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Citation for published version:

MacQueen, H & Hogg, M 2009 'Donation in Scots Law' Edinburgh Law School Working Papers Series, no. 2009/21, University of Edinburgh, School of Law, Working Papers. DOI: 10.2139/ssrn.1471376

Digital Object Identifier (DOI):

[10.2139/ssrn.1471376](https://doi.org/10.2139/ssrn.1471376)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Publisher Rights Statement:

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University of Edinburgh
School of Law

Working Paper Series

2009/21

Donation in Scots Law

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DONATION IN SCOTS LAW

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FORTHCOMING IN

Martin Schmidt Kaessel (ed), Donation in Europe

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Edinburgh School of Law Working Paper Series
General Editor: Daniel Augenstein
University of Edinburgh

Abstract: This paper is a Scots law contribution to a collection of essays on the laws of donation in the European jurisdictions, with comparative introduction and conclusions. The research has underpinned the work on donation carried out in the Study Group for a European Civil Code and its Principles of European Law series, and also published in the final edition of the Draft Common Frame of Reference. The paper's original contribution is an analysis of the relationship in Scots law between the contract of donation and the gratuitous unilateral promise, which is binding if certain conditions are met. The paper notes that, possibly reflecting the influence of English law, donation is today seen as primarily about transfers of property; but that otherwise much of the law continues to reflect its Civilian origins.

Keywords: law, comparative law, Scots law, obligations, contract of donation, unilateral promise, gratuitousness, transfer of property

Donation in Scots Law

I. Notion of Donation/Gift

Early treatments of donation in Scots law usually placed the subject in the context of the law of obligations. But in the seventeenth and eighteenth centuries the more specific context was the law of what we would now call unjustified enrichment and benevolent intervention, rather than contract. Thus the main discussion of donation by the institutional writer Stair, first published in 1681, occurs under the heading 'Recompense or Remuneration', an obligation founded upon the natural law principle 'obliging to do one good deed for another', and including 'all obligations of gratitude'.¹ Most such obligations were natural only, however, and gave rise to no legal remedy. So a donation, 'though it doth induce an obligation upon the mind and affection of the receiver to be thankful, yet doth not bind to the like liberality.' The main legal consequence of the obligation of gratitude was that 'by ingratitude the donation becomes void and returns'. Stair then moved on to cases 'when the good deed is done, not *animo donandi*, but of purpose to oblige the receiver of the benefit to recompense': these included *negotiorum gestio* 'and generally the obligations of recompense of what we are profited by the damage of others without their purpose to gift'. Stair is thus mostly using the example of donation to define the territory where unjustified enrichment and benevolent intervention do not go. He continues: 'It is a rule in law, *donatio non praesumitur*; and therefore, whatsoever is done, if it can receive any other construction than donation, it is constructed accordingly.' While the presumption against donation was qualified in a number of

¹ See for this and what follows in the remainder of this paragraph, Stair, Institutions, I,8,2.

respects, as Stair went on to show, none the less its existence meant that the scope for enrichment and benevolent intervention remedies was relatively wide.²

Stair, it should be noted, thus did not deal with donation as a matter of contract or voluntary (or, in his terms, 'conventional') obligation, but within his category of 'obediential' (or, in more modern terms, involuntary or legally imposed) obligations (which included delict as well as enrichment and benevolent intervention).³ The approach of another institutional writer, Bankton, published between 1751 and 1753, followed the same general structure and was similar in its substance. Gift, or donation, defined as 'the liberal grant of anything to which one could not be compelled by law',⁴ was treated, not in or alongside his chapter on voluntary obligations or contract, but in another chapter alongside the involuntary obligation of 'recompence', which embraced *negotiorum gestio* and recovery under the *lex Rhodia*. Bankton did however produce a much more substantial treatment than Stair of the law of donation, running to some 27 paragraphs; for him, it clearly had much greater significance than the mere exclusion of other branches of the law.⁵

Erskine, whose *Institute* was published posthumously in 1773, was the first to treat donation as an obligation or contract in its own right, in the concluding sections of a chapter on that subject:

² The effect today of the early treatment of donation alongside unjustified enrichment is that in the modern law it is clear that a transfer by way of valid gift excludes any enrichment claim, the gift justifying the retention of the enrichment. See further R Evans-Jones, *Unjustified Enrichment* (2003), para 6.82-6.91; W J Stewart, "The intention to donate in recompence and Professor Bell's definition", 1996 Scots Law Times (News) 270. An invalid gift may give rise to proprietary or enrichment claims for the donor. See further below, section IV(c)(i).

³ On Stair's scheme of obediential and conventional obligations, see A H Campbell, *The Structure of Stair's Institutions* (1954); P G Stein, "The theory of law", in D M Walker (ed), *Stair Tercentenary Studies* (1981), 181-187.

⁴ Bankton, *Institute*, I,9,2.

⁵ *Ibid*, I,9,2-28.

Most of what hath been hitherto said of obligations and contracts is applicable only to such as are onerous, where mutual engagements are entered into *hinc inde* by the several contracting parties. We may therefore in this place shortly explain the doctrine of gratuitous obligations, otherwise called donations, in so far as their nature, properties and effects differ from the other.⁶

Erskine began his discussion by linking donation with Stair's treatment of the obligation arising from unilateral promise binding without acceptance by the promisee, a subject which the latter had discussed quite separately from donation. Stair had argued that in Scots law 'a promise is that which is simple and pure, and hath not implied as a condition, the acceptance of anothee' and that such promises 'now are commonly held obligatory'.⁷ The promise to give was effectual to create an obligation, wrote Erskine, provided the promise be made in words proper to express a present act of the will, such as, 'I promise', or 'I oblige myself to give', or 'make over in a present'.⁸ Erskine also explained that 'though the *pactum donationis* confers on the donee a *jus ad rem*, a right of suing for performance, it gives him no right in the thing itself; the donor continues proprietor till delivery.'⁹

Erskine is thus the first to make clear a distinction between the obligation to donate and the transfer of property occurring as the result of a donation. The general distinction between obligation and transfer of property is one of the fundamentals of Scots private law.¹⁰ It helps to make clear the relationship between the law of unilateral promise first expounded by Stair and the law of donation: in the words of Professor Gordon, 'a clear distinction is drawn between an

⁶ Erskine, *Institute*, III,3,88.

⁷ Stair, *Institutions*, I,10,4.

⁸ Erskine, *Institute*, III,3,90.

