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because of the seller's lack of title. The claim that Johnstone had the right to retain possession from the mortgagees therefore well and truly missed the boat.

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Intimation: 1862-2008

How do you intimate an assignation? The point is important because Scots law retains intimation as a constitutive requirement for transfer. Few other legal systems still do. In modern Scottish practice the standard method is for the assignee to send the debtor a notice signed by the cedent notifying the debtor of the assignation and instructing the debtor into which bank account payment should be made.[1] The notice is usually sent by recorded delivery post. The practice is, however, problematic. It does not comply with the Transmission of Moveable Property (Scotland) Act 1862. The 1862 Act allows intimation to be made by posting a certified true copy of the assignation to the debtor. The 1862 Act is, admittedly, permissive rather than prescriptive.[2] But there is no solid authority for the standard practice.[3] Factoring is more problematic still: the notices are usually stamped or docketed to invoices, often in barely legible font and in ambiguous terms.

In *Christie Owen & Davies plc t/a Christie & Co v Campbell*,[4] there was a poorly drafted assignation tucked away in the terms and conditions of a wider, informally executed, agreement. Unusually, the whole agreement was sent to the debtor, but the putative assignee made no mention of the assignation when it purported to intimate. The case turned on whether there had been an intimated assignation.

A. THE DECISION

The facts of the *Christie* case were these. The pursuers (Christies) were selling agents involved in the sale of the first defender (Campbell)'s business. The second defenders

1 The notice purports to come from the cedent and, where the assignation is in security, usually instructs that payments should continue to be made to the cedent. The practice is inconsistent with the decision in *Hope and M'Caa v Wauch* 12 June 1816 FC.

2 Prior to the Transmission of Moveable Property (Scotland) Act 1862, conventional intimation of an assignation had to be notarial: the assignee's procurator, together with a notary (who had to be a different person from the procurator), would seek out the debtor and, in the presence of two witnesses, perform the customary notarial rituals. At that time, intimation of an assignation was indeed intimate. The 1862 Act arrived to obviate *notarial* intimation. Notarial intimation, though obsolete, remains competent.

3 It might be argued that the notice is nevertheless effective because (i) it is signed by the cedent (ii) it details what has been signed (iii) it provides the debtor with clear instructions where to pay and (iv) the assignee serves the notice; and (v) service is certain because it is effected by recorded delivery. But these are arguments; the point has never been decided.

4 Case no CA161/07, Glasgow Sheriff Court, 21 June 2007, Sheriff A F Deutsch, noted at 2007 GWD 24–397 affd 18 Dec 2007, Sheriff Principal J A Taylor (henceforth the *Christie* case).

were a firm of solicitors. Following the sale of Campbell's business, or at least an assignation of a lease, Christies became entitled to commission under a Sole Selling Rights Agreement ("SSRA").[5] The solicitors held the proceeds. Christies argued that the solicitors were liable to pay to Christies the commission Christies had earned. This obligation was based on a mandate granted by Campbell to Christies in the body of the SSRA:

> ... I/we hereby authorise the vendor's solicitors... to pay out of money received by such solicitors, the fees requested by [the pursuers] ...

Both the sheriff and the sheriff principal found that such an instruction was capable of amounting to an assignation.[6] (The soundness of that assumption may be doubted. There are important differences between mandates to pay, mandates *in rem suam* and assignations).[7] Christies alleged that they had sent the solicitors a copy of the SSRA and that this was enough to amount to intimation of the assignation. The solicitors refused to pay.[8] Sheriff Deutsch produced a detailed note, most of marginal relevance to the case before him.[9] But his decision was correct: Christies averments of an intimated assignation were insufficient and the case irrelevant. The sheriff principal agreed. Both opinions contain a number of points of interest.

B. INTIMATION

Intimation in Scots law has at least two purposes: (i) to provide a certain date of transfer; and (ii) to "interpel" the debtor, i.e. to inform the debtor that payment must now be made to the assignee.[10] Often these two functions are satisfied simultaneously. But it is not always so: (i) can occur without (ii) and (ii) can occur without (i). It is, for instance, possible to intimate an assignation in terms of the 1862 Act by recorded delivery post. The date of transfer is the presumed date of delivery of the intimation to the debtor.[11] And the date of transfer is thus fixed irrespective of whether the *debitor cessus* has actually received or read the intimation.[12] The assignee is, on intimation,

5 Conveyancers, working for impossibly low fixed-fees, should take note: the consideration for the assignation of the lease was £46,000. The commission £9,360.05. See para 2 of the sheriff principal's note.

