lord Rodger's Method of Textual Analysis

Greg Gordon

## Introduction

*Lawyers faced with a difficult problem are apt to pounce on a minor element of the case, make it the basis of their verdict and leave the problem unanswered.<sup>1</sup>*

So David Daube told his advanced Roman Law class when teaching them the intricacies of the civil law of sale. As befits a scholar who took a particular interest in the dodges used by the citizens of Rome to evade the law's attempts to regulate their affairs,<sup>2</sup> his keen (and mischievous<sup>3</sup>) eye had observed a favoured technique of lawyers ancient and modern when faced with a tricky point: to jink around it, rather than engage with it head-on.

The issue of what (if anything) has in practical terms been achieved by the introduction to a contract of a clause which excludes 'consequential loss' is a particularly difficult problem.<sup>4</sup> Scholars have lamented the way in which the courts address the matter,<sup>5</sup> and contractual draftsmen have to exercise great care in order to overcome the complexities caused by court decisions.<sup>6</sup>

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<sup>1</sup> E. Metzger, 'Remarks on David Daube's Lectures on Sale, with Special Attention to the liber homo and the res extra commercium' in idem (ed.), *David Daube: A Centenary Celebration* (Glasgow, 2010), 101 ('Daube's Lectures on Sale'), 108.

<sup>2</sup> 'Dodges, the cheekier the better, were always one of Daube's delights': A. Rodger, 'David Daube (8.2.1909–24.2.1999)', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, 118 (2001), XIV ('Zeitschrift Obituary'), XLVI. For reference to examples in Daube's work, see *ibid.*, fnn.118–20.

<sup>3</sup> A. Rodger, 'Law For All Times: The Work and Contribution of David Daube', *Roman Legal Tradition*, 2 (2004), 3 ('Law For All Times'), 8.

<sup>4</sup> Or, perhaps more accurately, set of problems, as the particular formula of words used could potentially influence the outcome.

<sup>5</sup> See e.g. H. McGregor, *McGregor on Damages* (18th edn, London, 2009), para. 1-038.

<sup>6</sup> See below, nn.67–9 and associated text.

Even a commercial judge as accomplished as Rix L.J. has been moved to note that he found the subject ‘conceptually difficult’ and approached it with ‘the diffidence of one who has already fallen into error in connection with it once.’<sup>7</sup>

Someone who approached the question of the meaning of the expression ‘indirect or consequential loss’ with no obvious diffidence at all was Lord Rodger of Earlsferry. Indeed, when he was called upon to address this problem in *Caledonia North Sea Limited v London Bridge Engineering Ltd* (*‘London Bridge’*)<sup>8</sup>, he attacked it with remarkable levels of enthusiasm and insight. In this paper, which I dedicate to the memory of Professor Angelo Forte,<sup>9</sup> I will argue that, in deciding *London Bridge*, Lord Rodger used a method of linguistic analysis instilled in him by his doctoral supervisor, David Daube, a brilliant civilist and interpreter of ancient texts, while the two debated the Roman law of servitude of light ‘across the fireplace [...] in All Souls’.<sup>10</sup>

After this introduction, the paper will commence by outlining the essential elements of Daube’s approach to textual analysis and the grounds for believing that Lord Rodger himself adopted this approach when called upon to interpret texts in a judicial context. It will then go on to consider the meaning generally given to ‘consequential loss’ (and like expressions) in the context of contractual exclusions of liability in English law before examining, through the prism of *London Bridge*, the extent to which Scots law can be said to adopt a distinct approach. *London Bridge* will also provide us with an opportunity to examine Lord Rodger’s approach to textual analysis in detail. I will conclude that Lord Rodger did indeed use Daube’s approach in *London Bridge*; that, in so doing, he furnished us with an interpretation of the exclusion of consequential loss clause that is more complete and persuasive than any of

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<sup>7</sup> *B.H.P. Petroleum Ltd & ors v British Steel p.l.c. & anor* [1999] 2 Lloyd’s Rep. 583, 598, affirmed by [2000] 2 All E.R. (Comm.) 133. Any diffidence he felt did not, however, prevent him from providing, at 595-604, a very insightful exposition of the difficulties inherent in the use and interpretation of such clauses.

<sup>8</sup> 2000 S.L.T. 1123, affirmed 2002 S.C. (H.L.) 117.

<sup>9</sup> Angelo was a great friend and mentor. He was a kind and calm man, although it was not impossible to rile him, as we who have done violence to the Italian language while trying to order gnocchi can attest. In contributing to this volume, I have chosen to write on a case that has a connection to the oil industry. Angelo wrote on oil and gas law – most notably, on decommissioning and we had hoped to work together on a piece on the problem of the battle of the forms (a topic which he first encountered in practice, which fascinated him, and to which he repeatedly returned) as arising in the context of that particular industry. Sadly, his final illness made that collaboration impossible.

<sup>10</sup> A. Rodger, *Owners and Neighbours in Roman Law* (Oxford, 1972), vii. This is the monograph which resulted from Rodger’s doctoral studies.

the other interpretations proffered in that case; that Lord Rodger's approach allowed Scots law to avoid adopting a deeply flawed answer to the problem of the meaning of 'consequential loss', when used in an exclusion of liability clause; and that, in spite of the highly unusual facts and circumstances of *London Bridge*, Lord Rodger's answer to this particular question is one which is of more general application, and should be of considerable interest to comparative lawyers who seek a better solution to the problem than has currently been arrived at within their own jurisdiction.

### The Daube-Rodger Approach To Textual Analysis

As I seek to demonstrate that Lord Rodger's approach to textual analysis was influenced by David Daube, I should commence by outlining the principal characteristics of Daube's approach. This – along with the intellectual capacity<sup>11</sup> and personal characteristics to which Daube allied it<sup>12</sup> – has been the subject of much prior discussion,<sup>13</sup> not least of all by Lord Rodger himself.<sup>14</sup> There is a strong convergence of testimony on its key features. Lord Rodger considered textual analysis to be 'surely the hallmark' of Daube's scholarly work.<sup>15</sup> Fundamentally, Daube's method of textual analysis was to engage in a close and questioning reading, the aim of which was to provide an interpretation that fully fits with the condition of the text.<sup>16</sup> This involved

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<sup>11</sup> A. Rodger, 'Law For All Times', 8: 'He was, quite simply, unbelievably clever.'

<sup>12</sup> These included an extraordinary breadth of literary and classical knowledge and a highly developed sense of fun. For a flavour of the man, see e.g. 'Law For All Times'; C. Carmichael, *Ideas and the Man: Remembering David Daube* (Frankfurt am Main, 2004) (*Ideas and the Man*); A. Watson, 'David Daube: A Personal Reminiscence' and J. Daube, 'David Daube' both in E. Metzger (ed.), *David Daube: A Centenary Celebration* (Glasgow, 2010), 127 and 138 respectively.

<sup>13</sup> In addition to the sources cited immediately above see E. Metzger, 'Quare? Argument in David Daube, after Karl Popper', *Roman Legal Tradition*, 2 (2004), 27 ('Argument in Daube').

<sup>14</sup> Lord Rodger alone described it in detail in three full-length publications: 'Zeitschrift Obituary', 'Law For All Times', and 'David Daube (1909–1999)', in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (Oxford, 2004), 233 ('*Jurists Uprooted*'). He also expertly sketched the approach in an Obituary published in *The Independent* on 5 March 1999.

<sup>15</sup> 'Law for All Times', 11. See also E. Metzger, 'Daube's Lectures on Sale', 116.

<sup>16</sup> See e.g. B. Jackson, 'Law, Narrative and Theology: Daube on the Prodigal Son' in E. Metzger (ed.), *David Daube: A Centenary Celebration* (Glasgow, 2010), 71, 86: 'David Daube's uniqueness lay in the questions and issues he identified, and the creative solutions he proposed to them.'

looking at the text and noticing something that seemed not to be fortuitous.<sup>17</sup> As Lord Rodger notes, '[t]he game'<sup>18</sup> was to look closely at their wording and to unearth something that other readers had missed.<sup>19</sup> This was achieved by a 'detailed and sensitive analysis of the language and style of the text', as a result of which it would 'very often [...] reveal to him far more than appeared on the surface.'<sup>20</sup> Daube's method, following that of Otto Lenel, his own great mentor,<sup>21</sup> involved 'looking at the context, at inconsistencies, the emphasis given to particular words and phrases, and the order in which particular matters occurred in texts'.<sup>22</sup> '[T]hen', as Lord Rodger observed,

you have to ask yourself *why*. Why did the draughtsman or author use this word rather than another? Why does that item come at the end of the list rather than the beginning?<sup>23</sup>

<sup>17</sup> E. Metzger, 'Argument in Daube', 51.

<sup>18</sup> Expressions such as 'puzzle' (*Jurists Uprooted*, 239) and 'game' (*Jurists Uprooted*, 246) abound, both in Daube's work and in discussions thereof. Carmichael notes that Daube opened his first book, *Studies in Biblical Law*, with a quotation from Bunyan's *Pilgrim Progress*, 'Would'st thou read Riddles, and their Explanation?' (C. Carmichael, 'Jacob's Red, Red Dish and the Riddle of the Red Heifer' in E. Metzger (ed.), *David Daube: A Centenary Celebration* (Glasgow, 2010), 48). These and other similar expressions (most notably 'problem') feature throughout Rodger's own scholarly work: see e.g. idem, 'The Palingsesia of Digest 36.2.13', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, 98 (1981), 366, 368; idem, 'Lord Macmillan's Speech in Donoghue v Stevenson', *L.Q.R.*, 108 (1992), 236, 244; idem, 'A Very Good Reason for Buying a Slave Woman?', *L.Q.R.*, 123 (2007), 446, 451, fn. 29. The ability to see the exercise of interpretation as an interesting puzzle to be solved, rather than a chore to be endured, is probably one of the reasons why Daube and Rodger were so good at it.

<sup>19</sup> *Jurists Uprooted*, 246. Metzger writes to similar effect when he says, 'Daube [...] will explain a text in a way which is entirely unexpected, but which seems suddenly to reveal something that had lain unnoticed': 'Argument in Daube', 27. See also C. Carmichael, *Ideas and the Man*, 36.

<sup>20</sup> 'Law for All Times', 11.

<sup>21</sup> For accounts of Daube's relationship with Lenel, see C. Carmichael, *Ideas and the Man*, 31 and 55–7; A. Rodger, 'Law for All Times', 11–12; idem, 'Zeitschrift Obituary', XV–XVIII. Long after Lenel's death, Daube urged the young Alan Rodger 'always to write something that would have interested Lenel': 'Zeitschrift Obituary', XL. Rodger's own admiration for Lenel is plain: see e.g. 'Law for All Times', 11 ('Daube was right to idolize [Lenel]') and A. Rodger, 'The Palingsesia of the Commentaries Relating to the Lex Aquilia', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung*, 124 (2007), 145 ('Palingsesia of the Commentaries Relating to the Lex Aquilia'), 146, where reference is made to 'Lenel's two works of genius.'

<sup>22</sup> 'Law for All Times', 11.

<sup>23</sup> *Ibid.*, 12.

It is in the answering of questions such as these that the interpretation of the text begins to take shape. An explanatory narrative (or, in the words of Metzger, a 'learned and imaginative proof'<sup>24</sup>) is constructed. Much of the inquiry is directed towards what caused the text to be as it is. It is for this reason that Metzger's description of Daube's approach as a causal method of analysis is so illuminating.<sup>25</sup> He also describes it as a psychological method.<sup>26</sup> This description, too, is apt, as Daube is often interested in considering what reason the author might have had to draft the text as he did.<sup>27</sup> Ultimately, however, it would seem that the causal and the psychological explanation will usually reduce down to much the same thing. If '[a] text has part of its history in its writer's mind, and Daube tried to discover that history',<sup>28</sup> what we believe about the writer's motive will surely inform our attempts to establish how that which (s)he wrote came to be written. Lord Rodger shrinks back from applying a theoretical badge to Daube's method, instead preferring to describe it using more descriptive terminology such as 'close reading'.<sup>29</sup> In so doing, he would seem to honour Daube's own practice: he was uncomfortable with 'the classifications and nomenclatures so beloved of theorists', believing them to 'obscure reality'.<sup>30</sup> Daube's fascination with discovering and fully describing that which is hidden within a text and the emphasis upon the text's historical and psychological setting would suggest that his approach was to some extent informed by the hermeneutical writings that he read,<sup>31</sup> absorbed and

<sup>24</sup> E. Metzger, 'Alan Rodger's Writings on Roman Law' in K. Baston and E. Metzger (eds), *The Roman Law Library of Alan Ferguson Rodger, Lord Rodger of Earlsferry* (Glasgow, 2012), 189 ('Rodger's Writings on Roman Law'), 190.

<sup>25</sup> E. Metzger, 'Argument in Daube', 44.

<sup>26</sup> *Ibid.*, 52.

<sup>27</sup> See e.g. E. Metzger, 'Argument in Daube', 30, where the author notes that, in disagreeing with Beseler on a point of interpretation, Daube observed: 'One can think of no plausible motive which might have induced anyone to turn Beseler's text into the present.'

<sup>28</sup> E. Metzger, 'Rodger's Writings on Roman Law', 190.

<sup>29</sup> A. Rodger, 'Law for All Times', 13.

<sup>30</sup> C. Carmichael, *Ideas and the Man*, 57.

<sup>31</sup> Hermeneutic methods are a prominent feature of the Talmudic legal tradition, the study of which formed a major element of Daube's work. Hermeneutics also featured heavily in 19th Century German scholarship. Daube's method seems, in particular, to chime with the work of Schleiermacher and Savigny: for an account of each, see J. Stelmach and B. Bròzek, *Methods of Legal Reasoning* (Dordrecht, The Netherlands, 2006), 176–7 and 184. We know that Daube read Savigny: see e.g. D. Daube, 'On the Use of the Term *damnum*' in D. Cohen and D. Simon (ed.), *David Daube: Collected Studies in Roman Law* (Frankfurt am Main, 1991), Erster Halbband (Book One) 279, 332; however, a perusal of the indices of names and sources at the end of *Collected*

commented upon.<sup>32</sup> Daube would, however, probably not have wished to be labelled a hermeneuticist, and would have considered his method to be more eclectic and individual.<sup>33</sup>

We turn now to the question of the extent to which Lord Rodger's approach to textual analysis was influenced by that of his mentor. This, at least, is not a difficult problem to solve. Although Lord Rodger's judicial work does not expressly acknowledge his debt to Daube, his extra-judicial writings clearly do.<sup>34</sup> Indeed, they go further: they exhort the reader to utilise Daube's method. In discussing the method, Lord Rodger noted that the German tradition of legal education to which Daube was exposed placed greater emphasis upon textual analysis than does contemporary legal education in the U.K..<sup>35</sup> He also observed that the fragmentary nature of Roman Law leads its scholars to scrutinise intensely the few, imperfect texts that they have.<sup>36</sup> He recognised, too, that in modern law, we have much more material to study and as a result tend not to devote a similar level of attention to our texts.<sup>37</sup> He

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*Studies* will be enough to demonstrate that the materials he utilised most were by far and away the primary Biblical, Roman and Talmudic sources that he sought to analyse, and the works of Beseler, Buckland, Mommsen and (especially) Lenel.

<sup>32</sup> See e.g. 'Rabbinic Methods of Interpretation and Hellenistic Rhetoric' in C. Carmichael (ed.), *Collected Works of David Daube, Volume One: Talmudic Law* (Berkeley, 1992), 333. Here, Daube discusses Hillel's seven norms of hermeneutics. Interestingly, he does so from the somewhat sceptical perspective of noting that these are not just consistent with, but were influenced by, Romano-Greek conceptions of rhetoric. Even when he is discussing hermeneutical sources, therefore, there is little evidence of his firmly nailing his flag to the hermeneutical mast.

<sup>33</sup> Despite Daube's great admiration for the palingenetical work of Lenel, and Daube's own significant contribution to the body of palingenetic work, we should probably not describe Daube's method as palingenetical either. Palingenesia involves the reconstruction of a lost primary text through close analysis of the surviving secondary commentaries thereon. Daube's method is not always palingenetic: palingenesia is but one of a number of elements in his work. In the 'Zeitschrift Obituary', Rodger lists, alongside a strand of work which he does not name but which corresponds to palingenesia, form criticism and the history of the development of technical terms (and the insights to be taken therefrom) as discrete strands of Daube's work: 'Zeitschrift Obituary', XLIV–XLVI.

<sup>34</sup> In addition to the sources referred to at n.14, above, Rodger makes approving reference to Daube in e.g. A. Rodger, 'The Form and Language of Judicial Opinions', *L.Q.R.*, 118 (2002), 226, 233, 235 and idem, 'The Form and Language of Legislation', *Rechtshistorisches Journal*, 18 (1999), 601, 623.

<sup>35</sup> A. Rodger, 'Law for All Times', 12.

<sup>36</sup> A. Rodger, 'The Form and Language of Legislation', *Rechtshistorisches Journal*, 18 (1999), 601, 605

<sup>37</sup> *Ibid.* The problem of information overload also arose when Lord Rodger spoke at the annual Universities of Baltimore and Maryland Comparative Summer School

nonetheless asserts that, when faced with the problem of interpreting a text, ‘Daube’s work provides endless models for how we should proceed,’<sup>38</sup> and ‘should [...] be studied by all those who are concerned as lawyers, in whatever capacity, in analysing documents and thinking about our legal system.’<sup>39</sup> We are emphatically told,<sup>40</sup>

[t]here is no magic about ancient sources that makes them peculiarly suitable for the kind of attention to style of language which Daube taught us. On the contrary, he applied it to texts of all periods and so should we.

Following endorsements as ringing as this, it would be strange indeed if no examples could be found of Lord Rodger using Daube’s approach in his judgments, and examples there are. Some of them Lord Rodger provides himself. Most striking is his discussion of *Salmon v H. M. Advocate*<sup>41</sup> in ‘Law for All Times’.<sup>42</sup> *Salmon* was concerned with the interpretation of s.28 of the Misuse of Drugs Act 1971, c.38. Throughout that statute, the expression ‘article’ is used to refer to items or things. However, in section 28(3), the more specific expression, ‘substance or product’ suddenly crops up. Lord Rodger stated that that he was ‘acutely conscious’ of Daube looking over his shoulder, and of ‘hearing Daube’s voice [...] saying, but why did Parliament use the words “substance or product” in subsection (3)?’<sup>43</sup> This sense that the draftsman must have had a particular reason for switching from a general to a more specific mode of expression triggered the thought process which led Lord Rodger to formulate a novel analysis of the structure and purpose of s.28.<sup>44</sup> ‘Law For All

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organised by David Carey Miller at the University of Aberdeen. Students would frequently ask what use Lord Rodger made of American materials, only to receive the provocative and often unwelcome answer, ‘Very little. There is just *so much* of it.’ (He did, however, acknowledge the value of consolidating initiatives such as the Restatement of Torts; and of course he did, from time to time, make use of American authorities: see e.g. the reference to *Bullock v Tamiami Trail Tours Inc.* (1959) 266 F. 2d 326 in *Mitchell v Glasgow City Council*, [2009] U.K.H.L. 11, [59].)

<sup>38</sup> ‘Law for All Times’, 12.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*, 15.

<sup>41</sup> 1999 J.C. 67.

<sup>42</sup> ‘Law for All Times’, 12–13. (The case is not named in the article itself, which was initially given as a public lecture, but it may be identified from the information given in the endnotes at 23).

<sup>43</sup> *Ibid.*

<sup>44</sup> 1999 J.C. 67, 72–8. Lord Rodger’s analysis has been repeatedly followed in Scotland,



Times<sup>45</sup> provides us with the further example of *Galbraith v H. M. Advocate*.<sup>46</sup> Lord Rodger noted that Daube had argued that it is only at an advanced stage of the development of a legal concept that a noun or noun-phrase will emerge describing it.<sup>47</sup> The law only names that which it can identify, and so the emergence of a noun or noun phrase marks the point when a doctrine has become stable enough to be recognised by a legal system. Lord Rodger made use of this insight in *Galbraith*, where, when called upon to decide the essential elements of the doctrine of diminished liability, he declined to attach significant weight to the cases which pre-dated the regular usage of the term, noting that, during this phase of development, the theoretical basis for allowing the jury to return a verdict of culpable homicide remained unclear.<sup>48</sup> A further example of Lord Rodger's use of Daubean methods – that of *Inveresk Paper Co. Ltd v Tullis Russell Ltd*<sup>49</sup> – was identified by Hector MacQueen in his Memoir of Lord Rodger for the British Academy.<sup>50</sup> I will argue that Lord Rodger's judgment in *London Bridge* provides a further clear instance. Before turning to that example, however, we need to consider the meaning of consequential loss.

### The Contractual Exclusion Of Consequential Losses: English Law

The expression 'consequential loss' has come to mean different things in different legal contexts. In the law of tort/delict, consequential loss (or consequential damage) is one of a number of expressions<sup>51</sup> used to connote the idea of losses suffered as a knock-on result of damage to a protected interest, such as the interest in bodily integrity or in one's corporeal property.<sup>52</sup>

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most recently in *Aiton v H. M. Advocate* 2010 J.C. 154 and, in addition, received the approval of the House of Lords in the English case of *R. v Lambert* [2001] U.K.H.L. 37, [2002] 2 A.C. 545.

<sup>45</sup> 'Law for All Times', 13–14.

<sup>46</sup> 2002 J.C. 1.

<sup>47</sup> 'Law for All Times', 14.

<sup>48</sup> 2002 J.C. 1, 10–12. See in particular [27]: 'If the terminology used by the judges was unsettled, this was because they had not really settled the precise nature of the plea which they were describing.'

<sup>49</sup> 2010 S.C. (U.K.S.C.) 106.

<sup>50</sup> H. L. MacQueen, 'Alan Ferguson Rodger 1944–2011', *Biographical Memoirs of Fellows of the British Academy*, XII (2013), 361, 393.

<sup>51</sup> Other expressions used to capture the same idea are 'derivative' or 'parasitic' loss.

<sup>52</sup> See e.g. A. Beever, *Rediscovering the Law of Negligence* (Oxford, 2007), 224. The loss so described is often economic in nature, but the expression is sometimes applied to e.g. psychiatric harm.



By contrast, in the English law of contract,<sup>53</sup> there is strong authority for the proposition that, when used in the context of a clause seeking to exclude or limit liability for consequential loss,<sup>54</sup> the expression has a different meaning: that (at least, in the absence of contrary definition<sup>55</sup>) it corresponds to the category of losses delimited by the second limb of *Hadley v Baxendale*.<sup>56</sup> *Hadley v Baxendale*<sup>57</sup> is (or was<sup>58</sup>) the leading case on remoteness of damage in English contract law. Under the first limb of *Hadley v Baxendale*, the innocent party will receive ‘such [damages] as may fairly and reasonably be considered [as] arising naturally, i.e., according to the usual course of things, from such breach of contract itself’.<sup>59</sup> Such damages are commonly known as direct losses. Second limb losses, by contrast, are:<sup>60</sup>

such as may reasonably be supposed to have been in the contemplation of both parties, at the time that they made the contract, as the probable

<sup>53</sup> This approach has not been accepted throughout the common law world. It has recently been specifically rejected in Australia: see e.g. *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd* [2008] V.S.C.A. 26.

<sup>54</sup> Sometimes expressed merely as ‘consequential loss’, sometimes as ‘indirect or consequential loss’ or ‘indirect or consequential or special losses’.

<sup>55</sup> On the impact of contrary definition, see nn.67–69 and associated text, below.

<sup>56</sup> This notion commenced with cases such as *Millar’s Machinery Co. v David Way & Son* (1935) 40 Com. Cas. 204 and *Saint Line v Richardson* [1940] 2 K.B. 99 and has subsequently been consolidated by decisions such as *British Sugar Plc v N.E.I. Power Projects Ltd* (1997) 87 B.L.R. 42; *Deepak Fertilisers and Petrochemicals Corporation v I.C.I. Chemicals & Polymers Ltd* (1999) 1 T.C.L.R. 200; *Hotel Services Ltd v Hilton International Ltd* [2000] 1 All E.R. (Comm.) 750; *McCain Foods G.B. Ltd v Eco-Tec (Europe) Ltd* [2011] E.W.H.C. 66 (T.C.C.); *Markerstudy Insurance Co. Ltd v Endsleigh Insurance Services Ltd* [2010] E.W.H.C. 281 (Comm.); *Glencore Energy U.K. Ltd v Cirrus Oil Services Ltd* [2014] E.W.H.C. 87 (Comm.); *Polyppearl Ltd v E.On Energy Solutions Ltd* [2014] E.W.H.C. 3045 (Q.B.). I shall collectively refer to this line of cases as ‘the consequential loss as second limb cases.’

<sup>57</sup> (1854) 9 Exch. 341.

<sup>58</sup> The future status of *Hadley v Baxendale* depends on the extent to which Lord Hoffmann’s judgment in *Transfield Shipping Inc. v Mercator Shipping Inc.* [2008] U.K.H.L. 48 comes to be accepted as (a) containing the ratio of the decision in *Transfield*; and (b) involving the use of a materially different test to that found in *Hadley v Baxendale*. At the time of writing, neither of these matters is wholly clear. It should be noted, however, that *Transfield* was concerned with the meaning of the first limb in *Hadley v Baxendale*, not the second; and that there has been no shift, post-*Transfield*, in the way that the courts have defined or conceptualised consequential or indirect and consequential loss: see the unbroken train of consequential loss as second limb cases cited at n.56, above.

<sup>59</sup> *Hadley v Baxendale*, 355 per Alderson B.

<sup>60</sup> *Hadley v Baxendale*, 355–6 per Alderson B..

result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damage resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under those special circumstances.

It is perhaps worth shortly stating what the second limb does *not* do before considering what it does. The two limbs of *Hadley v Baxendale* do not describe an unbroken continuum of loss; the second limb does not permit the recovery of losses which are conceptually similar to, but just somewhat more remote than, those recoverable under the first limb. The second limb makes recoverable an entirely different form of loss. Second limb cases involve losses of an unusual nature arising from the particular factual circumstances and which the party who feared suffering them happened to have the foresight to communicate to the other contractual party at or before the time of entering into the contract. Such losses are commonly described as ‘indirect’. The use of this term is well established, but its lack of precision is apt to create confusion. A more descriptive term such as ‘additional losses disclosed and accepted’ would better capture the nature of the losses recoverable under the second limb.

The courts’ decision to conflate ‘consequential loss’ with the second limb in *Hadley v Baxendale* has several effects. Firstly, and most obviously, it makes consequential loss a synonym for indirect loss. This being so, it is perhaps surprising that so many clauses which seek to exclude or limit consequential loss do so by referring to ‘consequential and indirect’ or ‘consequential or indirect’ loss. Such drafting is tautologous, a fact which might tend to suggest that the effect of the second limb in *Hadley v Baxendale* is not properly understood. Secondly, it provides a definition of consequential loss which, as McGregor notes, is ‘illogical and fails to make practical sense.’<sup>61</sup> Why would one contracting party go to the time and trouble of communicating special circumstances to the other ‘in order to fix him with a liability for loss to which he would not otherwise be subject and at the same time to accept an exclusion of liability in respect of the selfsame loss?’<sup>62</sup> Such a definition is also likely to

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<sup>61</sup> H. McGregor, *McGregor on Damages* (18th edn, London, 2009), para. 1-038.

<sup>62</sup> *Ibid.* The result seems all the more unlikely when one considers that the exclusion is in general terms – i.e., it makes no express reference to the special circumstances that the party has gone to such trouble to introduce.

fail to meet the needs and expectations of the client. Very often, what the client most fears is liability for loss of profit, and/or similar economic losses which may impose a burden out of all proportion to the value of the contract.<sup>63</sup> If consequential loss is to be defined in accordance with the second limb of *Hadley v Baxendale*, then such economic losses will be excluded only if they constitute a special circumstance. But very often, they will be no such thing. Commerce is directed towards the making of a profit. Loss of profit or other related economic losses will often be a perfectly foreseeable consequence of the breach of contract, and, where this is so, it falls within the first limb of *Hadley v Baxendale*, not the second. The exclusion of consequential loss will therefore be ineffectual, and the only restriction on liability will be imposed by the law of remoteness. The very limited scope of an exclusion of consequential loss clause deemed to be governed by the second limb was remarked upon by Parker J. in *Croudace v Canwood*,<sup>64</sup> while in *B.H.P. Petroleum and ors v British Steel and anor*, Rix L.J. noted that ‘in perhaps many cases, such an exclusion clause would be likely to exclude nothing.’<sup>65</sup> Situations where special circumstances have been held to be established and an exclusion of consequential loss clause has been triggered are rare indeed.<sup>66</sup> Thus, if Rix L.J.’s dictum is to be criticised for anything, it is for *over-stating* the likelihood of the consequential loss clause catching and excluding a head of claim.

It is, of course, possible for those drafting exclusion clauses to side-step the problem created by the deficiencies of the law’s attempt to give meaning to the expression ‘consequential loss’, and this they have regularly sought to do. However, so wedded have the courts been to the notion that consequential loss maps directly onto ‘*Hadley v Baxendale* indirectness’ that several attempts to provide consequential loss with a more expansive definition have failed in circumstances when the courts have read down the clause using reasoning which could be criticised as artificial. For instance, in *Markerstudy Insurance Co. v Endsleigh Insurance Services Ltd*,<sup>67</sup> (*Markerstudy v Endsleigh*) it was held that a

<sup>63</sup> In the oil industry, examples include loss of use of equipment and deferral and/or loss of production.

<sup>64</sup> [1978] 2 Lloyd’s Rep. 55, 59.

<sup>65</sup> [1999] 2 Lloyd’s Rep. 583, 600.

<sup>66</sup> In *B.H.P. Petroleum*, Rix identified only *Millar’s Machinery Co. Ltd v David Way and Son* (1935) 40 Comm. Cas. 204 as a case where this might have happened, but the brevity of the report made it impossible to be sure of even this example. In the overwhelming majority of the cases to consider the issue in modern times – including (with the possible exception of *Millar’s Machinery*) all of the cases cited at n.56, above – the attempt to exclude losses as consequential and/or indirect has been unsuccessful.

<sup>67</sup> [2010] E.W.H.C. 281 (Comm.).

clause which excluded ‘indirect or consequential loss (including [...] loss of anticipated profits)’ must be held to exclude loss of profit only in so far as it was a second-limb loss; and as loss of profit was perfectly foreseeable in the instant case, it fell under the first limb, not the second, and was therefore not excluded. This in turn has led to the term receiving ever more technical and detailed definitions in contractual documentation. In one of the leading standard oil and gas industry contracts, ‘consequential loss’ is defined as meaning:<sup>68</sup>

- (i) consequential loss under applicable law; and
- (ii) loss and/or deferral of production, loss of product, loss of use and loss of revenue, profit or anticipated profit (if any) whether direct or indirect to the extent that these are not included in (i), whether or not foreseeable at the date of execution of this Deed.

This, it is submitted, is a well-drafted clause which one would expect to succeed in its aim of expanding the scope of ‘consequential loss’ well beyond the limits of ‘*Hadley v Baxendale* indirectness’. There is, however, more than a faint whiff of the absurd in the formulation to which its authors have had to have recourse. In essence, it defines consequential loss as ‘whatever consequential loss means, plus – because we have no confidence that this includes the particular heads of claim that our client actually fears – the feared heads of claim, irrespective of whether they are, as a matter of technicality, direct, indirect, foreseeable or unforeseeable.’ This tortuous process is necessary largely because of the courts’ failure to provide a definition of consequential loss that makes practical sense. But although effective drafting can provide a solution to the problem, this should not lead us to conclude that the law’s less than helpful definition of consequential loss is of no moment. It is inelegant and dangerous for an expression like ‘consequential loss’ continually to have to be defined to mean something which – while similar to what the term would mean in a delictual context – is quite distinct from the meaning that the courts would ordinarily attribute thereto when construing a contractual exclusion. Not all contracts are drafted by a team as skilful as that which drafted the LOGIC IMHH, and nor is it reasonable to expect them to be. Many high-value contracts may very well be put together by unqualified personnel who may not understand the dangers inherent in using ‘consequential loss’ undefined, or, if they do appreciate that

<sup>68</sup> LOGIC, 2012 Mutual Indemnity and Hold Harmless Deed, <http://www.logic-oil.com/imhh/documents>, accessed 9 July 2015.

they need to expressly define-in loss of profit or other economic losses, may not be alive to the subtleties of why the issues of directness or foreseeability should be specifically addressed. And if these clauses fail, contractors may find themselves exposed to liabilities which are either uninsurable or which could have been insured but were not, or which at least were not in some way priced into the job, as the contractor mistakenly imagined that he had the benefit of a contractual exclusion of liability.<sup>69</sup>

### The Contractual Exclusion Of Consequential Losses: Scots Law

There has been a dearth of reported Scottish cases on the import of clauses which exclude or limit liability for consequential and/or indirect loss.<sup>70</sup> However, unlike the English cases on this matter, none of which have been appealed beyond the level of the Court of Appeal, the leading Scots case, *London Bridge*, was decided in the House of Lords. Although the case has, as an authority on the exclusion of liability for consequential loss,<sup>71</sup> been largely overlooked,<sup>72</sup> it is of high authority. *London Bridge* is of particular

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<sup>69</sup> An interesting question is the extent to which the process would be simplified if the parties gave up on the term 'consequential loss' altogether and instead excluded something like 'specified economic losses' instead. The economic losses that the parties had in mind could then be listed out in a definition clause. This should both achieve greater certainty and remove the need to deal expressly with the direct/indirect issue, although it would probably still be prudent to deal expressly with the issue of foreseeability at the time of entering into the contract.

<sup>70</sup> Only one Scottish case, *Ogilvie Builders Ltd v City of Glasgow District Council* 1995 S.L.T. 15, is recorded by Lord Caplan as having been cited to him in relation to the discussion of consequential loss in *London Bridge*, and he rightly notes that it is not directly in point. The opinion of Lord Caplan is available to download from the Scottish Courts website. The relevant part for our purposes is Part 5, available at <http://www.scotcourts.gov.uk/opinions/Pipervol5.doc>. The discussion of *Ogilvie* is at 1032-1033. In D. Cabrelli, *Commercial Agreements in Scotland: Law and Practice* (Edinburgh, 2006), ('*Commercial Agreements in Scotland*'), 520-529, the only Scots authority cited in an admirably full discussion of the meaning of 'indirect, special and/or consequential losses' is *London Bridge*.

<sup>71</sup> The case is recognised as an important authority in other areas of the law, such as subrogation, contribution, the interaction between contractual indemnities and those offered under insurance law, and the enforceability and operation of indemnity and hold harmless clauses.

<sup>72</sup> So far as my researches reveal, it has been entirely overlooked by subsequent case law. Few writers on the subject mention the case, although Cabrelli provides a detailed analysis (D. Cabrelli, *Commercial Agreements in Scotland*, 525-9), while McGregor refers to Lord Hoffmann's House of Lords judgment in H. McGregor, *Damages*, para. 1-038. See also C. Kidd, 'Excluding Consequential Damages', in B. Soyler and A. Tettenborn

interest because the House of Lords unanimously affirmed a decision of the Inner House which took a markedly different approach to the exclusion of consequential loss than that which has been adopted in the English courts, albeit in a factual context which differed from those which had been litigated in England. The case is plainly highly significant in Scots law and also has potential usefulness as a comparative source for other jurisdictions. It also provides a convenient occasion for us to analyse Lord Rodger's approach to the construction of a problematic text. For all of these reasons, *London Bridge* will be discussed in some detail below.

(1) *London Bridge: The Context of the Disputed Claim*

As noted above, disputes about whether or not liability for a particular head of claim is excluded as a consequential loss usually concern economic losses such as loss of profits. Generally, the loss will arise in the context of a claim for damages following a breach of contract, in circumstances where the party in breach seeks to be relieved of some of the consequences occasioned by the breach. In *London Bridge*, the disputed head of claim was unusual; so too were the circumstances in which it came to be advanced. The case arose out of the Piper Alpha disaster, in which an offshore installation located within the Scottish sector of the United Kingdom Continental Shelf was destroyed by a series of explosions and fires, leading to the death of 167 workers. Rightly, Piper Alpha is primarily viewed as a human tragedy, one which led to a much-needed redesign of the system of health and safety regulation in the offshore oil and gas industry;<sup>73</sup> but, of course, the occurrence of a disaster of such magnitude also leads to significant losses and liabilities.

