

The Transfer of Money Claims in Scots Law

Ross Gilbert Anderson



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Preface

In inception, this was to be a thesis on the creation of rights in security over incorporeal assets in Scots law. It soon became apparent, however, that such was the dearth of analysis on the voluntary transfer of the paradigm money claim that the original topic of study would have to be postponed. The thesis has therefore concentrated solely on investigating the principles applicable to the common-place, voluntary transfer. I have endeavoured to be as thorough as possible in referring to the available Scottish sources. The modern law of assignation in Scotland can be traced back for some five hundred years. In that time, there has been little change in the essentials of the Scottish approach. Sometimes the rules are old because they cannot be improved. That there are few modern Scottish authorities is not, in itself, an indication that Scots law is unworkable or impractical (indeed, I rather suspect the opposite to be the case); we do well to remember that in English law, for example, even the most recent cases on assignment continue to draw on old authorities which are less adaptable to modern law than our own. In any system, the historical source of a rule is usually lurking just below the surface. In the following thesis I have sought to identify the sources of our law; and, above all, I have endeavoured to be critical: what is important is not the age of a principle, but its utility. I have made liberal references to comparative law for three reasons: first, the Scots law of assignation was heavily influenced by developments on the continent; second, it is in the continental materials that the most detailed discussions of cession are to be found; third, due to the highly moveable nature of claims and their considerable economic importance, the law of assignation/assignment/cession is a prime candidate for harmonisation. It is only right, therefore, that Scots law is measured against the benchmark of our European neighbours.

Many people have provided me with invaluable assistance in the preparation of this thesis: to all of you, my thanks. In particular, I would like to thank: Alan Barr, Jan Biemanns, John Cairns, Eric Clive, Scott Dickson, Jacques Du Plessis, Paul Du Plessis, Christian Eckl, Sandra Eden, Stephan Festner, Philip Hellwege, Jan Kleinheisterkamp, Jens Kleinschmidt, Gerhard Lubbe, Bill McBryde, Sonja Meier, Ebhru Mercangoz, Ralph Michaels, Michael Milo, Kenneth Reid, Vincent Sagaert, Thomas Schindler, Andrew Steven, Jens Sherpe, Andrew Tettenborn, Stephan Wagner, Heinz Weidt, Jan Erik Windhorst, Scott Wortley, Niall Whitty and the staff of the Edinburgh University Law Library.

There are two people and one patrimony to whom I wish to convey special thanks. The patrimony is the Edinburgh Legal Education Trust. It was the generous scholarship from this fund that made my research possible. The two people are Reinhard Zimmermann and George Gretton. Professor Zimmermann generously provided me with the opportunity to work for a year at the Max-Planck-Institute für ausländisches und internationales Privatrecht in Hamburg. This experience was invaluable and memorable; and the opportunity to use the resources in the institute's unrivalled library was a privilege indeed. He was an understanding and inspiring mentor. For the kindness and generosity extended to me by all members of the institute and, in particular, by Professor Zimmermann, I will be forever grateful.

My greatest debt of gratitude is to Professor George Gretton. He acted as the primary supervisor of the thesis. He has read more drafts than I am sure he cares to remember; and the many penetrating criticisms that he offered have improved the

thesis immeasurably. I have learned much from him. Indeed, if there is any note of sadness on completing this thesis, it is only that our regular and lively meetings must come to an end. Again, my thanks.

With these acknowledgements I need hardly mention that I alone bear the responsibility for remaining errors.

Finally, it would be remiss of me not to record my deep gratitude to Gilbert, Mary, Murray and Keith: my family; for all the support that they, and only they, could provide. Also, to Keirs: a special tapadh leat.

I have endeavoured to take account of legal developments in Scotland up to 1st May 2005, although it has been possible to include some later references.

Declaration

I hereby declare, in terms of regulation 46.7 of the University's thesis regulations,
that

(a) the thesis is my own work; and

(b) no part of the thesis has been submitted for any other degree or professional
qualification

Ross Gilbert Anderson

17th August 2005.

Abbreviations

<i>ABGB</i>	<i>Allgemeines Bürgerliches Gesetzbuch</i>
AC	Law Reports, Appeal Cases
<i>AcP</i>	<i>Archiv für die civilistische Praxis</i>
AD	Appellate Division
ADC	<i>Acta Dominorum Concilii</i> (26 th March, 1501 - 27 th January, 1503, reprinted for the Stair Society, vol. 8, 1943)
<i>ADWO</i>	<i>Allgemeine Deutsche Wechselordnung</i>
Aff'd	affirmed
All ER	All England Law Reports
<i>ALR</i>	<i>Allgemeines Landrecht</i> (Prussia)
<i>Am J Comp Law</i>	<i>American Journal of Comparative Law</i>
APS	<i>Acts of the Parliament of Scotland</i> (T Thomson and C Innes (eds), 13 vols, 1814-1875)
App Cas	Law Reports, Appeal Cases
AUL	Aberdeen University Library
Balfour, <i>Practicks</i>	Balfour, <i>Practicks 1469-1579</i> (first published 1754; reprinted Stair Society, 1962-1963)
Bankton	A. M'Douall, Lord Bankton, <i>An Institute of the Laws of Scotland</i> (1751-1753) 3 vols (reprinted 1993-1995, Stair Society, vols 41-43)
BCLC	Butterworths Company Law Cases
Bell, <i>Comm.</i>	G J Bell, <i>Commentaries on the Law of Scotland</i> (7 th ed. by J McLaren, 1870)
Bell's Folio Cases	R Bell, <i>Cases Decided in the Court of Session 1794-1795</i>
Bell's Octavo Cases	R Bell, <i>Cases Decided in the Court of Session 1790-1792</i>
Bell, <i>Prin.</i>	G J Bell, <i>Principles of the Law of Scotland</i> , (10 th ed. by W Guthrie, 1899)

BGB	<i>Bürgerliches Gesetzbuch</i>
BLR	Building Law Reports
Br Sup	<i>Brown's Supplement to the Dictionary of Decisions (1622-1794)</i> 5 vols
c.	<i>circa</i>
C.	Codex
CA	Court of Appeal, England
ch	chapter
Ch	Law Reports, Chancery Division
CLJ	<i>Cambridge Law Journal</i>
D	Digest; Session Cases, Second Series, edited by Dunlop
DNB	<i>Dictionary of National Biography (2004)</i>
Dow	Reports of cases upon appeals and writs of error in the House of Lords decided during the sessions 1827-1832
12mo (Duodecimo)	T Murray, Lord Glendook (ed.) <i>The Laws and Acts of Parliament made by King James the First and his royal successors, Kings and Queen of Scotland (1682-1685)</i>
ed.	editor; edition
<i>Edin LR</i>	<i>Edinburgh Law Review</i>
Elchies	P Grant, Lord Elchies, <i>Decisions of the Court of Session, from the year 1733 to the year 1754</i>
ER	English Reports (1900) 176 vols
Erskine	J Erskine, <i>An Institute of the Law of Scotland</i> (Originally published posthumously, 1777; edition used: 5 th edn by Lord Ivory, 1824)
EUL	Edinburgh University Library
EUL Sp Col	Edinburgh University Library, Special Collections

F	Session Cases, Fifth Series, edited by Fraser
FC	Faculty Collection
Forbes Dec	<i>A Journal of the Session Containing the decisions of the Lords of Council and Session, in the most important cases, heard and determined from February 1705, till November 1713: and the acts of sederunt made in that time</i> (1714)
Fountainhall	J Lauder, Lord Fountainhall, <i>The decisions of the Lords of Council and Session, from June 6th, 1678, to July 30th, 1712</i>
Gaius	Gaius, <i>Institutes</i>
Gloag, <i>Contract</i>	W M Gloag, <i>The Law of Contract in Scotland</i> 2 nd edn (1929)
Grosskopf, <i>Geskiedenis</i>	F H Grosskopf, <i>Die Geskiedenis van die Sessie van Vorderingsregte</i> (Leiden, 1960)
GUL	Glasgow University Library
GWD	Greens Weekly Digest
H & N	Hurlstone & Norman's Exchequer Reports
Hailes	<i>Decisions of the Lords of Council and Session, from 1766 to 1791</i> (1826) 2 vols
<i>HGB</i>	<i>Handelsgesetzbuch</i>
HL	House of Lords
<i>HRG</i>	A Erler et al (eds) <i>Handwörterbuch zur deutschen Rechtsgeschichte</i> (1971-1998) 5 vols
Hume's Dec	D Hume, <i>Decisions of the Court of Session, 1781-1822</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>InsO</i>	<i>Insolvenzordnung</i>
IR	Irish Reports

<i>JLSS</i>	<i>Journal of the Law Society of Scotland</i>
<i>JR</i>	<i>Juridical Review</i>
<i>JSPTL</i>	<i>Journal of the Society of Public Teachers of Law</i>
Kames, <i>Dict.</i>	H Home, Lord Kames, <i>The decisions of the Court of Session from its first institution to the present time, abridged and digested under proper heads, in form of a dictionary</i> , (8 th ed. 1807) 2 vols
Kames, <i>Elucidations</i>	Lord Kames, <i>Elucidations respecting the Common and Statute Law of Scotland</i> (1777)
1 Kames Rem Dec	H Home, Lord Kames, <i>Remarkable decisions of the Court of Session, from 1716 to 1728</i>
2 Kames Rem Dec	H Home, Lord Kames, <i>Remarkable decisions of the Court of Session, from the year 1730 to the year 1752</i>
Kames Sel Dec	H Home, Lord Kames, <i>Select decisions of the Court of Session, from the year 1752 to the year 1768</i>
Kaser, <i>RPR</i>	M Kaser, <i>Das römische Privatrecht</i> (2 nd ed. 1971) 2 vols
KB	Law Reports, King's Bench
Kilkerran	<i>Decisions of the Court of Session, from the year 1738 to the year 1752</i> (1775)
<i>Lloyd's Rep</i>	Lloyd's List Law Reports
<i>LMCLQ</i>	<i>Lloyd's Maritime and Commercial Law Quarterly</i>
<i>LQR</i>	<i>Law Quarterly Review</i>
Luig, <i>Geschichte</i>	K Luig, <i>Zur Geschichte der Zessionslehre</i> (1966)
M	Session Cases, Third Series, edited by MacPherson
McBryde, <i>Contract</i>	W W McBryde, <i>The Law of Contract in Scotland</i> (2 nd ed. 2001)

MacKenzie, <i>Inst.</i>	Sir George MacKenzie, <i>Institutions of the Law of Scotland</i> (2 nd ed. 1688)
Macq	J F MacQueen, <i>Appeals to the House of Lords 1851-1865</i> 4 vols
<i>MLR</i>	<i>Modern Law Review</i>
Mor	W M Morison (ed.) <i>Dictionary of Decisions of the Court of Session 1491-1808</i>
Mor Supp Vol	Supplementary Volume to the Dictionary of Decisions
Mühlenbruch, <i>Cession</i>	C F Mühlenbruch, <i>Die Lehre von der Cession der Forderungsrechte</i> 3 rd edn (1836)
NAS	National Archives of Scotland
(NE)	New Edition (Shaw's Session Cases, First Series)
<i>OED</i>	<i>Oxford English Dictionary</i>
<i>OJLS</i>	<i>Oxford Journal of Legal Studies</i>
<i>OR</i>	<i>Schweizersisches Obligationenrecht</i>
Pat App	Paton's Appeal Cases 1726-1821, 6 vols
PC	Privy Council
PECL	<i>Principles of European Contract Law</i>
R	Session Cases, Fourth Series, ed. Rettie
<i>RabelsZ</i>	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
Reid, <i>Property</i>	K G C Reid, <i>The Law of Property in Scotland</i> (1996)
rev'd	reversed
Rob	G Robinson, <i>Appeals to the House of Lords 1840-1841</i> 2 vols
Ross LC	G Ross, <i>Leading Cases in the Law of Scotland</i> (1850) 3 vols