⁹ *Ibid.*

¹⁰ See K. G. C. Reid, *The Law of Property in Scotland* (1996), paras. 606-618; D.L. Carey Miller with D. Irvine, *Corporeal Moveables in Scots Law* (2nd ed., 2005), paras. 8.06-8.11

obligation to give and a conveyance in implement of that obligation.¹¹ But Erskine's linkage of the laws of donation and unilateral promise has not been pursued very far in subsequent writing on either subject in Scotland.¹² Promises are usually accorded their place in books on contract along with discussions of the further possibility of gratuitous contracts, but without more discussion of the rules on donation than occasional side references to the presumption against donation as part of the background for the law's similarly restrictive approach to enforcing promises.¹³ Detailed treatment of donation is mostly to be found in articles under that heading in legal encyclopaedias, and rarely discusses promises (or gratuitous contracts) in any depth.¹⁴

The leading modern discussion of donation, by Professor W. M. Gordon, is such an article, published in *The Laws of Scotland: Stair Memorial Encyclopaedia*¹⁵ (in which the topic of unilateral promises is covered in another volume and by another writer altogether¹⁶). Professor Gordon notes that, while treating donation amongst gratuitous obligations 'is, in a sense, logical since where there is an obligation to give, it will precede the actual donation', it is 'not .. entirely appropriate'.¹⁷ The definition of donation preferred in Professor Gordon's account is 'a gratuitous transfer of property which is intended to take effect *inter vivos*'.¹⁸ This essentially property-based characterisation of donation may be thought to reflect something of the mixed character of modern Scots law, in which a basically Civil Law structure has been overlaid to some extent by

¹¹ *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth SME) vol 8 para 605

¹² A recent exception is in an introductory work for students, J. Thomson, *Scots Private Law* (2006), pp. 37-39.

¹³ See e.g. Gloag, *Contract* (2nd edn, 1929), chapter III; McBryde, *Contract* (3rd edn, 2007), chapter 2 (note also the 1st edn at para 2.21-2.27); MacQueen and Thomson, *Contract Law in Scotland* (2nd edn, 2007), chapter 2.54-2.63.

¹⁴ See *Green's Encyclopaedia of Scots Law* (1st edn, 1896-1904; 2nd edn, 1909-1914); Lord Dunedin and Lord Wark, *Encyclopaedia of the Laws of Scotland* (1926-1935).

¹⁵ SME vol 8 paras 601-658. We here gladly acknowledge our deep indebtedness to Professor Gordon's treatment in preparing the present article.

¹⁶ SME vol 15 paras 611-618 (by Robert Black).

¹⁷ SME vol 8 (1992) para 603.

¹⁸ *Ibid*, para 601.

concepts and approaches from the Common Law;¹⁹ but it is consistent with a system recognising a distinct institution of promise and distinguishing between obligation and property transfer.

Promises and donations are clearly both unilateral juridical acts and gratuitous ones. They are unilateral in that only one party is actively involved in the promissory or donative act.²⁰ They are gratuitous, in that neither the promisor nor the donor may compel any counter-performance in return for the promise or act of donation.²¹ Promises and donations can both be conditional, however, in the sense that the obligation or transfer may be suspended until the occurrence of some event which can include the performance of some onerous act by the promisee or donee: in promise, the classic example is the promise of reward to the finder of lost property,²² while in one donation case the gift was dependent upon the donee providing the donor with maintenance and a decent burial.²³ The crucial point, however, is that in neither case can the beneficiary be compelled to fulfil the condition, meaning that both obligation to give and the actual transfer must be treated as gratuitous. Professor Gordon also notes authority that 'a transaction may be regarded as gratuitous although there is some remote possibility of consideration',²⁴ while both tax and insolvency law hold that transactions at an under-value may be regarded as gifts or gratuitous for certain purposes. There is also the concept of the 'remuneratory' donation, defined thus by Professor Gordon: 'a donation made in response to a moral obligation or carrying some reciprocal advantage which is in a sense the consideration for the gift.'²⁵ He goes on to note, however, that the relevance of the concept has largely if not entirely disappeared, since its main

¹⁹ Note that in P. Birks (ed), *English Private Law* (2000), 'gift' is treated as an aspect of the law about acquisition of property rights: volume 1, chapter 4.379-4.415 (by W. Swadling).

²⁰ See further on the concept of 'unilateral' acts, specifically as they occur in the law of obligations, M Hogg, *Obligations* (2nd ed, 2006) para 1.09 f.

²¹ See further on the concept of 'gratuitous' acts, specifically as they occur in the law of obligations, M Hogg, *Obligations*, para 1.16 – 1.17.

²² Hogg, *Obligations*, para 2.09 example 4; see also McBryde, *Contract*, para 2.26-2.27.

²³ See *Macfarquhar v M'Kay* (1869) 7 M 766, discussed by Gordon, SME vol 8 para 604.

²⁴ SME vol 8 para 604, citing *Beattie's Trustees v Beattie* (1884) 11 R 846.

²⁵ SME vol 8 para 608.

application was to limit the effect of the rule making donations between husband and wife generally revocable, which was abolished in 1920.²⁶ In this context, remuneratory donations were none the less irrevocable.

A donation may also be made for a purpose, and is said to be made *sub modo* (with a qualification) so long as the purpose is an enforceable term of the transfer rather than merely the motive for making it.²⁷ The classic example is the present of the engagement ring between couples planning to marry. In the event of the condition or purpose not being realised, the donation takes no effect or, if it has already taken effect, the subject-matter can be reclaimed under the rules of unjustified enrichment (the principle of the *condictio causa data causa non secuta* applies, with the remedies being repetition for money and restitution for corporeal property). In the case of the engagement ring when the betrothal is broken off before a wedding takes place, the ring must be returned to the donor, at least if he or she is not the one who ended the relationship.²⁸ But it would not seem appropriate in such cases to see the transfer as onerous rather than gratuitous. As Professor Gordon wisely remarks, ‘the better view would appear to be that what amounts to a donation is to be decided according to the context in which the question arises.’²⁹

This article seeks then to re-unite the law of gratuitous obligations (especially unilateral promises) and donation, at least so far as it is useful to do so. It is true that gratuitous obligations have their own particular rules quite apart from the law of donation, in particular with regard to formation or

²⁶ Married Women’s Property (Scotland) Act 1920, s.6.

²⁷ SME vol 8 para 640.

²⁸ Stair, *Institutions*, I, vii, 7; Bankton, *Institutes*, I, viii, 21; Erskine, *Institute*, III, i, 9-10. There are conflicting sheriff court decisions on the matter: *Gold v Hume* (1950) 66 Sh Ct Rep 85; *Savage v McAllister* (1952) 68 Sh Ct Rep 11. See further J Thomson, *Family Law in Scotland* (5th edn., 2006), para. 1.2. Gordon (SME vol 8 para 642) cautiously notes: “not all donations between engaged couples are conditional on subsequent marriage”.

²⁹ SME vol 8 para 604.

constitution: while gratuitous promises to give must in general be in writing, a donation as a transfer of property in general requires no formalities other than those which the nature of the subject-matter may make necessary.³⁰ Nor are the domains of the two subjects necessarily co-terminous: the performance of a gratuitous obligation need not involve any transfer of property, as for example in a promise to perform a service or in allowing another gratuitous use of an item, while a donation may not in any realistic sense be preceded by an obligation to do so, as when on a homeward-bound impulse I take flowers to my partner or, in sociable mood, buy my friend a drink in the pub.