6 See Sheriff Deutsch's note at para 12; Sheriff Principal Taylor's note at paras 4 and 7.

7 See G L Gretton, "Mandates and Assignations" (1994) 39 JLSS 175 and R G Anderson, *Assignation* (2008) paras 3-14 ff.

8 Why the solicitors refused is not clear. If Campbell was asserting an entitlement to the commission, the solicitors could, in principle, have raised a multiplepoinding, leaving Campbell and Christies to fight it out. There does not seem to be any reason in principle why the solicitors – the real raisers – could not also represent one of the claimants (Campbell) in the competition.

9 Sheriff Deutsch is interested in this area of the law: see his review of the third edition of F Salinger, *Factoring: The Law and Practice of Invoice Finance* (1999) at 47 (2002) JLSS Jan/44.

10 Another important purpose of intimation is to provide the cut-off date for those defences held against the cedent that the debtor may raise against the assignee.

11 Although, for assignations in security, the Registrar of Companies deems the date of posting to be the date of "creation" of a charge for the purposes of s 410 of the Companies Act 1985.

12 The only reported case covering this set of facts appears to be *Hume v Hume* (1632) Mor 848.

no longer subject to the cedent's creditors, although the debtor may still pay in good faith to the cedent until the debtor actually becomes aware of the assignation.

These basic underlying functions of intimation were not considered in the *Christie* case. Ironically, in the *Christie* case, the intimation was unusually formal since a full copy of the SSRA was actually sent with the purported intimation letter.[13] Yet the sheriff assumed that the intimation was informal and he embarked on a detailed search for support for informal intimation. The sheriff eventually found support for informal intimation in two cases decided under the pre-1862 law: *Carter v McIntosh*[14] and *Donaldson v Ord.*[15] At the time these cases were decided, conventional intimation had to be notarial. Any attempt to find support for informal intimation in these cases is not just strained but a search for the non-existent. Before the sheriff principal, the agents agreed that the test to be applied to whether there was intimation was that formulated by Lord Kincraig in *Libertas-Kommerz v Johnson*:[16]

> ... if there has been a written intimation to the debtor of the fact that an assignation has been granted, the terms of that intimation must be considered, and if they are such, on a reasonable interpretation, as to convey to the debtor that the debt has been transferred, and that the transferee is asserting his claim to the debt from the debtor, intimation will be held to be effectual.

The sheriff principal highlighted that there were two aspects to this test: first, the intimation must, on a reasonable interpretation, tell the reader that the debt has been transferred. Second, the transferee must assert his entitlement to payment.

Something should be said about the circumstances of the *Libertas-Kommerz* case. Lord Kincraig's test is not authoritative because in the *Libertas-Kommerz* case itself, counsel agreed the test.[17] The point was not the subject of debate, far less judicial consideration. It is for this reason that the case is of no value as an authority on this point. The eminence of the counsel involved (now Lords Hope and Penrose) has given credence to the view that the concession was well made. But law reports do not disclose the various motives in the name of which good arguments may be sacrificed. Moreover, as in *Christie*, there was, in *Libertas-Kommerz*, no true competition. The case involved the assignation of a claim secured by a floating charge. The original holder did not dispute the alleged assignations (made under German law). The liquidator did not dispute the existence of the floating charge. The question was solely whether the assignee was entitled to the charge. There were no antagonistic claims; rather the liquidator wanted to ensure that the creditor claiming in the liquidation was entitled to be paid. So the point remains for both discussion and decision whether the *Libertas-Kommerz* test is the correct one.

