

Aberdeen Student Law Review

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FOREWORD BY THE HON. LORD WOOLMAN

SENATOR OF THE COLLEGE OF JUSTICE

Has the ASLR already reached its second volume? I am delighted that the brio of those involved in launching the project has been sustained. That is evident from the table of contents for the new volume. The topics range across legal history, oil and gas law and the law of evidence. In my view, volume two confirms that the ASLR is continuing to make a significant contribution to legal learning in Scotland.

Stephen Woolman
July 2011

INTRODUCTION TO VOLUME TWO

In 1987 Professor Erwin N Griswold, former Dean of Harvard Law School, gave an insight into the history of the Harvard Law Review, the oldest student-led law review in the world. He acknowledged:

Some people are concerned that a major legal periodical in the United States is edited and managed by students. It is an unusual situation, but it started that way, and it developed mightily from its own strength.¹

I firmly believe in the strength of the student law review, and it is this belief that has shaped the endeavours of the editorial team during the past year

The second year of a professional publication can be as difficult as the first, and this year has certainly not been without challenge. My thanks must be extended to all those who have made this publication possible. In particular, I would like to thank Stronachs LLP for their generous sponsorship of volumes two and three of the review. I am delighted that they share my belief in the Aberdeen Student Law Review, its success thus far and its future potential. In the present economic climate it is hugely encouraging to have the assurance of financial support that will ensure the continuity of the review for both this year and next. In addition, the staff of the Aberdeen Law School must be thanked for all their assistance throughout the year. The administrative team in the law office were always happy to help, and Sarah Duncan provided invaluable advice. Thanks, as always, to our anonymous peer reviewers who were extremely obliging with their responses and helped inform many decisions.

On a personal note I would like to thank Dominic Scullion, the review's founder, for sharing his advice and experience in the light of many problems, and Ryan Whelan for all of his assistance, both professional and personal, in the run up to an impending deadline. Of course, this publication would never have been possible without the contributions of the editorial board; I thank them for their patience, their hard-work and their faith in the review. Finally, I am extremely grateful to Professor Margaret Ross for allowing us the opportunity to pursue this project, and being willing to support in every way possible.

I am delighted to introduce you to the second edition of the Aberdeen Student Law Review. I hope you find it to be an interesting and enjoyable read.

Leanne Bain
Managing Editor
July 2011

¹ Griswold, 'The Harvard Law Review - Glimpses of Its History as Seen by an Aficionado', in *Harvard Law Review: Centennial Album* (1987).

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Casus Omissus: The Aberdeen Law Project Inaugural Lecture

Foreword

This year it has been a privilege and delight to continue to support the work of the Aberdeen Law Project and to watch it develop under the leadership of Ryan Whelan and his team. In March 2011 we were very proud to host the first Annual General Meeting of the Project Board, and to view, through a full day of activities, the range of work being undertaken by the clinic in the presence of distinguished alumni who are members of the Board.

The article that follows is the text of the inaugural lecture for the project given by Gary Allan QC. As well as being elegant and erudite, it provides excellent evidence of the importance of pro bono work and the support for the project that exists within our alumni and the legal professional community.

**Professor Margaret Ross
Head of School of Law**

***Casus Omissus: The Aberdeen Law Project
Inaugural Lecture
07 March 2011***

GARY ALLAN QC*

It is a truly wonderful honour and privilege for me to be given an opportunity to address you in the Casus Omissus Inaugural Lecture. The establishment of the Aberdeen Law Project is a success story, and in the present times there are precious few of those to enjoy. So let us not hold back in celebrating today.

The project has taken the efforts of many to achieve its success but it is plain that the driving force behind it and the mainstay of its institution has been Ryan Whelan. I have little doubt that without his vision and energy and determination this project would have withered on the vine. In reality however, he has invested so much energy and enthusiasm that he has fired the imaginations of the most important people in any such venture- the students themselves. That he has, along the way persuaded others more established in the legal world to become involved is a testament to his powers of persuasion as well as his wisdom in creating a solid and experienced base from which to launch the Aberdeen Law Project's work.

~

Lawyers get a bad name. There is no doubt about it. It has always been that way. It is still the case.

Indeed my own son, when he went to school for the first day with his friend Tom was acutely conscious of that. The teacher was going round the class asking each child what his father did for a living. Tom said his father was an accountant, but when my son was asked, Tom was astonished to hear him tell the teacher that his father played the piano in a house of sin. 'But your father is a lawyer' whispered Tom. 'I know' replied my son, 'but how could I admit to something like that!!!'

The famous American General Ulysses S Grant was a very shabby dresser and of very unprepossessing appearance. One dark wintry night he arrived at a tavern in Galena, in the state of Illinois. The circuit court was in session in the town and a group of lawyers was huddled around the blazing fire. One of them noticed Grant

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and said jokingly, 'Here's a stranger, gentlemen, and by the looks of him, I'd say he's travelled through hell to get here!'

'I have indeed', replied Grant good naturedly. The other lawyers chuckled and the one who had spoken first said 'And how did you find things down there?'

'Much the same as here' replied Grant with a smile. 'The Lawyers are all closest to the fire'.

The earliest people who could be described as 'lawyers' were probably the orators of ancient Athens. However, Athenian orators faced serious structural difficulties.

First, there was a rule that individuals were supposed to plead their own cases, which was soon circumvented by the increasing tendency of individuals to ask a 'friend' for assistance. Right from the start therefore, lawyers operated under a cloak of dishonesty and disingenuity. However, around the middle of the fourth century, the Athenians almost, but not completely disposed of the pretence.

Second, a more serious obstacle, which the Athenian orators never completely overcame, was the rule that no one could take a fee to plead the cause of another person. This law was widely disregarded in practice, but was never actually abolished, which meant that orators could *never* present themselves officially as legal professionals or experts. They had to uphold the legal fiction that they were merely ordinary citizens generously helping out a friend for free, and thus they could never organise into a real profession—with professional associations and titles and all the other pomp and circumstance—like their modern counterparts.

The whole business of being a lawyer and charging a fee created for lawyers a reputation for shady dealings and money grabbing which has haunted them ever since.

If one narrows the definition to those men who could practice the legal profession openly and legally, then the first lawyers would have to be the orators of ancient Rome.

A law enacted in 204BC barred Roman advocates from taking fees for their efforts, but the law was widely ignored. The ban on fees was in due course abolished by Emperor Claudius, who legalised advocacy as a profession and allowed the Roman advocates to become the first lawyers who could practice openly—but he also imposed a fee ceiling of 10,000 sesterces. This was apparently not much money; the Satires of Juvenal complain that there was no money in working as an advocate.

Like their Greek counterparts, early Roman advocates were trained in rhetoric, not law, and the judges before whom they argued were also not law-trained. But very early on, unlike Athens, Rome developed a class of specialists who were learned in the law, known as juriconsults (*iuris consulti*). Juriconsults were almost always wealthy amateurs who dabbled in law as an intellectual hobby; they did not make their primary living from it. They gave legal opinions (*response*) on legal issues to all comers (a practice known as *publice respondere*).

Roman judges and governors would routinely consult with an advisory panel of juriconsults before rendering a decision, and advocates and ordinary people also went to juriconsults for legal opinions. Thus, the Romans were the first to have a class of people who spent their days thinking about legal problems, and this is why their law became so precise, detailed, and technical.

By the start of the Byzantine Empire, the legal profession had become well-established, heavily regulated, and highly stratified. The centralisation and bureaucratisation of the profession was apparently gradual at first, but accelerated during the reign of Emperor Hadrian. At the same time, the juriconsults went into decline during the imperial period.

By the fourth century things had changed in the Eastern Roman Empire: advocates now really were lawyers. For example, by the fourth century, advocates had to be enrolled on the bar of a court to argue before it; they could only be attached to one court at a time, and there were restrictions (which came and went depending upon who was emperor) on how many advocates could be enrolled at a particular court. By the late fourth century, advocates were studying law in addition to rhetoric (thus reducing the need for a separate class of juriconsults); in 460AD, Emperor Leo imposed a requirement that new advocates seeking admission had to produce testimonials from their teachers; and by the sixth century, a regular course of legal study lasting about four years was required for admission.

Claudius's fee ceiling lasted all the way into the Byzantine period, though by then it was measured at 100 solidi. Of course, it was widely evaded, either through demands for maintenance and expenses or surreptitious barter transactions. The latter was cause for disbarment if discovered. Again the lawyer is a cheat.

The class of legal person called notaries (*tabelliones*) appeared in the late Roman Empire. Like their modern-day descendants, the civil law notaries, they were responsible for drafting wills, conveyances, and contracts. They were ubiquitous and most villages had one. In Roman times, notaries were widely considered to be inferior to advocates and juriconsults. Roman notaries were not law-trained; they were barely literate hacks who wrapped the simplest transactions in mountains of legal jargon, since they were paid by the line. Once again members of the legal profession had found a way of creating distrust and loathing by their desire to maximise their own return from any problem or business of their clients.

After the fall of the Western Roman Empire and the onset of the Early Middle Ages, the legal profession of Western Europe collapsed. From then until the mid twelfth century, no one in Western Europe could properly be described as a professional lawyer in anything like the modern sense of the term 'professional'. However, from then onward, a small but increasing number of men became experts in canon law, but only in furtherance of other occupational goals, such as serving the Roman Catholic Church as priests. At the end of the twelfth and

beginning of the thirteenth centuries, however, there was a crucial shift in which some men began to practice canon law as a lifelong profession in itself.

The legal profession's gradual return in these Middle Ages was marked by the renewed efforts of church and state to regulate it. In 1231 two French councils mandated that lawyers had to swear an oath of admission before practicing before the bishop's courts in their regions, and a similar oath was promulgated by the Papal Legate in London in 1237. During the same decade, Frederick II, the emperor of the Kingdom of Sicily, imposed a similar oath in his civil courts. By 1250 the nucleus of a new legal profession had clearly emerged throughout Europe, and more than ever before, the focus was on their training and regulation.

The University of Aberdeen has played a distinguished part in the history of the law and in the training of lawyers in Scotland. As Dorothea Bruce wrote in 1996:

It must be remembered that for centuries the study of Law was a branch of Philosophy. Law as taught in the universities was not a vocational training.

Bishop Elphinstone had brought to his foundation the ideals of the universities of Italy and France, where the study of law had flourished. Law meant the application of two systems - Canon Law and Civil Law. Canon Law was taught by the Church. The study of Civil, or Roman Law, was regarded as a most effective organ of intellectual and ethical training, and the universities treated it as a necessary part of a liberal education.

King's College was founded as the 'Schule of Art and Jure', and was intended by its founder to be pre-eminently the school of Law for the whole of Scotland.

The Faculty of Law at King's College prospered until the Reformation, after which its fortunes sharply declined. During and after the Commonwealth there was a brief revival, but the Union with England in 1707 caused an immediate reversal. Thank goodness for a renaissance in fortune!

In Scotland this development occurred too in the development of the Faculty of Advocates whose records are dated from 1532 but whose activities certainly pre date that. Similarly a number of different associations of lawyers, who approximate to our understanding of solicitors, and who were called different things in different parts of the country, came to be recognised.

So it is then that over the centuries the Society of Advocates in Aberdeen was established in the sixteenth century. The Royal Faculty of Procurators in Glasgow in the seventeenth century, and throughout the country autonomous local Faculties regulated the admission, practice and professional conduct of lawyers.

Like its European counterparts the profession in Scotland became more and more ordered, coordinating with the universities and the courts in the regulation of members of the 'Legal Profession'.

The Law Society of Scotland, fulfilling a somewhat controversial role as both professional body and disciplinary regulator of solicitors, was established in 1948 amid some disquiet in the local faculties.

Recent debate and mass resignations from Law Society officialdom appears to show the disquiet as to its twin and some might suggest conflicting functions remains.

But what more of reputation? It was not and has not been all plain sailing here or in Europe amongst the new profession. Hostility towards the legal profession has always been a widespread phenomenon.

Such was public antipathy towards lawyers in the late eighteenth century that in the wave of general social reordering which took place, the legal profession was entirely abolished in Prussia in 1780 and in France in 1789, though both countries eventually realised that they needed a judicial system, and that system could not function efficiently without lawyers. Complaints about too many lawyers were common in both England and the United States in the 1840s, and in Germany in the 1910s. In more recent times the same complaint has arisen in Australia, Canada, the United States, and even recently in Scotland in the 1980s.

The complaints are many and varied, but it is hard to get away from the preponderant idea that lawyers are seen as self serving money grabbers. Humorous though these many jokes and stories are, they do betray the awful truth that lawyers are held in contempt because of their greed and self interest.

That is the perception. But for generations in many countries of the world, including our own, the truth has been somewhat different. In Scotland, the provision of legal advice and advocacy services to the poor has been a concern which has been addressed in the provision of a state funded 'legal aid' scheme.

The first shoots of such a scheme was the 'Poor's Roll', which came into being in 1424 in Scotland, and which provided:

and gif there bee onie pure creature, forfaulte of cunning, or expenses, that cannot, nor may not follow his cause, the King for the love of GOD, sail ordain the judge to purwey and get a leill and a wise Advocate, to follow sik pure creatures causes.

In 1587, the Scots Parliament passed an Act that gave

quhatsumever lieges of this Realme accused of treason, or for quatsumever crime... full libertie to provide himselfe of Advocates and Praeloquutoures, in competent numbers to defend his life, honour and land, against quhatsumever accusation.

The legal profession readily accepted these obligations as a duty to poor prisoners.

The Poor's Roll remained the basis for providing free legal assistance, with various refinements over the centuries, until the 20th century.

In 1937, the 'Committee on Poor Persons' Representation in Scotland' recommended, among other things, that

- legal aid become the responsibility of the General Council of Solicitors, with a grant from the state
- there should be a 'Public Defensor' in the police courts
- sheriffs and judges should grant legal aid in the criminal courts.

It was to be some time before anything came of these recommendations.

By 1950, major changes in social conditions following the two world wars generated much business in the courts. The Poor's Roll arrangements were no longer satisfactory, and the system required overhauling. There had been changes to the arrangements in England and a committee was set up to consider a similar scheme for Scotland. As a result, the Legal Aid and Solicitors (Scotland) Act 1949 became law.

Civil legal aid came first. Under the Act, the Law Society was responsible for setting up a central committee to manage the civil legal aid scheme. They had to decide whether applicants had a legal basis for their cases, and it was reasonable to give them legal aid - that is, for them to receive public funds to raise or defend court proceedings.

The National Assistance Board assessed whether applicants were financially eligible.

Solicitors and counsel received 85% of the fees fixed by the auditor of the relevant court for their legal aid work. Significantly, though some may think somewhat modestly, this meant the individual solicitors were subsidising the scheme by 15% as their contribution to the provision of advice and representation to the poor. The Government abolished this automatic percentage deduction in 1984, but introduced new rates of pay for legal aid cases, which were about 10% lower than the rates for privately funded cases.

The effective financial contribution of the solicitors and counsel to the operation of a scheme of assistance was still important.

In 1964, under the Criminal Justice (Scotland) Act 1963, criminal legal aid became available in the High Court and sheriff courts. Then in 1975, further legislation extended it to the district courts.

In 1972, the Legal Advice and Assistance Act 1972 introduced a new comprehensive scheme of advice and assistance for matters of Scots law.

In the first full year of the legal aid scheme (1952), the Law Society made about 4,400 grants of civil legal assistance.

In 2004, the Board granted 12,322 civil legal aid applications, grants of criminal legal aid reached 87,955, and solicitors granted advice and assistance in 303,019 cases.

In 1952, just under £ 80,000 was spent on legal aid. By 2004, it had risen to £146 million.

It is only right that the state contribution to the assistance of its citizens of modest means should be acknowledged and appreciated. For all the criticism of the system which we as practitioners have, for all the complaints of MPs as to who gets legal aid and who doesn't, and who should and who shouldn't, the fact remains

that our legal system provides a means by which the people who may need help the most have at least a chance of getting it. In that we must be the envy of the enlightened world, and we must be grateful for the visionaries who have created that situation.

The fact remains however that whatever the arrangements may be in any jurisdiction, there will always be areas of work in which there is a real need for the availability of legal advice and assistance and no means of funding it from public or private resources. There will always be areas of legal work which generate no public debate or excitement but which truly touch the core elements of the existence of many people of modest means. So it is that elemental issues like housing, state benefit, educational provision, and employment, which are fundamental but often not fee generating, attract little interest from the legal profession who acquire little expertise in these fields to allow them to provide the advice even when asked for it.

It is in these circumstances that the legal profession must now show that its own core values as a profession include an awareness that the duty of a professional is to provide service to those who need it, regardless of their means. It is the duty of a true professional to be above and beyond the limitations of being a hired gun.

The true professional must realise that duties to his fellow man must rank high on his list of priorities. One would like to think that a doctor would not walk past a man injured in the street. Should we as lawyers walk by when we have the means of helping, whatever his means?

The professional and moral duties of lawyers in providing such help have long been recognised. But it is perhaps a shame to have to admit this but it may be that having made a good early start, our own legal profession in Scotland has in recent years been slower than many elsewhere in embracing the responsibility and duty of providing free legal services to those in need. There have been various schemes organised with variable success, amongst both Advocates and solicitors. The Poor's Roll was a good start following upon the example of the earliest Athenian model, but there have more recently been such schemes as the Faculty of Advocates Free Representation Unit (coincidentally organised for a number of years by Lord Woolman during his own career at the bar) which have sought to meet an otherwise unmet need.

The provision of free legal advice and assistance remains though, I fear, something of an afterthought for practitioners in Scotland. I suspect that few would deny the general moral desirability of giving help to those who otherwise would not get it. But the practicalities of providing that help often elude the profession and good thoughts are frequently not translated into good deeds.

Compare that somewhat haphazard approach to that of the American Bar. This is what the American Bar Association says:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or
(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

Whilst these recommendations are made within a legal system that beyond a somewhat questionable 'public defender' role has no substantial legal aid scheme, can you imagine the transformation there would be in the provision of legal services in Scotland if each practitioner worked for fifty hours a year for the assistance of the poor and in addressing an unmet need?

Just imagine every lawyer working for no reward in a law clinic for a week. It will never happen, I hear the cries. Indeed it is hard to imagine high powered commercial lawyers with hourly charge out rates in excess of two hundred pounds an hour giving up their valuable time.

But in the United States (not a country to which I would often look to provide social models or direction) it appears the scheme actually does work, and where no substantial state funded arrangements exist, the legal profession itself has engaged with law students and academics to provide advice and assistance where none was previously available, and not only has that advice been of value to the clients. It has also been found to be enriching to the professionals, students and others involved.

As the American Bar comments:

Every lawyer, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association

urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule.

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

Now just imagine each of those high powered commercial lawyers writing a cheque for £10,000 to give towards the provision of pro bono legal services!

In this matter we must too look to our professional colleagues in England; The Attorney General coordinated the establishment of a voluntary scheme of pro bono legal advice providers under the banner LawWorks. The foundations of that organisation are these:

- At all stages throughout their career many lawyers regard Pro Bono Legal Work as an integral part of being a member of the legal profession, in providing access to justice and meeting unmet legal need.
- When we refer to Pro Bono Legal Work we mean legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public funding is not available.
- Legal work is Pro Bono Legal Work only if it is free to the client, without payment to the lawyer or law firm (regardless of the outcome) and provided voluntarily either by the lawyer or his or her firm.
- Pro Bono Legal Work is always only an adjunct to, and not a substitute for, a proper system of publicly funded legal services.
- Pro Bono Legal Work should always be done to a high standard.

That means in particular that:

- The availability of appropriate publicly funded legal advice or representation should always be considered before a lawyer undertakes Pro Bono Legal Work; and
- When a lawyer is requested to agree to undertake a piece of Pro Bono Legal Work the lawyer should give his/her decision within a reasonable time.

- The Pro Bono Legal Work should only be undertaken by a lawyer who is adequately trained, has appropriate knowledge, skills and experience and, where necessary, is adequately supervised for the work in question.
- The lawyer undertaking a piece of Pro Bono Legal Work (and where appropriate his or her supervisor) should have no less than the minimum level of legal expertise and experience as would be required if the particular work in question was paid work.
- In no case should the client be misled as to the lawyer's skill or ability to undertake the Pro Bono Legal Work.
- Once a lawyer has agreed to undertake a piece of Pro Bono Legal Work the lawyer (and if appropriate his or her firm) must give that work the same priority, attention and care as would apply to paid work.

In the establishment of Casus Omissus; The Aberdeen Law Project, the University of Aberdeen should be very proud that its students are organising and taking a lead from the best of practice from England and abroad. They have persuaded the student corpus to provide the human resource. They have persuaded the local professionals to provide the technical support and supervision. They have persuaded the establishment to lend its weight to the organisation and to embrace the ideal.

It is my fervent hope but confident belief that the vision shown here, drawing on moral duty and social imperative, but also mindful of the poor public perception of lawyers, serves to demonstrate that lawyers are not all money grabbers driven by self interest.

Casus Omissus is giving a lead which I am sure many will follow when they see its success, and witness its personal rather than its financial rewards. So good luck young people who now go out to provide the advice and to answer the unmet need. To help those who may otherwise have no voice. I know that I speak for the Board of Management in expressing our pride in being associated with you.

Raising Lazarus: Why Spuilzie Should Be Resurrected

JOHN TOWNSEND*

Abstract

We think that the action of spuilzie provided useful redress in promptly restoring a person who had been wrongfully deprived of or excluded from possession, and also in giving violent profits in appropriate cases. However, the invocation of ancient remedies of uncertain scope is not necessarily the ideal solution for modern wrongs. It seems to us that the delict of spuilzie, of uncertain competence and scope, should probably be expressly abolished, and consideration be given to what, if any, action or actions should be introduced in its place.

- Scottish Law Commission, *Corporeal Moveables: Remedies*,
Memo No. 31 (1976)

The purpose of this piece is to demonstrate that contrary to the view expressed by the Scottish Law Commission, spuilzie has an important place in modern law, and that abolition is undesirable. Instead, clarification is needed, and the following pages seek to provide guidance as to how this should be achieved. The article will attempt to give a comprehensive account of the remedy in order to eliminate much of the uncertainty surrounding its scope and nature, and will go on to highlight the modern day relevance of spuilzie before concluding with some tentative suggestions for reform.

1. Introduction

A. Spuilzie

The first point to note about spuilzie is that it is both a wrong and a remedy. The term is used to describe an act of unlawful dispossession of corporeal moveable property, and the remedy applicable to such an act. So for example, if A steals B's handbag, A has 'spuilzied' B's handbag. B may then raise an action of spuilzie against A in order to obtain the return of her handbag.

* Graduate, School of Law, University of Aberdeen. Many thanks to Professor David Carey Miller for his assistance during the research stage, and to the ASLR editors and peer reviewers for helpful comments on an initial draft.

In fact the principal remedy under the law of property for a party seeking to recover his property is an action for delivery. This is based on a right to possession, and is available to an owner by way of the *rei vindicatio* or his right to restitution.¹ Interdict can be used against a party who trespasses on moveable property that is capable of being occupied,² but otherwise there is no doctrine of trespass to moveable property in Scots law.³ Naturally there is an array of different wrongs that can be committed in respect of moveable property, and the law of obligations can provide redress where proprietary remedies are of no use.

Spuilzie is the remedy whereby a possessor is protected regardless of title. It is a remedy of a composite nature, with a basis in both property law and in delict, and combining elements of both restitution and reparation. In certain circumstances a dispossessed party may be entitled not only to restoration of possession, but also to a monetary payment, termed 'violent profits'.⁴ Spuilzie can be used generically to describe the possessory action for both heritable and moveable property.⁵ However, spuilzie in relation to land is more commonly termed 'ejection', which is beyond the scope of this paper. This piece will focus solely on spuilzie as an action in relation to corporeal moveable property.

B. Historical Development

The roots of the remedy can be traced back to Roman law, canon law and feudal law. In Roman law both the *actio furti*⁶ for theft of moveables (*res mobilis*) and the *actio vi bonorum raptorum*⁷ for robbery may have influenced the development of spuilzie in Scots law, particularly in respect of the delictual side to the action.⁸ The proprietary aspect of the remedy can be compared with the possessory interdicts of Roman law. Indeed Bankton⁹ states that spuilzie comes in place of the possessory interdicts of Roman law.

¹ An owner's right to restitution is actually a personal right against the wrongful possessor under the law of obligations, but is effectively proprietary (i.e. a right *in rem*) in that it can be used against any possessor under the obligation to restore the property to the owner.

² *Phestos Shipping Co Ltd v Kurmiawan* 1983 SLT 388; *Shell UK Ltd v McGillivray* 1991 SLT 667.

³ See Viscount Dunedin's unequivocal statement in *Leitch v Leydon* 1931 SC (HL) 1 at 8.

⁴ Stair, *Institutions of the Law of Scotland*, I.9.16.

⁵ Professor Reid deals with moveable and immoveable property together in the context of spuilzie. See KGC Reid, *The Law of Property in Scotland* (Butterworths, Edinburgh 1996) at para. 161.

⁶ See WW Buckland, *A Textbook of Roman Law from Augustus to Justinian* (3rd edn, Cambridge University Press, Cambridge 1975) at CXC VII – CXC VIII (pp. 578-584).

⁷ *ibid* at CXC IX (p. 584).

⁸ Both actions were penal since the victim could claim up to four times the maximum value of the property in addition to recovery of the property itself. Craig in his *Jus feudale* compares spuilzie to the *actio vi bonorum raptorum* (Craig, *Jus feudale*, II.11.30).

⁹ Bankton, *Institute of the Laws of Scotland*, II.1.31.

It is also commonly thought that spuilzie originated at least partly in the *exceptio spoli* of canon law.¹⁰ The underlying basis of the remedy is that the *status quo* of possession should be restored prior to determination of any question of rights. This is reflected in the canon law maxim *spoliatus ante omnia restituendus est*.¹¹ The *exceptio spoli* was initially designed to allow expelled bishops to recover possessions. This was soon extended to ordinary citizens. The action allowed recovery by *any* possessor of almost anything that it was possible to possess.

It is almost certainly the case that spuilzie also has more native antecedents, given that the protection of possession has always been important to maintaining public order. Several sources¹² indicate that spuilzie is related to the brieve of novel dissasine. This was an action to recover land where the question of right was irrelevant; all that had to be shown was dispossession carried out 'unjustly and without a judgement'.¹³ Actions of 'wrang and unlauch' referred to breaches of the king's peace with *vi et armis* (force of arms) and Hector MacQueen suggests that in some cases such actions would later be called spuilzie.¹⁴

It would thus appear that spuilzie originated from several different sources, but there can be no doubt that following its reception into Scots law, the remedy was often relied upon. The frequent recourse to spuilzie from the sixteenth through to the eighteenth centuries is reflected in its abundant presence in *Morison's Dictionary*¹⁵ and fairly extensive treatment in the institutional writings. There is also evidence of its importance in previous centuries. In his work on Scottish Legal History,¹⁶ Professor Walker identifies several fifteenth century Acts of Parliament whereby 'spulzheouris' were required to restore possession, failing which they would be declared a rebel. The author also notes that the maxim *spoliatus ante omnia restituendus est* was known in Scots law as early as the thirteenth century.¹⁷

¹⁰ KGC Reid, 'Property Law: Sources and Doctrine' in KGC Reid & R Zimmermann (eds) *A History of Private Law in Scotland* (Oxford University Press, Oxford 2000) at p. 212; see also Cairns, 'Historical Introduction' in Reid & Zimmermann (eds) *A History of Private Law in Scotland* (Oxford University Press, Oxford 2000) at p. 73.

¹¹ Bankton, *Institute*, I.10.126; Stair, *Institutions*, IV.28.9; Erskine, *Institute of the law of Scotland*, IV.i.15; see also *Lady Renton v Her Son* (1629) Mor. 14733.

¹² Craig, *Jus feudale*, II.17.25; *The Practicks of Sir James Balfour of Pittendreich* (1579) (McNeill (ed), Stair Society 1962) at pp. 465-476; TB Smith, *A Short Commentary on the Law of Scotland* (W Green, Edinburgh 1962) at p. 649.

¹³ H MacQueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh University Press, Edinburgh 1993) ch. 5.

¹⁴ *ibid* at p. 129.

¹⁵ *Morison's Dictionary of Decisions* (Court of Session) 1540-1808.

¹⁶ DM Walker, *A Legal History of Scotland*, Vol II (W Green, Edinburgh 1990) at p. 619.

¹⁷ Walker, *Legal History* (n 16) Vol III (1995) at p. 735.

Despite its frequent use in the past, recourse to spuilzie has all but died out today. The action has not formed the basis of a decision since 1831¹⁸ and even this case was probably not a true example of spuilzie.¹⁹ A combination of possible factors can explain the demise of the action, although as Professor Reid remarks,²⁰ its sudden departure from the law reports is somewhat mystifying. Scotland's transition towards a more civilised society may well have reduced the need for spuilzie, but such an abrupt disappearance is, as Reid suggests, more likely to be down to its misclassification as a remedy protecting ownership rather than possession.²¹ It is true that historically the pursuer in a spuilzie action was usually the owner of the property in question. Indeed Craig Anderson notes that 'it is very common for accounts of spuilzie to proceed on the basis that it is designed to protect the interests of an owner'.²² An owner would, in both a spuilzie action and a vindictory action, be burdened with proving both his prior possession and that he was vitiously dispossessed, and so one can see why such a misclassification may have arisen. The consequence of this was that vindication replaced spuilzie rather than operating in tandem with the possessory action.

It is perhaps regrettable that spuilzie has faded into apparent obsolescence. Certainly this is the view that was taken by Professor Walker. In a 1949 article²³ the author used the words 'undeserved desuetude' in relation to spuilzie, echoing the views expressed some eighteen years previously by Hector McKechnie.²⁴

While the action has never been expressly repealed, detailed accounts of spuilzie in modern works are few and far between, and those that do exist display significant discrepancies. This is perhaps to be expected given the paucity of contemporary judicial consideration of the action. Nevertheless the Scottish Law Commission appear somewhat dismissive in their suggestion that spuilzie should be abolished due to its uncertain scope and competence. Serious consideration ought to be given to the pros and cons of retaining the action before deciding whether or not it should be disposed of.

¹⁸ *Stove v Colvin* (1831) 9 S 633.

¹⁹ In *Stove* (n 18), the pursuers were prevented from coming into possession of a share of whales that they had helped to kill, and were thus entitled to by local custom. They were not dispossessed as such, and dispossession is an essential element of spuilzie.

²⁰ KGC Reid, 'Property Law: Sources and Doctrine' (n 10) at p. 214.

²¹ *ibid* at p. 214 footnote 174.

²² C Anderson, 'Spuilzie Today' (2008) 38 SLT 257.

²³ DM Walker, 'Spuilzie' (1949) SLT (News) 136.

²⁴ H McKechnie, 'Reparation' in Dunedin (ed), *Encyclopaedia of the Laws of Scotland* (W Green, Edinburgh 1931) at p. 353.

2. Exploring the Remedy

Essentially all that is required for a successful spuilzie action is an unlawful act of dispossession by the defender against the pursuer, known as ‘vitious dispossession’. Vitious dispossession occurs where possession is taken without consent or judicial warrant. The dispossessed party has this right to immediate reinstatement of the property regardless of whether he owns the property or not. As a result, the action becomes particularly important to a person who possesses property without good title.

A. Title

Spuilzie is a possessory action rather than a petitory action. The institutional writers are unanimous in the view that bare possession is sufficient.²⁵ Stair states that spuilzie ‘needs no other title but possession, from whence a right in moveables is presumed’.²⁶ This does not imply that a right in relation to the property is actually required; however the presumption that a possessor of a moveable is its owner may be the cause of some confusion on this point.²⁷

Reid highlights some of the early case law suggesting that a pursuer founding on spuilzie must show some kind of right in relation to the property.²⁸ The case law cited is not convincing. In *Morison’s Dictionary*, some of the cases are listed in the context of whether or not a colourable title provided a defence to spuilzie.²⁹ In such cases an examination of the pursuer’s title would, naturally, be necessary. Two other cases are reported in the context of actions of ejection from heritable subjects.³⁰ It is true that the same general principles apply for ejection and spuilzie.³¹ However there is no presumption of

²⁵ Stair, *Institutions*, I.9.17; IV.26.2 where he is very clear that spuilzie requires no title but proceeds on ‘sole possession’; Erskine, *Institute*, IV.i.15; Bankton, *Institute*, I.10.126.

²⁶ Stair, *Institutions*, I.9.17.

²⁷ Confusion may also arise from the fact that spuilzie was generally regarded as a civil action for theft (see Stair, *Institutions*, I.9.16) and that in most cases the pursuer in a spuilzie action was in fact the owner.

²⁸ See Reid (n 5) at para. 162 footnote 1.

²⁹ *Mudiall v Frissal* (1628) Mor. 14729; *A v B* (1677) Mor. 14751. In neither of these cases did the lords expressly hold that possession was insufficient. In *Mudiall* the pursuer was ordered to show his title where the defender averred a title of his own – naturally this would be relevant to determine whether or not the defence (from violent profits) of colourable title could be used. In *A v B* the lords were undecided on the question of whether someone could commit spuilzie of his own goods.

³⁰ *Wishart v Arbuthnot* (1573) Mor. 3605; *Gib v Hamilton* (1583) Mor. 16080. In *Gib* the lords held that the pursuer’s possession backed up by a supervenient title was sufficient for an action of ejection. It would be audacious to treat this case as authority for the proposition that a title is actually required.

³¹ Stair, *Institutions*, IV.30.1.

ownership that arises from possession of land. Thus, mere possession of land is not as strong as possession of moveables. The final case cited, *Strachan v Gordons*,³² seems to be authority for nothing more than the fact that dispossession carried out with a judicial warrant is not actionable even where the pursuer's possession was *bona fide* as owner.

Otherwise, the available evidence points towards the availability of spuilzie to a possessor holding without any right to possess. Firstly, several cases indicate that possession alone is sufficient.³³ Moreover, unlike the cases suggesting the contrary view, the cases cited are all listed under the section of *Morison's Dictionary* entitled 'What title requisite to found an action of spuilzie'.³⁴ Secondly, the maxim *spoliatus ante omnia restituendus est*, reflecting the very policy of spuilzie, indicates that the *status quo* of possession should be restored prior to determination of any question of right or ownership. It follows that an owner who vitiously dispossessed someone would be required to return the property³⁵ notwithstanding their superior right.

B. Possession

It has been shown that the bare fact of possession is sufficient to found an action of spuilzie, and this possession need not be rightful. The question must be asked, however, as to what 'bare possession' is.

In Scots law it is settled that both physical detention (*corpus*) and a mental element (*animus*) are required for possession to exist. The physical element is relatively straightforward in relation to moveables, the essential feature being exclusive physical control.³⁶ However, there is conflicting authority in the institutional writings regarding the necessary *animus*. While Erskine favours the more stringent test of holding as one's own property (*animo domini*),³⁷ Stair opines that detention for one's own use is sufficient.³⁸ Both are of the view that a mere depository or custodier lacks the necessary *animus* to

³² (1671) Mor. 1819.

³³ *Ogilvie v Restalrig* (1541) Mor. 14730; *Montgomery v Hamilton* (1548) Mor. 14731; *Dundas v Hog* (1543) Mor. 14731; *Lady Renton v Her Son* (1629) Mor. 14733 where the maxim *spoliatus ante omnia restituendus est* is cited; *Laird of Gadzeard v Sheriff of Ayr* (1781) Mor. 14732.

³⁴ *Morison's Dictionary* (n 15) at 14730.

³⁵ Stair, *Institutions*, II.i.22; Erskine, *Institute*, IV.i.16; Bankton, *Institute*, I.10.126. Bankton goes on to state (still at I.10.126) that an owner who violently seized his own property would forfeit his right to it (citing the principle of *quod metus causa* which refers to duress). This is an interesting concept but in the modern law there is probably no scope for this proposition – especially given the apparent acceptability of self-help. The inconsistency between spuilzie and self-help is discussed later.

³⁶ Stair, *Institutions*, II.i.11.

³⁷ Erskine, *Institute*, II.i.20.

³⁸ Stair (*Institutions* II.i.17) refers to different degrees of possession but settles on a common notion requiring physical detention and an *animus* to make use of the thing detained.

possess.³⁹ Further, both state that unlawful detention, regardless of *animus* to hold as owner, does not amount to possession.⁴⁰ Perhaps an appropriate way to regard the latter exception is that the necessary *animus* is tainted by criminal intent.

In the context of *spuilzie*, the boundaries of possession are ostensibly vital regarding title to sue since it is a possessory remedy. Yet there is still no consensus as to precisely what kind of holding constitutes possession. Fortunately, comparative studies illustrate that the practical consequences of the uncertainty can be overcome. Rafaele Caterina⁴¹ suggests three possible approaches to systematising possession, based on the different methodology of modern-day civilian systems. Firstly, a legal system may recognise a narrow category of ‘possessors’ as such, but extend a remedy against dispossession to other holders such as borrowers or hirers. This is the approach taken in France⁴² and in Italy.⁴³ A second possibility is to recognise a wide category of possessors but to distinguish between possessors for different purposes. This approach is evident in the German system, where a stronger type of possession is required in the context of acquisitive prescription than for other purposes.⁴⁴ Since acquisitive prescription confers proprietary rights on a possessor as a result of the passage of time, it is logical that a significant degree of control is necessary. The third and final possibility discussed by Caterina is an elastic concept of possession whereby it is interpreted with regard to its functional context. This is the approach in South Africa, where possession is interpreted to include lessees and similar holders for purposes of the *mandament van spolie*, but for acquisitive prescription such holders are not considered possessors.⁴⁵

³⁹ Stair, *Institutions*, II.i.17; Erskine, *Institute*, II.i.20.

⁴⁰ Erskine (*Institute* II.i.20), and Stair (*Institutions* II.i.17) state that it is not presumed to be possession when the holding or use infers a crime (e.g. theft).

⁴¹ R Caterina, ‘Concepts and Remedies in the law of Possession’ (2004) 8(2) Edin LR 267.

⁴² Mere control and use is not enough to constitute possession – the *animus domini* is an indispensable element of possession according to French texts (see, for example, J Carbonnier, *Droit Civil - Les Biens*, (14th edn, 1991) 200). Yet Article 2282 of the French Civil Code provides that a holder is protected against anybody other than the person from whom he derives his right.

⁴³ Article 1140 of the Italian CC states that possession is manifested by activity corresponding to the exercise of ownership or other real right. However, Article 1168 provides that anybody holding property can sue for recovery of possession (*reintegrazione*) apart from one who holds for mere service or hospitality.

⁴⁴ All that is required for possession per se is factual authority, or actual control (BGB Section 854). Yet a distinction is drawn between this (*Sachbesitz*) and possession as owner (*Eigenbesitzer*), and indeed only the latter is sufficient for acquisitive prescription to run (BGB Section 937 requires ‘proprietary possession’).

⁴⁵ The *mandament van spolie* is a possessory remedy stemming from Roman-Dutch law that is similar to *spuilzie*. Anybody exercising control over property with the intention of obtaining some benefit from it has recourse to this action. However such holders are not recognised as possessors for the purposes of acquisitive prescription or occupation.