Before we turn to the details of the law of promise and donation, however, it is also useful to make some further comments about how these topics relate to some other areas of Scots law. All the early treatments of donation show that the Scots law owed much to Roman law and its development through the *ius commune*: in particular Stair, Bankton and Erskine all discuss the distinction between donations *inter vivos* and *mortis causa*, the *beneficium competentiae*, and the revocability of donations between husband and wife. A donation *inter vivos* is one taking full effect according to its terms between two parties in their lifetimes. A donation *mortis causa*, on the other hand, is classically defined by Lord President Inglis as follows:

Donatio mortis causa in the law of Scotland may, I think, be defined as a conveyance of an immoveable or incorporeal right, or a transference of moveables or money by delivery, so that the property is immediately transferred to the grantee, upon the condition that he shall hold for the granter so long as he lives, subject to his power of revocation, and, failing such revocation, then for the grantee on the death of the granter. It is involved of course in this definition, that if the

³⁰ See further below, 000, 000.

grantee predeceases the grantor the property reverts to the grantor, and the qualified right of property which was vested in the grantee is extinguished by his predecease.³¹

As already noted, a donation may be conditional: a donation *mortis causa* is an example of a donation subject to an implied resolutive condition, that is, one bringing the donation to an end.³² The condition is that the donor does not revoke in his lifetime; the gift becomes irrevocable if the donee outlives the donor. The institutional writer Bankton neatly picks up the language of Justinian's *Institutes* to describe donation *mortis causa*: 'the giver therein prefers the grantee to his heirs, and prefers himself to both'.³³ Such donations are similar in many ways to legacies in wills, in particular in their revocability while the donor remains alive; but a crucial difference is that with donations there is a transfer of property to the donee, albeit one that may be reversed by the donor's revocation or the donee's predeceasing the donor, while with legacies there is no proprietary effect until after the death of the testator.³⁴

More generally, donation falls to be distinguished from trust. Scots law has recognised trusts for several centuries but characterises them quite differently from English law.³⁵ The model is that a trustor hands property over to a trustee or trustees who are thereupon under a fiduciary obligation to administer the trust property for the benefit of a third party, the beneficiary. The trustee is the owner of the trust property in this model, albeit subject to fiduciary duties to the

³¹ *Morris v Riddick* (1867) 5 M 1036 at 1041. See further R F Hunter, "The prerequisites of donatio mortis causa" 2005 Scots Law Times (News) 71.

³² SME vol 8 para 640. Another example may be wedding presents delivered before the marriage takes place, impliedly returnable if the nuptials are cancelled. See further Thomson, *Family Law*, para. 4.2.

³³ *Institute*, I,9,18; cf Justinian, *Institutes*, 2,7,1.

³⁴ SME vol 8 para 607. It is worth noting here that Scots law has a system of reserved portions in a deceased person's estate, prevailing over testamentary freedom. See further SME vol 25, paras 772-778. Note also however that reform of the law is under active consideration: Scottish Law Commission Discussion Paper No 136, *Succession* (2007). See further K Reid, M de Waal and R Zimmermann, *Exploring the Law of Succession: Studies National, Historical and Comparative* (2007).

³⁵ See generally G L Gretton, "Trusts", in K Reid and R Zimmermann (eds), *History of Private Law in Scotland* (2000), vol 1.

beneficiary who in turn has only personal rights, albeit privileged ones, against the trustee. The trust property is not available to the trustee's other personal creditors. A donee can therefore be readily distinguished in principle from a trustee, as one who gains ownership of an item of property unburdened by third party claims; but the application of the distinction to real facts, particularly where the transfer is in some way subject to conditions, can be difficult.

The position is further complicated by the contractual doctrine of *jus quaesitum tertio*, where two contracting parties agree to provide an enforceable benefit for a third party. This need not involve any transfer of property between the contracting parties and puts neither of them under any fiduciary obligations; while the third party obtains a merely personal right to performance of the contractual terms in his favour, which are usually analysed as a set of promises by the contracting parties, not requiring any acceptance to be binding.³⁶ Both trusts and a contractual *jus quaesitum tertio* can of course be mechanisms for making what are in practical effect gifts to the beneficiary or third party, as the case may be; but their scope is much wider than that of donation.³⁷

³⁶ See further MacQueen & Thomson, *Contract*, paras 2.69-2.83.

³⁷ See e.g. *Morton's Trustees v Aged Christian Friend Society of Scotland* (1899) 2 F 82.

II. Formation and Constitution

Our treatment here will take promise and donation in turn.

(a) Promise

(i) Intention

We have already referred to Erskine's stress on the need for 'words proper to express a present act of the will' to form a promise.³⁸ Stair had earlier elaborated upon the same point:

Conventional obligations [*amongst which Stair included promises*] do arise from our will and consent; ... But it is not every act of the will that raiseth an obligation, or power of exaction: and therefore that it may appear what act of it is obligatory .. [w]e must distinguish three acts in the will, desire, resolution, and engagement. Desire is a tendency or inclination of the will towards its object, and it is the first motion thereof, which is not sufficient to constitute a right; neither is resolution (which is a determinate purpose to do that which is desired) efficacious, because, whatsoever is resolved or purposed, may be without fault altered, unless by accident the matter be necessary, or that the resolution be holden forth to assure others; ... It remaineth then, that the only act of the will, which is efficacious, is that whereby the will conferreth or stateth a power of exaction in another, and thereby becomes engaged to that other to perform.³⁹

This passage was cited in a contemporary case where the question of how to distinguish between a statement giving rise to an obligation to give and one which is merely a statement of intention to give became crucial, *Countess of Cawdor v Earl of Cawdor*.⁴⁰ The crux of the matter was whether

³⁸ Erskine, *Institute*, III,3,90 (above, 000).

³⁹ Stair, *Institutions*, I,10, 1-2. See further McBryde, *Contract*, paras 2.07-2.15.

⁴⁰ 2007 SC 285.

or not the defenders (the current Earl of Cawdor and others, acting as trustees of the 'Number 1' trust scheme) had intended to make a unilateral promise to transfer certain pension fund assets to the pursuers (the Dowager Lady Cawdor and others, acting as trustees of the 'Number 2' trust scheme). The pursuers alleged that such a promise had been made by the Number 1 trustees at a meeting of its Board. The minute of the meeting, referred to in the leading judgment of the Lord President, contained the following wording, being the only alleged basis of the promise, namely that the Trustees 'after due consideration decided that they would comply with Lord and Lady Cawdor's requests for transfer payments.' Some assets were subsequently transferred to the Number 2 trustees, but not the complete amount expected.

