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danger that a pursuer in a similar position in the future might fail in his claim because a different court preferred to take a more realistic view of his alleged belief that he was owner. The difference between the two sorts of case exists notwithstanding the fact that Mr Newton, like a good faith possessor, was claiming recompense for improvements that he had made in good faith. This having been said, the cases can be compared on one level: just as an improver will be successful in his claim if he can show that he genuinely and reasonably believed that he had title, a claimant under the *condictio* will be successful if he can establish that he genuinely believed that there was a cause and this belief was reasonable. In such circumstances, a court may infer the existence of a “cause”. Normally it will do so only if the defender has acquiesced in the receipt of the benefit in a legally significant way. This, we must conclude, was perceived to have been the case with Mrs Newton who, notwithstanding having to pay for the improvements because of the court order, nevertheless did pretty well out of her affair.

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## *Buchanan v Alba Diagnostics: Accretion of Title and Assignment of Future Patents*

### A. ACCRETION OF TITLE

#### (1) Accretion of title

Accretion of title is a general principle of property law.<sup>1</sup> Suppose Y purports to dispoise land to Z. The land is actually owned by X. Y cannot give what he does not have. So, even if Z records his disposition, it will be ineffectual.<sup>2</sup> If X subsequently transfers the property to Y, however, ownership passes immediately from X to Z (momentarily passing through Y's patrimony) without the need for a further disposition. The basis of the doctrine is the warrandice in the disposition: it is “the law doing what the granter is

1 See generally K G C Reid, *The Law of Property in Scotland* (1996), para 677.

2 It must be emphasised that the doctrine of accretion is of decreasing importance in land law with the move to registration of title. The Land Register, to a certain degree, operates outwith the realm of property law. (Cf the General Register of Sasines. It operates within the boundaries of the law of property, hence the apparently outdated references to recording in the text.) In our example, therefore, when the disposition is registered in the Land Register then, because it is a register of title, Z will immediately become owner on registration. The interaction of the Land Register with property law is complex, but much can be gained from K G C Reid, “A non domino conveyances and the Land Register” 1991 JR 79; K G C Reid, “Void and voidable deeds and the Land Register” (1996) 1 SLPQ 265; and A J M Steven, “Problems of the Land Register” 1999 SLT (News) 163. See also the discussion in note 17 below.

bound to do".<sup>3</sup> So formulated, accretion applies to assets which, although not owned by the transferor at the time of the disposition, are nevertheless in existence.<sup>4</sup> It has been suggested, however, that this doctrine might be extended to assets which do not yet exist. The purported transfer of a right which does not exist, so the argument goes, will be perfected by accretion on the right coming into existence:

An expectant cannot sell the property to which he hopes to succeed, or any interest in it, nor can he exercise any power over it. He can sell no more than a chance—his chance of becoming proprietor; but it conveys nothing, in as much as he has nothing to convey. It becomes effectual by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest.<sup>5</sup>

This dictum, by Lord Rutherford Clark in *Reid v Morison*, is unhelpful. On the one hand, "an expectant cannot sell"; on the other, the effect is that there is "nothing but a mere agreement". While not all agreements are sales, all sales are certainly agreements. There is therefore a large potential overlap between what his Lordship says can and cannot happen. He further suggests that the purported assignation of future rights is ineffectual and is "nothing but a mere agreement to convey" which "becomes effectual by accretion alone". This, with respect, is not correct. After all, if there were no more than a personal obligation to grant a conveyance, then the doctrine of accretion could not apply. Accretion is a principle of property law. For the doctrine to operate there must be a purported disposition or assignation followed by either registration or intimation. In other words, *all* the steps required by the law to effect a transfer of an asset—we might collectively call such essential prerequisites the "rain dance"—must have occurred. Initially the transfer will be entirely ineffectual. Only on the granter becoming entitled is the doctrine triggered. As a result, a fresh conveyance is not required. The property is transferred *ipso iure*.<sup>6</sup> Importantly, a disponee whose title is based on accretion will prevail in a competition with a subsequent disponee who received his disposition or assignation after the common author's title was completed.<sup>7</sup>

It must be remembered, however, that warrandice is a personal right. On the insolvency of the transferor a personal right to a transfer based on warrandice may be worthless.<sup>8</sup>

3 G J Bell, *Principles* (10th edn 1899), § 881. It should be noted in passing that Bell's treatment of the law in § 882(2) has been superseded; see *Swan v Western Bank of Scotland* (1866) 4 Mor 663; *Smith v Wallace* (1869) 8 Mor 204.