Caterina's analysis uncovers an important point regarding the application of spuilzie in Scots law. While the definition of possession in the above systems differ, it is clear that protection against dispossession is afforded to all lawful holders against third parties. This means that a narrow view of possession *per se* does not necessarily preclude certain holders (such as a hirer) from founding on a possessory action. Thus while the narrow view of possession taken by Erskine would appear to prevent holders such as a hirer or pledgee from pursuing an action of spuilzie, this need not be the case. A flexible approach to possession can overcome any difficulties that dogmatic rigidity would otherwise pose. Indeed, Caterina's reckoning is evident in the Scottish institutional writings. Stair, who gives the most detailed consideration of spuilzie, indicates that even possession acquired by force, stealth or revocable grant is protected, stating '[t]hough the possession at the first was *vi, clam or precario*, yet it is a good title against any dispossession, except by law or consent'.⁴⁶ It follows that even a thief is protected by spuilzie. Thus, while certain holders may be excluded from the category of 'possessors' in any proper sense,⁴⁷ they are nevertheless protected from vitious dispossession. It is submitted that the correct understanding of spuilzie is that anyone holding property for their own use has recourse to the action if vitiously dispossessed.

This position appears to give spuilzie a wider scope than the possessory interdicts of Roman Law which did not protect possession acquired by way of force, stealth or revocable grant.⁴⁸ However, it strikes a chord with the South African *mandament van spolie*, where all that is required is peaceful possession that need not have been lawful.⁴⁹ It is also worth noting that a mere custodier is not entitled to raise spuilzie since he holds purely for another, and does not hold for his own use. A more contentious issue concerns whether or not one possessing civilly through another is entitled to rely on the action.

Reid states that civil possession is a sufficient basis upon which to base a spuilzie action, and cites several authorities in support of this assertion.⁵⁰ However, each of the relevant⁵¹ authorities cited relates to heritable property

⁴⁶ Stair, *Institutions*, IV.iii.47.

⁴⁷ Stair excludes a thief from being classed a possessor in the proper sense (*Institutions* II.i.17) but his statement at IV.iii.47 must be taken to include the unlawful possession of a thief.

⁴⁸ See A Borkowski & P Du Plessis, *Textbook on Roman Law* (3rd edn, Oxford University Press, Oxford 2005) at para. 6.3.5.1.

⁴⁹ See *Yeko v Qana* 1973 (4) SA 735 (AD) where van Blerk JA stated: '... the injustice of the possession of the person despoiled is irrelevant as he is entitled to a spoliation order even if he is a thief or a robber. The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliatus has to prove, is possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully ousted'.

⁵⁰ Reid, *Property* (n 5) at para. 163; see also DL Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, (2nd edn, Thomson/W Green, Edinburgh 2005) at para. 10.26.

⁵¹ *Mercantile Credit Co Ltd v Townsley* 1971 SLT (Sh Ct) 37 is a recent authority – the purpose of the current discussion is an analysis of spuilzie before it became dormant.

and refer to a landlord exercising spuilzie when his tenant has been ejected. Reid deals with spuilzie generically in relation to both heritable and moveable property, but in the present author's opinion there is a necessary distinction between the two regarding the proposition in question.

The presumption that the possessor of a moveable is its owner is significant in relation to spuilzie; Stair notes⁵² that possession is a sufficient title, since a right in moveables is therefore presumed.⁵³ The presumption however, while in theory consistent with civil possession,⁵⁴ can logically only apply to natural possession.⁵⁵ Allowing a civil possessor to raise a spuilzie action in respect of moveables is therefore inconsistent with Stair's account of the remedy, and there is nothing written in the historical authorities suggesting civil possession of moveable property can found a successful action. In fact, in *Laird of Durie v Duddingston*⁵⁶ a landlord was not entitled to pursue spuilzie on behalf of his tenant in respect of 'steelbow' goods (typically corn, cattle or farm equipment).⁵⁷

It is thus submitted that only a natural possessor of moveable property is protected by spuilzie. This is in line with the policy of restoring the *status quo* of possession. An owner who possesses civilly through another can resort to restitution, so will not be without a remedy in the event of his natural possessor being dispossessed.

It follows from this that actual possession is required, rather than a right to possess without actual possession. Reid states this to be the case, although the authority he cites is not conclusive.⁵⁸ It is acknowledged that the view that actual possession is required is far from unanimous: Bankton⁵⁹ describes spuilie (he drops the silent z) as anything excluding the owner from possession. Lord Rodger in a 1970 article⁶⁰ opined that someone with sufficient leisure to pursue

⁵² Stair, *Institutions*, I.9.17.

⁵³ It is unlikely the statement 'from whence a right in moveables is presumed' is purely incidental.

⁵⁴ See Carey Miller, *Corporeal Moveables* (n 50) at para. 1.20.

⁵⁵ Given the purpose of the presumption is to facilitate commerce by the easy traffic of goods (see Stair *Institutions* III.ii.7) the presumption can only apply in favour of physical holding. Furthermore, in a dispute between a civil possessor and a natural possessor, the presumption would apply in favour of the natural possessor and it would be up to the civil possessor to prove that the goods passed from him in a way not consistent with a transfer of ownership, such as by impignoration or loan (Stair, *Institutions*, IV.21.5; Hume, *Lectures*, IV, p.510); see also Reid, *Property* (n 5) at para. 130.

⁵⁶ (1549) Mor. 14735.

⁵⁷ Admittedly the reason for this was the contract of steelbow, under which the tenant does not have to replace the very same goods, but a like amount. Nonetheless the situation is akin to civil possession of moveables.

⁵⁸ Reid cites A Rodger, 'Spuilzie in the Modern World' (1970) SLT (News) 33 in which the author expressly leaves open the possibility of the opposite view being correct.

⁵⁹ Bankton, *Institute*, I.10.124.

⁶⁰ Rodger, 'Spuilzie in the Modern World' (n 58) at p. 35.

the issue could perhaps prove that a right to possession in itself could provide a basis for spuilzie. Professor Walker also seems to base spuilzie on a right to possess rather than the fact of possession itself.⁶¹ To cast even further doubt, the last reported case upholding spuilzie involved a part-owner excluding another part owner from coming into possession.⁶² The pursuer was not dispossessed as such.

Nevertheless, the view of the present author is that such an interpretation of spuilzie is too wide and overlooks the policy at the core of the remedy. The underlying basis of spuilzie is that possession is protected regardless of the question of right to possess – *spoliatus ante omnia restituendus est*. Furthermore, the frequent reference in the institutional writings to the proposition that solely prior possession gives title to sue⁶³ supports the conclusion that actual possession was required rather than an entitlement to possession.

C. Vitious Act of Dispossession

In an action of spuilzie it is crucial that the pursuer was dispossessed without consent⁶⁴ or judicial warrant. In such a case the defender's possession is said to be 'vitious'. It is worth stressing that it is the act of dispossession itself that must be vitious – wrongful retention of goods against the pursuer's will is not a spuilzie so long as consent was given to the initial transfer of possession.⁶⁵

For the sake of completeness some points should be clarified. While Stair⁶⁶ describes spuilzie as the 'taking away' of moveables, the words 'seizing' or 'intermeddling' used by Bankton⁶⁷ and Erskine⁶⁸ respectively are more suitable as they cover all kinds of dispossession.⁶⁹ Contrary to the opinion of Sheriff Gordon in a recent case where spuilzie was alleged,⁷⁰ it appears the institutional writers did comprehend that theft or spuilzie could be committed

⁶¹ DM Walker, *The Law of Delict in Scotland* (2nd edn, W Green, Edinburgh 1981) at pp.1002-1011.

⁶² *Stove v Colvin* (1831) 9 S 633.

⁶³ Stair, *Institutions*, I.9.17; IV.26.2; Erskine, *Institute*, IV.i.15; Bankton, *Institute*, I.10.126.

⁶⁴ Consent obtained fraudulently is not true consent and thus possession acquired through fraud is vitious (Erskine, *Institute*, II.i.27).

⁶⁵ Wrongful retention constitutes wrongous intromission rather than spuilzie (Stair, *Institutions*, IV.30.8).

⁶⁶ Stair, *Institutions*, I.9.16.

⁶⁷ Bankton, *Institute*, I.10.124.

⁶⁸ Erskine, *Institute*, III.7.16.

⁶⁹ For an example of dispossession carried out without carrying property away, see *Black v Carmichael* 1992 SLT 897 where theft was upheld following private clamping of a vehicle.

⁷⁰ *Gemmell v Bank of Scotland* 1998 SCLR 144.

by assumption of physical control without actual carrying away.⁷¹ However the word 'intermeddling' must be used with care. Dispossession itself is required since this is the essence of the wrong;⁷² interference without dispossessing the pursuer cannot be a spuillzie, contrary to what is suggested by Craig Anderson in a 2009 article.⁷³ This is a vital point, and fortunately there is an express decision on the very issue. In *Millar v Killarnie*⁷⁴ it was held that throwing away the pursuer's corn was not a spuillzie, but a separate wrong in itself.

On the basis of the available authorities, it would appear to be the case that a pursuer in a spuillzie action must show that he was the natural possessor of the property in question at the time the alleged spuillzie was committed, and that possession was taken from him without his consent or any form of judicial warrant. The question of the pursuer's right to possess is irrelevant, and any form of physical holding other than mere custody is enough to found the action.

D. Remedies

A successful spuillzie action enables the pursuer to recover the property taken (or its value if this is no longer possible) and also reparation termed violent profits based on what the property could have yielded had he not been deprived of his property. The remedy is thus of a composite nature, and it is appropriate to examine the proprietary and compensatory elements in turn.

Stair⁷⁵ states that spuillzie is a *vitium reale* and goods taken may be recovered from third party acquirers in good faith. This is certainly true in the case of an owner who is the victim of theft⁷⁶ but cannot be taken to mean that any act amounting to spuillzie constitutes a real vice. This must be so for two reasons. Firstly, as Professor Carey Miller⁷⁷ notes, the basis of an action of spuillzie is the wrongful act of dispossession – thus relief must only be possible against the dispossessor. Secondly, vitious dispossession includes dispossession where consent was given but induced by fraud.⁷⁸ Fraud is a vice of consent, not a real vice,⁷⁹ and so to claim spuillzie is a real vice unequivocally would be inconsistent with fundamental rules of property law.

⁷¹ Stair (*Institutions* II.i.17) indicates that to keep a horse that was 'waith' would infer theft. It is assumed that the term 'waith' refers to a horse that had strayed onto another's land. See also Bankton, *Institute*, I.10.143.

⁷² Stair, *Institutions*, I.9.16; Bankton, *Institute*, I.10.124.

⁷³ C Anderson, 'The alleged case of the spuillzied helicopter: a reply' (2009) 7 SLT 31 at p. 32.

⁷⁴ (1541) Mor. 14723.

⁷⁵ Stair, *Institutions*, I.9.16; see also Bankton, *Institute*, I.10.130.

⁷⁶ As was the case in *Hay v Leonard and others* (1677) Mor. 10286 which Stair cites as authority.

⁷⁷ Carey Miller, *Corporeal Moveables* (n 50) at para. 10.28.

⁷⁸ Erskine, *Institute*, II.i.27.

⁷⁹ Reid, *Property* (n 5) at para. 616.

This latter point can be well illustrated by reference to existing case law. In *MacLeod v Kerr*,⁸⁰ Kerr was unable to obtain the return of a car he had been tricked into selling to a fraudster who paid with a bad cheque. The fraudster had subsequently sold on to a good faith purchaser before absconding with the proceeds. The facts can certainly amount to *spuilzie* since Kerr was vitiously dispossessed. If *spuilzie* is always a real vice, Mr. Kerr could have founded on *spuilzie* successfully to obtain return of the car from the good faith buyer. Such a line of argument would undoubtedly fail in front of a judge, and it is sensible to conclude that *spuilzie* will only constitute a *vitium reale* in circumstances inconsistent with a transfer of ownership,⁸¹ and at the instance of the owner.

Perhaps more pertinent is the question of the measure of recovery available to a pursuer where the property itself cannot be recovered. Historically this was determined by the pursuer's oath *in litem*. This was an evidential privilege given to the pursuer, by which he was entitled to recover what he swore the property was worth to him when it was taken. This figure was subject to potential modification by a judge to prevent inflated claims.⁸² The effect of the oath is well illustrated in several cases.⁸³ For example, in *Dean of Murray v Coxton*⁸⁴ the pursuer claimed gold and silver had been taken from his safe, but could only prove that the coffer had been broken open and some weapons and gunpowder had been removed. However, since part of the libel was proved, the rest was presumed, and so the pursuer was entitled to recover the value of the gold and silver. In this way the oath can be likened to the maxim *contra spoliatorem omnia praesumuntur*.⁸⁵

The likely scenario today is that a pursuer may wish to claim reparation for loss of the property or for loss caused by damage to the property. This kind of loss will generally be recoverable under the law of delict although there can be complications due to the general rule debarring recovery in delict for pure economic loss,⁸⁶ and in particular secondary economic loss, which is loss sustained as a result of damage to another's property.⁸⁷ The oath *in litem* would protect against such loss⁸⁸ and indeed would allow a generous method of

⁸⁰ 1965 SC 253.

⁸¹ This will generally be in cases of theft, but may include a situation where there is an error *in persona* (*Morrison v Robertson* 1908 SC 332).

⁸² Bankton, *Institute*, I.10.133.

⁸³ *Jardine v Lady Melgum* (1573) Mor. 9359; *Dean of Murray v Coxton* (1580) Mor. 9360; *Brown v Murray* (1628) Mor. 9361.

⁸⁴ (1580) Mor. 9360.

⁸⁵ All things are presumed against a wrongdoer.

⁸⁶ See J Thomson, *Delictual Liability* (4th edn, Tottel Publishing, Haywards Heath 2009) at para. 4.10.

⁸⁷ *ibid* at para. 4.25; see also *Nacap Ltd v Moffat Plant Ltd* 1987 SLT 221.

⁸⁸ Bankton (*Institutions* I.10.133) states that the value is measured by its worth at the time of dispossession, in case the property is returned in worse condition.

damages that would not be admissible in delict.⁸⁹ However in the modern law the better view is that for a claim in spuilzie, where the *status quo* of possession cannot be restored, the pursuer's claim should be limited to his loss, decided by a court rather than the pursuer himself. This is the general policy of delictual damages.⁹⁰

It is possible (though perhaps tenuous) to reconcile this with the oath *in litem*. This would involve equating the phrase '[what the property] was worth to him'⁹¹ with the loss that the pursuer suffers due to his dispossession, rather than the monetary value of the property. For example, in a situation where a car hirer is not liable to the owner for loss or destruction, the car could be said to be worth nothing to him since its destruction will not cause him patrimonial loss. Alternatively, a vehicle subject to a hire-purchase agreement is only worth to the owner (the hire-purchase creditor) the amount outstanding under the contract.⁹²

E. Violent Profits

A victim of spuilzie is in certain circumstances entitled to claim violent profits from the defender, which are measured according to what could be made by putting the goods to their utmost industry.⁹³ As Bankton notes⁹⁴ spuilzie is partly penal in this sense because the wrongdoer may have to compensate the pursuer beyond his actual gain. Furthermore, violent profits are only payable when the defender's possession was *mala fide*.⁹⁵ There can be no doubt that violent profits are also partly persecutory since they are not due when the goods spuilzied are not capable of yielding a return.⁹⁶

The modern law of delict revolves around the Aquilian principle of *damnum iniuria datum* and so at first glance the prospect of violent profits in the modern law appears problematic due to the fact that a pursuer may be 'compensated' beyond his actual loss. For example, suppose X wrongfully takes and retains Y's taxi for two weeks. Y's loss extends to the cost of hiring a replacement vehicle and any loss of income he can prove (i.e. fares he would

⁸⁹ See *Lewis v The Laird Line Ltd and Others* 1925 SLT 316, per Lord Constable at p. 321.

⁹⁰ See also Carey Miller, *Corporeal Moveables* (n 50) at para. 10.29.

⁹¹ Bankton, *Institute*, I.10.133.

⁹² See however *FC Finance Ltd v Brown and Son* (1969) SLT (Sh Ct) 41 for an example of the contrary view. The Sheriff, considering that his decision may have been spuilzie in its modern form, awarded damages measured by the vehicle's value. This resulted in a windfall for the pursuers.

⁹³ Stair, *Institutions*, II.9.44; Bankton, *Institute*, I.10.133.

⁹⁴ Bankton, *Institute*, I.10.132.

⁹⁵ Reid, *Property* (n 5) at para. 171.

⁹⁶ Stair, *Institutions*, I.9.16; IV.30.7.

have received had he not been deprived of the taxi). This is recoverable through a delictual action in respect of the wrongful retention of Y's property.⁹⁷

Suppose instead however that Y decides to pursue a spuilzie action against X. Y may seek the return of his taxi in addition to violent profits, which will be measured according to the most efficient use to which the taxi could have been put while Y was deprived. Rather than simply recovering his actual loss, Y may recover the maximum potential revenue that his taxi could have yielded. This will, in all likelihood, confer a windfall on Y.

One must now consider whether it is acceptable in modern Scots law to allow an award of damages to confer a windfall on a pursuer. There is Scots authority for damages being awarded in delict despite no evidence of any precise *damnum*. In *Aarons and Co v Fraser*⁹⁸ damages were awarded for deprivation of property despite the fact there was no evidence of specific loss. The pursuers stored goods with the defenders. Following cancellation of a sale to a third party, they demanded delivery from the defender, who refused. The defender eventually indicated a willingness to return the furniture almost four months later. The court awarded £10 in general damages. The precise basis of this decision is unclear. Lord Aitchison probably based the award on trouble and inconvenience caused. It would seem Lord Anderson's view was that loss was sustained because the pursuers could have realised a higher price from a sale prior to the detention. Lord Murray stressed the importance of *damnum* to any claim in damages and put the award down to expenses.

Aarons is therefore not a particularly persuasive authority for the proposition that damages for *injuria sine damno*⁹⁹ are recoverable in delict. The better view is that loss must be proved to succeed in a claim for wrongful retention of property under the general principles of the law of delict. Thus the concept of violent profits does not sit well with the modern law of delict. There is however a possibility that spuilzie may not just be rationalised as a combination of delictual and proprietary aspects, but also ventures into the corridor of uncertainty that is unjustified enrichment law. WJ Stewart has hinted that an award of violent profits would be an example of restitution for wrongs, a term scarcely known to Scots lawyers.¹⁰⁰

The rather English notion of restitution for wrongs can be associated with a situation where a wrongdoer is enriched as a result of his activity, but this is not reflected in a mirror loss to the wronged party. Let us return to the example where X takes Y's taxi. Suppose X, on the pretence that he is a

⁹⁷ Scots law appears to allow recovery for intentionally caused pure economic loss. See *Saeed v Waheed* 1996 SLT (Sh Ct) 39; see also Thomson, *Delictual Liability* (n 86) at para. 4.10, fn 3; WJ Stewart, *The Law of Restitution in Scotland – A Supplement* (W Green, Edinburgh 1995) at para. 3.8.

⁹⁸ 1934 SLT 125.

⁹⁹ A legal wrong that causes no actual damage or injury to anyone.

¹⁰⁰ WJ Stewart, *Delict* (4th edn, W Green/Thomson, Edinburgh 2004) at para. 3-13.

qualified taxi driver, charges extortionate fares and uses the taxi efficiently. Consequently X's revenue is far greater than what Y *would* have made had he not been deprived of his taxi. Even after Y recovers his consequential loss, X is unjustifiably enriched.¹⁰¹ In Scots law a claim for unjustified enrichment would probably fail because the traditional view of recompense is that a mirror loss is required.¹⁰²

This is in fact a very controversial issue and flies in the face of the position in some other civilian systems.¹⁰³ In a 1992 article Professor John Blackie declared that Scots law does not have any rule constituting an absolute barrier to a claim for redress of enrichment from wrongs not mirrored by loss, and argued that in many cases recognising such a claim would be desirable.¹⁰⁴ Stewart himself undertakes a fascinating analysis of examples of cases where restitutionary damages have been awarded in Scots law.¹⁰⁵ In his analysis, Stewart also refers to an article by Andrew Steven suggesting that a lost 'interference action' (a general action imposing liability on a party who benefits as a result of wrongful interference with another's property) may be capable of resurrection.¹⁰⁶ Such an action is recognised in German law and is termed the *Eingriffskondiktion*.¹⁰⁷

In spite of this alluring debate, for the purpose of the current project it is best to view the example cases cited by Stewart as exceptional. The general position in the modern law is that a pursuer who does not suffer any loss is without recourse against a wrongdoer. The concept of violent profits in the modern law is entirely inconsistent with this position. Not only could violent profits represent a kind of restitution for wrongful enrichment following vitious dispossession, but they may go further because there is no requirement that the defender is enriched – they are measured by what the property *could* yield if used most efficiently, irrespective of the defender's actual gain.¹⁰⁸ In the taxi

¹⁰¹ In reality this type of situation will result from a criminal act (e.g. theft) and there are different rules relating to the proceeds of crime. For present purposes however any criminal element will be ignored.

¹⁰² *Hume*, III.167; *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99 per Lord Dunedin at 105 *et seq*; *Exchange Telegraph v Giulianotti* 1959 SC 19.

¹⁰³ In Germany loss is irrelevant. See R Zimmermann, 'Unjustified Enrichment: The Modern Civilian Approach' (1995) 15 OJLS 403 at pp. 403-404. See generally J Du Plessis, 'The Relevance of the Plaintiff's Impoverishment in Awarding Claims Based on Unjustified Enrichment' 2009 Stellenbosch Law Review 494.

¹⁰⁴ J Blackie, 'Enrichment and wrongs in Scots law' 1992 Acta Juridica 23 at p. 39; see also WJ Stewart, *Delict and Related Obligations* (3rd edn, W Green, Edinburgh 1998) at para. 13.21.

¹⁰⁵ WJ Stewart, *Reparation* (W Green/Sweet & Maxwell, Edinburgh 2000) at paras. 18-6 to 18-12; see also Stewart, *Restitution - Supplement* (n 97) at para. 3.8.

¹⁰⁶ A Steven, 'Recompense for Interference in Scots Law' 1996 JR 51.

¹⁰⁷ *ibid* at p. 51.

¹⁰⁸ Blackie, 'Enrichment and Wrongs' (n 104) at p. 32, suggests the claim is limited to what *the pursuer* could have made. However it is submitted the better view is that violent profits can

scenario, Y could claim from X not only X's wrongful enrichment but possibly an even greater sum, providing a judge thought it could realistically be made by putting the taxi to its utmost industry.

The crux of the issue is that a claim for violent profits can effectively constitute an unprincipled windfall for a pursuer. They are also essentially a form of punitive damages, which is also something that Scots law traditionally rejects.¹⁰⁹ The question of whether Scots law *should* allow a pursuer to receive a windfall (which could open the door to the restatement of violent profits) is a separate discussion, beyond the scope of this article.¹¹⁰ Violent profits are at odds with the general principles of modern Scots private law, and consequently any legislative attempt to clarify the remedy of spuilzie should exclude the possibility of such a claim. Rather spuilzie should be modernised to allow a claim in damages that extends to recovery of full consequential loss. This will reconcile the remedy with the modern law of delict, the function of which is corrective justice.

F. Defences

The institutional writers list several situations in which spuilzie is 'elided', some of which provide a complete defence and others which excuse the defender from the payment of violent profits. Violent profits are not due where the spuilzie was committed by the owner or rightful possessor,¹¹¹ nor where the property was returned promptly and accepted by the pursuer.¹¹² Complete defences logically include voluntary delivery¹¹³ and lawful poinding,¹¹⁴ since neither involves an unlawful act of dispossession. Passages in both Stair¹¹⁵ and

extend to what could have been made *by anyone*, since the idea is that the profits are attributable to the thing unlawfully possessed and not the skill of the person possessing.

¹⁰⁹ Walker, *Delict* (n 61) at p. 461.

¹¹⁰ This could in fact be a very interesting debate. On the one hand there is no real justification for awarding a pursuer more than his actual loss, especially where the profit arose as a result of the defender's skill or nous; on the other hand there is surely a valid argument for deterring wrongs such as advantageous breach of contract (see for example *Exchange Telegraph v Giulianotti* 1959 SC 19). Furthermore, there may be evidential difficulties in proving actual loss. The SLC tentatively suggest restating violent profits for this reason (Scottish Law Commission, *Corporeal Moveables: Remedies* (Memorandum No. 31, Edinburgh 1976) at para. 25) and Kames also discussed the rationale of violent profits as punishing the defender for the evidential difficulty he has created for the pursuer (Kames, *Principles of Equity* (3rd edn, 1778), vol 1, at pp. 97-98).

¹¹¹ Stair, *Institutions*, I.9.19; Bankton, *Institute*, I.10.134; Erskine, *Institute*, IV.i.15; *Bishop of Aberdeen v Lindsay* (1489) ADA 141.

¹¹² Stair, *Institutions*, I.9.23.

¹¹³ *ibid* I.9.20; *Cunninghame v McCulloch* (1628) Mor. 13879.

¹¹⁴ *ibid* I.9.21.

¹¹⁵ *ibid* I.9.24.

Bankton¹¹⁶ indicate that spuilzie would very occasionally be permitted as an act of private vengeance against someone who could not be reached by the ordinary course of law, but such a situation is hardly conceivable today.

The final defence against spuilzie is that sufficient time has passed for the action to be lost through the operation of negative prescription. The important point to note here is that the obligation to make reparation will be extinguished before the right to restitution expires. Historically the right to claim violent profits expired in three years,¹¹⁷ after which the action became a *rei persecutoria*¹¹⁸ that subsisted for the long prescription period of forty years.¹¹⁹ The law of prescription was overhauled by the Prescription and Limitation (Scotland) Act 1973 and the common view is that the right to recover possession subsists for twenty years under s7,¹²⁰ while the right to reparation is subject to the five year period of negative prescription under s6.¹²¹ There is scope for an engaging debate as to the applicability of these sections of the 1973 Act but this is beyond the ambit of this project.

3. Spuilzie's Role in Modern Law

The Scottish Law Commission has recommended the abolition of spuilzie,¹²² and academic opinion appears to be divided on the issue of whether or not there is any value in retaining the remedy.¹²³ It is the view of the present author that there is an implicit value in the recognition of spuilzie.

There is nothing to suggest that spuilzie is no longer a competent action. Certainly it has never been expressly abolished by statute. Nevertheless the Scottish Law Commission has contemplated the possibility that spuilzie may have been repealed by desuetude.¹²⁴ There is no question of this being the case; the House of Lords held in *McKendrick v Sinclair*¹²⁵ that a Scots common law

¹¹⁶ Bankton, *Institute*, I.10.144.

¹¹⁷ Prescription Act 1579 c21.

¹¹⁸ An action to recover the thing.

¹¹⁹ Bankton, *Institute*, I.10.141; Stair, *Institutions*, I.9.24; Erskine, *Institute*, III.7.16; *Hay v Ker* (1627) Mor. 11069.

¹²⁰ See D Johnston, *Prescription and Limitation* (W Green, Edinburgh 1999) at para. 7.14.

¹²¹ The right to claim reparation is a right correlative to the defender's obligation to make reparation which prescribes in five years under s6, applicable to Schedule 1 para. 1(d).

¹²² See SLC Memo No. 31 (n 110); see also Law Commission and Scottish Law Commission, *Statute Law Revision: Fourth Report – Draft Statute Law (Repeals) Bill* (1972) at p. 52.

¹²³ Craig Anderson has argued that spuilzie has a 'necessary place in the law' (see Anderson, 'Spuilzie today' (n 22) at p. 260); whereas WJ Stewart has indicated a preference for a Spuilzie (Abolition) Act (see WJ Stewart, 'The alleged case of the spuilzied helicopter' (2009) 3 SLT 13 at p. 31).

¹²⁴ SLC Memo. No. 31 (n 110) at para. 19.

¹²⁵ *McKendrick v Sinclair* 1972 SC (HL) 25. This case concerned the action of assythment which was subsequently abolished by s8 of the Damages (Scotland) Act 1976.

doctrine cannot be repealed by desuetude. Furthermore, the general maxim *cessante ratione legis cessat ipsa lex*¹²⁶ cannot apply since protection of possession is undoubtedly an important principle today.

However, in *McKendrick*, Lord Reid did state that when it comes to resuscitating a remedy that has not been used in nearly two centuries, the case must be looked at strictly to determine whether or not it comes 'squarely within the old law'.¹²⁷ Lord Simon used particularly florid language, stating that when a remedy went into a 'cataleptic trance' comparable to certain fictional characters such as Rip Van Winkle, it could not be revived at the mere call of any passing litigant.¹²⁸ Hence while spuilzie must be said to still be competent, its revival at common law would probably require quite specific circumstances.¹²⁹

That said, spuilzie is not a term that is totally alien to today's courts. Several attempts have been made in recent years to rely on the action, particularly in the context of hire-purchase scenarios. Frequently the courts have been dismissive of attempts to found on spuilzie, but this has not consistently been the case. In fact, in *FC Finance Ltd v Brown and Son*¹³⁰ Sheriff McDonald expressly suggested that the basis of damages awarded was simply spuilzie in its modern form.¹³¹

A. Attempts to revive spuilzie

In *Brown*, the pursuers, a finance company, entered a hire-purchase agreement with W. W, the hirer, instructed the defender to sell the motor vehicle. The defender duly sold to M, a private purchaser who obtained good title by virtue of s27 of the Hire-Purchase Act 1964. Damages were awarded to the extent of the value of the vehicle on the ground that the defender had not taken reasonable care to secure the pursuers' authority to dispose of the vehicle.

Despite contrary views expressed by eminent professionals,¹³² these facts are easily distinguishable from spuilzie. Firstly, it has been submitted that civil possession is insufficient to found an action of spuilzie in respect of moveable property. Secondly, even if this is disputed, there was no vitious act of

¹²⁶ When the reason for the law ceases to exist, the law itself lapses.

¹²⁷ *McKendrick* (n 125) at p. 54.

¹²⁸ *ibid* at p. 61.

¹²⁹ As will be seen below, there have been several failed attempts to revive spuilzie in the mid to late 20th century, none of which fit within the true boundaries of the doctrine.

¹³⁰ (1969) SLT (Sh Ct) 41.

¹³¹ *ibid* at p. 44.

¹³² Rodger, 'Spuilzie in the Modern World' (n 58). Furthermore, in *Mercantile Credit Co Ltd v Townsley* (1971) SLT (Sh Ct) 37, Sheriff Substitute Dickson stated (at p. 39) such facts were indistinguishable from spuilzie.

dispossession since the natural possessor consented to the transfer.¹³³ Indeed, the authority Reid cites for allowing a landlord to raise spuilzie when his tenant is dispossessed¹³⁴ is very much indicative of the landlord suing on *behalf* of his violently ejected tenant. This is entirely different to a situation where a hire-purchaser defrauds the owner by willingly disposing of the property.

Thus it can be said that spuilzie is of no relevance in the context of hire-purchase cases where a hirer defrauds his creditor. This is one way in which the action can be distinguished from the English tort of conversion. Given conversion is generally the appropriate civil action for theft, and this is equally the case for spuilzie, a temptation arises to equate the two. However, a fundamental distinction arises in that while conversion can be based on denial of a *right* to immediate possession,¹³⁵ spuilzie requires loss of actual possession, independent of any right to possess. Consequently cases such as *Brown*,¹³⁶ that may well constitute an act of conversion, are not true examples of spuilzie.

This distinction is critically overlooked by Professor Walker in his treatise on delict,¹³⁷ in which the author affords spuilzie an unjustifiably wide scope. In describing spuilzie as applicable to situations such as wrongful retention and failure to report lost property, Walker's account is more consistent with conversion than with spuilzie as it is correctly understood. Such a view was also mistakenly relied on in *Mackinnon v Avonside Homes Ltd*¹³⁸ and *Calor Gas Ltd v Express Fuels (Scotland) Ltd*.¹³⁹ In both cases, the pursuers were not in physical possession but rather had a right to possession.

This confusion nonetheless serves to highlight the important question of whether or not the law of Scotland ought to recognise an equivalent action to conversion. It is undoubtedly the case that Scots law does not recognise such an action – the courts have often so remarked¹⁴⁰ and a detailed discussion on the point took place in *Socgen Lease Ltd v Capital Bank*.¹⁴¹ In the context of the double actionability rule in private international law,¹⁴² it was held that an act

¹³³ See Reid, *Property* (n 5) at para. 164; Stair, *Institutions*, I.9.20; IV.28.7.

¹³⁴ Reid, *Property* (n 5) at para. 163 fn 5.

¹³⁵ *Winkworth v Christie, Manson and Woods Ltd and Another* [1980] Ch 496, per Slade J at 499; see, generally, RFV Heuston & RA Buckley, *Salmond and Heuston on the Law of Torts* (20th edn, Sweet & Maxwell, London 1996) ch. 6.

¹³⁶ See also *Mercantile Credit Co Ltd* (n 132); *FC Finance Ltd v Langtry Investment Co. Ltd* (1973) SLT (Sh Ct) 11.

¹³⁷ Walker, *Delict* (n 61) at pp. 1002-1011.

¹³⁸ 1993 SCLR 976.

¹³⁹ [2008] CSOH 13 (OH).

¹⁴⁰ *Leitch v Leydon* 1931 SC (HL) 1 per Viscount Dunedin at pp. 8-9; *First National Bank plc v Bank of Scotland* 1999 SLT (Sh Ct) 10; *North West Securities Ltd v Barrhead Coachworks Ltd* 1976 SC 68.

¹⁴¹ QB, 13 October 1999.

¹⁴² The doctrine provides that where a delict (or tort) is alleged to have been committed in a foreign jurisdiction, a successful action may only be brought if the conduct complained of is actionable in both the jurisdiction where the delict occurred and the jurisdiction where the action is brought.

amounting to conversion in English law was not actionable in Scots law, neither as an action based on *culpa* nor as a spuilzie action.¹⁴³

It is submitted that it would indeed be undesirable to recognise such an action in Scots law. To do so would undermine some of the general principles of Scots law. Imposing delictual liability without requiring proof of fault (conversion is a strict liability tort) is at odds with the foundations of our law of delict reflected in the principle *damnum iniuria datum*. An action based on *culpa* will provide compensation to deserving parties provided the pursuer can show a sufficient degree of proximity and that the defender's fault caused their loss.¹⁴⁴ Furthermore, an owner who cannot achieve the return of his property will be able to rely on his right to restitution to recover its value from someone who has parted with his property in bad faith.¹⁴⁵ Where no fault (or bad faith) can be shown, the law of recompense will provide just compensation which is limited to the defender's gain.¹⁴⁶ In the hire-purchase scenario, there is no strong policy reason for protecting hire-purchase sellers who cannot succeed in a negligence action – such parties voluntarily subject themselves to the risks inherent in parting with goods on credit, and can carry out checks to ensure a hirer has a good credit history.

Spuilzie has also been subject to judicial consideration in two relatively recent cases involving the eviction of individuals by creditors performing a repossession. In *Gemmell v Bank of Scotland*¹⁴⁷ and *Harris v Abbey National Plc*¹⁴⁸ the respective sheriffs were presented with the opportunity to expressly revive the remedy of spuilzie. Both involved the disposal of the pursuer's property by the defender following the pursuer's eviction. According to the respective sheriffs, the facts fell short of spuilzie because there was no vitious dispossession. In the circumstances this is a contentious point (the pursuers had left property behind and had not returned to claim it – whether this amounts to consensual dispossession is debatable) but importantly it is an acceptable basis upon which to reject spuilzie. Therefore, while the cases cited are not examples of spuilzie, they do not rule out the possibility of a modern action of spuilzie in respect of moveables clearly appropriated *without* consent.

¹⁴³ *Socgen Lease* (n 141), per Richard Field QC.

¹⁴⁴ This has been settled since the famous case of *Donoghue v Stevenson* [1932] AC 562; see also *Faulds v Townsend* (1861) 23 D 437; *FC Finance Ltd v Langtry Investment Co Ltd* (1973) SLT (Sh Ct) 11.

¹⁴⁵ *Stair, Institutions*, I.7.2; *Dalhanna Knitwear Co Ltd v Mohammed Ali* 1967 SLT (Sh Ct) 74.

¹⁴⁶ *Faulds* (n 144), per Lord Ardmillan at p. 439; *International Banking Corporation v Ferguson Shaw and Sons* 1910 SC 182, per Lord Dundas at p. 194.

¹⁴⁷ 1998 SCLR 144.

¹⁴⁸ 1997 SCLR 359.

B. The tacit value of spuilzie

It has been established that spuilzie cannot apply in certain modern-day circumstances, but it remains to be seen how it can be relevant today. It is the view of the present author that the true value of spuilzie lies in the vital principle it embodies regarding the right of possession.

Scots law recognises several different forms of possession, covering a broad spectrum of relationships between a person and a thing. Possession in its strongest sense is possession as owner, but to found an action of spuilzie all that is required (prior to being dispossessed) is bare possession. Thus for the present discussion we are solely concerned with the factual situation of possession, and the rights consequential of this. In other words, we are solely concerned with the *jura possessionis*, and need not worry about the *jus possidendi*.

The quaint phrase ‘finders keepers’ was famously given legal recognition in England in 1722,¹⁴⁹ and the principle that a possessor has a better right to property than anyone who cannot assert a superior right has long been recognised in Scots law.¹⁵⁰ The consequence is that a possessor may only be judicially dispossessed by the rightful possessor. More significantly, a possessor is also entitled not to be dispossessed vitiously by anybody including the rightful possessor, since this would constitute spuilzie. In other words, the right of possession extends to an absolute prohibition against anybody interfering with that possession without consent or judicial warrant. This is a real right,¹⁵¹ since it is enforceable against the world at large and can be properly said to relate to the property possessed rather than any particular person or class of persons.¹⁵² Crucially, a possessor has this real right regardless of whether they have a real right, personal right, or no right to¹⁵³ possess. In this way the right of possession (or the *jura possessionis*) is defined by spuilzie.

Consequently the practical importance of spuilzie is greater than one may imagine given the rarity of recent judicial consideration of the action. Firstly, as is noted in the Stair Memorial Encyclopaedia,¹⁵⁴ spuilzie unobtrusively deters inappropriate acts of self-help such as ‘snatch-back’ by hire-purchase sellers. This is a logical extension of the obvious point that spuilzie deters ‘snatching’ in general from parties without a real right to possess (such as a *bona fide* possessor). Secondly, the right of possession as embodied in

¹⁴⁹ *Armory v Delamirie* (1722) 1 Strange 505.

¹⁵⁰ Bankton, *Institute*, I.3.20.

¹⁵¹ Reid, *Property* (n 5) at para. 5; see also Stair, *Institutions*, II.i.8.

¹⁵² While spuilzie as a remedy is only enforceable against the immediate dispossessioner, the very existence of this remedy means that a possessor has an *absolute* right not to have the property in question taken from him. This right thus relates to the property, and is enforceable against any potential dispossessioner, i.e. the world at large.

¹⁵³ Note the crucial distinction between the right of possession (i.e. arising from possession) and the right to possession (that exists independently of actual possession).

¹⁵⁴ Stair Memorial Encyclopaedia, Civil Procedure (Reissue) para. 37 fn 25.

spuilzie can provide the basis for recovery in delict for secondary economic loss caused by damage to another's property. Thirdly, there are certain situations in which the only remedy available to a party is an order for the restoration of possession under the powers of the Sheriff Court or the Court of Session. To abolish spuilzie would be to take away the basis of these claims.