In an action by the Number 2 trustees for implement of the alleged promise, the First Division of the Court of Session had to consider whether a minute of a meeting, not delivered to any other party, setting out that trustees had 'decided' to make a transfer amounted to a unilateral promise in favour of another party. The Lord President (Lord Hamilton) thought not. Citing Stair's analysis of the stages in the formation of the will necessary to constitute an obligation – desire, resolution, and engagement⁴¹ – the Lord President considered that only stage two had been reached on the facts before him. He commented:

In my view, although this was a formal meeting at which the trustees proceeded on the basis of professional advice, they went no further than the stage of "resolution" referred to by Stair. They "decided" that they "would comply" with Lord and Lady Cawdor's requests for a transfer payment ... The circumstance that the meeting was not followed by a communication with the No. 2 Scheme trustees tends also to support the proposition that it

⁴¹ I,10,2.

was not intended that the decision taken at the meeting should of itself give rise to an obligation to them ... The fact that certain properties were in fact transferred did not translate a non-obligatory decision into an obligation.⁴²

As the decision in *Cawdor* demonstrates, words indicating a mere intention or decision to make a transfer, whether by donation or otherwise, will be insufficient to constitute a promise to do so in Scots law.⁴³

In general the Scottish courts are reluctant to find that a party has made a binding promise. In a text published in 2007, Professor McBryde remarks: 'In recent years there have been a few publicised cases which have been decided on the basis of an alleged promise'; he then discusses four decisions made between 1976 and 1991.⁴⁴ The context is often crucial. In *Krupp Uhde GmbH v Weir Westgarth Ltd*,⁴⁵ the parties were members of a consortium construction project. W issued a letter to K, undertaking to transfer to them sums due as retention monies to a third party in the consortium. The sums were to be transferred to K in consideration of a loan made by K to the third party's parent company. W's letter was in the following terms:

We confirm receipt of a letter ... from [*the third party*] a copy of which is attached, requesting us to amend remittance instructions in respect of the two retention payments specified therein. We

⁴² 2007 SC 285, para 15.

⁴³ Admittedly, the fact that some transfers in favour of the Number 2 trustees had taken place perhaps complicated matters in *Cawdor*, but transfers of assets can occur with being reinforced by any promissory obligation.

⁴⁴ McBryde, *Contract*, para 2.04. The cases thereafter cited are *Bathgate v Rosie* 1976 SLT (Sh Ct) 16; *Stone v MacDonald* 1979 SC 363; *Lord Advocate v City of Glasgow DC* 1990 SLT 721; *J W Soils (Suppliers) Ltd v Corbett* 1991GWD 32-1891. Claims of promise have been unsuccessful in other cases: most recently see the *Cawdor* case already cited, *Morrison v Leckie* 2005 GWD 40-734 (Paisley Sheriff Court), and *Dow v Tayside University Hospital NHS Trust* 2006 SLT (Sh Ct) 141. Note however *Smith v Stuart* 2004 SLT (Sh Ct) 2, where a unilateral promise was held to have prescribed.

⁴⁵ 2002 GWD 19-620.

undertake that we shall comply with [*the third party's*] irrevocable instructions therein and on the terms and conditions specified in the said letter.

The question was whether this undertaking by W amounted to a unilateral promise to K to pay the sums mentioned in the earlier letter, or whether, along with that earlier letter, it amounted to no more than an assignation by the third party of its claims to the retention monies coupled with a non-binding confirmation of W's intention to make payment of these monies. The court preferred the latter approach. The parties had not had any commercial contact before W's letter was issued to K, and adoption of the promise analysis would, in effect, be to make W guarantors of the third party's debt to K. Such an unusual obligation had to be spelled out with clarity, given the lack of prior dealings between the parties; and the language of W's letter was at best ambiguous.

(ii) Formalities

Scots law has long adopted a restrictive approach to the formation of gratuitous obligations. Until the Requirements of Writing (Scotland) Act 1995, gratuitous obligations could only be proved by the writ or oath of the person undertaking the obligation: that is to say, by writing of that person acknowledging the existence of the obligation (but not necessarily constituting the obligation itself, which thus theoretically might be entered orally); or by the person's admission of the existence of the obligation made in court having taken the oath. Thus in the classic decision of *Smith v Oliver*,⁴⁶ a church was built on the basis of an oral promise to make a bequest to pay for the work made by a member of its congregation; but on her death it was found that she had made no relevant provision in her will (although there was an unsigned codicil). Since there was no written evidence of the promise, and the deceased could not be put on oath, a claim by the church

⁴⁶ 1911 SC 103.

against her estate failed. The requirement of proof by writ or oath was however swept away by the 1995 Act, which substituted a new structure of rules on the subject; and now a unilateral gratuitous obligation must be constituted in a written document signed by the granter.⁴⁷

In some ways this new rule is even more restrictive than the previous law, since it has the general effect that a merely oral promise is not binding. From a purely social and domestic perspective, this may be just as well: as Professor Thomson observes, 'few people are aware of, let alone fulfil, these formalities when they promise to give someone a present: and so, as a general rule, a promisor incurs no liability if he changes his mind and decides not to give a present to the promisee.'⁴⁸ The rigour of the law is however tempered in two ways. The first is an exception to the requirement of writing where the promise is made in the course of business,⁴⁹ designed to avoid formal impediments to commercial activity. The other is a complex set of rules, the broad thrust of which is that where the promisee has acted or refrained from acting in reliance on the oral undertaking of the promisor with the latter's knowledge or acquiescence, then the promisor is not entitled to use the informality to withdraw from the obligation. It must also be clear that the promisee's actions have affected him or her to a material extent *and*, further, that the effect of the promisor's withdrawal would adversely affect the promise to a material degree. The promisee cannot plead the same facts to show the material effects of his or her actions and the adverse effects of the promisor's withdrawal.⁵⁰

⁴⁷ s.1(2)(a). The rule thus covers gratuitous contracts as well as unilateral promises.

⁴⁸ *Scots Private Law*, p. 37.

⁴⁹ s.1(2)(a).

⁵⁰ See ss 1(3) and (4); also *Caterleisure Ltd v. Glasgow Prestwick International Airport* 2006 SC 602; *Advice Centre for Mortgages Ltd v. McNicoll* 2006 SLT 591.

That these rules are somewhat more liberal than the old law of proof by writ or oath can be demonstrated by considering how *Smith v Oliver* would be decided today. Assuming that the promisor was not acting in the course of business, which seems clear, the church needed her promise to be in writing; since there was no such writing, there was at first sight no obligation. But the church, having acted in reliance upon what Mrs Oliver had said, and constructed a church building, seems likely to have been affected to a material extent in laying out funds and other resources on the project. A possible adverse effect of the estate's failure to honour Mrs Oliver's word would be the inability of the church to pursue other aspects of its mission or, in extremity, its insolvency and possible closure. In such circumstances, the various tests for holding orally made promises binding would seem to be at least potentially satisfiable.

(b) Donation

Although the early law on constitution and proof of donation was not wholly clear, by the late nineteenth century it was settled that 'donation in the sense of the actual transfer of property by delivery could be proved parole';⁵¹ that is to say, that no particular formalities such as writing are generally required, and that the question of whether or not a donation has taken place can be determined from the evidence of witnesses alone. The key facts to be proved were – and are - the intention to donate (*animus donandi*) and delivery of the subject-matter of the gift.⁵²

⁵¹ SME vol 8 para 605.