4 Although accretion could apply to the creation of a subordinate real right not yet in existence.

5 *Reid v Morison* (1893) 20 R 510 at 514, cited by the First Division in *Buchanan v Alba Diagnostics* 2001 SCLR 307; [2001] RPC 851 at 873 per Lord Clarke. See the discussion of *Reid v Morison* by H Goudy, "Contingent rights and bankruptcy" (1893) 5 JR 212. Cf *Miller v Muirhead* (1894) 21 R 658 at 660 per Lord Rutherford Clark.

6 It should also be mentioned that Bankruptcy (Scotland) Act 1913, s 97, and Bankruptcy (Scotland) Act 1985, s 31(5), seem to assume that *Reid v Morrison* was wrong. See generally, G L Gretton, "Assignation of contingent rights" 1993 JR 23 at 31–32.

7 See *John Neilson v Menzies of Enoch* (1671) Mor 7768, cited in Anon, "Accretion" (1962) 3 *Conveyancing Review* 108.

8 *Bank of Scotland v Liquidators of Hutchison Main & Co Ltd* 1914 SC (HL) 1. See also Reid, *Law of Property*, para 677: "Supervening sequestration prevents accretion, regardless of whether the title then comes to be acquired by the granter or his trustee in sequestration."

## (2) Accretion and future rights

The general application of the doctrine to moveables has been doubted.<sup>9</sup> However, in principle, there is no reason why the doctrine of accretion of title—i.e. where there is a purported transfer by Y to Z of a moveable owned by X—should not apply to moveables.<sup>10</sup> In the case of rights (as opposed to corporeal moveables), the application of the doctrine of accretion is complicated. Rights may have come into existence or they may not. If they already exist, there is clearly the potential for accretion to operate. Future rights are more difficult. They may be subject to different contingencies. Moreover, depending on the type of right, there may be different legal regimes regulating the transfer of the right. Each regime may require a different rain dance. Depending on the contingent nature of the right, it may or may not be possible to perform the desired rain dance. If the rain dance is impossible, however, the doctrine of accretion cannot possibly apply because there is then no purported transfer.

### (a) Rain dance not required?<sup>3</sup>

Some formalities will not be onerous. For example, the assignation of a copyright requires only writing signed by the cedent.<sup>11</sup> But it is a rain dance nevertheless. However, such is the potential for new species of rights (particularly new intellectual property rights (“IPRs”)) the possibility of there being no required rain dance for transfer is a real one. If there is no debtor involved (as in the case of IPRs), then the paradigm common law assignation, which requires intimation to the debtor, cannot apply. However, even where the law does not seem to demand a rain dance, it may be wise to perform one anyway. For example, in the purported transfer of a future IPR for which there is no specific statutory regime, registration of any transaction in the Books of Council and Session will clearly evidence the intention to transfer. It will also provide a certain date at which that transfer can be said to have occurred. Importantly, such a step will certainly allow the doctrine of accretion to operate.

### (b) Rain dance required

If a rain dance is required, the next question is whether it is possible. If there is a registration requirement, then there must be something that can be registered. If intimation is required, there must be something to intimate, and somebody to whom it can be intimated. It is only on these requirements being fulfilled that the doctrine of accretion can possibly operate. A purported transfer is required. This occurs only on completion of the appropriate rain dance.

9 Reid, *Law of Property*, para 678.

10 Both Stair (*Institutions*, 3.2.1) and Lord Kinloch (in *Smith v Wallace* (1869) 8 Mor 204 at 211) envisage accretion applying to assignations; cf. *Coats v Bannochie's Trs* 1912 SC 329 at 333 per Lord Salvesen.

