D. CONCLUSIONS

What lessons can be derived from all this? The first lesson concerns possession. European scholars have often discussed possession on the basis of Roman law, ignoring the fact that the courts applied remedies which were not of Roman origins. Thus, the general possessory theory has often been somewhat out of tune with the concrete reality of possessory protection. A full historical understanding of possession requires recognition that the Civilian tradition has, in this regard, a strong debt towards canon law and Germanic law.

A second lesson is more general. Practical rules usually do not depend on concepts and categorizations. In many cases, legal systems may reach similar results (deriving from history or practical convenience) while using different conceptual tools to explain them. Deriving a concrete solution from a concept is often a dangerous game.

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EdinLR Vol 8 pp 272–276

A Note on Edictal Intimation.[1]

Suppose that D is indebted to C1. C1 assigns this debt to C2. It is settled law that there is no transfer of the claim to C2 until there is intimation of the assignation to the debtor.[2] Intimation provides a clear date at which the transfer of the claim can be determined. Intimation has been described as analogous to the requirement of recording or registration for the transfer land,[3] and to *traditio* for the transfer corporeal moveables at common law.[4] What happens, then, if a debtor is furth of Scotland[5] or, more prosaically, just cannot be found?[6] The point is of much practical importance. Unless the assignee can effect an intimation (or some recognised equipollent) to the debtor of the assignation, the assignee is at the risk of the cedent's insolvency. The issue is also a

1 See generally, R Campbell, *The Law and Practice of Citation and Diligence* (1862) 31 *et seq*; Æ J G Mackay, *Manual of Practice in the Court of Session* (1877) 398 *et seq*; Æ J G Mackay, *Manual of Court of Session Practice* (1893) 200; J Graham Stewart, *Treatise on the Law of Diligence* (1898) 319; J Chisholm (ed), *Green's Encyclopaedia of the Law of Scotland*, 2nd edn (1910) vol 5, 58; Lord Dunedin et al (eds), *Encyclopaedia of the Law of Scotland* (1928) vol 3, para 897 and vol 5, para 57; J A Maclaren, *Court of Session Practice* (1916) 334 *et seq*; Anon, "Some notes on edictal citations" (1945) 61 *Scottish Law Review* 37; D Maxwell, *The Practice of the Court of Session* (1980) 180.

2 Stair, *Institutions*, 3.1.6; Bankton, *Institute*, 3.1.6; *Creditors of Benjendward, Competing* (1753) Mor 743 at 744; Kames Sel Dec 75 per Lord Kames; *Liquidators of Union Club Ltd* v *Edinburgh Life Assurance Co* (1906) 8 F 1143 at 1146 per Lord McLaren.

3 *Edmund* v *Mags of Aberdeen* (1855) 18 D 47 at 55 per Lord Curriehill; aff'd (1858) 3 Macq 116.

4 W M Gloag and J M Irvine, *The Law of Rights in Security* (1897) 476-477, approved in *Gallemos Ltd (in receivership)* v *Barratt Falkirk Ltd* 1989 SC 239 at 243 per Lord Dunpark. Cf G Marty, P Raynaud and P Jestaz, *Droit Civil, Les Obligations*, 2nd edn (1989) para 357.

5 A debtor is furth of Scotland if he or she has left the country with no intention of returning: *Brown* v *Blaikie* (1849) 11 D 475 at 482 per Lord Jeffrey; C Shand, *Practice of the Court of Session* (1848) 238-9. Even if the debtor has left family in Scotland, citation or intimation must be edictal: *Cribbes* v *Ross* (1851) 13 D 1369.

6 *Duke of Atholl* v *Robertson* (1872) 10 M 298 suggests that intimation to a suitably authorised agent may be sufficient.

topical one. Some have criticised the Scots law of assignation for requiring intimation to the debtor to effect a transfer.[7] In many other systems, the transfer occurs on the conclusion of the contract or on delivery of a deed of transfer.[8] There are two criticisms levelled at intimation: it is commercially inconvenient; and, secondly, it fails to publicise the transfer. Even if third parties were to make inquiries of the debtor, it is not clear whether the debtor is obliged to co-operate.[9] Law reformers have suggested that a registration or filing system[10] should be employed. Uniquely, it is argued, such a system would publicise to all who care to search when an assignation has occurred.[11] Edictal intimation is just such an example of a system of registration being used to effect the transfer of a money claim.