⁵² Lord Coulsfield and H L MacQueen (eds), *Gloag & Henderson's The Law of Scotland* (12th edn, 2007), para 32.15 (at p 669).

(i) Intention to donate

Animus donandi has given rise to much discussion in Scottish cases. Many of the points made above in relation to determining whether or not a statement is a promise are equally applicable to deciding whether or not there has been an intention to donate.⁵³ The intention must be to give now, not at some point in the future.⁵⁴ Several cases about deposit receipts (a savings facility provided by banks under which a party deposited money in the bank and took a written receipt the terms of which dictated the permissible mode of uplifting the funds deposited, contrasting with the current account, where the bank is bound to honour cheques for any amount drawn upon it if sufficient funds are available) have underlined a distinction between an intention to confer upon someone else the power to control the asset as an administrator, and an intention to give such a person ownership.⁵⁵

The question of whether or not a donation is made *mortis causa* is one of the donor's intention; there is no need for the donation to have been made in immediate contemplation of death. Thus in one case for example an individual opened a savings account in the name of himself and his wife 'conjunctly and severally, and the longest liver of them', and made payments into it for twenty years before his death. In a dispute between the widow and the deceased's sister over the ownership of the money, the court held that there had been donation *mortis causa* to the former, the intention being clear from the terms of the savings account itself and the wife's possession of the account book and administration of the account throughout her husband's life. While the donation might have been revocable by the husband in life, his death gave his widow a complete

⁵³ See further Hunter "Prerequisites of donatio mortis causa" at 72 ('Objective or subjective test?').

⁵⁴ *Wight's Trustees* (1870) 8 M 708; *Taggart v Higgins' Executor* (1900) 37 SLR 843; *Graham's Trustees v Gillies* 1956 SC 437; *Gray's Trustees v Murray* 1970 SC 1.

⁵⁵ SME vol 8 para 619.

entitlement.⁵⁶ Imminence of death or danger is however a factor to be weighed in determining whether the donor's intention was to make a donation *mortis causa*, and might indeed be a typical case of such a donation.⁵⁷ Thus in the leading decision of *Morris v Riddick*,⁵⁸ the deceased during what proved to be his last illness and just three or four days before his death gave the beneficiary £300, subject to an express condition of return should the donor recover. This was held to be a donation *mortis causa*.

An extremely important notion in the context of *animo donandi* generally is the presumption against donation – perhaps the one bit of the law of donation which is familiar to every student of Scots law. This is a positive presumption against donation rather than the absence of a presumption in favour of donation, and it has been given wide application in the modern law.⁵⁹ The effect is that intention to donate must be proved with clear and convincing, or 'very strong and unimpeachable' evidence, with no room given for cases of doubt.⁶⁰ The evidence of the donee will not usually be sufficient on its own, although it may be taken alongside other corroborative material.⁶¹ The best witnesses are those with no or an adverse interest.⁶²

⁵⁶ *Blyth v Curle* (1885) 12 R 674.

⁵⁷ SME vol 8 para 607. See further Hunter "Prerequisites of donatio mortis causa" at 71-72 ('The prospect of death and intention').

⁵⁸ (1867) 5 M 1036.

⁵⁹ See *Glenalan Ltd v Armitage* 1963 SLT (Sh Ct) 31; *Tyne Dock Engineering Co Ltd v Royal Bank of Scotland Ltd* 1974 SLT 57.

⁶⁰ *British Linen Co v Martin* (1849) 11 D 1004 at 1008, per Lord Fullerton and at 1011 per Lord Jeffrey; *Heron v M'Geoch* (1851) 14 D 25 at 30 per Lord Fullerton; *Sharp v Paton* (1883) 10 R 1000 at 1006, per Lord President Inglis; *Callander v Callander's Executor* 1972 SC (HL) 70.

⁶¹ *Thomson's Executor v Thomson* (1882) 9 R 911; cf *Gibson v Hutchison* (1872) 10 M 923.

⁶² See e.g. *Young v Donald's Trustees* (1881) 18 SLR 372; *Macdonald v Macdonald* (1889) 16 R 758.

The whole circumstances of the transaction can be taken into account, as can the relationship of the parties, donation being easier to prove between related rather than un-related parties.⁶³ A party who maintains another un-related person is rebuttably presumed to expect payment unless the person maintained was accepted as a guest, whereas with a person who has an obligation to maintain another, the presumption is the other way.⁶⁴ Where parties are in the legal relationship of debtor and creditor, the Roman maxim, *debitor non praesumitur donare* (a debtor is not presumed to donate [to his creditor]), reinforces the presumption against donation. The assumption will be that the debtor paying or transferring to the creditor is doing so in discharge of the debt.⁶⁵ It has been said that a donation will be upheld if there is no other reasonable explanation of the transaction in the circumstances.⁶⁶

As already noted, there was until 1920 a strong presumption against, amounting almost to a prohibition on, donations between spouses (subject to the notion of the 'remuneratory donation').⁶⁷ Since the legislative intervention abolishing the prohibition, it has been clear that in general there are no special rules applying to gifts between husband and wife.⁶⁸ Indeed there are rules which might almost be said to be a presumption – or more – in favour of donation, and these have been extended to family units over and above the relationship of husband and wife. It is worth noting first, however, that Stair provides authority for the non-application of the presumption against donation to gifts between parent and child.⁶⁹ The Family Law (Scotland) Act 1985 created a rebuttable presumption that money derived from any allowance made by either

⁶³ For a contemporary case on whether money was transferred as a gift or a loan and finding it to be the latter, see *Wilson v Carle* 2008 GWD 15-269 (Aberdeen Sheriff Court, 22 April 2008).

⁶⁴ SME vol 8 para 623.

⁶⁵ SME, vol 8 para 624.

⁶⁶ *British Linen Co v Martin* (1849) 11 D 1004; *Aiken's Executors v Aiken* 1937 SC 678; *Grant's Trustees v M'Donald* 1939 SC 448.

⁶⁷ See above, 000.

⁶⁸ *Beveridge v Beveridge* 1925 SLT 234.