Occidental, the operator of Piper Alpha, had entered into a number of contracts for the provision of services on the installation. In accordance with the usual industry practice, each of these contracts contained liability-allocation provisions. Cross-indemnity provisions stated that the operator would indemnify and hold harmless the contractor for any damage to the operator's property or injury to or death of the operator's employees, with each contractor, in turn, indemnifying and holding harmless the operator in respect of any damage to the contractor's property or injury to or death of the contractor's employees. In addition, the contracts included a mutual exclusion

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(eds.) *Offshore Contracts and Liabilities* (Abingdon, 2015).

<sup>73</sup> See the discussion in J. Paterson, 'Health and Safety at Work Offshore' in G. Gordon, J. Paterson and E. Üşenmez, *Oil and Gas Law: Current Issues and Emerging Trends* (2nd edn, Dundee, 2011), ('Gordon, Paterson and Üşenmez'), 187.

of liability for 'indirect or consequential loss', defined so as to include 'loss of use, loss of profits, loss of production or business interruption.'

Following the accident, the operator promptly settled the personal injury claims of the injured and the claims of the families of the deceased. This it did with the intention of ultimately bearing liability for its own personnel, but of using the contractual indemnity to claim back from the contractors the sums paid relative to the various contractors' personnel. Although the *locus delicti* lay within the Scottish sector of the U.K.C.S. and the operator was a U.K.-based company, the operator had a connection to Texas, where (unusually, for a company operating on the U.K.C.S.) it sold all its produced oil. It apprehended that there was a material risk that the Texan courts would accept jurisdiction if proceedings were initiated, and that (even without punitive damages), awards of damages would be higher there than in Scotland. The operator therefore settled the personal injury claims at a 'mid-Atlantic' level, including a 'Texas enhancement' in exchange for a waiver of the injured persons' potential right to sue in Texas.<sup>74</sup>

The contractors met the operator's claim for reimbursement under the indemnity by, *inter alia*,<sup>75</sup> contending that the Texas enhancement constituted an indirect or consequential loss which had been contractually excluded.

## (2) *The Decision at First Instance*

The contractors' argument was successful at first instance. Lord Caplan held<sup>76</sup> that 'the terms indirect and consequential loss are almost terms of art.'<sup>77</sup> He considered that, at least in the context of cases involving damages for breach of contract, these expressions had been held to correspond to

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<sup>74</sup> It is perhaps also worth noting at this stage what the operator did *not* sue for. Although it was the operator's position that the negligence of one of the contractors had caused or at least substantially contributed to the causation of the accident, the operator did not pursue a claim for damages for the destruction of the platform, presumably because it recognised that the mutual indemnity and hold harmless provision relative to property damage precluded it from doing so. Neither did the operator pursue the contractor for loss or deferral of production from the Piper field, and/or the loss of any profit therefrom. This was so notwithstanding the fact (a) that the operator alleged negligence on the part of at least one of the contractors; and (b) production from the field was shut in for a period of five years as a result of the destruction of the platform, resulting in the deferral of production of around 25-30 million barrels of oil. Presumably, the operator accepted that the possibility of recovering such losses was excluded by the operation of the consequential loss clause.

<sup>75</sup> A host of other defences were pursued by the contractors: see n.71, above.

<sup>76</sup> Above, n.70. The discussion of 'indirect and consequential loss' commences at 1021.

<sup>77</sup> *Ibid.*, 1076.



the second limb under *Hadley v Baxendale*. He recognised that the current case was not a case involving damages for breach of contract – it was one where a claim for payment under an indemnity was being met by the defence that some of the sums claimed were irrecoverable due to the operation of the exclusion clause – but observed that in some cases not involving breach of contract, the courts had borrowed their definition of indirect or consequential loss from the breach of contract cases. He considered that the *contra proferentem* rule meant that he did not have to determine finally if the second limb approach was apposite in the present circumstances. This was so because he thought the operator, as the party seeking to enforce the indemnity, was the *proferens*: any ambiguity therefore had to be resolved against the operator's interests, and so, as long as it was at least possible that the parties were using the phrase 'indirect and consequential loss' to denote a reference to the second limb in *Hadley v Baxendale*, the contractors would be entitled to the benefit of that construction; finally, he thought it was indeed possible that this was the parties' intention.<sup>78</sup>

Lord Caplan considered the question of whether or not the Texas enhancement was recoverable fell to be determined by whether the operators had provided the contractors with enough information about their close connection to Texas (and consequent susceptibility to being sued within that jurisdiction) to fix them with enough knowledge to satisfy the test of special circumstances. Lord Caplan thought that the operators had not, and therefore held that the Texas enhancement could not be recovered from the contractors.

We should not under-estimate the scale of the task that faced Lord Caplan as the judge of first instance in the largest and most complex proof in Scottish legal history, and should recall that the question of consequential loss was but one of a host of issues that Lord Caplan had to decide. However, there are a number of difficulties with Lord Caplan's analysis which, as we shall see, did not survive the scrutiny of the Inner House. Firstly and most fundamentally, he entirely misconstrues the 'consequential loss as second limb' case law. He believes that the fact that the operators had not communicated special circumstances means that the loss was consequential. But this is to turn the 'consequential loss as second limb' cases on their heads. In such cases, it is when the loss flows from special circumstances which *have* been communicated that it will be excluded as consequential, not when it has not. Losses which

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<sup>78</sup> Ibid..



do not arise from special circumstances communicated in advance are either recoverable in terms of the first limb or irrecoverable as too remote. If special circumstances have not been communicated, the second limb simply does not enter into the question.

Lord Caplan's judgment could also be criticised from a stylistic and methodological perspective. His is a somewhat halting and tentative opinion. There is little attempt to get to the bottom of what the wording actually means. The decision instead takes the form of the identification of one possible interpretation, and the application of an extrinsic rule of construction – *contra proferentem* – to elevate that possible interpretation into the one which is deemed to be correct. This gives the judgment an elliptical and artificial feel; and the idea that the operator is the *proferens* is quite mistaken. The concept of *contra proferentem* would seem to have no place in the context of the interpretation of a *mutual* risk-allocation clause;<sup>79</sup> but even if it were thought to be applicable, identifying the operator as the *proferens* in circumstances where the contractors are seeking to have the benefit of an exclusion clause would seem to make little sense. Overall, this part of Lord Caplan's judgment reads as an attempt to generate a short-cut answer to the difficult question posed, rather than a meaningful attempt to get to the root of the problem. We are reminded of the quotation from Daube with which this essay opened.

### (3) *The Decision in the Inner House*

The Inner House<sup>80</sup> unanimously reversed the Lord Ordinary's decision on the consequential loss point. Each of the judges wrote individual opinions. All were agreed that the task of interpretation primarily depended not upon having regard to prior caselaw but upon analysing the wording of the contract itself. Thereafter, the reasons for their decisions varied quite widely. It is therefore necessary to discuss each judgment in turn.

## **The Judgments Other Than That of Lord Rodger**

Lord Sutherland did not find the prior case law relative to the meaning of indirect and consequential losses to which he had been referred to be helpful, observing, perhaps wearily, perhaps wryly, that<sup>81</sup>

<sup>79</sup> See G. Gordon, 'Risk Allocation in Oil and Gas Contracts' in Gordon, Paterson and Üşenmez, para. 14.31, 466-467.

<sup>80</sup> Which, unusually, convened a bench of four to hear the appeal.

<sup>81</sup> *London Bridge*, 2000 S.L.T. 1123, 1177.

[f]rom the cases referred to [...] the only firm conclusions that can be drawn are that whatever “consequential” means, it does not simply mean what it would normally be understood to mean, namely “in consequence of”, and “direct” does not mean “indirect”, although that is not of the slightest help in trying to understand what either of these words does mean.

Although expressly disclaiming any use of the *eiusdem generis* rule, Lord Sutherland thought it legitimate, in undertaking the task of construing the phrase ‘indirect and consequential’ in context, to look at the specific examples of losses provided within the clause.<sup>82</sup> From this, he deduced that use of the word ‘indirect’ did not exclude direct<sup>83</sup> and that ‘consequential’ referred to economic losses arising from events causing interruption or cessation of production.<sup>84</sup> Had he chosen to end his opinion by adding that the Texas enhancement is, in essence, a claim for personal injury, not a claim for economic loss, his speech would have closely resembled those of Lords Coulsfield and Gill.<sup>85</sup> He instead sought to demonstrate the ‘fallacy’ of the contractors’ argument. This, he thought, lay in their attempt to apply a construction of ‘indirect and consequential’ which had been formulated in the context of breach of contract cases to the ‘very different situation’ of a claim under an indemnity clause.<sup>86</sup> What is the essential difference between the two situations? For Lord Sutherland, this lay in ‘what the parties are deemed to have had in contemplation’<sup>87</sup> – a factor which varies depending upon the nature of the claim under discussion. He argued that in the context of a claim for breach of contract, the parties are deemed to have had in contemplation the idea that the contract might be breached, and that if breach occurs, the loss flowing from that breach will be all losses that are not unlikely, a matter which will fall to be determined in accordance with the first limb in *Hadley v*

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<sup>82</sup> Ibid..

<sup>83</sup> By this he would seem to mean that, despite the fact that they would ordinarily be considered as direct and not indirect, the fact that the specific examples of loss – loss of profit, etc. – are expressly set out means that, for the purpose of this particular clause, they are to be deemed to be ‘indirect or consequential.’ From the standpoint of principle I am sympathetic to this position, and it is not wholly without precedent: see *B.H.P. Petroleum*, 600. However, we should note that it is not in accordance with the prevailing view on this point in English law: see e.g. the discussion of *Markerstudy v Endsleigh* at n.67 and associated text, above.

<sup>84</sup> *London Bridge*, 2000 S.L.T. 1123, 1177.

<sup>85</sup> Discussed below at nn.91-99 and associated text.

<sup>86</sup> *London Bridge*, 2000 S.L.T. 1123, 1177–1178.

<sup>87</sup> Ibid., 1178.

*Baxendale*.<sup>88</sup> In the context of a claim made under an indemnity, by contrast, Lord Sutherland considered that the parties are deemed to have in contemplation that a claim under the indemnity might arise, but that thereafter,<sup>89</sup>

it is immaterial how improbable it is that a claim would arise or that the circumstances in which the claim arises be of an unusual nature, so long as the claim is of a type that *prima facie* falls within the indemnity. When a claim is made and the indemnity thus triggered, consideration may have to be given to whether the loss falls within the exception of “indirect and consequential”. That does not appear to me to be a matter of considering what the parties may have contemplated, but a matter of considering whether the claim is for a loss which is too remote.

The reference to ‘circumstances [...] of an unusual nature’ mirrors, to some extent, Alderson B.’s formulation of the second limb in *Hadley v Baxendale*. This would suggest that Lord Sutherland is here attempting, in the context of claims arising under the indemnity clause, to sever the connection between ‘indirect and consequential loss’ and the second limb of *Hadley v Baxendale*. However, Lord Sutherland’s analysis is rather confused. It seems to suggest that, instead of being identified with the second limb, ‘indirect and consequential loss’ should map on to the concept of remoteness. If so, this makes no more sense than identifying consequential loss with second limb indirectness. Losses which are too remote are indeed irrecoverable, but this is because of the effect of the law of remoteness, not because they are consequential.

Other criticisms of Lord Sutherland’s analysis could also be advanced. It is not an attack upon the line of cases that (at least in the context of breach of contract claims) associates consequential loss with the second limb in *Hadley v Baxendale*, but merely an attempt to distinguish them on the basis that here, the consequential loss issue arises in the context of an indemnity claim. Given what has already been said about the deficiencies of the ‘consequential loss as second limb’ line of reasoning, this is disappointing; and it is also surprising, given that Lord Sutherland did not seem to find that line of case law particularly illuminating.<sup>90</sup> Moreover, Lord Sutherland’s analysis pays insufficient regard to

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<sup>88</sup> It is implicit in Lord Sutherland’s reasoning that in a breach of contract case, ‘indirect and consequential loss’ would be determined by reference to the second limb in *Hadley v Baxendale*.

<sup>89</sup> *London Bridge*, 2000 S.L.T. 1123, 1178.

<sup>90</sup> See above, n.81 and associated text.

the fact that the consequential loss clause was a free-standing exclusion of liability. Although, on the individual facts of the case, the provision was being invoked as an exception to an indemnity claim, the consequential loss clause was not part of the indemnity clause, and nor was its function exclusively tied thereto. Sometimes (for instance, in the factual circumstances of *London Bridge* itself) it will operate in conjunction with the indemnity clause. But it could just as easily operate alone: for instance, if a contractor supplies a defective piece of equipment, as a result of which oil production has to be shut in while a replacement is procured or fabricated and transported offshore. The failure to take account of this fact means that Lord Sutherland's interpretation would, even if correct, be incomplete; and it has been submitted that the analysis was not correct.

Lord Coulsfield also considered the cases relative to the construction of indirect and consequential loss to be unhelpful to the matter in hand, but for him, this was not because of any distinction to be drawn between cases concerning indemnities and those concerned with breach of contract. The 'radical difference'<sup>91</sup> that he perceived was as between the wording of the particular clause under discussion and those which had been discussed in previous cases. In interpreting the instant clause, he relied in particular upon the fact that in it, the expression 'indirect or consequential loss' was not used in isolation, but in conjunction with a series of illustrative examples ('loss of use, loss of profits, loss of production or business interruption').<sup>92</sup> Each of these could, broadly speaking, be categorised as things impacting upon the claimer's ability to earn profit. This, he thought, was the nub of what the clause was there to capture (and thereby exclude). He considered a clause in such terms to make sound commercial sense given the 'plain and obvious fact' that 'a fault giving rise to an interruption of production could, in turn, give rise to enormous liabilities utterly disproportionate either to the value of the contract work or the resources of the contractor.'<sup>93</sup> In considering whether the Texas enhancement was caught by the clause, he conceded that ultimately his judgment on the matter might boil down to 'a question of impression'.<sup>94</sup> He was nevertheless clear in his view that the Texas enhancement, as a claim essentially connected with personal injury, was 'a different sort of creature

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<sup>91</sup> *London Bridge*, 2000 S.L.T. 1123, 1206.

<sup>92</sup> *Ibid.*.

<sup>93</sup> *Ibid.*, 1207.

<sup>94</sup> *Ibid.*

altogether<sup>95</sup> from the profit-focused losses that the consequential loss clause envisaged.

Lord Coulsfield's judgment is crisply and clearly written and shows an acute awareness of the commercial realities of the oil industry. The judgment's reasoning could, however, be criticised as rather superficial. For all that Lord Coulsfield's instincts serve him well, to defer to impression is to judge by feel, rather than reason.

Lord Gill, too, considered the case law on consequential loss to be of limited guidance, for similar reasons to those given by Lord Coulsfield. He observed that in every case, the meaning of an exemption from liability for consequential loss is first to be sought in the terms of the clause itself, looked at in the context of the whole provisions of the contract.<sup>96</sup> Thereafter, Lord Gill's primary argument<sup>97</sup> was that if (as here) the loss were a direct loss (by which he meant a loss of a kind that the defendant should have realised was not unlikely to occur), the fact that the quantum of the loss turned out to be higher than might have been expected would be irrelevant: it was the type of loss that mattered, not its quantum.<sup>98</sup> There are points where this is not expressed as clearly as one might have wished,<sup>99</sup> and, like Lord Coulsfield's judgment, it could be criticised for a lack of development, but the broad thrust of the argument seems plain.

#### (4) *Lord Rodger's Judgment*

Speaking in an extra-judicial capacity, Lord Rodger would sometimes point out that the openings of judicial speeches can provide clues as to the likely

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<sup>95</sup> Ibid..

<sup>96</sup> Ibid., 1214.

<sup>97</sup> Lord Gill also advanced a secondary line of argument, based on the inferences to be drawn from the evidence, to the effect that, if the contractors were indeed correct in arguing that the prior case law required the court to interpret 'indirect and consequential loss' so as to coincide with the second limb of *Hadley v Baxendale*, that availed them naught, because sufficient facts had been found proved by the Lord Ordinary to allow us to conclude that the loss, so far as it arose from the mid-Atlantic uplift, was foreseeable, and therefore within the first limb of *Hadley v Baxendale*, not the second.

<sup>98</sup> *London Bridge*, 2000 S.L.T. 1123, 1215.

<sup>99</sup> For instance, Lord Gill's claim, *ibid.*, that there is 'no need [...] to construe the clause by reference to *Hadley v Baxendale*' is perplexing, as his construction *does* involve construing the clause by reference to *Hadley v Baxendale* – he construes the clause as a direct loss falling within the ambit of the first limb. Presumably, what he meant was that there is no need to construe the clause in accordance with *the second limb of Hadley v Baxendale*.

outcome.<sup>100</sup> Although the point was made light-heartedly, he meant what he said.<sup>101</sup> While he does not launch his discussion on consequential loss with an opening to match Lord Devlin's in *McCutcheon v David McBrayne Ltd*,<sup>102</sup> the introductory paragraphs of this section of his judgment are still telling. He commences not, as one might expect, with a discussion of the concept of consequential loss, but by reiterating<sup>103</sup> that the case arises in the context of a claim being made under an indemnity clause.<sup>104</sup> Thus he immediately locates his discussion of consequential loss within the context of the overall contractual risk allocation scheme. He continues by recognising that while the quantum of the personal injury claims in respect of which the pursuer claims indemnity is higher than would ordinarily be the case, at first instance, the Lord Ordinary found the payments to be reasonable but 'nevertheless went on to hold'<sup>105</sup> that the indemnity should be limited to the amount of losses recoverable under Scots law: i.e., to a sum less than that which had been held to be reasonable. He concludes his introductory remarks by observing that the Lord Ordinary chose to offer an interpretation of the expression 'indirect and consequential loss' when the phrase that was actually used in the majority of the contracts under discussion was 'indirect and consequential losses'.<sup>106</sup> Nothing determinative has been said so far, but already we know that Lord Rodger is going to interpret the clause by reference to the wording of other

<sup>100</sup> A. Rodger, 'The Form and Language of Judicial Opinions', *L.Q.R.*, 118 (2002), 226, 245. See also Lord Reed, 'The Form and Language of Lord Rodger's Judgments' in A. Burrows, D. Johnston and R. Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013), 121.

<sup>101</sup> Lord Rodger considered that humour – successfully deployed – can be a powerful means of making a point. See Lord Reed, *ibid.*, and A. Rodger, 'Humour in the Law', *S.L.T.*, [2009], 202. Daube, too, was adept at communicating serious points in a humorous way: see C. Carmichael, *Ideas and the Man*, 40–8.

<sup>102</sup> 'When a person in the Isle of Islay wishes to send goods to the mainland he goes into the office of MacBrayne (the Respondents) in Port Askaig which is conveniently combined with the local Post Office. There he is presented with a document headed "Conditions" containing three or four thousand words of small print divided into twenty-seven paragraphs': [1964] U.K.H.L. 4; [1964] 1 W.L.R. 165. Lord Rodger was particularly fond of this passage: he thought it 'beautifully composed' and considered that it left the reader 'in little doubt that the humble islander is going to triumph over the pettifogging shipping company': A Rodger, 'The Form and Language of Judicial Opinions', *L.Q.R.*, 118 (2002), 226, 245.

<sup>103</sup> The import of the indemnity provisions had already been considered in an earlier section of Lord Rodger's judgment. See *London Bridge*, 2000 S.L.T. 1123, 1146–1151.

<sup>104</sup> *London Bridge*, 2000 S.L.T. 1123, 1153.

<sup>105</sup> *Ibid.*, 1154.

<sup>106</sup> *Ibid.*.

relevant clauses in the contract, not by reference to prior case law; that he considers the defender's case to be an attempt to pay a sum less than that which is reasonable; and that he considers the Lord Ordinary's speech to be somewhat lacking in precision. None of this would seem to bode well for the contractors.

Moving in to his analysis of the clause, Lord Rodger notes that, insofar as the exclusion of indirect and consequential losses clause applies to the contractual indemnities, it 'must operate within the framework of the indemnities contained in that article.'<sup>107</sup> In examining the text of the indemnity provisions, he observed,<sup>108</sup> firstly, that the parties had not agreed to confine the indemnity to claims arising in any given jurisdiction: they applied to any claims, without territorial limitation. Secondly, he noted that the contractor's obligation to the operators was wider than a bare obligation to indemnify. The contractor was, in addition, obliged to *defend* the operators against any claim arising out of injury to, or death of, the contractor's employees; an obligation which, because it 'is not confined to any particular class of claims [...] applies generally.'<sup>109</sup> He remarked that if the pursuers had been sued in the courts in Texas, they could have called upon the contractors to defend them there; and there was 'nothing in the wording of the indemnity which would give the contractors any basis for arguing [...] that their obligation to defend the [operators] [...] extended no further than an obligation to defend them against the claim up to a value quantified on a Scottish [...] basis.'<sup>110</sup> From this, Lord Rodger drew the conclusion that the indemnity clause imposed an unqualified obligation to defend the operator. He thought it logical that the scope of the obligations to defend and to indemnify should be coterminous. The contractors, however, were arguing a case that implied that the obligation to defend against a claim was wider than the obligation to indemnify against the loss. As Lord Rodger

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<sup>107</sup> *Ibid.*, 1155.

<sup>108</sup> Lord Rodger prefaced these observations by saying, 'Two points stand out': *ibid.*, 1155. He used precisely the same formula of words when discussing Lenel's analysis of a particular part of Ulpian's commentary in D.9.2 and the Collatio: see A. Rodger, 'Palingenesia of the Commentaries Relating to the Lex Aquilia', 148. 'Two points might in turn be thought to arise from this. Firstly, the notion of points 'standing out' is very much in sympathy with Metzger's account of Daube's method of reviewing a text and alighting on something that seems not to be fortuitous. Secondly, the fact that the same formula of words is being put to service by Lord Rodger when he sits as a judge as when he writes a learned paper on Roman law tends to indicate that his cast of mind did not materially change when he moved between those two activities.

<sup>109</sup> *London Bridge*, 2000 S.L.T. 1123, 1155.

<sup>110</sup> *Ibid.*.

put it, 'the *unqualified* obligation to defend any claim would be matched by a *qualified* obligation to indemnify the operators only against the amount of loss from that claim which the contractor could have contemplated as having a very substantial degree of probability.'<sup>111</sup> Lord Rodger could see 'no rational basis' upon which the parties should have intended such an 'implausible result', and noted that, for that reason alone, he would have rejected the operator's construction.<sup>112</sup>

At this point, we should perhaps pause to consider two things. Firstly, Lord Rodger's reasoning here shows the influence of Daube. The approach is psychological and causative. The absence of any rational basis to motivate the parties to intend the result flowing from the construction contended for by the contractors requires that construction to be rejected. Secondly, by this point in his opinion, Lord Rodger has already said enough to allow him to reject the contractors' argument. Particularly given the vast range of matters with which the appeal was concerned, he could have been forgiven for stopping there. However, he did not; he pressed on, believing that the contractor's argument had to be examined more closely. He noted that in its original setting, *Hadley v Baxendale* 'is supposed to reflect the intention of the parties to a contract as to the liability in damages which a party in breach of the contract should owe to the party who suffers loss as a result of that breach.'<sup>113</sup> However, in drawing up the provisions of the indemnity and consequential loss clauses, the parties were not attempting to regulate their liability in the event of breach: they were seeking to define the scope of the contractor's 'strict contractual liability' to indemnify the operators.<sup>114</sup> Lord Rodger thought it would be 'somewhat surprising' if the parties had chosen to define the scope of that obligation by importing a test designed to deal with a different situation.<sup>115</sup> However, his main criticism of the contractors' argument was that it depended upon the court concluding that the parties intended the phrase 'indirect or consequential losses' to be construed in a manner said to have been established by the courts in the consequential loss as second limb cases. Lord Rodger accepted that the meaning attached to particular words in previous decided cases might, in certain circumstances, be useful in determining the meaning that the parties to a contract had intended it to bear. However, this was not a case where such an

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<sup>111</sup> Ibid..

<sup>112</sup> Ibid..

<sup>113</sup> Ibid..

<sup>114</sup> Ibid., 1156.

<sup>115</sup> Ibid..



approach should be taken. In passing, he noted that none of the cases to which he had been referred was actually concerned with the construction of the precise phrase ‘indirect or consequential loss’. They were instead concerned with the meaning of ‘consequential damages’<sup>116</sup>, ‘indirect or consequential damages’,<sup>117</sup> ‘indirect or consequential damage’<sup>118</sup> or ‘consequential loss’.<sup>119</sup> Although Lord Rodger did not develop this point,<sup>120</sup> it is worth noting that this level of attention to detail is very much in keeping with Daube’s approach, which requires consideration to be given to precisely what has been said and the manner of its saying.<sup>121</sup>

‘More important’ than this, however, and the dominant reason why Lord Rodger thought it was ‘[n]either necessary [n]or helpful’ to analyse the ‘consequential loss as second limb’ cases, was the fact that ‘the context in which the words were used in the decided cases was different from the present.’<sup>122</sup> As the word ‘context’ is potentially ambiguous<sup>123</sup> it is worth emphasising that the particular contextual feature that Lord Rodger had in mind was the wording of the exclusion clause itself. He noted that in the exclusion clause, the phrase ‘indirect or consequential losses’ did not stand alone, but ‘in conjunction with examples of the kinds of losses to the operators which it is said to include and which therefore must fall within its scope’<sup>124</sup>: i.e., loss of use, loss of profits, loss of production or business interruption. And, as the task of the court in the present case<sup>125</sup> was to discover how the exclusion clause affected

<sup>116</sup> *Millar’s Machinery Co. Ltd v David Way & Son* (1934) 40 Com. Cas. 204.

<sup>117</sup> *Saint Line Ltd v Richardsons, Westgarth & Co. Ltd* [1940] 2 K.B. 99.

<sup>118</sup> *Crounce Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd’s Rep. 55.

<sup>119</sup> *British Sugar p.l.c. v N.E.I. Power Projects Ltd* (1997) 87 B.L.R. 42.

<sup>120</sup> And there are points here to develop, if one wished or required to. Most obviously, one could start by asking, ‘If indirect and consequential mean the same thing, then what possible reason would the draftsman have to include them both in the clause?’

<sup>121</sup> Examples of this approach abound in Lord Rodger’s scholarly work. His palaeogenetical Roman Law works are meticulously detailed. See also A. Rodger, ‘Molina, Stair and the Jus Quaesitum Tertio’, *Juridical Review*, [1969], 34 (Part 1) and 128 (Part 2). At 130–131, he offers a compelling interpretation of the true meaning of Stair, *Institutions*, 1,10,3 based upon the omission, by subsequent editors, of a comma that had been present in the first edition.

<sup>122</sup> *London Bridge*, 2000 S.L.T. 1123, 1156.

<sup>123</sup> It can embrace, for instance, conceptions such as commercial context, business common sense and prior communication between the parties, as well as textual context.

<sup>124</sup> *London Bridge*, 2000 S.L.T. 1123, 1156.

<sup>125</sup> Lord Rodger recognised that the two clauses were separate provisions, and that it was only because of the particular circumstances of the case that their concurrent effect was relevant. *Ibid.*: ‘[s]ince we are concerned to discover how art 20 affects the operation of the indemnity in art 17.1, the two provisions must be considered together.’

the operation of the indemnity, the two had to be considered together. In so doing, he saw that,<sup>126</sup>

all the losses enumerated in [the consequential loss clause] are losses which the operators may suffer as a result of injury to, or death of, the contractor's employees, or as a result of damage to, or loss or destruction of, the contractor's property. In that sense, they are all examples of a situation where A suffers losses because of injury or damage to B: the losses which A suffers in such circumstances are indirect or consequential.

Lord Rodger then used the factual circumstances of *Allan v Barclay*<sup>127</sup> to illustrate an example of a species of loss in respect of which the combined effect of the indemnity and consequential loss clauses would be to exclude liability. In *Allan v Barclay*, an employer, upon discovering that his servant had been injured, sued the wrongdoer in the delict of negligence for the loss of the injured man's service. His action was unsuccessful. Recovery was barred by the delictual rules of remoteness of damage as the loss had not arisen naturally and directly out of the wrong done. Lord Rodger considered that, 'in much the same way', the operator's loss of use, loss of profits, loss of production or business interruption did not arise naturally and directly out of injury to the contractor's employee or out of the damage to, or loss or destruction of, the contractor's property.<sup>128</sup> Rather, such losses were secondary or indirect – species of 'knock on loss, arising out of the consequences which flow to [the operator] due to [its] relationship with the contractor affected.'<sup>129</sup> In other words, *absent* the indemnity, these losses would not be recoverable. The indemnity, if not accompanied by the exclusion of consequential loss clause, would make them recoverable; but the effect of the consequential loss clause was to exclude liability. Lord Rodger then provided a practical example of a situation where this sequence could occur within the instant contractual framework. He noted that the death of a contractor's employee might mean that a critical item of equipment could not be brought into service, causing the operator to suffer a deferral of oil production.<sup>130</sup> This, he thought, would

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<sup>126</sup> *London Bridge*, 2000 S.L.T. 1123, 1156.

<sup>127</sup> (1864) 2 M. 873.

<sup>128</sup> *London Bridge*, 2000 S.L.T. 1123, 1156.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

be an indirect loss to the operators arising out of the death of the contractor's employee. He contrasted such a case with the loss in respect of which the operators sought to be indemnified in the present case. This, he argued, was 'a direct loss to the [operators] themselves', and remained so, irrespective of the level of quantum of the loss.<sup>131</sup> 'In no sense',<sup>132</sup> therefore, was the Texas enhancement an indirect or consequential loss to the operators within the meaning of the exclusion of consequential loss clause.

For Lord Rodger, it was not enough to bat away the contractor's interpretation and then stop; to do so would be merely to rebut a counter-argument without proving one's own position. As Metzger has noted while commenting on Lord Rodger's scholarly work, Lord Rodger was 'committed to proving every argument. He never simply announced his impressions or asked the reader to trust his instincts.'<sup>133</sup> The treatment of the consequential loss provision in *London Bridge* would seem to be a prime example of that commitment in operation when Lord Rodger was acting in a judicial capacity. And Daube is in evidence here, too. Daube in this situation would construct a narrative to demonstrate that his favoured interpretation provided a full explanation for the condition of the text. By setting out the effect of the interpretation contended for and demonstrating that there is a not-unrealistic set of factual circumstances which the draftsman might have had in contemplation when drafting the clause, Lord Rodger did just that.

But what of Lord Rodger's judgment, not as an example of his approach to textual interpretation, but as an authority on the meaning of the exclusion of consequential loss? I would contend that it is extremely useful. It severs the unhelpful association between consequential loss and second-limb indirectness. This frees up the judge to determine the meaning of the clause based not on extrinsic rules but on the wording used by the parties themselves, in the clause set within the context of the document as a whole. This in turn means that the judge is not required to follow the strained and altogether unlikely line of reasoning exemplified by cases such as *Markerstudy v Endsleigh*,<sup>134</sup> where even heads of claim which are specifically mentioned in the exclusion clause are not excluded *in toto*, but only where they happen to be indirect in the *Hadley v Baxendale* sense; which they will be in only the most exceptional of cases. This opens up the possibility of providing a more natural and commercially

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<sup>131</sup> Ibid..

<sup>132</sup> Ibid..

<sup>133</sup> E. Metzger, 'Rodger's Writings on Roman law', 190.

<sup>134</sup> See n.67 and associated text, above.

sensible answer to the question of what indirect or consequential loss means, one which gives a more central role the wording used by the parties. This approach is also more in keeping with modern developments in contractual interpretation, which give reduced weight to the traditional, extrinsic, rules of legal interpretation.<sup>135</sup> However, it is not identical to the particular form of contextualism advocated by Lord Hoffmann in *Investors Compensation Scheme Limited v West Bromwich Building Society* ('I.C.S. v West Bromwich'):<sup>136</sup> Lord Rodger's approach places greater emphasis upon the particular language used in the contract. This point will be developed in a future paper.

#### (5) *The Decision in House of Lords*

*London Bridge* was appealed to the House of Lords, where the Inner House's judgment was unanimously upheld. Their Lordships' speeches address the consequential loss point only briefly. Lord Bingham, in recording his agreement with Lord Mackay of Clashfern, devotes one short paragraph to the topic; Lord Mackay, three paragraphs (two to establish the issue, one to discuss and resolve it) and Lord Hoffmann, four.<sup>137</sup> Lords Bingham and Mackay's reasoning can be dealt with together. Each founded on the fact that the Texas enhancement was essentially a personal injury claim, and neither considered it material that the quantum of loss was higher than it would be in the ordinary course of events. Lord Bingham noted that, had the actions been raised in Texas, as they could easily have been, the exclusion clause would not have applied to these claims, an observation which echoes Lord Rodger's judgment in the Inner House. Lords Mackay and Bingham both explicitly refer to the fact that 'indirect or consequential loss' was defined so as to include 'loss of use, loss of profits, loss of production or business interruption.' Thus it seems that, like all the judges in the Inner House, they are interpreting the clause primarily by reference to its wording, rather than by reference to the 'consequential loss as second limb' cases. But while they seem to decide the case for reasons very similar to those given in the Inner House (a decision which Lord Mackay specifically endorses as 'sound'<sup>138</sup>),

<sup>135</sup> See e.g. *H.I.H. Casualty and General Insurance Ltd & ors v Chase Manhattan Bank & ors* [2003] U.K.H.L. 6, where the House of Lords considered the *Canada Steamship Rules* as part of their broad interpretative process but declined to find them determinative, and ultimately decided the case in a manner inconsistent with the Rules' application.

<sup>136</sup> (1998) 1 W.L.R. 896.

<sup>137</sup> *London Bridge*, 2002 S.C. (H.L.) 117. See [17], [67]–[69] and [98]–[101].

<sup>138</sup> *Ibid.*, [69].

development of these points, and evidence of the process of reasoning that leads them to attach weight to these factors, is noticeable by its absence. The judgments are highly impressionistic. The reasoning of Lords Mackay and Bingham can only really be glimpsed when their judgments are looked at through the prism of the Inner House decision. This may help to explain why the full import of *London Bridge* as a decision on consequential loss has not been widely appreciated.

Lord Hoffmann adopted a different approach. He expressed reservations about the 'consequential loss as second limb' cases and would, if necessary, have joined Lords Bingham and Mackay in concluding that the Texas enhancement 'remain[ed] compensation for death or injury'<sup>139</sup> and so could not be regarded as a different kind of loss from the amount which would have been recoverable in Scotland. However, the principal basis for Lord Hoffmann's decision was that he considered the contractors' attempt to use the exclusion of consequential loss clause as a means of escaping liability for loss otherwise included in the indemnity clause to be misconceived. This was so because, while the consequential loss clause 'limit[ed] the liability of the parties for losses caused by breach of contract',<sup>140</sup> the instant case was not concerned with such a claim, but was 'a claim to an indemnity for a liability incurred by the operator outside the contract.'<sup>141</sup> Lord Hoffmann thought that the exclusion clause had 'no application to such a claim.'<sup>142</sup>

Lord Hoffmann here expects the reader simply to accept his unsupported opinion: his judgment, like those of Lords Bingham and Mackay, could therefore be criticised for its impressionistic nature. However, a more fundamental objection could be taken. There is no indication that Lord Hoffmann considered this to be one of those rare situations where, to borrow his own expression, 'something has gone wrong with the language', requiring the court to bring 'business commonsense' to bear in order to prevent the attribution to the parties of 'an intention that they plainly could not have had.'<sup>143</sup> One might therefore expect him to adopt a construction that derives from the words chosen by the parties, supplemented, if necessary, by 'matrix of fact' evidence. However, Lord Hoffmann's judgment does not do this. There is nothing in the contract that would allow one to conclude that the

<sup>139</sup> Ibid., [101].

<sup>140</sup> Ibid., [100].

<sup>141</sup> Ibid..