Ross Lead Comm Cas	G Ross, <i>Leading Cases in the Commercial Law of England and Scotland</i> (1853-1857) 3 vols
Ross, <i>Lectures</i>	<i>Lectures on the History and Practice of the Law of Scotland, relative to Conveyancing and Legal Diligence</i> (2 nd ed.1822)
S	Session Cases, First Series, edited by Shaw
SA	<i>South African Law Reports</i>
<i>SALJ</i>	<i>South African Law Journal</i>
Sc Jur	Scottish Jurist
SC	Session Cases (1907-)
SC (HL)	Session Cases, House of Lords
SCLR	Scottish Civil Law Reports
Sh Ct Rep	Sheriff Court Reports (1885-1963)
SLT	Scots Law Times
SLT (Land Ct)	Scots Law Times, Land Court Reports
SLT (News)	Scots Law Times, News Section
SLT (Notes)	Scots Law Times, Notes of Recent Decisions
SLT (Sh Ct)	Scots Law Times, Sheriff Court Reports
Sh App	P Shaw, <i>Appeals to the House of Lords, 1821-1826</i> 2 vols
Sh & Macl	P Shaw and C H Maclean, <i>Appeals to the House of Lords, 1835-1838</i> 3 vols
SLR	Scottish Law Reporter
<i>SME</i>	<i>Stair Memorial Encyclopaedia</i>
So	Solicitors' Journal
Stair	J Dalrymple, Viscount Stair, <i>Institutions of the Law of Scotland</i> (2 nd ed. 1693); reprinted, 'Tercentenary edition' by D M Walker (1981)
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>

Stuart	R Stuart, Reports of cases decided in the Court of Session, 11 th November 1851-20 th July 1853
<i>THRHR</i>	<i>Tydskrif vir Hedendaage Romeins-Hollandse Reg</i>
TLR	Times Law Reports
TPD	Reports of the Transvaal Provincial Division
TR	Durnford & East's Term Reports
<i>TSAR</i>	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
<i>Tulane LR</i>	<i>Tulane Law Review</i>
<i>TvR</i>	<i>Tijdschrift voor Rechtsgeschiedenis</i>
UNCITRAL	United Nations Convention on International Trade, <i>Draft Convention on the Assignment of Receivables in International Trade</i> A/CN.9/489
UNIDROIT <i>Convention</i>	<i>Convention on International Factoring</i> (1988) 'the Ottawa Convention'
UNIDROIT <i>Principles</i>	<i>Principles of International Commercial Contracts</i> 2 nd edn (2004)
<i>U Pa L Rev</i>	<i>University of Pennsylvania Law Review</i>
Windscheid, <i>Pandektenrechts</i>	B Windscheid, <i>Lehrbuch des Pandektenrechts</i> (9 th ed. by T. Kipp, 1906)
WLR	Weekly Law Reports
W & S	Wilson and Shaw's Appeals to the House of Lords 1825-1835 7 vols
<i>ZEuP</i>	<i>Zeitschrift für Europäisches Privatrecht</i>
Zimmermann, <i>Obligations</i>	R Zimmermann, <i>The Law of Obligations</i> (Cape Town: Juta, 1990; reprinted, Oxford: OUP, 1996)
<i>ZHR</i>	<i>Zeitschrift für das gesammte Handelsrecht</i>
<i>ZPO</i>	<i>Zivilprozessordnung</i>
<i>ZSS (RA)</i>	<i>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (romanistische Abteilung)</i>

Abstract

The Transfer of Money Claims in Scots Law

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University of Edinburgh PhD, 2005

The transfer of money claims (debts) is of the utmost practical importance. In Scots law this is achieved by an ‘assignation’ (also known as ‘assignment’ or ‘cession’). The first part of the thesis (chapters 2 and 3) places the Scots law of assignation in its comparative and historical context. At the outset, the differences between an assignation and other juridical institutions are highlighted. Assignation is but one – albeit important – method whereby a debt relationship may be utilised. With these distinctions in mind the accepted history of the law of assignment is considered. The development of the law, from Roman law through the *jus commune*, and the apparent reception of the French approach in Scots law, is traced.

The following three chapters deal with three important elements in a modern assignation. The constitutive role that debtor notification plays in Scots law is the subject of chapter 4. Chapter 5 looks at the so-called ‘*assignatus utitur jure auctoris*’ rule, i.e. the defences available to the debtor in an assignation against the assignee. Particular reference is made to the set-off pleas of *compensatio* and retention. Finally, chapter 6 is concerned with issues of validity. Does Scots law subscribe to the abstract theory of transfer? If so, what are the consequences? Particular reference is made to the effect of a contractual prohibition on assignment (*pactum de non cedendo*), including its effect on creditors, and the so-called ‘offside goals’ rule.

It will become apparent that, despite the relative paucity of recent litigation on the subject, the Scottish jurisprudence on assignment is rich. The sources show an unbroken path of legal development stretching over half a millennium. Although often characterised as unnecessarily formal, Scots law has a strikingly liberal attitude to the assignability of claims and other incorporeal assets. Clear general principles have been distilled. On matters of detail the position is less certain. The thesis identifies the relevant sources of the law of Scotland, many of which have been ignored. These are critically analysed, often from a comparative perspective.

Chapter 1

Introduction

“...it is probable that a branch of the law which comes at the meeting place of the law of property and the law of obligations can never be anything other than difficult to apply.”¹

I. The Subject

Assignment, assignment, cession: three different English words; but, usually at least, only one underlying concept. The difference in the use of language is indicative of deeper conceptual difficulties. Cession (in Scots law, an ‘assignment’) seeks to achieve a relatively simple result: the transfer of a personal right. Transfer is a concept well known to lawyers. But we tend to think of corporeal assets as objects of transfer. The tripartite situation in a cession, however, is more complex. Assignment is just one of several methods by which debtor-creditor relationship can be utilised, altered, discharged or circulated. The method chosen in any particular transaction ought to depend on the particular incidents of the institutions that may be employed. While this thesis is concerned with the detailed incidents of cession of money claims, it is important to observe that the law provides other methods which are functionally similar. Unfortunately, in the modern Scottish authorities at least, the relatively clear principles set out in the earlier sources have become confused; the distinctions between the different principles blurred. The law of cession/assignment/assignment is one of those subjects in Scots law to which Walter Ross’s appraisal is apposite: ‘The frequent mistakes, defects and weaknesses in our authorities, discovered in the course of our examination sufficiently prepare the mind for an amusement so conducive to the enlargement of its faculties’.²

¹ W.S. Holdsworth, ‘The History of the Treatment of Choses in Action by the Common Law’ (1919-20) 33 *Harvard L Rev* 997 at 1030.

² Ross, *Lectures* vol I, xxi.

II. Nature of Assignment

'It is said that this point has never been decided. Points never decided are the strongest and most certain in our law': so observed Lord Monboddo in *McDonnells v Carmichael*.³ This comment could well have been directed to the very juridical nature of an assignment. No decision can be cited where a satisfactory description of 'assignment' will be found, though assignments in Scottish case reports are ubiquitous. However, the precise nature of assignment⁴ is deeply engrained in the jurisprudence of the European jurisdictions with which Scots law has much in common; characteristics for which there is evidence in indigenous Scottish sources. Assignment is the *inter vivos* consensual transfer of (*inter alia*) a money claim by the cedent (the creditor in the claim) to a transferee (the assignee). The cedent must intend to convey the claim, which must be identifiable. The assignee must accept the delivery of the assignment. In Scots law, only on intimation to the debtor of the delivery of the assignment, is the claim transferred to the assignee. Debtor notification plays a constitutive role in Scots law. It is therefore an essential requirement for a transfer. Intimation raises points of difficulty as much practical as theoretical. These are discussed in detail in chapter 4 below.

One aspect of assignment must be highlighted: the debtor's consent to the transfer is not required.⁵ While it is occasionally suggested that an assignment occurs with the consent of the debtor,⁶ this is incorrect.⁷ For example, some claims that can

³ (1772) Mor 4974; (1772) Hailes 513 at 514. *McDonnells* is an important assignment case. It is discussed in chapter 5 below. Cf *Johnston v O'Neill* [1911] AC 552 at 592-3 *per* Lord Dunedin and D Daube, 'The Self-understood in Legal History' 1973 *JR* 126; (1973) 90 *ZSS (RA)* 1.

⁴ The historical development of the law, which sheds some light on the terminological differences, is discussed in chapter 3, 'History' below.

⁵ Stair III.i.3. Cf. Hume, *Lectures* III, 1; C. Maynz, *Cours de droit romain*, (4th ed. 1877) vol 2, 87. See also e.g. Prussian *ALR* I, 11, § 409 and P.M. Nienaber, 'Cession' in W.A. Joubert (ed.) *The Law of South Africa* 2nd edn, vol 2, Part 2 (2003) para 6. Cf. McBryde, *Contract* para 12-02 and S Woolman and J Lake, *Contract*, (3rd ed. 2001) para 11.4 who are equivocal on this point.

⁶ See for example Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1777) Art. 2, at 9-10; Art. 39, at 319. This opinion is discussed in detail in chapter 2. See too, H.L. MacQueen, *SME*, vol 15, para 861. Taking the lease as the paradigm, he observes that in leases a landlord can prevent assignment by refusing to consent to it (*Duke of Portland v Baird & Co* (1865) 4 M 10). He continues: 'It is undecided whether this is a rule peculiar to leases or one which may be extended to all contracts... it may be in other forms of contract there is an implied term that the

be assigned are not based on a consensual relationship between the cedent and the debtor. Claims for reparation in respect of wrongful acts, for example, are assignable⁸ although they arise *ex lege* and not *ex voluntate*. Moreover, the relative importance accorded to the doctrine of *delectus personae*⁹ in the Scottish sources is not entirely consistent with the debtor's consent being required. *Delectus personae*, like any implied term, can be overcome by agreement.¹⁰ A concept of *delectus personae* would therefore be unnecessary if all transfers required the (even implicit) consent of the debtor. Moreover, if assignation could not occur without the consent of the debtor, express prohibitions on assignation would be unnecessary.¹¹ Also, if the cedent assigns a claim to an assignee that the debtor does not like, it is accepted that the debtor cannot refuse to pay that assignee.¹² This is the position in the major European systems.¹³ Matters are further complicated where the claim transferred is not a claim to payment, but a right to demand non-monetary performance. However, for the purposes of this thesis, we will be primarily concerned with the transfer of money claims.

consent will not be unreasonably or capriciously withheld'. With respect, this confuses the assignation of a claim with the transfer of a contract *in toto* (confusingly, this too is often called an 'assignation'). A lease imposes obligations on the tenant as well as rights. In assigning the lease the tenant is attempting to get shot of his obligation to pay rent. For this reason the consent of the landlord, whether implicit or otherwise, is necessary. The consent of the tenant, however, seems to be irrelevant to the right of the landlord to assign his income stream from rents. Cf. English law, where the House of Lords has recently emphasised that assignment occurs without the consent of the debtor: *Mulkerrins v PricewaterhouseCoopers (a firm)* [2003] 1 WLR 1937 at para [13] *per* Lord Millet.

⁷ See William Guthrie's criticisms, in his edition of Bell's *Principles*, (10th ed. 1899) § 1461, n. (f), of *Ritchie v McLachlan* (1870) 8 M 815. In any event, *Ritchie* involved an order to pay, not a transfer of a claim. This distinction is discussed below.

⁸ *Munro v Wishart* (1582) Mor 10337; *Milne v Gauld's Trs* (1841) 3 D 345; *Traill & Sons v Actieselskabet Dalbeattie Ltd* (1904) 6 F 798, noted at (1905) 17 JR 240; *Cole-Hamilton v Boyd* 1963 SC (HL) 1. A right of action for damages for breach of trust is assignable: *Liquidator of Larkhall Collieries Ltd v Hamilton* 1906 14 SLT 68 OH.

⁹ For which see below.

¹⁰ Some claims are unassignable by statute. Consent cannot render them assignable.

¹¹ See chapter 6 below, 'Validity', Part V.

¹² Assuming there is no *delectus personae creditoris*.

¹³ See e.g. in Germany, A. Perneder, *Institutiones* (Ingolstadt, 1565) who noted that cession occurred 'ohne Wissen und Willen des Schuldners', cited by Luig, *Geschichte*, 23. This reflects modern German law where no debtor notification is required to effect a transfer. Cf. P. Gide, *Etudes sur la novation* (1879), quoted in chapter 3 below. Guthrie, in his final edition of Bell's *Principles*, (10th ed. 1899), refers Scots lawyers to the civil law in this regard: § 1460, n. (f). Ironically, however, older Scots law – and indeed French customary law – shared little in common with the civil law. See discussion in chapter 3 below.

Only the cedent's right to payment is transferred. If any of his obligations are to be transferred or discharged, the consent of the debtor in the assignation (i.e. the creditor in the cedent's obligation) is required. The point may seem self-evident, but clear statements to this effect are scarce.¹⁴ Historically, where failure to pay a debt could have deleterious personal consequences, there was apparently no free movement of debts, on the ground that there was always *delectus personae* in the person of the creditor.¹⁵ It may have been the case thereafter that claims were, at first, only assignable with consent; but we cannot be sure.¹⁶ In any event, the law has evolved. It is now held to be a matter of indifference to the debtor to whom he may be required to tender payment.¹⁷ Crucially, where a transfer does take place, the assignee can have no greater right vis-à-vis the debtor than was held by the cedent. In Scots law, this is the principle labelled *assignatus utitur jure auctoris*. The principle is sometimes thought to be peculiar to the law of assignation. It is therefore discussed in detail in chapter 5 below.