11 Copyright, Designs and Patents Act 1988, s 90(3). For the design right, see s 222(3).

## B. ACCRETION AND PATENT APPLICATIONS: *BUCHANAN V ALBA DIAGNOSTICS*

### (1) Assignations of patents

The paradigm form of assignation is the transfer of a claim to payment against a debtor. There is usually an agreement, followed by delivery of the assignation, which is then intimated to the debtor. Only on intimation is the claim transferred. On this paradigmatic level, assignation is of personal rights. Intellectual property rights (IPRs) are different. They are absolute rights. They can be enforced against anyone. There is no debtor as such. The mechanisms of transfer vary. Scots law—and, for that matter, many other legal systems—it must be conceded, has not really kept a pace with the explosion of IPRs and their heightened contemporary importance. Scots law says that IPRs are also transferred by “assignation”. In such a transfer there is no “debtor” because there is no “claim”. Transfer is not, therefore, achieved by intimation: there is no debtor to whom to intimate.<sup>12</sup> In the case of an assignation of a patent—or, indeed, an assignation in security—the only relevance of intimation may be to inform a licensee that royalties should now be paid to the assignee. But this is not a constitutive requirement; the constitutive requirement for transfer of a patent, we will see, is registration.

### (2) The *Buchanan case*<sup>13</sup>

#### (a) *Facts*

Buchanan was an inventor. He also had a company, “Innovations”. Buchanan was lent money by Mills. Mills subsequently wanted security. It was agreed that Buchanan’s company, Innovations, would grant Mills an assignation in security. Innovations purported to assign:

... their whole right, title and interest past, present and future in and to the Patents and the Applications and all the rights, powers, privileges and amenities conferred on the owners thereof and full and exclusive benefit of the same and all improvements, prolongations and extensions and all know-how relating therein and thereto ... and in relation to the applications to the intent that the grant of any patents thereon shall be in the name of the assignee.<sup>14</sup>

The relations between Buchanan and Mills quickly broke down. Mills joined another venture, Alba, the defenders to the action. In 1993, Innovations went into receivership. The receivership triggered a provision in the security agreement which granted Mills a power of sale. On joining Alba, Mills assigned to Alba the rights that had been assigned to him (by Innovations). The assignation was for value. The invention, meanwhile, had not been without its problems. Following the receivership of Innovations, Buchanan and Mills—independently of each other—set about trying to improve it. Buchanan filed a patent application for his improvement. This was granted in 1996. Mills applied for, and was granted, a patent for his improvements in 1997. The dispute

<sup>12</sup> Strangely, it has been suggested that there has to be intimation to the original cedent; *Buchanan v Alba Diagnostics Ltd* [2000] RPC 367 (OH) at 378 and 389 per Lord Hamilton.

<sup>13</sup> *Buchanan v Alba Diagnostics Ltd* 2004 SC (HL) 9; 2004 SLT 255 aff’g 2001 SCLR 307; [2001] RPC 851 (1st Div).

<sup>14</sup> [2000] RPC 367 at 373.

between the parties came to a head when Buchanan accused Alba of patent infringement. Alba countered that Buchanan had no title to sue: he had assigned all his rights to Mills, who, in turn, had assigned these to Alba. Much of the litigation was concerned with whether, on the evidence, the additional work done by Buchanan constituted an “improvement” and was thus covered by the dispositive clause in the assignment. This note is concerned only with the principles applicable to the transfer.

*(b) Assignment of patents*

There has been little discussion of the transfer of patents in Scots law. Section 31 of the Patents Act 1977 (PA 1977) provides that patents, or applications for patents, may be assigned in terms of that section. Writing is required. Unlike in England,<sup>15</sup> where all the parties must sign, in Scots law only the granter need subscribe in terms of the Requirements of Writing (Scotland) Act 1995. PA 1977, section 33(1) provides:

Any person who claims to have acquired the property in a patent or application for a patent ... shall be entitled as against any other person who claims to have acquired that property by virtue of an earlier transaction ... if, at the time of the later transaction ... (a) the earlier transaction ... was not registered, or (b) in the case of any application which has not been published, notice of the earlier transaction ... had not been given to the comptroller, and (c) in any case, the person claiming under the later transaction ... did not know of the earlier transaction ...<sup>16</sup>

In the case of the double sale, the second assignee who registers first, assuming he is in good faith, will be preferred. However, in the absence of a double sale, the Act provides no general principle of transfer. The common law must therefore fill the gaps. While the terms of the Act suggest that the register has a notice function (i.e. a so-called “notice” system),<sup>17</sup> it has been held in England that registration is a constitutive

15 See PA 1977 s 30(6).

16 This is in terms similar to those in the Sale of Goods Act 1979, s 24 (as amended). Section 24 concerns the seller who remains in possession after sale. The seller subsequently sells the goods again, though he no longer owns them. The second transferee, who takes in good faith and without notice of the previous sale, is preferred. Section 24 thus elides both the principle in s 17—that property passes when the parties intend that it should pass—as well as the rule *nemo plus iuris ad alium transferre potest quam ipse habe(re)t*. However, while s 24 of the 1979 Act and s 33 of the 1977 Act are analogous, PA 1977 contains no equivalent of s 17 of the 1979 Act.