<sup>142</sup> Ibid..

<sup>143</sup> *Investors Compensation Scheme Limited v West Bromwich Building Society* (1998) 1 W.L.R. 896, 913.

consequential loss clause's sole purpose is to limit the liability of the parties for losses caused by breach of contract. Indeed, the clause's wording points in the opposite direction: it says that '*in no event* shall either the contractor or the company be liable to the other for any indirect or consequential losses suffered' (Emphasis added).<sup>144</sup> This is expansive wording which does little to suggest that it is intended only to apply in the narrow context identified. Moreover, the assertion that the exclusion clause has no application to the indemnity clause is hard to reconcile with the fact that the exclusion opens with the words, '[n]otwithstanding any other provision of this contract'.<sup>145</sup> Such wording is a clear acknowledgement that there might be an overlap and competition between contractual provisions, and establishes the exclusion clause as having precedence in such situations. Logically, the most natural candidates to find themselves in competition with the exclusion clause must be clauses which either establish liability (e.g., the warranty clause) or clauses which, like the exclusion of consequential loss clause itself, re-allocate liability between the parties. Among the more obvious examples of the latter category of clauses would be an indemnity clause. Lord Hoffmann's analysis, although more detailed than those of his colleagues in the Judicial Committee, would therefore seem to be flawed. Lord Rodger's judgment on consequential loss therefore stands as the fullest and most persuasive account of the exclusion of indirect and consequential loss clause in *London Bridge*.

## Conclusions

### (1) *The Nature of Lord Rodger's Approach in London Bridge*

As we have seen, Lord Rodger reached the same result as the other appellate judges to decide the case, and, in some respects, his method is similar to that of the other judges. Like them, he rejects the notion that the prior case law should be determinative, and is instead primarily interested in interpreting the phrase in the light of its context. However, Lord Rodger's judgment stands head and shoulders above those of the other judges to hear the case. Even the most convincing of the other opinions are under-developed and impressionistic. The less convincing judgments are tentative, halting, error-strewn and/or hard to follow. Lord Rodger's judgment, by contrast, is a model of clarity. He is loyal to the text and committed to constructing an interpretation that is fully reasoned, matches the factual circumstances of the case and explains the

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<sup>144</sup> *London Bridge*, 2002 S.C. (H.L.) 117, [68].

<sup>145</sup> *Ibid.*.

wording as fully as possible. The influence of Daube is evident throughout. However, we should not permit this to diminish Lord Rodger's own intellectual contribution. Daube provides only an analytical method or intellectual toolkit; and while a bad workman may always blame his tools, a good workman has more than his tools to thank for his success. Without his own personal attributes as a logician and linguist; without his insight, imagination, clear-headedness and determination to argue the point through, Lord Rodger would not have succeeded in interpreting the text as he did.

(2) *London Bridge as an Authority on the Exclusion of Indirect or Consequential Losses*

I have argued that the current approach to the question of the meaning to be attributed to contractual attempts to exclude liability for indirect or consequential losses is both wrong in principle and produces unwelcome results. Should the English courts, then, abandon their current practice and adopt the *London Bridge* approach instead?

Making the argument that they should is not without its challenges. *London Bridge* is, in many ways, an atypical consequential loss case. The head of claim involved – a ‘top up’ element to personal injury claims – arose as a result of a complex and highly particular set of factual circumstances, and is quite different in nature from the forms of economic loss that are usually under discussion when exclusion of consequential loss clauses are litigated. The case is also unusual in that the exclusion of consequential loss clause was pled as an exception to the contractor's separate obligation to indemnify the operator, and not (as would more usually be the case) as a limitation upon the party in breach's obligation to make good the consequences of the breach. Despite being a case of the highest authority, at least in its native jurisdiction, and apparently of considerable comparative value, the case has been largely overlooked, possibly because of the features just described or perhaps for other, more practical, reasons.<sup>146</sup> I would argue, however, that despite all its peculiarities, *London Bridge* is a case which repays close study. That this is so is largely due to the judgment of Lord Rodger, who severs the mistaken connection between consequential loss and second-limb indirectness and places the text itself

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<sup>146</sup> It is a Scots authority; it is not surprising that it might be overlooked by English practitioners. The reasoning in the House of Lords is short and not especially impressive; it is only by going back to the Inner House judgments that the reasoning becomes plain. It is also a very long case which addresses a number of other points for which it is better known.

at the heart of the interpretative exercise; an approach which I have argued is consistent with the broader move towards contextual interpretation, and which, if adopted, would be greatly preferable to the artificial interpretations seen in the consequential loss as second limb cases.<sup>147</sup>

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<sup>147</sup> I gratefully acknowledge the valuable research assistance of Leanne Bain. This is a revised version of a paper presented at the conference held in memory of Angelo Forte and at a University of Aberdeen Law School Seminar on 6 June 2014. I am grateful to all who attended and should in particular thank Hector MacQueen, Ewan McKendrick, Mark Godfrey, Ernest Metzger, Scott Styles, Dirk Hanschel and Mátyás Bódig for their helpful questions and observations; but of course, none of them bear any responsibility for any errors and omissions which remain.



# Credit Rating Agencies and Their Conflicts of Interest: Causes, Consequences and Cure

*Tom Burns*

## Introduction

The investigations that took place in the aftermath of the great financial crash of 2007–2008 revealed that the credit rating agencies played a significant role in this international crisis.<sup>1</sup> Amongst other things, the credit rating agencies have been accused of producing inaccurate credit ratings<sup>2</sup> that misled issuers, investors and regulators. It is generally thought that this happened (at least in part) because the agencies were compromised by conflicts of interest. One of the damaging consequences of the conflicts of interest was the massive financial losses suffered by investors.<sup>3</sup> This is, therefore, an important and topical subject to examine critically.

The nature of the conflicts of interest of credit rating agencies shall be analysed to discover their causes and consequences so that due consideration can be given to the possible remedies that may be applied to solve these conflicts. To achieve this goal, the article shall examine a number of specific examples of the conflicts of interest that plagued the credit rating agencies including the potential role that fiduciary obligations might play in these cases. The article's focus on the possible role for fiduciary obligations in the regulation of conflicts of interest offers a fresh perspective on the topic and it may contribute to the existing literature on the civil liability of credit rating

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<sup>1</sup> The Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (New York, 2011) 118; The Financial Services Authority, *The Turner Review: A regulatory response to the global banking crisis* (London, 2009) Chapter 2

<sup>2</sup> According to the *International Monetary Fund*, *Global Financial Stability Report 2011*, 88, "A credit rating indicates the level of risk non-payment of principal and interest in a timely basis."

<sup>3</sup> This was in addition to the damage done to the financial system.

agencies, which so far, has tended to concentrated on the tortious/delictual aspects of the agencies' misleading credit ratings.<sup>4</sup>

To establish the essential background, this analysis will begin with a brief overview of the role of credit rating agencies in the financial system and how they contributed materially to the financial crisis and provoked a regulatory response. It will be explained that the credit rating agencies were responsible for a number of failures, which may give rise to claims for breach of contract, negligence and perhaps even fraud. However, the main focus shall be on the agencies' and the regulators' failure to resolve the conflicts of interest problem. This is a problem that shall be examined from a number of perspectives including the law on fiduciary obligations.

The next stage of the analysis shall be to explain why credit rating agencies were the subject of minimal regulation before 2008 (particularly on the issue of conflict of duty and interest). When one considers the quasi-regulatory role these agencies (as private-sector companies) played in the financial system, it is surprising that their regulation was minimal.<sup>5</sup> It left those reliant upon the credit rating agencies vulnerable to substantial financial losses. Why did this happen and what degree of regulation might now be required to remove or at least limit the threat posed by misleading ratings?

It will be argued that the principles-based or 'light touch' regulation<sup>6</sup> applied to the credit rating agencies can be attributed, to a significant degree, to the

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<sup>4</sup> Francesco De Pascalis, Civil Liability of Credit Rating Agencies from a European Perspective, *University of Oslo Research Paper No. 2015-05*, Available at SSRN: <http://ssrn.com/abstract=2546756>

Iain G. MacNeil, Credit Rating Agencies: Regulation and Financial Stability in Thomas Cottier, Rosa Lastra and Christian Tietje (editors), *The Role of Law in Monetary Affairs* (Cambridge, 2014) 178; Mattias Lehmann, Civil Liability of Rating Agencies: an Insipid Sprout from Brussels, LSE Law Society and Economy Working Papers 15/2014 [https://www.lse.ac.uk/collections/law/wps/WPS2014-15\\_Lehmann.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2014-15_Lehmann.pdf); Aline Darbelly, *Regulating Credit Rating Agencies* (Cheltenham, 2013); Harry McVea, Credit Rating Agencies, The Sub-Prime Mortgage Debacle and Global Governance: the EU strikes Back, [2010] *ICLQ*, 701–30; Arad Reisberg, The Future Role of Credit Rating Agencies in Contemporary Financial Markets: A Theoretical Perspective, in Dan Prentice and Arad Reisberg (editors) *Corporate Finance Law and the UK and EU* (Oxford, 2012) 169–209; Raquel Gracia Alcubilla and Javier Ruiz Del Pozo, *Credit Rating Agencies on the Watch List: An Analysis of European Regulation* (Oxford, 2012); Lynn Bai, On Regulating Conflicts of Interest in the Credit Rating Industry, 13 [2010] *Legislation and Public Policy*, 245–312

<sup>5</sup> Kern Alexander, The Risk of Ratings in Bank Capital Regulation, *European Business Law Review* [2014] 205–347 at 302

<sup>6</sup> Principles-based regulation has been described as 'light-touch' regulation by its critics. See Julia Black, The Rise, Fall and Fate of Principles-Based Regulation in

influence of the dominant economic theory on policy-makers.<sup>7</sup> Policy-makers became convinced that in order to promote economic growth and efficiency the state would have to support the operations of free markets by allowing market participants more scope for self-regulation. Markets were generally assumed to be efficient, self-correcting, and self-legitimising.<sup>8</sup> In the case of financial markets, they were thought to be particularly effective at raising funds for investment and managing credit risks, provided there was minimal state interference. Risk would be managed through financial innovation (such as sub-prime mortgage securities and other securitised products) which would result in the creation of financial products that could be credit-rated and sold to sophisticated investors who would be better able to bear those risks.

It was also assumed that market participants (such as credit rating agencies) should have the power to police themselves to a large extent, through self-regulation (which often took the form of codes of conduct). It will be argued that the free market theory placed too much reliance on the market's power to exert discipline on financial intermediaries and information providers. In addition, the assumption that the common law would be effective at holding credit rating agencies to account and providing appropriate remedies for those who suffered wrongdoing was similarly over-estimated. This raises an important question to be considered in the third section of the article, which is: to what extent have the previous weaknesses in the law affecting the credit rating agencies been sufficiently addressed by the recent reforms?

To answer this question, the final section of the chapter shall examine and evaluate the recent major legislative reforms emanating from the United States of America and the European Union, which are aimed at tackling the problem of conflicts of interest associated with credit rating agencies. These jurisdictions are chosen because they contain the biggest financial markets where the credit rating agencies are most active.

### **The Role Of The Credit Rating Agencies In The Financial Crisis**

In this section I shall provide the necessary background for the analysis of conflicts of interest in the credit rating industry by explaining the nature

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Kern Alexander and Niamh Moloney (editors) *Law Reforms and Financial Markets* (Cheltenham, 2011) 3–34

<sup>7</sup> David Harvey, *A Brief History of Neo-liberalism* (Oxford, 2005), 2

<sup>8</sup> Joseph Stiglitz, *Freefall: Free Markets and the Sinking of the Global Economy* (London, 2010), 16–17

of credit rating agencies, the role they play in the financial system and their unfortunate contribution to the financial crisis.

In 2007–2009 the world experienced the biggest financial collapse in history<sup>9</sup> and it has been argued that the credit reference agencies played a key role in this debacle. The various investigative reports produced in the aftermath of the crisis detail the deleterious effects of the agencies in the crisis.<sup>10</sup> Many academics have also made condemnatory comments on the negative role of the agencies and the ratings system in the period prior to the crisis. As Professor Partnoy notes, ‘A primary cause of the recent credit market turmoil was overdependence on credit ratings and credit rating agencies [by investors, banks and regulators].’<sup>11</sup> A more emphatic claim on the responsibility and culpability of the credit ratings agencies in contributing to the financial crisis is made by the Noble Laureate for Economics, Professor, Joseph Stiglitz.<sup>12</sup> Professor Stiglitz asserts that the credit rating agencies were

<sup>9</sup> Carmen M. Reinhart and Kenneth S. Rogoff, *This Time is Different: Eight centuries of Financial Folly* (Princeton, New Jersey, 2009), 208: ‘The global financial crisis of the late 2000s, whether measured by the depth, breadth and potential duration of the accompanying recession, or by its profound effect on asset markets, stands as the most serious global financial crisis since the Great Depression’.

<sup>10</sup> The Financial Services Authority, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (London, 2009), Chapter 2, [http://www.fsa.gov.uk/pubs/other/turner\\_review.pdf](http://www.fsa.gov.uk/pubs/other/turner_review.pdf), accessed 10 July 2015; The De Larosi re Group, *The High level Group on Financial Supervision in the EU* (Brussels, 2009), [http://ec.europa.eu/internal\\_market/finances/docs/de\\_larosi re\\_report\\_en.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larosi re_report_en.pdf), accessed 10 July 2015; Financial Stability Board, *Report on Enhancing Market and Institutional Resilience* (April, 2008), 37–38, [http://www.financialstabilityboard.org/wp-content/uploads/r\\_0804.pdf?page\\_moved=1](http://www.financialstabilityboard.org/wp-content/uploads/r_0804.pdf?page_moved=1), accessed July 2015; The International Organisation of Securities Commissions (I.O.S.C.O.), *Report of the Task Force on the Subprime Crisis (Final Report)* (May 2008), 23, <http://www.iasplus.com/en/binary/iosco/0805ioscosubprimereport.pdf>, accessed 10 July 2015.

<sup>11</sup> Frank Partnoy, ‘Overdependence on Credit Ratings was a Primary Cause of the Crisis’ in Lawrence E. Mitchell and Arthur E. Wilmarth Jr. (eds), *The Panic of 2008: Causes, Consequences and Implications for Reform* (Cheltenham, U.K. and Northampton, Ma., U.S.A., 2010), 116–31.

<sup>12</sup> There are dissenting voices on the issue of the degree of culpability of the credit ratings agencies. For example, Alistair Milne, *The Fall of the House of Credit* (Cambridge, 2009), 40–1, claims that the ratings for the more straightforward types of financial instruments have proved to be reasonably robust. However, even a dissident like Milne admits ‘the ratings agencies did make serious rating errors on more complex restructured securities [...] The rating agencies also failed to appreciate that their rating methodology for lower quality mezzanine and junior tranches of credit structures yielded ratings that were much more likely to be downgraded in a recession than were equivalently rated corporate bonds.’ See also Robert J. Shiller, *Finance and the Good Society* (New Jersey, 2012), 52.

‘one of the key culprits [responsible for the crash, because] they were the parties that performed the alchemy that converted the [sub-prime mortgaged backed] securities from “F-rated” to “A-rated”’. In his view, the banks could not have done what they did [i.e. engage in reckless lending and trading in complex financial products that ultimately failed] without the complicity of the ratings agencies’.<sup>13</sup>

In general, the agencies are accused of mispricing financial risk by awarding top credit ratings to complex structured financial products. This failure to rate accurately these products had a number of significant effects. Firstly, it gave legitimacy and credibility to a number of novel securities, such as mortgaged-backed securitised bonds containing sub-prime mortgages, collateralised debt obligations and derivative products, such as credit default swaps, where the latter was recognised by the agencies for the purposes of credit enhancements in securitisations.<sup>14</sup> Secondly, the high credit rating awarded to such financial products had the effect of lowering the borrowing costs of the issuers, significantly.<sup>15</sup> This encouraged the creation of more securitised products that could be rated and distributed to investors. Thirdly, favourable ratings facilitated the billion-dollar investment and trade in such products. A fourth significant consequence of issuing incorrect ratings occurred when the rating agencies were forced, belatedly, to downgrade the ratings of companies and financial institutions, in the wake of defaults by American sub-prime mortgagors. This had dramatic systemic effects across the international financial system. Those securities that were downgraded to a speculative grade, (i.e. grading below the BBB rating) had to be sold at knock-down prices by investment funds holding such products. Perhaps, inevitably, in times of high volatility, these desperate

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<sup>13</sup> Quoted by Howard Davies, *The Financial Crisis: Who is to Blame?* (Cambridge, 2010), 124. See also Joseph E. Stiglitz, *The Price of Inequality* (London, 2013), 240, where Professor Stiglitz reiterates his claim that the rating agencies inaccurately rated sub-prime mortgages as A-rated securities, but added that they also possibly ‘had a hand in sustaining fraudulent lending practices’, perpetrated by certain mortgage brokers.

<sup>14</sup> Tom Burns, ‘The Shadow Banking System as a New Source of Financial Turmoil’ in Kern Alexander and Rahul Dhumale (eds), *Research Handbook on International Financial Regulation* (Cheltenham, 2012), 30–41.

<sup>15</sup> For example, if a bond issue of £1 billion was rated triple A, the interest rate might have been 6 per cent (or £60 million a year), but if the bond issue was rated as being speculative (BB), the interest rate might be 10 per cent (or £100 million a year). However, the picture became more complex whenever tranching took place, as was the case with collateralised debt obligations. See Tom Burns, ‘The Role of Securitisation in Financing Film Production in the United Kingdom’, *Juridical Review*, [2006], 69–87. David Ramos Munoz, *The Law of Transnational Securitization* (Oxford, 2010), 5.

sellers found that there were very few buyers for such securities.<sup>16</sup> Indeed, even in cases where the downgrades were less drastic, such as a downgrade of a bond from AAA rating to AA rating, this too could have systemic effects. This effect can be seen clearly in the case of the banks. The banks required fewer reserves to cover losses if they held AAA-rated securities, under the Basel II regulations<sup>17</sup>, but would need to boost their capital significantly, in a falling market, if the banks' credit rating dropped from the top level to an AA-rating. Lenders (and particularly banks) generally became fearful of lending because of worries about further ratings downgrades (and the solvency of their borrowers). This led to the credit crunch which would be the harbinger of the great financial crisis. Thus, the rating agencies' actions amplified the evolving financial crisis in 2008.

However, the impact of faulty credit ratings did not end there. During the Euro debt crisis<sup>18</sup> in 2009 that followed the financial crisis, the credit rating agencies were accused of overreacting in their downgrading of the sovereign credit ratings of countries such as Greece, Portugal and Spain. These downgrades exacerbated the financial difficulties of those countries and did not take proper account of the supportive measures that were being put in place by the member states in the Eurozone.<sup>19</sup>

### What are Credit Rating Agencies and What is the Appeal of Credit Ratings?

Before considering these charges against the credit agencies and evaluating the case for ratings reform, it is important to appreciate the nature and primary function of the credit rating agency as a prelude to assessing the need for reform. Under E.U. legislation, the technical definition of a rating agency can be found in the E.U.'s Credit Rating Regulation 2009,<sup>20</sup> as

<sup>16</sup> Initially, hedge funds purchased some of these distressed assets.

<sup>17</sup> Simon Gleeson, *International Regulation of Banking: Basel II: Capital and Risk Requirements* (Oxford, 2009), ch. 4.

<sup>18</sup> Adrian Buckley, *Financial Crisis: Causes, Context and Consequences* (London, 2011), 299; Martin Wolf, *Shifts and Shocks: What we've learned and have still to learn from the Financial Crisis* (London, 2014), 45–50.

<sup>19</sup> Raquel Gracia Alcubilla and Javier Ruiz Del Pozo, *Credit Rating Agencies on the Watch List: An Analysis of European Regulation* (Oxford, 2012), 257–8.

<sup>20</sup> Article 3.1.(b) of the amended E.U. C.R.A. Regulation (Regulation (E.C.) No.1060/2009 of 16 September 2009 on credit rating agencies [2009] O.J. L302/1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436618357072&uri=CELEX:32009R1060>, accessed 11 July 2015), defines a credit *rating agency* in the following

amended three times.<sup>21</sup> Essentially, a credit rating agency is a private sector company (or more precisely a group of companies) that specialises in credit analysis, with a view to making profits. The three largest credit rating agencies (Standard & Poor Ratings Services, Moody's Investors' Service and Fitch Rating Agency) are international businesses operating in many countries, often through subsidiary companies. These rating agency companies provide opinions on the creditworthiness of legal entities that issue bonds, such as banks, companies or governments. The rating agencies can also rate the creditworthiness of financial instruments, such as asset backed commercial paper, collateralised debt obligations, bonds and other types of structured financial products. Credit rating agencies judge the likelihood of a security's or an entity's default and the relative magnitude of the loss, if such a default does occur. However, there is a limitation on the scope of the ratings. As the agencies make clear, their ratings do not evaluate liquidity risk, price volatility, or fundamental value.

There are two things that make credit ratings attractive and valuable. The first is that the agencies get access to confidential information from the companies seeking to issue securities. The agencies can then verify this private information and do a more thorough analysis of the creditworthiness of the companies and their securities. Certain benefits flow from this arrangement. For the issuer, its confidential financial information can be taken into account, normally without having to worry that this confidential information might be revealed to its business rivals. Another advantage is that the cost of capital

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manner: a "*credit rating agency*" means a legal person whose occupation includes the issuing of credit ratings on a professional basis' (emphasis added). Article 3.1.(a) states that a "*credit rating*" means an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories' (emphasis added). Article 3.1.(h) states that a "*rating category*" means a rating symbol, such as a letter or numerical symbol which might be accompanied by appending identifying characters, used in a credit rating to provide a relative measure of the risk to distinguish the different characteristics of the types of rated entities, issuers and financial instruments or other assets' (emphasis added).

<sup>21</sup> Regulation (E.C.) No.1060/2009 of 16 September 2009 on credit rating agencies [2009] O.J. L302/1. This Regulation is also referred to as the 'C.R.A. I Regulation'. This law was amended three times to reinforce the regulatory framework and deal with apparent weaknesses, firstly by Regulation (E.U.) No.513/2011 of 11 May 2011 [2011] O.J. L145/30 (This amending regulation is also known as the 'C.R.A. II regulation'). The Regulation was amended twice more: Directive 2011/61/E.U. of 8 June 2011 [2011] O.J. L174/1; Regulation (E.U.) No.462/2013 of 21 May 2013 [2013] O.J. L146/1.



should be lowered as a result of the more accurate rating, where a rating agency has a trustworthy reputation for impartial, professional judgments.<sup>22</sup>

The next feature that makes credit ratings particularly attractive to issuers, investors and regulators is the convenience of the ratings. The agencies synthesise large amounts of financial and qualitative data in order to present the product of this complex data analysis in a simple to comprehend metric. The main rating agencies use the first four letters of the alphabet to indicate credit quality.<sup>23</sup> This notation system ranges from AAA (for the very highest credit quality) to AA, (where the quality is just a degree less than top quality) to A, and then to BBB<sup>24</sup>, then down to BB and so on, to the bottom of the credit quality scale to the lowest grade of D.<sup>25</sup> With regard to the 'triple-A' credit rating, this indicates to investors that a bond, or a company, or a sovereign nation issuing the bond, is very unlikely to fail to pay interest or to fail to repay the principal sum borrowed, on time. In contrast, the lowest rating of D would indicate to investors the bond or company is expected to default imminently or has actually defaulted.<sup>26</sup> In some cases additional symbols may be used in

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<sup>22</sup> John Coffee, *Gatekeepers*, 287–8.

<sup>23</sup> The credit rating agency, Morningstar (which specialises in rating investment funds and rates over 200,000 funds worldwide) uses a one to five star rating system, instead of an alphabetic system.

<sup>24</sup> The BBB rating is the lowest rating for securities that are deemed to be 'investment grade' securities. This means they are not speculative and have adequate ability to pay interest and repay principal. If securities fall below 'investment grade' investment funds holding such securities will be forced to sell them.

<sup>25</sup> This is the notation used by the credit rating agency, Standard & Poor, one of the largest credit rating agencies in the world. Philip R. Wood, *International Loans, Bonds, Guarantees, Legal Opinions* (London, 2007), 206–207, notes that typically for corporate bonds over a five year period, an 'AAA rated bond may have a 0.1 per cent probability of default, an A rated bond, 0.3 per cent probability of default; a BB rated bond, may have a 15 per cent probability of default; a B rated, 32 per cent of default and a CCC rated bond a, 57 per cent, probability of default'.

<sup>26</sup> A fuller description of Standard & Poor's *long-term issue credit rating system* is provided by Standard and Poor on its bond website at <https://www.bonddesk.com/sp.html>, accessed 14 July 2015.

However, for the purposes of this article, it is worth noting the basic and essential features of the ratings system of S&P, the largest agency. This agency's highest rating is AAA. This means 'the obligor's capacity to meet its financial commitment on the obligation is extremely strong'. An obligation that is rated 'AA' differs from the highest-rated obligations only to a small degree. The obligor's capacity to meet its financial commitment on the obligation is very strong.

An obligation rated 'A' is more susceptible to the adverse effects of changes in circumstances and economic conditions than obligations in higher-rated categories. However, the obligor's capacity to meet its financial commitment on the obligation is



a rating to give greater precision.<sup>27</sup> The other feature of the ratings which make them so appealing to investors is that ratings are regarded as worldwide standards. Therefore, a bond rated triple-A in the U.S. will be deemed to have the same level of risk as a triple-A bond issued in the U.K..<sup>28</sup> Thus, credit rating agencies play an essential role in providing information on creditworthiness in an easily understood way to help investors make investment decisions, especially in fast-changing financial markets.

Regulators, too, find ratings useful in the prudential regulation of banks and other financial institutions. Ratings have been incorporated into a range of regulations<sup>29</sup> and regulators used these ratings to simplify their prudential control of financial institutions.<sup>30</sup> With regard to international banking regulation, the Basel Committee on Banking Supervision, which established an international approach to capital adequacy, recommended the use of ratings to judge a bank's capital requirements. The precise rules were set out in the subsequent Basel II Accord,<sup>31</sup> which explicitly incorporated credit ratings into

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still strong.

An obligation rated 'BBB' exhibits adequate protection parameters. However, adverse economic conditions or changing circumstances are more likely to lead to a weakened capacity of the obligor to meet its financial commitment on the obligation.

Obligations rated 'BB', 'B', 'CCC', 'CC', and 'C' are regarded as having significant speculative characteristics. 'BB' indicates the least degree of speculation and 'C' the highest. 'While such obligations will likely have some quality and protective characteristics, these may be outweighed by large uncertainties or major exposures to adverse conditions.'

<sup>27</sup> Standard & Poor notes that there can be further differentiation in its ratings by using symbols to modify general credit ratings, such as plus (+) or minus (-) for ratings in the range AA to CCC to show relative standing within these rating categories.

For example, a 'r' symbol may be attached to a rating for instruments with significant non-credit risks [e.g. foreign exchange risks]. 'It highlights risks to principal or volatility of expected returns, which are not addressed in the credit rating'. S&P provide some examples, which include: 'obligations linked or indexed to equities, currencies, or commodities; obligations exposed to severe prepayment risk, such as interest-only or principal-only mortgage securities; and obligations with unusually risky interest terms, such as inverse floaters'.

<sup>28</sup> Steven Schwarcz, Bruce A. Markell and Lissa Lamkin Broome, *Securitization, Structured Finance and Capital Markets* (Newark, New Jersey, 2004), 201–2.

<sup>29</sup> The term 'regulation', as used in this article, includes legislation (statutes), regulations (rules) and supervisory policies (guidelines and codes).

<sup>30</sup> Mike Buckle and John Thompson, *The UK Financial System: Theory and Practice* (Manchester, 2004), 190–2.

<sup>31</sup> The Basel II Accord (subsequently replaced by Basel III) introduced a more comprehensive system to assess banking risks to ensure that regulatory capital had a closer relationship to credit risk. This regulatory aim was partly fulfilled by compelling the banks to obtain external credit risk assessments from credit rating agencies.

the regulations. The Accord specified that asset-backed bonds held by banks had to be credit rated by the dominant credit rating agencies.

Ratings-based regulations were also found in other areas of the financial system. For example, in a number of countries, important investment institutions, such as pension funds, may be limited to investing in products that are deemed to be ‘investment grade’ by the credit rating agencies.<sup>32</sup>

References to credit ratings are a feature of financial contracts. It is common to find that ‘ratings-based triggers’<sup>33</sup> are incorporated into financial contracts, such as loan agreements, so that if, for example, the ratings of a company were to be downgraded from a BBB rating to a CCC rating, the payment obligations under the loan agreement would either accelerate, or the downgrade could be treated as a technical default (depending on the relevant contractual terms). Rating-based triggers also appear in investment contracts where fund managers are required to sell securities in their portfolios, if some of those securities are downgraded below the BBB rating. Thus, rating downgrades by credit ratings agencies can have negative systemic effects in the financial markets, causing sell-offs of securities at a time of falling prices.

It is clear that ratings are very important in the financial system and that when incorrect ratings are issued the negative effects of such inaccuracies can be systemic. Reformers, therefore, face a formidable task of ensuring that the ratings are more accurate in future by tackling conflicts of interest that contributed significantly to the poor quality of the ratings on structured financial debt.

### **An Analysis Of The Conflict Of Interest Concept**

Credit rating agencies are paid by their clients to use their knowledge, skills and expertise to produce considered professional judgments about the creditworthiness of debt securities or companies. The client, naturally, expects an objective judgment to be delivered by the credit rating agencies at the end of this process of assessment, untainted by selfish interests. Let us consider how the law may play an important role in meeting the client’s expectations through the imposition of fiduciary obligations.

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See Barbara Casu, Claudia Girardone and Philip Molyneux, *Introduction to Banking* (London, 2006), 185–8.

<sup>32</sup> Aline Darbellay, *Regulating Credit Rating Agencies* (Cheltenham, 2013), 171.

<sup>33</sup> Raquel Gracia Alcubilla and Javier Ruiz Del Pozo, *Credit Rating Agencies on the Watch List: An Analysis of European Regulation* (Oxford, 2012), 13–15.

It has been stated judicially that a 'distinguishing obligation of a fiduciary is the obligation of loyalty.'<sup>34</sup> Finn, who is one of the leading writers on fiduciary law, describes how, in general, a fiduciary's obligation may arise. 'A person will be a fiduciary in his relationship with another when, and in so far as, that other person is entitled to expect that he will act in that other's interests or (as in partnership) in their joint interests, to the exclusion of his own several interests.'<sup>35</sup> The question of how the expectation of reliance and trust arises will be considered in the next section, below.

However, for our present purposes, assuming that a fiduciary relationship is found, we need to explore the concept of conflict of interest further to understand it more fully before considering how it could be better regulated.

In general, there will be a conflict of interest 'when a person's obligation to act in the interests of another is interfered with by a competing interest that may obstruct the fulfilment of that obligation.'<sup>36</sup> The personal interest element of the definition highlights that the conflicted person stands to gain some benefit or advantage from betraying the trust placed in him as the fiduciary. No mention is made in the definition about possible losses to the client.

A conflict of interest may be actual, potential or apparent.<sup>37</sup> These distinctions can be useful for analysing the problem. A person would have a potential conflict of duty and personal interest where a professional judgment is required in the near future, but that person has not yet reached the point in time where the judgment has to be made. In other words, the person still has an option either to proceed to deliver the judgment or not. Thus, this type of conflict is avoidable, or at least manageable. In contrast, a person will be found to have an actual conflict of duty and personal interest on a particular matter where a professional judgment is required and the time has come to make that judgment. By making the judgment in a case where a conflict of interest is present, the fiduciary is in breach of his fiduciary duty of loyalty. Finally, a person may have an apparent conflict of interest where he does not have an actual or potential conflict of interest, but nonetheless finds himself in a situation where a third party could reasonably conclude that the person seems to have a conflict of duty and interest. There may not be direct legal consequences flowing from this type of conflict, but it does raise reputational

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<sup>34</sup> *Bristol and West Building Society v Mothew* [1998] Ch. 1, 16 per Millet L.J..

<sup>35</sup> Paul Finn, 'Fiduciary Law and the Modern Commercial World' in Ewan McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford, 1992), 9.

<sup>36</sup> Andrew Crane and Dirk Matten, *Business Ethics* (2nd edn, Oxford, 2007), 366.

<sup>37</sup> John R. Boatright, *Ethics in Finance* (Oxford, 1999), 143–4.

problems for the fiduciary and may have a disciplinary effect on him. The main problem with an apparent conflict of interest is that it can erode trust that investors and potential clients normally place in the financial agent and it may also raise a question over the integrity of that agent when it comes to fulfilling the duty to avoid conflicts of interest.<sup>38</sup> Companies recognise this problem and often address it by rules inserted into their codes of ethics, or business conduct codes.<sup>39</sup>

The distinctions, made above, may help to shape the solutions to various conflict situations. For example, it is clear that some conflicts can be avoided by the fiduciary withdrawing from the proposed transaction, or by divesting itself of the conflicting interest. Alternatively, conflicts could be avoided by redefining the relationship of dependence by the use of appropriately drafted contractual provisions, or by seeking informed consent from the beneficiary of the fiduciary duty for the commencement of a transaction where conflicts are apparent. Full disclosure by the company of the existence of a conflict of interest would help to prevent deception and allow the client to adjust their reliance on the professional judgment in such a situation. Disclosure can also assist a company with apparent conflicts. By making more information available to show that there is no actual or potential conflict, the concern over apparent conflicts of interest will wither away. However, disclosure, by itself, does not end the conflict of interest: it merely makes it less harmful.

Another useful distinction to make is that the person who bears a responsibility to avoid a conflict of interest can be an individual or a company, as a legal/artificial person in law. The individual could be a director of the credit rating agency. If the director found herself in a conflict of interest situation because she used confidential information obtained from the client in the course of her employment with the rating agency for personal profit, then there would be a breach of fiduciary duty.<sup>40</sup> In this case the individual's fiduciary duty would be owed, in the first instance, directly to the credit rating agency. Many other possible legal claims could arise from this scenario. The client could sue the agency that owed it a fiduciary duty to prevent the wrongful and misleading credit rating because the agency would have the

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<sup>38</sup> Andrew Crane and Dirk Matten, *Business Ethics*, 369.

<sup>39</sup> The role of codes of conduct will be examined in a later section of this work.

<sup>40</sup> *International & Scientific Communications Ltd v Pattison* [1979] F.S.R. 429; *Investors Syndicate Ltd v Versatile Investments Inc.* (1983) 42 O.R. (2d) 397 where it was held an agent could be restrained from using confidential information, on the basis of a fiduciary duty, despite the fact that there was an express term in the person's contract of employment, which was struck down for being in restraint of trade.

financial resources to compensate the client,<sup>41</sup> whereas an individual may not have those resources. It would also be possible for the client to bring a claim in contract or delict. (These issues will be examined fully in a later article).

On the other hand, a multi-functional company, such as a credit rating company, may find itself in a conflict of interest situation where it provides consultancy services as well as credit rating services and it has to make a decision on the allocation of resources. The company may decide, for example, to devote its best qualified staff and a significant amount of the company's resources to the consultancy arm of the business because this is where the most lucrative business activity is located, but this action may be taken to the severe detriment of the credit rating operations. The quality of the credit ratings in such a scenario would be impaired. Another example of a company facing a conflict of interest would arise where the company gives an overly generous rating to a client, perhaps influenced by the desire to maintain good relations with this client who happens to pay high fees for regular consultancy work from the same agency.

The next aspect of the analysis of the no-conflict rule to consider is its strict nature.<sup>42</sup> In the words of Lord Herschell, in the case of *Bray v Ford*,<sup>43</sup> 'It is an inflexible rule that a person in a fiduciary position [...] is not allowed to put himself in a position where his interest and duty conflict'. He continued,<sup>44</sup> 'It does not appear to me that this rule is [...] founded upon principles of morality. I regard it rather as based on the considerations that, human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest, rather than by duty, and thus prejudicing those whom he was bound to protect. It has, therefore, been deemed expedient to lay down this positive rule.' The strictness of the rule is apparent from the case law. The case law has produced and developed the no-profit rule, as found in cases such as *Keech v Stanford*,<sup>45</sup> *Boardman v Phipps*,<sup>46</sup> *Industrial Development Corporation v Cooley*,<sup>47</sup> *Regal (Hastings) Ltd v Gulliver*<sup>48</sup> where it was stated that the fiduciary who makes a profit from his position must

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<sup>41</sup> *Lloyd v Grace, Smith & Co.* [1912] A.C. 716.