The common law of Scotland provided that if the debtor cannot be found, or if he or she is furth of Scotland, then intimation of any assignation is to be made edictally. (The same process was invoked for the service of a summons against a defender subject to the court's jurisdiction but who could not be found; for one who had no fixed address;[12] or for the service of an arrestment in the hands of an absent arrestee). Edictal intimation was achieved by a messenger[13] crying three oyessess[14] and reading the warrant[15] and / or assignation, at the Market Cross at Edinburgh and at the pier and shore of Leith:[16]

> All executions at market crosses, or at the pier of Leith, must be by messengers, and must bear his going to the market-cross in due time of day, when people may take notice; and before he read the summons, he must, with audible voice, cry three Oyesses: the design whereof is to convocate people, to hear and give notice; and then he must read the letters, and require the witnesses being present, and must affix a copy upon the cross or pier. All which must be expressed in the executions.[17]

A copy of the warrant or assignation was affixed to the Market Cross. This was deemed to be the *communis patria* for Scots wherever they were situated.

This procedure was clearly somewhat primitive. It was abolished by the Court of Session Act 1825.[18] Instead edictal intimation was to be made by way of letters of supplement (essentially a warrant to cite or intimate issued by the Court[19]) registered in the appropriate edictal register.

7 R Bruce Wood, in F Salinger, *Factoring: the Law and Practice of Invoice Finance*, 3rd edn (1999), ch 7.

8 See O Lando, E Clive, A Prüm and R Zimmermann (eds), *Principles of European Contract Law*, part 3, (2003) and the commentaries to the provisions of Art 11.

9 In *Black* v *Scott* (1830) 8 S 367 the possibility of an uncooperative debtor was recognised but not discussed.

10 Similar to that found in the American Uniform Commercial Code. Cf UNCITRAL draft Convention on Assignment of Receivables in International Trade, 13 Mar 2001, A/CN.9/489, Annex to the draft Convention, "Priority based on registration".

11 H Kötz (ed), *International Encyclopaedia of Comparative Law* vol 7, ch 13, at 82, para 90.

12 *Home* v *Libberton* (1491) Mor 3707; Balfour, *Practicks*, No 41, perhaps the oldest case in Morison's Dictionary. It involved a vagrant. Why anyone would want to sue a vagrant is perplexing.

13 This seems to be the only instance where a court officer was required for intimation of an assignation. Cf the position in France: *Code civil* Art 1690 and *Nouveau code de procédure civile* Arts 651 *et seq*.

14 This was an essential element: *Gordon* v *Forbes* (1681) Mor 3768; *Preston* v *Sir John Clark* (1715) Mor 3769.

15 Issued by the court, for which see below.

16 Quite how this worked in detail is obscure. Failure to read at the Market Cross was fatal (*Christie* v *Jack* (1631) Mor 3712; *Ewing* v *Rochead* (1681) Mor 3803) as was a failure to read at the Pier and Shore (*Stewart* v *Achanay* (1626) Mor 3803).

17 Stair, *Institutions*, 4.38.16. See also Balfour, *Practicks*, No 305.

18 Section 51.

19 See G Watson (ed), *Bell's Dictionary and Digest of the Law of Scotland*, 7th edn (1890), "Supplement" and references there cited.

Judicial intervention was therefore necessary to effect the intimation. The register was in three parts: (i) one for all citations and summonses and orders of service as against persons furth of Scotland to appear before the supreme courts; (ii) another for all citations by virtue of letters of supplement to persons furth of Scotland to appear before any of the inferior courts; and (iii) for all charges, intimations and publications to persons furth of Scotland, given by virtue of letters other than summonses passing the Signet. The old procedure of edictal citation with regard to "edictal citations, charges, publications, citations and services" was now to be "done and performed by delivery of a copy of the instrument to be served at the Office of the Keeper of the Records of the Court of Session".[20] The Keeper of the Records,[21] (subsequently the Keeper of Edictal Citations)[22] or the clerk, would then register "an abstract of the copy so delivered, exhibiting the time of service, the nature of the writ, the names and designations of the parties, and the day against which the party shall be called upon to give obedience, or to make appearance". Responsibility for this Office was transferred to the Extractor of the Court of Session in 1929,[23] then, to the Keeper of the Registers and Records of Scotland[24] and finally to the Keeper of the Records of Scotland.[25] Standard textbooks suggest: "If the debtor's whereabouts are unknown and there is no agent in Scotland, it seems that there has to be edictal intimation, using letters of supplement".[26]