17 While the issue cannot be discussed in detail here, it can be helpful to differentiate different types of registration system. Three categories can be distinguished: the “race system”, the “notice system” and the “race–notice” system. The race system provides that registration is constitutive. Registration is determinative. The Land Register is, essentially, a race system (the issues are complex; the register can be rectified). In a notice system, registration is not a constitutive requirement; instead, registration confers additional rights: a registered deed can be relied upon against competing transferees. It brings the registered deed to the notice of other parties (often constructively). Such systems were traditionally common in English law. The Register of Sasines is a race–notice system: who wins the race to the register prevails, subject to the proviso that the party registering was not aware of any prior right before he entered into the contract to transfer; in other words, the offside goals rule. Characterisation of the system is important. For example, in a register of title like the Land Register, accretion is of lesser importance. If Y disposes to Z property owned by X, and Z registers, Z becomes owner immediately. X is involuntarily divested. The point will be important if, in the interim, Y becomes insolvent: see the general discussion in R Goode, *Commercial Law*, 3rd edn (2004), 57–58. For the position of the Land Register in Scotland, see the references cited in note 2 above.

requirement for transfer at law.<sup>18</sup> The additional good faith requirements of section 33 can therefore be seen as reflecting the common law “offside goals” rule in Scotland.<sup>19</sup> The view that registration is required to effect a transfer is also accepted by the few writers who have addressed the subject.<sup>20</sup> In English law, one can be the “proprietor” of a patent without being registered; this is not possible in Scots law.<sup>21</sup> A pursuer who does not appear on the register simply has no title to sue.<sup>22</sup> Moreover, and perhaps crucially, in both legal systems, there are certain rights to damages for infringement that are only available to a registered holder.<sup>23</sup>

There are three possible types of patent right to consider: (1) an existing patent right; (2) an application for a patent; and (3) a potential patent for which no application has yet been submitted. The transfer of the existing patent has been covered: registration is required to effect a transfer. Patent applications are equally simple. An application for a patent is made to the Comptroller. If the applicant seeks to transfer the right to this application, perhaps in security, there is then a tripartite relationship. Only on intimation does the transfer or security take effect. There are clear analogies with the paradigm assignation of a claim at common law. Indeed, section 33(1)(b) envisages competing assignments being settled by the first intimation to the Comptroller. The third type of patent right is more contingent. It is not covered by the legislation. It can still be sold. But this sale is only a contractual agreement. It transfers nothing. There is not even a purported conveyance. There is no one to whom to intimate and nothing to register. Even if one attempted to register, the application would be refused.<sup>24</sup> The doctrine of accretion therefore cannot apply. Only once an application has been made does the law of transfer become relevant.

(c) *Accretion and assignations*

In *Buchanan*, Lord Hoffmann stated that in Scots law the transfer of future rights may be based on the doctrine of accretion.<sup>25</sup> *Buchanan* involved a patent application. But there is no problem in Scots law with the assignation of a patent application. The statute makes it clear that the transfer of such a right can be intimated to the

18 *Coflexip Stena Offshore's Patent* [1997] RPC 179.

19 See *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 and crucial discussion by Reid, *Law of Property*, para 690 ff. Cf S Wortley, “Double sales and the offside trap: Some thoughts on the rule penalising private knowledge of a prior right” 2002 JR 291.

20 A M Bell, *Lectures on Conveyancing*, 3rd edn (1882), 329; J P Wood, *Lectures on Conveyancing* (1903), 592; J A MacLean, “Security over intellectual property: A Scottish perspective” (1988) 10 EIPR 115; T Guthrie and A Orr, “Fixed security rights over intellectual property rights in Scotland” (1996) 18 EIPR 597; D P Sellar, “Rights in security over Scottish patents” (1996) SLPQ 138.