As has been suggested, the debtor's consent is not required. What, then, is the position if the debtor actually explicitly consents to the transfer? A common express term in a loan agreement is that the creditor is entitled to assign his rights against the debtor. The parties are here expressing what the law already provides. So, while the debtor's consent is not required in an assignation, that the debtor does consent makes no difference. The claim is still transferred. And the transfer is a cession.

What then of the 'claim' that is to be transferred? 'Claim' is not a popular term in Scots law. Legal writers and judges have often referred to 'debts',¹⁸ 'obligations',¹⁹ and even 'contracts',²⁰ as the objects of assignation. These are all problematic. They have connotations which tend to focus on the negative side of the

¹⁴ Cf. G.L. Gretton and K.G.C. Reid, *Conveyancing*, (3rd ed. 2004) para 22.02: 'Only rights are assignable, not obligations. This is common sense'.

¹⁵ F. Schulz, *Classical Roman Law* (1951), 628, cited by Zimmermann, *Obligations*, 59. The history of the law of cession will be discussed in chapter 3 below. The Scottish history is perhaps unique.

¹⁶ See the discussion of the historical evolution of the law in chapter 3 below. Cf. Art 1122 *Code Civil*.

¹⁷ *Laidlaw v Smith* (1838) 16 S 367 aff'd (1841) 2 Rob 490 at 501 *per* Lord Cottenham. Compare the older Scottish authority for this proposition cited in chapter 3 below, n. 504.

¹⁸ E.g. Stair III.i.3.

¹⁹ E.g. Stair I.iii.1.

²⁰ Gloag, *Contract*, (2nd ed. 1929), 416.

relationship. The point is a basic one. Yet it has caused innumerable problems in the Scottish sources. It is worth quoting in full the passage with which Professor Zimmermann opens his magisterial *Law of Obligations*:

“Nam fundi et aedes obligatae sunt ob Amoris praedium’ said Astaphium ancilla in Platus’ play *Truculentus* (at 214), thus providing us with the oldest source in which the word ‘obligare’ is used. The substantive ‘obligatio’ can be traced back to Cicero. As to the literal meaning of the term, its root ‘lig-’ indicates that something or something is bound; just as we are all ‘bound-back’ (to God) by virtue of our ‘re-ligio’. This idea is still clearly reflected in the famous definition which Justinian advanced in his *Institutes*, where he introduced the subject of the law of obligations: ‘obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura’. Today the technical term ‘obligation’ is widely used to refer to a two-ended relationship which appears from the one end as a personal right to claim and from the other as a duty to render performance. The party ‘bound’ to make performance is called the debtor (debitor, from *debere*), whilst at the other end of the obligation we find the ‘creditor’ who has put his confidence in this specific debtor and relies (*credere*) on the debtor’s will and capacity to perform. As far as the Roman terminology is concerned, ‘obligatio’ could denote the *vinculum iuris* looked at from either end; it could refer to the creditor’s right as well as to the debtor’s duty. This obviously makes it somewhat difficult to render the Roman idea in English, for the English term ‘obligation’ is merely orientated toward the person bound, not towards the person entitled. With the words ‘my obligations’ I can refer only to my duties, not to my rights.”²¹

In many of the legal systems of Europe, the language employed by the law makes clear that it is the claim, the right, the positive or active element in the obligatory relationship that is being transferred. In French law, and systems based on it, it is quite clear that *cession de créance* refers to the transfer of personal rights. The same is clear from the language of *Forderungsabtretung* employed by German-speaking lawyers; *cesión de créditos* in Spanish; and *cessie van vorderingsrechte* (*sessie van vorderingsregte*) in Dutch (Afrikaans). As will be discussed below, Scots substantive law has been bedevilled as much by imprecise language as a lack of conceptual rigour. As Zimmermann observes, finding English words that adequately

²¹ Zimmermann, *Obligations*, 1.

describe either the concept of the transfer, or the object of it, is not easy. In a later development in her history, Scots law spoke of the assignation of contracts. No distinction was made between the rights and obligations that form the legal bond that is a contract. This unhappy episode in the Scots law of assignation is discussed in detail in chapter 2 below. This writer will therefore be careful to refer only to claims or rights. 'Claims' is the better term. It implies relativity: a claim must usually be exigible against another patrimony. 'Right' is much broader. It could conceivably encompass real rights, intellectual property rights or even human rights. 'Assignation of claims' also has some historical pedigree in Scots law. Hume entitled his chapter on this area of the law, 'Assignation of Personal Claims'.²²

III. Scottish Terminology

The transfer of a money claim in Scots law is effected by an 'assignation'. However, the term assignation has more than one meaning. Assignation is the term given to the contract to assign.²³ Assignation is also the term used to describe the transfer agreement,²⁴ the conveyance. Most commonly, it also refers to the physical deed which is delivered. Assignation, again, is used in two more general senses. One is the description of the completed transfer of a claim. This incorporates – normally²⁵ – the contract (the obligatory agreement), the conveyance (the transfer agreement) and the intimation to the debtor. Only on intimation does the transfer take effect. Assignation is also the general term for transfer in the Scottish sources: it has been applied to transfers of all types of property, not just claims; nor is it limited to incorporeals.²⁶ 'Assignation', 'assignment', or 'cession' can be used in either a wide

²² Hume, *Lectures*, vol III, 1 Arguably the adjective 'personal' is unnecessary: a claim, by definition, can refer only to another patrimony; rights, on the other hand, may be personal or real.

²³ *Brownlee v Robb* 1907 SC 1303 at 1312 *per* Lord McLaren; *Westville Shipping Co v Abram Steamship Co* 1922 SC 571 at 582 *per* Lord President Clyde; 1923 SC (HL) 68 at 71 *per* Lord Dunedin.

²⁴ This terminology will be discussed in chapter 6, 'Validity' below.

²⁵ A claim may be donated. In such a case there will be no contract.

²⁶ In particular, see Erskine III.v.1 and the criticism thereof by Hume, *Lectures* vol III, 8; W. Ross, *Lectures*, 189 (n). Cf. the following examples of this usage *Henry v Robertson & Sime* (1822) 1 S 399 (NE 375); *Borthwick v Urquhart* (1829) 7 S 420; *Johnstone v Sprott* (1814) Hume's Dec 448 and J. Craigie, *Scottish Law of Conveyancing: Moveable Rights* (1894), 250 ff.

or a narrow sense. This thesis is concerned with the narrow sense, i.e. the voluntary *inter vivos* transfer of particular claims; one particular type of singular succession. However, assignation can also be used in a wider sense to denote a universal succession.²⁷ Moreover, sometimes an ‘assignation’ can transfer real rights:

“A disposition may, and sometimes doth, signify the alienation of any right, whether real or personal; so the style and translation ordinarily bears, the assignee to transfer and dispone: as assignation is sometimes extended to the disposal of real rights, which are frequently provided, not only to heirs, but to assignees; yet these terms are so appropriated and distinguished, that disposition is applied to the alienation of real rights, and assignation of personal rights.”²⁸

‘Assignation’ is often used as a synonym for ‘transfer’ in the sources. It is used to denote the transfer of all manner of assets, things and rights. While there is a general idea of transfer, particular rules apply to the transfer of different assets. It is of some interest that, in Scotland, cases involving the transfer of one particular asset are referred to when dealing with other transfers. It is assumed that there are general underlying principles which are universally applicable to all transfers.²⁹ In other words, at a conceptual and practical level one can identify a general theory of transfer in Scots law. The idea of a ‘general assignation’ is perhaps just one manifestation of this. The following seeks to build upon that heritage.

For the purposes of this thesis, we will be concerned primarily with assignation as it is used in the specific sense, viz. the method whereby rights or claims are transferred. The term ‘cession’ is the most desirable for etymological reasons; ‘assignment’ is the standard English translation of the foreign equivalents; however, since the Scottish usage of ‘assignation’ is old and recognised, we will here prefer ‘assignation’ except where it is necessary to differentiate the modern transfer

²⁷ See ‘Universal Succession’, in chapter 2, below.

²⁸ Stair III.ii.pr. Erskine III.v.1 extends ‘assignation’ to the transfer of corporeal moveables. Cf. Mackenzie, *Inst* III.v.1.

²⁹ See the third paragraph of the Advertisement to the second edition of Stair, reproduced in D.M. Walker’s Tercentenary Edition (1981), 64 and *Inst*.I.i.23. Professor Gretton has written of the ‘abiding influence’ of Stair’s unitary theory of transfer which allows assignation to be treated as “one particular species of the genus ‘transfer’”: P.M. Nienaber and G.L. Gretton, ‘Assignation/Cession’ in R. Zimmermann, D. Visser and K.G.C. Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 787 at 789.

from one of its functional equivalents (also sometimes called an 'Assignment' in foreign legal systems). As with previous writers on Scots law, it will not be possible to look at the rules regulating the transfer of claims in isolation. Reference will be regularly made, therefore, to the rules relating to the transfer of heritable property and corporeal moveables.

IV. Transfer of What?

The traditional classification of the civil law is between persons, things and actions.³⁰ Although Stair departed from this classification, it has had an abiding influence on the law of Scotland.³¹ In terms of this classification, property (*res*) is divided into corporeal and incorporeal property. This classification can only be understood in terms of the primary real right, ownership. A thing will only qualify for classification if it is 'property', i.e. capable of being owned. Incorporeal property concerns rights, both real rights and personal rights.^{31a} This includes the real right of ownership. Where, then, can one locate the real right of ownership in this classification? It seems to be on both sides: it is always suggested that corporeal things are 'property', i.e. that they can be owned; in other words, the object of the primary real right, ownership. Being a 'right', however, ownership must be placed on the incorporeal side of the classification; so too must any subordinate real rights as well as personal rights. But, if this has the result that incorporeal side of the division encompasses both all the real rights as well as personal rights, why is the category of *res corporales* necessary? Everything with which the law is concerned is found under the classification *res incorporales*. The real right of ownership is just one of many types of rights.³² Therefore, as has been powerfully argued by Professor Gretton,³³ the traditional Gaian division of things into *res corporales* and *res*

³⁰ This can be traced to Gaius, *Inst.* I, 8.

³¹ See, for example, Scotland Act 1998, s. 129.

^{31a} Particularly interesting discussion of the development of the idea of claims as property is found in B. Huwiler, *Der Begriff der Zession in der Gesetzgebung seit dem Vernünfftrecht* (Zürich, 1975), 1-35.

³² Including other absolute rights, e.g., intellectual property rights.

³³ The theory here enunciated is the, as yet unpublished, theory of Professor Gretton of the University of Edinburgh. It was presented in abbreviated form to the *Goederenrecht* workshop at the Conference

incorporales is flawed. The law of things may be better analysed as the law of real rights; and the law of real rights is but one part, albeit a major part, of a wider law of patrimonial rights. If this is so, then the importance of the law of assignation, involving the transfer of personal rights is great. On this analysis, assignation is not concerned with the transfer of ownership in anything. Only rights are held in patrimonies. These may be personal or real. Assignation, traditionally, is concerned with the transfer of personal rights.

Personal rights are bilateral.³⁴ They are relative. Relative rights are personal rights, i.e. for every holder of a claim, there should be a concomitant debtor, and vice versa.³⁵ A law of relativity links the relationship between patrimonies: the law is found in the obligatory relationship. Personal rights are like electrodes: for every³⁶ positive end (the creditor's patrimony), there is a negative end (the debtor's patrimony). Assignation is primarily concerned with the transfer of the positive end

organised by the Ius Commune Law School, which took place on 28th November 2004, in Leuven, Belgium.

³⁴ Depending on the doctrinal basis of the third party right (*jus quaesitum tertio*), contractual rights may be trilateral.

³⁵ This is to oversimplify. One can conceive of debts which have, for the time being, no creditor. Take, for example, the bearer bill which has been lost in the post. Whether it is possible to conceive of claims or rights which have, for the time being, no ascertainable debtor is more difficult; yet, in principle, there is no reason why this should not be possible. It should be added that it has never been suggested that it is possible to abandon a right (i.e. for the right to remain in existence but the holder renounces his creditorship). When corporeal property is abandoned (see Reid, *Property* paras 547 and 568), one view is that the former owner's rights are extinguished; the other view is that they are transferred to the Crown (*quod nullius est fit domini Regis*). If the right is not embodied in a deed, can there be abandonment when there is nothing to abandon? Whether an abandoned right would vest in the Crown would depend on whether claims can be owned. Cf. generally, H. Dölle, 'Bermerkungen zur Blankozession' in *Festschrift für Martin Wolff* (1953) 23 at 28. However, the point is unlikely to be of much importance. Claims are incorporeal. Where there is no document evidencing the right, there can be no question – as with the finder of a corporeal moveable – of another appearing and seeking to assert the abandoned right. In practice, a creditor can easily get rid of his rights either by discharging the debtor (which, like a waiver, must be communicated: see *Moodiesburn House Hotel Ltd v Norwich Union Insurance Ltd* 2002 SCLR 122 at para [45] *per* Lord Macfadyen) or simply by doing nothing and allowing the prescriptive period to expire. Cf. generally, J. Kleinschmidt, *Der Verzicht im Schuldrecht* (2003).