The test seems sensible enough. On the facts of the *Christie* case, the sheriff principal helpfully points out that covering letters enclosing intimations should be

13 See para 6. In the sheriff principal's view, the defect in intimation lay in the covering letter: see para 7.
14 (1862) 24 D 925.
15 (1855) 17 D 1053.
16 1977 SC 191.
17 1977 SC 191 at 205.

unambiguous, something not mentioned in the 1862 Act. Complying literally with the terms of the 1862 Act is not enough: the assignation may be tucked away in the depths of 100-page document. The assignee must therefore communicate his purpose.

The *Libertas-Kommerz* test, however, is not a particularly helpful basis for the substantive law of intimation. The test addresses only the second function of intimation, namely, to inform the debtor. In both *Libertas-Kommerz* and *Christie* there was no competition and the question was between debtor and assignee. In *Christie*, agents' submissions before the sheriff principal proceeded on the understanding that the case turned on whether the debtor had actually read, or could be deemed to have read, the intimation. And where there are no competitors that might be a proper approach. But such a test says nothing about the first and primary role of intimation which is to establish a date of transfer.

Under the *Libertas-Kommerz* test, there is little indication when transfer actually occurs. Presumably it is only when the debtor actually reads, or at least actually receives and ought to have read, the intimation. Yet, if transfer were to occur only when the debtor reads the intimation, the Scots law of assignation would become completely unworkable. The assignee would now have absolutely no control over the date of transfer. As a result, the assignee would never be able to rely on an assignation intimated by recorded delivery post (or, for that matter, even an intimation served by a court officer in the presence of a witness) providing insolvency protection against the cedent's creditors. For there is never any guarantee that the debtor has received, far less read, the intimation. No one, not even a King – as the congregation at the High Kirk of Edinburgh so decisively showed Charles I[18] – can make anyone read anything.

All transfers, whether of real rights or personal rights or intellectual property rights, require certainty. The justification for formal intimation rules is that, for all they may appear cumbersome, they provide certainty. Neither the sheriff's nor the sheriff principal's opinion in the *Christie* case, however, considers the primary function of intimation, namely, provision of a certain date of transfer. The second function, of information, is actually of lesser importance: for the ignorant debtor who pays the wrong person through no fault of his own is always protected.[19] So although the sheriff and sheriff principal therefore reached the correct decision on the facts of the case, much of their reasoning sheds little light on the general law.

C. THE DEBTOR

The sheriff held that the requirement of an acknowledgment, where intimation was otherwise informal, was impractical:[20]

18 On 23 July 1637.

19 Stair, *Inst* 1.18.3 and 4.40.33; Erskine, *Inst* 3.4.3. There is statutory protection for foreign arrestees: Debts Securities (Scotland) Act 1856 s 1. Good faith payment will be disastrous for the assignee whose claim is destroyed (although he will have a warrandice claim against the cedent); hence the practical importance of intimation in all legal systems.

20 Para 27 of the sheriff's note.

> An agreement to be bound by a notice of assignation is only likely ever to be granted where the debtor has no beneficial interest in the funds but holds them to the order of the cedent, as in the case of the solicitor holding the proceeds of sale in a conveyancing transaction.

This statement betrays a misunderstanding of the law. Subject to the terms of the underlying contract, the debtor who receives an intimation is never obliged to grant an acknowledgement. This has nothing to do with "beneficial interests" in the "funds". The paradigm assignation is of a claim that the cedent holds against the *debitor cessus*. The debtor in an obligation can never be described as having a "beneficial interest" in his own *liability*. The debtor has an "interest", of course, in paying only to a person who can grant him a discharge. Usually this is his original creditor or an assignee who has properly intimated. But whether this is what the sheriff intended by "beneficial interest" is not clear. In any event, a debtor who pays in good faith to the person he takes to be his creditor is protected. References to "funds", meanwhile, tend to confuse. Unless there is a competition relating to a pile of coins and banknotes (an unlikely scenario) all references to "funds" or "moneys" are metaphorical. The true question is one of liability: how much is owed and, importantly, to whom.