⁶⁹ Stair, *Institutions*, I, 8, 2.

spouse for their joint household expenses or for similar purposes, or any property acquired out of such money, belonged to each party in equal shares, so altering the common law's assumption that such sums were provided for the purposes of household administration rather than as a personal donation.⁷⁰ This new presumption was extended to same-sex couples who entered a civil partnership under further legislation passed in 2004.⁷¹ In 2006 further legislation gave cohabitants living together as if spouses or civil partners a right (subject to their contrary agreement) to the same effect as the 1985 Act's rebuttable presumption; but 'property' here does not include a residence used by the cohabitants as the sole or main residence in which they live (or lived) together.⁷²

The Family Law (Scotland) Act 1985 also creates another rebuttable presumption that each spouse has a right to an equal share in household goods acquired (other than by gift or succession from a third party) during the period of cohabitation. This presumption, which now also extends to civil partnerships, cannot be overturned by showing only that the goods were purchased by either party alone or in unequal shares.⁷³ The presumption was further extended to cohabitants by the 2006 legislation, but it contains nothing similar to the 1985 Act's limitation on how the presumption can be overturned.⁷⁴ It follows that the cohabitant presumption *could* be overturned by evidence that the goods were purchased by either party alone or in unequal shares.⁷⁵

⁷⁰ Family Law (Scotland) Act 1985, s 26; SME vol 8 para 626.

⁷¹ Civil Partnership Act 2004 s 261(2) and Sch 28 Pt 2 para 29.

⁷² Family Law (Scotland) Act 2006, s 27.

⁷³ Family Law (Scotland) Act 1985, s 25, as amended by the Civil Partnership Act 2004.

⁷⁴ Family Law (Scotland) Act 2006, s 26.

⁷⁵ Thomson, *Family Law*, para 8.4.

(ii) Delivery

The second requirement for donation, delivery, means that more than a state of mind is required to complete a donation. It has been held that there is no gift where the donor had not dispossessed himself of anything.⁷⁶ In line with the general maxim of Scots law, *traditionibus non nudis pactis dominia rerum transferuntur*, the classic mode of donation would involve a physical handing-over of the subjects donated to the donee. The nature of the subject-matter may however mean that some written or registration formality is necessary to constitute or complete delivery – for example, with land and incorporeal moveables.⁷⁷

The requirement of delivery is to some extent diluted in the case of donations *mortis causa*, although the law has probably suffered in its development through lack of clear conceptual analysis.⁷⁸ The problems arose in connection with deposit receipts, where the bank was bound to pay to any person who presented the deposit receipt endorsed in blank or to any special endorsee. The question was whether such a transfer of the deposit receipt to a third party could ever be a donation *mortis causa* of the funds to that party, given that the endorsed deposit receipt was not a document of title to the money and so could not be a testamentary disposal of it either. Or must the donee actually have uplifted the cash to complete title? The courts did not usually go this far, at any rate in questions between the alleged donor and donee, or the donee and the bank. Delivery of the deposit receipt, endorsed as necessary, could operate as donation if there was the necessary *animus donandi*, even without intimation to the bank.⁷⁹ Equivalents of delivery, such as intimation to a third party, have also been held effective to constitute a donation *mortis*

⁷⁶ *Milne v Grant's Executors* (1884) 11 R 887; note also *Wright's Trustees* (1870) 8 M 708.

⁷⁷ See generally SME vol 8 paras 636, 638.

⁷⁸ See further Hunter "Prerequisites of donation mortis causa" at 72-73 ('The question of delivery').

⁷⁹ *Proctor's Trustees v Proctor* (1894) 2 SLT 29; *Penman's Trustees v Penman* (1896) 4 SLT 66; *Grant's Trustees v M'Donald* 1939 SC 448.

causa.⁸⁰ The decisions do not always make clear, however, whether the donee's right is merely personal or a real right of ownership, which would be important if the creditors of the supposed donor were also involved.⁸¹ The issue has also been confused in its overlap with the contractual doctrine of *jus quaesitum tertio* (third party rights in contracts), where, it is suggested, the right of the third party is purely personal.⁸²

(c) Rejection by the promisee/donee

While a promisee is not bound to accept to make the promise binding, Stair held that 'if he in whose favour they are made, accept not, they become void, not by the negative non-acceptance, but by the contrary rejection'. A promise could thus give a right even to those unable to accept: 'this also quadrates with the nature of a right, which consisteth in a faculty or power which may be in these, who exerce no act of the will about it, nor know not of it; so infants truly have right as well as men, though they do not know, nor cannot exerce it'.⁸³ Bankton made similar points but extended the analysis to donation more generally as well as suggesting rather obliquely that acceptance strengthened the right of the promisee/donee. He therefore introduced the idea of presumed acceptance if there was no express rejection by a party knowing of the promise or gift.⁸⁴ Erskine extended this idea further: 'acceptance, admitting that it is necessary towards constituting an obligation, may be reasonably presumed, without any formal act, in pure and simple donations, which imply no burden upon the donee.'⁸⁵ The concept of presumed acceptance in the absence of

⁸⁰ *Blyth v Curle* (1885) 12 R 674.

⁸¹ SME vol 8 paras 630, 637.

⁸² SME vol 15 paras 831-832, 848.

⁸³ Stair, *Institutions*, I,10,4.

⁸⁴ Bankton, *Institute*, I,9,9.

⁸⁵ Erskine, *Institute*, III,3,88.

rejection held sway thereafter amongst Scottish legal writers for 150 years,⁸⁶ while it was judicially held that an obligation could be constituted in favour of a non-existent person subsequently coming into being.⁸⁷ The contemporary approach to promise has however reinstated Stair's original approach and dispensed with the idea of presumed acceptance as mere surplusage,⁸⁸ while in donation Professor Gordon states that donations do not require acceptance but may be rejected.⁸⁹ This means that donations may be acquired by the insane or those under the age of legal capacity (16 years in Scots law). But Professor Gordon also states that 'as a general rule, when an intended donee is not in existence at the time when the donation is made the donation will fail'.⁹⁰ The crucial point to recall here is that donation is seen as a transfer of property rather than as an obligation, where, as noted above, the result is different.

Under the UK implementation of the Distance Selling Directive,⁹¹ if unsolicited goods are sent to a person with a view to his acquiring them, the recipient has no reasonable cause to believe the goods were sent with a view to their being acquired for business purposes, and the recipient has neither agreed to acquire or to return them, then that recipient may, as between himself and the sender, treat the goods as an unconditional gift to him, with any right of the sender being

⁸⁶ See W D H Sellar, "Promise" in Reid and Zimmermann (eds), *History of Private Law in Scotland* (2000), vol 2, 252-282, at 271-272.

⁸⁷ *Morton's Trustees v Aged Christian Friend Society* (1899) 2 F 82. The analysis is that the promisor creates an obligation subject to a suspensive condition (the coming into existence of the person) (Erskine, *Institute*, II,1,8). The promisor is not necessarily bound indefinitely, since it can be implied that the condition must be fulfilled within a reasonable time if there is no express time-limit (McBryde, *Contract*, para 5.39; J Thomson 'Suspensive and resolute conditions in the Scots law of contract' in A Gamble (ed) *Obligations in Context: essays in honour of Professor D M Walker* (1990) at 132-133; *T Boland & Co Ltd v Dundas's Trs* 1975 SLT (Notes) 80).

⁸⁸ Note however the discussion in McBryde, *Contract*, paras 2.28-2.34.

⁸⁹ SME vol 8 para 611.

⁹⁰ SME vol 8 para 614. There are some specialities relating to donations *mortis causa*, for which see further below, 000.