<sup>42</sup> Full disclosure to, and voluntary acceptance of, the conflict of interest by the beneficiary would be an exception to the 'inflexible rule'.

<sup>43</sup> *Bray v Ford* [1896] A.C. 44, 51–2.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Keech v Stanford* (1726) 25 E.R. 223.

<sup>46</sup> *Boardman v Phipps* [1967] 2 A.C. 46.

<sup>47</sup> *Industrial Development Corporation v Cooley* [1972] 1 W.L.R. 443.

<sup>48</sup> *Regal (Hastings) Ltd v Gulliver* [1967] 2 A.C. 134.

account for that profit to the beneficiary, regardless of the absence of bad faith on the part of the fiduciary. Similarly, there will be a breach of duty where the fiduciary acts to further his own personal interest, despite the fact that the beneficiary suffers no loss. Professor Birks identifies the key underlying principle that supports these rules. He states that, 'All the cases in which such fiduciaries have to make restitution of benefits acquired in breach of this duty can be explained by reference to the policy of prophylaxis.'<sup>49</sup> In other words, the law is aiming to prevent the fiduciary from being tempted to sacrifice the interests of the beneficiary to advance his own interests by the deterrent effect of the strict no-conflict rule.

The value of the no-conflict rule is especially prized in the financial sector because there is a public interest dimension to it.<sup>50</sup> If companies and investors lose trust in their financial intermediaries and information providers, the functioning of financial markets will be undermined.<sup>51</sup> Therefore, a conflict of interest is not just an issue to be resolved bilaterally between the two parties, but is an issue that is addressed in company voluntary codes of practice where the emphasis is on identification, prevention or management of conflicts of interest. As we shall see, credit rating agencies, like other financial intermediaries and professionals, have codes of business conduct to regulate conflicts.

### **On What Legal Basis Might A Credit Rating Agency Be Subject To A Fiduciary Duty?**

Although the literature on fiduciary law is large and expanding,<sup>52</sup> uncertainties remain about its scope and applicability,<sup>53</sup> so careful consideration needs to be given to the question of whether a credit rating agency would fall within the scope of the fiduciary duty under the criteria set out below.

Powell has stated that, 'a general test for a fiduciary relationship is elusive', but can be determined by the existence of a correlative 'power-dependency

<sup>49</sup> Peter Birks, *An Introduction to the Law of Restitution* (Oxford, 1989), 339.

<sup>50</sup> Joanna Benjamin, *Financial Law* (Oxford, 2007), 500.

<sup>51</sup> Francis Fukuyama, *Trust: the Social Virtues and the Creation of Prosperity* (London, 1995), 3–12.

<sup>52</sup> F. M. B. Reynolds, *Bonstead and Reynolds on Agency* (17th edn, London, 2001), 166.

<sup>53</sup> Alan Paterson and Bruce Ritchie, *Law, Practice and Conduct for Solicitors* (Edinburgh, 2006), 136, where the authors state, 'Scottish case law on conflict of interest leaves a number of key points unresolved.' John L. Powell, Fiduciary Duties in the New Millenium: Quo Vadis Conference paper, Thirteenth Commonwealth Law Conference 2003,, 2: 'Recognition of a fiduciary relationship is often difficult, despite the assurance of comfortable paradigm.'

relationship,<sup>54</sup> such as found in trustee-beneficiary relationships and professional adviser-client relationships.<sup>55</sup> To determine whether credit rating agencies could become subject to fiduciary duties under the common law we can consider two options. If the rating agency's relationship with the client is one where fiduciary duties are normally implied, such as the case of the principal – agent relationship, then the fiduciary obligations could be imposed. However, fiduciary obligations may also arise where, on the particular facts of a given situation, one person is dependent upon the good faith and loyalty<sup>56</sup> of another who may have superior knowledge or skills. The first category is referred to as the status-based fiduciary relationship and the second category is known as the fact-based fiduciary relationship.<sup>57</sup> If under either test the credit ratings agencies are deemed to be fiduciaries, then they will be subject to onerous responsibilities.

Let us now apply these tests to discover on what legal basis credit rating agencies might be deemed to be fiduciaries subject to the duty of loyalty.

Firstly, let us examine the proposition that credit rating companies, which are referred to as rating 'agencies', could owe fiduciary duties under the law of agency.<sup>58</sup> The agency relationship is defined as one which 'exists between two persons, one of whom (called the principal) expressly or impliedly consents to the other (called the agent) to act on his behalf so as to affect his relations with third parties'.<sup>59</sup> In the case of agency created by contract, the agent has authority to act on behalf of the principal. This confers a power<sup>60</sup> on the agent, which gives him the ability to bind the principal in legal relations with third parties.<sup>61</sup> However, this model of agency does not fit the relationship between the issuer and the credit rating agency. In the normal course of business, the rating agency is not granted the power to alter the issuer's legal relationship with third parties. They are hired to provide an assessment of creditworthiness using their professional expertise. Credit rating agencies are not truly agencies

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<sup>54</sup> A concept discussed in the Supreme Court of Canada in *Hodgkinson v Simms* (1994) 117 D.L.R. (4th) 161.

<sup>55</sup> John L. Powell, *Fiduciary Duties*, 2.

<sup>56</sup> Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of non-fiduciary Duties* (Oxford, 2010), 1-3.

<sup>57</sup> Joanna Benjamin, *Financial Law*, 544-5.

<sup>58</sup> Reynolds, *Bowstead and Reynolds on Agency* (17th edn), 1.

<sup>59</sup> *Ibid.*

<sup>60</sup> Employing a Hohfeldian analysis of rights to agency, the agent acquires the legal power to alter his principal's legal relations with third parties, and the principal is under a correlative liability to have his relations with third parties altered.

<sup>61</sup> Reynolds, *Bowstead and Reynolds on Agency* (17th edn), 1.



(as their nomenclature might imply), but are instead companies that do not have the conventional agent's authority to bind the principal to a third party in contract.

This is not conclusive. Agency law adapts to the needs of the evolving world of business. Currently in the actual world of commerce and finance, the term 'agency' is used broadly to include those who act on behalf of another without necessarily affecting the principal's relations with third parties. As a consequence, Bowstead and Reynolds have extended their description of agency to include any person who has 'the same fiduciary relationship with a principal where he acts on behalf of the principal, but has no authority and hence no power to affect the principal's relations with third parties. Because of the fiduciary relationship such a person may also be called an agent.'<sup>62</sup> In this context, where services are being provided, the fiduciary relationship would be one where, 'the relationship of the parties still imports an undertaking by one to act in the interests of another than his own, and this likewise, though to a lesser extent, justifies the law's intervention.'<sup>63</sup> Bowstead and Reynolds classify this relationship where the fiduciary duty exists without the existence of authority as an incomplete agency.<sup>64</sup> The intermediaries who are commonly recognised to fall within this category include 'introducing' agents, such as estate agents, advertising agents and canvassing agents. Arguably, the incomplete agency criteria could also apply to credit reference agencies because, while credit rating agencies cannot bind the issuer of securities to third parties, the 'principals' (i.e. the clients paying for a credit rating), nevertheless, place confidence and trust in the agencies to produce objective ratings based on the agencies' professional expertise. Therefore, it could be argued that the credit rating agencies may be subject to the fiduciary duties of agents, in their capacity of incomplete agents under the general law of agency.

An alternative way of establishing a fiduciary duty to avoid conflicts of duty and personal interest is through the fact-based fiduciary relationship. According to Finn<sup>65</sup>, this duty can arise where the client's expectations of the information provider (such as a credit rating agency) go beyond demanding honesty, disclosure, care and skill, or accuracy (which in any case can be dealt with by contract law, and/or tort/delictual law). Instead the client has to

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<sup>62</sup> Ibid., 1.

<sup>63</sup> Ibid., 166–7.

<sup>64</sup> Ibid., 8.

<sup>65</sup> Paul Finn, 'Fiduciary Law and the Modern Commercial World' in Ewan McKendrick (ed.), *Commercial Aspects of Trusts and Fiduciary Obligations* (Oxford, 1992), 10–11.



believe that he can trust and rely on the adviser/information provider to act in the client's best interests when providing that advice/information. Where this belief exists, one important condition for finding the existence of a fact-based fiduciary relationship is fulfilled. However, there will also be a public interest aspect to attaching fiduciary duties to such trust-based relationships. The public interest may be served by, for example, preserving the integrity of such relationships to maintain a general level of trust in financial intermediaries and the market. A case could be made that credit rating agencies have the burden of fiduciary duties placed upon them to avoid conflicts of interest, because they seem to fall within the scope of the fact-based fiduciary relationship test.

A key question is to whom is a fiduciary duty to avoid conflicts of interest owed. In the case of the credit rating agencies the duty will be owed to the client, who is normally in a contractual relationship with the credit rating agency. It is possible that this contract may modify the no-conflict duty. So, for example, if a credit rating agency makes a full disclosure of potential conflicts and obtains the informed consent of its client, then the duty has not been breached.<sup>66</sup> The client can be the issuer of the debt securities, or the investor seeking to find out the creditworthiness of a corporate bond or structured finance product, before committing money to buy such securities. In most cases the client is the issuer of the securities to be rated. Such a client will be keen to obtain as high a credit rating as possible to lower the issuer's cost of borrowing in the debt markets. Sometimes an agency's client may be an institutional investor seeking rating information to make a prudent investment.<sup>67</sup>

In either case, if the ratings are misleading, the client could raise claims for implied breach of contract, misrepresentation or negligence, as well as breach of fiduciary duty.

If a rating agency could stand accused of issuing an overly-optimistic credit rating for an issuer in the hope of gaining further contracts, the issuer would appear to gain a financial advantage by obtaining cheaper finance from the capital markets. The question arises over whether a client in such a scenario would be likely to sue the agency for breach of fiduciary duty. If there are no sudden downgrades of the rating for that client, it could be that there would be no litigation. However, if other market participants see the rating as an apparent conflict of interest (if it is egregious), the reputation of the agency could be adversely affected. On the other hand, it could be

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<sup>66</sup> Joanna Benjamin, *Financial Law*, 559.

<sup>67</sup> Only smaller credit rating agencies, such as Egan-Jones Ratings Company, use a subscriber/investor pays model: [www.egan-jones.com](http://www.egan-jones.com), accessed 10 July 2015.

argued that a rating agency's sense of responsibility towards fulfilling its duty of loyalty might be stronger under the investor-pays model. If subscribers to credit rating agencies have paid for objective ratings for potential investment opportunities, but find that the ratings were inflated (e.g. perhaps because the agency hoped to gain lucrative advisory work from the firm receiving such a favourable credit assessment), a claim for breach of fiduciary duty might be more readily made.<sup>68</sup>

The prospect of private litigation by the client against a rating agency may not be of direct value to the biggest potential losers where ratings are inflated under an issuer-pays model. These potential losers are the (non-client) investors who were led to underestimate the risk in buying certain rated securities by the publicly available credit ratings. Normally, these third parties may have to use the law of tort/delict to pursue possible claims for fraudulent misrepresentation, or negligence,<sup>69</sup> but they would face significant legal hurdles to achieve success.<sup>70</sup>

The clients of the credit rating agencies encounter problems suing for breach of fiduciary duty. For example, there was some doubt over whether a claimant suing for breach of fiduciary duty needed to establish a causal connection between the relevant breach and loss.<sup>71</sup> The case of *Swindle v. Harrison* has established that a causal connection is required.<sup>72</sup> Furthermore, the claimant may be in danger of losing the protection of the fiduciary duty where she gives informed consent to relieve the fiduciary of a conflict of interest. Similarly, where the client-beneficiary assumes personal responsibility for the protection of his own interests to the exclusion of the fiduciary, the protection of fiduciary law may be forfeited by the client.<sup>73</sup>

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<sup>68</sup> The subscriber-pays model is not without its potential conflicts of interest problems. For example, major investors who have paid for a rating may put pressure on the agencies to refrain from downgrading the rating of bonds that they have in their portfolios.

<sup>69</sup> To recover in negligence the claimant would have to establish a number of things by a preponderance of evidence, such as the existence of a duty of care; the applicable standard of care; the breach of duty; the cause-in-fact and the proximate cause; damage that is not remote.

<sup>70</sup> The auditor liability cases are instructive. See Rupert Jackson and John L. Powell, *Professional Liability* (London, 2011).

<sup>71</sup> Finn, 'Fiduciary Law and the Modern Commercial World', 41.

<sup>72</sup> *Swindle v Harrison* [1997] 4 All E.R. 705 (C.A.), esp. 733: 'There is a need to establish causation'.

<sup>73</sup> Finn, 'Fiduciary Law and the Modern Commercial World', 38.

On the other hand, there are undoubtedly a number of attractions to suing for breach of fiduciary duty.<sup>74</sup> In terms of remedies, for example, the victim of the conflict of interest can claim the profit-stripping remedy of account of profit.<sup>75</sup> It is also possible to raise a claim for damages for breach of fiduciary duty under English Law for losses suffered as a result of the breach.<sup>76</sup> This is important if the fiduciary did not make a profit, but suffered a loss, which would exclude the application of the profit-stripping remedy. With the possibility of a damages claim in such circumstances the client has an appropriate remedy and element of deterrence implicit in these conflict of interest claims is maintained. Furthermore, if the duty is classified as a fiduciary one, a defendant may not be able to rely upon contributory negligence in order to reduce the sum of damages payable to a plaintiff.<sup>77</sup> In addition, where there is a duty of loyalty there may be the possibility of imposing liability on those third parties who have knowingly participated in a breach of that fiduciary duty.<sup>78</sup> Powell argues that a common law action for breach of fiduciary duty may result in higher compensation than that available under statute, in some cases.<sup>79</sup> With regard to procedural law, Finn notes there is a reversal of the onus of proof where the onus is placed on the fiduciary to prove that full disclosure of the conflict has been made.<sup>80</sup>

### Exploring the Rating Agencies' Conflicts of Interest

One of the big problems for regulators seeking to reform the credit rating agencies is how to deal effectively with the conflicts of interest issue. Credit rating agencies face a number of actual and potential conflicts of interest, ranging from cases where the credit rating agency as a legal person owns securities of the issuer, to cases where an individual credit analyst tasked with the job of doing the ratings for a client has a financial interest in the client company, or has been promised lucrative employment with the client after the favourable rating award.

<sup>74</sup> A. J. Oakley, *Parker and Mellows' Modern Law of Trusts* (London, 2008), 366–8.

<sup>75</sup> For example, *Industrial Development Consultants Ltd v Cooley* [1972] 1 W.L.R. 443 and *English v Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93.

<sup>76</sup> *Nocton v Ashburton* [1914] A.C. 932.

<sup>77</sup> Powell, *Fiduciary Duties*, op cit, 8.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Finn, 'Fiduciary Law and the Modern Commercial World', 40.

However, this chapter shall consider the two most significant conflicts that are alleged to interfere substantially with the objectivity of the credit ratings. The first major conflict arises where agencies offer ancillary or consultancy services to companies and institutions that are highly profitable for the agencies and these are also the companies they rate. As one commentator observed, 'issuers may hope to get higher ratings if they purchase ancillary services [...] conversely they may fear that their failure to do so could negatively impact on their ratings'.<sup>81</sup> The conflict of interest can tempt agencies to give overly optimistic ratings to attract ancillary business.<sup>82</sup> There is evidence to indicate that the agencies' consultancy work may have led them to produce unreliable ratings for structured financial products. This may have occurred partly because the consultancy business of the rating agencies included the provision of advice to prospective bond issuers on how to create higher-rated structures.<sup>83</sup> In some cases, agencies would send their credit analysts to help clients boost the ratings of certain financial products that had received poor ratings first time around. The resulting credit rating would be *prima facie* questionable because how could an analyst advising a client on how to get a higher rating then act as a truly independent assessor contributing to the decision on the credit rating? This fairly obvious danger of a potential conflict of interest was missed by international regulation in the form of the International Organisation of Securities Commissions' (I.O.S.C.O.) Code of Conduct for credit rating agencies 2004,<sup>84</sup> which set out recommendations for dealing with conflicts of interest.<sup>85</sup>

The credit rating agencies' consultancy work on securitised financial structures was a fairly recent development. Unfortunately, the ratings agencies failed to do it well.<sup>86</sup> Although the credit rating agencies may have been competent in their traditional activities of rating sovereign risk and corporate bonds, they appear to have been out of their depth when assessing the credit risks of complex products, such as collateralised debt obligations (C.D.O.s)

<sup>81</sup> Aline Darbellay, *Regulating Credit Rating Agencies* (Cheltenham, 2013), 122–3.

<sup>82</sup> Howard Davies, *The Financial Crisis: Who is to Blame?* (Cambridge, 2010), 125.

<sup>83</sup> Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21<sup>st</sup> Century* (Cambridge, 2012), 226.

<sup>84</sup> I.O.S.C.O. *Code of Conduct Fundamentals for Credit Rating Agencies* (2004), <http://www.iosco.org/news/pdf/IOSCONEWS78.pdf>, accessed 10 July 2015. The code was revised in 2008: see <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf>, accessed 10 July 2015. I.O.S.C.O. is the International Organisation of Securities Commissions. The Code of Conduct relies on voluntary compliance.

<sup>85</sup> Chris Brummer, *Soft Law*, 227.

<sup>86</sup> Gillian Tett, *Fool's Gold* (London, 2009), 64–5.

and constant proportion debt obligations (C.P.D.O.s).<sup>87</sup> The agencies expanded their ancillary activities without investing sufficient additional funds in the technology and manpower to meet the challenges of the new work of rating highly complex structured financial instruments.<sup>88</sup> As a result of under-investment, the rating agencies under-estimated the risk of default of securitised products, like residential mortgaged-backed securities. They miscalculated the risk partly because they were misled by the complexity of the financial arrangements in the long chains of contracts that served to attenuate the links between the original debtor, for example a mortgagor in Little Rock, Arkansas, and the ultimate bondholder in the international capital markets, for example a British insurance company buying securitised bonds. The historical data assembled by the credit rating agencies on mortgage defaults for sub-prime borrowers was too recent to be a reliable guide on the level of future defaults. The agencies also misjudged the risk of a collapse of the monoline insurers,<sup>89</sup> such as A.I.G., that insured the securitised bonds and thereby appeared to make the securitised bonds safer by covering insured losses. Furthermore, despite the agencies possessing a huge amount of data on companies, securities and sovereign nations, the agencies failed to piece it all together to see the big picture of what was happening in the financial system. In other words, they failed to appreciate how the highly interconnected nature of modern finance had increased the systemic risks (that would ultimately manifest themselves in the great crash of 2007–2008) and did not take this factor sufficiently into account in the credit ratings of structured finance.

Thus, the conflict of interest that led the agencies to pursue profitable securitisation consultancy work, but which as a consequence produced inaccurate ratings, became an important issue to be addressed by reformers.

The next conflict of interest problem is probably the most important one. There is a fundamental conflict of interest arising from the fact that the main credit rating agencies have moved from a subscriber-pays business model to one where their fees are paid by the party that is being rated.<sup>90</sup> This leads to

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<sup>87</sup> Constant proportion debt obligations feature in a recent successful tort action in Australia against a credit rating agency in the case of *Bathurst Regional Council v Local Government Financial Services Pty Ltd* (No. 5) [2012] F.C.A. 1200.

<sup>88</sup> Chris Brummer, *Soft Law*, 227.

<sup>89</sup> 'A monoline insurer is an insurer who writes a single line of insurance: namely credit insurance. In effect, the insurer guarantees a payment of an obligation by writing an insurance policy to pay out if the obligation is not paid in full.' John Deacon, *Global Securitisation and CDOs* (Chichester, 2004), 564.

<sup>90</sup> Not all credit rating agencies have an issuer-pays model. A few agencies have the

the fundamental question of ‘whether one can trust a watchdog hired and paid by the party to be watched?’<sup>91</sup> If this conflict of interest is not satisfactorily resolved it, too, can call into doubt the reliability and trustworthiness of credit ratings.

Yet this obvious flaw did not prevent the rating system from thriving. There were a number of reasons for the apparent confidence shown by investors in the ratings system before 2008. Firstly, the governments appeared to have confidence in the reliability of the credit ratings – so much so that they inserted references to ratings in legislation. These regulations gave the credit rating agencies the legitimacy of legal authority and tended to encourage over-reliance on the ratings by investors.<sup>92</sup> More will be said about this particular issue in the next section of the chapter.

Secondly, from the point of view of market participants, it appeared that the agencies themselves were trying to manage the conflicts to reduce any deleterious effects and boost investors’ trust in credit ratings through self-regulation – at least as far as the traditional task of rating corporate bonds was concerned. For example, the agencies formulated rules to reduce the agencies’ incentive to inflate the ratings of corporate bonds to win business from clients by setting fees for corporate bonds.<sup>93</sup> An agency is paid a percentage of the bond issue, but this would normally be fixed at two or three basis points (i.e. two to three hundredths of a percent) regardless of the rating that the agency awarded.<sup>94</sup> Yet it must also be noted that despite the small percentage being charged by the agencies, the task of credit rating is a very profitable one for the big three credit rating agencies. In the market for rating corporate bonds the agencies enjoyed estimated profit margins of between 30 to 50 per cent.<sup>95</sup> Thirdly, in the absence of regulation on the matter, the agencies attempted to

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investor-pays model. The investor-pays model has potentially fewer conflicts of interest. For a brief account of the C.R.A. business model and how the shift from ‘investor pays’ or ‘subscriber-pays’ model to the ‘issuers pay’ model occurred see Kenneth A. Kim, John R. Nofsinger and Derek J. Mohr, *Corporate Governance* (New York, 2010), 78-92.

<sup>91</sup> John C. Coffee, *Gatekeepers: The Role of the Professions in Corporate Governance* (Oxford, 2006), 4.

<sup>92</sup> This was a finding in Financial Stability Board, *Report on Enhancing Market and Institutional Resilience*, (April, 2008), [http://www.financialstabilityboard.org/wp-content/uploads/r\\_0804.pdf?page\\_moved=1](http://www.financialstabilityboard.org/wp-content/uploads/r_0804.pdf?page_moved=1), accessed 10 July 2015.

<sup>93</sup> The fees for consultancy or ancillary services are not fixed.

<sup>94</sup> Coffee, *Gatekeepers*, 286.

<sup>95</sup> Kenneth A. Kim, John R. Nofsinger and Derek J. Mohr, *Corporate Governance* (New York, 2010), 84.

ensure that their credit analysts were not paid incentive-based compensation.<sup>96</sup> Fourthly, the market dealt with the risk arising from conflicts of interest by establishing the practice that an issuer has to seek two ratings from two different rating agencies (normally chosen from the big three agencies). This market practice aimed to reduce the temptation for the rating agencies to inflate the ratings for fear of losing business to a rival. However, this practice may have had the unwanted side-effect of reducing price and quality competition among the agencies, which, in turn, caused other problems that will be discussed in the next section.<sup>97</sup> As we shall see, all of these self-regulatory provisions and market practices worked reasonably well in the context of corporate bond rating, which is the traditional business of the agencies,<sup>98</sup> but it failed to work effectively in the context of credit ratings for structured finance where nearly half of the revenues of the big three agencies were being generated by 2007.<sup>99</sup> The signs of rating inflation became apparent by 2006 when there were only around twelve corporate bonds in the U.S.A. granted the much-coveted triple A-rating, but there were 65,000 triple A-rated securitised products in the U.S. markets, whose issuers were enjoying lower borrowing costs and attracting a multitude of investors.<sup>100</sup>

By 2007 the rating industry's self-regulatory system was showing signs that it was breaking down and was becoming less reliable. Compliance with the internal codes of business conduct on conflicts of interest was falling and the failures were not addressed by proper enforcement by the credit rating companies in a number of cases involving structured finance.

Instead of monitoring and enforcing the rules the credit rating agencies' management (no doubt in breach of their own code of conduct rules) put pressure on the credit analysts to sell ratings. Evidence of this emerged from a number of incriminating emails discovered in the post-financial crisis investigations after 2008. For example, two analysts working for Standard & Poor, who were rating a complex structured financial product called a collateralised debt obligation (or C.D.O.) in April 2007, commented on a proposed rating for this structured product in the following terms. 'He said that the deal is ridiculous. We should not be rating it.' The reply from the other

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<sup>96</sup> Coffee, *Gatekeepers*, 287.

<sup>97</sup> *Ibid.*, 287.

<sup>98</sup> The larger credit rating agencies had been rating corporate bonds for nearly one hundred years – largely successfully – and had built up good reputations for the quality of that work.

<sup>99</sup> Howard Davies, *The Financial Crisis: Who is to Blame?* (Cambridge, 2010), 123–4.

<sup>100</sup> *Ibid.*, 124.



Standard & Poor analyst was: ‘we rate every deal [...] it could be structured by cows and we would rate it’. In another email exchange between analysts at S.&P., one analyst expressed his concern about the quality of the work being done on structured financial products. He said, ‘Rating agencies continue to create an even bigger monster – the C.D.O. market. Let’s hope we are all wealthy and retired by the time this house of cards falters’!<sup>101</sup>

### Market Discipline and Its Limits

It may seem surprising that credit rating agencies as private sector companies were entrusted by the state to act as quasi-regulators in the financial markets and were not subject to close monitoring or substantial regulation. However, the dominant neo-liberal economic theories of the time suggested that, in the absence of market failures, the regulation of the credit rating agencies could be left to self-regulation, private litigation and the discipline of the market.

Hindsight reveals that a lack of suitable regulation left those reliant upon the credit rating agencies vulnerable and unprepared for the crash in asset values in 2008. However, there were earlier signs that credit rating agencies were becoming unreliable in the wake of corporate scandals (such as those involving Enron, WorldCom and Parmalat) between 2001 and 2003. Evidence emerged from these scandals that the major credit rating agencies had awarded ‘investment grade’ ratings to the debt securities of these companies despite the fact that these companies were moving close to insolvency. One factor that led to this lapse of judgment on the part of the credit rating agencies was the existence of conflicts of interest.<sup>102</sup> Unfortunately, the warning signs of the dysfunctional nature of the rating agencies did not provoke a sufficiently strong regulatory reaction following these corporate failures. An international code of conduct for credit rating agencies was promulgated by the International Organisation of Securities Commissions (the umbrella body of market regulators) in 2004, but it relied on voluntary compliance on a ‘comply or explain’ principle. Meanwhile, in the United States, some degree of external supervision of the agencies was introduced by legislation in the form of the U.S. Credit Rating Agency Reform Act 2006 (discussed below). But this measure and the I.O.S.C.O. Code had limited effect as the role of the rating agencies in the financial crisis of 2008 would reveal.

<sup>101</sup> ‘Credit Rating Agencies: Negative Outlook’, *The Economist*, 15 November 2008, 98.

<sup>102</sup> John C. Coffee, *Gatekeepers: The Professions and Corporate Governance* (Oxford, 2006), 34.



The policy-makers' insouciance may have been influenced by ideology. A major reason why there was a lack of regulation of credit rating agencies before 2008 was that the economic justification for imposing it (with all its associated monitoring and enforcement costs) was not thought to be compelling. While it was recognised that credit rating agencies were prone to conflicts of interest and capable of causing problems, it was thought that the market's disciplinary mechanisms could deal with these issues, without recourse to the production of regulations. Policy-makers believed that market participants should only be subject to regulation where it was necessary because of the existence of a market failure. Market failure was thought to be an exceptional occurrence because (according to the influential equilibrium theory of economics)<sup>103</sup> markets are generally thought to be efficient and self-correcting. This economic theory also assumes that investors are generally rational.<sup>104</sup> Therefore, whenever trouble does arise from market participants, such as credit rating agencies (where serious conflict of interest problems emerged), the theory assumes that the market is often capable of exerting a greater degree of discipline over the delinquent market participants than would be the case with regulatory law. In addition, the theory assumes that the market's disciplinary mechanisms are cheaper than the regulatory alternatives. The potential efficacy of the market's disciplinary mechanisms can be appreciated in how it may deal with companies that produce defective financial products or inaccurate advice. Such companies may lose their reputation and ultimately their customers and clients. But that is not all. The impact of the market's disciplinary power may result in a fall in the delinquent company's profits and share price. Thus the market can regulate its participants in most cases, according to the theory. The proponents of the general equilibrium theory would argue that regulatory restraint should be practised to promote efficiency and economic growth. However, there is an important exception to this economic assumption. Regulatory intervention may be necessary where market failures occur. These failures are defined by economic theory. They include justified interventions by the state where there is a lack of effective competition,<sup>105</sup> or where there exist barriers to entry to a market, or where principal-agent problems persist, or where negative externalities arise (such as systemic risk in the financial markets) which create

<sup>103</sup> Leading proponents of this free market economic theory include Friedrich Hayek, Milton Friedman and others from the 'Chicago School' of economists. See John Cassidy, *How Markets Fail* (London, 2009), 37–48.

<sup>104</sup> This is a questionable assumption. See Daniel Kahneman, *Thinking Fast and Slow* (London, 2011), 269.

<sup>105</sup> For example, monopoly, abuse of a dominant position.

problems for the wider economy and society.<sup>106</sup> Yet even where regulations can be justified under the general equilibrium theory of economics, any resulting regulations should be proportionate and not be so costly that they overshadow the expected benefits.<sup>107</sup> The dominant economic theory demanded that regulators devote much thought to the design of regulations, so that they do not impose more costs than are thought to be necessary. This helps to explain the policy-makers' rejection of 'command-and-control' regulations<sup>108</sup> and their preference for principles-based regulation<sup>109</sup> prior to 2008<sup>110</sup> where the regulators were convinced that a degree of regulation was necessary to deal with an obvious market failure.<sup>111</sup>

Given the fact that there were indications of the existence of market failures in the case of the rating agencies even before the great financial crisis in 2008 (as revealed in the case of Enron) it is surprising that there was little regulatory activity against the credit rating agencies. These market failures could have been grounds for stronger and more comprehensive regulatory intervention, but such was the faith in the market's disciplinary powers at that time that the issue of conflict of interest was left largely unregulated.

### Problematic Competition

Competition and regulation are often regarded as substitutes by policy makers influenced by the dominant economic thinking. The maxim they use as a

<sup>106</sup> Owing to the restrictions on the word count for this article, there is not the space to discuss these concepts. For further details see Richard A. Posner, *Economic Analysis of Law* (New York, 1998) and Julia Black, 'The Role of Risk in Regulatory Processes' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford, 2010), 305.

<sup>107</sup> Tom Burns, 'Law reform in the European Community and its limits' in A. Barav and D. A. Wyatt (eds) *16 Oxford Yearbook of European Law 1996* (Oxford, 1997), 243–75.

<sup>108</sup> Anthony Ogus, *Regulation: Legal Form and Economic Theory* (Oxford 1994), 79 command-and-control regulations are coercive detailed rules usually backed by criminal law sanctions.

<sup>109</sup> Niamh Moloney, 'The Legacy effects of the financial crisis on regulatory design in the EU', in Eilis Ferran, Niamh Moloney, Jennifer Hill and John C. Coffee (eds) *The Regulatory Aftermath of the Global Financial Crisis* (Cambridge, 2012) 142, Principles-based regulation was found to be inadequate and there has been a return to command and control regulation.

<sup>110</sup> Julia Black, 'The Rise, Fall and Fate of Principles-Based Regulation' in Kern Alexander and Niamh Moloney (editors) *Law Reforms and Financial Markets* (Cheltenham, 2011) 3–34

<sup>111</sup> S. Breyer, 'Typical Justifications for Regulation', in Robert Baldwin, Colin Scott and Christopher Hood (eds) *A Reader on Regulation* (Oxford, 1998), 59–92

general guide to action is 'competition where possible and regulation where necessary'.<sup>112</sup> In the case of credit rating agencies, these companies were able to operate with little regulation or supervision for such a long period of time because the policy-makers relied upon competition as another market mechanism to impose discipline on delinquent agencies. Economic theory suggests that workable competition among many credit rating agencies has the potential to improve quality; speed up the response rate of the agencies to signs of deterioration in the creditworthiness of any client;<sup>113</sup> lower prices; and discipline those businesses that are compromised by conflicts of interest and produce incorrect ratings. It means, for example, that if a rating agency produced inflated ratings, clients would be able to find another provider offering better quality services without undue difficulty. According to economic theory, the loss of market share should force the offending agency to improve the quality of its ratings or face further decline. With regard to the market for credit ratings, the policy-makers assumed that a workably competitive market<sup>114</sup> existed among the large rating agencies - Standard & Poor Ratings Services, Moody's Investors' Service and Fitch Rating Agency. These three large agencies appeared to act like the big four U.K. supermarkets by competing aggressively on price and quality to capture, or at least maintain, market share. Policy makers also hoped the market would become even more effective, over time, with many other credit rating agencies entering the market ready and willing to compete. There was an expectation that some of these newer credit rating agencies could emerge as serious contenders to the big three in specific segments of the market because of the specialised credit ratings they offer to particular sectors of finance. Such specialisation could give the newer market entrants a greater competitive advantage over the big three agencies which are more generalist in nature. The competitors to the big three include: the Canadian company, Dominion Bond Rating Service (D.B.R.S.), which is the fourth largest credit rating agency in the world; Kroll Bond Rating Agency; the Japan Credit Rating Agency (J.C.R.), The A.M. Best Company (specialising in insurance); Morningstar Inc. (specialising in rating mutual funds); and, finally, Egan-Jones Ratings Company (that markets its services to the investor-market and is the only credit rating agency to

<sup>112</sup> John Kay and John Vickers, 'Regulatory Reform: An Appraisal' in Sally Wheeler (ed.), *A Reader on The Law of the Business Enterprise* (Oxford, 1994), 420.

<sup>113</sup> John Coffee, *Gatekeepers*, 286.

<sup>114</sup> D. G. Goyder, *EC Competition Law* (Oxford, 1988), 10–13. Goyder describes the concept of workable competition as the situation where there are fewer competitors in the market than would be needed for perfect competition, but where there was a 'sharper degree and different tempo of mutual reaction than in an oligopoly'.

have a subscribers-pays model).<sup>115</sup> There are signs that these smaller agencies are increasing their market share over time, but this growth starts from a very low base.

Yet, despite these developments in competition the big three still have 96 per cent of the credit rating market. The largest agency, Standard & Poor, has 45 per cent of the market. Moody's has 38 per cent of the market and the smallest agency, Fitch, has 13 per cent of the market.<sup>116</sup> D.B.R.S., the fourth largest credit rating agency, is a long way behind the big three with only about 2 per cent of the market. The continued dominance of the big three is likely to remain. It means that the credit rating market is an oligopoly,<sup>117</sup> if not a duopoly, which inevitably raises concerns about the risk of collusion and questions about the extent to which proper market mechanisms can operate to control prices and quality and discipline those agencies guilty of conflicts of interest.

The policy makers' hope that the ratings industry will become less oligopolistic over time with more competitors entering the market may not be realistic, given the great advantages enjoyed by the big three. The other rating agencies are too small and their resources relatively too limited to be able to compete significantly with the big three, outside their niche areas in the market. Another discouraging feature of the current market place is that market participants, when given a free choice<sup>118</sup> of rating agency, will tend to pick one of the big three to rate their debt securities. This is usually because the big three have the resources and the huge data analysing capability to do the work thoroughly. In addition, these agencies have generally enjoyed good reputations for most of the hundred years for which they have been rating corporate bonds and government debt. It was largely the incorrect rating of structured finance products that tarnished their reputations after 2008.

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<sup>115</sup> *Financial Times*, 15 January 2013, 9.

<sup>116</sup> It is reasonable to argue that what we see is in fact a duopoly because Fitch's market share is so small. For implications of this see Nelson Camanho, Pragyan Deb and Zijun Liu, 'Credit Rating and Competition', *Financial Markets Group, London School of Economics and Political Science*, [July 2012], 1–31, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1573035](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573035), accessed 11/07/15.