(i) Recovery of secondary economic loss

In cases of damaged or destroyed property, the law of property will naturally be of no assistance. Rather, a delictual action based on *culpa* under the principle *damnum iniuria datum* will provide adequate redress for an owner.

It would seem logical to assume a possessor who is liable to the owner for any damage would also be able to claim on the premise of loss wrongfully caused in the event that a third party caused damage to or the destruction of the property in question. This type of loss is often termed secondary economic loss.¹⁵⁵ Recovery of secondary economic loss is a grey area of Scots law where the law of delict and property overlap. It appears that (at least where the defender acted negligently and not intentionally¹⁵⁶) loss may only be recovered in a case where the pursuer held the goods under a 'possessory right or title'. Otherwise, any loss suffered will be irrecoverable under the general rule of policy debarring recovery of pure economic loss.¹⁵⁷ The vagueness of the term 'possessory right or title' has inevitably led to fine distinctions in the law and a firm line must be drawn as to when loss is recoverable.

The weakness of the 'possessory title' test can be illustrated by comparing two significant cases. In *Nacap v Moffat*¹⁵⁸ the pursuers attempted to sue for damage to a pipeline they were laying for British Gas. Their loss (sustained in making good the damage to the owners) was held to be irrecoverable as they lacked title to sue. The Inner House held that despite being in physical possession of the pipes, the pursuers could not be said to have a sufficient possessory right or title.¹⁵⁹ This is somewhat perplexing since the pursuers had a right to possess the pipeline under their contract with British Gas.

In *North Scottish Helicopters v United Technologies (No. 1)*¹⁶⁰ the pursuers were permitted to sue for damage to a helicopter they held under a lease. Like the pursuers in *Nacap*, they had only a personal right to possession under the

¹⁵⁵ Thomson, *Delictual Liability* (n 86) at para. 4.25.

¹⁵⁶ Where an intentional harm is committed, it is thought that the only test is remoteness of damage and pure economic loss may be recovered (see n 97 above).

¹⁵⁷ *Nacap Ltd v Moffat Plant Ltd* 1987 SLT 221.

¹⁵⁸ *ibid.*

¹⁵⁹ The court drew a distinction between possession as owner and more limited forms of possession.

¹⁶⁰ 1988 SLT 77.

terms of a contract. Nevertheless, Lord Davidson held that the quality of possession was greater than that of the pursuers in *Nacap* and was sufficient to comply with 'the relevant test', whatever that was.¹⁶¹ The problem is that this test is ultimately standardless and comes down to a value judgement over the quality of the pursuer's possession. This is illustrated further by a long line of case law from both north and south of the border where different formulations have been approved.¹⁶²

At first glance, there is an obvious problem facing the application of spuilzie to cases of damage to property, namely that an act of dispossession is required. Damage can be, and often is, inflicted without any act of dispossession. However it is the implicit value of spuilzie that is important here. Because of the existence of spuilzie, a holder has a real right over property in his possession, extending to an absolute prohibition against vitious dispossession. This right is held by any physical holder other than a custodier who holds entirely on behalf of another. The right is therefore clear-cut, unlike the nebulous terminology 'possessory title', and ought to provide the basis for title to sue in respect of damage to another's property. In other words, it should be said that where one *would* be protected by spuilzie were he vitiously dispossessed of that property, he is protected from damage wrongfully inflicted on that property. Thus the proposed test is that physical detention is sufficient to give title to sue, so long as that detention is not exercised purely on behalf of another.

This position is not unsatisfactory. There is no great justification for protecting custodiers. The function of a custodier is, by definition, to look after property and it is not difficult to accept that he will bear the loss to property in his custody even where a third party wrongdoer intervenes. Otherwise it seems just to protect a possessor from bearing loss caused by the fault of another. Moreover common sense dictates that if a party is protected from dispossession, he should also be protected from damage inflicted by a third party. This approach is more appropriate than making an arbitrary judgement as to the quality of a pursuer's possession. Aside from greater certainty, it will prevent arbitrary and unjust distinctions being made, as was the case in *Nacap*.

The pursuers in *Nacap* held the pipeline for construction purposes and could not, in my view, be said to merely have custody of the pipe. Therefore they would have been protected by spuilzie had they been vitiously dispossessed. Thus, on the test proposed above, they would not have been prevented from recovering damages from the defenders who negligently

¹⁶¹ *ibid* at p. 81.

¹⁶² *Simpson & Co v Thomson* (1877-78) LR 3 Appeal Cases 279 per Lord Penzance at p. 289; *Reavis v Clan Line Steamers* 1925 SLT 386 per Lord Constable at p. 390; *Dynamco v Holland & Hannan & Cubbits (Scotland) Ltd* 1971 SLT 150; *Candlewood Navigation Corp. v Mitsui OSK Lines Ltd* [1986] AC 1; *Leigh and Sullivan Ltd. v Aliakmon Shipping Co Ltd* [1986] 2 WLR 902 per Lord Brandon at p. 908.

damaged the pipeline. With this clearer definition in mind, the *Nacap* court would have been able to declare that the pursuers did have a possessory right.

It is, one should note, arguable that there ought to be a more radical change to the law regarding secondary economic loss, especially in situations such as *Nacap* where there is no water behind the floodgates and the principle of 'transferred loss' could apply.¹⁶³ Such an approach has been favoured by Professors Forte and Wilkinson who have argued that all secondary economic loss should be recoverable as long as it is foreseeable.¹⁶⁴ Failing this however, recognition of the real right of possession, embodied in *spuilzie*, could refine the law.

It should be noted that the position taken is something of a compromise on a view expressed by Craig Anderson in two academic papers.¹⁶⁵ Anderson argues that *spuilzie* provides the *direct* basis for recovery for loss caused by damage to another's property. By virtue of reversing the maxim *ubi ius, ibi remedium*,¹⁶⁶ Anderson claims the remedy provided by the law of delict in cases such as *North Scottish Helicopters* must be based directly on the right of possession.

As WJ Stewart correctly points out,¹⁶⁷ this cannot be so. An unconvincing (but admittedly opportunistic) reliance on Erskine's definition of *spuilzie* underpins Anderson's argument.¹⁶⁸ Dispossession is required for *spuilzie* and so damage *simpliciter* cannot be recovered directly through a *spuilzie* action. The direct basis of recovery is a breach of the duty of care owed by the wrongdoer to the possessor. If, as Anderson insists, this must be translated into a right, this is simply the right not to be treated negligently or wrongfully. The better analysis is that possession (defined as it is by *spuilzie*) ought to provide the *indirect* basis of recovery in cases such as *North Scottish Helicopters* and *Nacap*, since it is this right that can provide an exception to the exclusionary rule for pure economic loss.

(ii) The sole protector of bare possession

The classic situation in which *spuilzie* provides a direct remedy is when property is wrongfully taken from the pursuer. Leaving *spuilzie* aside briefly, an owner will have recourse to a vindicatory action under the law of property.

¹⁶³ See Stewart, *Delict* (n 100) at para. 10-9.

¹⁶⁴ ADM Forte & AB Wilkinson, 'Pure Economic Loss – A Scottish Perspective' 1985 JR 1.

¹⁶⁵ Anderson, 'Spuilzie today' (n 22); Anderson, 'The alleged case of the spuilzied helicopter: a reply' (n 73).

¹⁶⁶ Where there is a right there is also a remedy.

¹⁶⁷ Stewart, 'The alleged case of the spuilzied helicopter' (n 123) at pp. 13-14.

¹⁶⁸ Of the principal institutional writers, Erskine deals with *spuilzie* in less detail than either Stair or Bankton. Erskine fails to stress the requirement for an act of dispossession, instead favouring the terminology 'intermeddling'. However there can be no doubt that an act of dispossession is required for *spuilzie*.

It is uncertain whether this action was strictly received into Scots law from Roman law¹⁶⁹ but in any case an owner can assert his right to restitution under the law of obligations against any possessor.¹⁷⁰

The situation is less straightforward for a possessor who is not owner. A party with a real right to possess property may raise an action for delivery.¹⁷¹ However, such a situation would be limited to moveable property subject to security such as a pledge or floating charge. In the more common situation of a possessor with no real right other than possession itself, such as a hirer, spuilzie probably provides the only protection. The word 'probably' is used here since there is a case that suggests the contrary. In *McArthur v O'Donnell*¹⁷² a hire-purchaser (who did not yet own the goods) recovered property from a third party. This was not a spuilzie case since there was no vitious dispossession by the third party (the pursuer willingly gave the goods to the defender). In the present author's view, this case was wrongly decided. The decision was based on an analogy with title to sue in delict for damage to property. Such an analogy is inappropriate given that the law of delict focuses on proximity whereas the law of property depends on rights. Indeed, Reid describes Sheriff Henderson's reasoning as 'unconvincing'.¹⁷³ The correct analysis is that the pursuer in *McArthur* had no real right in relation to the property other than possession itself. She willingly gave up this right and therefore should not have been entitled to seek its return from a third party.

Nevertheless there are strong policy reasons for allowing recovery where possession was lost without consent. As Anderson notes,¹⁷⁴ a hirer may well be liable to the owner for loss of the property and may also be obliged to continue paying for hire after the property is stolen. Recovery should not be limited to hirers. A *bona fide* possessor holding under a defective title also merits protection, except in an ultimate dispute with the rightful possessor.

If spuilzie does indeed provide the only protection for a party without a real right to possession, it follows that the powers of the Court of Session and the Sheriff Court to restore the status quo of possession must be based on spuilzie. Section 45 of the Court of Session Act 1988¹⁷⁵ provides that the court may order restoration of possession to a petitioner who has been violently or fraudulently deprived. This may proceed by summary petition. Section 46 provides for a kind of retrospective interdict. The court, or a Lord Ordinary,

¹⁶⁹ SLC Memo. No. 31 (n 110) at para. 6.

¹⁷⁰ This assumes the property was taken without the owner's consent and a *vitium reale* attaches to the property.

¹⁷¹ Reid, *Property* (n 5) at paras. 141 and 158.

¹⁷² 1969 SLT (Sh Ct) 24.

¹⁷³ Reid, *Property* (n 5) at para. 127 fn 9.

¹⁷⁴ Anderson, 'Spuilzie Today' (n 22) at pp. 259-260.

¹⁷⁵ Schedule 2 Part II of the Court of Session Act 1988 re-enacts sections 89 and 91 of the Court of Session Act 1868. These provisions are in any case effectively rewritten in the 1988 Act, in sections 46 and 45 respectively.

may order a respondent to restore possession to the complainer if it would have prohibited the dispossession by interdict. Section 35(1)(c) of the Sheriff Court Act 1971 provides that the Sheriff Court may hear actions for recovery of possession of heritable or moveable property under the summary cause procedure, provided there is no additional or alternative claim for payment of a sum exceeding £1500.

These powers may well provide appropriate redress for a pursuer who has been unlawfully dispossessed, and the Scottish Law Commission hint that these provisions render spuilzie unnecessary today.¹⁷⁶ This argument overlooks the obvious fact that the basis of these powers is in fact spuilzie. Indeed, both Reid¹⁷⁷ and Carey Miller¹⁷⁸ indicate that the court powers are in fact modern methods of enforcing a spuilzie action. To abolish spuilzie would call into question the basis of the courts' powers to restore possession. On the assumption that these powers would still exist, any legislation abolishing spuilzie would eradicate it by name only. This will do nothing more than create uncertainty, leaving a pursuer to petition the court on an unknown basis.

(iii) Indirect protection of personal privacy

Aside from providing the only protection for possessors without a real right to possess, spuilzie may be an attractive remedy for an owner. This is because he is not burdened with having to prove his ownership – he need only show his previous possession and an unlawful act of dispossession by the defender. Spuilzie is a remedy that ignores the rightfulness, or even legality, of the pursuer's possession.

In this way, there is nothing to prevent a possessor of contraband or stolen goods from founding on spuilzie to reclaim possession of goods taken by the police without a warrant. Similarities can be seen in this regard to the tort of trespass to goods in England and indeed the *mandament van spolie* in South Africa, both of which can be said to provide an indirect remedy against breach of privacy.¹⁷⁹ In *Gollan v Nugent*¹⁸⁰ the High Court of Australia held that the fact the plaintiff would probably commit a criminal offence if certain obscene articles were returned to him did not justify a denial of his right to possess them. In the South African case of *Polonyfis v Provincial Commissioner*¹⁸¹ CJ

¹⁷⁶ SLC Memo. No. 31 (n 110) at para. 24.

¹⁷⁷ Reid, *Property* (n 5) at para. 165.

¹⁷⁸ Carey Miller, *Corporeal Moveables* (n 50) at para. 10.30.

¹⁷⁹ See in particular the case of *White v Brown* [1983] CLY 972 where £775 damages were awarded for trespass to goods after a shop manager had rifled through the plaintiff's handbag. Nothing was taken and so the damages can only be put down to the invasion of her privacy.

¹⁸⁰ (1988) 166 CLR 18.

¹⁸¹ [2008] ZANHC 46.

Olivier felt bound to order the restoration of illegal gambling machines to a plaintiff after they had been seized by the police under an invalid warrant.

There are naturally safeguards against warrantless searches provided by the protective umbrella of the European Convention on Human Rights. Article 8 of the Convention provides a shield from Big Brother's piercing gaze. Nevertheless under Scots law the police may seize possessions without a warrant in several situations – either under statute¹⁸² or under the common law principle of urgency.¹⁸³ Urgency is apparently 'widely interpreted in favour of the police'.¹⁸⁴ Thus if spuilzie returned to prominence, it could be a useful remedy against warrantless searches and would supplement constitutional protection of individual privacy.

C. Inconsistency with self-help

When considering the role of spuilzie in the modern law, it is important to overcome a hurdle that appears to block its contemporary application, namely that spuilzie as a remedy is inconsistent with self-help. Self-help involves an owner effectively taking the law into his own hands to recover property directly from an unlawful possessor. However, in doing so the owner is himself committing a spuilzie.¹⁸⁵ The position regarding the use of self-help to recover moveables is uncertain as it has never been the subject of express decision, although there is certainly a possibility that it is not unlawful per se.¹⁸⁶ The practical consequences of this inconsistency are minor however, since in reality a party who is vitiously dispossessed at the hands of the rightful possessor will seldom if ever seek the return of the property. This is because the rightful possessor will invariably prevail in the ultimate question of rights.

4. Legislative Reform

It has been argued that spuilzie does have a place in the modern law and that abolition is undesirable. Nevertheless legislative reform is needed for the following reasons. Spuilzie has become dormant and its uncertain scope means that its revival by the courts is unlikely, despite several recent attempts to rely

¹⁸² See, for example, the Serious Organised Crime and Police Act 2005 s152, which gives police the power to seize motor vehicles in certain circumstances.

¹⁸³ See *HM Advocate v McGuigan* 1936 SLT 161; *Laverie v Murray* 1964 SLT (Notes) 3.

¹⁸⁴ GH Gordon (ed), *Renton and Brown's Criminal Procedure* (6th edn, Sweet & Maxwell, Edinburgh 2000) at para. 7-22.

¹⁸⁵ The unlawful possessor's lack of title is irrelevant; in a spuilzie action all he need show is that he had possession.

¹⁸⁶ DM Walker, *The Law of Civil Remedies in Scotland* (W Green, Edinburgh 1974) at pp. 262-264; SLC Memo. No. 31 (n 110) at paras. 3-5.

on the action. Clarification of the remedy is needed to give a court the confidence to hold that, in the correct circumstances, a spuilzie has been committed. Naturally certain aspects of the remedy are now out of date, and this includes the concept of violent profits, which does not sit well with the modern principles of Scots law. It is important to abolish this penal aspect of spuilzie as it was historically understood.

The following paragraphs will very briefly lay out the provisions that ought to be made in any Spuilzie Act that may be forthcoming. This chapter will not attempt to draw up legislation with the precision of a draftsman; rather suggestions will be made as to the general content of the necessary sections. This will include detailing the scope of the action, the remedies available to a pursuer, possible defences and several other supplementary provisions.

Section 1 ought to clarify that spuilzie occurs when possession is taken from another without consent or judicial warrant. The legislation should make clear that 'possession' in this sense is taken to mean any form of physical detention other than mere custody, and excludes civil possession. It should also be made clear that 'consent' does not include consent obtained fraudulently, so that an individual deceived into being dispossessed will have recourse against his disposessor.

Section 2 should outline the remedies available to the victim of spuilzie. Firstly it should be stated that a party who commits a spuilzie under section 1 is, where possible, liable to restore possession immediately to the pursuer. It is also important to expressly provide that a party who commits a spuilzie shall be liable for the full extent of the pursuer's loss arising from dispossession, but not for violent profits.

Since the basis of a spuilzie action is the unlawful act of dispossession, it is appropriate to limit liability to the immediate disposessor. Admittedly this departs from the historic view that spuilzie could be sustained against *mala fide* subsequent possessors who were not in fact 'spuilziers'.¹⁸⁷ However the practical consequences of limiting liability to the disposessor are unproblematic. Where the disposessor has passed the good on to a third party, an owner will be able to assert his right to restitution to secure delivery as long as the circumstances of dispossession constituted a *vitium reale*. Where a mere possessor is dispossessed and the disposessor subsequently disposes of the property, the dispossessed party will be able to claim from the disposessor the extent of his loss – perhaps sustained by being liable to the owner under contract. Limiting liability to the pursuer's loss is appropriate in the modern law. It is desirable to include express provision allowing recovery of loss not only for the sake of clarity, but to confirm that loss irrecoverable as purely

¹⁸⁷ Stair, *Institutions*, I.9.17; Bankton, *Institute*, I.10.130; *Earl of Roxburgh v Langtoun* (1628) Mor. 379.

economic if left to the law of negligence¹⁸⁸ *can* be recovered by way of a spuilzie action.

Section 3 could be dedicated to defences to an action of spuilzie. Defences must include lawful diligence in the form of an attachment, since such dispossession is carried out with judicial warrant. It will also, of course, be open to a defender to successfully defend a spuilzie action by proving that the goods were voluntarily delivered to him, or that the pursuer was not in possession at the time of the act complained of.

For the sake of certainty it may also be desirable to include a provision relating to the prescriptive periods applicable to a spuilzie action. It was stated above that an obligation to make reparation arising from spuilzie is extinguished in five years whereas the right to restoration of possession subsists for twenty years. However given the purpose of spuilzie is to facilitate prompt restoration of the *status quo* of possession, a shorter period of negative prescription is probably appropriate.¹⁸⁹ Perhaps it could even be the case that if the action is not brought within a reasonable time then it is lost by virtue of personal bar. Either could be provided for in this section, and the Prescription and Limitation (Scotland) Act 1973 accordingly amended.

It would be sensible for another section to allow an action of spuilzie to proceed by way of summary cause in the sheriff court or summary petition in the Court of Session, effectively replacing the aforementioned provisions in the Sheriff Court Act 1971 and the Court of Session Act 1988, which could be repealed. A Spuilzie Act would provide a clearer basis for actions for restoration of possession than these statutory provisions.

Finally, for clarity's sake it would be prudent to include a provision stating that the Act is without prejudice to other remedies that can be used by a victim of a spuilzie, such as vindication or a claim in delict for consequential loss.¹⁹⁰ No mention should be made of self-help until the law in that area is clarified.

There may be a need to include certain 'tidy-up' sections to eliminate any scope for uncertainty. It is certainly not claimed that the above suggestions

¹⁸⁸ See Thomson, *Delictual Liability* (n 86) at para. 1.15. The author notes that the decision in *FC Finance v Langtry Investment Co Ltd* (1973) SLT (Sh Ct) 11 was controversial because the pursuer's loss (held to be recoverable) was purely economic. A spuilzie action could not have succeeded in this case as there was no vitious act of dispossession by the defenders who had negligently facilitated the wrongful disposal of the pursuers' property. However it is not difficult to envisage circumstances where a pursuer would suffer loss due to disposal by the immediate dispossessor.

¹⁸⁹ See Carey Miller, *Corporeal Moveables* (n 50) at para. 10.31 fn 93.

¹⁹⁰ In Stewart, 'The alleged case of the spuilzied helicopter' (n 123) the author notes that this would need to be included in an act abolishing spuilzie. In an act clarifying the remedy the need for such a section would obviously be less pressing but there would be no harm in including it.

represent a full or meticulous picture of what the law ought to look like, rather it is stressed that the ideas expressed sketch a general guide.

5. Conclusion

The Scottish Law Commission recommends that spuilzie ought to be abolished since it is of uncertain competence and scope. The former assertion is unfounded. While spuilzie has not formed the precise basis of a decision in almost two centuries, there is no positive reason to doubt its competence. Indeed, the highest court in the land has expressly held that a common law doctrine cannot be repealed by desuetude.

Concerns about the uncertainty of the scope of spuilzie are justified. There is no reason, however, why confusion must necessarily lead to abolition. Clarification of the law is equally possible and this paper has attempted to give a clear account of the scope and nature of the remedy. The debate over abolition must boil down to whether or not the remedy is needed in the modern law. This paper has argued that there is such a need.

Spuilzie defines the right of possession, which is an absolute (or real) right against vitious dispossession. Abolishing spuilzie would therefore not just undermine the right of possession, but would eradicate it. This would have several undesirable consequences, leaving possessors without a real right to possession in a vulnerable position, at the mercy of 'snatchers'. Greater recognition of the right of possession may also hold the key to clarifying the law relating to secondary economic loss, but abolition of spuilzie would thwart this possibility. Furthermore, abolishing spuilzie would cast doubt over the underlying basis of statutory provisions for judicial restoration of possession in the Court of Session Act 1988 and the Sheriff Court Act 1971.

There is, however, a palpable need for reform. Abolition is undesirable, but there is no use in spuilzie lying dormant as would currently appear to be the case. The first step is to clarify the law through legislative action. The action would undoubtedly need to be adjusted to bring it into line with principles of the modern law, including a bar on the applicability of violent profits.

Such legislation will enhance knowledge of the very existence of spuilzie in the legal profession, and this may trigger a return to prominence of possessory actions. Subsequent possibilities such as protection of personal privacy may even develop should the action flourish in the way that the *mandament van spolie* has done in South Africa. It is readily admitted that reforming spuilzie is not high on the legislative agenda – in many ways the purpose of this piece is to warn against hasty decision making regarding abolition. However, when the opportunity does arise, it is hoped that spuilzie is not cast into oblivion, but is awoken from its enduring slumber.

Intestacy in Scotland: The Laughing Heir

KIRSTEN L. ANDERSON*

Abstract

There have been significant societal changes since the Succession (Scotland) Act 1964 was passed almost 50 years ago. Whilst a number of legislative reforms have taken place during this period, these reforms have not addressed all areas of the law of succession, and there are various outdated provisions remaining. The purpose of this paper is to show that the current position in Scots law regarding remote relatives' capacity to inherit on an intestate estate is not suited to today's societal structure. This will be done by highlighting the importance and increasing relevance of these provisions in modern society - factors which, it is suggested, have been overlooked by law reformers in Scotland. In doing so the historical nature of the sources used will become apparent. Using research from comparative jurisdictions a viable option for reform shall be proposed.

1. Introduction

The term 'laughing heir' is the English translation of the German term '*der lachende Erbe*' and refers to a person who inherits from the intestate estate of someone to whom he was so distantly related that he suffers little or no sense of bereavement as a result of the death.¹ The term suggests such heirs '[laugh] all the way to the bank.'²

The cause of the case of the laughing heir lies in the rules on intestate succession. Such a situation is likely to arise in a legal system which allows unlimited succession on intestacy. This means that any relative can inherit from the intestate estate, provided they can prove that they are the closest surviving relative of the deceased.

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¹ DF Cavers, 'Change in the American Family and the "Laughing Heir"' (1934 - 1935) 20 Iowa L Rev 203 at p. 208.

² MB Sussman, JN Cates & DT Smith, *The Family and Inheritance* (Russell Sage Foundation, New York 1970) at p. 139.

This 'tenuous link between the heirs and the intestate'³ can cause a number of problems, both theoretical and practical. There is, perhaps, a general discomfort caused by the thought of people who have no emotional or economic connection with the deceased inheriting on intestacy. In some cases, the heir may not have been aware of the existence of the person from whom he is inheriting.⁴ Those who come into an unexpected windfall can, understandably, be happy with their good fortune.⁵ There can, however, be feelings of resentment or unworthiness when such an heir inherits. Many heirs, whilst welcoming the money, also feel themselves undeserving and believe that the deceased should have made a will.⁶ Changes in social values and family structures mean that there is a possibility that a laughing heir may inherit instead of a cohabiting partner⁷ or close friend - who may, for example, have helped care for the deceased during illness leading to his death. The result is that those who are legally 'deserving' are able to inherit in place of those who are, arguably, *morally* deserving. Thus the issue of fairness arises.

In addition, the presence of a laughing heir also causes a number of practical challenges. Difficulties exist in identifying and finding heirs, and in the over-splitting of estates. These issues can arise even where there is a will in place. Cavers provides an apt example;⁸ Miss Wendel, a wealthy US woman, died with no close relatives and leaving a will bequeathing the majority of her estate to charity. The story was publicised in the New York Times⁹ which prompted around 2300 people to come forward, claiming they were relations of Miss Wendel and attempting to contest the will in order to inherit on intestacy. Four laughing heirs, conceded to be relatives of the fifth degree, were persuaded not to pursue their case with a settlement of \$2,000,000.¹⁰

³ DV DeRosa, 'Intestate Succession and the Laughing Heir: Who do we want to get the Last Laugh?' (1997-1998) 12 *Quinnipiac Prob L J* 153 at p. 154.

⁴ The cousins of Raymond Maynard, for example, were not aware of his existence before being contacted by heir hunting firm Fraser & Fraser. See H Greenaway, 'Heir hunters find Scots family of loner son of Mafia godfather' *Sunday Mail* (Glasgow, 14 February 2010). This situation was also noted in Sussman *et al* (n 2) at p. 140.

⁵ This is shown in the statement of one of the respondents to the study carried out by Sussman *et al* (n 2) at p. 140 - 'The inheritance was a windfall. I needed the money and I was glad to get it.'

⁶ The woman quoted as being glad to get her inheritance above (n 5), for example, goes on to note that she felt that the deceased should have made a will. Sussman *et al* (n 2) at p. 140.

⁷ Although cohabiting partners now have the right to apply to the court for financial provision on the intestacy of their partner under the Family Law (Scotland) Act 2006, s29.

⁸ Cavers (n 1) at p. 210.

⁹ 'Ella Wendel dies; last of her family; huge realty holdings valued at \$100,000,000 are left with no kin to claim them.' *New York Times* (New York, 24 March 1931).

¹⁰ See C Laporte, 'John M Harlan saves the Ella Wendel Estate' (1973) 59 *American Bar Association Journal* 868. It should also be noted that there were prosecutions for fraud connected to this case and this illustrates how a system which allows laughing heirs to inherit can leave valid wills open to such fraud.

Due to the inherent difficulties associated with the laughing heir scenario some legal systems have attempted to avoid it by placing limits on the degree of relationship which entitles a person to inherit on an intestate estate. This has, however, not been the case in Scotland. This aim of this paper is to provide an examination of the laughing heir situation, its impact upon the rules of succession and whether and how it should be remedied in Scots law. The intention is to show that the purpose of law of intestate succession is better served by limiting the degree of familial relationship entitled to inherit on intestacy. It is suggested that the law should be reformed in order to serve this objective.

2. Background

The law on the order of inheritance on intestacy in Scotland is currently governed by the s2 of the Succession (Scotland) Act 1964. Section 2(1)(i) provides that;

where an intestate is not survived by any prior relative, the ancestors of the intestate (being remoter than grandparents) generation by generation successively...shall have right to the whole of the intestate estate...

This provides no limitation on the relatives who can inherit on intestacy, and thus leaves open the possibility of inheritance by a laughing heir.

In the situation where no relative, however distant, can be found, the estate passes to the State as *ultimus haeres*¹¹ (the 'ultimate heir'). Where heirs have not been identified, the estate becomes *bona vacania* ('ownerless property') and is handled by the Queen's and Lord Treasurer's Rembrancer¹² (now the same person as the Crown Agent).¹³ Since devolution, all unclaimed *bona vacantia* is transferred to the Scottish Consolidation Fund, rather than to the Treasury in London. Where no heirs to an estate can be found, anyone who knew the intestate and feels they are 'deserving' of a share from the estate is entitled to apply to the QLTR for a discretionary payment.¹⁴

In contrast to the Scottish position, the intestacy laws of England¹⁵ and the Uniform Probate Code of the US¹⁶ restrict the familial relationships which

¹¹ Succession (Scotland) Act 1964, s 7.

¹² Herein 'QLTR'.

¹³ See Crown Office and Procurator Fiscal Service (COPFS), 'QLTR Overview', available at <<http://www.copfs.gov.uk/About/roles/qltr/qltr-overview>> (accessed 20 June 2011).

¹⁴ See DR Macdonald, *Succession* (3rd edn, W Green/Sweet & Maxwell, Edinburgh 2001) at para. 4.76.

¹⁵ Administration of Estates Act 1925 s46(1), herein '1925 Act'.

¹⁶ Uniform Probate Code (UPC), s2-103, available at <<http://www.law.upenn.edu/bll/archives/ulc/upc/final2005.htm>> (accessed 20 June 2011).

entitle relatives to inherit under an intestate estate to grandparents and their descendants. Where there is no eligible relation, the intestate estate passes to the State.¹⁷

A. Legislative Background

The issue of reform of Scots law in this area has been considered on various occasions, notably by the Mackintosh Committee in 1950 and the Scottish Law Commission in 1990. On every occasion, however, the suggestion to change the law in line with the English position has been discarded.

In 1949, a Committee of Inquiry was set up to review the law of succession in Scotland and make recommendations for reform. The 'Mackintosh Committee'¹⁸ reported its findings in December 1950.¹⁹ The Committee was attracted to the idea of putting limitations on those who could inherit on an intestate estate,²⁰ but failed to make a recommendation on the subject due to lack of support.²¹ A limiting provision was then put into the Succession (Scotland) Bill, but the Bill was amended during the legislative process to retain the infinite search amongst ancestors.²² The main focus of the Bill was the abolition of primogeniture and equalising the inheritance rights of maternal and paternal relatives. These developments were considerable, and thus it is somewhat understandable why, in comparison, the importance of the proposed reform on the order of succession was overlooked.

In the decades that have followed, reform of the law of succession has been a consistent area of consideration for the Scottish Law Commission.²³ The laughing heir issue was last raised in full by the Scottish Law Commission in 1990,²⁴ however the majority of respondents were against imposing any restriction on the list of those entitled to inherit on intestacy. Accordingly, the

¹⁷ Administration of Estates Act 1925, s46(1)(vi); UPC (n 16) s2-105.

¹⁸ Named after Lord Mackintosh, who headed the Committee.

¹⁹ See Lord Mackintosh, *Law of Succession in Scotland Report of the Committee of Inquiry* (Scottish Home Department, Edinburgh 1950), herein 'Mackintosh Report'.

²⁰ Which until then, as now, had allowed inheritance by remote relatives *ad infinitum*. See MC Meston, *The Succession (Scotland) Act 1964* (4th edn, W Green/Sweet & Maxwell, Edinburgh, 1993) at p. 7.

²¹ Mackintosh Report (n 19) at p. 26.

²² Meston (n 20) provides further discussion of the legislative process in regards to an infinite search among ancestors at pp. 81-82. See also, Hansard HL vol 256 cols 1062 – 1121 (23 March 1964), particularly the comments of Viscount Colville of Culross at cols 1062 – 1063.

²³ See Scottish Law Commission (SLC), *Intestate Succession and Legal Rights* (Memo No. 69, Edinburgh 1986); Scottish Law Commission (SLC), *Report on Succession* (Report No. 124, Edinburgh 1990); and Scottish Law Commission (SLC), *Report on Succession* (Report No. 215, Edinburgh 2009).

²⁴ SLC Memo No. 69 (n 23) and SLC Report No. 124 (n 23).

Commission made no recommendation for change.²⁵ In its most recent Report on the subject,²⁶ the Commission gave the matter very little consideration, stating merely that its opinion on the order of succession on intestacy remained the same.²⁷ The main focus of this Report reflected more recent changes in social structure; particularly the possibility of giving step-children rights on intestacy,²⁸ and increasing the rights of half-blood siblings to equal the rights of full-blood siblings.²⁹ It is unfortunate that in giving primacy to these issues the importance of the matter of the laughing heir has been obscured.

B. Importance of Intestacy Legislation

In social terms, the intestacy laws of a legal system are fundamental. Lomenzo notes;

most people are involved with inheritance at some time, and thus no area of private law more concerns the public than intestate succession.³⁰

A survey conducted in 2006³¹ showed that only 37% of Scots have made a will.³² Although this figure rises to 69% for those over 65,³³ it still remains that a fairly large proportion of people dying in Scotland will be intestate. One study, cited by the Law Commission in England and Wales,³⁴ suggested that almost a quarter of those in the age bracket of 55-64 years have had ‘personal experience of the human and economic costs associated with intestacy.’³⁵ The figure in Scotland is likely to be even higher, given the difference in intestacy laws which allows a wider category of entitled heirs.

The importance of intestacy legislation does not stop with those who die intestate. There are three situations pertaining to testate succession in which intestacy rules will be relevant despite the presence of a will. Firstly, a testator may believe that he has made a valid will, but it is in fact invalid through the

²⁵ SLC Report No. 124 (n 23) at para. 2.28.

²⁶ SLC Report No. 215 (n 23).

²⁷ *ibid* at para. 2.35.

²⁸ *ibid* at paras. 2.31 – 2.34.

²⁹ *ibid* at para. 2.37.

³⁰ CG Lomenzo, ‘A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses’ (1994-1995) 46 *Hastings L J* 941 at p. 941.

³¹ See S O’Neill, *Wills and Awareness of Inheritance Rights in Scotland Summary* (Scottish Consumer Council, Edinburgh 2006).

³² *ibid* at p. 6.

³³ *ibid*.

³⁴ Law Commission, *Intestacy and Family Provision Claims on Death* (Consultation Paper No. 191, London 2009) at para. 1.8.

³⁵ S Brooker, *Finding the will: a report on will writing behaviour in England & Wales* (National Consumer Council, 2007) at pp. 11 – 12.

requirements of either essential or formal validity. In this case, the entire estate will be disposed of using intestacy provisions, as the invalidity results in total intestacy. Secondly, intestacy provisions operate on partial intestacy; for example, where there is a valid will but this fails to dispose of the testator's estate in its entirety. Here, the residue of the estate will be dealt with under intestacy rules. Lastly, it should also be noted that distributive provisions are also used in the interpretation of a valid will. Where a testator leaves a bequest to 'next of kin' or 'heirs', the meaning of this phrase is interpreted in relation to intestacy provisions.³⁶ Thus, as DeRosa aptly notes;

although unlimited collateral succession may seem to be an archaic problem with only a minor impact...this position understates the importance of the intestacy law.³⁷

He goes on to quote Michael Curran, a British 'heir hunter' interviewed in 1995.³⁸ Curran predicted that after 2010, there would be a rise in the number of people dying without close surviving family members and an increase in larger inheritances with no obvious heirs.³⁹ It is submitted that a number social changes over the last century means that that problem of the laughing heir has, and will, become more prevalent. This is particularly due to a change in population trends in developed countries like Scotland since the Second World War.

The 'baby boom' was an abnormally large and sudden rise in the birth rate following the end of the Second World War. As a result of this there is now an unusually high percentage of the population in their late 50s and early 60s.⁴⁰ Although the average life expectancy in Scotland is now around 75.4 for men and 80.1 for women,⁴¹ this varies greatly dependent on standard of living and

³⁶ Macdonald (n 14) at para. 10.16. This is not, however, an absolute rule. Other provisions in a will can be used to show that the testator envisaged an alternative distribution. See, for example, *Nelson's Trs v Nelson's Curator Bonis* 1979 SLT 83, as cited by Macdonald (n 14) at para. 10.16.

³⁷ DeRosa (n 3) at pp. 191-192.

³⁸ In E Grice, 'Features: It's for you – from Great Aunt Agatha. Windfalls don't just come from the National Lottery – each year there is £30 million waiting to be collected from the Crown. Elizabeth Grice meets a man who traces the heirs to unclaimed fortunes' *The Daily Telegraph* (London, 24 October 1995), as cited by DeRosa (n 3) at p. 170, fn 76.

³⁹ *ibid.*

⁴⁰ See General Register Office for Scotland, 'High Level Summary of Statistics: Population and Migration' available at <<http://www.gro-scotland.gov.uk/files2/stats/high-level-summary/j11198/j1119802.htm>> (accessed 20 June 2011) which provides estimated population figures as of 30 June 2010.

⁴¹ Scottish Government, 'Health of Scotland's Population – Life Expectancy' available at <<http://www.scotland.gov.uk/Topics/Statistics/Browse/Health/TrendLifeExpectancy>> (accessed 20 June 2011).

can be much lower for men living in deprived areas.⁴² Furthermore, this trend is accompanied by another which increases the possibility of the laughing heir situation. People are, statistically, now opting to have fewer children,⁴³ resulting in a declining birth rate.⁴⁴ This, in turn, increases the possibility of collateral succession.⁴⁵ The importance of intestacy legislation is therefore both current and likely to continue to grow in relevance if such trends continue.

C. The Purpose of Intestate Succession Laws

The heritage of following blood kinships to any degree necessary to find a 'relative' serves no purpose at all.⁴⁶

Morton discusses the purpose of inheritance laws, suggesting that many laws 'overpass the reasons for them'.⁴⁷ In relation to inheritance, and to intestacy in particular, the purpose of the law may continually develop as changes occur in societal and familial relationships. During the times of the feudal system, there was a significant emphasis on the protection of family fortunes and the value of land. Large estates of heritage were therefore afforded protection through the laws of intestate succession. The principle of primogeniture⁴⁸ is a prime example of how the laws of succession protected the values of society at this time. Society today is guided much more by respect for an individual's private property and his right to dispose of it as he wishes. Such a modernisation in living requires a modernised law. It is important, therefore, that the law reflects its most current purpose.

In the specific context of intestacy the purpose of intestate rules can be embodied under two headings; the implementation of the presumed wishes of the deceased, and the provision for 'worthy heirs'.

⁴² General Register Office for Scotland, 'Life Expectancy in Scottish Council Areas Split by Deprivation 2005-2009' available at <<http://gro-scotland.gov.uk/files2/stats/life-expectancy-special-areas/le-council-area-deprivation-05-09.pdf>> (accessed 20 June 2011).

⁴³ A declining birth rate is a factor considered by Cavers (n 1) at pp. 207 - 208

⁴⁴ The birth rate is now around half the size of that in Scotland in 1946-50. See General Register Office for Scotland, 'Population and Vital Events, Scotland, 1985-2009' available at <<http://gro-scotland.gov.uk/files2/stats/births-marriages-deaths-preliminary/preliminary-09-tab-1.pdf>> (accessed 20 June 2011).

⁴⁵ This likelihood is, at least, increased significantly for those who opt not to have children, or whose children predecease them.

⁴⁶ Professor Richard V Wellman, University of Michigan School of Law, as cited by Sussman *et al* (n 2) at p. 142.

⁴⁷ JM Morton Jr, 'The Theory of Inheritance' (1894-1895) 8 Harvard Law Review 161 at p. 161

⁴⁸ Where the eldest son of the deceased was entitled to inherit the estate in its entirety - to the exclusion even of his siblings .