There is, however, one problem. In 1988, section 51 of the Court of Session Act 1825 was repealed.[27] This was in line with the intention to abolish edictal citation of summonses.[28] However the repeal was not limited to future edictal service of summonses. The legal basis for the existence of the office was abrogated *in toto*. Incidental Acts of Sederunt which make reference to the Office of Edictal Citations,[29] even if they are in force,[30] which is doubtful, are not in normative terms. In any event they refer only to citations. The effect is two-fold: edictal intimation is now incompetent and there is no basis for the existence of the Office of Edictal Citations. Rules 16.7–16.11 of the present Rules of the Court of Session refer to the intimation of "documents". This is defined in rule 1 in terms of the Civil Evidence (Scotland) Act 1988, section 9. While an assignation would seem to fall within this general definition of document, the provision is not applicable. Intimation is not merely evidential. It is a substantive requirement of the common law for the transfer of a claim.[31] The Rules of Court generally deal with points of procedure – they are not conventionally used for abrogating four centuries of common law.

20 The procedure was extended to the service of an arrestment in the hands of a party furth of Scotland by the Debtors (Scotland) Act 1838 (the "Personal Diligence Act"), s 18.

21 The office of the Keeper of the Records was established by Court of Session (Records) Act 1815. It was abolished from 1839: Court of Session Act (No 2) 1838, ss 20 and 21. The responsibility thereafter passed to the Office of the Keeper of Edictal Citations and of the Minute Book.

22 See Act of Sederunt 24 Dec 1838, s 7. An edictal citation served on the Keeper of the Records was held bad after the passing of the Act of Sederunt: *Stephenson* v *Dunlop* (1840) 2 D 1366.

23 S R & O No 588 1929 made under Reorganisation of Offices (Scotland) Act 1928, s 8.

24 Public Records (Scotland) Act 1937, s 13.

25 Public Registers and Records (Scotland) Act 1948, s 1(3).

26 W W McBryde, *The Law of Contract in Scotland*, 2nd edn (2001) para 12-125. Professor McBryde has now corrected this in his *Second Cumulative Supplement* (2003) para 12-124.

27 Court of Session Act 1988, Sch 2. The recommendations for reform were published as an appendix to Scottish Law Commission Report No 111, 1988. There was no report as such however, just an appendix thereto containing the draft bill. Neither a discussion paper nor a memorandum preceded the report.

28 The relevant law for service of summonses abroad is now to be found in RCS r 16.5.

29 Act of Sederunt 24 Dec 1838, s 7.

30 Cf *MacKintosh's Trs* v *Davidson and Sharp* (1898) 25 R 554; *Morrison* v *Vallentine's Exrs* 1907 SC 999; *Young* v *Harper* 1970 SC 174 OH.

31 A simplified form is provided in the Transmission of Moveable Property (Scotland) Act 1862.

Certain enactments, however, continue to assume that the Office exists. For example, on the resignation of a trustee, intimation must be made to the other trustees. Where any of the other trustees cannot be found, then the Trusts (Scotland) Act 1921 envisages that intimation of such a resignation should be made edictally.[32] Again, this is a substantive requirement.

Edictal intimation was re-introduced for the purposes of executing diligence in the hands of a common debtor who is furth of Scotland or who cannot be found. This is to be apparently to be effected by a "messenger-at-arms leaving or depositing the appropriate schedule mentioned in rule 16.15 at the Office of the Extractor".[33] A copy of this schedule must then be sent by the messenger-at-arms by registered post or the first-class recorded delivery service to the place furth of Scotland where the person on whom diligence is to be executed edictally resides, or as the case may be, such last known place.[34] However, there is no legal obligation on the Extractor to keep a register. What is to be done with the schedules? Is a register to be maintained? Can this be searched? If not, the whole exercise of edictal execution is rendered otiose.

Whatever may be the position for edictal execution of diligence, the position with regard to edictal intimation of assignations is clear: it is presently incompetent. It is probably the case that where a debtor is furth of Scotland and his whereabouts can be ascertained, then intimation can be made to him in terms of the Transmission of Moveable Property (Scotland) Act 1862.[35] But, this is nugatory if a debtor cannot be found. Such a situation is not difficult to envisage. What then is the position? It cannot be the case that intimation is just not required. How are competing assignations of the same right to be judged? If the mere date of the assignation deed is taken, then the potential for fraud is great; the danger of dishonestly ante-dated assignations is real. It seems, then, that the only way to intimate would be to raise an action against the debtor, in terms of the relevant rules of court.[36] Judicial intimation is a recognised equivalent to intimation.[37] In the absence of such intimation the debtor will be free,[38] indeed, he or she will be obliged, to pay the cedent. (It should be noted that even if there is edictal intimation, the absent debtor who pays the cedent in good faith will be protected).[39]

The repeal of the section 51 of the 1825 Act was probably an oversight. Presently, only registration of the assignation in the Books of Council and Session will provide a certain date at which the transfer can be determined.[40] While this is not presently recognised as an equipollent of intimation,[41] this would at least be a public document of a certain date. It should be entitled to a preference over any post-dated unregistered and unintimated assignation. Failing that, the assignee would have to go through the long and cumbersome process of raising an action against a defender of no known address to ensure that there is a transfer of the right by means of judicial intimation of the assignation.