³⁶ Although one could conceive of a personal right which has a patrimony at one end but not the other: see n. 35 above. Real rights have a person at one end but not the other.

of this relationship. These are difficult issues of considerable depth and jurisprudential complexity. Unfortunately, they cannot be further explored here.³⁷

V. Constituent Elements in Transfer.

It was observed above that there are, usually,³⁸ three stages in an assignation. The examination in the pages that follow will concentrate on the second and third stages, i.e. assignation as a *transfer*. Stage one, being a contract, is no different than any other.³⁹

³⁷ The literature on this issue is large. For a basic overview of the issues in the context of Scots law, compare K.G.C. Reid, 'Property and Obligations: Exploring the Border' 1997 *Acta Juridica* 225 with G.L. Gretton, 'Owning Rights and Things' (1997) 8 *Stell LR* 176.

³⁸ See n 25 above.

³⁹ For which, the chapter on 'Assignation' in McBryde, *Contract*, is the leading treatment. This fundamental contribution is written from a contractual perspective.

Chapter 2

The Paradigm Incidents and some Analogous Institutions

I. Paradigm Incidents

A. Assignment and Accessory Rights

The assignment of the claim will carry all rights which are properly accessory to it.⁴⁰ For example, D owes C1 £100 for which P is cautioner. If C1 transfers his claim against D to C2, the assignment will carry the accessory cautionary obligation. This is not so much a principle of the law of assignment, but of rights in security and cautionary obligations. Accessory rights cannot exist in the abstract.⁴¹ Subject to one important exception,⁴² they are parasitic to debt. A right in security necessarily presupposes a debt. The debt is the principal. Where the principal goes the accessory must follow: *accessorium sequitur principale*.⁴³ The received position is that the

⁴⁰ Stair III.i.17; Erskine III.v.8; Bankton II, 191, 7; *Anderson v Scottish NE Rly Co* (1866) 1 SLR 116; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 at 368 per Lord Blackburn (Ordinary) and 386 per Lord Anderson; *Trotter v Trotter* 2001 SLT (Sh Ct) 42.

⁴¹ *Jackson v Nicoll* (1870) 8 M 408; *Cameron v Williamson* (1895) 22 R 293; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 at 368 per Lord Blackburn (Ordinary). Cf. § 1250 I (2) BGB; Art 3: 7 BW.

⁴² i.e. the case of a right in security granted for 'all sums due and to become due'. At a particular point in time the debtor may not owe the creditor any money. The security is not, however, discharged. It continues to exist in respect of contingent indebtedness.

⁴³ A.J.M. Steven, *Pledge and Lien in Scots Law*, (Unpublished PhD thesis, University of Edinburgh, 1997) para 53 argues that the assignment of a claim secured by a pledge does not carry the creditor's secured right. He argues that the assignee only acquires the security on the transfer of possession. But this would mean that in the interim period between intimation of the assignment and the transfer of possession that there is a 'pledge' securing nothing. This is contrary to principle. The assignee is entitled to exercise secured rights on the completion of the transfer of the claim. Formalities may have to be complied with, such as the transfer of possession. The Dutch *Burgerlijk Wetboek* provides generally that accessory rights follow the claim: Art 3: 82 BW; where the claim is secured by a pledge, the cedent is bound to hand over the pledged article to the assignee, but only where the cedent is assigning the whole claim secured by the pledge: Art. 6: 143(3) BW. Cf. §§ 1250-1252 BGB and F. Terré and P. Simler, *Droit civil: Les biens*, (5th ed. 1998) para 201. For the history, see R. Feenstra, 'La caractère accessoire des différentes types de cautionnement verbis en droit romain classique' in *Etudes offertes à Jean Maquerons* (D'aix en Provence, 1970), 301.

creditor in the principal debt and the secured creditor cannot be different parties.⁴⁴ So where there is a transfer of a claim, all accessory rights are also transferred even if there is no express mention of accessory rights in the transfer of the principal right.⁴⁵ It has been held that the statutory preference enjoyed by Customs and Excise for the payment of arrears of VAT is also 'incidental' to the debt and transfers by an assignation of the principal debt.⁴⁶ The principle that accessory rights follow the right assigned is of the greatest importance. It is this incident of assignation that may be decisive in structuring a transaction in terms of assignation. It is therefore of some interest to note that other legal systems observe the same principle: France,⁴⁷ Germany,⁴⁸ Austria,⁴⁹ Switzerland,⁵⁰ Louisiana,⁵¹ Quebec,⁵² and South Africa.⁵³ The

⁴⁴ Compare the decisions in *Waydale Ltd v DHL Holdings* 1996 SCLR 391 OH (Lord Penrose) and that of the Cour de Cassation, *com D. 2000, 224* (note by L Aynès) (also noted at (2002) *European Review of Private Law* 333) which suggest that cautionary obligations are not inherently assignable. After a reclaiming motion on the issue of *res iudicata* (2000 SC 172), the *Waydale* case was remitted again to the Outer House. This time Lord Hamilton came to the opposite conclusion, viz. that the guarantee was assignable, though only in the 'transactional context' before him: 2001 SLT 224. The writer's view is that not only are cautionary obligations inherently assignable, there is no need to make express mention of the guarantee in the transfer of the principal obligation; for where the principal goes the accessory must surely follow. Like any other claim, a cautionary obligation could contain an express prohibition on transfer. Such a prohibition could also be implied.

⁴⁵ *Johnston v Jack*, 12th December 1622, noted by Stair, III.i.4 and J.S. Sturrock (ed.) *Conveyancing according to the Law of Scotland, being the Lectures of the Late Allan Menzies* (1900), 274; *Beg v Beg* (1665) Mor 6304; *Culty and Hunter v Earl of Airly* (1676) 2 Br Sup 197; 2 Stair 409; *Wilson v Burrel* (1751) Kilkerran 1; *Stewart v Kidd* (1852) 14 D 527; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363 at 386 *per* Lord Anderson. In *Anderson v Provan* (1665) Mor 6235 and 10377 and *Wedderburn v James* (1707) Mor 10399 it was held that the assignee of a landlord's right to rent can exercise the landlord's hypothec. A clause of registration entitling the creditor to summary diligence also passes to an assignee: *Lord Yester v Lord Innerwick* (1635) Mor 10321.

⁴⁶ *Villaswan Ltd v Sheraton Caltrust (Blythswood) Ltd* 1999 SCLR 199 OH. The distinction drawn by the Lord Ordinary between 'incidental' statutory preferences and 'ancillary' securities cannot, however, be correct. See discussion in R.G. Anderson and S. Eden, 'Transfer of Preferences on Payment' (2003) 7 *Edin LR* 297. Cf. R. Macpherson, 'Are Preferences Preferable?' 2002 SLT (News) 257. While there may be public policy considerations which would suggest that such preferences should not be exercisable by any party other than the Crown, there are older cases where such preferences have been exercised by assignees: *Cleland's Creditors Competing* (1705) Mor 10397.

⁴⁷ *Code Civil* Art 1250 (subrogation), Art. 1692 (cession); Ripert and Planiol, *Traité pratique de droit civil français* vol VII, para 1219.

⁴⁸ § 401 *BGB*.

⁴⁹ § 1394 *ABGB*.

⁵⁰ Art. 170 *OR* (Swiss Federal Code of Obligations). It may be noted in passing that, in the codification movement at the end of the nineteenth century, the leading Scottish protagonist, Sheriff (later Professor) John Dove Wilson, suggested that the Swiss, *Obligationenrecht* (being 'substantially ... a commercial code') would provide the best model for any codification of commercial law in the British Empire: Dove Wilson, 'Concerning a Code of Commercial Law' (1884) 28 *Journal of Jurisprudence* 337 at 341.

principle is adopted in the modern European⁵⁴ and international contract codes.⁵⁵ If the principle is clear, however, the practice is not. Take the example of a claim secured by a standard security. The creditor assigns the claim. The accessory principle holds that the security must be transferred with the claim. How does this principle interact with the publicity principle? Must the assignee be registered as the new security holder? Can the assignation be registered? The point has not been discussed in Scots law.⁵⁶ While Scots law jealously guards against any weakening of the publicity principle, it is submitted that the assignee is entitled to exercise the security rights of the cedent without registering the transfer of the security. This is the position in other European jurisdictions.⁵⁷ If the security is valid the original creditor must have registered. Arguably, the requirement of publicity has been fulfilled. Of course, we have now the possible situation that the register will be inaccurate at least in the interval between the assignation and registration. But

⁵¹ Louisiana Civil Code Art. 1826 (subrogation) and Art. 2645 (cession); S. Litvinoff, *The Law of Obligations* (2001) § 11.1.

⁵² *Code Civil du Québec* Art. 1638 (cession). The right to accessories by virtue of *subrogation personnelle* is not clear from the code but is axiomatic: J-L Baudouin and P. G. Jobin, *Les obligations* (5th ed. 1998) para 910.

⁵³ J.G. Lotz (rev'd J J Henning) in W.A. Joubert (ed.) *The Law of South Africa* vol 26 'Suretyship' (reissue 1997) para 205; P.M. Nienaber, 'Cession' in W.A. Joubert (ed.) *The Law of South Africa*, 2nd edn, vol 2, Part 2 (2003) para 49. Cf. *Lief v Dettman* 1964 (2) SA 252 (A).

⁵⁴ M.L.R. Gandolfi (ed.) *Académie des Privatistes Européens, Code Européen des Contrats*, Livre Premier, (Preliminary Draft, 2001), Art. 122 (7); *Principles of European Contract Law* (Part III, 2003) Art 11:201 (1) (b). Cf. H McGregor, *Contract Code* (Milan, 1993) Art. 661 (2), which makes no express provision for accessory rights.

⁵⁵ UNCITRAL Art. 12.

⁵⁶ What of the converse situation: can a security be assigned? Cf. G.L. Gretton, 'Assignment of All-Sums Standard Securities' 1994 SLT (News) 207; W. Lucas, 'Assignment of Floating Charges' 1996 SLT (News) 203; and § 1153 II *BGB*: 'Die Forderung kann nicht ohne die Hypothek, die Hypothek kann nicht ohne die Forderung übertragen werden'.

⁵⁷ Importantly, § 835 *Schweizerisches Zivilgesetzbuch* (Swiss Civil Code) provides that registration of the security in the name of the assignee is not essential to the validity of the transfer of the security to him: 'Die Übertragung der Forderung, für die eine Grundpfandverschreibung errichtet ist, bedarf zu ihrer Gültigkeit keiner Eintragung in das Grundbuch'. In French, the article reads, 'L'inscription au registre foncier n'est pas nécessaire pour valider la cession des créances garanties par une hypothèque'. But compare the position in Belgian law, where registration of the security in the name of the assignee seems to be required in terms of the law of rights in security, see P. van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *Transmission des obligations* (1980), 95, para 17; *idem*, 'Le Nouveau regime de la cession et de la dation en gage des créances' [1995] 114 *Journal des tribunaux* 529 at 530; P.A. Foriers and M. Grégoire, 'Die Forderungsabtretung im belgischen Recht' in W. Hadding and U.W. Schneider, *Die Forderungsabtretung, insbesondere zur Kreditsicherung, in ausländischen Rechtsordnungen* (1999), 136. See generally, discussion by K.H.

creditors are no more prejudiced in this case than in any other. That a name appears on the register is never determinative of the position. The registration may, for example, be void (e.g. for forgery) or challengeable for a host of reasons that are not ascertainable from the register. What a creditor can ascertain from the register is that there is a creditor with a standard security. Creditors of the cedent are not prejudiced: although the register bears that the cedent holds a standard security, any security can only be held in respect of debt. If there is no debt owed to the creditor, the security is meaningless; indeed, with one exception, it is invalid. The exception is the 'all sums' security.