(i) Presumed Wishes of the Deceased

Carrying out the presumed wishes of the intestate was described as 'one of the more widely acknowledged aims of intestacy rules...' ⁴⁹ by the New South Wales Law Reform Commission in 2005. The distribution under intestacy should therefore aim to act as a 'surrogate will.' ⁵⁰

Given that the intestate, by definition, failed to leave a valid will disposing of all his property, his wishes must be presumed. It is not easy, however, to ascertain these wishes. One could look into the life of each intestate to establish their values under a discretionary system, which would, at least in theory provide the most accurate impression of the wishes of the deceased. This would inevitably be at the expense of simplicity and certainty, and does not eliminate the potential for abuse. Alternatively, wishes could be presumed through the use of will studies. These have, however, been criticised for allowing the wishes of those who have died testate to dictate the distribution of intestate estates. ⁵¹ It is submitted, therefore, that an examination of social trends could provide the most reliable way of ascertaining the presumed wishes of the deceased, while preserving certainty in the law. This point is to be developed further below.

(ii) Provision for 'Worthy Heirs'

While it seems that the interests of the deceased are the paramount consideration in Scots succession law, the needs of potential beneficiaries are not completely disregarded. To a certain extent, the purpose of intestacy law is also to provide for those 'worthy heirs' that have been left behind.

At first glance, Scots law gives the concept of 'worthy heirs' a wide interpretation, debarring as 'unworthy' only those who kill the person from whose estate they wish to inherit. ⁵² Upon closer inspection, however, aspects of a potential beneficiary's worthiness are quite commonly taken into account in succession law. For example, when an intestate estate falls to the Crown as *ultimus haeres*, there is the opportunity for 'persons who have a moral claim on

⁴⁹ New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* (Report No. 116, 2007) at para. 1.25.

⁵⁰ JR Glucksman, 'Intestate Succession in New Jersey: Does it Conform to Popular Expectations?' (1975-1976) 12 *Columbia Journal of Law & Social Problems* 253 at p. 253.

⁵¹ See Law Commission, *Distribution on Intestacy* (Working Paper No. 108, London 1988) at para. 4.2.

⁵² See, for example, the case in Meston's Opinion No. 89, MC Meston & D O'Donnell (eds) *Meston's Succession Opinions* (W Green/Sweet & Maxwell, Edinburgh 2000) at para. 89.1. This concept is based mainly on the adoption of English public policy grounds – the 'forfeiture rule'. See, for example, *Giles, Deceased* [1972] Ch 544. See also the Parricide Act 1594; Macdonald (n 14) at paras. 2.02-2.23.

the deceased⁵³ to apply to the QLTR for a grant from the estate by proving that they are morally worthy, and thus ought to be legally so.⁵⁴ Similarly in testate succession, Scots law protects specific ‘worthy’ beneficiaries (a person’s spouse and children) from disinheritance through a system of legal rights and legitim.⁵⁵ The law deems those heirs entitled to inherit under the intestate rules, and those too protected under testate succession, to be legally worthy of a bequest.

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It can therefore be seen that the purpose of the law of intestate succession is closely connected with societal values and structure. In a developing society this warrants regular scrutiny of the law in order to ascertain whether these purposes are being met properly. In light of this it can be seen that old rules on collateral succession may not be appropriate to a modern context. As a result, a debate on whether law reform is necessary in this area arises.

3. Proposals in Favour of Change

There are various proposals in favour of reforming the law to implement limits on the categories of relatives that can inherit on an intestate estate. These arguments are broadly based on either policy or practical reasoning. Policy arguments are focused on fulfilling the purpose of intestacy provision, while practical reasoning focuses on how reasonably feasible it is to perform an infinite search for heirs.

A. Policy Arguments

(i) Fairness

The laughing heir scenario often provokes feelings of injustice. This is based on the value attributed to one of the abovementioned purposes; implementing the presumed wishes of the deceased. This is particularly relevant in the situation where the deceased made a will which is subsequently found to be invalid.

⁵³ Meston (n 20) at p. 82.

⁵⁴ The Treasury Solicitor, who acts as QLTR for England and Wales, considers factors like the nature of the relationship between the parties and any moral obligation which the deceased owed the applicant. See The Treasury Solicitor: Bona Vacantia Division, ‘Guide to Discretionary Grants in Estates Cases’ available at <<http://www.bonavacantia.gov.uk/output/Discretionary-Grants-in-Estates-Cases.aspx>> (accessed 20 June 2011). It is likely that similar factors will be considered in Scotland.

⁵⁵ See Succession (Scotland) Act 1964 Part II. It is noted, however, that this system is under review. See SLC Report No. 215 (n 23) Part 3.

Allowing a distant relative to inherit in place of those nominated under the invalid will is certainly questionable in terms of fairness.

A study conducted by Sussman *et al* suggests that even those who inherit as laughing heirs recognise this level of unfairness. One heir noted that he didn't think 'things were divided up like they should be' and recognised that the deceased must have had friends 'who were closer than any of the relatives who received.'⁵⁶ Another heir stated; 'I had no claim on the estate; I don't think I deserved anything. I think people who had helped [the deceased], lived with her, helped with expenses should have received it.'⁵⁷

It may also be the case that the deceased had specific wishes for distribution but did not make these into a will for a number of reasons, such as 'illusion of continued life,'⁵⁸ superstition,⁵⁹ or an informal agreement with friends or family.⁶⁰

On this basic level, it is apparent that a law which allows distant relatives to inherit on intestacy fails to satisfy its purpose. While there is a system whereby those who are not entitled to inherit can apply to the QLTR for a discretionary payment, this can be done only when no entitled heir can be located, and is therefore outwith the scope of a laughing heir scenario.

(ii) Changes in social structure and the impact on the wishes of the deceased

In 2009, the Law Commission in England and Wales stated that

probably the most important factor that motivates reform is the change in family structures and values in society since these areas were last reviewed.⁶¹

They went on to say that changes in society means that laws enacted in response to social norms as little as 20 years ago can be inappropriate today.⁶²

Meston comments that the main policy reasoning behind the 1964 Act reform was a desire to take account of changes in the structure of society. The

⁵⁶ Sussman *et al* (n 2) at p. 140.

⁵⁷ *ibid* at p. 142.

⁵⁸ For example, procrastination in making a will based on the belief that an untimely death is unlikely. See AJ Hirsch, 'Default Rules in Inheritance Law: A Problem is Search of its Context' (2004-2005) 73 Fordham L Rev 1031 at pp. 1047-1048.

⁵⁹ For example, the fear that making a will would somehow prompt an untimely death. *ibid* at p. 1048.

⁶⁰ There are a variety of other reasons why a person may not make a will. See, for example, Rowlingson & MacKay, *Attitudes to Inheritance in Britain* (The Policy Press, Bristol 2005) at p. 69.

⁶¹ Law Com Consultation No. 191 (n 34) at para. 1.25.

⁶² *ibid*.

abolition of primogeniture⁶³ and the equalisation of the succession rights of maternal and paternal relatives, for example, indicates a move away from the feudal influences mentioned above. Similarly, the reform of succession law regarding illegitimacy displays the increasing normalisation of children of unmarried parents in society.⁶⁴

Unlimited collateral succession on an intestate estate was of relevance in an era when people tended to live in close proximity to their extended family. David Cavers recognised a change of trend in this regard as early as 1935.⁶⁵ He described how the population was beginning to live a more urbanised life: people were more likely to move away from the place where they were born and continued to move in later life due to work pressures.⁶⁶ Extended families which in the past lived in close-knit communities were now much more dispersed. Links between remote family members became more tenuous. Cavers commented that it would become ‘increasingly incongruous’⁶⁷ that more remote collateral relatives should have the right to inherit on an intestate estate or indeed the power to challenge an existing will.

Seventy-five years later, the unlimited right of remote collaterals to succeed to an intestate estate where there is no closer relative continues to exist in Scotland. Despite this fact, it is highly likely that Scottish society today is even more dispersed than the society to which Cavers was referring. These trends suggest that the social distance from one’s extended relatives will continue to increase. It is suggested that while people will generally retain bonds with siblings despite physical distance between them (and thus a fondness for their children) the same cannot be said for more remote relatives.⁶⁸ It is unlikely in today’s society that the average person would include remote relatives in his will, particularly if he was not even aware of their existence. To include them in the ‘surrogate will’ of intestacy provisions is therefore counter-intuitive.

⁶³ The Mackintosh Committee cited various Institutional Writers to illustrate ‘how outmoded and inapplicable to the present day are the conditions social and national which formed at once the origin of and the justification for the rule of primogeniture...’ Mackintosh Report (n 19) at para. 7.

⁶⁴ See the reforms made in the Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s1 and subsequently the Law Reform (Parent and Child)(Scotland) Act 1986, s1.

⁶⁵ Cavers (n 1).

⁶⁶ *ibid* at pp. 205-207.

⁶⁷ *ibid* at p. 207.

⁶⁸ As one respondent to Sussman *et al*’s enquiry into inheritance commented; ‘[I] don’t think [the deceased] knew some of us were even alive.’ Sussman *et al* (n 2). It is notable that these trends were noticed in a survey published some forty years ago.

B. Practical Arguments

(i) Practicalities of finding heirs

When a person dies with no obvious relatives, it is the job of the executor to trace those entitled to benefit from the estate. It has been argued that;

the expense and delay caused by tracing remote relatives is the strongest argument in favour of a limit [on inheritance by remote relatives on intestacy].⁶⁹

In an extension of the argument above, it is noted that the increasing trend of relocation from the place where one was born means that not only is it less likely that more distant relatives will know each other, but they are also more difficult to trace. Meston commented that allowing the search for heirs to be extended indefinitely, when combined with the reforms in the 1964 Act of rights given to half-blood collaterals and the removal of the significance of illegitimacy means that 'an enormous area of search is opened up.'⁷⁰ This can cause 'considerable difficulty in practice in drawing up complete and accurate family trees.'⁷¹ Complications of this kind will also increase the cost of a search.

In some instances, the executor will attempt to identify and locate heirs himself, but this can be a time-consuming and complex task. In many challenging cases, the executor will engage the services of a probate research firm or 'heir hunter'.⁷² These are firms of genealogists who trace the relatives of the deceased and identify those entitled to benefit. As the heir hunting industry is unregulated, these firms are able to charge any level of fee they wish for their services.⁷³ Some firms can charge the estate up to 40% commission for any

⁶⁹ NSW Law Com Report No. 116 (n 49) at para. 9.42.

⁷⁰ Meston (n 20) at p. 81.

⁷¹ *ibid.*

⁷² Heir hunters are discussed further below.

⁷³ A fact which has caused controversy recently, particularly in light of the popularity of the BBC daytime programme *Heir Hunters*, which follows various probate research firms in their work. See B Todd & C Fernandez, 'BBC "bounty hunters" row: Anger at show that lets firms track down relatives to cash in on unclaimed wills'. *Daily Mail* (London, 4 February 2010) available at <<http://www.dailymail.co.uk/news/article-1248377/BBC-bounty-hunters-row-Anger-lets-firms-track-relatives-cash-unclaimed-wills.html>> (accessed 20 June 2011). See also Title Research, 'Consumer protection needed on 'heir hunters' contingency fees' available at <<http://www.titlesearch.com/Resources/Articles/Heir-hunters-fees-unfair-unlawful>> (accessed 20 June 2011).

entitlements of the beneficiaries they sign up.⁷⁴ It can be speculated that such expenses involved in administration fails to fulfil the presumed wishes of the deceased.

Executors have a duty to attempt to find all heirs to an estate. In some cases, however, there will be ‘missing heirs’: heirs who are known to exist, but cannot be found.⁷⁵ Where this occurs, Paul Lewis, former Partner at Ledingham Chalmers LLP, Aberdeen,⁷⁶ explains that the executor should take out Missing Beneficiary Indemnity Insurance to insure against the case where a missing heir turns up and asserts his claim on the estate.⁷⁷ Paying the premium for the title indemnity will further diminish the size of an intestate estate. This is, again, not an efficient way of fulfilling the wishes of the deceased.

(ii) Size of Share

As the trace for heirs moves from the field of close relatives to those who are more remote there is an increase in the number of potential beneficiaries. The estate must, therefore, be split into smaller pieces and each individual beneficiary inherits less.⁷⁸ In order to make a proper assessment it is prudent to consider the size of the average intestate estate. In a recent consultation paper, the Law Commission in England and Wales note that the average intestate estate is valued at £56,000.⁷⁹ This is significantly smaller than the average testate estate, which is valued at £160,000.⁸⁰ Further, most intestate estates are ‘relatively modest’⁸¹ with a third being valued at less than £25,000.⁸² Given that the size of the intestate estate is generally modest, a large number of laughing heirs will inevitably inherit a fairly negligible amount.

⁷⁴ See Todd & Fernandez (n 73). Most heir hunting firms do not display the percentage commission they will charge on their websites. Various firms, including Fraser & Fraser and Kin were contacted to enquire as to what they would charge, but none chose to respond. See generally <<http://www.fraserandfraser.com>> and <<http://www.kin.uk>> (accessed 20 June 2011).

⁷⁵ Law Com Consultation No. 191 (n 34) at para. 6.58.

⁷⁶ Interview with Paul Lewis, Partner, Ledingham Chalmers LLP, (Aberdeen 10 March 2010). Mr Lewis has since left his position at Ledingham Chalmers.

⁷⁷ An example of a provider of such insurance is Title Research. See Title Research, ‘Missing Beneficiary Insurance’ available at <<http://www.titleresearch.com/Services/Missing-beneficiary-insurance>> (accessed 20 June 2011).

⁷⁸ See, for example, *West v Weston* (1998) 44 NSWLR 657, as cited in NSW Law Com Report No. 116 (n 49) at para. 9.43

⁷⁹ Law Com Consultation No. 191 (n 34) at para. 1.29.

⁸⁰ *ibid.*

⁸¹ *ibid* at para. 1.30.

⁸² *ibid* at para. 1.29.

If the intestacy rules are about deciding how to slice the cake, we must be conscious of the fact that in many cases the cake is very small.⁸³

The absurdity of this can be seen in practice. In Sussman's survey⁸⁴ a case was highlighted where twelve heirs were identified: a nephew and eleven grandchildren of the deceased's half-siblings. Three of the beneficiaries inherited just \$18.19 from the estate. It was also pointed out that this figure would have been even smaller had all eligible heirs been located. As one laughing heir commented; 'the estate was so split up that no one benefited except the lawyers.'⁸⁵

Allowing half-blood relatives to inherit on intestacy may be fair, but an extension to grandchildren of half-siblings results in a large pool of potential beneficiaries. When the law was reformed to allow half-blood siblings to inherit in 1964,⁸⁶ Parliament should have legislated to balance the effects of this reform by putting a limitation on inheritance on intestacy.

Problems of this kind continue to emerge in the situation where a valid will is made that refers to 'heirs'.⁸⁷ Paul Lewis⁸⁸ recounted a situation involving a testate estate which illustrates this. The will concerned was that of a husband who had died in the 1960s, leaving a liferent to his wife. His wife died in 2004. Due to the manner in which the will was framed, vesting of the liferent property was not postponed and as such, when the wife died, the property subject to the liferent vested in relatives of the husband in the 1960s. Hundreds of beneficiaries to the estate were found, some living as far away as Australia. Given the number of people entitled to inherit on the estate, some shares were as little as £1000. This example concerned a larger testate estate and it is clear that had the same number of heirs been found for a more modest estate, the size of each inheritance would not have been worth the search; the estate could not be split enough times to give each beneficiary a share.

These problems could be remedied, at least to some extent, by a limitation on the categories of heirs who may inherit on an intestate estate. Cases would be less complicated, costly and time-consuming if it was not necessary to trace bloodlines back to an indefinite degree.⁸⁹ A reduction in the number of potential heirs would result in a reduced likelihood of 'missing heirs', negating the need for Missing Beneficiary Indemnity Insurance, or at

⁸³ Law Com Consultation No. 191 (n 34).

⁸⁴ See Sussman *et al* (n 2) at p. 141

⁸⁵ Sussman *et al* (n 2) at 140

⁸⁶ See Succession (Scotland) Act 1964, s 2(2).

⁸⁷ As noted above, distributive provisions are also used in the interpretation of a valid will.

⁸⁸ Interview with Paul Lewis (n 76).

⁸⁹ Note Lomenzo's emphasis on limiting delays, expenses and liabilities connected with the identification and notification of heirs. Lomenzo (n 30) at pp. 952-954.

least cutting the cost of premiums. Overall, in practice, the administration of intestate estates would be much easier.⁹⁰

Whilst larger estates may be able to more readily withstand being reduced in value by such administrative expenses, the Scottish Law Commission have noted that

it is more important...that [the rules on intestate succession] should be suitable for small and medium sized estates than they should be suitable for very large estates.⁹¹

As a result, costly administrative outgoings should not be necessary in the large majority of cases. Such a system benefits only lawyers and heir hunters. If one accepts, as Scots law does, that the purpose of intestacy provisions is to implement the presumed wishes of the deceased, it is difficult to see how the current law can be reconciled with this purpose.

C. Comparative Analysis

When considering the reform of primogeniture, Lord Craigton in the House of Lords noted that other legal systems had abolished such notions a significant time earlier.⁹² England and Wales, for example, had changed their law in 1922; forty-four years before Scotland. It is therefore prudent to take into consideration the actions of other comparative jurisdictions in the specific context of the laughing heir.

Both English law and the Uniform Probate Code limit inheritance on intestacy at the level of grandparents. Surviving uncles and aunts of the deceased may succeed, but great-grandparents and their descendants are excluded.⁹³ If there is no entitled relative, the estate escheats to the State⁹⁴ It is interesting to note that the English Law Commission considered reforming the law to reflect the Scottish 'unlimited system', but quickly discarded the idea. It was felt to 'have little practical benefit, and would be difficult to justify in principle.'⁹⁵

⁹⁰ Interview with Paul Lewis (n 76). It should be noted that much emphasis is put on certainty, clarity and simplicity in the laws of intestacy. Note that this aim is mentioned by both the Law Commission for England and Wales (Law Commission, *Family Law: Distribution on Intestacy* (Report No. 187, London 1989) at para. 1.33) and the Law Reform Commission of New South Wales (NSW Law Com Report No. 116 (n 49) at para. 1.32).

⁹¹ SLC Report No. 124 (n 23) at para. 2.2. See also D Reid, 'From the Cradle to the Grave: Politics, Families and Inheritance Law' (2008) 12 *Edinburgh Law Review* 39, at pp. 413-414.

⁹² Hansard HL vol 256 col 552 (12 March 1964).

⁹³ Administration of Estates Act 1925, s46(1)(v); Uniform Probate Code s2-103.

⁹⁴ Or the Duchy of Lancaster or Duke of Cornwall, if heritable property in these areas is concerned. Administration of Estates Act 1925, s 46(1)(vi), Uniform Probate Code s 2-105

⁹⁵ Law Com Consultation No. 191 (n 34) at paras. 6.57-6.58.

Similarly, succession laws in Australia have been the subject of recent reform in an attempt to unify succession law across the country. The introduction of the Succession Amendment (Intestacy) Act 2009 allows relatives no more distant than cousins to inherit on intestacy,⁹⁶ thus upholding the position of restricted inheritance.

As a result of these restrictions, it is submitted that the law in these countries is more readily able to effectuate the core purpose underlying the intestate rules; fulfilling the presumed wishes of the deceased and allowing only 'worthy' heirs to inherit. The law is also more suited to the modern structure of society.

4. Proposals Against Change

In light of the various policy and practical reasons for introducing a limitation on intestate succession there should be equally persuasive arguments against reform if the current position is to be justified. It is, however, difficult to find persuasive reasoning behind the Scottish Law Commission's decision not to substantively consider the area, nor propose reform, in either of its most recent succession reports.⁹⁷ This fact has not gone unnoticed by previous commentators. DeRosa, for example, states that

other than the legislator's belief that intestate decedents would prefer anyone except the state to inherit their property, the policy reasons supporting a traditional intestacy scheme remain vague.⁹⁸

Lomenzo, too, comments that 'other rationales behind such provisions remain disappointingly unarticulated.'⁹⁹ While it is possible to ascertain a number of reasons as to why the implementation of an artificial limit may not be desired, it is submitted that this reasoning lacks strength. A consideration of the main proposals against reform shall be considered in order to demonstrate this point.

A. No public demand

Despite the fact that intestacy provisions have an important social impact, this is not an area of law reform that has been given much public attention. A lack of attention can often be translated into a lack of demand. This, however, fails

⁹⁶ See Succession Amendment (Intestacy) Act 2009 Sch.1, amending Succession Act 2006 ss. 127 - 131.

⁹⁷ SLC Report No. 124 (n 23) and SLC Report No. 215 (n 23).

⁹⁸ DeRosa (n 3) at p. 174.

⁹⁹ Lomenzo (n 30) at p. 949.

to recognise the general lack of knowledge that exists in this area. This factor is highlighted by a study carried out on behalf of the Scottish Consumer Council, which found that many people were unaware of the comparative rights on intestacy of cohabitants and estranged spouses, step-children and children from previous marriages.¹⁰⁰

It should also be noted that a lack of public demand was an argument used in earlier reforms against the abolition of primogeniture.¹⁰¹ Despite this, the law was reformed, for the reason that it was failing to fulfil its modern purpose. It is submitted that the law on the laughing heir is another example of a situation where the law should be changed, despite a lack of (obvious) public demand, due to stronger reasons in favour of reform.

B. Wishes of the Deceased

Opponents of reform raise fears that a limitation on the categories of heirs who are entitled to inherit may be actually be against the wishes of the deceased. This is due to the fact that a limitation would necessarily result in an increased occurrence of estates passing to the Crown as *ultimus haeres*. Paul Lewis¹⁰² suggests that this is the main problem with limiting inheritance and is the probable reasoning behind the lack of support for reform when the proposal was raised both in 1950¹⁰³ and 1990.¹⁰⁴

Historical arguments suggest that the State is regarded as deserving by its citizens, since it maintains charitable and educational institutions used by the whole population.¹⁰⁵ Today, however, it is unlikely that many would take this view. In fact it is speculated that in many cases, the treasury fund may be the last place that a person would wish his estate to end up..

This position is reflected in a general study on attitudes to inheritance carried out on behalf of the Joseph Rowntree Foundation. It was found that inheritance tax was a 'very unpopular tax.'¹⁰⁶ It follows that those people who are against the State inheriting a portion of an estate via tax mechanisms are likely to be similarly against any reform which allows the State to more frequently inherit estates in their entirety. It is submitted that this is a legitimate

¹⁰⁰ See S O'Neill, *Wills and Awareness of Inheritance Rights in Scotland – Summary of Findings* (Scottish Consumer Council, Edinburgh 2006) at p. 2.

¹⁰¹ Mackintosh Report (n 19) at para. 7.

¹⁰² Interview with Paul Lewis (n 76).

¹⁰³ See Mackintosh Report (n 19) at para. 26.

¹⁰⁴ SLC Report No. 124 (n 23) at para. 2.28

¹⁰⁵ See, for example, Cavers (n 1) at p. 210.

¹⁰⁶ Rowlingson & McKay (n 60) at p. 70.

concern.¹⁰⁷ When contemplating reform, one must always have the purpose of the legislation in mind. Since the core purpose of intestacy legislation is to represent the presumed wishes of the deceased, it is important to seriously consider public opinion on this type of law reform.

This concern, however, is not without remedy. There are two ways in which an intestacy limitation could be put in place without the consequent increase of revenue to the State. Firstly, if a limit is drawn on the categories of blood relatives that may inherit, other categories could be introduced to determine who would be entitled to succeed to the estate on a discretionary basis. The Scottish Law Commission considered the possibility of introducing a system whereby stepchildren could inherit on intestacy if they had been 'accepted as a child of the family'.¹⁰⁸ This was dismissed, however, on the basis that asking questions of degrees of 'acceptance' would introduce an arguably unacceptable level of uncertainty.¹⁰⁹ It followed that if there is not enough justification for step-children's inclusion on their own merit, there is unlikely to be sufficient justification to include them simply to prevent an estate passing to the Crown. As a result the second alternative is likely to be a more attractive proposal.

The second suggestion has been proposed in various forms on numerous occasions by both academics and law reformers. The suggestion is simply that estates that fall to the State should be specifically be earmarked for public or charitable services.¹¹⁰ In Alberta, for example, money which goes to the State from intestacy is used to fund education, by holding it in trust for the State's universities.¹¹¹

The proposal that estates should go to a charitable purpose, rather than generally to the State, is an appealing one. This solution, however, like any other, is not without challenge. The main problem is reaching a consensus as to the kind of purpose for which proceeds should be used. Something similar to a Common Good fund may be appropriate. Aberdeen City Common Good Fund¹¹² historically gave money to fund the building of hospitals or schools for

¹⁰⁷ Although it has been suggested that this is 'more an emotional reaction than one rooted in fact and logic.' Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Report No. 78 1999) at p. 159.

¹⁰⁸ SLC Report No. 215 (n 23) at paras. 2.31-2.34.

¹⁰⁹ *ibid* at para. 2.34. It is noted that a cohabiting partner may apply to the court for financial provision on intestacy. A partner is not entitled automatically, however, and so distant relatives may still inherit, see Family Law (Scotland) Act 2006, s29.

¹¹⁰ Cavers (n 1) at p. 210.

¹¹¹ Ultimate Heir Act, RSA 2000, s9 available at <<http://www.canlii.org/en/ab/laws/stat/rsa-2000-c-u-1/latest/rsa-2000-c-u-1.html>> (accessed 20 June 2011).

¹¹² Controlled by the Local Authority. See, for example, Aberdeen City Council, 'Common Good of the City of Aberdeen' available at <http://www.aberdeencity.gov.uk/LocalHistory/common_good/loc_common_good.asp> (accessed 20 June 2011).

example;¹¹³ it is, however, currently used mainly for Council hospitality and the upkeep of the civic car.¹¹⁴ It is questionable, therefore, whether a fund controlled by a Local Authority would be any more popular than simple State acquisition.

It is submitted that an independent fund, which would benefit a number of different causes, would be a much more desirable outlet for estates that would otherwise fall to the State. This would be socially advantageous and is likely to receive greater public favour. This solution would therefore negate any argument against the reform proposal on this basis.

C. The Scottish System

Meston states that,

it appears now to be accepted in Scotland that an artificial limit on the circle of relations entitled to succeed on intestacy is repugnant to our system of law.¹¹⁵

He gives no reasoning or explanation for this statement. It seems anomalous that a limitation would be repugnant to our system of law and yet embraced in countries with similar social structures. This poses a question as to whether there is something fundamentally different about the Scottish legal system which renders a limitation on the relatives who can inherit on intestacy 'repugnant.' It is submitted that there is not. This can be said with conviction by looking, again, at the roots and purposes of the laws of succession in Scotland.

As has been noted above, the Scottish position on the intestate succession is feudal in its roots. English law prior to 1925 is likely to have been modelled on a similar societal structure. Despite this, the English legal system has imposed a system of limitation for intestacy. Scots law does, of course, differ from that of English law due to the influence of civilian systems and Roman roots. It is interesting to note, however, that the system of collateral succession under Roman law did not include a search as wide as the current Scottish one. Although there was unlimited *successio granduum*, there was limited representation.¹¹⁶ On this basis, it appears that there is little historical reasoning for Meston's statement.

¹¹³ *ibid.*

¹¹⁴ Aberdeen City Council, 'The Present Day Common Good' available at <http://www.aberdeencity.gov.uk/LocalHistory/common_good/loc_present_day_common_good.asp> (accessed 20 June 2011).

¹¹⁵ Meston (n 20) at p. 82

¹¹⁶ B Nicholas, *An Introduction to Roman Law* (Clarendon Press, Oxford 1962) at p. 251.

Meston also mentions that Scots law

[adheres...] to the long-standing principle that an infinite search must be made following the principles of the parentelic system which we use.¹¹⁷

It is unclear whether he means this as an argument for the retention of the current system. It is submitted that this is, in fact, justification for a reform in the law. The law of succession must be flexible to modern society in order to fulfil its purpose. If a rule of the law of succession has been as long-standing as this, one must seriously consider whether it serves a current purpose. It is submitted that, in this case, the purpose of this provision no longer corresponds to the purpose of intestate succession law as a whole.

D. Heir Hunters

An industry which certainly has an active interest in this area of law is that of the professional genealogists, or heir hunters. They make their money - indeed, in many cases they make a great deal of money¹¹⁸ - from tracing heirs in more complicated cases where it is difficult to find beneficiaries. The majority of their work comes from solicitors acting as executors to estates where they are unable to find beneficiaries. If it is made easier in practice to trace heirs by limiting the search, fewer cases would be referred to them and thus they would lose business.

It has been suggested by DeRosa that this industry has been taken into consideration by legal systems that have opted not to limit intestate succession.¹¹⁹ It should, however, be noted that heir hunting is still a thriving business in England,¹²⁰ despite the limit which stops relatives more distant than the descendants of grandparents inheriting on intestacy. It should not, therefore, be a consideration that bars future reform that would be of benefit to society as a whole.

E. The Effect of Modern Technology

In response to some of the arguments made in the previous chapter concerning the effect of modern living on the relationships between more distant relations, there are often corresponding points made concerning the effect that modern

¹¹⁷ Meston (n 20) at p. 82.

¹¹⁸ See discussion above.

¹¹⁹ DeRosa (n 3) at p. 174. There is, however, no evidence to suggest that there has been undue influence on proposed law reform in Scotland from heir hunters.

¹²⁰ There are many companies which operate in England, the largest being Fraser & Fraser (see n 74).

technology has on modern relationships and on the practicalities of finding heirs.

Through use of modern technology it is not difficult to communicate with someone on the other side of the world. As a result, although people are more likely to move away from where the family was centred, people can still maintain bonds. It is conceded that this is indeed possible, and modern technology is likely to keep siblings or parents and children who live apart closer. It is also possible for second cousins, or more distant relatives, who live at opposite sides of the globe to keep in touch in a similar way. Modern technology rarely, however, creates relationships amongst distant family members who are unaware of their remote relatives' existence.¹²¹ Thus, whilst the possibility for an extension in relationships exists, the likelihood of this is more questionable. Indeed, New South Wales Law Reform Commission took this viewpoint when considering the issue in their jurisdiction.¹²²

It is without doubt that modern technology has made the job of tracing heirs much easier. This advancement, however, does little to benefit anyone but the professional heir hunters. Fees charged by many heir hunting firms are based not on hours spent on a case, but on a percentage of the estate the heirs they 'sign up' are entitled to. This means that while it may be quicker to trace heirs, this is not likely to have such an impact financially on the estate.¹²³

5. Reform Proposals

It is submitted, therefore, that the strength of the argument in favour of reform, outweighs the insufficient justification that exists for maintaining the current position. As a result, it is the intention of the author to consider the alternative reform proposals that exist, before making tentative suggestions for the most attractive option.

A. Options for Reform

There is more than one viable way in which the laughing heir could be prevented from inheriting, and thus more than one option for reform. Firstly,

¹²¹ Manitoba Law Reform Commission submitted that 'in our mobile and urban society most intestates are now unlikely to know, let alone have a familial relationship with, the more remote relatives'. Manitoba Law Reform Commission, *Intestate Succession* (Report No. 61, 1985) at p. 34.

¹²² NSW Law Com Report No. 116 (n 49) at para. 9.42.

¹²³ If many heir hunting firms were to continue to charge fees as a percentage of the value of heirs' inheritance, the amount they receive will not be affected by the time it takes to locate and sign up beneficiaries.

intestate inheritance could be abolished altogether.¹²⁴ However, this move, reminiscent of communist Russia, would likely be completely against the presumed wishes of the intestate and is likely to receive little favour with the general public. An alternative option would be to abolish the order of succession entirely for a purely discretionary system; with any 'worthy' heir having the opportunity to apply for a share of the estate. This, however, would seriously impinge on certainty and would leave the system open to abuse. The current system which introduces a discretionary element in the narrow context of cohabiting partners¹²⁵ can be criticised for introducing such uncertainty, and for increasing the burden placed on court time. Use of a discretionary system to deal with the distribution of every single intestate estate would undoubtedly be open to much stronger criticism. The final alternative, therefore, is to introduce a system of limitation on the line of intestate succession as based on the English, American and Australian legislation. It is this option that the present author recommends.

B. Reform Structure

In proposing reform of the law in accordance with a system of limitation, the question must be asked as to how this reform should be structured; where the line of limitation is to be drawn. It is suggested that this limit should mirror English law and be placed at the level of the descendants of grandparents of the deceased. The order of succession outlined in s2 of the 1964 Act should otherwise remain unchanged. This effectively means that subsections 2(1)(h) and 2(1)(i) of the Succession (Scotland) Act 1964 would be repealed.

The English provisions for limitation have been described as 'modest'¹²⁶ and thus are probably the most appropriate reform structure for a legal system which previously allowed a limitless search for heirs. On the other hand to allow relatives more remote than the descendants of the intestate's grandparents to inherit – uncles and aunts and their descendants – would be to leave open the option of second cousins inheriting and thus a much wider pool of potential beneficiaries. A limit based on the English provision is likely to meet the requirements of practicality and purpose and, at least in most cases, there would also no longer be excessive splitting of the estate.

¹²⁴ This was a step considered, for example, by TE Atkinson, 'Succession Among Collaterals' (1934 -1935) 20 Iowa Law Review 185 at p. 185

¹²⁵ Under the Family Law (Scotland) Act 2006, s29, a cohabiting partner of an intestate deceased may apply to the court for a capital sum or transfer of property from the estate. It is at the discretion of the court whether this should be granted, and if so, the size of the share given to the surviving partner.

¹²⁶ Cavers (n 1) at p. 212

An inevitable consequence of such a change in the law is that the Crown acquires more frequently as *ultimus haeres*. In order to avoid this unpopular result it is suggested that estates for which there is no heir should go to a specific charitable cause. The precise form of this fund would be a consideration for Parliament, but it is suggested that one which is distributed independently between a number of different causes would be likely to be the most satisfactory.

Lastly, it should be noted that where no heirs can be identified, the system of application to the QLTR by any 'worthy' heirs who cannot inherit under intestacy rules should still exist. This could be used, for example, where there are relatives who, despite being distantly related to the deceased, were still close to him, or where there is evidence that the deceased would have wanted at least a portion of his estate to go to a particular charity. This, it is submitted, further helps to represent the wishes of the deceased and satisfy the ultimate purpose of the intestate succession rules.

It is submitted that this proposal for reform modernises the law and is better suited to serving the core purpose. Morally deserving beneficiaries are better catered for under this system, since they are able to apply to the QLTR for financial provision from the estate, with a reduced chance that a distant relative will inherit before this can happen. The proposed reforms also protect the interests of beneficiaries under a will, particularly charities, from challenges of invalidity from distant relatives who would stand to succeed on intestacy.¹²⁷ Thus certainty is increased in both intestate and testate succession. A limitation would also make the practice of administration of an intestate estate simpler and increases certainty that all viable heirs have been identified and located. This means that the typically smaller intestate estate is not as likely to be eroded by expenses for heir hunting firms and indemnity insurance against missing heirs. These effects can be achieved whilst still having regard for legitimate objections over estates going to the Crown.

6. Conclusion

The problem of the laughing heir is one that has been largely overlooked in importance. This is particularly due to the fact that the subject has been overshadowed in the past by more pressing issues, such as the abolition of primogeniture and the equalisation on intestacy of the rights of maternal relatives with those of paternal relatives. The relevance and importance of this problem will, however, become more apparent in future years as the impact of recent social trends, specifically the post-World War II baby boom followed by a decline in birth rate, takes effect.

¹²⁷ As with the case of Miss Wendel noted above (n 9).

While other legal systems place a limitation on those who may succeed to an intestate estate, Scots law currently allows a laughing heir to inherit through an infinite search for heirs. The principle purpose of intestate succession is to carry out the presumed wishes of the deceased through providing for deserving beneficiaries. This purpose should be carried out with the objectives of clarity, simplicity and certainty in mind. The arguments for limiting those who can succeed on intestacy to close relatives were based on fulfilling this aim. Allowing remote relatives to inherit on intestacy is not suited to the structure of today's society, where families are becoming increasingly nucleated. Current law is suited to succession in a feudal system. The aim of this paper was, therefore, to show that Scots law is in real need of reform.

The proposal for reform detailed above sets out a way in which the law can be modernised and more effectively achieve its purpose. A limit at the level of the descendants of grandparents, similar to the law in England and Australia, would suitably reform the law of intestate succession in Scotland for the needs and values of today's society.

It is noted as a final observation that, of course, the problem of the laughing heir would be greatly alleviated if instances of intestacy were reduced. A valid will removes almost all uncertainty surrounding the wishes of the deceased. Attempts should be made to remove the fears surrounding the making of a will.¹²⁸ It is hoped that reform of the law of intestate succession, and wide publicity afforded to an often forgotten area, would go some way to encourage this aim.

¹²⁸ See Rowlingson & McKay (n 60) at p. 69; and Hirsch (n 58) at p. 1048.

Evidentiary Barriers to Conviction in Cases of Domestic Violence: A Comparative Analysis of Scottish and German Criminal Procedure

MICHAEL C. WUTZ*

1. Introduction: The Problem

The public perception of domestic violence has changed significantly over the last few decades in Western societies. Previously regarded as a private matter by society and state authorities, domestic abuse is now widely seen as an issue of public concern, and numerous policy initiatives have been launched in jurisdictions around the world to reduce domestic violence by both legal and other means of intervention.¹

Despite this change in perception, domestic violence is still both widespread and difficult to prosecute. The Scottish Crime and Justice Survey 2008-09 on Partner Abuse found that 18% of the population have experienced a form of partner abuse at least once since the age of sixteen.² Police recorded incidents have seen a steady rise during the last decade in Scotland.³ Similarly, in Germany, a first representative study published in 2004 indicated that domestic violence occurs in about 25% of relationships.⁴ In the vast majority of cases violence is committed by a male perpetrator against a female partner.⁵ Although many different forms of abusive behaviour and categories of offences can be subsumed under the heading of 'domestic violence', criminal

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¹ G Davis & A Cretney, 'Prosecuting domestic assault' [1996] *Criminal Law Review* 162 at pp. 162-163; D Ohl, 'Häusliche Gewalt – Beschreibung eines gesellschaftlichen Problems' (*domestic violence - description of a social problem*) *FPR – Familie, Partnerschaft, Recht* 2005, 6 at p. 7.

² Scottish Executive, *Scottish Crime and Justice Survey 2008-09: Partner Abuse* (Scottish Government Social Research, Edinburgh 2009) at para. 2.1.

³ Scottish Executive, *Domestic abuse recorded by the police in Scotland 2008-09* (24 November 2009) available at <<http://www.scotland.gov.uk/Resource/Doc/292984/0090391.pdf>> (accessed 23 June 2010) at para. 2.

⁴ Ohl (n 1) at p. 7.