<sup>117</sup> Oligopoly is the market situation in which a product is supplied by a small number of companies, whose activities and policies are determined by the expected reactions of one another.

<sup>118</sup> Free choice may be restricted because certain investors, such as pension funds, will only buy securities that are rated by one of the big three as 'investment grade'. This restriction may be written into the fund manager's mandate.

Law-makers did little to deal with this difficult problem prior to the financial crisis beyond encouraging more of the smaller agencies to apply for N.R.S.R.O. (Nationally Recognised Statistical Rating Organisation) registration in the U.S..<sup>119</sup> Critics argue that this attempt to lower barriers to entry to improve competition may backfire. It is argued by Darbellay, for example, that some issuers may be tempted to commission a more recently N.R.S.R.O.-registered credit rating agency if they think it is more likely that a higher rating may be obtained. The newer agency's more generous approach to rating may be influenced by an agency's desire to increase its market share. Darbellay is concerned that the lower barriers to entry may have the unwanted effect of encouraging a race to the bottom instead improving the quality of ratings.<sup>120</sup> Competition as a market mechanism to control the problem of conflicts of interest may not be a comprehensive solution to that problem.

### **The Use of Codes of Conduct and its Limits as a Regulatory Mechanism**

The use of corporate codes of conduct was another market mechanism that was thought to be capable of dealing with conflicts of interest in credit rating agencies, without resorting to legislation. In this section I shall explain why the codes proved to be inadequate and why regulatory reforms were needed.

Before the financial crisis of 2008, policy-makers generally thought the credit rating agencies could deal with the conflict of interest problem by the mechanism of self-regulation in the form of codes of business conduct. Credit rating agencies could police themselves, or face market disapproval. Like many other commercial companies, credit rating agencies had their own corporate codes of ethics – often called codes of professional conduct or codes of business conduct.<sup>121</sup> Credit rating agencies created codes of ethics with a view to reassuring the client and third parties of the integrity of the agencies.

These codes have a number of interesting features, which appealed to the policy makers. For example, the codes can distinguish actual, potential and apparent conflicts of interest. They can set out procedures for management conflicts that cannot be avoided and they can set out enforcement mechanisms

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<sup>119</sup> The Credit Rating Agency Reform Act 2006.

<sup>120</sup> Aline Darbellay, *Regulating Credit Rating Agencies* (Cheltenham, 2013), 68-69.

<sup>121</sup> E.g. *Moody's Policy on Conflicts of Interest Certification*, [https://www.moodys.com/uploadpage/Mco%20Documents/Policy\\_on\\_Conflict\\_of\\_Interest\\_Certification.pdf](https://www.moodys.com/uploadpage/Mco%20Documents/Policy_on_Conflict_of_Interest_Certification.pdf), accessed 10 July 2015. See also *Moody's Code of Professional Conduct* (for the management of conflicts of interest), [https://www.moodys.com/uploadpage/Mco%20Documents/Documents\\_professional\\_conduct.pdf](https://www.moodys.com/uploadpage/Mco%20Documents/Documents_professional_conduct.pdf), accessed 10 July 2015.

to ensure compliance with the rules. Self-regulation could be a lower-cost alternative to command-and-control government regulation (for example, in terms of monitoring and enforcement costs) and in times of reduced resources for regulators, reputable agencies should be trusted by the authorities to police themselves through corporate codes of conduct. In addition, the company's own internal regulations are more likely to be obeyed, if properly enforced internally, than some externally imposed rules that rating agencies might not see as being reasonable in terms of the obligations they impose upon the industry.<sup>122</sup>

Although the rules contained in a company's code of conduct are non-statutory, that does not necessarily mean they are without legal implications. While not legally enforceable in their own right, it is possible for a court to regard the code's provisions as determinative or persuasive with regard to some question of fact or law. A company's code of conduct may have evidential value in judging the standards expected of professionals engaged in the credit rating – including conforming to the duty to avoid conflicts of interest. The terms of a code may also be incorporated into a contract by an appropriate reference thereto in the contract with the client.<sup>123</sup> The codes may, therefore, indirectly encourage private law enforcement actions by strengthening the legal case of the client in private law against the rating agency on the matter of conflicts of duty and interest. Policy makers see an advantage, in terms of cost-savings, of encouraging such private law enforcement actions.

On the other hand, it was a mistake to over-rely on codes of conduct as a market mechanism for disciplining those who breached the duty of loyalty to avoid conflicts of interest. Self-regulatory codes of conduct are open to criticism. They are focused on the interests of the rating company and may fail to take fully into account the public interest. The codes may also lack legitimacy and public trust if they are not properly enforced. Prior to the financial crisis of 2008 there was evidence that the codes were not enforced with sufficient rigour because of inadequate communication, inconsistent implementation and weak enforcement. Even where there is a willingness to enforce the provisions of the code there are practical difficulties. Codes are often composed of a mix of ideals, etiquette, protocols and rules which make their provisions open to varied interpretations. This causes difficulties

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<sup>122</sup> Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford, 1999), 126–37.

<sup>123</sup> R. B. Ferguson, 'The Legal Status of Non-Statutory Codes of Practice', *Journal of Business Law*, [1988], 12–19.

for enforcers. Furthermore, proper enforcement relies on having appropriate institutions and procedures set up, such as supervision systems, ethics training, personal integration, ethics officers and review panels and this infrastructure was not always in place.

Ultimately, the reliance placed upon self-regulatory codes of conduct by policy-makers proved to be largely misplaced. In the aftermath of the financial crisis, it emerged that the compliance and enforcement systems promised by the codes did not work in practice to prevent incorrect ratings owing to conflicts of interest. There were powerful financial incentives to inflate the ratings on structured debt products that made conflicts of interests more acute. For example, it was reported that the views of credit analysts who recommended changes to overcome deficiencies in the mathematical models that were used by the agency to evaluate credit risk in securitised loans, based on sub-prime mortgages, were ignored by rating agency executives. These executives were worried that such changes could lead to a loss of revenues, if an amended mathematic model had the effect of producing lower credit ratings.<sup>124</sup> Other credit analysts sent emails complaining about alleged abuses arising from conflicts of interest. One wrote, 'We sold our soul to the devil for revenue'. Another credit analyst called his firm's rating practices 'a scam'.<sup>125</sup> Thus, there was a significant degree of awareness within the rating agencies that conflicts of interest were causing problems and needed to be addressed urgently, but little was done. The financial crisis has shown that self-regulation does not solve the problem of conflicts of interest distorting the ratings.

### **The Theory of Credit Rating Agencies as Gatekeepers of the Capital Markets**

Another major reason for the trust placed in ratings by market participants and regulators was the belief that the market has produced a special system of accountability that could meet the challenges posed by financial intermediaries and information providers compromised by conflicts.<sup>126</sup> This was the imposition of gatekeeper accountability. This reassuring belief was based on an economic theory, which characterised a credit rating agency as a gatekeeper of the capital markets.

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<sup>124</sup> *Financial Times*, 6 February 2013.

<sup>125</sup> George Ugeux, *International Finance Regulation: the Quest for Financial Stability* (Chichester, 2014), 132–3.

<sup>126</sup> Assaf Hamdani, 'Gatekeeper Liability', *Southern California Law Review*, 77 (2003), 53.



How does it work? The economic theory of ‘gatekeepers’ postulates that wrongdoing by the agencies (including acting in breach of the duty to avoid conflicts of duty and interest) can be punished by the market.<sup>127</sup> An account of how this disciplinary mechanism works has been described by Professor John Coffee, a leading legal authority on the subject. In essence, according to Coffee, a gatekeeper is ‘someone who screens out flaws or defects or verifies compliance with standards or procedures [...] [b]y withholding [gatekeeper] approval,’ which has to be obtained by a firm wishing to sell its debt securities on the capital markets.<sup>128</sup> Credit rating agencies, as gatekeepers, have the power to deny issuers of securities access to the capital markets, where the issuers can expect to obtain lower costs of borrowing, if the securities they are planning to offer for sale are below a certain quality as judged by the rating agency. However, the gatekeeper is more than just a private policeman for the capital markets. Credit rating agencies in their dual roles as gatekeepers and also as ‘agents’ for the issuers perform the role of reputational intermediaries. The largest credit rating agencies, as repeat players in the credit analysis market, have built up their profitable businesses based on developing favourable reputations for predicting default and estimating potential credit risk. The history of the largest three credit rating agencies stretches back one hundred years. Possessing a positive reputation is an asset and, like other business assets, it has the potential to generate further business. As a consequence, if a credit rating agency were tempted to issue inflated ratings to accommodate the wishes of the fee-paying issuer to gain some extra revenue,<sup>129</sup> it would not be in the agency’s rational economic interest to yield to such a temptation. This is because the potential losses (in terms of reputational damage and loss of future business) normally exceed the anticipated financial gain. As Coffee explains, ‘in theory, so long as the gatekeeper has reputational capital at risk whose value exceeds the expected profit that it will receive from the client, it logically should be faithful to the investors and not provide a false or reckless certification.’<sup>130</sup>

There is evidence to show that this gatekeeper theory worked in practice (at least, most of the time). In those cases where the watchdogs failed to

<sup>127</sup> Ibid., 53.

<sup>128</sup> John C. Coffee, *Gatekeepers: The Professions and Corporate Governance* (Oxford, 2006), 2.

<sup>129</sup> Ibid., 296. The fees for rating corporate bonds are based on a formula, typically based on two or three hundredths of a percent of the debt issued. Coffee provides an example of how large the fees can be. A \$1 billion securities issue on a fee of two basis points would produce a fee of \$200,000. Higher fees are charged for securitisations.

<sup>130</sup> Ibid., 4.



bark and wrongdoing occurred, there were negative consequences for those gatekeepers who failed in their prime task, in terms of reputational damage. Perhaps the classic example of the market working in a disciplinary fashion against a gatekeeper is the case of the auditor, Arthur Andersen. In this case the audit firm, Arthur Andersen, failed as a gatekeeper/watchdog to spot fraud in the energy giant Enron. The firm collapsed in the wake of the Enron scandal as its clients deserted the disgraced auditor, leading ultimately to the firm's collapse.<sup>131</sup> Market discipline was seen to punish the gatekeeper in the way the theory predicted.

The credit rating agencies did not perform well in the Enron crisis, either. They were too slow to downgrade the credit ratings for Enron's debt and the credit rating agencies failed to predict Enron's insolvency. This failure damaged the reputation of the agencies for quality and reliability. Yet the agencies' failures in relation to Enron did not lead to the collapse of any of the credit rating agencies involved. Neither was there was a significant shift in the market shares enjoyed by the biggest credit rating agencies. Within a relatively short period it was 'back to business as usual' for the credit rating agencies. Not all gatekeeper failures ended in Andersen-style punishments by the market. In the case of credit rating agencies, the disciplinary effect of the market against weak gatekeepers was not strong enough on its own to deter conflicts of interest. However, in keeping with the dominant ideology (and the lobbying power of the credit rating agencies) the ensuing regulatory response was minimal. The legislative action in the U.S.A., which was aimed at the credit rating agencies, took the form of the Credit Rating Agency Reform Act, 2006.<sup>132</sup> It was the first step towards the supervision of credit rating agencies with the aim of improving the quality of the ratings. The S.E.C.<sup>133</sup> was given the power to monitor the industry and this regulator paid particular attention to those credit ratings agencies designated as Nationally Recognised Statistical Rating Organizations (N.R.S.R.O.s). This was because N.R.S.R.O.s were agencies recognised by legislation to supply ratings for investments held by regulatory entities under various regulations. The Act also established a new procedure for obtaining the necessary certification to become a N.R.S.R.O. The aim of the Act was to encourage more of those existing, but non-

<sup>131</sup> Guido Ferrarini and Paolo Giudici, 'Financial scandals and the Role of Private Enforcement' in John Armour and Joseph A. McCahery (eds), *After Enron: Improving Corporate Law and Modernising Securities Regulation in Europe and the US* (Oxford, 2006), 159–214.

<sup>132</sup> Credit Rating Agency Reform Act, 2006, S.3850, 109th Congress (2006).

<sup>133</sup> The American financial regulator, the Securities and Exchange Commission.

registered, credit rating agencies to compete with the big three by becoming N.R.S.R.O.s and accessing a wider client base. This legislation showed that a degree of regulation was needed to supplement market forces if effective discipline was to be imposed on the reputational intermediary with gatekeeper responsibilities.

However, this heavy reliance upon market-based discipline supplemented by minimal regulation broke down in less than two years in the case of the rating of complex structured finance. The reason for the breakdown of the system was a change in incentives. The profit generated by the credit rating agencies from the advisory work they did on structured finance on behalf of clients who were aiming to issue mortgaged backed securities, or C.D.O.s, exceeded the reputational constraints on these credit rating agencies. The existence of these strong financial incentives meant these agencies were prepared to take the gamble that the risk<sup>134</sup> of suffering reputational damage, if the issued ratings proved to be overly optimistic, was worth taking financially.<sup>135</sup>

Furthermore, the Credit Rating Agency Reform Act seemed unlikely to bolster the weakening market incentives to avoid conflicts of interest. There were signs that the Act's aim of increasing the number of N.R.S.R.O.s was encouraging a 'race to laxity' because issuers had more choice of rating providers and better ratings could be obtained by seeking out those agencies that appeared to be most relaxed about ratings.<sup>136</sup> There was already an established practice known as 'rating shopping'. This involved prospective issuers of securitised assets approaching a number of credit rating agencies to get their opinion on the likely ratings that they might give to C.D.O. tranches, before submitting the securities to a formal rating review. An agency that would be minded to award a triple A-rating to the top slice of the C.D.O. structured product would be a first choice for prospective issuers.<sup>137</sup> Thus, the Credit Rating Agency Reform Act 2006 did little to prevent those credit rating agencies that were certified, registered and monitored as N.R.S.R.O.s by the S.E.C. from contributing to the financial crash of 2007–2008. Minimum levels of regulation to supplement market discipline proved to be insufficient to prevent conflicts of interest in the credit rating agencies. This had the effect of distorting the ratings of those structured financial products that so badly

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<sup>134</sup> The risk of reputational loss was judged to be small by the leading credit ratings agencies.

<sup>135</sup> Darbellay, *Regulating Credit Rating Agencies*, 126.

<sup>136</sup> Joshua Rosner, 'Towards an understanding: NRSRO Failings in Structured Ratings', *Journal of Structured Finance*, 14 (2009), 11.

<sup>137</sup> I.O.S.C.O., *Report of the Task Force on the Subprime Crisis (Final Report)* (May 2008), 21.

damaged the financial system. After the financial crisis policy-makers were forced to reconsider their views on regulation and the disciplinary power of markets.

### **Dealing with C.R.A.S' Conflicts of Interest by Adopting Rules Applied to Other Financial Intermediaries**

In this section of the paper it will be argued that when regulators finally realised that self-regulatory codes and the disciplinary mechanisms of the market were not working effectively to prevent serious conflicts of interest, the regulators in the U.S. and E.U. decided to take decisive regulatory action. To craft the necessary reforms the U.S. and E.U. lawmakers looked for inspiration from rules devised to deal with conflicts of interest affecting other financial and informational intermediaries, such as financial analysts and auditors. As Professor Boatright said, 'conflicts of interest are present in every sector of the financial services industry and constitute a major concern of financial ethics.'<sup>138</sup> Therefore, it can be useful to examine what has been tried in the past to discover what might succeed. There is also merit in promoting regulatory consistency across a range of financial/informational intermediaries.<sup>139</sup> However, there are some disadvantages with this comparative approach. Rules devised to deal with specific problems arising in the past might not be best suited to deal with more recent problems. Secondly, focusing on how to adapt existing rules may close the minds of regulators to new ideas. For example, the radical idea of creating a government-supported credit rating agency and an independent European Credit Rating Agency based on a public utility model was mooted but did not materialise.<sup>140</sup> The alternative strategy of adapting some existing rules to fit new situations may well have proved to be more attractive to law reformers under pressure to produce reforms than creating new rules.

In the course of the regulators' search for solutions to the conflicts of interest in the case of credit rating agencies, certain ideas were adopted from the regulations that govern other financial intermediaries. These common solutions include: the drive for stronger supervision to ensure better internal

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<sup>138</sup> John R. Boatright, *Ethics in Finance* (Oxford, 1999), 44.

<sup>139</sup> Patrick C. Leyens, 'Intermediary Independence: Auditors, Financial Analysts and Rating Agencies', *The Journal of Corporate Law Studies*, 11 (2011), 33–66.

<sup>140</sup> Raquel Gracia Alcubilla and Javier Ruiz Del Pozo, *Credit Rating Agencies on the Watch List: An Analysis of European Regulation* (Oxford, 2012), 249–51.

compliance with, and enforcement of, codes of conduct; the use of Chinese walls<sup>141</sup> (which involves a clearer separation of functions within multi-functional agencies), and more disclosure. Furthermore, because financial and informational intermediaries operate across borders (like audit firms and credit rating agencies) the reforms need to have an international dimension. We shall see that the main reforms of the credit rating agencies (discussed below) draw upon these ideas.

### **To What Extent do the Recent Reforms Address the Conflicts of Interest Problems?**

Financial intermediaries, such as audit firms and credit rating agencies, are international in their operations, so any legislative response to the conflict of interest problem needs to take this into account, especially if the lawmakers aim to prevent regulatory arbitrage. Legislative action may need to be taken at different levels, not least because reformers need to cooperate and coordinate their national regulatory efforts through international bodies. In the case of credit rating agencies, an attempt was made to promote international cooperation through the International Organisation of Securities Commissions. I.O.S.C.O. amended their existing best practice guidelines on the regulation of conflicts of interest affecting credit rating agencies following the financial crisis. This resulted in the revised I.O.S.C.O. Code, issued in 2008, which (amongst other things) put in place new rules to deal with the rating of structured financial instruments and sought to improve the monitoring of compliance with the revised Code. At the supranational level the European Union identified conflicts of interest in the credit rating industry as an issue to be resolved. There have also been national regulatory initiatives to deal with conflicts of interest. However, for those states within the European Union, national laws should not conflict with E.U. rules on this subject. One potential problem with so many operative rules covering the same issue is that the rules may not be fully consistent with one another. This can lead to potential confusion and extra costs for stakeholders.<sup>142</sup> This has happened before. For example, Cranston notes that the Financial Services and Markets Act 2000,

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<sup>141</sup> It is a metaphor which refers to the procedural and informational barriers that need to be put in place in a multi-functional financial business offering different services in order to stop confidential information gained from a client being used by another part of the business, for example.

<sup>142</sup> Joanna Benjamin, *Financial Law*, 560.

c.8 did not abrogate the fiduciary duty, which means that for those subject to the provisions in the statute ‘compliance with rules under the Act does not necessarily provide an excuse for deviation from common law strictness’.<sup>143</sup> In the case of the attempts to reform the law on credit rating agencies, Lehmann has pointed out that the drafting of Article 35a of the Credit Rating Agency Regulation on the issue of credit rating agencies’ liability leaves the door open to different national interpretations of the provision instead of harmonising the law.<sup>144</sup> This may result in uncertainties and inconsistencies in the legal regime governing credit rating agencies, which is a cause for concern.

The U.S.A. and the E.U. have addressed the problem of regulating conflicts of interest, in a remarkably similar fashion, which may help to reduce the opportunities available to credit rating agencies to engage in regulatory arbitrage. In both jurisdictions there has been an attempt to ensure greater supervision of the credit rating agencies. In the U.S., the S.E.C. has been charged with the oversight of N.R.S.R.O.s; while in the E.U. the tasks of registration and supervision have been allocated to the European Securities and Markets Authority (E.S.M.A.). The reforming legislation has granted these regulators significant powers. These include the power to demand all necessary information from the credit rating agencies; the power to examine all other relevant material (such as records of data traffic and telephone calls); the power to interview or summon persons as part of the investigations, and the legal power to carry out on-site inspections. Another feature of the reforming legislation is that the regulators enjoy substantial enforcement powers. For example, where credit rating agencies have infringed the rules, the E.S.M.A. is empowered to order that the infringement come to an end. The regulators can also suspend the use of ratings, and withdraw the registration of the credit rating agency. In addition, the regulators may impose fines or periodic penalties. The costs of supervision and enforcement are paid for by the credit rating agencies in the form of a levy. The new supervision and enforcement regimes may serve to deter rating agencies from breaching their duty of loyalty to their clients by pursuing their own selfish interests.

One of the four main goals of the E.U. Regulation on Credit Ratings Agencies is to eliminate, or reduce, and manage conflicts of interest.<sup>145</sup> The

<sup>143</sup> Ross Cranston, *Principles of Banking Law* (Oxford, 2002), 24.

<sup>144</sup> Matthias Lehmann, ‘Civil Liability of Rating Agencies’, L.S.E. Working Paper No. 15/2014, 22, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2456953](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456953), accessed 11/07/15.

<sup>145</sup> The other goals of the E.U. Credit Ratings Agencies Regulation are: to ensure that financial institutions do not blindly rely only on credit ratings for their investments; to

E.U. Regulation<sup>146</sup> requires credit rating agencies to establish internal policies and procedures to prevent, identify, eliminate or manage, and disclose any conflicts of interest.<sup>147</sup> A similar approach to the regulation of conflicts of interest is taken in the U.S. by The Dodd-Frank Wall Street Reform and Consumer Protection Act 2010<sup>148</sup> (normally referred to as the Dodd-Frank Act) under Title IX, Subtitle C (consisting of sections 931 through to 939H under the heading of: ‘Improvements to the Regulation of Credit Rating Agencies’) where the aim is to identify and eliminate or properly manage and disclose conflicts of interest.

Disclosure is an important strategy in the E.U. and U.S. reforms because it may help to reveal possible conflicts of interest. The S.E.C. has the responsibility to require N.R.S.R.O.s to make disclosures on a number of things, including the main assumptions underlying the rating; the methodology used; the potential limitations of the rating and uncertainties subsisting in the ratings. In addition data about the issuer used in awarding the rating has to be disclosed. Information on whether and to what extent third party due diligence reports have been used and the agency’s assessment of the quality of the data which is available has to be disclosed, together with any information related to conflicts of interest. Similarly, in the case of the law in the European Union, the E.U. Regulation provides for the disclosure by publication of methodologies and key assumptions used to determine the rating<sup>149</sup> as well as disclosures of any conflicts of interest and how they are to be eliminated and managed.<sup>150</sup>

Financial intermediaries are normally subject to disclosure rules and extending these rules to credit rating agencies is not unreasonable. The traditional rationales for disclosure rules are well known. The rules help to reduce the possibility that market participants will be misled; they can reveal

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ensure more transparent and more frequent sovereign debt ratings; to make C.R.A.s more accountable for the ratings they provide. [http://europa.eu/rapid/press-release\\_IP-11-1355\\_en.htm?locale=en#footnote-2](http://europa.eu/rapid/press-release_IP-11-1355_en.htm?locale=en#footnote-2), accessed 10 July 2015.

<sup>146</sup> Regulation (E.C.) No.1060/2009 of 16 September 2009 on credit rating agencies [2009] O.J. L302/1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1436618357072&uri=CELEX:32009R1060>, accessed 11 July 2015.

<sup>147</sup> For an example of how Moody’s complies with E.U. Regulation requirements, see *Moody’s Investor Service European Union Transparency Report*, <https://www.moody.com/PublishingImages/MCO/EU%20Trans%2011.pdf>, accessed 10 July 2015.

<sup>148</sup> H.R. 4173, 11th Congress, 2nd Session (2010). For the full text of the Act, see <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf>, accessed 10 July 2015.

<sup>149</sup> E.U. C.R.A. Regulation, No. 1060/2009, Article 8.1.

<sup>150</sup> *Ibid.*, Recital 26 and Article 6.1.

the presence of actual and potential conflicts of interest and they can help to promote rational decision-making based on disclosed factual evidence. But mandatory disclosure has its problems, too. It can be costly in terms of time, effort and money for the regulated entity to produce the required information. It can also be costly for the regulators to enforce the disclosure rules. There is the danger that the regulated entity is being asked to produce more information than may be strictly necessary. Moreover, any additional information that the regulated entity (in this case, a credit agency) must now produce may present a challenge to clients. The ability of the clients to assimilate and utilise substantial quantities of information may be subject to limitations. This is a problem that has been highlighted by behavioural economists, such as Amos Tversky and Daniel Kahneman.<sup>151</sup> Nevertheless, the reformers' aim of making credit rating agencies disclose much more about their activities and their conflicts of interest is, on balance, a positive development.

In the U.S., the complex task of creating the detailed rules has been delegated to the Security and Exchange Commission (S.E.C.) by the Dodd-Frank Act. This Act (which amends the U.S. Securities and Exchange Act 1934) draws the distinction between conflicts that are prohibited<sup>152</sup> and conflicts that may be permitted.<sup>153</sup> Potential conflicts of interest may be permitted on condition that they are disclosed and can be managed through the application of suitable internal policies and procedures. In other words, the goal is to ensure that the permitted conflict is managed in such a way as to prevent it influencing the quality of the rating.

Some examples of prohibited conflicts include situations where the Nationally Recognised Statistical Rating Organization attempts to give a rating to a client that has provided 10 per cent or more of the rating agency's total net revenue in the last financial year. In a similar manner, where a credit analyst or person approving ratings has securities or any other direct ownership in the rated entity, the conflict is prohibited. (This rule does not apply in the case of sovereign issuers). A prohibited conflict also arises where the analyst or person approving the rating or the person implementing the rating methodologies has negotiated fees with the rated entity. Finally, in the list of some main examples, if the credit rating agency made the issuance of a rating conditional

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<sup>151</sup> Amos Tversky and Daniel Kahneman, *Choices, Values and Frames* (Cambridge, 2000).

<sup>152</sup> The Securities and Exchange Act 1934, Rule 17g-5(b).

<sup>153</sup> *Ibid.*, Rule 17g-5(c).



on the issuer buying ancillary services<sup>154</sup> from the agency, the rating would be compromised by the conflict of interest and would have to be cancelled.

In cases of permitted conflicts in the U.S., the Dodd-Frank Act (like its E.U. counterpart) proposes new rules for internal control and governance. This is to ensure that ratings are not unduly influenced by permitted conflicts of interest.<sup>155</sup> This would entail the creation of written policies and procedures to manage conflicts of interest. As a result, there are provisions that permit the establishment of a 'Chinese wall' between the credit rating team and the sales team of a N.R.S.R.O. to prevent the sales team influencing the credit analysts. Chinese walls have been used by other financial institutions, but they have not been entirely successful. Where the financial incentives are high, there have been attempts to climb over or tunnel under the Chinese wall. So there remains a concern that the use of Chinese walls might be insufficient on their own to prevent breaches of duty. Some clients would wish to see additional assurances from the credit rating agencies that ancillary work and rating work are kept separate.

In the E.U. legislation, the rules on how to address conflicts of interest are set out in Annex 1, sections A and B in the Credit Rating Agencies Regulation. The E.U. Regulation is similar to the American legislation. Where a conflict of interest is identified, the management of the agency has to determine whether the conflict is one prohibited by the Regulation. If it is prohibited, the rating process is to be abandoned. If the conflict is permitted the rating can proceed, provided the conflict can be managed by the agency's internal rules. In either case, the actual or potential conflict of interest must be disclosed. Where the actual or potential conflict of the type referred to in Annex I, section B, point 1 (Annex I.B.1) of the Regulation arises in connection with a rating, it must be disclosed and published on the agency's website (under Annex I.E.I.1.), as well as in the report associated with the publication of the rating. By this means, the market participants are made aware of potential factors that could affect the objectivity of the rating and what has been done to address the problem by the agency.

As is the case in America, some conflicts of interest are prohibited by E.U. law (Annex I.B.1). Under the Regulation, ratings are not to be issued where the conflict is apparent *ex ante*. Where the ratings have been issued

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<sup>154</sup> Ancillary work means work that is not rating. It is explained in the C.R.A. Regulation, Annex I, Section B.4 as consisting of market forecasts, estimates of economic trends, pricing analyses, and other general analyses as well as distribution services.

<sup>155</sup> Title IX, Subtitle C, s.932.



before the conflict of interest became apparent, the compromised ratings are to be immediately put on ‘the watch list’,<sup>156</sup> so that market participants will be made aware of the pending alteration, confirmation or withdrawal of the ratings. The types of prohibited conflicts of interest in the E.U. are similar to those identified in the Dodd-Frank Act. Thus, where a credit analyst or person approving ratings has direct or indirect ownership of the rated entity (collective investment schemes are excluded) the rating is prohibited. Where the rated entity is linked by control to the credit rating agency, or where the credit analyst or person approving ratings is a member of the supervisory or management board of the rated entity, then such conflicts are prohibited (Annex I.B.3).

There are two conflicts of interest cases which are of particular importance: the conflicts arising from the ‘issuer-pays model’ and from the provision of ancillary services. With regard to the provision of consulting and advisory services, regulators in the E.U. and U.S. recognised that there is serious potential for conflicts of interest. These conflicts can arise where the agencies compromise their integrity and undermine the quality of their ratings to produce inflated ratings in order to attract new lucrative consultation and advisory business. It reported that Moody’s offered its rated clients a ‘Rating Assessment Service’ (R.A.S.). Under this advisory service, a client company was charged a fee of around €75,000, to receive advice from the credit rating agency, in confidence, on what the client’s credit rating would be if it undertook a particular course of action that would have a significant impact on the company, for instance a share buyback or an acquisition. If the company did not like the rating that it might be awarded for one proposal, it could pay a further €25,000 to get the agency’s opinion of what the credit rating would be for a client’s alternative financial proposal.<sup>157</sup> It proved to be lucrative work, but, as the article reported, it left some credit analysts feeling uneasy. Some credit analysts ‘were unhappy about this new push into risk consulting, and inside the agencies, analysts feared that they would be used to

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<sup>156</sup> C.R.A.s are obliged to monitor the issue after the initial rating has been given. Each agency has a watch list for companies and rated securities that may need to be reviewed, which could result in a downgrade. See Raquel Gracia Alcubilla and Javier Ruiz Del Pozo, *Credit Rating Agencies on the Watch List: An Analysis of European Regulation* (Oxford, 2012), 62.

<sup>157</sup> ‘Credit Rating Agencies: New Interests, New Conflicts’, *The Economist*, 12th April 2001.

sell extra products on the back of the credit-rating brand, but ultimately to its detriment.<sup>158</sup>

The E.U. reforms address these concerns. Credit rating agencies are prohibited from providing consultancy or advisory services to the rated entity or a related third party regarding the corporate or legal structure, assets, liabilities or activities of that rated entity or related third party.<sup>159</sup> In contrast, the U.S. is currently more permissive. The provision of consultancy or advisory services to the rated entity or a related third party is not (yet) prohibited. However, the conflict of interest has to be disclosed and properly managed. This rule is under review in the Dodd-Frank Act process of detailed rule-making by the S.E.C.. It is possible that advisory services may become one of the prohibited activities for credit rating agencies.

The E.U. Regulation defines ancillary services as ‘services other than issuance of credit ratings’ which are ‘not part of credit rating activities. These activities comprise market forecasts, estimates of economic trends, pricing analysis and other general data analysis as well as related distribution services.’<sup>160</sup> There is no definition of ancillary services in the U.S. legislation, but the general definition used by the Securities and Exchange Commission, which describes ancillary services as, ‘services other than issuance of credit ratings’ is generally accepted.<sup>161</sup>

Under the E.U.’s Credit Rating Agency Regulation, an agency must disclose any ancillary services it has provided for the rated entity or any related third party in its ratings report. It must also report the revenues it generates from its ancillary services and report on revenues received from fees from all non-credit rating activities.<sup>162</sup> In addition, a rating agency must report on how it manages the potential conflict of interest under the internal policies and procedures it has established for that purpose.

## Conclusions

The reforms have tried to reduce the incidence and impact of misleading credit ratings in two main ways: firstly, by attempting to reduce the reliance

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<sup>158</sup> Ibid.

<sup>159</sup> E.U. C.R.A. Regulation, No. 1060/2009, Annex E.I.2.

<sup>160</sup> Ibid., Annex I.B.4.

<sup>161</sup> S.E.C., *Report to Congress, Credit Rating Agency Independence Study As Required by Section 939C of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (November 2013), <http://www.sec.gov/news/studies/2013/credit-rating-agency-independence-study-2013.pdf>, accessed 10 July 2015.

<sup>162</sup> E.U. C.R.A. Regulation, No. 1060/2009, Annex I.B.4.

placed upon ratings by investors and regulators and encouraging the use of other credit assessment options; and secondly, by addressing the conflicts of interest problem in a systematic fashion.

However, there are limits to what the regulators might achieve. On the one hand, the removal of provisions from various statutes that previously required the use of credit ratings should help to create a space for the emergence of alternatives to credit ratings. On the other hand, credit ratings have traditionally played a very important role in the financial system and in privately negotiated financial contracts. There is not much evidence from current market practice to indicate that the introduction of legislative measures to reduce the reliance placed upon ratings is likely to diminish significantly the role of credit ratings. Ratings are likely to remain attractive to investors because they present such concise measurements of creditworthiness. As long as other options to assess creditworthiness fail to match the convenience and comprehensibility of the credit rating system, market participants will continue to rely, wholly or in part, on credit rating agencies.

With regards to the reforms aimed at addressing the conflicts of interest problem, following the great financial crash of 2007–2008, the challenge for regulators and, indeed, for the rating agencies themselves, is how to reassure market participants that the ratings will be objective, credible, and reliable in the future. As explained, one of the methods chosen by policy-makers to achieve this goal was to legislate to deal with the conflicts of interest problem: a problem that had become acute with the rise of complex structured finance. The older system of relying largely on market mechanisms to prevent or manage conflicts of interest failed to work in the way that the policy-makers had assumed. The disciplinary value of various mechanisms such as those posited by gatekeeper theory; competition theory; voluntary disclosure rules (designed to make conflicts easier to detect and deter); the threat of private law actions based on fiduciary claims; the establishment of self-regulation through voluntary company codes of conduct, and through international soft law (in the form of the I.O.S.C.O. Code of 2004) was diminished when the incentives for the rating agencies changed as a result of structured finance and the development of ancillary business lines. The financial rewards accruing to credit rating agencies from structured finance incentivised the agencies to put their corporate interests before their duty of loyalty to their client-base and seriously weakened the reputational constraints that traditionally operated to curb conflicts of interest.

After 2008, when the evidence for the existence of market failures proved to be irrefutable, the law reformers took legislative action. In this new scheme, the tools of market discipline would play only a supplementary role. The reforming legislation in the U.S. and the E.U. promulgated broadly similar rules to deal with the common problems caused by the international rating agencies operating in both regions. The legislation clarifies key terms and concepts and provides detailed rules on conflicts of interest and how they should be eliminated or managed. The legislation also introduces rules to enable the more effective supervision and enforcement of the law. The increased transparency introduced by the legislation should lend further support to private law actions for breach of fiduciary duty, which has been an overlooked course of action, so far. Perhaps the discussion of this issue in the article may encourage a re-appraisal of the potential value of fiduciary law in the context of credit rating.

Although the reforms are significant, there are weaknesses in the new statutory regimes. The drafting of the E.U. C.R.A. Regulation on the issue of credit rating agencies' civil liability leaves the door open to different national interpretations of the provision instead of harmonising the law. This may result in uncertainties and inconsistencies. Ancillary work is permitted to continue, despite it being a potential source of conflicts of interest, on condition that the potential conflicts are managed by the agencies. This is controversial and the successful operation of this rule will depend upon how willing each credit rating agency is to enforce its internal rules to manage conflicts and how this is externally monitored and enforced by the S.E.C. and E.S.M.A.. Currently, the potential effectiveness of the enforcement of the legislation is uncertain because of budget cuts. In addition, the objectivity of ratings for complex structured products might be questionable as long as agencies have to work closely with the issuers of structured products. Such collaboration may be a practical necessity if the credit rating agency is to gain an understanding of how the designer's model works. Inevitably the models used by the agencies to evaluate credit risk will tend to be deeply influenced by the models designed by the issuer. Meanwhile, the reformers continue to tolerate a business model that could produce biased ratings – namely, the dominant 'issuers-pay' business model where the rating agency's fees are paid by the party that is being rated.