Where someone other than the debtor has paid the debt, the payer is entitled to an assignation of the creditor's rights against the debtor.⁵⁸ It is a general principle that a creditor cannot be forced to assign a security where this would be prejudicial.⁵⁹ In any case, therefore, where the cedent of a particular claim holds an all sums security against the debtor, the cedent cannot be made to assign the whole security. Arguably, in this situation, registration by the assignee is not even an option. Nevertheless, the accessory principle can still be given effect. The assignee is entitled to the preference enjoyed by the cedent. The assignee will rank proportionally with any 'all sums' creditor for the sum assigned.⁶⁰

What, then, if there is compliance with the formalities of registration but not of assignation? In other words, the security is registered in the name of the assignee but the assignation is not intimated.⁶¹ It is clear as a matter of authority in Scots law that, generally, registration in the Sasine or Land Register is not an equipollent of intimation.⁶² But there is a logical reason in principle why this must be so: although

Neumayer, 'La transmission des obligations en droit comparé' in *Transmission des obligations* (1980) at 199-200, n. 16bis.

⁵⁸ By virtue of the so-called *beneficium cedendarum actionum*. The subject is difficult. If the payer has paid the debtor's debt, the creditor should have nothing to assign. See generally the opinion of Lord President Rodger in *Caledonia North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123, especially at 1143.

⁵⁹ *Sligo v Menzies* (1840) 2 D 1478; *Ewart v Latta* (1865) 3 M (HL) 36.

⁶⁰ See discussion in R.G. Anderson and S. Eden, 'Transfer of Preferences on Payment' (2003) 7 *Edin LR* 398.

⁶¹ This is a complex issue in other jurisdictions: see P van Ommeslaghe (1980) *op. cit.*, n. 57 above at 95.

⁶² *Tod's Trs v Wilson* (1869) 7 M 1100.

it is a general principle that *accessorium sequitur principale*, it is not a principle of law that the principal follows the accessory.

In other jurisdictions, the cession of a claim to payment for goods sold and delivered also transfers any benefit in a clause retaining title to the goods. However, although it is very often used as such, ownership is not a true right in security: it is not a *jus in re aliena*. That said, in such a situation, ownership seems to be parasitic to the debt: on payment of the price of the goods, ownership will pass to the buyer. This is very much like a security. On this basis it could be argued that ownership, though not a *jus in re aliena*, is nevertheless accessory to the claim. But there are difficulties. Seller Co enters into a contract of sale with Buyer Co. The contract contains a retention of title clause. Seller Co then factors all of its debts to Factor Co. If ownership is treated as an accessory security right, Factor Co becomes the owner of the goods; yet, in terms of the contract, Seller Co is bound to transfer property in the goods to Buyer Co. How can this be achieved if Seller Co is no longer the owner of the goods when Buyer Co tenders payment? These are issues of considerable complexity. It seems to this writer that there are great, perhaps insuperable, difficulties with the idea that ownership can ever be viewed as an accessory right, even where it is being used as a functional security right.

B. Partial Assignment

‘The simpler the proposition is’, one lawyer has wryly observed, ‘the harder ... it is to find a precise authority upon it’.⁶³ Whether there can be a partial transfer of a claim is a simple question. In principle, so is the answer: there can be. However, the dearth of solid authority for this proposition in Scotland, coupled with the proscription on partial cession in some other legal systems, raises the issue to one of some importance. In Scots law, it has never been suggested that a partial assignment is invalid on the basis that it is prejudicial to the debtor, and thus offends the

⁶³ W.A. Ashburner, *Principles of Equity*, (2nd ed. 1933), vii. Cf. *Panama & South Pacific Telegraph Co v India Rubber, Gutta & Telegraph Works Co* (1875) 10 Ch App 515 at 526 *per* James LJ.

assignatus utitur jure auctoris principle, as in some legal systems.⁶⁴ Indeed, there never seems to have been any argument in Scots law that partial assignation is not competent.⁶⁵

In *Solomon v Morrison's Trs*,⁶⁶ a beneficiary assigned her rights under the trust in security for advances. Her beneficial interest was an unvested right to a one twentieth share in the residue of the trust estate. Intimation of the assignation was made to the trustees. The assignees sought to compel the trustees to exhibit the trust accounts to them. The trustees refused. They argued that 'a person who holds an assignment of a beneficial interest in a trust estate is in an entirely different position from that occupied by his cedent, so far as regards the right to see the trust accounts. The maxim *assignatus utitur jure auctoris* had no application, unless the cedent transferred his whole right out and out to the assignee...an assignee of a part only of his share could not each simultaneously possess and exercise the same right of inspection. A right cannot be assigned and at the same time retained'.⁶⁷ The trustee defenders sought to emphasise that since the assignation was in security, if the assignees were allowed to demand to see the trust accounts, the number of people so

⁶⁴ Such as South Africa, for which see S. Scott, *The Law of Cession*, (2nd ed. 1991), 192 ff; R.H. Christie, *The Law of Contract in South Africa*, 4th edn (2001), 539; 'N.O.T.', 'Cession of a Portion of a debt' (1929) 46 *SALJ* 270; 'J.H.L.', 'Cession of a Portion of a debt' (1937) 54 *SALJ* 40; E.M. Burchell, 'Partial Cession' (1952) 69 *SALJ* 131; W. Rosenthal, 'Ceding a Portion of a Debt' (1971) 88 *SALJ* 236. It is not possible to execute a legal assignment of part of a debt under English law: *Foster v Baker* [1910] 2 KB 636; *Conlan v Carlow County Council* [1912] 2 IR 535; *Re Steel Wing Co* [1921] 1 Ch 349. See also Sir Roy Goode, 'Are Intangible Assets Fungible?' in P. Birks and A. Pretto (eds) *Themes in Comparative Law: Essays in Honour of Bernard Rudden* (2002), 97 at 103, also at [2003] LMCLQ 74. In Louisiana, although partial cession is envisaged by Art. 2643 of the Civil Code, the debtor's consent is required for partial cession: *Salter v Walsworth* (1936) 167 So 494.

⁶⁵ On the contrary, all discussion assumes that partial cession is competent: George Dallas of Saint-Martins, *A System of Stiles as now Practised within the Kingdom of Scotland* (1688, published 1774) vol I, at 7, comments that, where there is partial assignation, the warrandice should be carefully restricted. A.M. Bell, *Lectures on Conveyancing*, (3rd ed. 1882), 1181 assumes that partial assignation of a claim is competent. J. Burns, 'Bond' in Viscount Dunedin et al (eds) *Encyclopaedia of the Laws of Scotland* vol 2 (1927) para 749 states, 'If the assignation is partial only, the extent must be stated'. One important case on cession in Scots law, *Fraser v Duguid* (1838) 16 S 1130 (for which, more below), involved a partial cession. It has been cited with approval at the highest level: *Caledonia North Sea v London Bridge Engineering Ltd* 2000 SLT 1123 at 1140A, per Lord President Rodger. For the right of an assignee to pursue in the name of the cedent (with which *Fraser v Duguid* is concerned), see Part I, C, below.

⁶⁶ 1912 2 SLT 499; (1912) 50 SLR 584 OH. See also *A v B* (1534) Balfour, *Practicks*, 517; *Cairns v Leyis* (1533) Mor 827; Balfour, *Practicks*, 169.

⁶⁷ As reported by the Lord Ordinary (Skerrington) 1912 2 SLT 499 at 500.

entitled would be doubled at a stroke. The beneficiary could execute a score or more of partial assignments and thus ‘multiply indefinitely the expense of managing the trust and the duties of the trustees’.⁶⁸ Lord Skerrington peremptorily rejected such an argument:

“These arguments [of the defenders] overlook the fact that a share, whether vested or unvested, in the capital of a trust estate is in law assignable in whole or in part... The defenders’ counsel expressly conceded that if the action had been at the instance of the pursuer’s cedent there would have been no good defence to it. But the right to examine the accounts is just as valuable, and indeed necessary, to a partial assignee as it is to an original beneficiary; and if one denies it to the former, one gratuitously deprives this species of property one of its natural incidents, with the result that it becomes less marketable and consequently of less value to the beneficiary. Does any valid reason exist why a partial assignee should not be entitled to take the best means of satisfying himself that the trust is being properly managed, and of ascertaining the true value of the trust estate? I am aware of none.”⁶⁹

It was held, however, that, since a beneficiary could not involve the trust in unnecessary expense, neither could an assignee. The latter could therefore be compelled to cover the costs of procuring accounts. As for the hypothetical situation of multiple partial assignment, ‘[the assignees] must either appoint a single representative to inspect the accounts on their behalf, or they must indemnify the trust by paying for the extra expense occasioned by repeated inspections of the accounts’.⁷⁰ Although *Solamon* deals with the situation of an obligation *ad factum praestandum* it is thought that the same reasoning applies *a fortiori* to the money claim, payment of which should not involve additional expense over and above the principal sum.^{70a} It is instructive that in France, from where the law of Scotland relating to assignments was derived, partial cession is accepted.⁷¹ On the insolvency

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.* The solution adopted by Lord Skerrington is that favoured in the *Principles of European Contract Law* (Part III, 2003) Art 11:103 and the UNIDROIT *Principles of International Commercial Contracts* (2004), Art. 9.1.8.

^{70a} See too *R. Gaffney & Son Ltd v Davidson* 1996 SLT (Sh Ct) 36 at 39 *per* Sheriff Principal Hay.

⁷¹ See e.g. A. Rey ‘Cession de Créance’ in P. Raynaud and J.L. Aubert (eds) *Dalloz Encyclopédie Juridique* (2^e éd. 1986), Tome III, para 539. See also UNCITRAL Art. 9.

of the debtor in a partial assignation, the assignee and cedent will rank proportionally for their shares.⁷² Where an assignation purports to convey more than is actually owed to the cedent, the assignation will be effectual to the extent of the amount owed;⁷³ the assignee will then have a claim in warrandice against the cedent for the balance.

C. The Right of the Assignee to Pursue in the Name of the Cedent

‘Nothing is more common in law’, Lord Kames observes, ‘than effects kept up after their causes cease’.⁷⁴ The apparent right of the assignee to sue in the cedent’s name can only be explained on a historical basis; and, as will be discussed in the following chapter, that historical basis is not entirely firm. Despite admitting the transfer of claims from an early stage in the development of the law, Scots law has retained the style of *procuratio in rem suam* as a functional equivalent of an assignation.⁷⁵ The historical development of the law will be discussed in detail in the following chapter. In summary, however, the procurator was appointed as the creditor’s representative. Originally, the procurator’s position was precarious. As Roman law developed, his position was improved. Nevertheless, the fact remained: strictly speaking there was no transfer. As a representative, therefore, the assignee had to bring the action in the name of the cedent.⁷⁶ This is analogous to English law. There, it was not possible to transfer a debt from one person to another until the Judicature Act in 1873. The Courts of Equity circumvented this rule by giving effect to agreements to assign. Under an equitable assignment, the assignee always sued in the name of the assignor. Equity would protect his right to the proceeds. Moreover, the Courts of Equity could

⁷² Cf. *Code Civil du Québec* Art. 1646.

⁷³ *British Linen Co Bank v Carruthers and Fergusson* (1883) 10 R 923 at 926-7 *per* Lord President Inglis; at 928 *per* Lord Shand.

⁷⁴ Kames, *Elucidations*, Art. 22, ‘litiscontestation’, at 144.

⁷⁵ See, in particular, the opinion of Lord President Rodger in *Caledonia North Sea v London Bridge Engineering Ltd* 2000 SLT 1123.

⁷⁶ Stair III.i.18 and see discussion in Chapter 3, Part I, below.

compel the assignor to allow the assignee to use the assignor's name.⁷⁷ Scots law has never had a separation between law and equity. As with ownership of a thing, a person is either the creditor of a debtor or he is not. If a claim is transferred, it is henceforth held in the patrimony of the assignee. Transfer is instantaneous. There is no halfway house.⁷⁸

Generally speaking, if A tries to bring an action on the basis of a right which he holds in the name of B it can be met with a plea of no title to sue.⁷⁹ The apparent rule in the law of assignation is, therefore, peculiar. It is an historical hangover from the days when cession was thought (perhaps erroneously) to be prohibited and the mandate *in rem suam* had to be invoked. Yet the title of the assignee to sue in his own name has always been accepted.⁸⁰ The right to sue in the cedent's name is an anachronism. As will be seen, however, it is difficult to see how a mandate *in rem suam* actually effects a transfer. There are two avenues that can be followed where parties to a transaction wish to allow one of them to exercise rights held by the other.