⁵ Scottish Executive (n 3) at para. 2: 84%; self-reported studies such as the *Scottish Crime and Justice Survey 2008-09: Partner Abuse* (n 2, at para. 3.5.1) indicate a somewhat higher percentage of female perpetrators.

prosecution in this area is often extremely difficult due to certain common characteristics unique to domestic violence cases. In a number of cases – research findings and estimations range from around 50 to 90%⁶ – victims withdraw their initial complaint and their support for the prosecution. Due to this phenomenon attrition rates in domestic violence cases are high in many jurisdictions, because prosecutors tend to automatically dismiss the case if the victim withdraws the complaint; there is often no evidence other than the victim's statement which would allow them to proceed.⁷

It is important to consider the criminological research findings on the dynamics of domestic violence in order to understand the phenomenon of complaint withdrawal. Domestic abuse is typically 'systematic, continual, and escalatory'⁸. Abuse typically takes the form of a 'cycle of violence'⁹ which can be divided into three periods: a 'tension building phase', an 'acute battering phase', and a 'honeymoon phase', which is marked by apologies and regret on part of the perpetrator and by attempts for reconciliation.¹⁰ This cyclical nature is visible in high recidivism rates among domestic abusers.¹¹ In addition, there is now broad consensus among criminologists that domestic violence is an 'instrumental'¹² form of violence which is systematically used to control the partner, and not just the result of the perpetrator's 'loss of control, or (...) inability to manage anger'.¹³ These aspects show that various pressures operate upon domestic violence victims to recant an earlier statement. Particularly in the 'honeymoon phase', recantation will often be motivated by hopes for reconciliation with the partner.¹⁴ Due to the continuous control exercised by an abusive partner, the fear and threat of further violence, retaliation and escalation are also major reasons for the withdrawal of an initial complaint.¹⁵

⁶ DE Beloof & J Shapiro, 'Let the truth be told: proposed hearsay exceptions to admit domestic violence victims' out of court statements as substantive evidence' (2002) 11 Columbia Journal of Gender and Law 1 at p. 3; LM De Sanctis, 'Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence' (1996) 8 Yale Journal of Law and Feminism 359 at p. 367; L Ellison, 'Prosecuting Domestic Violence without Victim Participation' (2002) 65 Modern Law Review 834 at p. 834.

⁷ Cf. A Corsilles, 'No-drop policies in the prosecution of domestic violence cases: guarantee to action or dangerous solution?' (1994) 63 Fordham Law Review 853 at p. 857; Davis & Cretney (n 1) at pp. 164 and 166.

⁸ Ellison (n 6) at p. 844.

⁹ T McCormick, 'Convicting Domestic Violence Abusers When the Victim Remains Silent' (1998) 13 BYU Journal of Public Law 428 at p. 431.

¹⁰ LA Letendre, 'Beating again and again and again: Why Washington needs a new rule of evidence admitting prior acts of domestic violence' (2000) 75 Washington Law Review 973 at pp. 975-976; McCormick (n 9) at p. 431.

¹¹ Letendre (n 10) at p. 975.

¹² De Sanctis (n 6) at p. 388.

¹³ *ibid*; see also Corsilles (n 7) at p. 881.

¹⁴ *ibid* at p. 369; Letendre (n 10) at p. 979.

¹⁵ *ibid* at p. 368; Ellison (n 6) at p. 839.

This article analyses the ability of criminal justice systems to meet the particular evidentiary challenges posed by domestic violence cases using the example of two specific jurisdictions: the Scottish and the German criminal justice systems. The law of evidence in both systems will be analysed from the narrow angle of domestic violence prosecutions and on the basis of the described characteristics of domestic abuse. The dichotomy between adversarial and inquisitorial systems of criminal justice makes this analysis particularly interesting. In its exploration of both systems the thesis that this article seeks to defend is that, although the German law of evidence is somewhat more favourable to conviction in cases of domestic violence, the difference between both systems is not as significant as the classical distinction between adversarial and inquisitorial systems may suggest. Given that the term 'domestic violence' is most commonly used to describe violence against intimate partners, the analysis will focus on such conduct. It should, however, be kept in mind that other family members, especially children, may also frequently be direct or indirect victims of violence in the home.¹⁶

2. Evidentiary barriers in the Scottish system

A. Influence of the principle of opportunity

The Scottish system follows the adversarial tradition of discretionary prosecution under the principle of opportunity as opposed to mandatory prosecution under the principle of legality.¹⁷ This means that prosecutors are not obligated to press charges when there is sufficient evidence of a criminal offence having been committed, but have discretion to judge whether prosecution would be in the public interest. Several adversarial systems have introduced a 'no drop-policy'¹⁸ in domestic violence cases which regulates the exercise of prosecutorial discretion and urges prosecutors to continue the case in the event of victim withdrawal.¹⁹ In Scotland, the victim has traditionally been presumed to be the main witness for the prosecution.²⁰ Moreover, the Prosecution Code which has been issued by the Crown Office and Procurator Fiscal Service (COPFS) cites the victim's attitude to prosecution as one factor the

¹⁶ Ohl (n 1) at pp. 9-10.

¹⁷ P Duff, 'The Prosecution Service: Independence and Accountability' in Duff and Hutton (eds), *Criminal Justice in Scotland* (Dartmouth, Aldershot 1999) 115 at p. 118.

¹⁸ Corsilles (n 7) at p. 859.

¹⁹ *ibid* at pp. 856 and 859; Scottish Executive, *Violence against women - a literature review* (2005) available at <<http://www.scotland.gov.uk/Resource/Doc/37428/0009571.pdf>> (accessed 24 June 2010) at p. 60.

²⁰ Scottish Executive (n 19) at p. 59.

prosecutor should consider when deciding whether to continue a case.²¹ However, the COPFS and the Association of Chief Police Officers in Scotland (ACPOS) have recently issued a Joint Protocol which establishes a presumption in favour of prosecution in domestic abuse cases.²² This suggests that prosecutors will not drop charges if the victim withdraws an initial complaint. On the other hand, it has to be considered that many domestic violence cases are dismissed because there is insufficient admissible evidence available and not simply because the prosecutor would defer to the complainant's wishes.²³ Given that domestic violence mostly occurs in the private sphere witnesses are typically lacking.²⁴ Evidence has to pass the 'sufficiency test' regardless of the prosecution scheme that has been adopted. These aspects considered, it may be concluded that the Scottish prosecution model is more favourable to the conviction of domestic violence offenders than a discretionary prosecution regime without a specific prosecution policy for domestic abuse, but that its significance for the conviction of domestic abusers must not be exaggerated.

B. The victim as a compellable witness

Closely related to the question of mandatory or discretionary prosecution is the question of whether a domestic violence victim should be a *compellable* witness against the perpetrator. A compellable witness can be forced to testify at trial under the threat of arrest and a charge of contempt of court if they fail to do so.²⁵ Since the 1980s, several jurisdictions have adopted the position that the compellability of victims is an important measure in the fight against domestic violence.²⁶ If the victim simply has no choice as to whether to testify, this would considerably ease the pressures upon her to recant an earlier statement, would remove responsibility for the prosecution from her and thereby give the perpetrator less motive for retaliatory violence. Cretney and Davis argue that the low convictions rates in domestic abuse cases are 'a direct result of victims'

²¹ Prosecution Code (2001) available at <<http://www.copfs.gov.uk/Resource/Doc/13423/0000034.pdf>> (accessed 14 July 2010) at para. 07-05.

²² COPFS and ACPOS, 'In partnership, challenging domestic abuse' (2008) V3/12/08, available at <http://www.acpos.police.uk/Documents/Policies/CRIME_ACPOS-COPFSDomesticAbuseJointProtocolV3_Dec%2008.pdf> (accessed 14 July 2010) at paras. 12 and 23.

²³ Cf. De Sanctis (n 6) at pp. 370-371; Ellison (n 6) at p. 836.

²⁴ *ibid* at p. 370.

²⁵ F Raitt, *Evidence: Principles, Policy and Practice* (Thomson/W Green, Edinburgh 2008) at para. 3-05; M Ross & J Chalmers, *Walker and Walker: The Law of Evidence in Scotland* (3rd edn Tottel Pub., Haywards Heath 2009) at para. 13.2.9.

²⁶ S Edwards, 'Compelling a reluctant spouse' (1989) 139 New Law Journal 691 at p. 691.

inability or unwillingness (...) to give evidence when called upon to do so'.²⁷ In Australia, the New Wales Task Force on Domestic Violence stated that 'the placing of a choice in the hand of the woman herself is almost an act of legal cruelty'.²⁸ Some women's rights organisations have also advocated contempt of court convictions of domestic violence victims.²⁹

Prior to the recent enactment of the Criminal Justice and Licensing (Scotland) Act 2010 s86 the position in Scots law as regards the compellability of domestic violence victims required an understanding of the distinction between three groups of partners: spouses, civil partners and other intimate partners. The spouse was generally not a compellable witness for the prosecution.³⁰ There existed, however, a common law exception to this general rule, which was of significance in domestic violence cases: the spouse was a compellable witness against the accused if he or she was the alleged victim of the offence charged, and this especially included cases where one spouse was accused of having assaulted the other.³¹ The exception appeared to be based on considerations of expediency.³² A civil partner was not a compellable witness for the prosecution,³³ whether or not being the alleged victim of the offence – an inconsistency that appeared to be hard to justify.³⁴ Other partners have always been fully compellable witnesses against the accused.³⁵ Consequently, a large number of intimate partners have already been compellable witnesses in domestic violence cases under the previous law. Section 86 of the Criminal Justice and Licensing (Scotland) Act 2010 has now removed any testimonial privileges of spouses and civil partners and has placed these partners on an equal footing with other partners.³⁶

The compellability of intimate partners is certainly a procedural device that can facilitate the conviction of domestic abusers in some cases. Some victims will be motivated to give evidence in support of the prosecution case by the prospective sanctions for a failure to do so, and the fact that the victim has no legal choice whether or not to participate will encourage some prosecutors to

²⁷ A Cretney & G Davis, *Punishing violence* (Routledge, London 1995) at p. 144.

²⁸ Report of the New Wales Task Force on Domestic Violence (1981) as cited by Edwards (n 26) at p. 691.

²⁹ Edwards (n 26) at p. 693.

³⁰ See s264(2)(a) Criminal Procedure (Scotland) Act 1995 and Raitt (n 25) at para. 3-33.

³¹ F Davidson, *Evidence* (Thompson/W. Green, Edinburgh 2007) at para. 8.49; Ross & Chalmers (n 25) at para. 13.8.1; it should, however, be noted that the spouse could not be compelled to disclose any marital communications, which were protected by a special statutory privilege (see s264(2)(b) Criminal Procedure (Scotland) Act 1995 and Davidson (*ibid*) at para. 13.67).

³² *ibid* at para. 8.49 fn 220.

³³ S130(2) Civil Partnership Act 2004.

³⁴ Cf. Davidson (n 31) at para 8.48 fn 218.

³⁵ Raitt (n 25) at para. 3-37.

³⁶ In force as of 28 March 2011 by virtue of the Criminal Justice and Licensing (Scotland) Act 2011 (Commencement No 8, Transitional and Saving Provisions) Order 2011, Schedule. See also Criminal Justice and Licensing (Scotland) Act 2010, Explanatory Notes, at paras. 408-413.

proceed with a case. Nevertheless, it appears that advocates of witness compellability tend to overestimate its significance. In practice, reluctant witnesses are also weak witnesses³⁷ and compellability *per se* will often not change a victim's attitude towards testifying.³⁸ As Beloof and Shapiro put it

[t]he sanctions of the batterer [i.e. retaliatory acts of violence] are simply surer, swifter, more devastating, and more real than speculative court sanctions.³⁹

The influence of victim compellability should thus not be ignored, but may be limited.

C. Hearsay in cases of domestic violence

Beloof and Shapiro state that in many jurisdictions

policy efforts to intervene in battering relationships are readily thwarted by hearsay rule limits.⁴⁰

Indeed, the general exclusion of hearsay evidence as a classical feature of the adversarial process can be a significant barrier to the conviction of domestic abusers. If a victim recants an earlier statement and refuses to testify, or proposes a different story about what happened at trial, hearsay laws operating in many jurisdictions make it difficult for prosecutors to introduce as evidence the initial complaint; which will frequently be the 'single most important piece of evidence'⁴¹ and will often seem perfectly reliable. In domestic violence cases, initial complaints are typically more reliable than later statements made at trial after the described pressures have begun to influence the victim's behaviour.⁴² In the US, the infamous OJ Simpson trial gave rise to a broad discussion about the inadequacy of existing hearsay laws in domestic violence cases, and the State of California has enacted a special hearsay exception intended to deal with the problems of proof typically arising in these cases.⁴³

Scots law follows the adversarial tradition and retains a hearsay rule which excludes

³⁷ A Cretney & G Davis, 'The significance of compellability in the prosecution of domestic assault' (1997) 37 British Journal of Criminology 75 at p. 80; Ellison (n 6) at p. 840.

³⁸ Edwards (n 26) at p. 692.

³⁹ Beloof & Shapiro (n 6) at p. 6.

⁴⁰ *ibid* at p. 2 fn 2.

⁴¹ De Sanctis (n 6) at p. 368.

⁴² Beloof & Shapiro (n 6) at p. 5.

⁴³ *ibid* at p. 1 fn 1; N Hudders, 'The Problem of Using Hearsay in Domestic Violence Cases: Is a New Exception the Answer?' (2000) 49 Duke Law Journal 1041 at p. 1052.

[a]ny assertion other than one made by a person while giving oral evidence in the proceedings (...) as evidence of any fact asserted.⁴⁴

This rule, however, is macerated by numerous common law and statutory exceptions, some of which appear to be particularly relevant in domestic violence cases.

A long standing common law exception is the admissibility of statements that are *res gestae*. These are statements which are

so clearly associated with [the action], in time, place and circumstances, that they are part of the thing being done.⁴⁵

Obvious examples of such statements are screams and other exclamations by a victim *during* the commission of the offence,⁴⁶ and these can certainly be valuable pieces of evidence. The more important question, however, appears to be whether a statement made shortly after an incident, for example to the police in an emergency call, falls within the scope of the *res gestae* exception; this would allow prosecutors to introduce evidence of an initial complaint by the victim in many cases. Authorities in other jurisdictions as well as earlier Scottish authorities have regarded subsequent statements as admissible, as long as they represent a spontaneous reaction in the sense that the period between the incident and the statement is short enough to exclude the possibility of reflection and concoction.⁴⁷ Importantly, however, more recent Scottish case law suggests that a statement can only be considered as being part of the *res gestae* if it was made contemporaneously with the event in question.⁴⁸ The question may not yet be settled.⁴⁹ In light of the existing case law, there are stronger reasons against regarding the *res gestae* exception as an effective tool for Scottish prosecutors to introduce evidence of an initial complaint in domestic violence cases.

Sections 259 and 260 of the Criminal Procedure (Scotland) Act 1995 introduced a number of far going statutory exceptions to the hearsay rule. In the context of domestic violence prosecutions s259(2)(e) can become relevant. Where the general conditions for admissibility set out in s259(1) are satisfied⁵⁰, the provision renders a hearsay statement admissible if a witness either refuses to take the oath, or refuses to give evidence after having been sworn in and

⁴⁴ Tapper, *Cross & Tapper on Evidence* (8th edn, Butterworths, London 1995) at p. 42.

⁴⁵ *Teper v R* [1952] AC 480 at 487.

⁴⁶ *Raith* (n 25) at paras. 11-20.

⁴⁷ See *Ratten v R* [1972] AC 378 at 391; *O'Hara v Central SMT Co* 1941 SC 363 at 381; see also F Davidson, 'Res gestae in the Law of Evidence' (2007) 11 *Edinburgh Law Review* 379 at pp. 384-385 and pp. 387-388.

⁴⁸ See *Cinci v HM Advocate* 2004 JC 103 at 107; see also Davidson (n 47) at pp. 388-389.

⁴⁹ Davidson (n 47) at p. 389.

⁵⁰ But see s259(7).

directed by the judge to testify. Thus, in the case of a reluctant witness statute provides for the admission of a prior statement. Davidson convincingly argues that the exception only applies if a witness *illegitimately* refuses to testify.⁵¹ As seen above, given that statute no longer retains testimonial privileges for spouses and civil partners and that a large number of intimate partners have already been compellable witnesses at common law, this requirement does not constitute a significant obstacle to the admission of a prior statement in cases where the victim declines to give evidence. In addition, it should be noted that the exception does not apply to a statement in a precognition other than one on oath.⁵² However, statements made to investigating police officers are generally not considered to be precognitions, as long as the police do not gather specific evidence on the instruction of the prosecutor.⁵³ These aspects considered, the provision can be regarded as a valuable device for the prosecution to introduce evidence of a previous statement by a domestic violence victim if she strictly refuses to give evidence. On the other hand, many domestic violence victims do not simply refuse to testify, but do not appear in court, claim not to remember the incident, or testify in a way that is inconsistent with a previous statement.⁵⁴ Hudders refers to an American case which is an extreme example of the latter scenario: at trial, the victim testified that 'the story she had given to police was a lie and that she had grabbed the knife and stabbed herself'.⁵⁵ In these cases, neither s259 nor s260⁵⁶, under which a previous statement is only admissible if the witness adopts it, remedy the problems of proof that arise. Section 263(4) deals with prior inconsistent statements and provides that evidence 'may be led (...) to prove that the witness made the different statement on the occasion specified'.⁵⁷ However, the provision makes prior statements admissible only for the limited purpose of undermining the witness's credibility, and thus upholds the traditional position of Scots law that prior inconsistent statements are generally not admissible as evidence of their content.⁵⁸ The High Court confirmed this view in a recent domestic violence case.⁵⁹

The overall picture that emerges is an ambivalent one. On the one hand, statute allows prosecutors to introduce evidence of an initial complaint if the victim simply refuses to testify. Moreover, some valuable evidence may fall within the scope of the *res gestae* exception. On the other hand, the hearsay rule

⁵¹ Davidson (n 31) at para. 12.121 with reference to the intention of the Scottish Law Commission.

⁵² s262(1) Criminal Procedure (Scotland) Act 1995.

⁵³ Davidson (n 31) at para. 12.130; Ross & Chalmers (n 25) at para. 8.7.2.

⁵⁴ Hudders (n 43) at pp. 1049-1050.

⁵⁵ *ibid* at p. 1041.

⁵⁶ Criminal Procedure (Scotland) Act 1995.

⁵⁷ *ibid*.

⁵⁸ Davidson (n 31) at paras. 12.133 and 12.135; see also P Duff, 'Hearsay issues: a Scottish perspective' [2005] Criminal Law Review 525 at pp. 536 and 539-540.

⁵⁹ *Healy v Vannet* 2000 SCCR 35 at p. 37.

excludes previous statements in other cases where there is a reluctant witness, however reliable they may seem.

D. Corroboration requirement

The corroboration requirement is often regarded as one of the most notable and unique aspects of Scottish criminal procedure.⁶⁰ The corroboration rule requires the essential facts of the prosecution case to be corroborated by evidence from a second independent source that 'strengthens, confirms, or supports'⁶¹ other inculpatory evidence.⁶² Whether a fact is 'essential' in a certain case depends on the ingredients of the offence that was allegedly committed⁶³, but will generally at least include the commission of the crime and the identification of the accused.⁶⁴ The corroboration requirement can be a particular barrier to conviction for offences that typically happen in private.⁶⁵ Since violence against intimate partners most commonly occurs in the private sphere, there is typically a lack of eyewitnesses.⁶⁶ Moreover, it is not only the victim that tends to be uncooperative in these circumstances. Other witnesses, such as neighbours or other acquaintances, are often reluctant to testify because they do not want to take sides in a conflict where they know both parties, or because they fear retaliation by the abuser.⁶⁷ Thus, even in cases where the victim is willing to testify against the abuser or incriminating evidence is available from other sources, prosecutors will often face significant difficulties in finding corroborative evidence.

Corroborative evidence need not be direct evidence and in practice essential facts are frequently corroborated by circumstantial evidence.⁶⁸ In domestic abuse cases, photographs of injuries, medical reports, or noises heard by neighbours may therefore be important pieces of corroborative evidence.⁶⁹ Scottish courts have also accepted the distressed condition of the victim shortly after a criminal incident as corroborative evidence.⁷⁰ The doctrine has been mostly – but not exclusively – applied in rape cases where the victim's consent to sexual intercourse was in issue.⁷¹ As Raitt observes, 'the case law has not

⁶⁰ Raitt (n 25) at para. 8-01.

⁶¹ *Fox v HM Advocate* 1998 SLT 335 at p. 339.

⁶² Raitt (n 25) at para. 8-01.

⁶³ Davidson (n 31) at para. 15.10.

⁶⁴ Ross & Chalmers (n 25) at para. 5.4.1.

⁶⁵ Raitt (n 25) at para. 8-38.

⁶⁶ De Sanctis (n 6) at p. 370.

⁶⁷ *ibid* at p. 371.

⁶⁸ Raitt (n 25) at paras. 8-01, 8-06-8-07 and 8-11.

⁶⁹ Cf. Scottish Executive (n 19) at p. 59.

⁷⁰ See Davidson (n 31) at para. 15.39.

⁷¹ Raitt (n 25) at para. 8-52; Davidson (n 31) at para. 15.40.

produced a consistency of approach'.⁷² Especially recent dicta give rise to doubts as to whether distress can be corroborative evidence beyond issues of consent in sexual offences cases.⁷³ However, in the specific context of domestic violence prosecutions the available case law suggests that the distressed condition of the victim can be corroborative, at least if taken together with other circumstantial evidence.⁷⁴

Despite the described possibilities of using circumstantial evidence for the purpose of corroboration, it appears that the requirement of having evidence from two independent sources can be a significant barrier to conviction in many domestic violence cases. It is often the case that there is simply insufficient circumstantial evidence available to compensate for the lack of (cooperative) eyewitness evidence which is typical of domestic abuse cases, thus presenting a major setback to successful prosecution.⁷⁵

E. Propensity evidence

As a generic term, 'propensity evidence' refers to evidence relating to 'a person's character, predilections, or incidents from past life'.⁷⁶ There has been an extensive discussion about the use of such evidence in domestic violence cases, particularly in the US, and some states have enacted special legislation intended to make this evidence admissible.⁷⁷ There are indeed strong reasons why evidence of prior domestic violence incidents is likely to be of high probative value, if one considers the characteristic features of such violence. As noted above, domestic abuse is typically of cyclical nature and often tends to increase in 'frequency and severity'.⁷⁸ Being part of a larger 'system of control',⁷⁹ a domestic violence offence is rarely a one-off incident.⁸⁰ Adversarial criminal justice systems generally exclude evidence of previous misdeeds because its probative value as regards the charged offence is considered to be weak, and/or fact-finders - especially jurors - are said to be unable to properly

⁷² *ibid* para. 8-52.

⁷³ See *Smith v Lees* 1997 JC 73, *Cinci* (n 48), *McKearny v HM Advocate* 2004 JC 87. See generally, Raitt (n 25) at paras. 8-56-8-57; see also Davidson (n 31) at para. 15.42.

⁷⁴ See *Healy v Vannet* (n 59) at 36-37; cf. Davidson (in the context of indecent assault prosecutions) (n 31) at para. 15.45.

⁷⁵ The Scottish Executive recognised this setback in its recent publication on domestic violence. See Scottish Executive (n 19) at p. 59.

⁷⁶ M Damaška, 'Propensity evidence in continental legal systems' (1994) 70 *Chicago-Kent Law Review* 55 at p. 55.

⁷⁷ LA Linsky, 'The Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach' (1995) 16 *Pace Law Review* 73 at p. 73; Letendre (n 10) at p. 992.

⁷⁸ De Sanctis (n 6) at p. 388.

⁷⁹ *ibid* at p. 388.

⁸⁰ Letendre (n 10) at p. 977.

evaluate such evidence and may therefore be prejudiced against the accused.⁸¹ Criminological findings on domestic abuse, however, suggest that the probative value of domestic violence history evidence is often so strong that it outweighs its potentially prejudicial effect. Moreover, such evidence may often be crucial in ensuring fact-finders understand the dynamics of domestic violence, and in preventing 'undue speculation'⁸² on typical phenomena such as the recanting victims.⁸³

Scots law follows the adversarial tradition, generally excluding evidence relating to the accused's past misdeeds and bad character. Statute explicitly provides that the prosecution is generally⁸⁴ not allowed to disclose the accused's previous convictions.⁸⁵ Unless the accused, who testifies at trial, puts his own good character in evidence or attacks the character of a prosecution witness or of the complainer, the accused is protected from being questioned about a previous (charged or uncharged) criminal offence allegedly committed by him, or from questions tending to show that he has a bad character.⁸⁶ Correspondingly, the prosecution may lead evidence relating to these issues only where the defence raises issues of character as laid down in s270(1) of the Criminal Procedure (Scotland) Act 1995.

In certain respects, the admissibility of the described category of evidence appears to be even more limited in Scotland than in other common law jurisdictions. Many of these jurisdictions recognise the admissibility of similar facts evidence.⁸⁷ This is evidence of the accused's criminal behaviour on other occasions which is marked by a high degree of similarity between the previous and current conduct. This high degree of similarity - which is often described by formulations such as 'strikingly similar'⁸⁸ or 'a similarity that is inexplicable on the basis of coincidence'⁸⁹ - is said to found the strong probative value of such evidence that goes beyond showing that the defendant has a disposition to commit a certain type of crime.⁹⁰ The prevailing view in Scotland appears to be that similar facts evidence has not been admitted and that there is no such doctrine in Scots law.⁹¹ Others argue that the law recognises similar facts evidence in the narrow context of corroboration in the shape of the infamous *Moorov* doctrine and that there is thus at least a 'nascent

⁸¹ *ibid* at p. 983.

⁸² Linsky (n 77) at p. 82.

⁸³ *ibid* at pp. 81-82.

⁸⁴ For the limited exceptions to the general rule see the overview given by Raitt (n 25) at paras. 12-61-12-67 and the statutory provisions cited at n 85 and n 86.

⁸⁵ See ss101(1) and 166(3) Criminal Procedure (Scotland) Act 1995.

⁸⁶ See s266(4) Criminal Procedure (Scotland) Act 1995 (particularly (b)).

⁸⁷ P Duff, 'Similar facts' Evidence in Scots Law?' (2008) 12 Edinburgh Law Review 121 at p. 122.

⁸⁸ *DPP v Boardman* [1975] AC 421 at p. 462.

⁸⁹ *ibid*.

⁹⁰ Raitt (n 25) at paras. 12-10-12-11.

⁹¹ See *HM Advocate v DS* 2007 SLT 1026 at para. 42.

doctrine'⁹² of similar facts evidence.⁹³ A detailed analysis of this issue, however, is not necessary in the context of domestic violence, due to the fact that similar facts evidence can be of little relevance in this area. Domestic abuse offences are similar in concept in the sense that the perpetrator uses violence to control the victim, but the forms of abusive conduct and the surrounding circumstances differ significantly from one incident to another.⁹⁴ As Letendre puts it,

[d]espite being victim to the same abuse and control tactics by the defendant, domestic violence victims' experiences often differ in both the type of offense (...) and triggering event.⁹⁵

The relevant issue in relation to domestic abuse is the admissibility of evidence which indicates that the accused has a certain disposition towards partner abuse. It follows from what has been said that Scots law does not allow prosecutors to adduce evidence indicative of such a disposition in the vast majority of cases. Although a recent dictum⁹⁶ recognises that in the case of s275A⁹⁷ previous convictions are disclosed for the purpose of showing the defendant's *propensity* to commit sexual offences, Scots law upholds the adversarial tradition of generally excluding evidence that 'only' allows an inference as to the defendant's disposition to commit a certain type of crime.⁹⁸

3. Evidentiary barriers in the German system

A. Influence of the principle of legality

As a general rule, prosecutorial decision-making in the German system is governed by the principle of legality, which places a duty on prosecutors to press charges whenever there is sufficient evidence that a criminal offence has been committed.⁹⁹ The general principle, however, is macerated by two devices which appear to be particularly relevant in the context of domestic violence prosecutions. Firstly, German law recognises a right to private prosecution for certain minor offences such as simple assault or insult.¹⁰⁰ These offences will

⁹² P Duff, 'Towards a unified theory of 'similar facts evidence' in Scots law: relevance, fairness and the reinterpretation of *Moorov*' 2002 Juridical Review 143 at p. 145.

⁹³ *ibid* p. 165. See *Moorov v HM Advocate* 1930 SLT 596.

⁹⁴ De Sanctis (n 6) at pp. 395-396; Letendre (n 10) at pp. 989 and 995.

⁹⁵ Letendre (n 10) at p. 995.

⁹⁶ *HM Advocate v DS* (n 91) at para. 44; see also Duff (n 87) at pp. 123-124.

⁹⁷ Criminal Procedure (Scotland) Act 1995.

⁹⁸ Cf. Raitt (n 25) at para. 12-11.

⁹⁹ See s152(2) Code of Criminal Procedure, official translation by the German Federal Ministry of Justice available at <http://bundesrecht.juris.de/englisch_stpo> (accessed 1 July 2010).

¹⁰⁰ See s374(1) Code of Criminal Procedure (n 99).

only be prosecuted by a public prosecutor if this is considered to be in the public interest.¹⁰¹ Secondly, substantive criminal law provides that certain offences, once again including simple assault, will only be prosecuted if the complainer formally requests that the prosecutor bring proceedings or if there is a special public interest in prosecuting the offence.¹⁰² Both aspects point in the same direction. The prosecution of simple assault, which is still the most frequent form of domestic violence,¹⁰³ depends on a discretionary decision by the prosecutor, or on the complainer's willingness to see the offender prosecuted. It is obvious that the latter cannot be regarded as a reliable basis for the prosecution of domestic abusers, given the nature of the crime and the pressures typically faced by the complainer. As regards the former aspect, it should be noted that public guidelines exist for the exercise of prosecutorial discretion which state that prosecution should generally be regarded as in the public interest if it was unreasonable to require the complainer to set proceedings in motion because of his or her personal relationship with the perpetrator.¹⁰⁴ This favours public prosecution in domestic violence cases.¹⁰⁵

Overall, no significant differences can be identified between the German and the Scottish prosecution regime as regards domestic violence offences. Similar to Scotland, guidelines in Germany surrounding the exercise of prosecutorial discretion favour prosecution in less serious cases. More serious forms of violence are subject to mandatory prosecution under German law. However, it should be considered that mandatory prosecution *per se* is no remedy against the problems of proof typically arising in domestic violence cases. The 'sufficient evidence' test gives a considerable measure of *de facto* discretion to the prosecutor¹⁰⁶ to drop cases that are perceived as 'weak', and research findings suggest that these will often be cases where the victim has withdrawn an initial complaint.¹⁰⁷

¹⁰¹ s376 Code of Criminal Procedure (n 99).

¹⁰² See s230(1) Criminal Code (for the offence of simple assault), official translation by the German Federal Ministry of Justice available at <http://bundesrecht.juris.de/englisch_stgb/index.html> (accessed 1 July 2010).

¹⁰³ Wissenschaftliche Begleitung der Interventionsprojekte gegen häusliche Gewalt (WiBIG), 'Staatliche Interventionen gegen häusliche Gewalt' (*Research group accompanying the intervention projects against domestic violence (WiBIG), 'State interventions against domestic violence'*), Abschlussbericht 2000-2004, Band 2 (BMFSFJ, 2004) available at <<http://www.wibig.uni-osnabrueck.de/download/studie-wibig-band2.pdf>> (accessed 1 July 2010) at para. 4.1.1.2.

¹⁰⁴ See s86(2) and s234(1) RiStBV (*Guidelines for criminal proceedings and proceedings for administrative offences*).

¹⁰⁵ WiBIG (n 103) at paras. 4.1.1.1-4.1.1.2.

¹⁰⁶ Cf. Duff (n 17) at p. 116.

¹⁰⁷ See WiBIG (n 103), 'Forschungsergebnisse der Wissenschaftlichen Begleitung der Interventionsprojekte gegen häusliche Gewalt (WiBIG)' (*Research result of the research group accompanying the intervention projects against domestic violence*) (BMFSFJ, 2004) available at <<http://www.wibig.uni-osnabrueck.de/download/langfassung-studie-wibig.pdf>> (accessed 1 July 2010) at para. 4.2.

B. The victim as a compellable witness

As stated above, witness compellability can - at least to some extent - facilitate the conviction of domestic abusers. The position under German law, as provided by s52(1)(No.2) of the German Code of Criminal Procedure,¹⁰⁸ states that the defendant's spouse may refuse to testify and thus is not a compellable witness in any case. Similarly, the same section provides that neither civil partners nor fiancé(e)s are compellable witnesses.¹⁰⁹ Other partners are fully compellable.¹¹⁰ From the perspective of the prosecution, German law is therefore much more restrictive than Scots law. Apart from the strict non-compellability of the abovementioned partners, the inclusion of fiancé(e)s within the range of privileged partners has considerable potential for abuse in practice. Since engagement is not subject to any formal requirement under German law, a witness can easily claim to be engaged to the defendant and an abusive partner is likely to pressurise the victim to make use of this possibility. Reform proposals in recent years which were aimed at abolishing the fiancé(e)'s privileged position have not been successful thus far.¹¹¹ It therefore appears clear that domestic violence complainers will less commonly be compellable witnesses in cases before German courts than in equivalent Scottish cases.

C. The principle of immediacy: general exclusion of hearsay witnesses?

Forming part of the inquisitorial tradition of criminal justice systems, the German system places great emphasis on the free evaluation of evidence by the court¹¹² and has, compared with adversarial systems, only a small number of rules regulating the admissibility of evidence. This does not mean, however, that German courts can make completely unrestricted use of hearsay evidence. The use of such evidence, which may, as seen above, often be crucial in domestic violence cases, is to a certain, but limited extent restricted by the so-called principle of immediacy. The principle is specified in s250 Code of Criminal Procedure:

If the proof of a fact is based on the observation of a person, such person shall be examined at the main hearing. The examination shall not be replaced by

¹⁰⁸ See S52(1)(No. 1) Code of Criminal (n 99).

¹⁰⁹ *ibid.*

¹¹⁰ L Senge in *Karlsruher Kommentar zur Strafprozessordnung (Karlsruhe Commentary on the Code of Criminal Procedure)* (6th edn C.H. Beck, Munich 2008) s52 at para. 11.

¹¹¹ Senge (n 110) s52 para. 10.

¹¹² See s261 Code of Criminal Procedure (n 99).

reading out the record of a previous examination or reading out a written statement.¹¹³

The provision could be understood as stating the general inadmissibility of hearsay statements. Such an interpretation would, however, be contrary to the virtually unanimous view advanced by German courts and scholars that s250 does not generally exclude hearsay evidence, but only dictates the primacy of *oral* testimony over the use of *written* evidence.¹¹⁴ The common interpretation is that a person who reports what someone else told her, also reports from her *own* sensory perception *what that other person told her*.¹¹⁵ As Damaška puts it so accurately,

[o]n this view, then, the hearsay witness is not a derivative source, but instead a first-hand source of information concerning the evidentiary fact that the declarant made a statement.¹¹⁶

The principle of immediacy thus does not exclude any oral hearsay evidence. What the principle does is prohibit the court from conducting a mere 'paper trial' by simply reading out recorded statements from the case file or other sources. Consequently, it does not prevent the court from hearing witnesses that do not have personal knowledge of the fact in issue - such as a police officer who testifies as to an initial complaint by a domestic violence victim - nor does it exclude the possibility of confronting witnesses with a prior statement.¹¹⁷ The influence of the principle of immediacy on the use of hearsay evidence is thus very limited.

Another aspect of German criminal procedure, however, imposes a restriction on the use of hearsay evidence. German criminal courts have a duty to investigate the cases brought before them and to adduce all evidence necessary to elucidate the truth.¹¹⁸ This duty is subject to appellate review. Due to the (often) limited probative value of hearsay evidence, the court has to justify its decision to rely on a hearsay statement - especially if the original source of evidence is available - in the reasoned opinion¹¹⁹ which has to be given for each final judgement. The effect of this is that the use of hearsay evidence is *de facto* governed by a 'best evidence' rule.¹²⁰

¹¹³ Official translation by the Federal Ministry of Justice (see n 99).

¹¹⁴ H Diemer in *Karlsruher Kommentar zur Strafprozessordnung* (n 110) s250 at paras. 1 and 10.

¹¹⁵ See BGH (*Federal Court of Justice*) St 17, 382 at 383; Diemer (n 114) s250 at para. 10.

¹¹⁶ M Damaška, 'Of hearsay and its analogues' (1992) 76 *Minnesota Law Review* 425 at p. 453.

¹¹⁷ Diemer (n 114) s250 at paras. 1-2.

¹¹⁸ See s244(2) *Code of Criminal Procedure* (n 99).

¹¹⁹ BGH (*Federal Court of Justice*) NJW 2004, 1259 at 1260.

¹²⁰ K Detter, 'Der Zeuge vom Hörensagen - eine Bestandsaufnahme' (*The hearsay witness - an appraisal*) *NStZ* 2003, 1 at p. 3.

In domestic violence cases this means that a complainant's prior statement is not excluded by general legal instruments regulating the use of hearsay evidence. As long as they do not simply read out a recorded statement, judges may use the statement of a hearsay witness if the victim recants an earlier statement. If the victim refuses to testify at trial the hearsay witness is the best evidence available. If the victim gives evidence at trial in a way which is inconsistent with a previous statement, the court may nevertheless reject her statement and rely on the testimony of a hearsay witness. The court would only violate its duty to properly investigate the case if it simply did not call the victim as a witness thereby entirely ignoring the availability of a 'direct' witness.¹²¹

D. Prior witness statements and s252 Code of Criminal Procedure

While courts can generally use hearsay statements under the aforementioned conditions, the Code of Criminal Procedure contains a special provision which bars courts from using certain hearsay statements made by non-compellable witnesses. Section 252 states that:

The statement of a witness examined prior to the main hearing who does not make use of his right to refuse to testify until the main hearing may not be read out.¹²²

The wording of the provision suggests that the court is only barred from 'reading out' a prior statement. In accordance with what was mentioned in the previous paragraph this would mean that a hearsay witness may nevertheless testify to the content of the respective statement. Yet, the Federal Court of Justice has considerably extended the scope of s252 by interpreting the provision – and this provision only – as *fully excluding as evidence* a prior witness statement in the scenario described by s252.¹²³ This means that, if a non-compellable witness – including the spouse or fiancé(e) – makes a statement when being examined at pre-trial stage and later refuses to testify at trial, there generally exists no possibility that such a statement could be used as evidence. The rationale for this is that non-compellable witnesses should have a free and genuine choice as to whether they will testify at trial even if they made a statement at pre-trial stage, and that their decision should not be influenced by the prospective admission of a prior statement in the event of their refusal to

¹²¹ Cf. *ibid* at pp. 2-3.

¹²² Official translation by the Federal Ministry of Justice (see n 99).

¹²³ For the first time stated in BGH (*Federal Court of Justice*) St 2, 99.

testify.¹²⁴ As indicated by its wording ('examined'), the scope of the provision is restricted to statements made to official investigators and s252 does not apply to statements made to private individuals.¹²⁵ According to the general rule, prior statements by domestic violence victims are thus inadmissible if they were made to an investigating official and if the victim is a non-compellable witness. The case law, however, recognises two important exceptions which appear to be particularly relevant in domestic violence cases.

Firstly, according to the case law of the Federal Court of Justice, s252 does not apply to statements made at an interrogation conducted by an examining magistrate.¹²⁶ It is argued that the prominent situation of interrogation by the neutral examining magistrate justifies the described exception,¹²⁷ but many also criticise that the exception does not have a convincing rationale at all.¹²⁸ The 'examining magistrate exception' is certainly a valuable procedural device for the police and prosecution in domestic violence cases.¹²⁹ They may request the examining magistrate to interrogate the complainant shortly after the incident. If she later recants a statement made before the magistrate, the latter can be called as a hearsay witness at trial and testify to the content of the recanted statement.