21 Although *Laird & Co v Laird & Rutherford* (1884) 12 R 294 followed in *Downie v Hay & Robertson* (1902) 9 SLT 331 (but cf s 32(3) PA 1977) suggests that detailed averments of trust may be admitted. This is yet another unfortunate consequence of the lamentable decision in *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43. To allow latent trusts to affect the position is bizarre considering the Act expressly prohibits any express notice of trust on the register: s 32(3) PA 1977.

22 *Cuthbertson v Simpson* 1961 SLT (Notes) 43.

23 See s 68 PA 1977.

24 Even if it were mistakenly registered, it is arguably a nullity for want of specificity.

25 [2004] UKHL 5; 2004 SC (HL) 9; 2004 SLT 455 para 19. His Lordship cites the usual authorities: Reid, *Law of Property*, para 677, and Bell, *Principles*, 10th edn (1899), § 881.

Comptroller.<sup>26</sup> In *Buchanan* there was no intimation. The doctrine of accretion will only be relevant to patents if the cedent had no title to the application which he purported to assign, but such title was acquired subsequent to the purported cession.<sup>27</sup> The only other case where accretion might be relevant is where there is the purported assignation of an IPR for which there is no additional requirement of registration, such as copyright. However, where there is such a requirement, as in the case of patent applications, it must be complied with. Until then, there is no purported transfer. If there is no purported transfer, the principle of accretion cannot operate. In the case of patent applications, if the rain dance has been complied with (i.e. intimation of the assignation to the Comptroller), there is also no room for accretion to operate. The transfer of the application takes effect on intimation. If the application is successful, the patent vests in the assignee. It is a fruit of the application. It seems to this writer that, in such cases, reference to the doctrine of accretion is an unnecessary complication. Indeed, if the application is properly viewed as an asset and the patent as a fruit, there is no issue of future property whatsoever. In many cases, therefore, the principle of accretion is irrelevant to the transfer of future rights. Transfers involving registrable IPRs (like a patent) are actually relatively simple. The assignment of any patent application can be notified to the Comptroller. Admittedly, other IPR regimes do not deal with “applications” for the reason that the rights may not be registrable. Similarly, in the paradigm assignation—the transfer of a money claim—the situation is complex where the claim is not yet in existence. There is a debtor who must be protected. Moreover, it is not clear whether the acquisition by the assignee is original or derivative. Some other legal systems seem to manage without great difficulty.<sup>28</sup> But this general point cannot be discussed here.

As far as registrable IPRs are concerned, then, accretion may be limited to the unusual case where, on the first day, there is a purported transfer by Y of a patent, or patent application, held by X, to Z. Z registers this. On the second day, X assigns to Y. Z's title will be based on accretion. The doctrine of accretion will also operate in one other case of future IPRs: those IPRs that have no additional constitutive requirement for transfer. Copyright is the most important example.<sup>29</sup>

#### (d) *Accretion and insolvency*

What is the effect on an assignation of a future right based on accretion if, before that asset comes into existence, the cedent becomes insolvent? In *Buchanan*, Lord Hoffman stated *obiter*:

But I do not wish to be taken to accept that the obligation alluded to by Bell is anything more than a fiction. The assignation of future improvements is expressed as a dispositive act and it

<sup>26</sup> PA 1977, s 33(3).

<sup>27</sup> But any possible application is limited: the putative cedent will be different from the applicant. It is difficult to see why the Comptroller would give effect to a notification of any such assignation.

<sup>28</sup> Cf the *Vorausabtretung* of German law. Nevertheless, even German lawyers have not provided satisfactory solutions to the problems which arise with future claims to payment.