⁷⁷ The history of the assignment of choses in action in England is perhaps even more complex than in the civil law. It is treated briefly in chapter 3 below, especially at n. 400 f. It should be noted, however, that there is a further distinction to be made in English law. Choses in action may be legal or equitable. The courts of equity always exercised exclusive jurisdiction over equitable choses. These include some paradigm money claims, e.g. interests in the estates of deceased persons. Where such choses in action were assigned, the assignee was always entitled to sue in his own name. This is somewhat at odds with the accepted rationale of the assignee having the right to sue in the name of the assignor or, in the case of subrogation, the apparent rule that the subrogee *must* sue in the name of the payee. This would depend on whether there was subrogation to an equitable or legal right. Cf. A.M. Tettenborn, *An Introduction to the Law of Obligations* (1984), 202: 'The assignment of things in action is an unplanned area in English law, straddling Common Law and Equity, property and obligation'.

⁷⁸ Cf. the bizarre argument for the pursuers before the House of Lords in *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* 1988 SLT 874 at 882A: "there is only an *equitable assignation* by the indemnified person to the indemnifier, the latter can deal with this problem in England since the Judicature Act 1873 by joining those with the legal right to sue as co-defendants in the action and in Scotland by convening them as parties if the defender tables a plea of 'all parties not called'." There is no such thing as an equitable assignation in Scots law.

⁷⁹ *Wyper v Harveys* (1861) 23 D 607 at 613 *per* Lord Justice-Clerk Inglis. Indeed, in two other mixed legal systems, it is clear that the assignee must sue in his own name: Louisiana Code of Civil Procedure Arts 697(2) and 698(2) (West Group, 2001); *Code de Procedure Civile* Art. 59 (Quebec). For the history, see Brunner, 'Inhaberpapier', 535 ff.

⁸⁰ *Munro v Wishart* (1582) Mor 10337. Cf. *Jacksons (Edinburgh) v Constructors John Brown* 1965 SLT 37 where Lord Fraser followed *Duncan v Town of Arbroath* (1668) Mor 10075. As the late Professor Wilson, *Introductory Essays on Scots Law* (1978), 77 commented, 'This case is found in the collected works of Sir George Mackenzie in his *Pleadings in some remarkable Cases before the Supreme Courts of Scotland* (1673), the fourth of which is *Carmichael against the Town of Aberbrothock* and is in fact the same case, Duncan being Carmichael's assignee'.

The first is to transfer the claim outright. This is a transfer like any other. If it is a transfer, there no basis on which the assignee should be able to sue in the name of the cedent: the assignee is now the creditor and the cedent no longer has any rights against the debtor.⁸¹ The second is to constitute the putative ‘assignee’ as a procurator *in rem suam*. This gives the assignee a mandate to uplift the creditor’s claim on his behalf. This is a clear basis in which to raise an action in the name of the creditor. This is the same basic principle that allows a solicitor to raise an action in a client’s name.⁸² However, the consequences of these actions will be different, especially where the cedent becomes insolvent.

The position has recently been thrown into sharp focus in the context of insurance, and the right of the insurer to be ‘subrogated’ to the rights of the insured.⁸³ The specialities of the law of insurance and subrogation cannot be discussed here. For present purposes it is sufficient to note that Lord President Rodger held that the principle that an assignee can sue in the name of his cedent is deeply rooted in the law of assignation. The basis of this proposition is to be found in *Fraser v Duguid*:⁸⁴

“...it is an established principle in our law, that Ker the assignee may sue in the name of the cedent. What objection can there be to such a proceeding? Even as to expenses, Ker the assignee removes every possible objection by coming forward and offering to sist himself. That was more than was necessary, as a mere mandate from him would have been enough.”⁸⁵

This passage is hardly illuminating. On a pragmatic level, there seems to be little point in objecting to an action proceeding where both the assignee and the cedent are parties to the process. The debtor can thereby be sure he is indeed granted

⁸¹ Cf. *Scottish Iron and Steel Co Ltd v Gillieaux & Collinet* (1913) 30 Sh Ct Rep 42 at 44 *per* Sheriff Lees: ‘In their condescendence, the pursuers found upon an assignation ... but from the instance it does not appear that the pursuers are assignees. On the contrary, they sue with the consent and concurrence of the original [creditor] which, if it is not to be wholly meaningless, appears to be inconsistent with the title to sue having been passed by assignation’.

⁸² Although, in this case, since the mandate is not *in rem suam*, the solicitor cannot retain the proceeds for himself.

⁸³ *Esso Petroleum v Hall Russell* 1988 SLT 33 (1st Div) aff’d 1988 SLT 854 HL; *Caledonia North Sea v London Bridge Engineering Ltd* 2000 SLT 1123 (1st Div) aff’d 2002 SC (HL) 117.

⁸⁴ (1838) 16 S. 1130. Cited by Lord Rodger, 2000 SLT 1123 at 1140A.

⁸⁵ *Per* Lord Corehouse at 1131.

a discharge. As to expenses, the fact that the assignee is also sisted means that there is no need for the debtor to raise another action for payment of expenses, as the Court will be able to decern against the *dominus litis* at the conclusion of proceedings. More generally, however, what is the position where the assignee raises proceedings in the name of the cedent, but the latter is not sisted?⁸⁶ According to Lord Corehouse, the minimum required was ‘a mere mandate from him’. But to whom does the ‘him’ refer? Only a mandate from the original creditor, the cedent, would have been sufficient to allow proceedings to be brought in the cedent’s name. Bizarrely, however, the ‘him’ in Lord Corehouse’s opinion refers to the assignee. But what use is it for an assignee to produce a mandate from himself? John cannot randomly bring proceedings in the name of Jessica because he (John) has granted himself a mandate to that effect. Such a proposition is nonsensical. The objection against such a proceeding is two-fold. Firstly, even if it were the position that an assignee suing in the name of the cedent must produce a mandate from the cedent, that is somewhat different from saying, as Lord Corehouse initially suggests, that as a matter of general principle an assignee can sue in the name of the cedent without one.⁸⁷ Indeed, the right of the ‘assignee’ will depend on the form of the transaction. If the form of the transaction is a mandate *in rem suam*, the ‘assignee’ is a mere mandatory

⁸⁶ What if the assignee sues in the cedent’s name but is unsuccessful? The cedent could then be found liable for expenses. It is for this reason that J.P. Wood, *Lectures on Conveyancing* (1903), 582 cautions all cedents to insert a clause prohibiting the assignee from suing in the cedent’s name. In this writer’s opinion, this is well-advised; but it should be unnecessary in a true cession: suing in the cedent’s name being inconsistent with transfer. This raises issues analogous to seeking an award of expenses against the so-called *dominus litis*. The *locus classicus* of the doctrine is found in the opinion of Lord Rutherford in *Mathieson v Thomson* (1853) 16 D 19 at 23-4. He gives the case of an assignee suing in the name of his cedent as the paradigm situation where the defender can demand that the assignee be sisted. Cf. *Waddell v Hope* (1843) 6 D 160 and *Stevenson v Sneddon* (1900) 38 SLR 138. The authorities are fully canvassed in *Cairns v M’Gregor* 1930 SC 84 and *Cole-Hamilton v Boyd* 1963 SC (HL) 1. See, most recently, *Aitken v Financial Services Compensation Scheme Ltd* 2003 SLT 878 and *O’Connor v Bullimore Underwriting Agency Ltd* [2005] CSOH 90.

⁸⁷ It is interesting to note that in Gloag and Henderson, *The Law of Scotland*, (10th ed. 1995) (of which Lord Rodger was one of the editors) it is stated at para 11.16 only that ‘An assignee may sue in his own name, or may sist himself as pursuer in an action commenced by his cedent’ (emphasis added) citation of *Fraser v Duguid* then follows. Nevertheless, *Grier v Maxwell* (1621) Mor 828; *Hope Maj Pr* II.12 §22 (though the reports are too brief to be useful), *Paxton v Hunter* (1749) Kilkerran 581; *Marshall v Grant and Sillers*, 31st May 1864, noted at (1864) 8 *Journal of Jurisprudence* 360; *Traill v Dalbeattie* (1904) 6 F 798, *Goodall v McInnes Shaw* 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary) and *Ryan v McBirnie* 1940 SC 173, maintain the right of the assignee to sue in the name of

rather than a transferee. Consequently, he *must* bring the action in the name of the cedent. If there has been an outright assignation the position is different. The assignee, properly so-called, is now the creditor. To bring an action in the name of the cedent would be irrelevant: the named pursuer (the cedent) has no title to sue; he has no right which he can authorise the transferee to exercise.⁸⁸

The most conservative of the institutional writers,⁸⁹ Erskine, well distinguishes a conveyance from a mere procuration:

“It would seem, that by our ancient law all obligations were intransmissible, from a notion that no creditor could compel his debtor, contrary to the precise terms of his obligation, to become debtor to another, where the obligation did not expressly bear *to assignees*. And it was perhaps upon this ground, that by the old style of assignations, which is sometimes continued to this day, the assignee was made a mandatory and procurator in rem suam; which mandate empowered him to sue for, recover, and discharge the obligation, as the creditor himself could have done; *but our later customs have considered assignations, not barely as mandates, but as conveyances, by which the property of the subject assigned is, without any such clause, fully vested in the assignee; and the general rule is, that whoever is in the right of any subject, though it should not bear to assignees, may at pleasure convey it to another, except where he is barred, either by the nature of the subject or by immemorial custom.*”⁹⁰

Erskine here makes a clear distinction between the effect of a procuration and an assignation as a conveyance. Although he does not fully articulate the consequences of it, the point is important. If the consequences are followed to their logical conclusion, then we reach the second objection. Take an assignee who sues in the cedent’s name. The defender takes no plea to the relevancy. The pursuer is successful. Decree is granted in the pursuer’s name, i.e. the cedent. What, then, if the

the cedent. Cf. the doubts expressed about this by A.M. Bell, *Lectures on Conveyancing*, (3rd ed. 1882), 304.

⁸⁸ *Stewart v Kidd* (1852) 14 D 527, in so far as it suggests that an assignee can sue in the name of the cedent if he produces a special mandate to that effect must be wrong. Following the assignation, only the assignee will have title to sue. To bring the action in the name of the cedent would be irrelevant.

⁸⁹ The description is Lord Reid’s: ‘The Judge as a Law-Maker’ (1972-73) 12 JSPTL 22 at 24.

⁹⁰ Erskine III.v.2, emphasis added. For Erskine’s statements about the history of the law, see the following chapter.

cedent becomes insolvent? Who is entitled to enforce the decree against the debtor: the cedent's trustee in sequestration or the assignee? Even if there is mandate *in rem suam*, there is no reason why this will confer a preference on the mandatory over the other creditors of the insolvent cedent.⁹¹ There is little discussion of the effect of insolvency on a mandate. But first principles must rule. It is a contract. The rights arising out of this relationship are personal. There may have been protection in classical Roman law, on the basis that the procurator became the true creditor by novation of the debtor/creditor relationship on *litis contestatio*, or on the procedural development which awarded the procurator an *actio utilis*. Yet even by the time of Justinian, the extinctive effect of *litis contestatio* had disappeared.⁹² More importantly, it has been denied that *litis contestatio* continues to have this effect in Scotland by the House of Lords, as well as the First Division while Lord Rodger was Lord President.⁹³ Indeed, it has been held that the effect of decree being pronounced in another's name is to judicially assign the original pursuer's claim to the person

⁹¹ It also raises the question of what happens if the assignee sues in the name of the cedent and loses and it is the assignee that becomes insolvent. Does this mean that the cedent, who may have had nothing to do with the proceedings, is fixed with liability for not just expenses (the doctrine of *dominus litis* is limited to expenses) but to the principal sum on any counterclaim? It may be noted that a beneficiary may only bring actions against third parties in the name of the trustees where sufficient caution is found for any expenses that may be awarded against the trustees: *Morrison v Morrison's Exrs* 1912 SC 892; *Brown's Tr v Brown* (1888) 15 R 581.

⁹² H.F. Jolowicz, *Roman Foundations of Modern Law* (1957), 88. For discussion of the *litis contestatio* in Roman law, see discussion in chapter 3 below, Part I.