It could be argued that although the reforms impose compliance costs and a number of new demands on the credit rating agencies, they do not radically alter their business models or diminish their market success. The big

three agencies still have a market share of around 96 per cent and are not feeling threatened by new competition. Their profits have recovered since the financial crisis and remain high. Furthermore, with no obvious and convenient replacement for ratings, the market participants will continue to rely heavily on the ratings that the agencies produce. Under these circumstances, there remains a risk to investors and the financial system, despite the diminution of the threat of conflicts of interest producing unreliable ratings.

# Wind-Farms – Whither Nuisance?

*Francis McManus*

## Introduction

Nuisance, as a separate head of action, became part of Scots law by a process of osmosis which commenced in earnest during the eighteenth century.<sup>1</sup> Possibly, one of the outstanding and enduring features of common law nuisance is that it has traditionally suffered from definitional problems. Indeed, both academics and judges have struggled to give a comprehensive definition of the expression ‘nuisance’. According to Pun and Hall, a ‘private nuisance is perhaps, incapable of complete definition, given the wide and amorphous nature of the tort.’<sup>2</sup> Possibly, the pronounced difficulty which has been experienced by authors in proffering a convincing definition of nuisance is expressed by Prosser and Keeton who argue that ‘[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word, “nuisance.”’<sup>3</sup> However, in the view of the present author, the most perceptive but, at the same time, the most incisive view of the definition of nuisance, certainly in practical terms, is given by Judge Langan in the recent statutory nuisance case of *Elvington Park Ltd v City of York Council*.<sup>4</sup> After alluding to the fact that there have been a variety of definitions of nuisance in both decided cases and also textbooks, the learned judge stated:

As far as those in the cases are concerned, the relevant definitions were frequently framed in order to illuminate the particular question arising

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<sup>1</sup> For a comparison of nuisance in English and Scots law, see G. Cameron, ‘Cross-border neighbour law’, *Juridical Review*, [2014], 37.

<sup>2</sup> G. Pun and M. Hall, *The Law of Nuisance in Canada* (Canada, 2010), 56.

<sup>3</sup> W. Page Keeton (ed.), *Prosser and Keeton on Torts* (5<sup>th</sup> edn, St Paul, Minn., 1984), 616.

<sup>4</sup> [2011] E.W.H.C. 2213, [49]

for decision. None of those found in the textbooks can be presented in the nature of a code which must be applied to all cases.

Indeed, with respect, the learned judge seems, almost, to be parodying the decision in the oft-cited and much earlier case of *Bamford v Turnley*<sup>5</sup> where the court expressed the view that:

[the] nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances [...] as to make it impossible to lay down any rule of law applicable to every case.

It is instructive now to consider the definitions of nuisance which have been proffered by academic writers. Newark, in his seminal article on the subject of nuisance, 'The Boundaries of Nuisance,' and citing Erle C.J.'s (undelivered) judgement in *Brand v Hammersmith Rly*,<sup>6</sup> was of the opinion that '[w]hat is a nuisance is immersed in undefined uncertainty.'<sup>7</sup> The author goes on to somewhat laconically comment that nuisance is so intractable, both to define and, also, to analyse, that it immediately betrays its mongrel origins. The learned author also observes that the prime cause of this difficulty is that the boundaries of the tort of nuisance are blurred. In other words, the function of the law of nuisance is uncertain. Professor Winfield describes a nuisance as an 'unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it.'<sup>8</sup> More recently, another English author, Professor Murphy described nuisance as:

'any ongoing or recurrent activity or state of affairs that causes a substantial and unreasonable interference with a claimant's land, or with his use or enjoyment of that land.'<sup>9</sup>

As far as Scottish authority is concerned, the expression 'nuisance' was not used as such by the institutional writers, Stair, Bankton and Erskine. However,

<sup>5</sup> (1862) 3 B. & S. 66, 79.

<sup>6</sup> (1867) L.R. 2 Q.B. 223, 247.

<sup>7</sup> F. Newark, 'The Boundaries of Nuisance', *L.Q.R.*, 65 (1949), 480, 480.

<sup>8</sup> *Textbook on the Law of Tort* (1st edn, London, 1937), 462.

<sup>9</sup> J. Murphy, *The Law of Nuisance* (Oxford, 2010), 5.

Bell defined the expression, ‘nuisance’ as:<sup>10</sup>

[w]hatever obstructs the public means of commerce and intercourse, whether in highways or navigable rivers; whatever is noxious or unsafe, or renders life uncomfortable to the public generally, or to the neighbourhood [...] whatever is intolerably offensive to individuals in their dwelling-houses, or inconsistent with the comfort [...] of life

In turn, Glegg described a nuisance as ‘[a]ny act which renders the enjoyment of life and property in the neighbourhood “uncomfortable,” or subjects the neighbourhood “to material discomfort and annoyance” is a nuisance at common law.’<sup>11</sup> In *Interdict*,<sup>12</sup> H. Burn-Murdoch described a nuisance as an: ‘Interference, substantial in degree (resulting from conduct that is not a matter of legal right absolute) with another’s person’s use or enjoyment of either (a) heritage owned or lawfully occupied by that other (the interference operating through means intangible or transient), or (b) a public place (the interference operating through any physical means).’<sup>13</sup>

As far as judicial authority is concerned, in the most-cited Scottish nuisance case of *Watt v Jamieson*,<sup>14</sup> Lord President Cooper (sitting, for some reason, in the Outer House) emphasised that, in ascertaining whether any adverse state of affairs was capable of ranking as a nuisance in law, the ‘proper angle of approach is from the standpoint of the victim as opposed to that of the alleged offender.’ In proceeding to proffer a definition of nuisance, his Lordship stated:<sup>15</sup>

The balance in all such cases has to be held between the freedom of a proprietor to use his property as he pleases, and the duty on a proprietor not to inflict material loss or inconvenience on adjoining proprietors or adjoining property and, in every case, the answer depends

<sup>10</sup> Bell, *Principles*, para. 974.

<sup>11</sup> J. Lindsay Duncan (ed.), *A. T. Glegg, The Law of Reparation in Scotland* (4th edn, Edinburgh, 1955), 324.

<sup>12</sup> H. Burn-Murdoch, *Interdict in the Law of Scotland* (Edinburgh and Glasgow, 1933), 202.

<sup>13</sup> In D. M. Walker, *The Law of Delict in Scotland* (2nd edn, Edinburgh, 1981), 955, the author observes that: ‘Nuisance covers any use of property which causes trouble or annoyance to neighbours’. See also W. J. Stewart, *Delict* (4th edn, Edinburgh, 2004), 36, where it is stated that: ‘Nuisance arises where a person uses his land in such a way that is more than the pursuer should have to tolerate.’

<sup>14</sup> 1954 S.C. 56, 57.

<sup>15</sup> *Ibid.*, 58.



on considerations of fact and degree. The critical question is whether what he is exposed to was *plus quam tolerabile* when due weight has been given to all surrounding circumstances of the offensive conduct and its effects. I do not consider that our law accepts as a defence that the nature of the user complained of was usual, familiar and normal. Any type of use which in the sense indicated above subjects adjoining proprietors to substantial annoyance, or causes material damage to their property, is *prima facie* not a reasonable use.

Therefore, in essence, in order to ascertain whether the adverse state in question ranks as a nuisance, one has to assess whether the conduct of the defender is unreasonable in the circumstances.

In the House of Lords case of *Southwark v Mills*<sup>16</sup> Lord Millett stated that, ‘the law of nuisance is concerned with balancing the conflicting interests of adjoining owners [...] in practice, the law seeks to protect the competing interests of both parties so far as it can.’ For this purpose, it employs the control mechanism described by Lord Goff of Chieveley in *Cambridge Water v Eastern Counties Leather Ltd*<sup>17</sup> as ‘the principle of reasonable user-the principle of give and take.’

However, the concept of unreasonableness is amorphous. Indeed, Murphy describes the concept of unreasonable user in terms of the law of nuisance as ‘one of the main, yet most controversial control devices within the law of private nuisance’.<sup>18</sup> In turn, Lord Wright in the House of Lords case of *Sedleigh-Denfield v O’Callaghan*,<sup>19</sup> in attempting to define the concept of unreasonableness in terms of the law of nuisance, expressed the view that

‘[i]t is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society’.

Summarising the above attempted definitions of the law of nuisance is, of course, most difficult. However, a common theme which runs through these broad definitions of the law of nuisance is the requirement for existence of a state of affairs on the defender’s land which has some form of negative impact

<sup>16</sup> [2001] 1 A.C. 1, 20.

<sup>17</sup> [1994] 2 A.C. 264, 299.

<sup>18</sup> Murphy, *The Law of Nuisance*, para. 1.14

<sup>19</sup> [1940] A.C. 880, 903.

(loosely defined) on the enjoyment of the land of the pursuer. Essentially, the law is attempting to strike a balance between the competing rights, or interests, of proprietors of land, each of whom has the right to enjoy his land. Such a conflict between proprietors of land is pragmatically, albeit crudely, resolved by the courts imposing a duty on each not to use his land in such a way as to unreasonably interfere with his neighbour's enjoyment of land. Such an affirmative duty is sometimes expressed in the maxim '*sic utere tuo ut alienum non laedas*' (use your property in such a way as not to harm your neighbour).<sup>20</sup> However, at best, this maxim is vague and, at worst, almost a meaningless shibboleth. The maxim's utility in its practical application to novel situations such as the advent of wind-farms is also limited. Unfortunately, in the development of the law of nuisance there has been no equivalent to the celebrated neighbourhood principle, which was enunciated in *Donoghue v Stevenson*,<sup>21</sup> to proffer guidance to the courts. In particular, there is little to offer insight into the problems posed by wind-farms, an issue which is addressed below.

## Wind-Farms

From what has been said, thus far, it is clear that what constitutes a nuisance is difficult to define in the abstract. In effect, the courts have to decide a case in the face of a given factual background. The law of nuisance was crystallised during the nineteenth century when the industrial revolution was in full swing. Indeed, one can argue that the law is steeped in its Victorian past to the extent that modern nuisance law reflects, in some ways, at least, the rights of the landed proprietor of that era. This raises, of course, the question as to whether the law of nuisance is capable of meeting modern day challenges. However, what challenges, and in particular, what new challenges, does the law of nuisance face in the twenty-first century? The advent of wind-farms must surely rank as one such challenge. Indeed, wind-farms present the Scottish courts with an obvious and, indeed, formidable challenge, in terms of the law of nuisance. Wind overtook hydropower in 2007 as the U.K.'s largest renewable energy source. However, wind-turbines cause noise. Furthermore, wind-turbines also have a negative visual impact, that is to say, wind-farms are not aesthetically attractive. Furthermore, it has been claimed that wind-farms can reduce the

<sup>20</sup> See e.g. H Burn-Murdoch *Interdict* (Edinburgh, 1933), 207.

<sup>21</sup> 1932 S.C. (H.L.) 31.

value of homes by up to eight per cent.<sup>22</sup> As Samuels pertinently observes, a wind-turbine proposal (that is, a planning application to develop a wind-farm which is submitted to the relevant planning authority) inevitably gives rise to a conflict situation.<sup>23</sup> Perhaps no other topic has generated more interest, especially in local newspapers, than wind-farms.<sup>24</sup>

While, at the time of writing, there is a pronounced paucity of case law which concerns noise from wind-farms, it seems likely that the law of private nuisance will be invoked in the future.<sup>25</sup> This article will, therefore, discuss, firstly, how the law of nuisance may respond to noise pollution from wind-farms and, secondly, to their negative visual impact. However, before one proceeds to consider these issues, wind-farms may have the capacity to interfere with the use of land in more subtle and less publicised forms. It has been recently reported that two wind-turbines which were installed during 2013 have not yet been switched on because they would compromise safety at a nearby airport on account of their capacity to interfere with radar systems there.<sup>26</sup>

## Wind-Farms and Noise

As far as noise pollution from wind-farms is concerned, the majority of complaints from opponents of wind-farms mainly relate to what is commonly described as ‘amplitude modulation’ or ‘whooshing’ or ‘whoomphing’ sound which can be heard close to turbines as they cut through the air.<sup>27</sup> In some circumstances the rotation of the blades through the air may create a more noticeable ‘whoomph’ or ‘thump’. This feature is ‘commonly known as “enhanced” or “other” amplitude modulation’.<sup>28</sup> There may also be audible

<sup>22</sup> *Daily Telegraph*, 1 November 2013.

<sup>23</sup> A. Samuels, ‘Wind Turbine law: an overview’, *J.P.L.*, [2013], 1255, 1255.

<sup>24</sup> *Southern Reporter*, 10 May 2014.

<sup>25</sup> For a general discussion of wind farm noise and private nuisance see S. Ring and B. Webb, ‘Wind farm noise and private nuisance: a return to common sense’, *J.P.L.*, [2012], 892.

<sup>26</sup> *Daily Telegraph*, 13 May 2014.

<sup>27</sup> *The Guardian*, 16 December 2013. In a few cases there have been complaints about what is called ‘Enhanced amplitude modulation’ noise which comprises, partly, ‘thumping’ noise: see *Report published by Renewable UK: Wind Turbine Modulation: Research to Improve Understanding as to its Cause and Effect* (2013), 4, <http://www.renewableuk.com/en/publications/index.cfm/wind-turbine-amplitude-modulation>, accessed 1 July 2015.

<sup>28</sup> See W. Norris, ‘Wind farm noise and private nuisance: issues arising in *Davis v Tinsley*’, *J.P.L.*, [2012], 230, 230.

low frequency tones. These are associated with the mechanical noise generated by rotating components (such as the generator or the gearbox) contained within the nacelle of the turbine, and have sometimes been described as the ‘hum’.<sup>29</sup> Samuels observes that in relation to the measurement of noise from wind-farms, a simple dBA level is no criterion, because levels and perceptions depend upon many factors, such as location, contours, climate, wind strength, design, height, spacing, proximity, and also the size and angles of the blades. The noise from the turbine may be regular and rhythmic, or irregular and intermittent.<sup>30</sup> The potential noise problem from wind-turbines has been recognised for some time. Indeed, in 1996, the Working Group on Wind Turbine Noise produced a Report on wind-turbine noise, ETSU-R-97.<sup>31</sup> The purpose of the Report was to provide advice to developers and planners on environmental assessment of noise from wind-turbines.<sup>32</sup>

At the time of writing,<sup>33</sup> there is no U.K. case law where noise from wind-farms is the subject matter of a private nuisance action. However, it is instructive to reflect on the wide variety of sources which have been held to constitute a nuisance at common law. The motley list includes noise from print works,<sup>34</sup> building works,<sup>35</sup> a sawing mill,<sup>36</sup> singing,<sup>37</sup> cattle,<sup>38</sup> horses,<sup>39</sup> an oil refinery,<sup>40</sup>

<sup>29</sup> Ibid., 230.

<sup>30</sup> Samuels, ‘Wind Turbine law: an overview’, 1259.

<sup>31</sup> See the *Report on the findings of a Working Group on Wind Turbine Noise (Final Report)* (September 1996), [http://regmedia.co.uk/2011/08/02/etsu\\_r\\_97.pdf](http://regmedia.co.uk/2011/08/02/etsu_r_97.pdf), accessed 1 July 2015. See also the Institute of Acoustics, *Good Practice Guide to the Application of ETSU-R-97 for the Assessment and Rating of Wind Turbine Noise* (2013), <http://www.ioa.org.uk/sites/default/files/IOA%20Good%20Practice%20Guide%20on%20Wind%20Turbine%20Noise%20-%20May%202013.pdf>, accessed 1 July 2015.

<sup>32</sup> For a discussion of ETSU see A. Paul, ‘Noise from wind turbines and ETSU-R-97’, *J.P.L.*, [2013], 271.

<sup>33</sup> June 2014.

<sup>34</sup> *Rushmer v Polsue and Alfieri* [1906] 1 Ch. 234. See also, *Heather v Pardon* (1877) 37 L.T. 393; and *Smith v Jaffray* (1886) 2 T.L.R. 480.

<sup>35</sup> *Andreae v Selfridge and Co. Ltd* [1938] Ch. 1. See also *Wherry v K.B. Hutcherson Pty Ltd* (1987) Aust. Torts Reports 80 and *City of London v Bovis Construction Ltd* (1989) 153 Local Govt Rev. 166. See also *Webb v Barker* (1881) W.N. 158; and *De Keyser’s Royal Hotel (Ltd) v Spicer Brothers Ltd and Minter* (1914) 30 T.L.R. 257; and *Husey v Bailey* (1894–5) 11 T.L.R. 221. See also, *Hoare v McAlpine* [1923] 1 Ch. 167 where it was held that the rule in *Rylands v Fletcher* applied to vibrations which emanated from pile driving operations. See also *Bower v Richardson* [1938] 2 D.L.R. 309.

<sup>36</sup> *Gilling v Gray* [1910] T.L.R. 427. See also *Gort (Viscountess) v Clark* (1868) L.T. 343.

<sup>37</sup> *Motion v Mills* (1897) 13 T.L.R. 427.

<sup>38</sup> *London, Brighton and South Coast Railway v Truman* (1886) 11 App. Cas. 45.

<sup>39</sup> *Ball v Ray* (1873) 8 Ch. App. 467.

<sup>40</sup> *Allen v Gulf Oil Refinery Ltd* [1981] A.C. 1001.

an unruly family,<sup>41</sup> power boats,<sup>42</sup> a children's playground,<sup>43</sup> a military tattoo,<sup>44</sup> the firing of guns,<sup>45</sup> military aircraft,<sup>46</sup> amusements,<sup>47</sup> dancing,<sup>48</sup> church bells,<sup>49</sup> quarrying,<sup>50</sup> recreational activities,<sup>51</sup> an electricity-generating station,<sup>52</sup> a dairy,<sup>53</sup> speedway racing,<sup>54</sup> a forge,<sup>55</sup> pigeons,<sup>56</sup> vehicle repair,<sup>57</sup> religious services,<sup>58</sup> aeroplane engine testing,<sup>59</sup> boilers,<sup>60</sup> a nursery,<sup>61</sup> pumping stations,<sup>62</sup> fetes,<sup>63</sup> a steam organ,<sup>64</sup> a 24 hour shop,<sup>65</sup> and a gas engine.<sup>66</sup>

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<sup>41</sup> *Smith v Scott* [1973] Ch. 314.

<sup>42</sup> *Kennaway v Thomson* [1981] Q.B. 88.

<sup>43</sup> *Dunton v Dover D.C.* (1978) 76 L.G.R. 87. See also, *Compton v Bunting* (1939) 83 Sol. Jo. 398.

<sup>44</sup> *Webster v Lord Advocate* 1984 S.L.T. 13.

<sup>45</sup> *Hollywood Silver Fox v Emmett* [1936] 2 K.B. 468. See, also *MacGibbon v Robinson* (1953) 2 D.L.R. 689.

<sup>46</sup> *Dennis v M.O.D.* [2003] E.H.L.R. 297.

<sup>47</sup> *Becker v Earl's Court* (1911) 56 Sol. Jo. 73. See also *Winter v Baker* (1886) 3 T.L.R. 569 and *Walker v Brewster* (1867) L.R. 5 Eq. 25.

<sup>48</sup> *Johnson v Clinton* (1943) 4 D.L.R. 572. See also *Goldfarb and Ono Ltd v Williams* [1945] I.R. 433. See also *The New Zealand and Windsor Hotel Co. v Johnston* [1912] I.R. 327 and *Clark v Sloane* [1923] N.Z.L.R. 1129.

<sup>49</sup> *Hadden v Lynch* [1911] V.L.R. 5. See also *Soltan v De Held* (1851) 2 Sim. (N.S.) 132, 61 E.R. 290 and *Hardman v Holberton* [1866] W.N. 379. See R. Bloor, 'Clocks, Bells and Cockerels', *Ecc. L.J.*, 3 (1993-95), 393.

<sup>50</sup> *Harris v James* (1876) 45 L.J.Q.B. 545. See also, *Calvert v Gardiner*, *The Times*, 22 July 2002.

<sup>51</sup> *Ward v Magna International* (1994) 21 C.C.L.T. (2<sup>d</sup>) 178.

<sup>52</sup> *Knight v Isle of Wight Electric Co.* (1904) 73 L.J. Ch. 299. See also, *Heath v Mayor of Brighton* (1908) 24 T.L.R. 414. See also *Calvert v St Pancras B.C.* [1904] 1 Ch. 707.

<sup>53</sup> *Painter v Reed* [1930] S.A.S.R. 295. See also *McKelvey v Invercargill Milk Supply Co. Ltd* [1928] N.Z.L.R. 223. See also *Tinkler v Aylesbury Dairy Co. Ltd* (1888) 5 T.L.R. 52.

<sup>54</sup> *Coventry v Lawrence* [2014] 2 W.L.R. 433. See also, *Stretch v Romford F.C.* (1971) 115 S.J. 741 and *Tarry v Chandler* (1934) 79 Sol. Jo. 11.

<sup>55</sup> *Goose v Bedford* (1873) 21 W.R. 449. See also *Roskell v Whitworth* (1871) 19 Sol. Jo. 804.

<sup>56</sup> *Fraser v Booth* (1949) 50 S.R. (N.S.W.) 113.

<sup>57</sup> *Kidman v Page* [1959] Qd R. 53.

<sup>58</sup> *Prinsloo v Shaw* [1938] A.D. 570 where the nuisance comprised loud and strident singing, yelling, frenzied praying, stamping of feet, clapping of hands and groaning. See also *Hackney L.B.C. v Rottenberg* [2007] Env. L.R. 24 which was a statutory nuisance case, where the noise consisted of shouting, chanting and jumping on internal floors.

<sup>59</sup> *Bosworth-Smith v Gwynnes Ltd* (1920) 122 L.T. 15.

<sup>60</sup> *Halsey v Esso* [1961] 2 All E.R. 145. See also *Gaunt v Fynney* (1872) 21 W.R. 129.

<sup>61</sup> *Moy v Stoop* (1909) 25 T.L.R. 262. See also *Compton v Bunting* (1939) 83 Sol. Jo. 398.

<sup>62</sup> *Harrison v Southwark and Vauxhall Water Co.* [1891] 2 Ch. 409.

<sup>63</sup> *Walker v Brewster* (1867) 17 L.T. (N.S.) 135.

<sup>64</sup> *Barham v Hodges* [1876] W.N. 673.

<sup>65</sup> *O'Kane v Campbell* [1985] I.R. 115.

<sup>66</sup> *McEwan v Steedman and McAllister* 1911 2 S.L.T. 397.

What one can deduce from the variety of noise sources which have been the subject of successful nuisance actions is that the courts have refrained from differentiating between the various types of noise which have been the subject of a nuisance action. Unreasonably loud noise from a wind-farm would, therefore, be capable of ranking as a nuisance in law. This almost seems like a statement of the obvious. However, wind-farms differ from factories, racing circuits, milk-bottling plants etc., in that not only do they create noise: the source of the noise (i.e. the wind-turbine) is also visibly moving and, therefore, has a negative visual impact on the neighbourhood simultaneously. This raises the question as to whether such a combination of adverse circumstances could be taken into account by a court in a nuisance action. This would, in the last analysis, depend on the general flexibility of the law of nuisance which will be discussed after the visual impact from wind-farms is discussed.

### **The Visual Impact of Wind-Farms**

In this section of the article one addresses the issue as to whether the law of nuisance could provide those who live in the vicinity of a wind-farm with a remedy for any negative visual impact posed by that wind-farm. Indeed, Tromans observes that a perennial ground for challenge in a town and country planning context is that the proposed wind-farm would have an adverse visual impact on the surrounding landscape.<sup>67</sup> The learned author observes, however, that to generalise is unhelpful. The matter will turn on the size of the turbines, the site, and the topography of the landscape. Whilst there are a plethora of cases where noise (albeit, as explained above,<sup>68</sup> not wind-farm noise) in general, has been held to rank as a nuisance, there are very few cases in the U.K. where the claimant or pursuer has succeeded in a nuisance action, simply on the basis that the defender is carrying out an activity which is visually unattractive. For example, could a disgruntled householder successfully invoke the law of nuisance to obtain redress for the loss of amenity in respect of the presence of a wind-farm in the vicinity of his house? Generally, the adverse state of affairs which is the subject of a nuisance action comprises some form of pollution, such as noise, smoke, smell etc., emanating from the defender's premises. A fundamental issue here, of course, is whether one can successfully raise an action in nuisance in relation to a state of affairs which, although visually

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<sup>67</sup> S. Tromans 'Legal Issues in Assessing Wind Turbine Impacts' *United Kingdom Environmental Law Association e-law*, Issue 59 (September, 2010) 6, 11.

<sup>68</sup> See text accompanying notes 33–66 above.

unattractive, is simply confined to the land of the defender? That is to say, in the context of the present discussion, could one raise an action in nuisance in respect of the mere presence of a wind-farm on the land of the defender? There is no direct authority on this point. However, in *Hunter v Canary Wharf Ltd*<sup>69</sup> [1997] 2 All ER 426 the plaintiffs claimed damages for interference with their television reception at their homes by a very tall tower. The House of Lords held that an action in nuisance failed. Their Lordships were of the view that the mere presence of a building that interfered with the reception of television signals did not rank as a nuisance in law. Unfortunately, in the context of the present discussion, there was little discussion as to whether an emanation from the defendant's premises was a condition precedent to liability in nuisance, in general. However, Lord Goff expressed the view<sup>70</sup> that occasional activities which take place on the defendant's land which are so offensive to neighbours can constitute an actionable nuisance in law.<sup>71</sup> In short, and importantly in the context of the present discussion, there was no doctrinal reason why a state of affairs which poses simply a negative visual impact to the neighbourhood cannot rank as a nuisance.

The obvious difference between tall buildings and wind-farms, in the context of the present discussion, is that wind-turbine blades revolve, and can, therefore, have a strobe effect. Whilst wind-turbines potentially present a greater negative visual impact than the mere physical presence of a tall building, in the final analysis the straightforward question which requires to be answered, in doctrinal terms, is whether the law of nuisance in Scotland regards an impact on the visual senses of a potential pursuer as falling within its scope. There is some authority, albeit paltry, that visually offensive activity, which takes place on the property of the defender, can rank as a nuisance in law. For example, according to Bell, a nuisance could consist of a state of affairs which was 'intolerably offensive to individuals in their dwelling houses or inconsistent with the comfort of life, whether by stench (as the boiling of whale blubber) by noise (as a smithy in an upper floor) or by indecency (as a

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<sup>69</sup> [1997] 2 All E.R. 426.

<sup>70</sup> *Ibid.*, 432.

<sup>71</sup> In *Barratt Homes Ltd v Dwr Cymru Cyfyngedig* (No. 2) [2013] 1 W.L.R. 3486, 3504, where the defendant local authority had intentionally obstructed the drains of the claimant developer from discharging into a public sewer, Lloyd Jones L.J. expressed the view, *obiter*, that, in order to succeed in an action for nuisance, it was not necessary to establish that the offending state of affairs which was the subject matter of the action emanated from the defendant's premises.



brothel next door).<sup>72</sup> As far as case law is concerned, in *Smith v Cox*<sup>73</sup> it was held that the drying of cow hides within the site of a public road was a nuisance.

Whereas, as far as Scots law is concerned, there is no authority on whether a state of affairs on property which presents a negative visual impact to individuals in the vicinity can rank as a nuisance, there is English authority to the effect that a brothel in the vicinity of residential property could rank as a nuisance in law. For example, in *Thomson-Schwab v Costaki*<sup>74</sup> it was held that since the plaintiff, who resided in property which was situated close to a brothel, could see prostitutes and their clients leaving and entering the premises, this state of affairs ranked as a nuisance. Similarly, in *Laws v Florinplace*,<sup>75</sup> the defendants established a sex shop and cinema in the vicinity of the plaintiff's premises. It was claimed on the plaintiff's behalf that the defendant's activities would threaten the ordinary enjoyment of family life in the street where the plaintiff lived and would also be an embarrassment and a potential danger to young persons, especially young girls who might meet with indecent suggestions.<sup>76</sup> Importantly, Vinelott J. was of the view that, as far as the private law of nuisance was concerned, there was no need for a physical emanation from the defendant's premises.

Unlike a nuisance action which is based on noise pollution, odour, or light pollution, one of the main problems which would confront the courts in recognising the negative visual impact of wind-farms on neighbouring proprietors is that the courts would have difficulty in recognising an individual interest which is really capable of being measured by an objective standard.<sup>77</sup> Indeed, Pound argues that the law can recognise an interest in the peace and comfort of one's thoughts and emotions only to a limited extent.<sup>78</sup> The learned dean goes on to argue that a hurdle standing in the way of the courts is that an objective standard is required by the social interest with which the individual interest must be balanced. More recently, Osbourne has argued that the courts are much more reluctant to impose liability for non-intrusive conduct that interferes with the comfortable enjoyment of land.<sup>79</sup> In the learned author's

<sup>72</sup> *Principles* (10th edn, Edinburgh, 1899), para. 974.

<sup>73</sup> 5th July 1810, F.C..

<sup>74</sup> [1956] 1 W.L.R. 335.

<sup>75</sup> [1981] 1 All E.R. 659.

<sup>76</sup> *Ibid.*, 663.

<sup>77</sup> [Anon] 'The Modern Tendency Towards the Protection of the Aesthetic', *W. Va. L.Q.*, 44 (1937), 58, 59.

<sup>78</sup> R. Pound, 'Interests in Personality', *Harn. L.Rev.*, 38 (1915), 343, 362.

<sup>79</sup> P. Osbourne, *The Law of Torts* (3rd edn, Toronto, 2007), 366.



opinion, the recognition of such rights poses a much greater threat to the defendant's freedom of land use. Unfortunately, Osbourne does not elaborate on this point. However, the gist of his argument seems to be that beauty, as well as ugliness, lies in the eye of the beholder. Therefore, to allow one to recover for what is, in effect, an assault to the eye, would set a dangerous precedent. However, there is some U.S. authority to the effect that an unpleasant site can rank as a nuisance in law.<sup>80</sup>

By way of conclusion as to whether the law of nuisance would recognise a claim which was based on the negative visual impact of a wind-farm, whilst there is little direct authority on the point, there is no doctrinal reason, *prima facie*, why such a claim could not succeed. This proposition is founded on the simple fact that the law makes no distinction in terms of the form by means of which the pursuer's interest in land is invaded. In short, the law adopts a stoically neutral stance. Whilst, as just stated, the law could, theoretically, regard the negative visual impact of a wind-farm as a nuisance, the author must, *perforce*, consider the grounds on which the modern law can do so.

### The Flexibility of the Law of Nuisance

As has already been mentioned, in order to determine whether the law of nuisance could be successfully invoked to deal with both the noise and, especially, the visual impact presented by wind-farms, one must now examine the flexibility of the law.

Whilst the development of the law of nuisance is, to say the least, pedestrian, it has in the past certainly shown itself capable of rising to new environmental challenges. The leading nineteenth century case of *St Helens Smelting Company v Tipping*<sup>81</sup> (which was decided at a time when the law of nuisance was being developed) serves as a pristine example of how the courts have developed the law in order to take account of advances in industry and technology. It will be recalled that the plaintiff in that case, who owned an estate situated in the Black Country, raised an action against St Helens Smelting Company. The former claimed that the effluvium from the defendant's works had damaged shrubs on his premises. By way of a defence, the latter claimed that, by reason of the fact that the locality was industrial in nature and heavily polluted, this factor should be taken into account by the court when considering if the user of the defendant's land was unreasonable and, therefore, ranked as a

<sup>80</sup> See *Parkersburg Builders Material Company v Barrack* 118 W.Va. 608; 191 S.E. 368 (1937).

<sup>81</sup> (1865) 11 H.L. Cas. 642.

nuisance. The House of Lords, in deciding in favour of the plaintiff, held that the locality factor, in terms of the law of nuisance, was redundant in circumstances where the plaintiff had sustained sensible (or physical) damage to his property. In short, whereas one could take into account the nature of the locality if one was considering whether any adverse state of affairs (for example noise) simply impacted on the personal comfort of the plaintiff, the locality factor was redundant if the defendant's activities caused physical or sensible damage to the plaintiff's property.<sup>82</sup>

The next important development in terms of the law of nuisance came with the House of Lords case of *Sedleigh-Denfield v O'Callaghan*.<sup>83</sup> In this case, a local authority trespassed on the land of the defendant and proceeded to construct a culvert on a ditch. One of the employees of the defendant knew of the existence of the culvert. Furthermore, the defendants also used the culvert in order to get rid of the water from their own property. However, the culvert was not properly constructed, the upshot of which was that it became blocked by detritus. A heavy thunderstorm caused the ditch to flood. The plaintiff's land became flooded. The House of Lords held the defendant liable in nuisance by virtue of both continuing and also adopting the nuisance.<sup>84</sup>

The Privy Council had an opportunity to consider the law relating to nuisances which were created on the defender's land by third parties in the celebrated case of *Goldman v Hargrave*.<sup>85</sup> In that case, a tall gum tree, which was situated on the defendant's land, was struck by lightning and then caught fire. The defendant cut the tree down the following day. However, he did not take any further steps to stop the fire from spreading, preferring simply to let the fire burn itself out. Several days later the weather changed. The wind became stronger and, also, the air temperature increased. This caused the fire

<sup>82</sup> For a stimulating discussion of this case see A. W. Brian Simpson, 'Victorian Judges and the Problem of Social Cost: Tipping v St Helen's Smelting Company (1865)' in idem, *Leading cases in the Common Law* (Oxford, 1995), 163.

<sup>83</sup> [1940] A.C. 880. For a useful discussion of this case, see M. Lunney, '*Goldman v Hargrave* (1967)' in C. Mitchell and P. Mitchell (eds), *Landmark Cases in the Law of Tort* (Oxford and Portland, Oregon, 2010), 199.

<sup>84</sup> It should be observed that in *Marcic v Thames Water Utilities Ltd* [2012] 2 A.C. 42 the House of Lords held that the learning in *Sedleigh-Denfield* was inapplicable to determining the liability of a public utility in terms of whether it was liable to the claimant for damage which had been caused to his property. The property had been inundated by effluent which had escaped from the defendant's sewer. For a discussion of *Marcic* and its relevance to Scotland, see F. McManus, 'Marcic rules OK? Liability in the law of nuisance in Scotland for escapes from overloaded sewers', *Water Law*, [2008], 61.

<sup>85</sup> [1967] 1 A.C. 645.

to revive. The fire then spread over the plaintiff's land which was damaged. The Privy Council held that the defendant was liable for the damage, in that he had failed to remove the nuisance from his land. However, in deciding whether the defendant had failed to attain the standard of care which the law demanded of him, one was required to adopt a subjective approach. One would therefore, require to take into account the resources of the defendant. In turn, one would expect less of the occupier of small premises than of the owner of a larger property. Again, less would be demanded of the infirm than of the able-bodied.

The learning in *Goldman* was followed in *Leakey v The National Trust*.<sup>86</sup> In that case, the plaintiffs owned houses which were situated at the base of a steep conical hill which rejoiced in the name of the 'Burrow Mump'. Part of the hill, which adjoined the plaintiffs' land, had become unstable. The condition of the hill was made known to the defendants by the plaintiffs. However, no remedial action was taken by the defendants. A few weeks later there was a substantial fall of earth and tree stumps from the hill on to the plaintiffs' land. The plaintiffs brought an action in nuisance. The Court of Appeal held the defendants liable in nuisance. The court refused to draw a distinction between an adverse state of affairs which had been foisted on the defendants by man-made activities and one which had arisen by the operation of nature. The judgement of Megaw L.J. is particularly interesting in terms of the affirmative duty which the law imposes on the occupier of land in relation to nuisances which have been foisted upon him. In his Lordship's view, the extent of the harm to the plaintiff's premises, should an accident occur, the practicability of preventative action, the cost of the relevant works, and also the time which is available to take the necessary remedial action, were all relevant factors which fell to be taken into account in determining liability on the part of the defendant.<sup>87</sup> One would also take into account the defendant's age and personal means.<sup>88</sup>

This, now famous, trilogy of cases, the learning in which was endorsed by the House of Lords in the Scottish case of *Smith v Littlewood Organisation Ltd*,<sup>89</sup> provides evidence that the law of nuisance is not static and is quite capable

<sup>86</sup> [1980] Q.B. 485.