<sup>29</sup> Cf the provisions relating to the purported transfer of the performer's property rights in a future performance or “prospective ownership” of a design right; Copyright, Designs and Patents Act 1988, s 191C(2) and s 223(1) respectively.



seems to me arguable that it creates no personal obligation but operates entirely in the realm of proprietary rights. If it were otherwise, no effective security could be created over future property because the continuing obligation giving rise to the necessary accretion would not itself be secured and, in the event of the bankruptcy of the assignor, could only be the subject of a ranking.<sup>30</sup>

With respect, these *dicta* are problematic. As argued above, his Lordship's assertion that the assignment of a patent operates, without registration, as a dispositive act, cannot be correct. With regard to the issue of intervening insolvency, Lord Hoffmann's analysis is difficult to follow. Why his Lordship seeks to introduce another security into the equation (to secure the warrandice obligation) is perplexing. In any event, Lord Hoffmann's views on the effect of an intervening insolvency cannot be reconciled with Bell's. As observed above, it is a settled principle of Scots law that a transferee founding on accretion will not be protected on the transferor's intervening insolvency.<sup>31</sup> But this conflicts with Lord Hoffmann's preferred policy—hence his doubts about the juridical basis of accretion in warrandice. The problems with Lord Hoffmann's approach are threefold.

First, it conflicts with the stated policy of the legislature. Under section 31(3) of the Bankruptcy (Scotland) Act 1985, it is provided that accretion cannot be invoked to the prejudice of the trustee in sequestration; moreover, under section 31(5) it is provided that non-vested contingent rights will fall into the sequestration. There is one Sheriff Court decision where this provision was applied to a fishing licence.<sup>32</sup> There seems to this writer no reason why the scope of this section should not also cover future IPRs which the bankrupt has purported to assign where these assignments could not be completed. There is also no reason why this principle should not also apply to liquidation or receivership. Admittedly, this area is horrendously complex,<sup>33</sup> but the rationale behind the rule is obvious.

Secondly, Lord Hoffmann expressed the concern that an inability to transfer rights in patent applications would hinder the availability of credit to small businesses. This is a general point. It may be a good one. But it was not relevant in the *Buchanan* case. In Scots law, the transfer of rights in patent applications is relatively unproblematic: these can be assigned, the assignment taking effect on intimation to the Comptroller. The problem in the *Buchanan* case was not that the future patent rights *could not* be assigned, but that, because there was no intimation to the Comptroller of the assignment, they *were not* assigned.

Furthermore, accretion is a general doctrine in property law. With corporeal moveables and heritable property accretion normally applies only to property already in existence. Yet, Lord Hoffmann's approach would also affect these assets. This would deprive the trustee in sequestration of property that was not future and had nothing to do with business finance. Indeed, the only doubt, before *Buchanan*, about the principle of accretion was whether transfers of moveables could take effect by

30 See [2004] UKHL 5; 2004 SC (HL) 9; 2004 SLT 455, para 22.

31 Reid, *Law of Property*, para 677.

32 See Sheriff Meston's decision in *Cay's Tr*, unreported, Peterhead Sheriff Court, 1994, referred to in D J Cusine and R R M Paisley, *Unreported Property Cases from the Sheriff Courts* (2000), 149.

33 See W W McBryde and G L Gretton, "Sequestration and the *spes successionis*" (2000) 4 Edin LR 129.

accretion.<sup>34</sup> In *Buchanan*, the House of Lords assumed that accretion does apply to moveables, although perhaps for the wrong reasons.<sup>35</sup>

### (3) IPRs and sequestration

Patents, copyrights, trade marks and design rights are all incorporeal moveable property.<sup>36</sup> Where a debtor is sequestrated, his “whole estate” vests in the trustee in sequestration by virtue of the act and warrant.<sup>37</sup> Vesting is couched in terms of the relevant diligence. While modern statutes classify IPRs as incorporeal moveable property, IPRs were only so classified in Scots law following the Exchequer Court’s decision in *Advocate General v Oswald*.<sup>38</sup> Prior to this decision, IPRs such as patents had generally been considered incorporeal heritable assets. Like annuities, IPRs were seen as having a future tract of time and were, as such, quasi-feudal. Consequently, IPRs, though moveable, can be attached only by adjudication. Arrestment is not available: there is no claim to be arrested and no arrestee in whose hands it can be served. But section 31(1)(b) of the 1985 Act, which equates the act and warrant to an adjudication in implement of sale as well as in security, refers only to the *heritable* estate of the debtor. In terms of section 31(4) of the 1985 Act, moveable property vests in the trustee by virtue of the act and warrant as if there had been delivery to him, possession taken by him, or intimation of any assignation made to him. Patent applications, then, will vest by virtue of the act and warrant. But in the assignation of an existing patent there is no one to whom to intimate any assignation. In the case of patents, the transfer must be completed by registration, not intimation.