⁹³ *Stewart v London, Midland & Scottish Railway Co* 1943 SC (HL) 19 at 25 *per* Viscount Simon LC; *Dick v Burgh of Falkirk* 1976 SC (HL) 1 cited with approval by Lord Rodger in *Coutts' Tr. v Coutts* 1998 SC 798 at 804 D- I. Lord Rodger is well-acquainted with the doctrine of *litis contestatio*: see A. Rodger, 'Procurator Restitutus' in C. Krampe (ed.) *Quaestiones Iuris, Festschrift für Joseph Georg Wolf zum 70. Geburtstag* (2000), 207-220. For *litis contestatio* in older Scots law, see G. Ross (ed) *Bell's Dictionary and Digest of the Law of Scotland* (1882), 601, *s.v.* 'litiscontestatio' and the arguments in *Sir John Meres v York Buildings Company* (1728) 1 Kames Rem Dec 193. Cf. L.R. Caney, *A Treatise on the Law of Novation*, (2nd ed. 1973), 66 ff. Even if there were some sort of novation, the decree would still be in favour of the now bankrupt insured. His trustee would take the proceeds. Also, novation extinguishes the original obligation. Consequently, any accessory security rights will also be extinguished. In classical Roman law accessory cautionary obligations were thus discharged: see P.F. Girard, *Manuel élémentaire de droit romain*, (6th ed. 1918), 745, n. 5; (8th ed. 1929), 774, n. 5. This would mean that the assignee suing in the name of the cedent might lose accessory security rights to which he would otherwise be entitled. This would be a major factor in deciding whether to exercise the apparent right to sue in the name of the cedent. Admittedly, by the time of Justinian, *litis contestatio* had ceased to have any novatory effect: see the preceding note. Cf. Mühlenbruch, *Cession*, § 4, 35-37, n. 64 for the distinction between delegation and *litis contestatio*. For the remarkable survival of the *litis contestatio* in modern American law, see R. Helmholz, 'The

named in the decree.⁹⁴ This is the opposite of what the creditor who constitutes another as his procurator *in rem suam* wants to achieve. In the other situations where a person is allowed to bring an action in the name of another, anything recovered will benefit the party in whose name the action was brought and decree recovered.⁹⁵ The law is therefore clear in principle if not authority. Only a pursuer, who is expressly constituted as a procurator *in rem suam*, can sue in the name of the cedent. If the cedent becomes insolvent the right to recover will fall into the cedent's sequestration. Indeed, on analogy with the well-known case of *Redfearn v Sommervails*,⁹⁶ by allowing the decree to pass in the cedent's name, the assignee may be personally barred from recovering. As to whether the pursuer, who holds a procuratory *in rem suam*, can sue in his own name, the position is unclear. While the right of an assignee to sue in his own name has never been doubted, there are no cases where a transaction in the form of a mandate *in rem suam* has allowed the mandatory to sue in his own name. If the cedent becomes insolvent the right to recover will fall into the cedent's sequestration.

The issue has also arisen on the appointment of a receiver. The receiver has the power to ingather debts owed to the company in receivership.⁹⁷ However, in whose name should the receiver pursue for payment? His own?⁹⁸ The name of the company in receivership? Or the name of the creditor holding the floating charge? The courts have swayed between the first two alternatives, finally falling on the side of the second.⁹⁹ However, the basis for this view is not clear. A floating charge

litis contestatio: Its survival in the Medieval *ius commune* and Beyond' in M. Hoeflich (ed.) *Lex et Romanitas: Essays for Alan Watson* (2000), 73 at 80 f.

⁹⁴ *Brand & Co and WT Craig v Cummings* (1913) 30 Sh Ct Rep 26 at 28. (A case involving the right of an agent disburser to take a decree for expenses in his own name). Indeed, it is on this basis that the right of the so-called 'agent disburser' developed: the agent takes decree in his own name. The effect is to assign judicially the award of expenses to the agent: *Gordon v Davidson* (1865) 3 M 939; *Fleming v Love* (1839) 1 D 1097.

⁹⁵ For example, the right of a beneficiary to bring an action in the names of the trustees to vindicate trust property. It is accepted that any benefit enures to the trust, not directly to the beneficiaries.

⁹⁶ (1813) 1 Dow 50 HL, discussed in Chapter 5 below 'Assignatus', Part V.

⁹⁷ Insolvency Act 1986, s. 55 and Schedule 2; Companies Act 1985, s. 471(1)(f).

⁹⁸ *McPhail v Lothian Regional Council* 1981 SC 119 OH.

⁹⁹ As was held in *Taylor v Scott and Universal Newspapers Ltd* 1981 SC 408 OH, *Macphail v Cuninghame District Council* 1983 SC 246 and *Myles J Callaghan Ltd (in receivership) v Glasgow District Council* 1987 SC 171 OH all declining to follow *Lothian RC* above.

attaches to incorporeal moveables ‘as if’ it were a fixed security, i.e. an assignation in security.¹⁰⁰ Lord Prosser has suggested that the attachment cannot be exactly the same as an assignation in security; otherwise the receiver would be able to sue in his own name, which he cannot.¹⁰¹ However, this seems to confuse the receiver with the creditor. Surely if the attachment of a floating charge is equivalent to an assignation in security, the assignee must be the creditor who holds the floating charge. This creditor is quite separate from the receiver, although the receiver acts for his benefit. It seems, then, that the only person with a good title to sue is the creditor (though a receiver may collect payment as the creditor’s agent).

It is noteworthy that, when a right is assigned on which diligence has followed, the assignee cannot execute the diligence in the name of the cedent.¹⁰² If the cedent has applied for a warrant to use diligence, and providing execution has not begun, the diligence can be issued in the name of the assignee.¹⁰³

D. The (ir)relevance of ‘delectus personae’ to Assignment.

1. Rights and Liabilities

It is axiomatic that assignation is the conveyance whereby claims or rights of a creditor against a debtor can, on intimation of the assignation to the debtor by the assignee, be transferred without the consent of the debtor. Rights or claims are to be distinguished from obligations or liabilities. A person cannot escape his obligations without the consent of his creditor.¹⁰⁴ This much seems clear. Yet the so-called

¹⁰⁰ *Forth & Clyde Construction Ltd v Trinity Timber & Plywood Co* 1984 SC 1.

¹⁰¹ *Myles J Callaghan Ltd (in receivership) v Glasgow District Council* 1987 SC 171 OH at 181. Cf. *Fraser v Dunbar* (1839) 1 D 882; 6th June 1839 FC.

¹⁰² *Hay v Stewart* (1745) Mor 834 and 8123; *Elchies, Assignation* No 6; *Horning* No 3; *Kilkerran* 331; *Foggo and Galloway v Scot and Oliver* (1769) Mor 3693; *Hailes* 319 at 320 *per* Lord Pitfour.

¹⁰³ *Young v Buchanan* (1799) Mor 8137.

¹⁰⁴ A point recognised by McBryde, *Contract* para 12-65, n. 74: ‘Obviously if any debtor could assign a debt, without the consent of the creditor, to any person the debtor chose, there would be the end of commercial life as we know it’. This is preferable to his statement that, (*Contract* para 12-89): ‘The assignation may transfer rights and obligations...’. Cf. K.G.C. Reid and G.L. Gretton, *Conveyancing*, (3rd ed. 2004) para 22.02 quoted at n. 14 above. Surprisingly, it was suggested in the ‘Halliday Report’, *Report by the Working Party on Security over Moveable Property* (1986) at 9 that one of the

'classic cases' on the subject in Scotland constantly refer to the assignation of *contracts*, and the doctrine of *delectus personae*; the presence or absence of the latter being the decisive factor in the determination of whether a *contract* can be the object of assignation.¹⁰⁵

There are two points to be made. First, to speak of the assignation of *contracts* is inaccurate.¹⁰⁶ Contracts are, by definition, at least bilateral. They contain rights. But mutual contracts contain correlative obligations. To say that a *contract* is assignable necessarily admits that it is possible to alienate one's liabilities without the consent of the creditor.¹⁰⁷ Rights are the proper subjects of assignation. Secondly, reference to *delectus personae* contributes only confusion to the question of what can be assigned. It will be seen that almost all the references to *delectus personae* are actually instances of liabilities. These, *ex hypothesi*, are not transferable (without the consent of the creditor) anyway.

2. *Delectus Personae and Assignation of 'contracts'*

The transfer of a mutual contract¹⁰⁸ necessarily supposes the transfer of liabilities as well as rights;¹⁰⁹ and a paradigm assignation is a transfer without the consent of the debtor. But liabilities cannot be transferred without the consent of the creditor. Yet, on one reading of the authorities, Scots law appears to disregard this important rule. The textbook statements are based, essentially, on two cases: *Cole v*

problems with an assignation in security was that the assignee could become liable for the obligations of the cedent. That is not correct. For a better view, see H.L. MacQueen, 'Assignation' in *SME*, vol 15 (1995) para 858. Further discussion is found in 'Transfer of Contracts', Part II, H below.

¹⁰⁵ *Cole v Handyside* 1910 SC 68 at 73 *per* Lord Dunedin and the opinion of the Lord Ordinary. *Cole* was approved most recently in *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH and *Karl Construction Ltd v Palisade Properties plc* 2002 SC 270 OH.

¹⁰⁶ F. Terré, P. Simler and Y. Lequette, *Droit civil: les obligations*, (8th ed. 2002) para 1304.

¹⁰⁷ It is probably possible in Scots law to transfer a contract *in toto*. However, since this requires the consent of all the parties, this is not an 'assignation' in the strict sense of the term, see '*cession de contrat*' below.

¹⁰⁸ Gloag, *Contract*, (2nd ed. 1929), 416-422; McBryde, *Contract* para 12-50; Reid, *Property* para 600. See also D.M. Walker, *The Law of Contracts and Related Obligations in Scotland*, (3rd ed. 1995) para 29.23.

*Handyside*¹¹⁰ and *Anderson v Hamilton*.¹¹¹ The rubric in a third and oft-cited case, *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation*¹¹² contributes further to the confusion. The factual situations in the cases are almost identical. A enters into a mutual contract with C for the delivery of certain goods or provision of services. In *Cole* there was no performance by A; in *Anderson* and *Asphaltic Limestone*, A had partially performed. In all the cases, A then became insolvent. The question for decision in both cases was whether B, the trustee or insolvency administrator of the insolvent estate, could 'adopt' A's contract with C, tender performance and thereby become entitled to payment. In *Cole*, C was held bound to pay B. In *Anderson* the adoption came too late. In *Asphaltic Limestone*, the question was whether the insolvency administrator could adopt one contract but repudiate another. 'Adoption' is a difficult concept, but it is distinct from an assignation. Confusion arises because often the trustee will be an assignee of the *rights* (although a liquidator is not, since there is no vesting as a result of liquidation¹¹³). It is by 'adoption' that he performs the debtor's existing obligations and undertakes new liabilities. The right to 'adopt' is peculiar to trustees in sequestration¹¹⁴ and executors on death. There is no *assignation* of the obligations to deliver the goods, so reference to the assignation of *contracts* is inaccurate.¹¹⁵ The concept of adoption will be discussed in more detail below.

¹⁰⁹ J. Ghestin, 'La transmission des obligations en droit positif français' in *La transmission des obligations* (1980), 7-8: 'La cession de contrat synallagmatique contient nécessairement une cession de dettes', i.e. the transfer of an obligation *in toto* without it being discharged.

¹¹⁰ 1910 SC 68.

¹¹¹ (1875) 2 R 355. See, for example, W.M. Gloag, *The Law of Contract in Scotland* (1914), 458 ff; (2nd ed. 1929) at 416-422. Gloag's tripartite distinction at 416 is utterly confused. Though not infrequently cited, (e.g. it is adopted by T.B. Smith, *Short Commentary on the Law of Scotland* (1962), 785 ff.) none of those examples in his division can be the object of assignation. Indeed Gloag's suggested trichotomy directly contradicts his treatment of delegation at 258 (2nd edn, 1929). In a similar vein, see also D.M. Walker, *The Law of Contracts and Related Obligations in Scotland*, (3rd ed. 1995) para 29.28.

¹¹² 1907 SC 463.

¹¹³ Vesting in a liquidator, though uncommon, is possible: Insolvency Act 1986, s. 145; Titles to Land (Consolidation) (Scotland) Act 1868, s. 25.

¹¹⁴ Or his corporate equivalent, i.e. a liquidator, receiver or administrator.

¹¹⁵ Although the egregious terminology is widespread: see e.g. *Scottish Iron & Steel Co Ltd v Gillieaux & Collinet* (1913) 42 Sh Ct Rep 42; *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH; *Karl Construction Ltd v Palisade Properties Plc* 2002 SC 270 OH.

Asphaltic complicates matters by characterising the liability of the insolvent company to perform its obligations as a right to perform and thus claim the money. This is a fatal trap into which to fall. Simply formulating an obligation or liability positively, in terms of an entitlement to the pecuniary award payable on performance of the obligation, cannot be allowed to cloud the legal situation.