<sup>87</sup> *Ibid.*, 524.

<sup>88</sup> *Ibid.*, 526.

<sup>89</sup> [1987] A.C. 241. The learning in the trilogy has since been applied by the English courts in a number of cases which include *Delaware Mansions Ltd v Westminster City Council* [2002] 1 A.C. 321 and *Bybrook Barn Garden Centre Ltd v Kent County Council* [2000] B.L.G.R. 302.

of change in relation to different forms of activities which take place on the defender's land. The trilogy also demonstrates how the law of nuisance was capable of reforming itself in order to balance the duties which are owed by the occupier of land to his neighbour in the context of a tripartite situation: that is to say, one in which that occupier has an adverse state of affairs from an external source whether human, as in *Sedleigh-Denfield*, or by virtue of an act of nature, as in *Goldman*. In the last analysis, the trilogy demonstrates the flexibility of the law of nuisance. However, not only does this, now almost famous, trilogy of cases demonstrate the flexibility of the law, it provides authority for the proposition that the law of nuisance, in reforming itself, is reluctant to draw a distinction as to the nature of the external threat which is posed to the enjoyment of the pursuer's land.

The recent case of *Willis v Derwentside D.C.*<sup>90</sup> illustrates another interesting development in the law of nuisance, and, furthermore, demonstrates its flexibility in dealing with different forms of negative external circumstances. The case concerned a claim for damages in nuisance, negligence and, also under the rule in *Rylands v Fletcher*. In *Willis* the claim arose from the escape of CO<sub>2</sub> gas from land which was owned by Derwentside District Council (the 'Council'). The claimants (W.) owned a house (the 'Property') and also occupied adjacent land, which included two barns, as licensees of the Council. Immediately south of the property lay a disused drift or adit. The mouth of the adit lay on land which the Council had acquired from the National Coal Board (N.C.B.) in 1978. For many years before it was sealed in 2006–7, the mouth of the adit was open to the air, access to it being obstructed only by an iron barred grille and undergrowth. Since it lay at the lowest part of the disused workings, the adit formed a natural point of egress for CO<sub>2</sub> which was generated in the colliery coal seams. In short, CO<sub>2</sub> and depleted oxygen, or 'stythe' gas, was emitted from the mouth of the adit. Since stythe gas is heavier than air, the former can accumulate close to the ground in dangerous concentrations in poorly ventilated buildings. The Council discovered that the adit was emitting stythe gas in spring 2006. However, it delayed taking appropriate remedial measures for some months. W. claimed that the stythe gas had, *inter alia*, caused the death of some of the animals which W. kept on the premises. W., therefore, claimed that the Council was liable in nuisance, in that it had failed to take immediate action on discovering the existence of the adverse state of affairs.

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<sup>90</sup> [2013] E.W.H.C. 738.

After rejecting the claim in terms of the rule in *Rylands v Fletcher*, Briggs J. turned to deal with the claim in terms of the law of nuisance. His Lordship drew attention to the fact that the Council had not itself created the adverse state of affairs which was the subject matter of the action.<sup>91</sup> However, the Council had tolerated the presence of the nuisance after it had become aware of its existence. Under the now famous trilogy of cases of *Sedleigh-Denfield v O'Callaghan*,<sup>92</sup> *Goldman v Hargrave*,<sup>93</sup> and *Leakey v National Trust*,<sup>94</sup> (which were not cited) as we have just observed, an occupier of land is liable for damage which is caused by a nuisance on his land if he does not take reasonable steps to abate the nuisance after he becomes aware of its existence. Therefore, in the view of his Lordship, the Council came under an obligation to remedy the cause of the escape of gas from the adit itself, or from the drain which ran beneath it, only after the Council had discovered the respective escapes in the spring of 2006.<sup>95</sup> Of interest was the fact that his Lordship went on to hold that the obligation on the part of the Council to abate the nuisance involved providing the claimants with information about the causes of the escape, the levels of gas being emitted and, also, the design of the remedial works with which the emissions are planned to be abated.<sup>96</sup> In the last analysis, W. were not provided with such information, the upshot of which was that W. were compelled to take independent advice, at a cost. His Lordship held that W. should be compensated for this expenditure.

Whilst it is well-established now that the occupier of land comes under a duty to abate a nuisance once he becomes aware of it, *Willis* is significant in that the Court held that the Council's legal obligation to W. extended to keeping W. suitably informed about the causes of the gas escape etc.. No authority was cited for this novel approach to the law of nuisance. However, *Willis* does take the law further and, importantly, illustrates a more general point to the effect that the law of nuisance is flexible, not least in its willingness to allow the claimant to recover pure economic loss. It is trite law, indeed, that the courts have, over the years, displayed a pronounced disinclination to allow claims for pure economic loss.<sup>97</sup> Viewed in such a context, *Willis* does, in the

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<sup>91</sup> *Ibid.*, [51].

<sup>92</sup> [1940] A.C. 880.

<sup>93</sup> [1967] 1 A.C. 645.

<sup>94</sup> [1980] Q.B. 485.

<sup>95</sup> [2013] E.W.H.C. 738, [55].

<sup>96</sup> *Ibid.*, [69].

<sup>97</sup> See, e.g., *Spartan Steel & Alloys Ltd v Martin and Co. (Contractors) Ltd* [1972] 3 All E.R. 557 and *Murphy v Brentwood D.C.* [1990] 3 W.L.R. 414.

view of the author, represent more than an incremental step, not simply in terms of the law of nuisance, but also, generally, in terms of the law of tort. To what extent *Willis* represents Scots law is, of course, uncertain. However, given the fact that Scottish courts have tended to follow English case law in determining which forms of invasion of interests of land are capable of ranking as a nuisance in law, the endorsement of *Willis* would not run contrary to the development of the law north of the Border.

### Nuisance and Environmental Regulation

We have seen how the law of nuisance has adapted to different challenges which have been posed by the physical environment. However, to what extent, if any, has the law of nuisance been influenced by the regulation of the external environment? The capacity of the law of nuisance to adapt to the way that the external environment is regulated is demonstrated in a number of cases where it has been held that the grant of planning permission, if implemented, can notionally alter the character of the locality in terms of the law of nuisance, the upshot of which is that a state of affairs which would otherwise rank as a nuisance in law would no longer be so. For example, in *Gillingham v Medway (Chatham Docks) Ltd*,<sup>98</sup> a dock company obtained planning permission to operate the former naval dockyard in Chatham as a commercial port. However, once the port was in operation, the local authority received a number of complaints concerning noise which emanated from the port. At first instance, Buckley J. held<sup>99</sup> that, in determining whether the noise in question ranked as a nuisance, one had to ascertain the character of the neighbourhood in terms of the planning permission for use of the dockyard as a commercial port. In short, the grant of planning permission, if implemented, could notionally transform the nature of the locality.

This approach to the effect of planning permission was followed by the Court of Appeal in *Wheeler v Saunders*,<sup>100</sup> and, more recently, by the same court, in *Watson v Croft Promo-Sport*.<sup>101</sup> The relevant case law was reviewed in the recent Supreme Court case of *Lawrence v Fen Tigers Ltd*.<sup>102</sup>

<sup>98</sup> [1993] Q.B. 343.

<sup>99</sup> *Ibid.*, 360.

<sup>100</sup> [1996] Ch. 19.

<sup>101</sup> [2009] E.W.C.A. Civ. 15.

<sup>102</sup> [2014] 2 W.L.R. 433. See D. Howarth, 'Noise and Nuisance', *C.L.J.*, [2014], 247. See also N. Westaway, 'Coventry v Lawrence: nuisance redefined', *Em. L.Rev.*, [2014], 211. The Irish courts have rejected the proposition that if the defendant is complying with

The facts of the case were simple. In 1975, the fourth defendant obtained planning permission to construct a stadium, which was to be used for various motor sports, including speedway and also stock car racing. In 1992 he obtained planning permission to use agricultural land which was situated towards the rear of the stadium as a motocross track for one year. He constructed a track there. The permission was renewed on a number of occasions, until permanent permission was granted in 2002. The permissions placed conditions, both in terms of the frequency and also the times of the activities at the stadium, but did not place any conditions on the level of noise which was to be emitted during those activities. In 2006 the claimants bought a house which was situated close to the stadium and track. In response to complaints about the noise which was generated by motor sports at the stadium and track, the local authority served abatement notices, in terms of the Environmental Protection Act 1990, c.43, on the second defendant who organised events at the stadium, and also upon the third defendant, who had been granted a lease of the land on which the track was situated. After works were carried out to reduce the noise, the planning authority took no further action. The claimants then took proceedings in private nuisance against the second to fourth defendants, amongst others.

At first instance, the judge held that the planning permissions for the uses of the stadium and the track did not change the character of the area so as to affect his assessment of what noise levels and frequency would constitute a nuisance, and that, on all the evidence which was before him, the operation of the activities at the stadium and track both before and also after the abatement works constituted a noise nuisance to the claimants. The judge also rejected a claim, by way of defence, that the defendants had acquired a prescriptive right to create the nuisance in question by virtue of the activities which took place at the stadium having lasted for more than twenty years. On appeal, the Court of Appeal held that the implementation of planning permission had changed the character of the land for the purposes of the law of nuisance in such a way that the noise from both the stadium and track was to be regarded as simply an established part of the character of the locality. The claim in nuisance, therefore, failed. The claimants successfully appealed to the Supreme Court.

The Supreme Court held that it was possible for the owner of land to acquire, by prescription, an easement (i.e. a legal right to allow one to carry

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planning permission this gives that party the right to commit a civil wrong to neighbouring proprietors. See, e.g., *Cork C.C. v Slatery Precast Concrete Ltd* [2008] I.E.H.C. 291 and *Lanigan v Barry* [2008] I.E.H.C. 29.



out an activity over another parcel of land) to emit noise, provided that the noise had been emitted for twenty years, albeit not continuously. However, it would be open to the defendant to claim that the complaint could only have arisen because of some post-acquisition change of use of that property by the claimant. The court also held that, in determining whether an activity caused a nuisance by noise, the court had to assess the level of noise which, objectively, a normal person would find it reasonable to tolerate given the established pattern of uses, or character, of the locality in which the activity concerned was carried out. For that purpose, the defendant could rely on his own activity on his land, in so far as it could be shown that such activity was a lawful part (that is to say, it did not rank as a nuisance in law) of the established pattern of uses of the area. In this respect, any implementation of planning permission for the defendant's activity could be relevant to an evaluation of the established pattern of uses in the locality. Similarly, the terms and conditions of planning permission could be taken into account in order to evaluate the acceptability of the complained of noise. However, the defendant could not rely on a planning permission which permitted the very noise which was alleged to constitute a nuisance, as making such a noise an established part of the locality. Furthermore, planning permission was not a major determinant of liability, notwithstanding the fact that the grant related to a major development.

The court also held that where a claimant had established that the defendant's activities constituted a nuisance, the primary remedy was an injunction. However, the court had power to award damages instead of an injunction. In considering whether to do so, the court was free to take account of the effect on persons, other than the claimant, who would remain badly affected by the nuisance if an injunction was not granted. In allowing the appeal, the Supreme Court held that the noise from the defendant's activities had not caused a nuisance to the claimant's land for a sufficiently long period as to establish a right by prescription. Furthermore, the defendants could not rely on the defence that the claimants had come to the nuisance. Finally, the existence of planning permission was not determinative of the character of the locality in terms of the law of nuisance.

For Lord Neuberger, there was no doctrinal reason why a right to make a noise could not be acquired by prescription.<sup>103</sup> In his Lordship's view, the extent of prescriptive right to transmit sound waves was highly fact-sensitive, and might

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<sup>103</sup> *Ibid.*, [32].



often depend, not only on the amount and the frequency of the noise emitted, but also on other factors, including the character of the neighbourhood and the give and take between neighbours.<sup>104</sup> Lord Neuberger emphasised that for the defence to succeed, the noise in question required to constitute a nuisance for the relevant prescriptive period.<sup>105</sup> His Lordship also recognised the well-established principle that ‘coming to a nuisance’ was no defence in law.<sup>106</sup> However, his Lordship stated *obiter* that it might well be a defence, in certain circumstances, for a defendant to contend that the defendant’s pre-existing activity constitutes a nuisance only because the claimant has either changed the use of, or built on, his own land.<sup>107</sup> With respect, the author finds it difficult to accept this proposition, which was based on scanty authority. Such a defence would seem to be capable of denying worthy claimants a remedy. For example, suppose the pursuer, an accountant (A.) purchases office premises which are situated close to a milk-bottling plant. A. occupies the premises during the day, when the noise from the plant is not unreasonably loud, and, therefore, does not constitute a nuisance. However, after a few years, A. decides to retire. A., therefore, converts the former office to a dwelling house and then lives there. However, soon A. becomes reasonably discomfited by noise from the plant during the night and in the early hours of the morning, and so he sues the occupier of the plant in nuisance. If Lord Neuberger’s approach is followed, A. would be denied a remedy. However, in the author’s opinion it would seem unfair to deny A. a remedy in such circumstances. In effect, A. would not be denied a remedy if he had not previously occupied the relevant premises which is affected by noise but now A. cannot succeed in a nuisance action simply because he has changed the use of the premises. However, it should be conceded that Lord Neuberger stated that the defence would be confined to a situation only where the claimant’s senses were adversely affected.<sup>108</sup>

As far as the assessment of the character of the locality, for the purpose of assessing whether a defendant’s activities constituted a nuisance, was concerned, Lord Neuberger was of the view that, at times, it might be difficult to identify the precise extent of the locality, or the precise words to describe the character of the locality. Thus, in the view of his Lordship, the concept of the ‘character’ of the locality may be too monolithic in some cases. A

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<sup>104</sup> Ibid., [38].

<sup>105</sup> Ibid., [43].

<sup>106</sup> Ibid., [47].

<sup>107</sup> Ibid., [58].

<sup>108</sup> Ibid., [56].

better description might be, ‘the established pattern of uses’ in the locality. In the instant case, the defendant’s activities were to be taken into account in determining the character of the locality. However, in so far as the defendant’s activities constituted a nuisance, such activities should be disregarded in determining the character of the locality.<sup>109</sup> For his Lordship it was both illogical as well as unfair to the claimants for the court to take these into account. In his Lordship’s view, to take activities which were causing a nuisance into account would involve the defendants invoking their own wrong against the appellants in order to justify their continuing to commit that very wrong against the defendant.<sup>110</sup> Unfortunately, Lord Neuberger did not cite any authority for this novel non-defence in a nuisance action. Whilst one can see the logic which underpins this approach, in the view of the author, it is not without difficulties in its application. For example, suppose P resides in a house, which is situated at the edge of an industrial estate. P has been affected by noise from factory X for about twenty five years. The noise amounts to a nuisance. However, the noise has remained more, or less, constant for that period of time, the upshot of which is that P’s right to raise a successful nuisance action against the occupier of factory X is lost, by way of prescription. However a new factory, factory Y, is built near factory X. Factory Y makes the same amount of noise as factory X and discomfits P. P therefore, sues the occupier of factory Y. If Lord Neuberger’s approach is followed, factory X would fall to be ignored for the purpose of determining the character of the relevant locality but factory Y would be included. In the author’s opinion, it seems unacceptable to ignore factory X but include factory Y in determining the character of the locality. Surely, both factories should be taken into account? To further illustrate how the application of Lord Neuberger’s approach could work to the unfair disadvantage of the pursuer, one can vary the facts of the above scenario slightly. Suppose, factory A emits enough noise to annoy P, but not quite enough noise to constitute an actionable nuisance. Factory B emits simply one decibel more noise than factory A and does cause a nuisance. It would, in the author’s view, seem artificial to exclude B but include A in determining the character of the locality.

Lord Neuberger then went on to discuss the inter-relationship of planning permission and nuisance. This topic, of course, is a controversial, and grey, area of the law of nuisance. For his Lordship, the grant of planning permission

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<sup>109</sup> Ibid., [65].

<sup>110</sup> Ibid., [73].

for a particular use was potentially relevant to a nuisance claim in two ways.<sup>111</sup> First, the grant of planning permission could permit the very noise which was alleged by the claimant to constitute a nuisance. In such a case, the question was the extent, if any, to which the planning permission could be relied on as a defence to the nuisance claim. Secondly, either the grant of planning permission or the conditions attached to such permission could permit the defendant's property to be used for a certain purpose. The question which would fall to be answered here would be to what extent, if any, that permission had changed the character of the relevant land.

For his Lordship, the significance of planning permission, in terms of the law of nuisance, was that the implementation of such permission could give rise to a change in the character of the locality in question.<sup>112</sup> However, such implementation, in his Lordship's view, was no different (subject to one possible point) from any other building work or change of use, which, indeed, did not require planning permission.<sup>113</sup> Thus, if the implementation of the planning permission results in the creation of nuisance to the claimant, the implementation of that permission, subject to one possible point, could not be said to have changed the character of the locality in question, except, as was discussed above, (1) to the extent to which such implementation would not have created a nuisance, or (2) where the defendant could show a prescriptive right to create the nuisance, or, (3) where the court had decided to award the claimant damages rather than an injunction in respect of the nuisance.

Lord Neuberger then went on to discuss the possible proviso which he alluded to above.<sup>114</sup> That was the extent, if any, to which the defendant, in seeking to rebut a claim in nuisance, could rely on the fact that planning permission had permitted the very noise (or other disturbance) which is alleged by the claimant to constitute a nuisance, or which is relied upon by a defendant to change the character of the land. In order to answer this question, Lord Neuberger discussed the cases where the courts have accepted the proposition that, whereas planning decisions and planning permission cannot, *per se*, authorise the creation of a nuisance, such administrative acts can change the character of the locality for the purpose of the law of nuisance.<sup>115</sup> In the then most recent case, namely, *Watson v Croft Pro. Sport Ltd*,<sup>116</sup> the

<sup>111</sup> Ibid., [77].

<sup>112</sup> Ibid., [82].

<sup>113</sup> Ibid., [82].

<sup>114</sup> Ibid., [83].

<sup>115</sup> Ibid., [84]-[85].

<sup>116</sup> [2009] 3 All E.R. 249.

majority of the judges in the Court of Appeal were of the view that only if such permission authorised a major development could such a decision have this effect. However, in the opinion of Lord Neuberger, this approach was untenable.<sup>117</sup> In his Lordship's view, no distinction fell to be drawn between a strategic planning decision and other planning decisions. Such a view was underpinned by the Court of Appeal decision in *Barr v Biffa Waste Services Ltd*<sup>118</sup> where Carnwath L.J. (as he then was) expressed the view that the common law should not 'march in step' with statutory law.<sup>119</sup> Lord Neuberger, therefore, concluded that, normally, the fact that the activity which causes the alleged nuisance had been granted planning permission was of no assistance to the defendant in a nuisance action.<sup>120</sup> However, his Lordship stated that there could be occasions where the grant of planning permission could be of some relevance in a nuisance case.<sup>121</sup> For example, the fact that the noisy activity is acceptable to the relevant planning authority after 0830hrs, or the fact that noise is limited to a certain decibel level in a particular locality, may be of real value, at least as a starting point, in a case where the claimant is contending that the activity gives rise to a nuisance if such activity starts before 0930hrs or the noise is below the permitted decibel level.

As regards the relevance of the defendant's activity in determining the character of the relevant land for the purposes of the law of nuisance, Lord Carnwath was of the opinion that an existing activity could be taken into account.<sup>122</sup> The author, respectfully, agrees with his Lordship on this point, as previously explained.<sup>123</sup> However, for Lord Carnwath, the most difficult problem which was raised by the appeal was what his Lordship described as the 'planning history' of the defendant's activity.<sup>124</sup> At the outset, Lord Carnwath drew attention to the fact that the law of private nuisance, which was of far greater antiquity than modern planning law, also fulfils the function of protecting the interests of property owners.<sup>125</sup> However, in his Lordship's view, there were fundamental differences between planning law and the law of nuisance. Whereas the former exists to protect and promote the public

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<sup>117</sup> [2014] U.K.S.C. 13, [87].

<sup>118</sup> [2013] Q.B. 455.

<sup>119</sup> *Ibid.*, [92].

<sup>120</sup> *Ibid.*, [94].

<sup>121</sup> *Ibid.*, [96].

<sup>122</sup> *Ibid.*, [187].

<sup>123</sup> See text accompanying notes 103–108 above.

<sup>124</sup> *Barr v Biffa Waste Services Ltd*, [191].

<sup>125</sup> *Ibid.*, [193].

interest, the latter exists to protect the rights of particular individuals. His Lordship then went on to review the cases where the courts had held that the grant of planning permission had authorised a change to the character of the relevant land against which the reasonableness of the defendant's use of the land was to be judged.<sup>126</sup> Lord Carnwath then summarised how planning permission may be relevant in a nuisance action in two distinct ways.<sup>127</sup>

Firstly, such permission may provide evidence of the relative importance of the permitted activity as part of the pattern of uses of the area. Secondly, where a relevant planning permission includes a detailed and carefully considered framework of conditions governing the acceptable limits of a noise use, such conditions may provide a useful starting point or benchmark for the court's consideration of the same issues.

As far as the first point was concerned, Lord Carnwath addressed the question as to whether the relative importance of an activity was relevant to a nuisance action at all.<sup>128</sup> After stating that there should be a strong presumption against allowing private rights to be overridden by administrative decisions, in his Lordship's view, the relevance of public utility fell to be confined to the context of remedies rather than liability.<sup>129</sup> That is to say, in his Lordship's view, the public utility of the activity in question did not fall to be considered at the substantive stage, that is to say, when the court was considering whether the adverse state of affairs complained of ranked as a nuisance in law. Lord Carnwath, therefore, followed the approach which was taken by Buckley J. in *Dennis v Ministry of Defence*.<sup>130</sup> However, as regards the question whether such an approach represents the law of Scotland, in the Outer House case of *King v Lord Advocate*<sup>131</sup> Lord Pentland expressed the view that he was uncertain whether the decision in *Dennis* represented the law of Scotland.

As far as the relevance of planning permission in terms of the law of nuisance was concerned, Lord Carnwath accepted that in exceptional circumstances (in relation, in effect, to large scale developments) a planning permission may be the result of a considered policy decision by the competent authority, leading to a fundamental change in the pattern of uses which cannot sensibly be ignored in assessing the character of the area against which the

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<sup>126</sup> Ibid., [195]-[216].

<sup>127</sup> Ibid., [218].

<sup>128</sup> Ibid., [220].

<sup>129</sup> Ibid., [222].

<sup>130</sup> [2003] Env. L.R. 741.

<sup>131</sup> [2005] C.S.O.H. 169, [17].

acceptability of the defendant's activity is to be judged.<sup>132</sup> In the author's view, what his Lordship seemed to be saying (it is not, with respect, absolutely clear) was that in such exceptional circumstances it was legitimate to take the social or public utility of the relevant activity into account at the substantive stage as opposed to the remedy stage. By way of conclusion on this point, Lord Carnwath's saying that the public utility of the defendant's activity should only be taken into account when the court is considering the appropriate remedy flies in the face of weighty authority.<sup>133</sup>

As far as the second point was concerned, Lord Carnwath stated that apart from large scale developments, planning permission might also be of some practical utility in a different way.<sup>134</sup> Where evidence shows that a set of conditions has been carefully designed to represent the authority's view of a fair balance (i.e. of the relevant competing uses of land) there was much to be said for the parties and their experts who were involved in a nuisance action to adopt such conditions as a starting point for their own consideration.<sup>135</sup> Evidence of failure to comply with such conditions, while not determinative, may re-enforce the case for a finding of nuisance under the reasonableness test.

The decision of the Supreme Court certainly means that a planning permission and a relevant development plan are not to be accorded as much status as was formerly the case in private nuisance actions. However, to what extent such planning decisions are relevant in a private nuisance action, unfortunately, remains uncertain. Lord Neuberger's judgement to the effect that planning permission is of 'some relevance' on occasion, is, with respect, confusing, to say the least. Furthermore, Lord Carnwath, unfortunately, did not clarify matters in this context, by stating that planning permission could be of relevance in a nuisance action if it struck a balance between competing uses of land. It may prove difficult to articulate these principles in practice.

By way of conclusion, in *Lawrence* the Supreme Court had a splendid opportunity to clarify the law as to whether planning permission which has been granted by the local planning authority can change the character of land in terms of the law of nuisance. Unfortunately, the opportunity was missed, and the relevance of planning permission in a private nuisance action still remains a notoriously grey area of law. Indeed, one can plausibly argue

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<sup>132</sup> Ibid., [223].

<sup>133</sup> See, e.g., *Harrison v Southwark Vauxhall Water Co.* [1891] 2 Ch. 409.

<sup>134</sup> Ibid., [224].

<sup>135</sup> Ibid., [226].

that *Lawrence* has muddied the waters further. For example, to what extent, if any, is it now legitimate to take into account national planning policy in attempting to strike a balance between competing interests in land, and also in ascertaining the public utility of the activity in question? Indeed, of relevance to the subject matter of this article, as far as windfarms are concerned, as far as the relevance of the Scottish National Planning Framework 3 (which makes specific reference to supporting the further deployment of onshore windfarms,)<sup>136</sup> could it be plausibly argued, in a private nuisance action, that such Scottish Government support gives weight to the argument that windfarms are of public utility?

The author also finds it difficult to reconcile the decision in *Lawrence* with that of the Court of Appeal in *Barr v Biffa Waste Services Ltd.*<sup>137</sup> The facts of *Barr* could not have been simpler. The defendant waste company operated a landfill site which accommodated pre-treated waste. The claimants, who lived in the vicinity of the site, had been affected by odours which emanated from the site for a period of five years. They brought an action in nuisance against the defendant. Biffa, by way of a defence, claimed that, firstly, if the smell from the site did rank as a nuisance, it could avail itself of the defence of statutory authority, and, secondly, by virtue of the fact that the defendant complied with both the terms of its permit which had been issued by the Environment Agency under the Pollution Prevention and Control Regulations and also with the conditions which were attached to its site licence under Part 2 of the Environmental Protection Act 1990, the use of the land where the adverse state of affairs existed was reasonable and, therefore, did not rank as a nuisance in law. At first instance, Coulson J. held ([2011] 4 All ER 1065) that, whereas the defendant company could not avail itself of the defence of statutory authority, the odour did not rank as a nuisance since it emanated from the reasonable user of land simply by virtue of the fact that Biffa Waste had complied with the terms of its permit. In his Lordship's view, it was necessary for the common law to 'march in step' with the relevant statutory regime. Coulson J. gave a very detailed account of both E.U. and also U.K. legislation which governed the disposal of waste. His Lordship expressed the view that both the weight, and also the extent, of such legislation was such that it would be unsatisfactory, to say the least, if the common law did not act in tandem with detailed environmental legislation. The common law required

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<sup>136</sup> *Scottish National Planning Framework (S.N.P.F.)* 3, para. 2.7. At the time of writing (April 2014) the S.N.P.F. is before the Scottish Parliament for approval.

<sup>137</sup> [2012] E.W.C.A. Civ. 312.

to be flexible in order to survive. In the last analysis, the duties which Biffa Waste owed the occupiers were four-square with the defendants' obligations in terms of its compliance with the relevant permit. The claimants appealed.

The Court of Appeal upheld the appeal. The leading judgement was given by Carnwath L.J. (as he then was). On the issue as to whether the detailed statutory regime which governed the operation of the landfill had any impact on the application of the common law, there was simply no principle to the effect that the common law should march in step with a statutory scheme which covered a similar matter. In the last analysis, the statutory scheme for regulating landfill sites could not cut down private rights. It should be observed that while Carnwath L.J. tacitly accepted<sup>138</sup> the proposition that the implementation of planning permission could change the character of land for the purposes of the law of nuisance, he did not subject the case law to detailed scrutiny.

In comparing the decision in *Barr* with that of the Supreme Court in *Lawrence*, it seems inconsistent, on the one hand, for a court to accord no importance (in terms of private nuisance) to one environmental regulatory regime (a permitting regime), and then to allow another separate regime (a planning regime) to be accorded some moment, albeit in limited circumstances. The decision in *Lawrence*, of course, is not binding on the Scottish courts. In the view of the author, in the absence of authority on the relevance of planning in relation to the law of nuisance, it is suggested that the Supreme Court's decision in *Lawrence* does not represent the law of Scotland. The author bases this view on the grounds, albeit not particularly firm grounds, that in developing the law of delict, the Scottish courts display a tendency to set less store by the relevant statutory background to the facts of the case than courts south of the Border. The recent Inner House decision in *MacDonald v Aberdeenshire Council*<sup>139</sup> (which concerned a negligence action against a roads authority) illustrates this point.

## Nuisance and Human Rights

When considering the general flexibility of the law of nuisance, one must, of course, address the impact on the law of nuisance by human rights jurisprudence. In short, to what extent, if any, has the law relating to nuisance

<sup>138</sup> *Ibid.*, [85].

<sup>139</sup> [2013] C.S.I.H. 83. For a discussion of this case see F. McManus, 'Delictual liability of roads authorities', *S.P.E.L.*, 164 (2014), 89.



been influenced by the development of the law relating to human rights? While this is discussed in the context of the visual impact of wind-farms, it is also relevant in terms of noise from wind-farms. Unfortunately, there is a paucity of case law on this subject. However, the impact of human rights law on the law of nuisance fell to be considered in the first instance case of *Dennis v M.o.D.*<sup>140</sup> In that case, the claimants owned and lived on a large estate which was situated in close proximity to R.A.F. Wittering, which is home to the famous Harrier jet: a very noisy aircraft. Indeed, there are none noisier. The witnesses who gave evidence to the court described the noise from the aircraft as sometimes ‘intolerable.’ The claimants brought an action in nuisance against the M.o.D. Buckley J. had no hesitation in holding that the noise from the Harriers amounted to a nuisance in law.<sup>141</sup> However, notwithstanding the fact that the noise in question did amount to a nuisance, it was also beyond dispute that the flying of military aircraft in the very manner which gave rise to the action in question redounded to the benefit of the general public.<sup>142</sup> Put simply, Britain needs its airforce, including aircraft, which inevitably cause a great deal of noise. However, to weigh this factor in the judicial scales when determining whether the noise in question amounted to a nuisance would, in the view of Buckley J., have deprived the claimants of a judicial remedy under common law.<sup>143</sup> Given the great social benefit which accrued to the U.K. from the use of the offending Harrier jets, it was appropriate to award damages to the claimant, rather than award an injunction or make a declaration to the effect that the adverse noise in question amounted to a nuisance.<sup>144</sup> Here, of course, Buckley J. addressed the relevance of social utility, not as a factor which should be taken into account in determining whether a nuisance existed, but, rather, in deciding which remedy should be granted. Whether *Dennis* represents the law of Scotland is unclear. In the Outer House decision of *King v Advocate General for Scotland*,<sup>145</sup> (which concerned a nuisance action in relation to noise from low-flying military aircraft) Lord Pentland did not express an opinion as

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<sup>140</sup> [2003] E.H.L.R. 297.

<sup>141</sup> *Ibid.*, 311.

<sup>142</sup> *Ibid.*, 315.

<sup>143</sup> *Ibid.*, 316.

<sup>144</sup> See, however, *McKenna v British Aluminium* [2002] Env. L.R. 721, where Neuberger J. (as he then was) supported the contention which was advanced by counsel to the effect that it would be inappropriate to extend the common law by way of the law of nuisance in order to give effect to Art. 8 of the E.C.H.R..

<sup>145</sup> [2009] C.S.O.H. 169, [17].

to whether the approach taken by Buckley J. in *Dennis* represented the law in Scotland.

To what extent human rights jurisprudence has influenced the factors which a court could take into account when determining whether a nuisance exists, therefore, remains uncertain. If, indeed, human rights law should influence the development of nuisance, one factor which may fall to be taken into account is whether the adverse state of affairs is typical of modern life. In *Fadeyeva v Russia*,<sup>146</sup> which concerned pollution, including noise from a steel works, the court held that in determining whether the pollution in question infringed Art. 8 of the E.C.H.R., one was required to consider whether the adverse state of affairs which was complained of was typical of modern life. In the House of Lords case of *Hunter v Canary Wharf Ltd*,<sup>147</sup> it was held that the mere presence of a tall building which interfered with the reception of television signals did not constitute an actionable nuisance. However, in the Court of Appeal Pill L.J. seemed to suggest<sup>148</sup> that whether any adverse state of affairs was commonplace might not be a relevant factor in a nuisance action if the subject matter of the action consisted of an activity as opposed to a static state of affairs.

There is no Scottish authority in terms of the law of nuisance as to whether one should take account of whether the subject matter of the action is typical of modern life. In the absence of such authority, it is the view of the author that such a factor should be taken into account since the law of nuisance should be responsive to circumstances which have become accepted by society as being a feature of the modern world. Such an approach would allow the law to become more dynamic and also responsive to the needs of society and, at the same time, facilitate a fairer balance being struck between competing uses of land, a concept which underpins the law of nuisance. As far as wind-farms in Scotland are concerned, whilst the presence of wind-farms is becoming more common on our landscape, one cannot claim that they are typical of modern life. Therefore, in the author's opinion, the court would be more inclined to decide that pollution from a wind-farm ranks as a nuisance.

By way of conclusion on whether the pursuer could succeed in an action which is based on the negative visual impact of a windfarm, one formidable obstacle to the law countenancing nuisance actions based on negative visual

<sup>146</sup> App. No.55723/00 judgement of June 9, 2005.

<sup>147</sup> [1997] Env. L.R. 488.

<sup>148</sup> [1996] 1 All E.R. 482, 489.

impact is that what one is addressing is the effect which wind-farms have on the senses. In short, we really are considering the extent, if any, to which wind-farms depress us and, importantly, whether this is a type of harm which the common law will both recognise and also redress. Generally speaking, the common law has, traditionally, looked askance at how external events impact on the mind. For example, it was only comparatively recently in the development of the common law that the courts would countenance action which was based on the law of negligence, for harm which was caused by nervous shock.<sup>149</sup> Currently, as far as secondary victims of nervous shock are concerned (that is, those who simply witness a traumatic event, as opposed to being physically involved therein) the law insists that the event which causes the harm be sudden and that the claimant sustain nervous shock by witnessing harm to close relatives. However, here, one should be wary of accepting the view that one branch of the law can influence the development of another. The author has argued elsewhere that the law of delict is, generally speaking, an un-integrated subject.<sup>150</sup>

## Conclusions

Perhaps there is no better time to discuss the subject of wind-farms in the context of the general development of the law of nuisance. Wind-farms, as mentioned above, are proliferating on the Scottish landscape (and offshore), not always to the delight of the neighbouring community. One could have reasonably foreseen, therefore, that to date, proprietors of land would have enlisted the law of nuisance to seek redress. However, there have been no decided cases in the United Kingdom, as a whole, on the subject of nuisance from wind-farms. As far as the Scots law of nuisance is concerned, the law has been generally slow-moving. There have been comparatively few cases on the law of nuisance, far fewer on the subject of noise nuisance, or cases concerning the negative visual impact of an activity. This, of course, is a consequence, firstly, of Scotland being a small jurisdiction, and, secondly, as far as the noise is concerned, the fact that the public normally attempt to enlist the aid of local authorities to redress noise problems. In the author's view, if a wind-farm nuisance action comes to the courts, one of the most

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<sup>149</sup> See eg *Wilkinson v Downton* [1897] 2 Q.B. 57 which was one of the earliest of such cases.