⁹¹ Parliament and Council Directive 97/7/EC on the protection of consumers in relation to distance contracts.

extinguished.⁹² Before the Directive this matter was governed to the same effect by the Unsolicited Goods and Services Act 1971.

III. Obligations and Remedies of the Parties

Gratuitous obligations are enforceable in the same way as other voluntary obligations in Scots law, that is, through actions for specific implement, payment and damages.⁹³ There are no implied terms in law with regard to such obligations either, although there is nothing to prevent the implication of a term in the particular circumstances of an individual case, applying the usual tests of necessity and, where appropriate, business efficacy.⁹⁴ In a donation, the donor is held to guarantee only that he will not do anything to defeat the donee's right in future ("simple warrandice", in the technical language of Scots law). There is no guarantee of the donee's title, or that the donor has done nothing in the past to affect that title,⁹⁵ nor is there any guarantee of the quality of the subject-matter of the donation.

⁹² Consumer Protection (Distance Selling) Regulations 2000 (SI 2000 No 2334), reg 24. The words "as between himself and the sender" should not in general be read in Scotland as meaning that the transfer is not good against the world. But there may be difficulties where the sender has no title to the goods, or a defective or limited one.

⁹³ See MacQueen and Thomson, *Contract*, chapter 6.

⁹⁴ *Ibid*, paras. 3.27-3.38. For an example of the implication of terms in fact in a gratuitous contract of services not involving donation, see *J & H Ritchie Ltd v Lloyd Ltd* 2007 SC (HL) 89.

⁹⁵ SME vol 8 para 639.

IV. Revocation and Similar Mechanisms Diluting the Binding Force of the Donation

(a) Rights of revocation limited

Revocation of an *inter vivos* gift is not allowed in Scots law, whether for the donee's ingratitude or on any other ground, unless the donor expressly exercises the right to reserve a power to revoke. The donee's ingratitude was recognised by Stair and Bankton as a ground of revocation,⁹⁶ but Erskine appeared more hesitant on the subject and certainly limited its scope, commenting that a gratuitous deed is not revocable after delivery unless the power to revoke is expressly reserved.⁹⁷ In the nineteenth century the courts established the modern position in a series of decisions.⁹⁸

Scots law does recognise the *conditio si testator sine liberis decesserit*, under which a will making no provision for the possibility of subsequent birth of a child or children to the testator is presumed to be revoked by that event. This is only a presumption, however, and it can be rebutted by circumstances showing the testator's contrary intention. A challenge under the *conditio* is open only to the affected child.⁹⁹ But these rules apply only to wills, and have no application to donations in general.

Revocation is at its most significant with regard to donations *mortis causa*, which are in principle revocable by the donor. Revocation may be express or implied, but it is not automatic as, for example, where the donor recovers from the illness or survives the hazard that preceded the

⁹⁶ Stair, *Institutions*, I,8,2; Bankton, *Institute*, I,9,4.

⁹⁷ Erskine, *Institute*, III,3,90, 91.

⁹⁸ *Duguid v Caddell's Trustees* (1831) 9 S 844; *Swan's Executors v M'Dougall* (1868) 5 SLR 675; *Hogg's Trustees* (1875) 12 SLR 495. A modern decision is *Pickard v Pickard* 1963 SC 604.

⁹⁹ Gloag & Henderson, para. 40.11.

donation. Revocation of testamentary provisions does not entail revocation of donations *mortis causa*.

Professor Gordon draws attention to the position of the donee *mortis causa* pending the donor's revocation, about which, as he says, there has been little discussion in Scotland:

Partly this is because such donations have often involved money and the donee could not be expected to retain the actual money handed over (if it had been handed over); partly it is because there have been few cases in which the donee has had any serious possibility of dealing with the property before the death of the donor. However, the position would seem to be that in principle the donee could not deal with the property in a way inconsistent with the right of the donor to revoke the gift. He would be in the same position as a donee spouse under the previous law relating to donations *inter virum et uxorem*, who could not alienate or charge the property which was the subject of a gift, even in favour of creditors and singular successors. However, presumably this principle would apply as against onerous bona fide acquirers only if it was apparent that the donee held on a title which was subject to revocation.

(b) Effect of donor's impoverishment

Having initially rejected the Roman *beneficium competentiae* allowing a donor to revoke a gift when he subsequently became unable to maintain himself, Scots law came to give it limited acceptance in the eighteenth century, enabling the father or grandfather of a donee to plead the benefit in order to avoid having to pay more than he could afford without reducing himself to

want.¹⁰⁰ This was on the basis of the reciprocity of the obligation of aliment (maintenance and support) between father and child and grandfather and grandchild, and on this basis it could presumably have been extended to the cases of mothers and grandmothers had such arisen. Collateral relatives were refused the *beneficium competentiae*, however, since in those relationships there was no mutual alimentary obligation. The effect upon the benefit of the statutory abolition of a child's obligation to aliment a parent or grandparent, and of the limitation of the parent's obligation to aliment a child only until he or she reaches the age of 18 (in some cases 25), remains to be tested in court.¹⁰¹

(c) Invalidity of the gratuitous obligation/donation

(i) Error

While Scots law generally makes it very difficult for a party to challenge a contract on the basis of error or mistake,¹⁰² it takes a more relaxed approach to such challenges with regard to gratuitous obligations. Thus a unilateral error not induced by the other party's misrepresentation and not necessarily in the essentials of the obligation may still ground an action for reduction of the obligation.¹⁰³ In *McLaurin v Stafford*,¹⁰⁴ for example, the pursuers granted a written transfer of property to their daughter under the impression that the document was merely testamentary and therefore revocable. They later sought to strike the deed down on the ground of essential error.

¹⁰⁰ SME vol 8 para 644.

¹⁰¹ See Family Law (Scotland) Act 1985, s.1; SME vol 8 para 644; SME Reissue Child and Family Law, para 131 note 4. A child may continue to claim parental aliment after reaching the age of 18 and until reaching the age of 25 only if reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation.

¹⁰² See MacQueen and Thomson, *Contract*, paras 4.36-4.66.

¹⁰³ McBryde, *Contract*, para 15.39. It is also controversial in the general Scots law of contract whether an error of one party known to and taken advantage of by the other invalidates the contract between them (see *ibid*, para 15.30-15.33), but presumably in gratuitous transactions such a situation would lead to invalidity.

¹⁰⁴ (1875) 3 R 265.