Secondly, courts have repeatedly held that s252 does not apply to spontaneous statements made by a person without being questioned.¹³⁰ The provision is only applicable if the police or prosecution positively question a witness instead of simply receiving information from him.¹³¹ An initial complaint by a domestic abuse victim to the police, for example in an emergency call, will thus not be excluded under s252. Similarly, a statement by an agitated complainer made to police on their arrival at the crime scene is not inadmissible under s252. Such statements often comprise important information in domestic violence cases.¹³²

A final issue concerning the use of hearsay evidence in the German system should be mentioned in the present context. Under the influence of the case law of the European Court of Human Rights in relation to Art 6(3)(d) ECHR, German courts, including the Federal Constitutional Court, have held that hearsay statements 'generally' have to be supported by other independent

¹²⁴ G Pfeiffer, *Strafprozessordnung, Kommentar (Code of Criminal Procedure, Commentary)* (5th edn, CH Beck, Munich 2005) s252 at para. 1.

¹²⁵ Diemer (n 114) s252 at paras. 14 and 20.

¹²⁶ For the first time stated in BGH (*Federal Court of Justice*) St 2, 99.

¹²⁷ BGH (*Federal Court of Justice*) St 49, 72 at 77.

¹²⁸ See Mosbacher, 'Aktuelles Strafprozessrecht' (*Current issues in criminal procedure*) JuS 2008, 688 at p. 688.

¹²⁹ *ibid* at p. 688; WiBIG (n 103) at para. 14.2.2.

¹³⁰ BGH (*Federal Court of Justice*) NStZ 1986, 232 at 232; OLG Saarbrücken (*Court of Appeal Saarbrücken*) NJW 2008, 1396 at 1396.

¹³¹ Mosbacher (n 128) at p. 689.

¹³² See WiBIG (n 103) at para. 14.2.5.

evidence.¹³³ To the Scottish lawyer this may be reminiscent of a corroboration rule for hearsay evidence. It is, however, not clear whether the case law establishes this. The requirement was mostly set out in cases of anonymous witnesses,¹³⁴ but also in a case where hearsay evidence was admitted on the basis of the described 'examining magistrate exception'.¹³⁵ The existence of such a requirement in other cases is uncertain. Given that the courts did not restrict the rule to specific categories of cases, there exists good reason to assume that it applies to all hearsay statements. It is similarly uncertain what is meant by the formulation that there must 'generally' be supportive evidence. Given that the German system places great emphasis on free proof, a plausible explanation is that the requirement was intended only to be a guideline for the evaluation of the evidence, instead of a strict rule regulating the legal sufficiency of evidence such as that of corroboration in Scotland. In any case, the available case law suggests that German courts will in most cases refuse to convict a domestic violence offender if the only incriminating evidence is a hearsay statement.

E. Propensity evidence

In relation to propensity evidence Damaška states that

[a]nyone expecting to find elaborate doctrines in continental European evidence law regarding information about a person's character, predilections, or incidents from past life, is bound to be disappointed.¹³⁶

The German system is no different from other continental systems in this respect. The Code of Criminal Procedure addresses the issue briefly and only with regard to previous convictions:

Previous convictions of the defendant should be disclosed only insofar as they are relevant to the decision. The presiding judge shall decide when such convictions are to be disclosed.¹³⁷

No elaborate legal doctrine exists, however, to determine exactly when such previous convictions will be 'relevant'. Leading legal commentaries emphasise that previous convictions are *mostly* relevant to the determination of the sentence.¹³⁸ This does not mean that such information must not be used to

¹³³ BVerfG (*Federal Constitutional Court*) NJW 2001, 2245 at 2246; BGH (*Federal Court of Justice*) NJW 2000, 3505 at 3510.

¹³⁴ BGH (*Federal Court of Justice*) NJW 1962, 1876 at 1877; St 33 at 83, 88 at 42; 15 at 25.

¹³⁵ BGH (*Federal Court of Justice*) (n 133) at 3510.

¹³⁶ Damaška (n 76) at p. 55.

¹³⁷ §243(4)(3) Code of Criminal Procedure (see n 99).

¹³⁸ L Meyer-Gofner, *Strafprozessordnung (Code of Criminal Procedure)* §243 at para. 33; H

support an inference of guilt. Previous convictions on the official criminal record, which is fully available to professional judges (as opposed to the lay judges on the bench), are deleted from the record after a certain period of time in order to promote the rehabilitation of criminal offenders.¹³⁹ Courts and legal scholars stress that previous convictions must not be used for the determination of guilt if they have been deleted from the official criminal record.¹⁴⁰ This of course implies that previous convictions are *not generally* inadmissible evidence for this purpose.

As regards other types of propensity evidence, Damaška observes that, from the common law perspective, the continental law of evidence is 'strangely silent'¹⁴¹ on the admissibility of such evidence, and so too is German law. It has only been sporadically mentioned in case law and in legal commentaries that the court may take into account similar uncharged acts¹⁴² or that a conviction may not exclusively be based on previous uncharged misdeeds.¹⁴³

Despite the absence of any general rules of admissibility, it would be fallacious to conclude that German law ignores the dangers of relying on prior acts to establish the accused's guilt of the crime now charged. Continental legal doctrine does not purport that previous criminal behaviour or other information concerning a person's character generally is a good indicator of guilt.¹⁴⁴ Rather, it focuses exclusively on the probative value of such evidence,¹⁴⁵ which has to be evaluated by the court in the individual case. This approach can be explained by the general assumption that probative value cannot be accurately reflected in a categorical rule.¹⁴⁶ Furthermore, the structure of the continental criminal process, where the trial is not divided into a guilt-determination and a sentencing stage, and where professional judges have full knowledge of the evidence gathered in the case file prior to the trial, makes character-related rules of evidence much less practicable than in adversarial systems.¹⁴⁷

It must be asked, therefore, what this means for prosecution and conviction of domestic violence offenders. Judges that are familiar with the cyclical nature of domestic violence will certainly tend to give some weight to

Schneider in *Karlsruher Kommentar zur Strafprozessordnung* (n 110) s243 at para. 56.

¹³⁹ See ss45-46 Bundeszentralregistergesetz (BZRG) and A Bücherl in *Beck'scher Online-Kommentar zur Strafprozessordnung* (7th edn, CH Beck, Munich 2010) s51 BZRG at para. 1.

¹⁴⁰ BGH (*Federal Court of Justice*) NJW 1990, 2264 at 2264; Bücherl (n 139) s51 BZRG at para. 32; Pfeiffer (n 124) s261 at para. 11; cf. s51 Bundeszentralregistergesetz.

¹⁴¹ Damaška (n 76) at p. 60.

¹⁴² BGH (*Federal Court of Justice*) NJW 1951, 769 at 770; Schoreit in *Karlsruher Kommentar zur Strafprozessordnung* (n 110) s261 at para. 64.

¹⁴³ Schoreit (n 142) s261 at para. 64.

¹⁴⁴ Damaška (n 76) at p. 57.

¹⁴⁵ *ibid* at p. 57.

¹⁴⁶ *ibid* at p. 55.

¹⁴⁷ *ibid* at p. 56.

evidence relating to previous acts of domestic violence and use such information as supportive evidence. Moreover, due to the structure of the continental criminal process, judges are continuously exposed to character-related information. It would be unrealistic to assume that judges are capable of fully ignoring this information when deciding on guilt or innocence even where it is of little probative value from an objective point of view.¹⁴⁸ On the other hand, it should be considered that the court's duty to give a reasoned opinion in written form, which will be reviewed on appeal, operates as a safeguard against heavy reliance on any kind of propensity evidence.¹⁴⁹ Judges will be careful not to place too much emphasis on such evidence in order to avoid any situation where the appeal court could overturn their decision on the basis that it does not satisfy the criminal standard of proof, it disregards the presumption of innocence or does not have a 'solid support in rational inference'.¹⁵⁰ All things considered, it appears that under German law evidence of prior incidents of domestic violence 'could tip the scales of justice against the accused in at least some close cases',¹⁵¹ where he might go unpunished under Scots law.

4. Comparison and Evaluation

As has been demonstrated in the foregoing discussion there are a number of evidentiary barriers to conviction in cases of domestic violence in both the Scottish and the German criminal justice systems. It is important to consider the extent to which these systems differ, and whether one is more favourable to conviction. In doing so, the classical dichotomy between adversarial and inquisitorial systems can be analysed.

With regard to prosecutorial decision-making, it has been demonstrated above that in the majority of domestic violence cases the continuance of a case in either jurisdiction depends on a discretionary decision by the prosecutor, but that guidelines favour the prosecution of domestic violence offenders. The analysis does thus not fully bear out the classical image of discretionary prosecution in adversarial systems and mandatory prosecution in inquisitorial systems. Despite the mandatory prosecution scheme for serious forms of violence under German law, neither system can be said to be noticeably more favourable to the prosecution and conviction of domestic violence offenders.

As regards witness compellability, German law is more restrictive than Scots law from the perspective of the prosecution. A significant number of uncooperative domestic violence victims will not be induced to testify by prospective court sanctions for a refusal to do so. Yet, the extensive rights to

¹⁴⁸ *ibid* at pp. 65-66.

¹⁴⁹ *ibid* at p. 66.

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

refuse to give evidence under German law make the victim more susceptible to intimidation and manipulation on part of the abuser. The inclusion of fiancé(e)s within the group of non-compellable witnesses is outdated and should be abolished. The provision can easily be abused and there is evidence of this taking place, particularly in cases of female trafficking.¹⁵² In the domestic violence context it gives abusers in non-married relationships a formidable motive to pressurise the partner not to testify and the abused partner an easy opportunity to give in to this pressure.

With regard to hearsay statements, it has been demonstrated that the rather strict approach of Scots law to prior inconsistent statements and the narrow interpretation of the *res gestae* exception pose evidentiary barriers in domestic violence cases. Scots law thus reflects the adversarial tradition of evidence in this respect. It must be questioned whether fact-finders will always be able to make the fine distinction required in Scots law between the use of a prior statement as substantive evidence, and the use of a prior statement simply to undermine witness credibility. Doubts have been expressed about jurors' capacity to make such a distinction in their evaluation of the evidence.¹⁵³ In contrast, the position in German law as regards hearsay evidence is more favourable to conviction. Contrary to the inquisitorial 'stereotype' of free admissibility of hearsay evidence, however, s252 of the Code of Criminal Procedure restricts the admissibility of hearsay statements. Despite this deviation from the 'inquisitorial ideal' of free proof, it should be kept in mind that the scope of s252 is considerably narrower than the hearsay rule, and the discussed exceptions are more favourable to prosecution than the relevant exceptions in Scots law. Most importantly, the 'examining magistrate exception' makes it possible to 'can' a statement made by a domestic violence victim at pre-trial stage.¹⁵⁴

With respect to the corroboration rule it can be said that, despite the fact that Scottish courts have devised methods to attenuate the harsh consequences which often result from the corroboration requirement with regard to offences that are typically committed in the private sphere, the rule will often aggravate the problems of proof that typically arise. A rule that is in its consequences at least similar to a corroboration requirement for hearsay evidence has also evolved in German case law. German prosecutors will therefore be hesitant to proceed with a domestic violence case on the basis of hearsay evidence alone.

¹⁵² See BR-Drs. (*Federal Council Reports*) 15/5659, at pp. 1 and 6; T Fischer, *Strafgesetzbuch (Code of Criminal Procedure)* (57th edn, CH Beck, Munich 2010) s11 at para. 8.

¹⁵³ See Scottish Law Commission, *Evidence: Report on Hearsay Evidence in Criminal Proceedings* (Scot Law Com No. 149 (1995)) at paras. 2.21-2.23.

¹⁵⁴ The significance of the exception in practice should, however, not be overstated: research in this area shows that prosecutors are rather reluctant to involve an examining magistrate, as these judges are often unavailable or unwilling to cooperate due to an increasing workload, or because the involvement would delay the investigation (WiBIG (n 103) at para. 14.2.2.).

This, to some extent, eradicates the advantages from which German prosecutors benefit in relation to the lack of a general corroboration requirement and the less restrictive approach to hearsay evidence. Once again, a closer analysis does not reflect inquisitorial 'stereotypes': the idea that courts cannot convict on the basis of one piece of evidence only is completely alien to traditional inquisitorial thinking.¹⁵⁵

As regards propensity evidence, the approach taken by Scots law is quite strict and Scottish prosecutors generally do not have any legal possibility to introduce evidence indicating the accused's disposition to partner abuse. Given the absence of any elaborate rules in German law, it is difficult to contrast this approach. It has been shown that propensity-related information is generally considered to be admissible evidence that can be helpful in determining the accused's guilt, and that German judges are necessarily much more exposed to such information than fact-finders in adversarial systems. It should, however, be cautioned against the false conclusion based on another inquisitorial 'stereotype'¹⁵⁶ that German criminal courts in fact judge a person's past life and character rather than a concrete infraction of the criminal law. As Damaška rightly observes,

it is (...) easy to attach too much significance to the absence in the civil law of rules excluding the defendant's prior record and evidence of other crimes.¹⁵⁷

Multitudinous provisions in the Code of Criminal Procedure oblige the prosecution and the court to focus on a specific charge based on specific facts. Moreover, it has been shown above that there exist mechanisms which safeguard against extensive reliance on character-related information. All things considered, the German approach to propensity evidence nevertheless appears to be more favourable to the conviction of domestic violence offenders than the Scottish approach at least in close cases.

The overall picture that emerges, therefore, is that German law of evidence is somewhat more favourable to conviction in cases of domestic violence than the Scottish equivalent. Yet, the differences are not as big as the classical dichotomy between adversarial and inquisitorial criminal justice systems may suggest. The present analysis therefore confirms that these classical and commonly used terms are not accurate characterisations of particular criminal justice systems, but are in fact no more than 'suggestive caricatures'.¹⁵⁸

¹⁵⁵ M Damaška, 'Evidentiary barriers to conviction and two models of criminal procedure: a comparative study' (1972) 121 *University of Pennsylvania Law Review* 507 at pp. 530-531.

¹⁵⁶ See B McKillop, *Anatomy of a French murder case* (Hawkins Press, Sydney 1997) at p. 93, who refers to a common legal saying in France that 'one judges the man, not the facts'.

¹⁵⁷ Damaška (n 155) at p. 518.

¹⁵⁸ *ibid* at p. 577.

5. Conclusion

The comparative analysis has shown that there exist significant legal barriers to the conviction of domestic violence offenders and that these barriers are not unique to jurisdictions with a particular evidentiary tradition but that they exist across jurisdictions and evidentiary systems. Given the difficulty in prosecuting domestic abusers, the implementation of special domestic violence courts like the domestic abuse court in Glasgow¹⁵⁹ or the specialised domestic abuse departments in prosecution offices that have been established in some German states¹⁶⁰ are certainly a step in the right direction. Specialised criminal justice professionals will be more likely to manage the specific challenges related to the prosecution of domestic abuse. Despite all these difficulties, legislative measures addressing evidentiary problems in domestic violence cases should only be implemented restrainedly and with great care for the rights of the accused. Legislative initiatives intended to favour the prosecution of domestic abusers will have significant potential to compromise the legitimate rights of the defendant. Moreover, adopting special rules of evidence for a certain type of offence is likely to have an erosive effect and special rules for other types of offences may potentially follow. If there are relaxed evidentiary standards for the prosecution of domestic abusers, it must be questioned whether the same relaxed rules will eventually apply to the prosecution of murderers, paedophiles, terrorists...? To do so would be at the expense of the presumption of innocence and the proper administration of justice.

¹⁵⁹ See Scottish Executive, 'Glasgow Domestic Abuse Court Feasibility Study Report April 2008' (23 June 2008) available at <<http://www.scotland.gov.uk/Publications/2008/06/18103536/0>> (accessed 20 June 2010).

¹⁶⁰ WiBIG (n 103) at para. 4.1.3.

The Prince of Wales & The Duke of Cambridge: A Constitutional Analysis

DOMINIC SCULLION*

1. Introduction

The marriage of Prince William of Wales to Catherine Middleton has one obvious similarity to the wedding of William's mother and father: it is a union of future King to his chosen Queen. However, whilst Prince Charles was first in the line of succession at the time of his wedding and, indeed, was already Prince of Wales, William was neither. The author's interest in this is of a constitutional nature, namely the various roles Prince William, now Duke of Cambridge, will undertake in his royal life. The constitutional role of the Sovereign has been written about considerably and will not be discussed in this paper. Instead, the focus will be on the constitutional role of the Prince of Wales and that of his first son. The role of the Prince of Wales will be discussed with reference to the conventions created by the present incumbent, and to those created by his predecessors. The role of the new Duke of Cambridge will be discussed more briefly, but with specific reference to the hypothetical situation of Prince William remaining but second in line to the throne for a while longer. Will he begin to assist the Prince of Wales in carrying out his duties? This paper will address this speculative question and comment on whether Prince William will inadvertently create new constitutional conventions. To begin the discussion, some time will be spent considering constitutional conventions in general, before moving on to applying that consideration to the role of the Prince of Wales and his first son.

2. Constitutional Conventions

The constitution of the United Kingdom cannot be found in a singular document. Instead, it stems from different sources and takes different forms. Constitutional conventions are a feature of the British constitution; the Sovereign, her ministers, politicians and other constitutional actors are expected

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to observe this body of largely unwritten rules. John Mackintosh defines a convention as 'a generally accepted political practice usually with a record of successful applications or precedents'.¹ Oxford professor AV Dicey thought them to be 'rules for determining the mode in which the discretionary powers of the Crown...ought to be exercised'.²

Conventions vary in life-span, import and character and found amongst them are some of the pillars of modern-day Britain: the office of Prime Minister is a creation of constitutional convention; the notions of collective cabinet responsibility and ministerial accountability for the running of government departments are conventions; and more recently, following the Scotland Act 1998 and the re-establishment of a Scottish Parliament, the Sewell Convention established that Westminster would have to seek the consent of Holyrood should it wish to legislate on a matter which was devolved to Edinburgh.³ Other conventions, of seemingly less constitutional importance, also deserve notice: it is convention that the eldest son of the monarch receives the title Prince of Wales. It is convention that the Prime Minister is selected from the House of Commons, and not the Lords. It is convention that following a hung parliament, the incumbent government has the first attempt to form a coalition and to see whether it can command the confidence of the House of Commons.⁴ Whilst these may not go to the heart of the British constitution, they are conventions nonetheless. Rodney Brazier has argued for sub-division and regulation within the sphere of conventions and wishes to see some of what we would currently call conventions re-defined as 'constitutional practices' which would be 'hierarchically inferior' to conventions, and another species of the constitution to be born in the superior 'constitutional obligation'.⁵ However, the present author endorses the view of Colin Munro who suggests that 'it seems preferable to view the non-legal *rules* relevant to the constitution as being of one class, even if – perhaps because – their importance, precision, and obligatoriness are variable'.⁶ The key distinction ought to remain between conventions and laws, although this point is one of considerable controversy and differing views.

¹ JP Mackintosh, *The British Cabinet* (3rd edn, Stevens, London 1977) at p. 13.

² AV Dicey, *Introduction to the Law of the Constitution* (10th edn, Macmillan, London 1961) at p. 422.

³ This consent is sought through a Legislative Consent Motion.

⁴ This must follow following the general elections in 1974 and 2010, and is now enshrined in Cabinet Office, 'The Cabinet Manual – Draft, A guide to laws, conventions, and rules on the operation of government' (December 2010) at para. 46, available at <<http://www.cabinetoffice.gov.uk/resource-library/cabinet-manual>> (accessed 19 June 2011).

⁵ R Brazier, 'The Non-Legal Constitution: Thoughts on Convention, Practice and Principle' (1992) 43 NILQ 262.

⁶ C Munro, *Studies in Constitutional Law* (2nd edn, Butterworths, London 1999) at p. 81.

Dicey distinguished conventions from laws in a practical manner; laws could be enforced by courts, whereas conventions could not.⁷ Jennings considered there to be 'no distinction of substance'.⁸ Munro points to considerable case law in which the courts have refused to recognise conventions as law⁹ and highlights Lord Widgery CJ who said that 'a true convention [is]...an obligation founded in conscience only'.¹⁰ The difference between convention and law can be further highlighted when one considers the differing implications of either being breached. Someone who breaks the law can be punished in a court – his actions have been deemed illegal. Someone who breaks with convention, however, cannot be punished in a court, but his actions might be deemed unconstitutional and his position may become untenable. A law which is broken does not cease to exist, but this *can* be the result when a convention ceases to be observed. Conventions can be made into laws by legislation.¹¹ There is speculation as to whether conventions can 'crystallise' into laws over time and such speculation has received renewed energy since the Ministerial Code was re-vamped and re-published by Mr. Brown in 2007 and again by Mr Cameron in 2010.¹² Whether judges have or should recognise conventions as legal rules which already exist is another area under the spotlight.¹³ This has received further examination in light of Freedom of Information legislation and how this co-exists with the convention of cabinet responsibility and secrecy.¹⁴ The convention that neither fact nor content of advice given by the Law Officers can be disclosed outside government without the Law Officers' consent received scrutiny in *Her Majesty's Treasury v. Information Commissioner*.¹⁵ However, despite a few recent articles and cases which suggest there is a potential future role for the courts in interpreting conventions, it is submitted that there is insufficient evidence to suggest that we are at that stage yet. The speech by Lord Reid in *Madzimbamuto v. Lardner-*

⁷ Dicey (n 2) at p. 23.

⁸ I Jennings, *The Law and the Constitution* (5th edn, University of London Press, London 1959) at p. 81.

⁹ C Munro (n 5) at pp. 66-74.

¹⁰ *Attorney-General v. Jonathan Cape Ltd* [1976] QB 752 at 765. This case concerned the attempt of the executors of deceased Labour cabinet minister, Richard Crossman, to publish Mr Crossman's diaries. The Attorney-General sought to prevent publication on the basis of the convention of collective ministerial responsibility. An injunction was granted because of the growing common law of confidentiality, not because of the constitutional convention.

¹¹ The best examples of which are found in the Scotland Act 1998 which, for example, made it a statutory requirement for the Prime Minister to be the appropriate person to advise Her Majesty on the appointment of the Lord President of the Court of Session and the Lord Justice-Clerk. This was previously convention. (s95(1) Scotland Act 1998).

¹² See, for example, NW Barber, 'Laws and constitutional conventions' 2009 125(Apr) LQR 294.

¹³ See M Elliott, 'Parliamentary Sovereignty and the New Constitutional Order' (2002) 22 LS 340.

¹⁴ See R Hazell & D Busfield-Birch, 'Opening the Cabinet door: freedom of information and government policy making' 2011 PL 260.

¹⁵ [2009] EWHC 1811 (Admin); [2010] QB 563.

*Burke*¹⁶, when it was suggested to the Privy Council that Parliament had ignored convention by legislating for Southern Rhodesia without its consent, remains relevant today when he said: 'Their Lordships in declaring the law are not concerned with these matters'.

Despite many attempts to offer a clear definition of conventions and the features of them, it is suggested that a more valuable approach may be found in leaning towards flexibility over rigidity, and in considering all opinions proffered on this matter. The reader should also be forgiven if feelings of frustration emerge at the lack of clarity offered on this complex area of constitutional law; it is suggested, however, that had the author attempted to glean any more rules or underpinnings from the research carried out, that it would have been at the expense of accuracy.

3. The role of the Prince of Wales

The constitutional role of the Sovereign was famously summed up by Bagehot when he declared that she had 'the right to be consulted, the right to encourage [and] the right to warn'.¹⁷ The role of the Prince of Wales, however, has been an area of constitutional law that has been largely overlooked. Rodney Brazier has written one of the only articles dedicated to the topic¹⁸ but not much discussion or critique followed. Brazier separated his article into those constitutional 'rights and duties', 'obligations' and 'qualities' which the Prince of Wales enjoys, adheres to and should possess. This section will analyse some of Brazier's findings, whilst keeping in mind the theme of the paper being one of constitutional conventions. Unless stated otherwise, all references to the 'Prince of Wales' should be taken to mean the present incumbent.

A. Brazier on the Prince of Wales

Brazier begins his study of the Prince of Wales by focussing on what he described as 'the Prince's right to be instructed in the business of government so as to prepare him for kingship'.¹⁹ He points to the Queen's hand in instructing Charles on constitutional matters and to her practice of allowing him access to government papers. Brazier views this as unexceptional and, indeed, this convention may be backed up by the knowledge that many of Charles' most recent predecessors were given the same education by the monarch of the time. Discussion of the Prince's role as Counsellor of State, his

¹⁶ [1969] 1 AC 645 at 723.

¹⁷ W Bagehot (R Crossman (ed.)), *The English Constitution* (Collins, London 1963) at p. 111.

¹⁸ R Brazier, 'The constitutional position of the Prince of Wales' 1995 PL 401.

¹⁹ *ibid* at p. 401.

right to sit in the House of Lords²⁰ and his special position on taxation followed. However, the 'constitutionally much more interesting'²¹ part of the Prince's role was to be found in his relationship with Her Majesty's Government.

The Prince of Wales' right to be instructed on and to be involved in the business of government is, as previously said, uncontroversial. There is a precedent in action, one which Charles himself believed he was following, and there was a reason for this precedent.²² However, the Prince of Wales took this further and has met privately with the Prime Minister, secretaries and ministers of state, shadow ministers and leaders of the devolved administrations. A scan of the court circular in 1994 over a twelve month period showed that the Prince met in private with ten ministers, two shadow ministers and the Leader of the Opposition.²³ A scan of a nine month period between 2010 and 2011 shows that figure to have increased. Of course the minutes of such meetings are never released²⁴ but it is thought that the Prince of Wales would have seen these meetings as opportunity to offer his opinions. As Brazier pointed out, Charles sees it as both his duty and his right 'to raise matters of public policy with Ministers'.²⁵ Ministers, of course, are free to ignore the advice of the Prince and there can be no consequence to them so doing. Brazier believes that 'there are more than enough precedents to establish the existence of [a] convention'²⁶ and that Prince William will be able to rely on this convention when he becomes heir apparent. As a concluding note, Brazier believes that should subsequent ministers have an objection to this practice, that they have no one to blame but themselves 'for allowing the Prince's actions to gel into a new convention rather than stifling it at birth'.²⁷

Political neutrality is what Brazier defines as a constitutional obligation to which the Prince must adhere.²⁸ Whilst all members of the Royal family should remain neutral, it is particularly important that the Prince adhere to this, owing to his future role as monarch. His impartiality, however, has been questioned throughout his 60 year 'reign' and he has been accused of meddling and even of being a dissident. Brazier gives examples of some of his controversial remarks, but these will be replaced by more recent examples in

²⁰ Since abolished by the House of Lords Act 1999.

²¹ R Brazier (n 17) at p. 402.

²² Thus satisfying Sir Ivor Jennings' test for the creation of a constitutional convention. Jennings (n 7) at p. 131.

²³ As highlighted by Jonathan Dimbleby in his authoritative autobiography on the Prince of Wales. *The Prince of Wales* (Little Brown & Co, London 1994) at p. 405.

²⁴ Freedom of Information Act 2000 s37(1): 'Information is exempt information if it relates to (a) communications with Her Majesty, with other members of the Royal family or with the Royal Household.'

²⁵ R Brazier (n 17) at p. 404.

²⁶ *ibid.*

²⁷ *ibid* at p. 405.

²⁸ *ibid.* at p. 406.

the analysis section which follows. Brazier hypothesises on whether the Prince of Wales could ignore formal advice given by ministers and suggests that the Prince would be 'constitutionally bound to act on any formal...advice which might be given to him which affects his constitutional position'.²⁹ Brazier reaches this conclusion based, principally, on the fact that the Sovereign must accept the advice of her ministers and so, too, must the Prince. At the time of writing, Brazier questioned whether there would ever be a situation in which ministers would have to tender formal advice to the Prince, instead of going through the Queen or through informal channels. Although the answer to this is still unknown, it is not farfetched to suggest that there would have been occasion to give advice to the Prince, as well as the Queen, in the lead up to his marriage with Mrs. Parker-Bowles.³⁰ In the final sections of his article Brazier discusses, amongst other things, what would prevent Charles acceding to the throne³¹ short of death or abdication. He speculates on divorce and re-marriage³² and concludes by stating that whilst the day-to-day job of the Prince remains that of his choosing, that there is now a 'sizeable body of convention and law'³³ to help understand his position.

B. Analysis

Brazier's writing on the Prince of Wales filled a gap in our understanding of constitutional law in Britain. The aim of this article, however, is to focus on the conventions which Prince Charles has adhered to or created. The author has already noted Brazier's arguments for the differing categories of constitutional convention and it is in this respect that differences between our analyses may emerge. This paper will adopt Munro's view³⁴ that constitutional conventions are of one category, regardless of how rigidly a convention is followed or of the level of constitutional import which can be attributed to it.

Brazier termed the Prince of Wales' ability to seek information from government ministers as a 'constitutional right' and concluded that this right was now a convention. Whilst the present author agrees with Brazier that a constitutional convention has been established allowing the Prince of Wales to meet with and seek information from ministers, a cautious approach will be taken in further defining that as a constitutional right. This definition and sub-categorisation implies that it is different from, for example, the Prince's

²⁹ *ibid.* at p. 409.

³⁰ The Queen would have been advised on whether to consent to the marriage, as required by the Royal Marriages Act 1772.

³¹ Namely marrying a Roman Catholic or converting to Catholicism.

³² Both of which have since occurred.

³³ R Brazier (n 17) at p. 416.

³⁴ See generally, Munro (n 5).

'obligation' to remain politically neutral. Whilst Brazier undoubtedly adopted these terms for the ease of the reader, it is submitted that this, in fact, could add confusion to the student of the constitution. The term 'constitutional right' could be taken to imply that this convention had started crystallising into law and that no one could deny the Prince this right. Brazier seemed to endorse this implication by suggesting that future ministers could not ignore this convention if future Princes of Wales sought information from them. It is suggested that there is a danger in following this argument. It is worth considering what the implications would be should a future minister refuse to allow a future Prince of Wales access to government papers? As stated above, if a convention is no longer followed, it can spell the end of a convention, and short of Parliament enacting legislation to make the one-time convention law, not much else can be done. A future Prince of Wales could raise an action in court but, as we have seen, the case law seems to suggest that the courts would be unwilling to enforce a convention. Would a Prince of Wales appeal to an MP to introduce a bill to Parliament affirming his right to seek government papers? Perhaps, but this would be a very unlikely course of action and any such bill would be unlikely to get past the committee stage. It is submitted, therefore, that this particular convention highlights the difficulties which can occur should one attempt to declare a particular convention as being of higher importance than another; conventions have one thing in common, regardless of the role they play: they are not laws and are not rigid in nature.

Brazier speaks of the 'obligation' that the Prince of Wales remains politically neutral. Again, the author would question the need to sub-categorise this convention as a 'constitutional obligation' and will refer to it simply as a constitutional convention, albeit one which 'obliges' the Prince not to act in a certain manner. The Prince's observation of this convention has sparked the most criticism from the press and he has been repeatedly criticised for his outspoken remarks. In August 2008, Prince Charles gave an interview to the Daily Telegraph on the matter of companies developing genetically modified crops. The Prince said that it was 'a gigantic experiment with nature and the whole of humanity which has gone seriously wrong' and that reliance on these corporations for food would end in 'absolute disaster'.³⁵ Following the Prince's interview with the Daily Telegraph, the then Environment Minister, Phil Woolas, 'challenged Prince Charles to prove his claim that GM crops could cause a global environmental disaster'.³⁶ In 2004, Education Secretary Charles Clarke, described Prince Charles as 'very old-fashioned and out of time' for his

³⁵ J Randall, 'Prince Charles warns GM crops risk causing the biggest-ever environmental disaster' *The Daily Telegraph* (12 August 2008) available at <<http://www.telegraph.co.uk/earth/earthnews/3349308/Prince-Charles-warns-GM-crops-risk-causing-the-biggest-ever-environmental-disaster.html>> (accessed 19 February 2009).

³⁶ 'Prince must prove anti-GM claim' *BBC News Online* (17 August 2008) available at <<http://news.bbc.co.uk/1/hi/uk/7566012.stm>> (accessed 19 February 2009).

views on education.³⁷ Charles has been out-spoken on climate change, urban planning, architecture and religion. A documentary produced by Channel 4's Dispatches programme entitled *Charles: The Meddling Prince* tried to expose Charles' public views on political issues as something which, post coronation, could lead to a constitutional crisis. As a result of the programme Sir Michael Peat, Private Secretary to the Prince, wrote a letter to Channel 4 countering all allegations which, in his view, were inaccurate and he went on to provide further information about the Prince's role.³⁸ Sir Michael distinguished between 'political issues' and 'matters of public policy' and indicated that Charles' comments were directed towards matters of public interest but were not party-political issues. Charles did not directly criticise the government for its policy on GM foods and, as Sir Michael noted: 'If an issue becomes party political or politically contentious after His Royal Highness has raised it, for example GM crops, he will not do so in public again'.

In light of the above, it is unsurprising that questions have been raised regarding Prince Charles' observation of the convention to retain political neutrality. It is submitted, however, that the Prince has not ignored this convention. On his official website, Charles describes himself as 'acting... as a catalyst to facilitate change'.³⁹ He has not sided with a political party nor has he directly criticised the government.⁴⁰ Being an activist and a prince need not be mutually exclusive; provided that Charles continues to avoid party political issues, the author can see no constitutional objection to the Prince continuing campaigning. Additionally, it is possible to view this activism as a creation of a new constitutional convention. It would be difficult to sub-categorise this into a 'right' or 'obligation' of the Prince, but as stated above, the present author would not wish to do so. It could, however, be considered convention that the heir to the throne need not remain as silent as the monarch and there can be a place for campaigning on matters of public interest. Indeed, should William when Prince of Wales begin campaigning on certain issues, it would be difficult to circumscribe his doing so on constitutional grounds. A caveat will be added at this juncture. Whilst this paper has touched upon what the outcome would be were a convention ignored, it is submitted that should the Prince align

³⁷ T Halpin, 'Charles v Charles head to head' *The Times* (19 November 2004) available at <<http://www.timesonline.co.uk/tol/news/uk/article392874.ece>> (accessed 5 April 2009).

³⁸ Letter from Sir Michael Peat to Channel 4, 5 March 2007, retrieved from The Official Website of The Prince of Wales, 'Documents', 'Letter to Dispatches' available at <<http://www.princeofwales.gov.uk/content/documents/Letter%20to%20Dispatches%205th%20March%202007.pdf>> (accessed 30 March 2009).

³⁹ The Official Website of The Prince of Wales, 'At work', 'Raising Issues' available at <<http://www.princeofwales.gov.uk/personalprofiles/theprinceofwales/atwork/promotingandprotecting/raisingissues/index.html>>.

⁴⁰ See, for example, Tony Blair's response to a question on the matter, from The Website of the Prime Minister, 'Monthly Press Conference 23 February 2006 – Full Transcript' available at <<http://www.number10.gov.uk/Page9098>> (accessed 6 April 2009).

himself politically and therefore cast doubt on whether he is capable of neutrality when King, that the result would be a growing republican movement and would pose a serious threat to the future of the British monarchy.

C. Additional Observations

A few additional observations on the role of the Prince of Wales can be made at this point. It is established convention through centuries of precedent that the primary role of the Prince of Wales is to support the monarch. This will take the form of representing the Sovereign at official functions, the carrying out of investitures and receiving foreign delegations. The Prince of Wales is also expected to support the government of the day by undertaking trips abroad to further British interests. The increased use of air-travel during Charles' time as Prince meant that he undertook many more foreign trips at the request of the Foreign Office than many of his predecessors. Perhaps 'supporting Her/His Majesty's Government' has become a distinct role, falling alongside the traditional role of 'supporting the Queen'.⁴¹ Establishing a charitable enterprise is an innovation of the current Prince. The Prince's Charities, which includes The Prince's Trust, is the brainchild of Charles. Whilst future Princes could not be forced to be as actively involved in charity as Charles has been, the precedent which has been set by him in undertaking hundreds of engagements a year and being a campaigner for charities will be hard to ignore.

4. *The Duke of Cambridge*

As a final section to this paper, a short discussion of the role of Prince William, now Duke of Cambridge, will take place. Unlike the title 'Prince of Wales' which has always been reserved for the eldest son of the monarch, the title 'Duke of Cambridge' has been held by a variety of different royals throughout history. The discussion which follows, therefore, will focus on the constitutional position of William as son of the Prince of Wales, as opposed to any constitutional significance attached to the title Duke of Cambridge. The reader should by now be comfortable in the knowledge that a constitutional convention is usually held to exist because of precedent. It is of interest therefore to discuss conventions which might be created when there is no precedent available. The role of the new Duke of Cambridge affords us an opportunity to speculate on potential future conventions. What will his role be?

⁴¹ This is the principal role of the Prince of Wales, as stated on his official website. The Official Website of The Prince of Wales, 'At work' available at <http://www.princeofwales.gov.uk/personalprofiles/theprinceofwales/atwork/index.html> (accessed 19 February 2009).

Will it change over time? Will conventions be created? These questions will be addressed.

The role of the Duke of Cambridge, at least for the near future, will presumably not be too different from his role prior to marriage. He will continue to serve as a search and rescue pilot at RAF Anglesey and will continue to support his charities. It is likely that he will begin to make more public appearances over time and will represent Britain in an official capacity with increased frequency. This, however, is not noteworthy. In fact, any constitutional interest in the Duke of Cambridge will begin only if the Queen continues to reign for a time longer, and as long as her son, Charles, does not predecease her. A hypothetical, but not un-realistic, scenario will be considered. Should the Queen reign for another ten years, she will be ninety-five years old and the Prince of Wales will be seventy-three. Over the past few years, Charles has started to take over some of his mother's duties in order to lighten her load. This is unremarkable and expected practice of the Prince of Wales.⁴² However, should this hypothetical situation become a reality, it is not far-fetched to suggest that the seventy-three year old Prince, who is assisting the ninety-five year old monarch, might seek assistance from the thirty-nine year old Duke. The Duke, who is already a Counsellor of State by statute and can, for example, give assent to bills in the absence of the monarch, might find himself treading on uncharted waters. Will the Prince of Wales begin to show the Duke cabinet papers in order to prepare him for his role as Prince of Wales? If he does, it is submitted that this would create a new constitutional convention but would be uncontroversial. Jennings' requirement that there be a reason for the convention's existence would be satisfied;⁴³ the Duke would be being prepared for a future role. Would this same reasoning be applied should the Duke begin to seek meetings with ministers and secretaries of state? It is suggested that it would. The Prince of Wales is permitted to do so because he is being prepared for kingship. It follows, therefore, that the Duke would be permitted to do so in preparation for becoming Prince of Wales. Conversely it is submitted that should, for example, Prince Henry (Harry) of Wales attempt to seek government information or meet with ministers of state, that this should be refused by ministers as there would be no reason to allow it; he will never be King nor will he ever be Prince of Wales.⁴⁴ Therefore, owing to the advanced age of the British monarch, the British constitution might begin to see new conventions created in the practice of her grandson, the Duke of Cambridge. This section is, by its nature, entirely speculative but there can be value in considering potential new conventions prior to their creation. It could add a little more certainty to a very uncertain area of constitutional study.

⁴² And, indeed, of a son!

⁴³ Jennings (n 7) at p. 131.