32 Section 19(1). See W A Wilson and A G M Duncan, *Trusts, Trustees and Executors*, 2nd edn (1995) at para 22-30.

33 Rules of the Court of Session, r 16.12(4).

34 Rules of the Court of Session, r 16.12(5).

35 See McBryde, *Contract* para 12-125 and textbooks cited at note 32.

36 Rules of the Court of Session, r 16.5; Ordinary Cause Rules, r 5.5 and r 5.6. Both the Rules of the Court of Session and the Ordinary Cause Rules are available online at <*www.scotcourts.gov.uk*>.

37 *Carter* v *McIntosh* (1862) 24 D 925 at 934 per Lord Justice-Clerk Inglis.

38 Stair, *Institutions*, 4.40.33. Cf Erskine, *Institute*, 3.4.3. An arrestee is now protected by statute: Debts Securities (Scotland) Act 1856, s 1, cited by W A Wilson, *The Scottish Law of Debt* 2nd edn (1991) para 17.5.

39 See note 38 above.

40 The doctrine of *data certa* is a feature of some continental European systems. Although there are few references to this doctrine in the Scottish sources, this must have been one of the motivations for the creation of the Books of Council and Session: see *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 19 (1990), J Imrie, "Public registers and records", para 839.

41 *Tod's Trs* v *Wilson* (1869) 7 M 1100.

What, then, is the contemporary relevance of the abrogation of the ancient institution of edictal intimation? The answer is a great deal. Actual intimation of an assignation to a debtor has become unfashionable: commercial undertakings do not want their trade debtors to know that they are factoring their receivables. The factor argues that intimation is an expensive and cumbersome process which increases transaction costs. The counter-argument is that intimation is a formal process which provides a certain date of transfer and which goes a long way to prevent fraud. Registration has been suggested as a third way. A public register is transparent. It hinders fraud. It is cheap and it is efficient. There may be much to be said for these arguments. For present purposes it is sufficient to highlight a great irony: Scots law, so often criticised as archaic, had presciently provided a model system of registration for a century and a half prior to its peremptory repeal in 1988. That is not to say that the system was perfect; far from it. The need for a judicial warrant (letters of supplement) was particularly cumbersome and any future system of registration should eschew such a requirement.

The point raises general and important issues reform of the Scots law of assignation. More specifically, however, there is an issue of immediate concern: a gap in Scots law, which prevents the transfer of a claim against an absent debtor without recourse to a prolonged court procedure.

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(*The author is indebted to discussions with Professor G L Gretton and Professor N R Whitty; but any errors or omissions are the author's sole responsibility.*)

EdinLR Vol 8 pp 276–278

More cautionary tales

This is a brief note on the recent Inner House case of *Royal Bank of Scotland* v *Wilson*[1] as a postscript to an earlier article on the cases on "cautionary" wives published in this journal last year.[2]

The broad shape of this sorry tale is by now familiar. A person (often a wife of the principal debtor) grants either a cautionary obligation (guarantee) or standard security for the debts of another. The debtor defaults, the lender seeks to enforce the security and the granter raises the defence that the security was tainted in some way. *Wilson* follows this pattern with a particular speciality: the security granted by the husband and wife was an "all sums due" security granted originally in support of a loan for the home.[3] Subsequently, a further loan was made by the bank to the husband for business purposes.

Earlier cases have established the framework of this defence: (i) the cautioner's consent to the contract must have been be vitiated, generally by some wrongful act of the debtor; and (ii) the creditor must have been aware of the existence of a relationship between the cautioner and the debtor which is such as to give rise to a reasonable suspicion that consent might be defective.

1 2003 SLT 910. References are to the paragraph numbers of the report. See also J Thomson, "Limiting Smith" 2003 SLG 158.

2 S Eden, "Cautionary tales – the continued development of *Smith* v *Bank of Scotland*" (2003) 7 EdinLR 107.

3 There were in fact two actions against each of two Wilson brothers and their respective wives. One loan was for the purchase of a home, the other for the construction of a conservatory. The facts are sufficiently similar to raise identical issues, although there are two Mrs Wilsons.