The daughter argued that the parents had to prove that their error was induced by her representations; but this was rejected by the court, apparently on the basis that the transfer was gratuitous. Most of the cases on this topic are however concerned with gratuitous discharges of pre-existing obligations rather than gifts.¹⁰⁵

A controversial case where charitable payments and gifts were made subject to a mistake, giving rise to questions about their return under the law of unjustified enrichment, is *Fraternity of Masters and Seamen of Dundee v Cockerill*.¹⁰⁶ The FMSD was a charitable organisation, the members of which subscribed an annual fee, in return for which they and their dependents were entitled to certain payments if the member died or fell into financial difficulties. C, a member, went on a voyage from Dundee and was not heard of for 16 years. During that time, when it was believed that C was dead, his wife received support from FMSD in accordance with the rules of the organisation, and also the sum of 13 shillings in addition. When C returned, it was held that the support given under the rules should be repaid, having been made under a liability error of fact (that C was dead and his widow therefore entitled to the benefits of the charity); but not the 13 shillings, since although it had been paid under the same mistake about C's continued life, it was a gift which FMSD had no preceding legal obligation to make.

This case is controversial because, apart from facts which 'irrelevantly in point of principle, excite sympathy' for the wife,¹⁰⁷ arguably the FMSD's mistake about C's death was as much an

¹⁰⁵ See e.g. *McCaig's Trustee v University of Glasgow* (1904) 6 F 918; *Hunter v Bradford Property Trust* 1970 SLT 173 (HL); *Security Pacific Finance Ltd v T & I Filshie's Trustee* 1994 SCLR 1100, affirmed 1995 SCLR 1171. Note however *Sinclair v Sinclair* 1949 SLT (Notes) 16, a case about a disposition of a croft by one brother to another, but where the report leaves the gratuitousness or otherwise of the transaction unclear.

¹⁰⁶ (1869) 8 M 278.

¹⁰⁷ P Birks, "Six questions in search of a subject: unjust enrichment in a crisis of identity", 1985 *Juridical Review* 227 at 240 note 43.

invalidation of the gift as it was of the payment under the rules. The judges said that the FMSD would not have been able to recover the 13 shillings if, e.g., C's wife had unexpectedly become rich after the donation. But that situation, it is suggested, would not have involved an error of the kind required to invalidate the gift and trigger an enrichment claim for its restoration to the donor, but was rather one of a misprediction as to uncertain future events, quite different in kind from the question of whether or not C was alive at the time of the donation. The result would certainly have been different if the 13 shillings had been paid conditionally, made for example on the basis that, if C returned, or if his wife remarried, it would be repayable; this would mean that the money was returnable upon the fulfilment of the condition.¹⁰⁸

(ii) Other grounds of invalidity

Professor Gordon points out that in the nature of the human condition donations may also be especially open to challenge on grounds such as facility and circumvention and undue influence.¹⁰⁹

Facility and circumvention arises where a person in a weak and vulnerable state of mind owing to age, physical or mental illness (short of insanity) enters a transaction to his or her disadvantage by the dishonest inducement of another; undue influence occurs where a party places trust and confidence in another who has assumed a dominant or ascendant position in their relationship, and a transaction to the disadvantage of the first party takes place between them.¹¹⁰ Gifts can be to the disadvantage of the donor, and if procured through either facility and circumvention or

¹⁰⁸ For further discussion of failed gifts and unjustified enrichment, arguing that Scots law recognizes a *condictio donandi causa* and criticising the *Cockerill* case for relying on the *condictio indebiti*, see Evans-Jones, *Unjustified Enrichment*, vol 1, paras 6.82-6.96.

¹⁰⁹ SME vol 8 para 647.

¹¹⁰ McBryde, *Contract*, chapter 16, considers both grounds of challenge.

undue influence the transfer can be subsequently challenged and struck down. The same would hold good for a donation procured by fraud or threats.¹¹¹

(iii) Invalidity and transfer of property

Reference was made above to the distinction drawn in Scots law between an obligation and a transfer of property.¹¹² A successful challenge to one of these on the ground of error, fraud, threats, facility and circumvention or undue influence will not necessarily have any effect on the validity of the other. But generally where the preceding obligation is tainted, it is likely that the same factors will also affect the implementing transfer.¹¹³ Where that is so, the donee will be bound to return the goods donated. There appears to be no case determining whether or not the donee also has an enrichment obligation in respect of any use there may have been of the property, but in principle this would appear to be so.

V. Mixed Contracts

Under the law of gratuitous obligations before the Requirements of Writing (Scotland) Act 1995, the rule limiting proof of such obligations to the writ or oath of the promisor was not applicable where the obligations in question were added to ones contained in a mutual and onerous contract. In the leading case on the subject, parties reached a compromise in which one who was relieved of a possible claim of damages for failure to implement a lease also undertook to endorse a grocer's licence which had been granted in his name. At first instance it was held that this

¹¹¹ Ibid, chapters 14 and 17.

¹¹² See above, 000.

¹¹³ See further Reid, *Property*, paras. 614-617; Carey Miller with Irvine, *Corporeal Moveables*, para. 8.11.

undertaking could be proved parole (i.e. did not require reference to the undertaker's writ or oath).¹¹⁴ Lord Kyllachy said:

A promise or undertaking is not in the eyes of the law gratuitous – that is to say, it is not a mere *nudum pactum*, if it be part of a transaction which includes *hinc inde* onerous elements, such, for example, as a waiver or discharge of claims, or objections to claims – claims or objections which, whether good or bad, it is desired to extinguish. In such a case the whole transaction – unless heritable rights are affected – may, I think it is clear, be the subject of parole proof.¹¹⁵

It is unsettled whether this broad permissive approach continues to apply under the more formal regime of the 1995 Act, under which promises must be in subscribed writing unless entered in the course of business.¹¹⁶ One writer opines:

As the Act contains no provision exempting .. a unilateral promise from the requirement of writing merely because of its containment within a contract, it is to be presumed that the promise at least would require to be subscribed (which, in practice, would mean the whole contract would be subscribed).¹¹⁷

The uncertainty could cause problems in some very common situations. The text just quoted gives the example of 'a contract between two parties not undertaken in the course of business containing a gratuitous option in favour of one of the parties to purchase property.' An even more difficult example is when parties are negotiating the private non-commercial sale of a second-hand car, a transaction not requiring any formalities of writing in Scots law. The prospective buyer

¹¹⁴ *Hawick Heritable Investment Bank v Hoggan* (1902) 5 F 75.

¹¹⁵ *Ibid*, at 79.

¹¹⁶ See above, 000.

¹¹⁷ Hogg, *Obligations*, para 2.22.

makes an oral offer at a certain price, giving the owner until a fixed time the following day to make up his mind. This firm offer is characterised in Scots law as a promise not to revoke the offer; but is it enforceable if it is not in writing signed by the offeror? It is not even clear that the liberal approach of Lord Kyllachy under the old law would have saved this promise from proof by the prospective buyer's writ or oath, since it is not strictly part of a *hinc inde* onerous transaction, no such transaction having at the relevant moment been entered.¹¹⁸

The question does not really arise with donation as a transfer of property; what matters here so far as formalities are concerned is the nature of the property being transferred, whether or not the transfer is gratuitous. The issue of whether an onerous transfer includes an element of donation is most likely to be of concern in the context of taxation or insolvency.

¹¹⁸ Note Gloag, *Contract*, at 52 note 2.