⁴⁴ Unless, of course, The Duchess of Cambridge does not produce an heir, in which case Prince Harry would remain next in line after William.

5. Conclusion

The marriage of the Duke and Duchess of Cambridge has given reason for an article of this nature to be written. William will have three main roles in his life: that of second in line to the throne; heir to the throne; and monarch. As stated in the introduction, the constitutional role of the monarch has been written on in depth. Sixteen years ago, Brazier enlightened the constitutional enthusiast with an article on the Prince of Wales. This article has attempted to analyse Brazier's work on the Prince of Wales and to provide some commentary on the constitutional role of the Duke of Cambridge by focussing on the constitutional conventions which underpin the two royal positions.

The UK Oil and Gas Taxation Regime: A 'Smash and Grab' Approach?

PETER RIPLEY*

1. Introduction

Oil and gas taxation regimes aim to acquire for the State

a fair share of the wealth accruing [from the extraction of the resources] whilst encouraging investors to ensure optimal economic recovery of those hydrocarbon resources.¹

The problem is that these aims are 'often competing rather than complementary'.² If the State gets too greedy and imposes an excessive tax burden then the effect is to discourage investment. Maximising government revenue in the long term involves

balancing the possibility of revenue loss on highly profitable projects through an over-liberal approach against the possibility of setting rent charges so high that there is revenue loss through deterrence of projects.³

This is a difficult balance to strike given the unique geology of each field, cost uncertainties, and oil price volatility. In fact it is

impossible to conceive a fiscal regime that meets all the required characteristics at all prices, at all times for all sizes of fields and cost structures likely to be encountered in a given basin.⁴

Alex Salmond recently accused the Chancellor of the Exchequer of making a 'smash and grab raid' on the profits of oil and gas companies operating in the

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¹ C Nakhle, *Petroleum Taxation: Sharing the Oil Wealth: A Study of Petroleum Taxation Yesterday, Today and Tomorrow* (Routledge, New York 2008) at p. 5.

² *ibid* at p. 6.

³ R Garnaut & AC Ross, 'Uncertainty, Risk Aversion and the Taxing of Natural Resource Projects' (1975) 85(338) *The Economic Journal* 272 at p. 273.

⁴ Nakhle, *Sharing the Oil Wealth* (n 1) at p. 28.

UK.⁵ The accusation was based on the Chancellor's decision to increase the supplementary tax on oil and gas production in order to fund a cut in fuel duty.⁶ The UK oil and gas tax regime has always contained distortions of the rules ordinarily applicable in the case of UK corporation tax and this is justified by a need to accommodate the aims of oil and gas taxation and the special circumstances of the industry. However, there is some substance to Alex Salmond's criticism because the current regime fails to strike a balance between oil company profitability and Government take. The regime now imposes an excessively high tax burden without offering meaningful incentives for investment. This may boost Government revenue in the short term but could render recovery of significant reserves uneconomic. The life of the industry could be cut short and the Government's revenue stream would dry up altogether.

2. The Need for Distortions

The exploitation of finite hydrocarbon reserves generates significant economic rent. Economic rent represents

the true value of the natural resource, the difference between the revenues generated from resource extraction and the costs of extraction.⁷

Costs of extraction include the minimum return necessary to attract the investment in the first place.⁸ Therefore economic rent is 'equivalent to excess profits'⁹ and so it is considered to form the base for an ideal tax. Kemp and Stephen remark that

⁵ 'New Scots Powers "not ruled out" says Alex Salmond' *BBC News Online* (23 May 2011) available at <<http://www.bbc.co.uk/news/uk-scotland-13498678>> (accessed 27 May 2011).

⁶ See HM Treasury, 'Budget 2011' (23 March 2011) at paras. [1.146] and [2.101] available at <http://cdn.hm-treasury.gov.uk/2011budget_complete.pdf> (accessed 27 May 2011). The Finance Bill 2011 contains legislation, effective from 24 March 2011, to increase the supplementary charge payable on ring-fenced profits on UK and North Sea Oil and Gas activities from 20% to 32%. See below at (n 56) and accompanying text.

⁷ Nakhle, *Sharing the Oil Wealth* (n 1) at p. 16. Kumar defines economic rent as that part of the value of the output of industry which is a gift of nature and not produced by man: R Kumar, 'Taxation for a Cyclical Industry' (1991) *Resources Policy* 133 at p. 134. Kumar adds that economic rent is both cost and price determined, it changes with market prices that move in a cyclical fashion.

⁸ This is referred to as the supply price of investment.

⁹ D Johnston, *International Petroleum Fiscal Systems and Production Sharing Contracts* (PennWell Publishing Company, Tulsa, Oklahoma 1994) at p. 6.

the purpose of the special taxation arrangements for the UKCS is to collect a 'reasonable' share of the economic rents emanating from oil and gas exploration.¹⁰

A fiscal regime which captures pure economic rent satisfies the equity principle of taxation.¹¹ Vertical equity requires that taxpayers with a greater ability to pay should pay more tax. It follows that oil companies exploiting valuable resources and generating supernormal economic rents have a greater ability to pay and so their tax liabilities should be greater.¹² Furthermore, extracting and consuming natural resources now will reduce the stock available for future generations. It has therefore been argued that to satisfy an 'intergenerational equity criterion' the tax system should discourage rapid depletion of resources at times when prices are low.¹³ Higher tax rates have this effect and ensure that future generations get a fair share of the resources or compensation for those that are depleted.

Equity considerations also arise from the assumption that the Crown should receive a fair and equitable payment for all concessions as the basic owner of the UK's natural resources.¹⁴ There exists a

deeply embedded popular notion that all natural resources, and oil in particular, belong to the nation . . . and that proceeds from their extraction should go mainly to the owners.¹⁵

This underpins much of the policy behind petroleum tax regimes and is felt to justify a far higher government take from the profits oil companies generate

¹⁰ AG Kemp & L Stephen, 'The Impact of the 2002 Tax Changes on the UK Continental Shelf' (North Sea Study Occasional Paper No.89, University of Aberdeen: Department of Economics, Aberdeen 2002) at p. 42.

¹¹ Such a regime also satisfies the principle of neutrality which, in the context of the oil and gas industry, requires that a tax neither causes over-investment nor affects the decision to invest. A tax aimed at collecting economic rent is considered to be optimal in this regard because the rent represents a return not required to motivate investment in extraction. See A Raja 'Should Neutrality be the Major Objective in the Decision-Making Process of the Government and the Firm?' Centre for Energy, Petroleum and Mineral Law Policy 1999 Annual Review 3 - Article 2 available at <http://www.dundee.ac.uk/cepmlp/car/html/car3_article2.htm> (accessed 22 November 2010).

¹² See: Nakhle, *Sharing the Oil Wealth* (n 1) at p. 12; I Rutledge and P Wright, 'Profitability and Taxation in the UKCS Oil and Gas Industry: Analysing the Distribution of Rewards between Company and Country' (1998) 26(10) Energy Policy 795 at p. 798.

¹³ Nakhle, *Sharing the Oil Wealth* (n 1) at p. 12.

¹⁴ Strictly speaking the Crown does not own the hydrocarbons situated on the UKCS. Section 1(1) of the Continental Shelf Act 1964 simply refers back to the UK's 'sovereign right' under international law to exploit natural resources on its continental shelf. This is not a right of full ownership. Oil and gas in strata on the UKCS is therefore *res nullius*. Ownership is created in favour of the licensees at the wellhead.

¹⁵ Nakhle, *Sharing the Oil Wealth* (n 1) at p. 149.

than is the case with other forms of production or income creating activities. The profit sharing calculation between the State and oil companies becomes one of deciding what to leave, rather than what to take. The Alberta Royalty Review Panel assert that 'the resources do not belong to the developers; they belong to the people', and so it follows that

the design of a royalty and tax system for energy resources...must justify every dollar that does not go to the owners.¹⁶

This is an expression of the principle that the country should be adequately compensated for the depletion of what is a nationally owned resource. This principle also underpins the UK Government's objectives

to promote investment and production whilst striking the right balance between producers and consumers and *ensuring a fair return for the UK taxpayer from our national resources*.¹⁷

Principles of taxation and equity justify the appropriation of economic rent. However, the economic rent only arises because of the entrepreneurial efforts of the oil companies. Therefore petroleum tax regimes must also facilitate and encourage investment from oil companies through distortions of the ordinarily applicable tax system which recognise the special characteristics of the oil industry, including the high levels of risk involved. The tax regime plays a significant role in reducing both exploration and political risk in order to incentivise investment and unlock economic rent from the resource.

Exploration risk is the risk of losing large sums of money on projects that produce no commercial discoveries. A good tax regime should achieve a fair sharing of this risk between the Government and the oil companies. There is no equity participation from the Government in UKCS operations and so risk sharing is instead achieved through a system of reliefs and allowances different to those ordinarily applicable. The Government shares the risk through lower tax revenue. Kumar observes that

the Government becomes a sleeping partner, taking a share when profits are made and sharing the risks through loss offsets.¹⁸

¹⁶ See WM Hunter, E Chrapko, J Dwarkin, K McKenzie & A Plourde, 'Our Fair Share: Report of the Alberta Royalty Review Panel to the Hon. Lyle Oberg, Minister of Finance' (Edmonton, September 2007) at p. 5.

¹⁷ HM Treasury, 'The North Sea Fiscal Regime: A Discussion Paper' (March 2007) at para. 1.4 (emphasis added) available at <http://www.hm-treasury.gov.uk/d/bud07_northsea_222.pdf> (accessed 22 November 2010).

¹⁸ Kumar (n 7) at p. 143.

The more extensive reliefs and allowances available to oil companies can mitigate the effect of the higher tax rates they pay.

Political risk arises in the UK due to instability in the fiscal regime. Investors add a risk premium when faced with greater fiscal instability and so oil states should strive to put in place a stable regime.¹⁹ Unfortunately the UK Government has made many changes to the regime since 1975 and

[m]ost, if not all the changes have occurred to change the risk reward balance between the oil companies and the State, as the general economic environment has changed.²⁰

This incessant tinkering has significantly increased political risk.

3. The Current Distortions

A. Petroleum Revenue Tax

Petroleum revenue tax (PRT) was introduced under the Oil Taxation Act 1975 but was later abolished for all fields given development consent on or after 16 March 1993.²¹ However, a number of fields remain liable to PRT and the tax continues to contribute significantly to the Government's revenue from the North Sea.²²

PRT is an 'additional profits' or 'windfall' tax which seeks to 'cream off a large proportion of the very high profits' earned by oil companies at the peak of oil price cycle or from particularly low cost fields.²³ It is charged on each

¹⁹ Nakhle, *Sharing the Oil Wealth* (n 1) at p. 64.

²⁰ T Daintith, GDM Willoughby & A Hill, *United Kingdom Oil and Gas Law* (Sweet & Maxwell, London 1984 (as updated)) at p. 1439. Bartlett remarks that '[f]or a capital intensive industry, heavily reliant on new technology and innovation and built on long lead projects involving huge cash investments, this amount of fiscal complexity and change has always been a challenge to manage'. See Bartlett, 'Taxing North Sea Oil' (2002) 11 IELTR 267.

²¹ Finance Act 1993 s185. Since 1 July 2007 PRT also no longer applies to re-commissioned fields. See Finance Act 2007 s102 which amends the Finance Act 1993 s185.

²² See HMRC, 'Government Revenues from UK Oil and Gas Production' available at <http://www.hmrc.gov.uk/stats/corporate_tax/table11_11.pdf> (accessed 22 November 2010).

²³ Kumar (n 7) at p. 143 referring specifically to additional profits taxes in the context of mining taxation. PRT is similar to the resource rent tax (RRT) advocated by Garnaut and Ross insofar as it is a profit tax that begins to be collected when a certain threshold internal rate of return on total cash flow has been realised. See Garnaut & Ross (n 3) at p. 277 *et seq.* The difference is that RRT allows expenditure to be carried forward in real terms, together with an interest mark up, for offset against future profits. This relief is absent from PRT but is compensated for by the 'uplift' allowance. Note also that the 'safeguard' relief under PRT is equivalent to a 15% return allowance under an RRT scheme. On uplift and safeguard see below.

participator's share of profits from each individual taxable field.²⁴ The high PRT tax rates are a distortion of the ordinarily applicable rules aimed at increasing the Government's share of oil profits. The tax is currently levied at a rate of 50%.²⁵ Some of the means by which the tax is calculated and administered also favour the State at the expense of oil companies. The tax intends to collect excess profits but the stock adjustment included in the calculation of assessable profits incorporates an element of production taxation.²⁶ In effect, oil companies are taxed on production at half of market value before profit of sale. To ensure that tax due is paid as early as possible PRT is collected twice a year.²⁷ Losses are not usually allocated in the period charged because they must be approved via an administrative procedure.²⁸ Therefore profits are paid up front. A number of commentators view PRT as a barrier to investment. Following its abolition for fields given development consent on or after 16 March 1993 there was a marked increase in North Sea activity. A study by Martin suggested that the 1995 peak in oil production would not have happened without the abolition of PRT.²⁹ Bartlett remarks that,

the major shift in the balance of risk and reward introduced in 1993 was clearly the spur for investors to increase activity levels and improve profitability, ultimately generating more revenue from [corporation tax].³⁰

²⁴ Note that PRT profit and losses are therefore calculated using the statutory procedure set out in the Oil Taxation Act 1975 rather than by reference to profits shown in the company's accounts. The Oil Taxation Act 1983 brought tariff and disposal receipts arising from the use of field assets directly into the PRT charge. However, the Finance Act 2004 inserted a new s6A into the 1983 Act with the effect that tariffs relating to new business that are tax-exempt tariffing receipts do not constitute chargeable tariffs for PRT purposes. 'Participator' is defined in the Oil Taxation Act 1975 s12(1).

²⁵ Oil Taxation Act 1975 s1(2). During the period 1983-1993 the tax was levied at 75%.

²⁶ To be included in the computation of profits is one half of the market value of oil won but not sold/appropriated or sold but not delivered on the last business day of the chargeable period less one half of the market value of oil won but not sold/appropriated or sold but not delivered on the last business day of the preceding chargeable period. See Oil Taxation Act 1975 s2.

²⁷ The tax has a chargeable period of six months. See Oil Taxation Act 1975 s1(3).

²⁸ See Oil Taxation Act 1975 s7 and sch 2. Expenditure must also be claimed and allowed before it can reduce a company's tax liability with the result that it often reduces PRT payable for the following half yearly assessment rather than necessarily for the half year period in which it was incurred. Provisional expenditure allowance mitigates the disadvantages of this by providing for a provisional allowance by reference to two components. See Oil Taxation Act 1975 s2. However, provisional expenditure allowance has been abolished in relation to any chargeable period beginning after 30 June 2009. See Finance Act 1999 s89 and sch 43 amending s2 of the 1975 Act.

²⁹ S Martin, 'Tax or Technology? The Revival of UK North Sea Oil Production' (1997) Oxford Institute for Energy Studies available at <<http://www.oxfordenergy.org/pdfs/SP8.pdf>> (accessed 22 November 2010).

³⁰ Bartlett (n 20) at p. 267.

However, high tax rates and up-front payment of tax liabilities are not the only attributes of PRT. The tax is also characterised by an extensive system of reliefs and allowances enabling a project to rapidly recover its costs and ensuring that projects where no economic rent is likely are protected from the tax. Mommer contends that the various reliefs available 'ensure that PRT cannot, even accidentally, cut into the normal profits to which the companies are entitled.'³¹

In general, there is no distinction between capital and revenue expenditure for PRT purposes and the categories of allowable field expenditure are fairly generous.³² Finance costs do not come within the scope of allowable expenditure but as a result of this an additional relief known as uplift or supplement is available which provides for a super deduction of 135% in relation to certain types of qualifying expenditure.³³ Uplift is available for expenditure incurred up to the end of the period in which the cumulative field cash flow turns positive. There is also an oil allowance of 250,000, 500,000 or 125,000 metric tonnes for each chargeable period depending on when the field concerned was given development consent with an aggregate allowance of twenty times the allowance per period.³⁴ This is a 'gross production relief which has the effect of reducing the effective PRT rate'.³⁵ The safeguard is an overriding relief which is only applicable following deduction of all expenditure and other reliefs.³⁶ In common with the oil allowance, the safeguard is designed to ensure the viability of smaller, more marginal fields. It guarantees a specific return on capital before companies have to start paying PRT.³⁷

³¹ B Mommer, 'Bernard Mommer Defends Petroleum Royalty as an Efficient Rent-Collecting Device' (Energy Forum, Oxford, May 1996) 15 in Nakhle, *Sharing the Oil Wealth* (n 1) at p. 59.

³² Oil Taxation Act 1975 s3. On the scope of 'initial storage and treatment' expenditure see *BP Exploration Operating Company Ltd v The Commissioners of Inland Revenue* 2000 WL 33148483 in which BP was held to be entitled to claim expenditure of just under £60 million for the design and development of a marine vapour recovery system. The dispute arose because the Inland Revenue had taken a narrow approach to the meaning of initial storage and treatment under s3 and initially disallowed the claim. On expenditure incurred searching for oil anywhere within the area of the oil field under s3 see *Amerada Hess Limited v Inland Revenue Commissioners* 2001 WL 172046. Schedule 5 of the Act contains details on the procedure for claiming expenditure. Note also that oil used in petroleum operations is excluded from the scope of PRT.

³³ See Oil Taxation Act 1975 ss2(9) and 3(5).

³⁴ Oil Taxation Act 1975 s8. Any surplus allowance can be carried forward as part of the pool of oil allowance but it does not increase the allowance for a later period above the normal limit per period.

³⁵ Deloitte, 'Fiscal and Regulatory Guide' (Petro Reports, UK September 2009) at p. 71.

³⁶ Oil Taxation Act 1975 s9.

³⁷ If adjusted profits are less than 15% of the company's accumulated capital expenditure (ACE) in the field up to the end of the relevant chargeable period then the PRT for that period is reduced to zero. ACE is the total amount of expenditure qualifying for supplement, also known as the safeguard capital base. If the adjusted profits are more than 15% of the company's ACE then the PRT charge is the lesser of 80% of the excess or the amount of PRT charge calculated in the normal way.

To temper the field based nature of PRT a cross field allowance was introduced by the Finance Act 1987³⁸

to give companies a financial incentive to develop smaller second generation fields by allowing a measure of relief for expenditure incurred in such developments against income from larger and more mature fields.³⁹

The treatment of losses under the PRT regime further mitigates the higher tax rates. Losses may be carried forward indefinitely and set off against the first available future profits.⁴⁰ Losses can also be carried back indefinitely and set off against previous taxable profits from the field.⁴¹ If there are insufficient assessable profits in earlier periods to absorb the loss, it may be possible to claim it as 'unrelievable field loss' in another field.⁴² In a recent period of discussion between industry and the Government the future of PRT was considered.⁴³ A major reason behind the ultimate decision not to abolish the regime entirely⁴⁴ was concern from industry about the impact of the resulting removal of unlimited carry back of losses arising during decommissioning.⁴⁵

³⁸ s65. See also Oil Taxation Act 1975 ss5A and 5B and sch 7 for details of exploration and appraisal relief and research relief which also allowed non-field expenditure to be set off against PRT.

³⁹ Deloitte (n 35) at p. 70. Companies can elect to surrender up to 10% of eligible development expenditure incurred. Claiming the cross field allowance forfeits any entitlement to supplement on the transferred expenditure but as the donor fields are often small and not expected to pay PRT the supplement would be worthless in terms of tax relief anyway. The importance of this allowance is dwindling and in time it will disappear since fields given development consent on or after 16 March 1993 do not incur eligible development expenditure.

⁴⁰ Oil Taxation Act 1975 s7.

⁴¹ Losses carried back displace the oil allowance and any safeguard restrictions.

⁴² See Oil Taxation Act 1975 s6 and sch 8.

⁴³ See HM Treasury, 'The North Sea Fiscal Regime: A Discussion Paper' (March 2007) available at <http://www.hm-treasury.gov.uk/d/bud07_northsea_222.pdf>; HM Treasury, 'Securing a Sustainable Future: A Consultation on the North Sea Fiscal Regime' (December 2007) available at <http://www.hm-treasury.gov.uk/d/consult_northsea051207.pdf>; HM Treasury, 'Supporting Investment: A Consultation on the North Sea Fiscal Regime' (November 2008) available at <http://www.hm-treasury.gov.uk/d/pbr08_northsea_1080.pdf> (all accessed 22 November 2010).

⁴⁴ Note that a power was created to allow HMRC to remove fields from the scope of PRT if they are never likely to pay the tax due to the availability of allowances. See Finance Act 2008 s107 which amended Finance Act 1993 s185. New developments can also be removed from the scope of existing PRT fields where it can be demonstrated that the application of PRT makes such exploitation uneconomic. A new return deferral scheme was also introduced.

⁴⁵ A number of minor adjustments were made to the regime to alleviate industry concern over decommissioning costs. Measures have been introduced to ensure that a former licence holder can obtain PRT relief where the current licensees default on their decommissioning costs (Finance Act 2008 ss103-105 and Oil Taxation Act 1975 sch 5) and ensuring tax relief for costs incurred post licence expiry (Finance Act 2009 s88 and sch 42 which amends s12 and sch 1 and 5 of Oil Taxation Act 1975).

The PRT regime was not a smash and grab raid on the profits of oil companies because the higher tax rates aimed at capturing economic rent were balanced by the system of reliefs and allowances. PRT favours neither the State nor the investor disproportionately. Zhang contends that, before the abolition of PRT for new fields, the regime was 'close to being neutral and relatively efficient at collecting economic rent'.⁴⁶ Zhang asserts that PRT did not distort investment decisions, stating that the 'combination of an up-lift of 35% and a tax rate of over 80% only affect the trigger [for development] marginally, but can collect 3/4 of the rent'.⁴⁷ PRT hits at economic rent because the allowances and reliefs available ensure that it is only payable after the company has achieved a normal rate of return. There is no doubt that the 1993 changes encouraged investment but this is only because new fields benefited from very low tax rates.⁴⁸ There was nothing inherently wrong with the PRT regime itself. Rutledge and Wright contend that there is considerable evidence to suggest that the majority of new investment would have been made even without the 1993 changes.⁴⁹ The additional production may have come later and been triggered by a factor other than a liberal fiscal regime, such as a rise in oil price or improved technology, but it would have come. The Government was not willing to wait and so employed a liberal fiscal regime to incentivise immediate production. This damaged overall revenue take and violated the intergenerational aspect of the principle of equity.⁵⁰

B. Ring Fence Corporation Tax

Ring fence corporation tax (RFCT) is the same as the standard corporation tax that all companies are liable to pay except for the fact that it applies within a 'ring fence'. The ring fence severs a company's 'oil related activities' in the UK

⁴⁶ L Zhang, 'Neutrality and Efficiency of Petroleum Revenue Tax: A Theoretical Assessment' (1997) 107(433) *The Economic Journal* 1106 at p. 1116.

⁴⁷ *ibid* at p. 1116.

⁴⁸ Rutledge & Wright ((n 12) at pp. 802-803) remark that following the 1993 changes the State share of profits became exceptionally low and was inequitable from historical and international perspectives. Oil companies had the opportunity to make super profits on the UKCS as the fiscal regime was failing to capture economic rent.

⁴⁹ Rutledge & Wright (n 12) at p. 807.

⁵⁰ Mommer asserts that the removal of PRT resulted in a net loss in fiscal revenues of £3.3 billion in relation to the increased production that followed, and that a 'property conscious' government would not have been very pleased with this. See B Mommer, 'Fiscal Regimes and Oil Revenues in the UK, Alaska and Venezuela' (2001) Oxford Institute for Energy Studies 10.

from all of its other trading activity for tax purposes.⁵¹ This prevents profits from the ring fence trade (RFT) being reduced by expenses not incurred wholly and exclusively for the purposes of the RFT or by losses not connected with, or arising out of, the RFT.⁵² The restriction does not apply in reverse and so ring fence losses can still be set off against non ring fence profits of the company.⁵³

Since 2008 the RFCT rate has been set independently of the normal corporation tax rate and it is currently set at 30%, which is 2% higher than the normal rate.⁵⁴ The RFCT rate is set to remain at 30% despite the cut in the normal rate of corporation tax from 28% to 23% over four years from 2011 to 2014 that was announced in the 2011 budget.⁵⁵ Therefore by 2014 RFCT will be 7% higher than the normal rate. This higher rate, and the ring fencing of an oil company's profit from its petroliferous trade, can be viewed as distortions of the ordinarily applicable rules aimed at increasing the State's share of the profits from oil production. The supplementary charge (SC) has the same purpose. The 2011 budget announced a 12% increase in the rate of the SC from 20% to 32%.⁵⁶ The SC is computed on a similar, but not identical, basis to RFCT.⁵⁷ It applies to a company's 'adjusted ring fence profits' which excludes financing costs.⁵⁸ Bartlett asserts that 'the denial of relief for interest against the new supplementary charge is a major disincentive for investment' because it increases the cost of debt finance.⁵⁹ The Government's stated objective for the denial of relief was to prevent oil companies manipulating their levels of borrowing between ring fence and non ring fence activities to minimise the

⁵¹ Corporation Tax Act 2010 ss277 and 279. Section 274 defines oil related activities as oil extraction activities and any activities consisting of the acquisition, enjoyment or exploitation of oil rights. Section 272 defines oil extraction activities as activities in searching for oil and natural gas, transporting oil and natural gas to dry land in the UK, or effecting initial treatment or initial storage of oil and natural gas. Section 273 defines oil rights. Section 291 provides that the activities of a participator in an oil field (or a connected person), in making available an asset in a way that gives rise to tariff receipts, are also to be treated as oil extraction activities.

⁵² See Corporation Tax Act 2010 s304. s305 prohibits group relief from losses allowances or expenditure from outside the ring fence trade from being set off against profits of a ring fenced trade.

⁵³ See Corporation Tax Act 2010 ss37, 45 and 304.

⁵⁴ The RFCT rate has been the same ever since it was set separately from the normal rate. See: Finance Act 2008 s6(2)(b); Finance Act 2009 s7; Finance Act 2010 s2.

⁵⁵ HM Treasury, 'Budget 2011' (n 6) at paras. [1.74] and [2.66].

⁵⁶ HM Treasury, 'Budget 2011' (n 6) at paras. [1.146] and [2.101]. See also s7 of the Finance Bill 2011, available at

<<http://www.publications.parliament.uk/pa/cm201011/cmbills/175/11175.i-v.html>> (accessed 11 June 2011).

⁵⁷ Corporation Tax Act 2010 s330. The charge was introduced by the Finance Act 2002 s91 at a rate of 10% for accounting periods beginning on or after 17 April 2002. The rate was then increased by the Finance Act 2006 s152 to 20% with effect from 1 January 2006.

⁵⁸ Corporation Tax Act 2010 s330. Financing costs are widely defined in s331.

⁵⁹ Bartlett (n 20) at p. 270.

impact of the SC.⁶⁰ But as Bartlett remarks, 'this area is already policed very strictly' through detailed provisions which restrict the deduction of interest against ring fence profits

unless the debt is specifically used to meet expenditure in carrying on oil extraction activities or in acquiring oil rights other than from a connected person.⁶¹

There are some special reliefs and allowances in relation to RFCT and the SC but unlike those available in relation to PRT they fail to mitigate the effect of the higher tax rates imposed. PRT paid is deductible for RFCT.⁶² General and administrative costs incurred wholly and exclusively for the purposes of the RFT are usually deducted in full as incurred in line with the ordinary corporation tax rules. However, any deductions for expenses of management of an investment business against profits from a RFT are expressly prohibited.⁶³ And as noted above, there are limits placed upon when interest can be deducted.⁶⁴ To take account of the investor's decommissioning liabilities costs associated with abandonment are allowable as deductions from ring fence profits. This includes expenditure incurred in obtaining an abandonment guarantee,⁶⁵ reimbursement expenditure,⁶⁶ expenditure incurred by a participator in meeting a defaulter's abandonment expenditure⁶⁷ and expenditure incurred by the defaulter in subsequently reimbursing the contributing participator.⁶⁸ With regard to the SC, the 2011 Budget indicates

⁶⁰ *ibid.*

⁶¹ *ibid.* See the provisions in relation to loan relationships contained in the Corporation Tax Act 2010 ss286-287.

⁶² Corporation Tax Act 2010 s299. See ss299 and 300 for rules governing the situation in which PRT is subsequently repaid to the taxpayer.

⁶³ Corporation Tax Act 2010 s303.

⁶⁴ Corporation Tax Act 2010 ss286-287. Special provision is also made in relation to sale and lease-back under s288 which prohibits a deduction from expenditure from ring fence profits for sale and lease-back financing unless certain conditions are met.

⁶⁵ Corporation Tax Act 2010 s292. The provision provides that expenditure is allowable as a deduction in calculating the participator's ring fence income if it would be so allowable for PRT purposes under the Oil Taxation Act 1975 s3. 'Abandonment guarantee' is defined in the Finance Act 1991 s104.

⁶⁶ Corporation Tax Act 2010 s293. This is relief by way of a deduction in the calculation of the relevant participator's ring fence profits for expenditure incurred by a participator who has become liable to the guarantor following the making of the guarantee payment under the abandonment guarantee. See also ss294-295.

⁶⁷ Corporation Tax Act 2010 s297. This is relief by way of capital allowance or deduction in calculating ring fence profits to a current or former participator in relation to additional abandonment expenditure paid as a result of the current or former participator's default as the case may be.

⁶⁸ Corporation Tax Act 2010 s298. The contributing participator having incurred expenditure in making up the shortfall as result of the default.

that the Government will restrict tax relief for decommissioning to the 20% rate.⁶⁹ Therefore the reliefs will not be available against the 12% increase. The aim of this measure is to avoid incentivising accelerated decommissioning. Losses attributable to decommissioning are also given special treatment.⁷⁰ If incurred in accounting periods beginning on or after 12 March 2008 they may be carried back as far as 17 April 2002, otherwise they can only be carried back three years. In respect of a ring fence trade that ceases on or after 12 March 2008 costs incurred in the decommissioning of fields after cessation of trade can be claimed for tax purposes until such time as the decommissioning has been properly completed.

A 100% first year allowance (FYA) applies to capital expenditure on oil and natural gas extraction activities incurred on or after 17 April 2002.⁷¹ This allows the costs to be written off for tax purposes in the accounting period in which the expenditure is incurred. Expenditure incurred in acquiring mineral rights or deposits also qualifies for mineral extraction allowance but only at a rate of 10%.⁷² The research and development allowance regime permits the cost of most exploration and appraisal activity to be relieved in full in the year incurred.⁷³ With effect from 17 April 2002 expenditure on plant and machinery with an economic life of less than 25 years qualifies for the immediate 100% FYA.⁷⁴ With effect from 12 March 2008 the 100% FYA was extended to expenditure on long life assets⁷⁵ and expenditure on mid-life decommissioning.⁷⁶ These accelerated rates at which expenditure can be written off do help to increase the front-end liquidity of the investor and hence generally raise the net rate of return.⁷⁷

⁶⁹ HM Treasury, 'Budget 2011' (n 6) at paras. [1.149] and [2.103]. The Government added that there would be no further restrictions to decommissioning relief for the life of the current Parliament and that the Government is committed to working with the industry with the aim of announcing further, longer term, certainty on decommissioning at Budget 2012.

⁷⁰ Corporation Tax Act ss40, 42 and 43; Capital Allowances Act 2001 ss163-165.

⁷¹ Capital Allowances Act 2001 ss416B and 416D. Exploration expenditure, the initial cost of acquiring a licence, and expenditure on land and buildings do not qualify for the 100% FYA. Persons carrying on a ring fence trade are entitled to elect to have a special allowance made to them for expenditure incurred on decommissioning plant and machinery. See Capital Allowances Act 2001 ss163-165.

⁷² Capital Allowances Act 2001 ss403 and 418.

⁷³ Capital Allowances Act 2001 pt 7.

⁷⁴ Capital Allowances Act 2001 ss45F and 52. Prior to 17 April 2002, relief for expenditure on qualifying plant and machinery was available on a 25 % reducing balance method.

⁷⁵ Assets with a useful economic life of at least 25 years.

⁷⁶ Prior to 12 March 2008 and with effect from 17 April 2002, a 24% allowance, given in the first year of acquisition, applied to expenditure that would otherwise have qualified for the 6% long-life asset allowance. In the second and subsequent years, the balance was relieved at 6% per annum on a reducing balance basis. With effect from 12 March 2008, the rate of writing down allowance for existing long-life assets was increased from 6% to 10%. See Capital Allowances Act 2001 ss102, 104A and 104D.

⁷⁷ Kumar (n 7) at p. 140.

A ring fence expenditure supplement was introduced with effect from 1 January 2006.⁷⁸ It allows companies that do not yet have any taxable income against which to set off their exploration, appraisal and development costs and capital allowances to claim a supplement which increases the value of unused expenditure carried forward from one period to the next by a compound 6% per annum for a maximum of six years. It includes all deductible expenditure (both revenue and capital) incurred in the course of oil extraction activities.⁷⁹ The supplement was introduced as a sweetener to industry following the increase in SC but it is 'almost illusory' because the cost of the supplement is minuscule in comparison to the increase in tax take secured by the increase in SC.⁸⁰

The most recent fiscal incentive to be introduced is the field allowance which seeks to reduce the SC for licensees in certain new fields given development consent on or after 22 April 2009.⁸¹ The 'pool of field allowances' is subtracted from the adjusted ring fence profits for an accounting period.⁸² This has the effect of reducing the profits that the SC applies to. However, the field allowance is unlikely to mitigate the effect of high tax rates in practice because it applies only to fields meeting onerous criteria to qualify as small, ultra heavy, or ultra high pressure/high temperature.⁸³ The House of Commons Energy and Climate Change Committee found that

the criteria for qualifying for the allowance are so stringent (especially with regard to HPHT) that its effect will be minimal; and its modest scale is such that it will not provide a significant incentive for investment even in new fields.⁸⁴

Usenmez asserts that '[l]ong term fiscal instability may soak up the intended effect of the new allowance system'.⁸⁵

⁷⁸ See the Corporation Tax Act 2010 pt 8 ch 5.

⁷⁹ The ring fence expenditure supplement replaced the exploration expenditure supplement (EES) which had been introduced by the Finance Act 2004. EES was only available in respect of exploration and appraisal costs.

⁸⁰ D Leith, 'Oil and Gas Companies' (2005) 818 Tax Journal 7.

⁸¹ See the Corporation Tax Act 2010 pt 8 ch 7.

⁸² Corporation Tax Act 2010 s333. ss334 and 335 outline the manner in which allowances are to be calculated and carried forward.

⁸³ See the Corporation Tax Act 2010 ss353, 354 and 355 respectively for definitions of these qualifying fields.

⁸⁴ House of Commons, Energy and Climate Change Committee, 'UK Offshore Oil and Gas' (2008-09) at para. [71].

⁸⁵ E Usenmez, 'The Stability of the UK Tax Regime for Offshore Oil and Gas: Positive Developments and Potential Threats' (2010) 21 ICCLR 16 at p. 17.

4. Conclusion

The UK oil and gas taxation regime significantly distorts the rules ordinarily applicable in the case of UK corporation tax. Distortions are necessary to capture the larger economic rents generated by oil and gas production and to ensure that the State in control of the natural resources receives a fair share of the wealth accruing from their extraction. But distortions are also necessary to manage the high levels of risk involved in extracting and producing hydrocarbons and to encourage investment from the oil companies that make that extraction possible. Before the abolition of PRT for fields given development consent on or after 16 March 1993 the regime was close to being neutral and relatively efficient at capturing economic rent. PRT's extensive system of reliefs and allowances ensures that the tax cannot cut into the normal profits to which the company is entitled. It may have been wiser to simplify PRT and reduce costs associated with its collection than to remove it outright because for a period after the abolition of PRT new fields enjoyed excessively low tax rates under RFCT alone. The introduction of the SC increased these tax rates but came at the wrong time and imposes an excessive tax burden for the now mature North Sea province. The reliefs and allowances available do not incentivise investment to ensure maximum economic recovery of UKCS hydrocarbons. It is therefore not surprising that the most recent hike in supplementary charge has attracted criticism as a smash and grab raid on profits. The tax regime lacks coherency and arbitrary increases in supplementary charge are a crude method of increasing Government take in the short term. The cost of this in the long term will be measured in barrels of oil left in strata, never to be recovered or taxed at all.

Case Comment:
***Bocado SA v Star Energy UK Onshore Ltd
and another***

CALUM STACEY*

Abstract

The intention of this paper is to analyse the decision and possible consequences of the Supreme Court's ruling in Bocado SA v Star Energy UK Onshore Ltd and another.¹ While this is an English case, the case is of relevance particularly to oil and gas companies and by extension it is hopefully of interest to the readers of the Aberdeen Student Law Review, as Aberdeen is the energy capital of Europe. Furthermore, while it is an English case in which principles of English law were applied, the broad statutory framework which provided the basis for the decision is equally applicable in Scotland.

1. The Supreme Court's Decision

A. Factual Background

Star held a licence to search, bore for and extract petroleum from the Palmers Wood oil field in Surrey. The apex of the oil field is under property owned by Bocado. To reach the oil, the original licence holder drilled diagonal wells from neighbouring land owned by them and only entered the sub-strata of Bocado's land at a depth of 800ft. The drilling and existence of the wells did not affect Bocado's use or enjoyment of their land. The statutory framework provides the opportunity for a licence holder to acquire ancillary rights required to access the petroleum if an agreement with the landowner cannot be reached. However, neither Star nor the original licence holder had sought to negotiate with Bocado over such access rights or make use of the statutory framework to acquire such rights.

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¹*Bocado SA v Star Energy UK Onshore Ltd and another* [2010] UKSC 35; the parties are designated 'Bocado' and 'Star' hereinafter.

B. Litigation History

Against this factual background, at first instance Peter J accepted that trespass had occurred and assessed Bocardo's damages as 9% of the gross revenue generated by the oil field from 22 July 2000 until 31 December 2007, which equated to £621,180 plus interest, and 9% of all future revenue.² In reaching these figures the court adopted the 'user damages' approach to valuation.

Star appealed to the Court of Appeal which held that trespass had occurred but that the proper measure of damages in this context was that of general principles of compulsory purchase valuation.³ Consequently, the measure of damages was the value to the owner, which in this case was assessed as a nominal £1,000.

C. Statutory Framework

The Supreme Court decided this case within the statutory framework of the Petroleum (Production) Act 1934 (hereinafter 'the 1934 Act') and the Mines (Working Facilities and Support) Act 1966 (hereinafter 'the 1966 Act'). Lord Clarke of Stone-cum-Ebony provided the fullest description of the statutory framework.⁴

Section 3 of the 1934 Act is headed 'Provisions as to compulsory acquisition of rights to enter on land' and provides that:

Part 1 of the Mines (Working Facilities and Support) Act 1923,⁵ as amended by subsequent enactment, shall apply for the purposes of enabling a person holding a licence under this Act to acquire such ancillary rights as may be required for the exercise of the rights granted by the licence.⁶

The 1966 Act provides a general definition of ancillary rights; 'in relation to minerals, any facility, right or privilege'.⁷ Section 2(1) of the 1966 Act then goes on to provide a non-exhaustive list of rights which are included in the general definition. This case was concerned particularly with section 2(1)(b) of the 1966 Act;

² *Bocardo SA v Star Energy UK Onshore Ltd* [2008] EWHC 1756 (Ch).