<sup>150</sup> F. McManus and E. Russell, *Delict-A Comprehensive Guide to the Law in Scotland* (2nd edn, Dundee, 2011), 1.

contentious issues which will fall to be addressed is the relevance of planning permission to private law. The decision of the Supreme Court in *Coventry v Lawrence* above (which, as stated above, succeeds only in obfuscating the law, and which is not, of course, binding on the Scottish courts) will, no doubt, fall to be discussed. However, in the author's view, as stated above, the decision does not represent the law of Scotland. This approach is commendable in that it conduces to clarity. Public law, generally, presents a serrated edge to the common law. The courts have never felt particularly comfortable in integrating public law principles with those of the common law. Case law relating to the liability of public authorities for failure to exercise their powers serves as a good example in this context. As far as the law of nuisance is concerned, it has been demonstrated above that the law possesses the flexibility to address the potential problems which are presented by wind-farms. Whilst, as stated above, there have been no decided cases, there is little doubt that unreasonably loud noise from a wind-farm would rank as a nuisance in law. This almost seems a statement of the obvious. Much more problematic, of course, is whether a pursuer could recover in relation to the negative visual impact which is posed by a wind-farm. In this context, wind-farms present the courts with a novel problem, in that here, the offending activity comprises a state of affairs which is in motion, in contradistinction to (say) a tall building, as was the case in *Hunter*. However, in the author's opinion, in the absence of authority, such a form of visual impact *per se* would not rank as a nuisance. As far as noise is concerned, it has already been stated that unreasonably loud noise from a wind-farm could constitute a nuisance. What is arguable, however, is whether noise from a wind-farm, which would not *per se* constitute a nuisance since it is not sufficiently loud, could be regarded as a nuisance if one were to take into account the combined impact of noise and its visual impact, since here we have a bifurcated attack being made on the senses of the occupier of land. In the author's view, the court would not be acting contrary to authority if it did so. The law of nuisance possesses the flexibility to do so. Indeed, in *Sturges v Bridgman*<sup>151</sup> Thesiger L.J. observed that the law of nuisance is to be determined 'not merely by an abstract consideration of the thing itself, but in reference to its circumstances'.<sup>152</sup>

<sup>151</sup> (1879) 11 Ch. D. 852, 858.

<sup>152</sup> The author would like to thank H. Thorsby, Barrister at Law, for his comments on an earlier draft of this chapter. Thanks are also due to the anonymous referee for his/her comments. However, any errors and other shortcomings in the chapter rest firmly with the author.

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# Index

## A

Aberdeen Burgh Records, 126  
Aberdeen Stylebook (1722), 61, 175–6  
Aberdeen University, 1, 9  
    King's College, 178–9, 183  
    Marischal College, 179, 183  
Academic Research Assessment Exercises, 44–6  
*Actio quanti minoris*, 65  
Adam, Lord, 316  
Admiralty Court (Scotland), 5, 25–6, 242, 262–6, 271–4, 278  
Adults with Incapacity (Scotland) Act 2000, 335  
Agency, 22, 23, 30, 405  
Alexander II of Scotland, 103, 108–9, 111, 114–5, 122, 128, 145  
Alexander III, Pope, 79  
Alness, Lord, 317  
Alonso, Hilario Casado, 245  
Anderson, Katherine, 151  
Anglicisation of Scots law, 3–4, 17–42  
Armstrong, Jackson, 98, 127  
Assizes of Clarendon, 117–18  
Assumpsit, 257–8  
Assythment, 144–5  
Aquinas, St Thomas, 99

## B

Bailment, 38–41  
Balfour, Sir James, of Pittendriech (*see also Practicks, Of Balfour, Sir James, of Pittendriech*), 169, 190, 192–200, 221, 224–6, 228, 230  
Balgray, Lord, 14–5, 27–8  
Bankton, Andrew McDouall, Lord, 19–21, 30, 35–7, 241, 305, 311, 512  
Barbour, Violet, 244–6, 276  
Barrow, G.W.S., 111  
Basel Committee on Banking Supervision, 474  
Bawcutt, Priscilla, 200  
Beale, Hugh, 61  
Bed-evil, 127

Bell, George Joseph, 16, 21–4, 29–30, 34, 37–41, 240, 305, 308, 354–5, 389, 394, 513, 520  
Bergen, 159  
Bergen Law Faculty, 9  
Bernham, David de, 117  
Bills of Exchange, 3, 15, 17, 18, 19, 20, 22, 28, 33  
Bills of Exchange Act 1882, 15  
Bingham, Lord, 400, 421, 461–2  
Bishops' Wars, 182, 233  
Bisset, Habbakuk, 197  
Boardman, Stephen, 140, 142  
Bonds, 22  
Briefe of division, 169  
Briefe of novel dissasine, 128–30, 145–6  
Briefe of protection, 128–30, 145  
Briggs J., 526  
British Civil Wars, 182, 184–5  
Brown, Michael, 140  
Brown, Mungo Ponton, 30–1, 33–4  
Brundage, James, 113, 136,  
Bruce, Laurence, 152–3, 157, 164, 167, 172  
Brus, Robert de, 101  
Buckland, W.W., 341  
Buckley J., 527, 534, 538–9  
Burn-Murdoch, H., 513

## C

Cairns, John, 178–179  
Callander, Robin, 183  
Camden, Lord, 14  
Canon law, 72, 78–81, 86, 95, 109, 112–18, 136–8, 145–7, 227, 313  
Cantilupe, Nicholas, 4, 70–9, 81–94  
Cantilupe, William, 4, 69–73, 89–91, 93–4  
Caplan, Lord, 448–50  
Cardozo, J., 399, 411  
Carnwath, L.J., 533–5, 537  
Carriage, law of, 11–2, 36–7, 40, 47, 49, 55, 61–2, 66  
Carrick, John, 138  
Caterans, 140–3, 145  
Cattle, 100, 108, 140

- Cautionary obligations, 22, 62–3
- Celtic law, 41–2
- Certainty in the law, importance of, 60, 67, 346, 349, 353, 361, 399–401
- Charity, 335–6
- Charles I of Great Britain, 182, 202
- Chasseneuz, Barthélemy de, 99
- Civil partnership, 326–30, 334
- Clarke, Alison, 381, 395–6
- Clarke, Matthew, 58
- Cochrane, William, 250, 262, 264, 278
- Coffee, John, 497
- Cohabitants, 324–35
- Collateralised debt obligations (C.D.O.s), 485, 488–9, 499
- College of Justice (*also* Court of Session), 5, 12–4, 25–6, 31, 60, 153, 156, 164–6, 170–1, 177–8, 195, 210, 235, 240, 242, 262, 266, 267, 271–5, 278, 291, 308, 312, 314, 342, 377, 415–6, 418, 426–8, 430, 432–3, 447, 449, 450, 461–2, 513, 534, 537–8
- Colville, Alexander (see also *Practicks, Of Colville, Alexander*), 235
- Commercial law, history of, 10–42, 237–79
  - Hire, Scottish history of, 34–41
    - Anglicisation, considered, 35–41
  - Insurance, history of (see also Insurance, In Scotland, prior to the mid-eighteenth century; Insurance, In England prior to the mid-eighteenth century; Insurance, Specialist insurance tribunals (historical)), 3, 5, 12–5, 17–30, 33, 237–79
  - Structure of Scots Contract law,
    - According to broadly Roman structures, 17–21, 40
    - According to mercantile functionality, 22–24, 40
  - Sale, Scottish history of, 29–34
    - Anglicisation, considered, 30–34
- Commissary Court/ Commissary of Aberdeen, 5, 175–7, 179–80, 188, 190, 203, 207, 209, 213, 226, 233, 236
- Commodatum*, 17, 34
- Common European Sales Law, 414, 429
- Conditio si testator sine liberis decesserit*, 6, 280–338
  - Abolition (proposed), 337
  - Application, 322–4, 330–5
  - Civil partnership, and, 326–30, 334
  - Cohabitants, and, 324–35
  - Confusion of doctrine, 281–2
  - Lapse, and, 302–4
  - Legal rights, interaction with, 325–326, 332–5
  - Ius relicti/ relictae, 329
  - Mechanics and operation, 293–308
  - Prior rights, interaction with, 326, 329
  - Rationale, 308–22
  - Reduction and mechanics, 281, 289–90, 292–303, 308–10, 320, 322–3, 325–30, 332–3, 335–6
  - Revocation by force of law and mechanics, 282–93
  - Secondary literature and judicial commentary, 288–93
  - Testamentary freedom, and, 282–3, 301, 320–1
  - Time limit, 336
- Congenital adrenal hyperplasia (C.A.H.), 83–5, 89
- Consumer Protection Act 1987, 49
- ‘Consequential loss’, exclusion of, 434–65
  - Drafting of clauses, 444–6
    - Link between exclusion of consequential loss and the second limb of *Hadley v Baxendale*, considered, 442–6, 449, 451–2, 457, 460
  - Meaning of clauses in English case-law, 441–6
  - Meaning of clauses in Scots law, 446–65
    - ‘Indirect and consequential’ loss perceived as a term of art, 448–9
  - House of Lords, approach to the matter, 461–3
  - Lord Rodger’s analysis, 454–61
  - Objections to the use of the *contra proferentem* rule in construction, 449–50
- Constant proportion debt obligations (C.P.D.O.s), 485–6
- Contra proferentem* rule, 449–50
- Convention on Limitation of Liability for Maritime Claims 1976, 383
- Cooper, Lord, 355, 361–2, 419, 513
- Coulsfield, Lord, 451, 453–4
- Coulson, J., 421, 536
- Covington, Lord, 272
- Craig, Thomas, 235
  - Jus Feudale*, 235
- Cranston, Ross, 501–502
- Credit Rating Agencies, 8, 466–510

Codes of conduct, and, 494–6  
 Competition, and, 491–4  
 Conflict of interest, and, 475–9  
 Described, 471–5  
 European Union, and (*see also European Union/ European Union law*), 471–2, 501–3, 505–7, 509  
 Fiduciary obligations, and, 8, 466–7, 476–84, 502, 508–9  
 Fitch Rating Agency, 472, 492–3  
 ‘Gatekeepers’ of capital markets, 496–500  
 Market discipline, and, 489–91  
 Moody’s Investors’ Service, 472, 492–3, 506  
 Nationally Recognised Statistical Rating Organisation (N.R.S.R.O.), 494, 498–9, 502–3, 505  
 Recent reforms, and, 501–7  
 Role in the financial crisis, 468–71  
 Standard & Poor Ratings Services, 472, 488–89, 492–93  
 U.S. law (*see also U.S. law*), 468, 489, 494, 498–9, 500, 502–7, 509  
 Credit Rating Agency Regulation, 502, 507, 509  
 Criminal procedures  
   ‘Accusatorial’, 102–9, 122–6, 142  
   ‘*Per Inquisitionem*’ (‘dittay’), 109–20, 126–7, 143–5  
   ‘*Per Notorium*’, 130–8, 143, 145–8  
 Crown pleas, 96, 98, 101–2, 106  
 Custody, 17, 40–1, 344, 347, 352

## D

Dalrymple, David, Lord Hailes *see Hailes*  
 Dalrymple, James, Viscount Stair *see Stair*  
 Darbellay, Aline, 494  
 Daube, David, 434–41, 450, 457–8, 460, 464  
 David I of Scotland, 102  
 David II of Scotland, 139–40, 146  
 Delict (*see also Forte, Angelo, On Delict*), 47, 49–54, 441, 445, 459, 467, 478, 481, 483, 537, 540  
 Denning, Lord, 58, 400, 406  
 Deposit, 17–20, 28, 34, 35–6, 39–40, 249, 355  
 Devlin, Lord, 455  
 Dewar Gibb, Andrew, 16  
 Dickson, W.G., 345, 351–2, 358, 362  
 Diplock, Lord, 411  
*Do ut des*, 18

*Do ut facias*, 18  
 Dodd-Frank Act, 503–7  
 Dolezalek, Gero, 176, 192–194, 214–19  
 Domat, Jean, 31  
 Donaldson, Gordon, 169  
 Donaldson, Lord, 381  
 Donahue, Charles Junior, 80–1  
 Draft Common Frame of Reference, 414, 429–33  
 Drug smuggling, 62  
 Duel (battle), trial by, 107, 115  
 Dunning, John, 13–4  
 Durandus, 113  
 Dutch law, 24, 267, 277, 304–5

## E

*Eadem persona cum defuncto*, 300  
 Economic frustration, 413–33  
   Comparative law, and, 429–33  
   Draft Common Frame of Reference, and, 429–33  
   Equitable adjustment, and, 415–20  
   Frustration and alternative responses, 420–9  
   Flexibility of frustration, 421–2  
   International trends, 433  
   Interpretation of contract, and, 424–9  
   Contextual and purposive approach, 427–9  
   Legal uncertainty, and, 433  
 Edinburgh University, 237, 339  
*Eiusdem generis* rule, 451  
 English law, 3, 6, 14–16, 20–41, 50, 52, 55–6, 59–60, 65, 95, 105, 117, 118–9, 123, 127–8, 130, 138, 146–7, 250–8, 271, 312, 341, 368, 375–90, 394, 396, 416–17, 420–5, 429–30, 433, 435, 441–7, 464, 484, 521, 527  
   Equity, 357, 375–7, 382, 387–90, 392, 394, 396  
 Enron, 489, 491, 498  
 Enterprise Act 2016, 410  
 Environmental Protection Act 1990, 528, 536  
 Erle C.J., 512  
 Erskine, John, 20, 35, 36, 241, 305, 311, 363, 377, 512  
 European Union/ European Union law, 468, 471–2, 501–3, 505–7, 509, 536  
   European Securities and Markets Authority, 502, 509

Euro debt crisis (2009), 471

Exodus, Book of, 99

## F

*Facio ut facias*, 18

Factory, 23, 30, 40

Faculty of Procurators, Glasgow, 178, 185

Feuding, 118–19, 139–41

Fiduciary obligations, 8, 466–7, 476–84, 502, 508–9

Fifoot, C.H.S., 258

Financial Conduct Authority, 398

Financial crisis, 2007–2008, 466

Financial Services and Markets Act 2000, 501–2

Finn, Paul, 476, 481, 484

Forbes, William, 15, 19, 20 30, 35, 37

Ford, J.D., 177, 212, 236

Forte, Angelo, 1–9, 10–1, 41–2, 43–4, 67–8, 148–9, 174, 175–176, 237–9, 280, 339, 365–6

As a lecturer/ supervisor, 148–9, 237–9

As a student, 339

*Ius Commune* Scepticism, 47, 50, 65, 67

On the ‘battle of the forms’, 57–8

On certainty in the law and its merits, 67

On comparative law, 67

On contract in general, 54–61

On contractual breakdown, 60–1

On delict, 49–54

On economic frustration of commercial contracts, 413–7, 420, 422, 429, 433

On exception and limitation clauses, 58–60

On George Joseph Bell, 16

On good faith, 62–3

On the history of Commercial law, 10–6

On insurance, 12, 43–4, 47, 55, 62, 67–8

On the history of insurance, 5, 12–15, 237–79

On the interpretation of contract, 55

On legal history, 68, 150, 174, 280, 365–6

On legal principle, 280

On obligations, 3, 7, 43–68

On offer and acceptance, 55–6

On pragmatism in the law, 2, 67–8, 280, 366

On product liability and blood, 49

On pure economic loss, 49–54

On Shetland law, 150–1, 156

On special contracts, 61–6

On unjustified enrichment, 47–9

Fourth Lateran Council, 112, 115

French law, 24, 391, 401, 429

## G

Galloway, laws of, 121–2

German law, 56, 397, 429

Gibson, Sir Alexander, of Durie (*see also Practicks, Of Gibson, Sir Alexander, of Durie*), 177, 213–14, 232, 236

Gill, Lord, 451, 454

Girvan, John, 318

*Glanvill*, 117, 123, 127

Glegg, A.T., 513

Glennie, Lord, 416–8, 425–8

Go, Sabine, 245, 250

Goff, Lord, 51, 400, 411, 514, 520

Good faith, 62–3

Goodal, Walter, 193

Gow, J. J., 16, 64

Gordon, William, 30, 33

Grant, Alexander, 98, 131–2, 139–40, 144

Greasley Castle, Nottinghamshire, 70–7, 85–6, 88, 90–3

Gretton, George, 321

de Groote, Henry, 245

Grotius, 50, 249–50, 274, 277–8

Gulating Compilation, 156, 158–9

## H

Hailes, David Dalrymple, Lord, 13–4, 258–9, 266

Hall, M., 511

Hamilton, Lord, 416

Hamilton, Sir Thomas, earl of Haddington (*see also Practicks, Of Hamilton, Sir Thomas, earl of Haddington*), 177, 213, 236

Hanseatic League, 155

Steelyard, 252

Insurance legislation, 255–6

‘Haymhold’ procedure, 124–5

Harald Fairhair of Norway, 158

Harding, Alan, 130

Herkless, W.R., 306

Herschell, Lord, 478

Hire (*see also* Locatio conductio), 12, 17, 21, 22, 29, 30, 34–41

Hodge, Lord, 421

Hoffmann, Lord, 424–5, 461–3

Homicide, 111, 116, 127, 131–135, 138–9, 141, 143, 146, 441

*Chaudmella*, 131–2, 135–6, 138  
 Home, Henry, Lord Kames *see* *Kames, Henry Home, Lord*  
 Hope, Lord David, of Craighead, 342, 418–19  
 Hope, Charles, Lord Granton, 28  
 Hope, Sir Thomas, of Craighall (*see also Practicks, Of Hope, Sir Thomas, of Craighall*), 176, 189 204–6, 210, 213–14, 232, 236  
 Horning (procedure), 135, 144, 148, 156  
 Hostiensis, 114  
 House of Lords, 3, 16, 48, 60, 63, 242, 263, 287, 410, 446–7, 461–3, 514, 520, 523–4, 539  
 Human rights and nuisance (*see also Wind-farms and nuisance, Human Rights and nuisance*), 537–40  
 Hume, David, Baron, 21–2, 30, 34, 37, 240, 341, 345, 347–50, 352–3, 366  
 Hunter, Lord, 345

## I

Ibbetson, David, 256–7  
 Impotence in canon law, 79–81  
 Inglis, Lord, 377–8, 389  
 Industrial Revolution, 11–2, 259, 515  
*In mobilibus possessio praesumit titulum*, 343  
 Innocent III, Pope, 79, 112–14, 136, 146  
 Insurance, 3, 5, 7, 12–5, 17–30, 33, 62, 237–79, 369, 398–412  
   Definition, and comparison with general Contract law, 402–12  
   Causation, 404  
   Estoppel, 409  
   Formation, 403  
   Intermediaries and agency, 405  
   Liability, 409–10  
   Performance, 403  
   Product description, 404  
   Reasonable expectations, 406–8  
   Risks covered, interpretation of, 405  
   Vitiation, 408–9  
 In Scotland, prior to the mid-eighteenth century, 237–79  
 Arbitration, 268–71  
 ‘Assurance’, 246–9  
   Use of underwriters outwith Scotland, 263–7  
 In England, prior to the mid-eighteenth century, 252–8  
 Specialist insurance tribunals (historical),

267–74

Assurance Chamber, 248, 267  
*Kammer van Assurantie*, 248, 256, 259–60, 268, 277  
 Insurance Act 2015, 410  
 Institutional Writers, 50, 64, 67, 278, 286, 311, 323, 512  
 International Convention on Maritime Liens and Mortgages 1993, 380  
 International Organisation of Securities Commissions’ Code of Conduct, 485, 489, 501, 508  
 Irish Supreme Court, 64  
*Ius Commune*, 14–16, 31, 47, 50, 305, 311, 368  
*Ius Gentium*/ law of nations, 14–5, 20, 21–2, 33, 38, 39, 41

## J

James I of Scotland, 171  
 James IV of Scotland, 171  
 James VI of Scotland, 173, 182, 202  
 Jones, William, 38–40  
*Journal of the Law Society of Scotland*, 44–6, 57

## K

Kames, Henry Home, Lord  
 On the *conditio si testator sine liberis decesserit*, 311–5, 316  
 Keeton, W. Page, 511  
 Kent, James, 22, 38  
 Kinnear, Lord, 301  
 Knowledge exchange, 44–6

## L

Land Registration (Scotland) Act 1979, 392  
 Law Merchant (*see also* *Lex Mercatoria*), 14–5, 21–5, 27, 29, 30, 39, 41, 254, 270  
 Law of Property Act 1925, 378  
 Law Reform (Frustrated Contracts) Act 1943, 419  
 Lenel, Otto, 437  
 Leases Act 1449, 35  
*Leges Burgorum*, 196, 200, 228, 231  
*Leges Scocie* (L.S.), 102–12  
 Legal fictions, 295–6  
 Lehmann, Mathias, 502  
 Leonard, Adrian, 246, 254–5  
 van Leeuwen, Simon, 304–5  
*Lex Mercatoria*, 14  
*Lex Rhodia de jactu*, 61



Lien, 61, 379, 385, 397  
 Lloyd, Lord, 407  
 Loan, 17–20, 34, 39–41, 340, 344, 349, 353,  
 356, 374, 475, 496  
*Locatio conductio* (see also *Hire*), 17–20, 29,  
 34–7, 39, 40  
 Low, Lord, 315

## M

MacDonald, Lord, 291  
 Macgregor, Laura, 30  
 Mackay, Lord, 461–2  
 Mackenzie, Colin, 377, 387–8  
 Mackenzie, Lord, 28  
 MacQueen, Hector, 57, 105, 109, 112–3,  
 116, 119, 126, 128, 130, 138, 441  
 Magnus VI of Norway (the ‘Law-Mender’),  
 156, 158  
     Code of law (1274), 156, 159–68, 170,  
     172–3  
 Maitland, F. W., 100, 128  
 Maitland, Sir Richard, of Lethington (see  
     also *Practicks, Of Maitland, Sir Richard, of*  
     *Lethington*), 214–25, 227–8, 232–3, 235  
 Malveisin, 112, 115, 117  
 Mance, Lord, 427–29  
 Mandate, 17, 19–20, 23, 29–30, 35, 37, 40  
 Mansfield, William Murray, Lord, 14, 268,  
 270, 399, 411  
 Marine Insurance Act 1906, 12, 15  
 Marshall, Samuel, 13  
 Mary, Queen of Scots, 159  
 Matthaëus, 50  
 McGregor, H., 443  
 McKechnie, Hector, 191  
 McKenzie, Lord, 416  
 McLaren, Lord, 288, 306, 316  
 McMillan, A.R.G., 376–7  
 McNair, Arnold, 341  
 McNeill, Peter, 193, 197  
 Mercantile Law Amendment Act 1856, 33  
 Meadowbank, Lord, 27  
 Megaw L.J., 524  
 Merchant Shipping Act 1854, 388, 390, 395  
 Merchant Shipping Act 1995, 369–70, 374–  
 5, 379, 384–8, 390  
 Merchant Shipping (Registration, etc.) Act  
 1993, 371  
 Merchant Shipping (Registration of Ships)  
 Regulations 1993, 369–73, 376, 379–80,  
 384  
 Meston, Michael C., 176, 318  
 Millar, John Junior, 13–4, 240, 270–1  
 Millar, William, 45  
 Millett, Lord, 514  
*Modus tenendi curias*, 199  
 Monck, General, 252  
 Morison’s *Dictionary*, 24–5, 240, 275  
 Mowat, Gilbert, 166–7, 170  
 Mowat, Roger, 211  
 Murray, William, Lord Mansfield see  
     *Mansfield, William Murray, Lord*  
 Murder, 69–72, 83–4, 89, 91–3, 101, 116,  
 131–4, 139, 146  
 Murphy, J., 512  
*Mutuum*, 17, 19, 34, 41

## N

*Nautae, canpones, stabularii* (edict), 35–7, 61  
 Napier, Macvey, 292  
*Negotiorum gestio*, 47–8  
*Nemo dat quod non habet*, 357  
 Nervous shock, 540  
 Neuberger, Lord, 529–33, 535  
 New Zealand law, 383–4  
 Nicolson, Sir Thomas, of Carnock (see  
     also *Practicks, Of Nicolson, Sir Thomas, of*  
     *Carnock*), 203, 206–8, 210, 213, 236  
 Nicolson, Thomas, of Cockburnspath, 203  
 Nicholls, Lord, 410  
 Northern Ireland, 375  
 Norwegian law, 5, 150–1, 155–6, 158–70,  
 170, 172–4  
     *Siaundar*, 167–8  
 Notaries Act 1587, 186  
 Nuisance see *Windfarms and nuisance*

## O

Osbourne, P., 521–2  
 Ordeal, trial by, 107–12  
 Ormidale, Lord, 317

## P

Papal Curia, 77, 79  
 Park, James Alan, 13  
 Parker, J., 444  
 Partnership (see also *Society*), 17, 19, 23, 29,  
 261, 476  
 Partnoy, Frank, 469  
 Paynel family, 69–79, 81–3, 86–90, 92–4  
 Pentland, Lord, 534, 538  
 Pepys, Samuel, 258

- Permutation, 18, 20, 64
  - Phillips, Alfie, 45
  - Pill L.J., 539
  - Pindar, 310, 338
  - Piper Alpha disaster, 447
  - Pirate radio stations, 62
  - Planning permission (*see also Windfarms and Nuisance, Planning permission and nuisance*), 527–29, 531–35, 537, 541
  - Pledge, 20, 28, 40–1, 346, 349, 355, 396
  - Poinding, 101, 344, 354–6
  - Pollock, Frederick, 100, 370
  - Pollution Prevention and Control Regulations, 536
  - Polynesia, 11
  - Pothier, Robert Joseph, 22, 31, 38
  - Posner, Richard, 3
  - Post Office Act 1953, 66
  - Pound, R., 521
  - Powell, John, 479, 484
  - Practicks, 175–236
    - Of Balfour, Sir James, of Pittendrieck (*see also Balfour, Sir James, of Pittendrieck*), 169, 190, 192–200, 221, 224–6, 228, 230
    - Of Colville, Alexander (*see also Colville, Alexander*), 235
    - Of Gibson, Sir Alexander, of Durie, 177, 213–14, 232, 236
    - Of Hamilton, Sir Thomas, earl of Haddington (*see also Hamilton, Sir Thomas, earl of Haddington*), 177, 213, 236
    - Of Hope, Sir Thomas, of Craighall (*see also Hope, Sir Thomas, of Craighall*), 204–6, 210, 213–14, 232, 236
      - Major Practicks*, 176, 205
      - Minor Practicks*, 176, 189, 205
    - Of Maitland, Sir Richard, of Lethington (*see also Maitland, Sir Richard, of Lethington*), 214–25, 227–8, 232–3, 235
    - Of Nicolson, Sir Thomas, of Carnock (*see also Nicolson, Sir Thomas of Carnock*), 203, 206–8, 210, 213, 236
    - Of Sinclair, John (*see also Sinclair, John*), 235
    - Of Spalding, Alexander (*see also Spalding, Alexander*), 185–236
      - Purpose, 232–6
      - The surviving manuscripts, 185–91
      - The First Pairt, 191–211, 228–30
      - The Second Pairt, 211–30
      - Use of works by other lawyers, 192–210, 214–28, 232–6
      - Of Spottiswoode, Sir Robert, of Pentland (*see also Spottiswoode, Sir Robert, of Pentland*), 176–7, 232, 236
  - Pragmatism in the law, 1–9, 44, 147, 239, 280, 287, 337–8, 366
  - Prescription, 170, 190, 352
    - Positive, 339–40, 528–9, 531
    - Negative, 298, 340
  - Prescription and Limitation (Scotland) Act 1973, 6, 340
  - Presumption that the possessor of a moveable is its owner, 6, 339–66
    - Commercial reality, 343, 347–9, 362
    - Diligence application, 354–6
    - Evidentiary effects, 340–1, 354, 361–3
    - Good faith, and, 350, 353, 359
    - Nemo dat quod non habet, and, 357
    - ‘Offside goals’, and, 364
    - Possession protected, 350–1
    - Presumptive transfer of ownership, 340, 342–53
    - Quod nullius est fit domini regis, interaction with, 340
    - Structural function, 356–60
    - Substantive effects, 340, 342–53, 361–3, 365
    - Unititular system of ownership, interaction with, 342, 365
  - Principal and Agent, 23
  - Principles of European Contract Law, 414, 429–30
  - Privy Council, 523–4
  - Promissory notes, 22
  - Publicae utilitatis intersit, ne crimina remaneant impunita*, 114, 136
  - Publicity principle, 396
  - Pufendorf, 249–50, 277–8
  - Pun, G., 511
- Q**
- Quod nullius est fit domini regis*, 340
  - Quoniam Attachiamenta (Q.A.)*, 122, 124–6, 130, 196, 199, 201, 228, 231
- R**
- Regiam Majestatem (R.M.)*, 122–7, 129–30, 185, 192, 196–7, 199–201, 226–8, 230–1, 235

- Rei vindicatio*, 344, 358  
 Reid, Kenneth, 342, 361  
 Remissions, 139  
 Restitution, 48, 105, 130, 148, 346, 350, 403, 479  
 Reynolds, F.M.B., 481,  
 Rix L.J., 421, 435, 444  
 Road Haulage Association's Conditions of Carriage (1991), 61  
 Robbery, 5, 95–149  
     Contrasted with theft, 96–100  
 Robert I of Scotland, 122, 127, 129, 140, 146  
 Robert II of Scotland, 131, 141–2, 146  
 Robert III of Scotland, 134, 142  
 Rodger, Lord Alan, of Earlsferry, 3, 7, 37–8, 348, 435–41, 447, 454–61, 463–4  
     Method of textual analysis, 435–41, 447, 454–61, 463–4  
 Roman law, 16–24, 29–31, 37–41, 64–5, 99, 163, 178, 199, 227, 286, 322, 341–2, 434–5, 439  
 Roman structure of Contract law (as used in Scotland), 17–20  
 Rose (Ross), Robert, 189–91  
 Rossi, Guido, 249
- S**  
 Sale (*see also Sale of Goods Act 1893 and Sale of Goods Act 1979*), 4, 15, 17–22, 24, 29–34, 41, 47, 56–7, 60, 64–5, 100, 341, 346, 353, 367–8, 373–4, 377–9, 382, 388–94, 396–7, 430, 434  
 Sale of Goods Act 1893, 15, 33, 237  
 Sale of Goods Act 1979, 65, 369, 384–7  
 Salvage, 43–4, 47–9, 369  
 Samuels, A., 516–17  
 Sandilands, James, 212  
 von Savigny, Friedrich Carl, 358–9  
 Scott, Sir John, of Scotstarvet, 343  
 Scottish Law Commission, 285, 288, 293, 298, 309, 324, 325, 327–32, 334, 337, 339–40, 361, 397, 430, 432  
 Scottish National Planning Framework, 536  
 Scotton, Lincolnshire, 69–70  
 Scougall, James, 188–91  
 Scougall, John, 188  
 Scougall, Patrick, 188  
 Sellar, W.D.H., 131, 138–9, 147, 342, 361  
 Shetland/ Orkney law, 5, 41, 150–74  
     *Scatt*, 163  
     Schound bills, 158, 165–71  
     *Siaundar*, 167–8  
     Udal rights *see Udal property/ law*  
 Sheriff Court of Aberdeen, 134–5, 180, 229, 233  
 Ships, Property law of, 6, 367–97  
     Bankruptcy/ insolvency, and, 373–4  
     Bond of bottomry, 397  
     Charterparty, and, 397  
     Existing literature, 367–8  
     Hire purchase, 397  
     International Private law, 378–83, 397  
     Mortgages, 367, 373–5, 378–82, 384, 389, 392, 394–7  
     Ownership, 383–4  
     Acquisition and transfer of ownership, 386–93  
     Publicity principle, and, 396  
     Registration, 370–3  
     Retention of title, 397  
     Sale of Goods Act 1979, and, 384–6  
     Sources of the law, 368–70  
     Trusts, and, 373–4  
*Sic utere tuo ut alienum non laedas*, 515  
 Sillem, Rosamund, 69–71, 91  
 Simpson, Andrew, 175, 359–60  
 Sinclair, Francis, 150–8, 160–2, 164–6, 170  
 Sinclair, James, 5, 151–5, 157–8, 162, 164–6, 170–3  
 Sinclair, John (*see also Practicks, Of Sinclair, John*), 235  
 Skene, Sir John, of Curriehill, 98–9, 114, 131–2, 196–202, 221, 226, 228, 230–2, 234–6  
     *De Verborum Significatione*, 131, 197, 202, 228, 230  
     *Forme of Proces*, 197–200, 226, 228, 234, 236  
 Smith, Brian, 151, 167  
 Smith, Sir Thomas B., 16, 64  
 Society (*see also Partnership*), 17, 19, 20, 23, 29  
 Society of Advocates in Aberdeen, 177, 178–9, 188, 212  
 Spalding, Alexander, 5, 176–7  
     Biography, 177–85  
     *Practicks (see also Practicks, Of Spalding, Alexander)*, 185–236  
 Spooner, F.C., 260, 267  
 Spottiswoode, Sir Robert, of Pentland (*see also Practicks, Of Spottiswoode, Sir Robert, of Pentland*), 176–7, 232, 236

Spuilzie, 95, 148, 344, 347–8, 359–60, 365  
*Statuta Regis Alexandri (S.A.)*, 107–22  
*Statutes of Guild*, 231  
 Stair, James Dalrymple, Viscount, 17–20, 30,  
 35, 36–7, 48, 341, 343, 345–7, 349, 351,  
 360–2, 364, 366, 377, 512  
*Institutions*, 177  
 On insurance, 274–8  
*Stair Memorial Encyclopaedia*, 377  
 Stair Society, 150, 193  
 Steven, Andrew, 321  
 Stevenson, David, 176, 181–2  
 Stewart, Alexander, earl of Buchan, 5,  
 134–6, 141–3, 146  
 Stewart, Sir Lewis, of Kirkhill, 208–10  
 Stewart, John, 243, 262, 265, 278  
 Stewart, Patrick, earl of Orkney, 153, 156–7,  
 169–70  
 Stewart, Robert, earl of Fife, 142–3, 146  
 Stewart, Robert, earl of Orkney, 152–3, 162  
 Stewart, William, 48  
 Steyn, Lord, 407, 411  
 Stiglitz, Joseph, 469–70  
 Stormonth-Darling, Lord, 317  
 Story, Joseph, 22  
 Stythe gas, 525  
 Succession (Scotland) Act 2016, 333–4  
 Sutherland, Lord, 450–3  
 Sutherland, Robert, 215–17, 219, 221

## T

Tancred, 137  
 Taylor, Alice, 101–2, 118, 129  
 Thesiger L.J., 541  
 Trusts, 20, 299–300, 335–6, 373–4  
 Truck Act 1830, 34

## U

Udal law/ property, 150–1, 154–6, 158–60,  
 162–7, 169–73  
 Economics, 155  
 Pre-emption rights, 163–4  
 Unfair Contract Terms Act 1977, 53–4,  
 58–9, 62, 65  
 Unfair Terms in Consumer Contracts  
 Regulations 1994, 53, 62  
 Unidroit Principles of International  
 Commercial Contracts, 414, 429–30  
 United Kingdom Supreme Court, 287, 414,

418–9, 426–33, 527–9, 535, 537, 541  
 U.K.C.S., 447–8  
 U.S. law, 22, 24, 38, 40, 406, 429, 468, 489,  
 500, 502–7, 509, 522  
 Credit Rating Agency Reform Act 2006,  
 489, 498–9

## V

Vikings, 42  
 Vinelott, J., 521  
 Voet, 50  
*Volenti non fit iniuria*, 54

## W

Wales, 375, 378  
 Walker, A.G., 306–7  
 Walker, David M., 64  
 Walker, N.M.L., 306–7  
 Warrantors, 102–9  
 Watson, Lord, 323  
 Welwood, William, 241  
 Wilkinson, Alexander, 50  
 William I of Scotland, 96, 101–2, 114, 145,  
 147  
 Williston, S., 401  
 Wilson, William, 47  
 Wind-farms and nuisance, 8, 511–41  
 Definition of nuisance, 511–5  
 Environmental regulation and nuisance,  
 527–37  
 Flexibility of the law of nuisance, 522–7  
 Human rights and nuisance, 537–40  
 Planning permission and nuisance (*see*  
*also Planning permission*), 527–9, 531–5,  
 537, 541  
 Wind-farms and noise, 516–9  
 Prescription, 529–30  
 Wind-farms in general, 515–6  
 Wind-farms, visual impact, 519–22  
 Winfield, P.H., 512  
 Working Group on Wind Turbine Noise,  
 517  
 ‘Wrang and unlaw’, plea of, 124, 126  
 Wright, Lord, 514  
 Writers to the Signet, 178

## Y

Yates, Joseph, 14  
 York Consistory Court, 75–8, 81–8