D. CONCLUSIONS

The *Christie* case involved a quite unsatisfactory mandate to pay in the context of a conveyancing transaction. The sheriff and sheriff principal rightly held it could not operate as an assignation. The sheriff's detailed discussion of informal intimation in factoring transactions, although interesting, had nothing to do with the case. As in *Libertas-Kommerz*, the issue arose because of a plea of no title to sue. But it is settled law that the holder of an unintimated assignation has a title to sue: the raising of the action is itself intimation.[21]

For some,[22] the Scots law of intimation appears archaic. Often, however, it is with practitioners rather than with the law where old habits die hard. Scots law has sanctioned outright assignations for over half a millennium. Why commercial lawyers continue to appoint procurators *in rem suam*, mandatories or attorneys is quite extraordinary. Some of the ambiguities that arose in the *Christie* case could have been avoided by better drafting: a conveyance with a single sentence specifying what the granter "HEREBY ASSIGNS" instead of the rather timid payment authorisation tucked away in the terms and conditions of an informally executed contract.

The *Christie* case was clearly correct on the facts. The more general statements of law, however, particularly in the sheriff's note, should not be followed. In a case

21 The most recent discussion of the point is in *Laurence McIntosh Limited v Balfour Beatty Group Limited* [2006] CSOH 197. See too *Tayplan Limited v D & A Contracts* 2005 SLT 195 and *Slattadale v Tilbury Homes Limited* 1997 SLT 197. The same issue arose in *Libertas-Kommerz*, a note of appeal from an adjudication and deliverance of the liquidator, where counsel (Mr Hope) offered to produce the assignations in process: art 9 of the condescendence, 1977 SC 191 at 196.

22 R B Wood, "Special considerations for Scotland", in N Ruddy, S Mills and N Davidson, *Salinger on Factoring: the Law and Practice of Invoice Finance*, 4th edn (2006) para 7.36 ff. As W W McBryde, *The Law of Contract in Scotland,* 3rd edn (2007) para 12-95 n 325 points out, this passage "ignores much inconvenient authority".

involving a genuine competition, it is difficult to see how the *Libertas-Kommerz* test can provide any assistance. So it may be doubted whether Scots law, in 2008, recognises informal intimation as effective without acknowledgement. The *Christie* case holds that covering letters must make state the purpose of the enclosures. The case has little to say about the fundamental role of intimation in Scots law, which is to establish a date of transfer.

To determine whether intimation has been validly made, two issues must be addressed: (i) whether there is a certain date of transfer and (ii) the content of the notice. *Christie* dealt with covering letters, which goes to (ii).[23] Unfortunately there remains no clear authority for when intimation occurs where, for example, notices are lost but there is proof of posting; and how that proof would be dealt with on competition, such as with an arrester. To satisfy (i), anything short of recorded delivery post is unlikely to be sufficient. Importantly, it must be recognised that there is little to be gained from trudging through old authorities for support for informal intimation. No support can be found for informal intimation in these cases. Scots law could, of course, survive without formal intimation. But an alternative method of ensuring that the transfer has a certain date will have to be found.[24] That is the challenge.

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Lien as an Excludable and Equitable Right

Onyvax Ltd v Endpoint Research (UK) Ltd[1] is the second Court of Session decision on lien in as many months.[2] The pursuers had contracted with the defenders to carry out clinical trial work in relation to the development of a new cancer vaccine. The contract was subsequently terminated. The pursuers sought delivery of a document produced by the defenders containing details of the work. In response, the defenders asserted a lien over the document on the basis that they were still owed £147,267.70

23 For an old case, see *Lawrie v Hay* (1696) Mor 849 where the content of the notice was sufficient to interpel the debtor, but insufficient to prevail in a competition.

24 In other systems, where notice is not a constitutive requirement, such as Germany, certainty is achieved by notarial execution of the transfer agreement. One solution in Scotland would be to reverse *Tod's Tr v Wilson* (1869) 7 M 1100, and hold that an assignation that has been executed before a notary and registered in the Books of Council and Session, say, within 21 days of its date, divests the cedent from the date of the deed, although the debtor who pays the wrong person in good faith is protected. Intimation will still occur, but only because of the need to interpel the debtor.

1 [2007] CSOH 211.

2 The first was *Air and General Finance Ltd v RYB Marine Ltd* [2007] CSOH 177, for which see 270 above. The most recent previous reported decision on lien was *Goudie v Mulholland* 2000 SC 61. See also *Thomson Pettie Tube Products Ltd v Hogg*, CSOH 4 May 2001.