³ *Bocardo SA v Star Energy UK Onshore Ltd* [2009] EWCA Civ 579.

⁴ See *Bocardo SA* (n 1) at paras. 129-135; such description adopted by the lead judgement of Lord Hope of Craighead at para. 37.

⁵ Lord Clarke of Stone-cum-Ebony explained that the precursor to the 1966 Act, namely the Mines (Working Facilities and Support) Act 1923, was consolidated by the 1966 Act.

⁶ Petroleum (Production) Act 1934 s3(1).

⁷ Mines (Working Facilities and Support) Act 1966 s2(1).

a right of air-way, shaft-way or surface or underground wayleave, other right for the purpose of access to or conveyance of minerals or the ventilation or drainage of the mines.⁸

Lord Clarke of Stone-cum-Ebony continued:

If the licensee wished to drill a deviated well beneath another person's land, he needed to negotiate or apply under the 1966 Act for an ancillary right, here an underground wayleave.⁹

D. Questions to the Court

Within the statutory framework described above the Supreme Court was asked the following questions:

1. Did the deviational drilling through Bocardo's land constitute trespass?
2. If it did constitute trespass, what was the appropriate measure of damages?

E. Court's Decision

The Supreme Court unanimously upheld both the High Court and Court of Appeal's decisions that the deviational drilling constituted trespass. This affirmed the Latin maxim *cuius est solum, cuius est usque ad coelum et ad inferos*.¹⁰ This part of the decision is taken as accepted and the focus of this article's analysis is on the second part of the decision, in relation to which the Supreme Court held, by a majority of 4-1, that the principles of compulsory purchase were applicable in assessing the damages.¹¹ In reaching a final decision on the actual measure of damages in this case, the Supreme Court held that the general principles of compulsory purchase, and in particular the *Point Gourde* principle,¹² applied to the valuation. As a result any increase in value attributable to the existence of the scheme in question should be disregarded. The scheme in this case was the exploitation of the petroleum from the Palmer Wood oil field under a licence granted by the Secretary of State. This final decision was reached by a 3-2 majority.

⁸ *ibid* s2(1)(b).

⁹ *Bocardo SA* (n 1) at para. 133.

¹⁰ Whoever owns [the] soil, [it] is theirs all the way to Heaven and to Hell.

¹¹ Lord Clark of Stone-cum-Ebony provided the only dissenting opinion which will be discussed in further detail below.

¹² Derived from *Point Gourde Quarrying & Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565.

2. Analysis of the Majority's Approach

Despite the fact that the event giving rise to a claim of damages was trespass, the measure of damages was not decided within the common law of trespass. This was due to the agreement between the parties that, if damages were to be assessed, it should be done on the basis of the price that would have been negotiated between reasonable persons in the position of the parties within the statutory framework set out above.¹³

There are two broad arguments against the majority's approach:

1. The specific statutory framework of this case (i.e. 1934/1966 Acts) is not one to which the principles of compulsory purchase apply; and
2. If the applicability of compulsory purchase principles is accepted, the valuation attached to the compulsorily purchased rights should not disregard the market/ransom value.

A. Do the principles of compulsory purchase apply?

The first of these arguments is essentially one of statutory interpretation. Lord Clarke of Stone-cum-Ebony argued that on a literal interpretation, neither the 1934 Act nor the 1966 Act state that the principles regarding compulsory purchase should apply to the valuation of the right acquired by the licence holder. On the contrary, section 8(2) of the 1966 Act provides:

The compensation or consideration in respect of any right, including a right to enforce restrictions, *shall be assessed by the court on the basis of what would be fair and reasonable between a willing grantor and a willing grantee*, having regard to the conditions subject to which the right is or is to be granted.¹⁴

The wording of the 1966 Act does not suggest that the potential value to the purchaser should be disregarded. On the contrary, the statutory framework explicitly states that the valuation of the right acquired should be assessed on the basis of what would be fair and reasonable between a willing grantor and a willing grantee. This is in contrast to a variety of compulsory purchase legislation which specifically states how compensation is to be assessed.¹⁵ In rebutting Lord Clarke's analysis that the general principles of compulsory purchase valuation do not apply, Lord Brown argued that due to section 3(2)(b) of the 1934 Act, and the express reference to compensation being 'on account of

¹³Bocardo SA (n 1) at para. 37.

¹⁴ Emphasis added.

¹⁵ For example, s.63 of the Land Clauses Consolidation Act 1845, the Gas Act 1986 or the Channel Tunnel Act 1987.

the acquisition of the right being compulsory',¹⁶ the situation is indisputably one that the general principles of compulsory purchase valuation apply irrespective of the actual words used in the 1966 Act.¹⁷ In doing so, Lord Brown creates the inference that when rights over land are purchased compulsorily, all of the general principles of compulsory purchase valuation are automatically applicable. Such a view is supported by Lord Collins of Mapesbury when he states that:

Even without the express reference in section 3(2)(b) to the acquisition of the right being compulsory, there can be no doubt that this would have been a case of compulsory acquisition and that any general principles of compulsory acquisition law are applicable.¹⁸

However, in my respectful submission even if one accepts that one should disregard the express wording of the 1966 Act, the inference of automatic applicability of all of the general principles of compulsory purchase valuation is incorrect. Indeed, there is precedent for Lord Clarke's approach. In *Mercury Communications Ltd v London and India Dock Investments Ltd*,¹⁹ the court held that due to similar provisions in the Telecommunications Code, the *Pointe Gourde* principle used in valuing the rights acquired compulsorily was not applicable. Rather, the valuation of the rights to be acquired was determined in the light of the actual words used in the code, namely:

with respect to the payment of consideration in respect of the giving of the agreement, or the exercise of the rights to which the order relates, as it appears to the court would have been fair and reasonable if the agreement had been given willingly and subject to the other provisions of the order.²⁰

The ability to compulsorily purchase rights over land, without automatically importing all of the compulsory purchase valuation principles has also been accepted by the Upper Tribunal (Lands Chamber).²¹ It is submitted that this approach is preferable as it would allow the valuation process expressly envisaged by the 1966 Act to be applied whilst recognising the fact that the rights have been acquired compulsorily as stated by the 1934 Act.

One could argue that the valuation of the right acquired between a willing grantor and grantee would produce the same results as that under the

¹⁶ Petroleum (Production) Act 1934 s3(2)(b).

¹⁷ *Bocardo SA* (n 1) at para. 71.

¹⁸ *ibid* at para. 101.

¹⁹ *Mercury Communications Ltd v London and India Dock Investments Ltd* (1995) 69 P & CR 135, hereinafter the 'LIDI case'.

²⁰ Telecommunication Act 1984 (as amended), Schedule 2 The Telecommunications Code, Paragraph 7(1)(a)

²¹ *Potter v Hillingdon LBC* [2010] UKUT 212 (LC).

general principles of compulsory purchase. However, it is submitted that the results would in fact be in stark contrast. On the one hand, in this case where the general principles of compulsory purchase were applied to the valuation, the Supreme Court valued the necessary rights acquired to make effective use of the licence holder's licence to extract petroleum at a sum of £1,000. On the other hand, if one looks at the twelve mile territorial seabed which is managed on behalf of the Crown by the Crown Estate, a very different picture emerges. It is submitted that as the general principles of compulsory purchase do not apply to Crown land,²² the Crown Estate is in the position of negotiating a valuation of the necessary rights in the way envisaged by the 1966 Act (i.e. between a willing grantee and a willing grantor). The practical consequence of this is that it generates a far greater income for the grantee of the necessary rights. For example, the headline income from similar wayleave rights to the seabed for laying pipelines required to make effective use of a licence holder's licence is £46.6 million per year (as of 2009/2010).²³ On an individual project basis, as in the Bocardo case, the Crown Estate provides a standard heads of terms. This gives an indication of the valuation of the rights that Bocardo could have expected if the valuation was conducted as specified in the 1966 Act. These heads of terms specify a base rate of £32,700 per annum, with an additional rental rate ranging from £10,500 to £259,000 per annum.²⁴

B. Should the key value be disregarded?

Even if one accepts the majority's approach to the all-inclusive nature of the general principles of compulsory purchase, does this negate any key value that the land to be acquired may have when measuring the value of damages to the 'selling' party? Despite giving the lead speech, Lord Hope of Craighead was in the minority when it came to the valuation of damages. Lord Hope accepted that the compulsory purchase principles apply, including the 'value to owner' and 'no scheme rule' principles.²⁵ Lord Hope continued:

Accordingly, an increase in value which is consequent on the scheme for which the land is being acquired must be disregarded. The basis on which

²² Stair Memorial Encyclopaedia, Compulsory Acquisition and Compensation (Reissue 4) at para. 44; the general rule that a statute is presumed not to apply to the Crown except by express statement or necessary implication. Neither the 1934 Act nor the 1966 Act fall within this exception,

²³ The Crown Estate, 'Annual Report 2010', available at <http://www.thecrownestate.co.uk/our_portfolio/marine.htm> (accessed 12 June 2011).

²⁴ The Crown Estate, 'Terms for Rents and other lease terms for Oil and Gas Pipelines within United Kingdom Territorial Waters', available at <http://www.thecrownestate.co.uk/37_pipeline_heads_of_term.pdf> (accessed 12 June 2011).

²⁵ *Bocardo SA* (n 1) at para. 38.

compensation is awarded is the value of the land to the owner, not its value when taken by the promoter of the scheme. *But if the land has a special value because it is the key to the development of other land, that will represent part of its value to the owner which may be taken into account in the assessment of compensation in just the same way as it would if the owner was negotiating to realise its value in the open market: Waters v Welsh Development Agency* [2004] 1 WLR 1304, paras 64-65 per Lord Nicholls of Birkenhead.²⁶

Lord Hope then went on to argue that the special, or key, value of Bocardo's land was the geographical position above the apex of the oil field. While acknowledging that there could only be one licence holder to the oil field at a time, Lord Hope argued that anyone who obtained a licence would have had the same need to acquire a wayleave from Bocardo in order not to commit trespass. This is essentially the ransom strip argument to valuation. Therefore,

it was not Star's scheme that gave the relevant strata beneath Bocardo's land its peculiar and unusual value. It was the geographical position that its land occupies above the apex of the reservoir, coupled with the fact that it was only by drilling through Bocardo's land that any licence-holder could obtain access to the part of the reservoir that gives it its key value.²⁷

In support of this view, Lord Hope relied on the decision of the Lands Tribunal in *Chapman, Lowry & Puttick Ltd v Chichester District Council*.²⁸ This case involved a strip of wasteland to the rear of a plot of land which the Council had gained planning permission for fourteen houses to be built. The strip of land was required for access to the development. VG Wellings Esq, QC noted that any owner or developer of the plot of land would have the same need for the wasteland as the Council. He concluded that:

It is not the scheme underlying the acquisition which gives value to the reference land [the strip of waste ground] in excess of its existing use value; it is its geographical position, coupled with the fact that there is no other suitable access for residential development on the rear land [the plot purchased by the Council]. If rule 3 [of section 5 of the Land Compensation Act 1961]²⁹ were to apply the claimants would receive in compensation less than their true loss and would be wrong.³⁰

²⁶ *ibid* at para. 39; emphasis added.

²⁷ *ibid* at para. 42.

²⁸ (1984) 47 P & CR 674.

²⁹ Rule 3 states '[T]he special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority possessing compulsory purchase powers', Land Compensation Act 1961 s5.

³⁰ *Chapman, Lowry & Puttick Ltd v Chichester District Council* (1984) 47 P & CR 674 at p. 680.

Interestingly, Lord Walker of Gestingthorpe JSC relies on the same Lands Tribunal case to reach opposite conclusion. Lord Walker notes that

the key's value depended entirely on the scheme, unlike a ransom strip for which there might have been a variety of possibilities of profitable realisation, some not involving compulsory purchase.³¹

In my respectful submission, this is incorrect. There is no difference here between a ransom strip, as in the *Chapman* case, and the factual situation in Bocardo. The inference that there needs to be a variety of possibilities of profitable realisation, some not involving compulsory purchase is not supported by the *Chapman* case. In his decision VG Wellings Esq, QC states:

the question whether the needs of the authority for the reference land [the strip of waste ground] as access to the rear land are peculiar to itself cannot be determined unless the needs of other possible owners of the rear land are considered. It is therefore right to take into account the needs of some hypothetical owner or developer of the rear land. It is, in my opinion, reasonable to assume that such hypothetical owner or developer could expect to receive precisely the same planning permission for precisely the same residential development as that which the acquiring authority obtained....I accordingly hold that the acquiring authority's needs for the reference land as access to the rear land are not peculiar to itself. On that basis rule 3 does not apply and I so hold. It appears to me that the reference land is the key which unlocks the development value of the rear land in whosoever's hands the rear land happens to be. By reason of that fact the reference land had acquired naturally a value in excess of its existing use value.³²

As stated above, and identified by Lord Hope, while there can only be one licence holder at a time, any licence holder to the Palmers Wood oil field would have precisely the same need as Star to drill through Bocardo's land if they wanted to reach the apex of the oil field. As a result, Star's requirement for the underground wayleave was not peculiar to itself. The very fact that the licence has been transferred between companies illustrates that the hypothetical licence holder envisaged by VG Wellings Esq, QC does exist. Consequently, the value that Bocardo could have expected to receive would be in excess of its existing use value. It is therefore submitted that the valuation would be in excess of the nominal £1,000 it was awarded, as illustrated above with regards to the Crown Estate valuation of the necessary rights required to make offshore licences effective within the twelve mile territorial seabed.

³¹ *Bocardo SA* (n 1) at para. 55.

³² *Chapman* (n 30) at pp.679-680

Even if one does not accept the above analysis regarding a ransom value, Lord Clarke also put forward another argument for the key value of Bocado's land not being disregarded. Such an argument is closely linked with the above but focuses on the *Pointe Gourde* principle. Under that principle, the value of the right that is to be compulsorily purchased is to be considered with regards to the value to the owner and not to the potential purchaser. As a result, the additional value that one could expect either in the form of a ransom value or value added as a result of the proposed scheme is to be disregarded. However, Lord Clarke argued that the key value pre-existed Star's scheme. Therefore, it formed part of the value to the owner and should not be disregarded under the *Pointe Gourde* principle. Lord Brown argued against such an approach stating that the statutory framework essentially deleted any pre-existing value.³³ He stated:

The correct analysis seems to me to be this: that by these provisions Parliament was at one and the same time extinguishing whatever pre-existing key value Bocado's land might be thought to have had in the open market and creating a new world in which only the Crown and its licensees had any interest in accessing the oilfield and in which they had been empowered to do so (to turn the key if one want to persist in the metaphor) compulsorily and thus on terms subject to the *Pointe Gourde* approach to compensation.³⁴

In my respectful submission, it does not logically follow that a pre-existent increase in value beyond a land's use value is dependant on an unlimited possible users. The pre-existent increase in the value of the land is dependant only on their being more than one possible user, real or hypothetical, as discussed in *Chapman*. By Lord Brown's very definition of the 'new world' there is more than one possible user in this case. Therefore, the change brought about by the 1934 Act did not alter the status quo with regards to the pre-existent value of Bocado's land. As a result, it is submitted that it should therefore not have been disregarded under the *Pointe Gourde* principle. In addition, Lord Brown, as discussed above, does not appear to acknowledge the ability, which has been judicially approved, for land to be compulsorily purchased without *Pointe Gourde* automatically applying.

3. Potential Consequences of the Majority's Approach

Despite the decision ultimately being only a token award of damages, it is submitted that the decision is not a victory for oil and gas companies. The unanimous decision of the Supreme Court was that the deviational drilling

³³ *Bocado SA* (n 1) at para. 90

³⁴ *ibid.*

employed by the original licence-holder was trespass, irrespective of well depth or affect on the surface. This has two broad consequences; firstly the immediate impact on current schemes that have adopted a similar approach and secondly the potential inadequacy of the current legislative provisions in light of this decision.

A. Current Projects/Schemes

Even if one views the decision of the Supreme Court as a victory for oil and gas companies,³⁵ there are still immediate concerns for such companies. Firstly, is the potential negative corporate image that could be generated as being labelled as a trespasser and infringing on other's rights. Secondly, in this particular case there was only one landowner who was affected by the trespass and therefore the award of damages in itself was inconsequential. However, it is conceivable that there are current schemes whose wells go through land owned by multiple owners. Indeed Star's expert witness, a Dr SC Wright stated that he was unaware of any current scheme having made use of the statutory framework to gain the necessary ancillary rights required to avoid committing trespass.

B. Potential Inadequacy of Current Statutory Framework

The potential inadequacy of the current statutory framework in light of the Supreme Court's decision has been highlighted by a letter from the United Kingdom Onshore Operators Group (UKOOG).³⁶ This emphasises the potential cost of the Supreme Court's decision both in time delays and the viability of projects when applied to the current legislative provisions. UKOOG has summarised the procedure into six steps:

1. Determine the expected well path, allowing for margins of error should the well deviate from its planned path
2. Identify the landownership under which the well is expected to pass
3. Enter into negotiations with the landowner with a view to obtaining the necessary grant of rights to drill under their land
4. If the landowners are too numerous, refuse the grant or demands unreasonable terms, apply to the Minister (the Department of Energy and Climate Change ('DECC') for ancillary rights

³⁵ For example, Tetley-Jones 'Closing Pandora's Box' 2010 Property Law Journal 6.

³⁶ Letter from the Chairman of UKOOG to all of the onshore licence operators (obtained via personal communication).

5. The Minister will review the case, including consultation with the landowners and, unless he considers that a prima facie case is not made out, refer the matter to the Court
6. The Court will set a date and hear the case and, if it is satisfied that the requirements of the legislation are complied with in the case of the applicant licence holder, grant the compulsory purchase rights.

UKOOG estimate that where a landowner refuses to grant the required rights or attempts to impose terms that the applicant licence holder considers unreasonable, the process would take eighteen to twenty-four months. Such a delay and uncertainty may make future projects unviable. This may become of particular importance if there is an increase in onshore oil and gas activity. Such an increase may occur as a result of the development of shale gas and other unconventional hydrocarbon resources.³⁷

4. Conclusion

While the Supreme Court's decision would have initially alleviated the fears of oil and gas companies, it is not as strong a judgement in favour of the oil and gas companies as it may first appear. Underpinning the judgement is the fact that the Court held that the deviational drilling utilised resulted in the licence holder committing trespass. Furthermore, the only reason that one could consider the decision a triumph for oil and gas companies is the fact that a nominal award of damages was made. However, it is this final valuation that split the Court 3-2 and as discussed the majority's approach may be open to criticism. As a result, it is foreseeable that the valuation of damages will be revisited which could result in this case being distinguished on its facts. If this were to happen it would open up the possibility of higher awards of damages being made to landowners whose land has been trespassed upon.

³⁷ DECC, 'The Unconventional Hydrocarbon Resources of Britain's Onshore Basins - Shale Gas', available at:
<https://www.og.decc.gov.uk/UKpromote/onshore_paper/UK_onshore_shalegas.pdf>
(accessed 12 June 2011).

Take Ownership: The Aberdeen Law Project 2011

RYAN T. WHELAN*

One year ago I wrote in the inaugural Aberdeen Student Law Review that '*pro bono* has a considerable role to play within the Granite City'. At that stage *Casus Omissus*, the Aberdeen Law Project, had taken only its first tentative steps into the provision of *pro bono* services. The statement was a mere hypothesis, an expected result which may have been disproven. It has unfortunately proven to be accurate – there are a vast number of people in North East communities living within the gaps of the system. These people, often the most vulnerable in our society, are without a voice due largely to economic circumstance. There is therefore a need for *pro bono*, and the Aberdeen Law Project, both now and in the future.

Our *pro bono* venture is called 'the Aberdeen Law Project', not 'the Aberdeen Law Clinic'. That was deliberate. We are indeed a law clinic, but the clinic dimension (herein 'the clinic') is only one element of our endeavour. The project is much bigger than resolving legal disputes. The project is about community engagement, and development being achieved through our students investing their time, talents and energies into the community. Although legal knowledge is the main attribute that we can offer, law students are some of the brightest and most able persons in society, and not all wish to pursue a career in law. With accomplished reading, writing and (often to a lesser extent) numerical ability law students are well placed to assist in almost any domain. The Aberdeen Law Project recognises this in its approach to *pro bono*.

Having visited the United States earlier this year to study *pro bono* provision in New York, Baltimore and Washington DC, and having also spoken to those from various law clinics throughout the UK, I think it is clear that the Aberdeen Law project is unique. There is no other quite like it. Student founded, led and operated with a non-traditional focus, the project does not seek solely to provide resolution to disputes that have arisen. Instead, our project seeks to go further – attempting to address the core issues which generate the need for dispute resolution. These issues, aside from economic deprivation, are generally related to education. It is for this reason that we

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invest so heavily in outreach and educational programmes which target young people and vulnerable persons. Such programmes include mock trials for primary school children, substantive law lectures at secondary schools and the dissemination of legal training to community groups and charities. Albeit not focused on the resolution of a dispute, the provision of these ancillary services is beneficial to both our communities and our student advisors. The initiatives that we provide are not sporadic or unrelated, however. There is a common thread throughout our work: 'universal gain'. We listen to the local community and respond to their needs where we are able to do so, where there is no alternative recourse and where there is a benefit to our student advisors in doing so.

Over the course of this year much progress has been made, and many universally beneficial relationships formed. The clinic caseload continues to expand in size and divergence, and Malcolm Combe, a qualified lawyer with experience of *pro bono* at Strathclyde and Edinburgh, has been recruited to the law school staff, in part, to supervise our increasingly popular clinic. Sponsorship agreements have been concluded with, amongst others, Connarty, Murray and Hastie stables; partnerships have been formed with a number of organisations including Grampian Police, The Big Plus, HMP Aberdeen and The Seaton Project; and the clinic has been accredited by the Faculty of Advocates Free Legal Services Unit. The mock trial programme is also gathering pace, having amassed an average three month waiting list. In addition, the project is now providing a mediation service in conjunction with the University of Aberdeen, whilst also supporting AspireNorth with encouraging those from non-traditional backgrounds to consider further education. Relative to this last initiative, the clinic is pursuing the establishment of our own 'Ambassadors Programme'.

The aim of the Ambassadors Programme is simple: to establish links between graduates and the schools at which they were educated so that current pupils can benefit from the experience of their *alma mater*. Creating a link between schools and current students/practitioners of the same background is a means by which to encourage and facilitate aspiration amongst those persons who are academically capable of pursuing a degree, particularly though not exclusively law, but who believe for whatever reason that University (or a particular course, say law) is beyond them. Typically the reason for such a mindset is family finances and a lack of identification with those currently in the field. The two are, in effect, individual aspects of the same perceived issue: having the 'wrong background'.

Pupils from non-traditional backgrounds tend to think, not through ignorance, but through a lack of direct knowledge and perception, that all lawyers are from wealthy backgrounds, have attended at private schools or 'at worst' a top ranking state school, and have contacts with numerous family or family friends who are themselves lawyers. This is far from the truth. Some

lawyers are privileged enough to be from such a background. Others are from a background which would be euphemistically described as challenging. In the modern era a background does not define a person. Nor does a background make someone a good or bad lawyer. Those from the upper echelons of society are not good lawyers by reason of their background, and those from inner-city council estates are not bad lawyers by reason of their background. In fact, I would suggest that lawyers, like people generally, can utilise their background and experience to their advantage, regardless of its nature; the profession, like society, benefits from an eclectic 'melting-pot' membership. In reality, as we all know having the benefit of being able to experience the profession first hand, lawyers are judged by clients and colleagues alike on their abilities in practising law - very little else is deemed to be of any significance.

By removing the stereotypical conception of what and who a lawyer is, and replacing it with an actual lawyer from the same school as the aspirant, it is hoped that the erroneous perception that law is not for those from 'non-traditional' backgrounds will be removed, replaced with a stance that the law is for those with the grades to pursue it, whatever their background. What has this, you may ask, to do with a law clinic? The answer is very little, if anything. That, however, is my very point - the Aberdeen Law Project has never been a traditional law clinic focused solely on case resolution. Providing legal recourse is a central aim of the project, but it is one of many aims. Equally important is community investment, whatever its guise. Encouraging those from non-traditional backgrounds to believe in themselves and pursue opportunities may not provide an immediate tangible gain to the community, but in the future, if successful, both the particular community and wider society will gain from that person's endeavours. That, in my opinion, is to be valued.

As stated above, the Aberdeen Law Project seeks to invest in the community. And as with every investment portfolio, whether monetary or not, one should seek diversification and balance to ensure a return. The return that we, the project, seek from every investment of our time and limited resources is a benefit to the community (long or short-term) coupled with a valuable experience for the student advisors involved. Initiatives like the Ambassadors Programme are of a speculative nature. It is by no means clear that establishing such a programme will have any effect. Accordingly, the project may be unsuccessful in achieving a return in the form of a community benefit. That does not render the programme redundant. Given our processes for selecting opportunities to pursue, and the project-wide policy of empowering students to achieve objectives, every initiative secures a return in terms of valuable experience for our student advisors. It may be that our efforts in this particular regard will bear no fruits, but given our inability to lose anything tangible, that is no reason not to invest. And that is the beauty of our project. Whereas charities, government bodies and other publicly funded organisations require clear results to justify their existence and expenditure, we, as a project which

dedicates no more than student time to initiatives that are non-clinic focussed, are in a privileged position which enables the pursuit of speculative schemes that may have a substantial effect. As the project progresses, this privileged position should be utilised further. The students involved must continue to listen to the community in order to identify unmet need, and thereafter be given the latitude to frame and pursue an initiative capable of addressing the problem. Not every initiative will work, but from every experience there will be something to be learnt about the community and our project.

This project is the sum of its constituent parts: it is the sum of the student members, the board and the professional sponsors and supporters. It is therefore these constituent parts, particularly the student membership, which will determine the success of the project in the long-term. As the student membership changes so too will the direction of the various initiatives. That is to be embraced. The Aberdeen Law Project was founded to be responsive to community need and fluid, developing with the students who run it. Provided those students remain engaged with and dedicated to the community then this project will continue to be of universal gain.

I leave the project's daily running with pride in what has already been achieved, and with a great deal of excitement and anticipation as to what the Aberdeen Law Project can go on to achieve in the future. With Jodie Chandler as Student-Director, supported by a number of extremely talented students and Malcolm Combe, the Faculty-Director, it is clear that the project generally, and the clinic particularly, is in very capable hands. I look forward to following, and celebrating, its successes as a Member of the Management Board.

If I can offer any advice from my experience with the project in closing then it is this: do not lose the ambition and culture of creativity that has been fostered. Stay true to the founding principles. It is through empowering individual students, whether a fresher or postgraduate, that the necessary ingenuity and resourcefulness to sustain the project and ensure its continued ability to make a difference will be generated and secured. Each student member must be permitted to take ownership of the project's work, and take ownership they must -

‘Do not wait for leaders; do it alone, person to person’
(Blessed Mother Teresa of Calcutta)

Book Review

Nuclear Law: The Law Applying to Nuclear Installations and Radioactive Substances in its Historic Context

Stephen Tromans QC

(Hart Publishing, Oxford 2010, ISBN: 9781841138572)

History informs us that nuclear is the most controversial form of energy. Few are apathetic. Critics focus upon the volatility inherent in producing nuclear power and the danger posed by the process, illustrating the latter point by reference to previous nuclear disasters, particularly Chernobyl. Such critics make little mention of its dependable, low carbon, post build economically efficient nature - characteristics emphasised by pro-nuclear supporters. It had recently looked like there may be a nuclear renaissance, with the British Government encouraging the diversification of the country's power mix from ever depleting and expensive oil, and the politically inexpedient importation of gas, towards low carbon alternatives which provide energy security. In the aftermath of the Fukushima nuclear disaster, which has seen Germany announce that it will phase-out its nuclear plants by 2022, the renaissance appears momentarily, if not permanently, to have stalled within the UK. Nevertheless, the present author would speculate, along with many more distinguished names, that nuclear energy will continue to have at least a transitional role to play (filling the 'energy gap') as the world moves towards the primacy of renewable energy. Stephen Tromans' textbook, written prior to the Fukushima disaster, is a valuable and authoritative exposition of a most complex and relevant area of law.

The first three chapters serve to provide the reader with a sense of the historical, political and regulatory context relative to nuclear power. Chapter one, the introduction, is particularly useful in providing an initial contextual appreciation as it contains an explanation of the scientific technicalities, examines nuclear development and introduces key themes of concern (private investment viability, safety and protection against misuse). Towards the close of the chapter, Tromans illustrates the international appetite for nuclear energy at the time of his writing by mapping those countries pursuing the continued development of nuclear power (China, France, Japan, Ukraine and Russia being the most prominent), thereafter he suggests that the only event that would 'set back, if not completely destroy, the current public appetite for new nuclear power stations is a serious nuclear accident somewhere in the world' (p. 31). How right he was.

In continuing the exploration of the inherently international nature of nuclear technology chapter two focuses upon the international institutions and regimes relative to nuclear energy and the use of radioactive materials. The reader is introduced to the International Commission on Radiological Protection (ICRP), the International Atomic Energy Agency (IAEA) and the Global Nuclear Energy Partnership (GNEP).

Establishing a civil industry in nuclear energy has long been an aim within Europe. Chapter three focuses upon the European Atomic Energy Community (Euratom), the body established for that very purpose. In examining the Euratom Treaty the focus of the text is upon 'the real meat of Euratom' (p.53): Title II, which focuses on encouraging progress in the nuclear energy field. Taking the constituent chapters of Title II in turn, Tromans provides the reader with an extremely informative commentary which serves to assist in identifying moot points. One such moot point is whether the Euratom Treaty is still capable of providing the basis upon which knowledge, infrastructure and funding will continue to be shared and monitored if the renaissance in expansion throughout Europe is to recommence. A reading of chapter three will inform any opinion.

With the historical, political and regulatory context explored, chapter four and five deal with the licensing regime and new builds. Post Fukushima, in accordance with the chilling effect predicted by Tromans in the introduction, the appetite for new builds within the UK has become less vocal. Interestingly the British Government has remained pro-Nuclear. Chapters four and five therefore look likely to be of significance, albeit not within Scotland where the controversial Planning Act 2008 is not applicable, and where the majority SNP Government, to whom planning power is devolved, have signalled their absolute opposition to any new build. Against the backdrop of Fukushima, issues of liability, insurance and reinsurance have become even more critical within the nuclear industry. If the renaissance is to be resurrected then liability is an issue upon which much will rest, not least incentivising necessary private investment. Chapter six provides an extremely accomplished exploration of the provisions that will form the basis for debate: the Paris, Brussels and Vienna Conventions as well as the Nuclear Installations Act 1965.

Meanwhile chapter eight, entitled 'safeguards and security' looks at the threats, aside from safety, which are posed by nuclear energy. Terrorism and the non-proliferation treaty are particular focuses. These are real threats: nuclear terrorism is not a 'science fiction' (Lowry, 2007) and there are countries who are thought to be seeking nuclear weapons capability. The destructive force of atomic energy therefore continues to pose a threat, and suitable safeguards and security are required whilst the world pursues what Obama terms 'a world without nuclear weapons'.

Regardless of whether the renaissance has stalled or terminated, ageing nuclear facilities within the UK require to be decommissioned and radioactive

waste disposed of. That is the focus of chapters eleven and twelve respectively. Particularly interesting discussions within those chapters include: decommissioning as regard to new build facilities that will not be publicly, but privately owned; and what classifies as radioactive waste. Both academically interesting, and practically significant, these discussions typify the content of this textbook.

Appendices within the Tromans text include the Nuclear Installations Act 1965, the Standard Nuclear Site Licence Conditions, the Convention on Nuclear Safety and the consolidated version of the Paris Convention on Third Party Liability (as amended).

Nuclear energy continues to court controversy, as it always has, and one would suspect always will. Whether the UK will continue to utilise nuclear energy is uncertain at present. What is certain is that those who are looking to constructively contribute to the nuclear debate could do no better than to start with reading this textbook. Tromans, the pre-eminent authority on nuclear law, has produced a masterful work which deserves to be both praised and utilised.

*Ryan T. Whelan
July 2011*

Book Review

Personality, Confidentiality and Privacy in Scots Law
Elspeth Reid
(W Green, Edinburgh 2010, ISBN: 9780414016811)

In the midst of the 'Giggs-gate' super-injunction saga it seems apt to be reviewing Elspeth Reid's textbook, 'Personality, Confidentiality and Privacy in Scots Law'. With judicial and legislative developments afoot in this evolving area of law there will be many practitioners and academics seeking an authoritative textbook to inform and guide their viewpoints. This is the textbook to which they (and others) should turn.

Spanning 432 pages, this book covers much ground. It begins by providing a comparative and historical account of personality, confidentiality and particularly privacy, where the impact of the European Convention on Human Rights (ECHR) is considered. The text then examines the law regarding protection of the person; protection of liberty; defamation and verbal injury; and breach of confidence and protection of privacy. Whereas it is common, as the preface notes, to explain complexities in this area of law 'by references to shoehorns, cans of worms, and of course poor overworked Pandora', Reid adopts a different and infinitely more effective approach: clear legal analysis. Throughout the book Reid skilfully examines both the Scottish and European jurisprudence, providing the reader with an account of both. This review will concentrate on part four of the text: 'Defamation and Verbal Injury'. This is not due, it must be said, to any particular excellence; the entire book is of an impressive standard. These chapters have instead been chosen for their importance in the view of the present author, and their ability to illustrate the generally applicable merits of this text.

In many respects part four of Reid's text serves to update and expand upon the leading Scottish textbook in the area, written by Kenneth Norrie some sixteen years ago (K McK Norrie, *Defamation and Related Actions in Scots Law* (Butterworths, Edinburgh 1995). Reid's work, achieving the aforementioned as it does, whilst contributing to various ongoing debates, is therefore a timely and useful contribution. However, more than this, Reid's exploration of the law in this area serves to highlight and clarify some fundamental points that are regularly overlooked.

The right to protection of reputation is recognised as being guaranteed by Article 8 ECHR. In Scotland there are two routes by which one can protect reputation against false statements that cause damage: defamation and verbal injury. The boundary between the two has however narrowed to the point of

being unclear. Reid assists in addressing this much overlooked problem. Defamation, Reid writes, is a means of 'control over expression of that which is objective and false – or at any rate cannot be proved to be true' (p. 99). Verbal injury meanwhile is harder to define, especially given that it continues to be used in its general sense as a genus and also in the specific sense as 'an injury that has been inflicted by harmful words which cannot be classified as defamatory'. This is useful, but the real value is at p. 102 where Reid provides a much needed account of what may still constitute a 'verbal injury' under the latter head:

- (a) intentional injury to business interests caused by false statements;
- (b) intentional injury to feelings caused by false statements (although this is now a marginal category, since a claim is more likely to be made for defamation where the statements are so damaging as to be defamatory); and
- (c) patrimonial loss suffered as a consequence of a slander upon a third party.

Within chapter seven, eight and nine Reid develops and illustrates the detail of the above verbal injury synopsis. This will assist in clarifying the ambit of verbal injury and, it is hoped, increase its utilisation by practitioners where appropriate. In advancing the above as remaining actionable, Reid notes it unlikely that either 'loss or injury suffered as a result of the making of true statements' or 'injury to feelings suffered as a consequence of a slander upon a third party' would still be actionable as a verbal injury.

As is illustrated in her exposition of verbal injury, Reid is disciplined in her reading of previous authorities – looking always to contextualise developments and analyse accordingly. This approach is to the reader's benefit. A 'labyrinth' is how Lord Wheatley (*Steele v Scottish Daily Record and Sunday Mail* 1970 SLT 53 at para. 60) described the myriad of complexities in the Scottish law regarding defamation and verbal injury. His Lordship's observation was accurate then, and remains applicable now. Nevertheless, in spite of this, Reid has produced a book which provides a useful and accurate synopsis of the present law. This will be infinitely helpful to those approaching (or utilising in argument) the 'labyrinth' that are the primary authorities.

Chapter ten, entitled 'Defamatory Imputations', thoroughly analyses the action of defamation in Scotland. Throughout there are interesting observations. For instance, at p. 138, Reid observes that the 'right-thinking members of society' test assumes 'a level of community consensus as to the 'right' way to think'. Reid opines that 'inevitably the standard becomes based upon a normative rather than a purely descriptive assessment – the values that members of the community ought to have, in the judgement of the court'. Far from being disadvantageous, it is further noted, with reference to a race case from the Supreme Court of South Carolina, that this is virtuous because it enables the court to progress the right-thinking person's view. The normative

nature of the test should, according to Reid, be utilised so that the values and principles of the ECHR are held to inform the attitudes of the 'right-thinking' member of society in determining if a statement is defamatory or not. This seems sensible.

In chapter eleven the attention of the reader is turned to the defences and partial defences that may be advanced against an action for defamation: truth; absolute privilege; qualified privilege; fair comment; offer of amends; and innocent dissemination. Of the defences the most controversial at present is fair comment, recently examined and renamed 'honest comment' in a Supreme Court case which followed publication of the text (*Spiller v Joseph* [2010] UKSC 53). Reid's discussion of fair comment, particularly the extent to which reference must be made to the facts upon which a comment is based – that being the fourth proposition in *Cheng* ([2001] EMLR 777, per Lord Nicholls at para. 19) and the question at the centre of *Spiller* – is illustrative of this text's ability to remain relevant and useful in a rapidly developing area.

Throughout defamation law there are legislative (and likely piecemeal common law) changes on the horizon. Although the text obviously does not include them, it will undoubtedly provide a coherent and accessible basis upon which the changes can be assessed and further research undertaken. This book will be particularly useful for students at honours or masters level, and one would accordingly advocate this text as prescribed reading. Priced at £95 it is in all likelihood beyond the reach of all but the most dedicated students; thus, at the very least, law libraries should purchase copies for consultation.

In closing, homage must be paid to the depth of research, analysis and clarity of expression upon most complex concepts, material and jurisprudence within this text. Most academic books, whether legal writings or not, tend to be either accessible or impressively and accurately researched. It is rare indeed that you find a book dealing with a complex subject-matter which does both. 'Personality, Privacy and Confidentiality' is such a text, and an impressive example at that. I recommend it without reservation to student, practitioner and academic alike. A pleasure to read and review.

Ryan T. Whelan
July 2011

Guidelines for Contributors

Submissions are welcomed from students and graduates of the University of Aberdeen.

Several types of articles will be considered:

- Case Notes (500 to 1500 words on a recent judicial development)
- Book Reviews (500 to 1500 words on a recent publication)
- Essays and Short Articles (1500 to 4000 words)
- Long Articles (4000 to 10,000 words)

The limits specified are for general guidance only, and will not be strictly upheld.

Every piece of work is reviewed anonymously by the student Editorial Board, before being sent for Peer Review. Submissions may be accepted outright, accepted subject to modification, or rejected. Constructive comments will be sent to the author.

Published articles will be compiled in an annual issue which will be available online and in law libraries throughout the country.

All submissions must conform to House Style and to the Oxford Standard for Citation of Legal Authorities.

Articles must provide a critical analysis of a particular area of law, publication or judicial decision. Comment should be original, relevant and aim to make an interesting contribution to the academic debate.

For further information on submitting an article, subscribing to the journal or becoming involved in a supportive capacity please contact us via the details on our website: www.abdn.ac.uk/law/aslr.

We would be delighted to hear from you.

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