There are three possible interpretations. The first is that patents do not fall into sequestration. But there is no reason in principle or policy why such valuable assets should remain out of the reach of creditors. Second, it could be argued that since IPRs are part of “the whole estate of the debtor” in terms of section 31(1) of the 1985 Act, IPRs fall into the sequestration but do not vest in the trustee.<sup>39</sup> Third, it could be argued that section 31(1) is clear in that “the whole estate of the debtor shall vest at the date of the sequestration in the permanent trustee”. The trustee can therefore register the patent in his own name. This result is also congruent with the policy of section 30(3) PA 1977. Unfortunately, section 31 PA 1977 expressly states that section 30 PA

34 See note 9 above. See also *Tayplan Ltd v D & A Contracts Ltd* 2005 SLT 195 OH, and comment at 2005 SLT(New) 119

35 A note of caution is apposite. In the general case of an assignation of a claim, the presence of a third party, the debtor, complicates matters considerably. The doctrine of accretion separates the moment of transfer from the moment of registration or intimation; further, in an assignation, it implies a result in law which is at odds with what the debtor has been asked to do in fact (by virtue of the various intimations). Consequently, there are great, perhaps insuperable, difficulties: it will be almost impossible for a debtor to pay the correct person. But the debtor who pays the wrong person in good faith must always be protected. Detailed discussion of these issues is outwith the scope of the present note.

36 See Patents Act 1977, s 31(2); Copyright, Designs and Patents Act 1988, s 90(1) for copyright; s 222(1) for the design right; Trade Marks Act 1994, s 22.

37 Bankruptcy (Scotland) Act, 1985 s 31(1)(a).

38 (1848) 10 D 969. The Scottish Law Commission has recommended reform of this area of the law: Attachment Orders and Money Attachment (Scot Law Com Disc Paper No 108, 1999), paras 2.60 ff.

39 As in the case of a company in insolvent liquidation: there is no vesting of the company’s assets in the liquidator.

1977 does not apply in Scotland; and there is no similar provision on vesting in section 31 PA 1977. Nevertheless, despite this ambiguity, vesting is the sensible result.

### C. CONCLUSION

*Buchanan* involved difficult subjects: patents, assignments, accretion and insolvency. But the principles in all of these areas in Scots law are reasonably clear. Patent applications are relatively unproblematic. These can be assigned, the transfer being completed by intimation to the Comptroller. Accretion is not relevant. Where future rights are to be assigned and no additional step, such as intimation or registration, is required by the law (e.g. copyright), the principle of accretion may be relevant. But, since the principle is based on a personal right, it will provide no protection to the assignee if, before the asset comes into existence, the cedent becomes insolvent.

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## The Gaelic Language (Scotland) Act 2005

The Gaelic Language (Scotland) Bill<sup>1</sup> was passed by the Scottish Parliament on Thursday, 21 April 2005 without any votes against, and on receiving Royal Assent in June became the Gaelic Language (Scotland) Act 2005 (the “Act”). Two previous attempts to pass such legislation were unsuccessful. In 1980, Donald Stewart, the former Scottish National Party (“SNP”) member of the House of Commons for the Western Isles introduced a Gaelic (Miscellaneous Provisions) Bill into the Westminster Parliament which was debated on 13 February 1981 but which did not come to a vote due to a government-led filibuster to prevent a separate piece of legislation coming before Parliament.<sup>2</sup> Michael Russell, also of the SNP, introduced a Gaelic Language (Scotland) Bill<sup>3</sup> into the Scottish Parliament in 2002 as a member’s bill, and although it gained the support in principle of the Parliament at stage one, there was insufficient Parliamentary time before dissolution in April 2003 for the Scottish Parliamentary elections, and this bill also died.

The idea of legislation to support the Gaelic language and the rights of its speakers has been around for some time. In 1945, the Gaelic polymath and Laird of the Hebridean Island of Canna, John Lorne Campbell, published a monograph in which he surveyed

1 SP Bill 25 Session 2 (2004).

2 See K MacKinnon, *Gaelic: A Past and Future Prospect* (1991) at 111, for an account.

3 SP Bill 69 Session 1 (2002).