Whether the creditor is bound to accept performance from someone other than the debtor is a proper question of *delectus personae*. And it may be that the assignee of rights wants to perform the cedent's outstanding obligations, as in *Asphaltic*. The presence or absence of *delectus personae* will determine whether the creditor is bound to accept the performance. If there is *delectus personae*, the assignee cannot perform the cedent's obligations, even if he wants to; if there is no *delectus personae*, the assignee may perform if he wants to, but he is never bound to do so by virtue of the assignation.^{115a} What is not clear, however, is what most of this discussion has to do with the law of assignation. Indeed, Nienaber and Gretton have gone so far as to suggest that:

“One pessimistic view would be that *Cole* has reduced the Scots law of cession to a hopeless morass of confusion between assignation, delegation and sub-contracting, and the role of *delectus personae* in all three. But the essential principles should, notwithstanding *Cole*, be clear enough.”¹¹⁶

It is interesting to note that in English law, where references to the assignment of contracts were common, the House of Lords has now accepted that only *rights* arising out of a contract can be assigned.¹¹⁷

^{115a} Some historical antecedents to *Asphaltic Limetone* are: *Logan v Hamilton* (1627) Mor 9207; *Murdoch v Dick* (1673) Mor 9209; *Shearer v Cargill* (1686) Mor 9210; *Lord Lyon v Feuars of Balveny* (1672) Mor 5076; *Shaw v Forbes* (1687) Mor 4381. Not of these cases render the assignee liable for the cedent's obligations; but the assignee may be entitled to perform the cedent's obligations if the debtor will not otherwise pay.

¹¹⁶ P. Nienaber and G. Gretton, 'Cession/Assignment' in R. Zimmermann, D. Visser and K.G.C. Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004), 807.

¹¹⁷ *Pan Ocean Shipping Ltd v Creditcorp Ltd, the Trident Beauty* [1994] 1 WLR 161. Strangely, the Lord Ordinary in *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH suggested that the underlying reasoning of the House of Lords was inconsistent with the principles of Scots law.

3. What is *delectus personae*?

It is often said that the presence of *delectus personae* will bar assignation.¹¹⁸ *Delectus personae* is of two sorts: *delectus personae creditoris* and *delectus personae debitoris*. The former bars assignation of the right; the latter prevents the debtor sub-contracting. What, then, is *delectus personae*?¹¹⁹ It has been said that there is *delectus personae* where the parties to the contract selected each other on the basis of personal qualifications or suitability,¹²⁰ or where there is ‘deliberate choice as opposed to mere caprice’.¹²¹ In the first edition of his work on *Contract*, Gloag suggests the following:

“It is submitted that in contracts where the element of *delectus personae* consists in the fact that reciprocal obligations are undertaken on each side though not assignable by voluntary assignation admit of being adopted and carried out by the trustee in bankruptcy.”¹²²

Here, Gloag confounds the three concepts of assignation, sub-contracting and adoption and the respective role of *delectus personae* in each. Indeed, if *delectus personae* bars assignation, but *delectus personae* can consist in ‘mutual obligations

¹¹⁸ McBryde, *Contract* para 12-39. See also Reid, *Property* para 600; J.C. Carmont KC, ‘Delectus Personae’ in Lord Dunedin et al (eds) *Green’s Encyclopaedia of the Laws of Scotland*, (2nd ed. 1928) vol 5 para 1172 ff. This analysis has been employed by the House of Lords: *International Fibre Syndicate Ltd v Dawson* (1901) 3 F (HL) 32. Cf. P. Nienaber, ‘Cession’ in W.A. Joubert et al (eds) *The Law of South Africa*, 2nd edn, vol 2, Part II, (2003) para 38.

¹¹⁹ In the context of assignation, the formulation can be traced to Erskine III.v.2. Erskine’s *Institute* first appeared (posthumously) in 1773. Until the nineteenth century, however, the terminology is only found in leases cases: see e.g. Lord Monboddo in *Locheil’s Trs v Alexander, Duke of Gordon* (1772) Mor 15050; Hailes 472 at 472 and 475. *Atchison v Benny* (1748) Mor 10405 refers to ‘*electio personae*’ in the tenant of an urban dwelling. The earliest use of the term, ‘*delectus personae*’, traced by this writer, is in *Nairne v Freeburn* (1737) Mor 10403. Cf. W.C. Smith, ‘The Sources of the Law of Scotland’ (1904) 16 *JR* 375 at 387 who suggests that the term *delectus personae* was first invoked in an arbitration case, *Buchanan v Muirhead* (1799) Mor 14593 (which refers to ‘*dilectus personae*’), and that, ‘ever since nobody has been quite able to understand it’.

¹²⁰ W. Trotter, *The Law of Contract in Scotland* (1913), 269. There seems no reason why there cannot be *delectus personae* on only one side of the contract, thereby allowing sub-contracting by one party but not by the other. See *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 618E per Selikowitz J quoted below. This is preferable to the dicta of Lord McLaren in *Berlitz School of Languages v Duchêne* (1903) 6 F 181 at 185 – he states that *delectus personae* bars the assignation of a contract; *a fortiori*, there can be no assignation of any particular rights under that contract. This is incorrect.

¹²¹ Gloag, *Contract*, (2nd ed. 1929), 416. Cf. F. Valleur, *L’Intuitus personae dans les contrats* (Paris, 1938), 7.

¹²² *Contract* (1914), 466.

undertaken on each side', then, since this is the essence of a *contract*, on Gloag's own argument, contracts cannot be assignable.¹²³ In the second edition of his work, Gloag adopts an oft-cited dictum of Bramwell B:¹²⁴

“Where a contract is made in which the personality of the contracting party is or may be of importance, as a contract with a man to write a book, or the like, *or where there might be a set-off*, no other person can interpose and *adopt* the contract.”¹²⁵

There are a number of problems with this explanation. We will deal with the most problematic.¹²⁶ If the possibility of set-off is fundamental to *delectus personae*, then there must be *delectus personae* in every contractual relationship where the possibility of set-off has not been excluded. But the most commonly assigned right is the right to payment arising out of a contract. It is incontrovertible that such *rights* are transferable. Since the debtor may plead compensation against the assignee (*assignatus utitur jure auctoris*), a potential plea of compensation is entirely irrelevant to both assignation and *delectus personae*.¹²⁷

Where there is *delectus personae* in a contract, the chosen person is not usually debarred (subject to some special cases addressed below) from assigning his *right* to payment. A person cannot transfer his obligation to perform without the consent of

¹²³ See too the title on '*Delectus personae*' by J.C. Carmont KC in Lord Dunedin et al (eds) *The Laws of Scotland*, vol 5, (2nd ed. 1928), especially at para 1189.

¹²⁴ At 416 and again at 418.

¹²⁵ *Boulton v Jones* (1857) 2 H & N 564; 157 ER 232 (emphasis added). Admittedly, Gloag later rightly criticises (at 422) the Second Division for their approval of *Boulton* in *Grierson, Oldham & Co v Forbes, Maxwell & Co* (1895) 22 R 812. *Boulton* was cited by Sheriff Lees in *Scottish Iron & Steel Co Ltd v Gillieaux & Collinet* (1913) 30 Sh Ct Rep 42 at 45. That judgment preceded the publication of the first edition of Gloag on *Contract*. See too the criticism in Bell, *Principles*, (10th ed. by W Guthrie, 1899) § 1459, n (h).

¹²⁶ The other issues being the relative state of English law when the statement was made, the reference to 'adoption', and that *delectus personae* is not a term of English law; it is not mentioned in *Boulton* or, as far as the writer is aware, any other English case. *Boulton* is really an authority for the proposition that an offer to contract addressed to X cannot be accepted by Y: see McBryde, *Contract* para 6-110; cf. *Hersch v Nel* 1948 (3) SA 686 at 691 (A) per Schreiner JA. For English law see generally: Sir Guenter Treitel, 'Assignment' in P. Birks (ed.) *English Private Law* (2000), vol II, para 8. 343.

¹²⁷ Gloag's passage at p. 418 contradicts his treatment of the *assignatus* rule at 429.

the other party because it is a liability. This prohibition has nothing to do with the fact that he is especially skilled.¹²⁸

“The restriction on the cession of rights in a contract because it involves *delectus personae* is tested with reference to the nature of the debtor’s obligation vis-à-vis the cedent, and not the nature of the cedent’s obligation vis-à-vis the debtor¹²⁹ ... In this case the nature of the obligation which allegedly rests on the applicant is the obligation to make payment. It is not affected by the change in the identity of the creditor.”¹³⁰

An employee in a contract of employment is a useful example. Such a person may or may not be considered as skilled. The point is not relevant to the assignability of the employee’s wages. They are assignable: they are simple money claims and, consequently, arrestable (to the extent that they are not alimentary).¹³¹ In the case of a contract for professional services where there will usually be *delectus personae* vis-à-vis the contractor, the contractor’s fees are assignable as well as arrestable.¹³² As the example of the contract of employment shows, however, there may be exceptions to this principle: e.g. the right of an employer to the service of an employee is said to be a right coloured by *delectus personae* and as such unassignable (remembering always that ‘assignable’ means transfer without the consent of the debtor).¹³³ Certain

¹²⁸ Cf. S. Woolman and J. Lake, *Contract*, (3rd ed. 2001) para 11.4 and H. Weber, *Einführung in das schottische Recht* (1978), 81. Both works conflate the concept of transfer of rights (which does not require the debtor’s consent) and the transfer of contracts (which requires the consent of the creditor in the liability to be assigned).

¹²⁹ See *Densam (Pty) Ltd v Cywilnat (Pty) Ltd* 1991 (1) SA 100 (A) at 112.

¹³⁰ *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 618E per Selikowitz J. See also T. Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) para 186, at 268: ‘Il est donc démontré par tout ce qui précède, que les droits de créance, même lorsque leur création légale ou conventionnelle a été certainement déterminée par la considération de la personne, sont pleinement cessibles comme les autres. Comment donc se fait-il qu’on lise souvent dans les auteurs et dans les arrêts qu’un droit constitué *intuitu personae* ne peut être cédé? C’est uniquement par l’effet d’une équivoque qui s’est produite quant à la manière d’envisager le droit. On a confondu l’élément passif avec l’élément actif, c’est-à-dire la dette avec la créance.’

¹³¹ Debtors (Scotland) Act 1987, Part III, ss 47-50 and sch 2. But, unusually, if the employee becomes bankrupt, his wages do not vest in the trustee: Bankruptcy (Scotland) Act 1986, s. 32(1) although the trustee can apply (s. 32(2)) to the sheriff for an order that the bankrupt pay over income that exceeds the alimentary level; see too *Brown’s Tr v Brown* 1995 SLT (Sh Ct) 2.

¹³² J. Graham Stewart, *Diligence* (1898), 100.

¹³³ The subject is large and cannot be discussed here. It is usually examined only in the context of employment law with little consideration of the basic juridical nature of the transfer. Often, where a business is transferred, the transferee may wish to enforce restrictive covenants against former

rights under a lease are also problematic.¹³⁴ Yet, neither of these examples are paradigm situations of the assignation of a money claim. Nevertheless, this is not to say *delectus personae* is meaningless. In particular, when used in its proper sense, it will be relevant in two cases: (i) sometimes *delectus personae* will prevent claims from being assigned (*delectus personae creditoris*); (ii) it will determine whether a debtor can sub-contract an obligation (*delectus personae debitoris*).

4. When is *delectus personae* relevant?

There are certain claims which are inherently non-transferable. Numerous statutory provisions state that a purported assignation of the claim will be void.¹³⁵ This is an express prohibition. The so-called *pactum de non cedendo* is commonly expressed in contract. These prohibitions will be discussed in detail below.¹³⁶ Alternatively, however, it is possible to view these prohibitions from the point of view of the right assigned: there is *delectus personae creditoris* and, as result, the right is non-transferable. Conversely, however, one can expressly override what the law would imply, i.e. one can contract out of *delectus personae*.¹³⁷ At common law, certain rights are deemed to be unassignable because the debtor has a recognised interest in retaining a particular creditor; other rights are prohibited by statute. The express agreement of the parties cannot override legislative provisions rendering a claim unassignable.

There are important implications for the *delectus personae* rule if the holder of the right becomes bankrupt. A trustee in sequestration is a judicial assignee.

employees: *Berlitz School of Languages v Duchene* (1903) 6 F 181; *Fraser & Son v Renwick* 1906 14 SLT 443. Cf. V. Bertrand, *Transfert des contrats de travail et cession d'entreprise* (1988).

¹³⁴ These cannot be considered here. Some long leases are deemed to be assignable, while shorter leases are held to be unassignable. The usual provision is that the lease is assignable with the consent of the landlord, which shall not be unreasonably withheld. See generally A. McAllister, *Scottish Law of Leases* (3rd ed. 2002), 151.

¹³⁵ See McBryde, *Contract* para 12-54.

¹³⁶ See chapter 6, Part II, A, 2 below.

¹³⁷ Cf. S. Woolman and J. Lake, *Contract*, (3rd ed. 2001) para 11.4: 'Most contractual rights are assignable when consent is given'. Almost all contractual rights are assignable where consent is given.

Arguably, therefore, such a non-assignable right cannot fall into the right holder's sequestration.¹³⁸ *A fortiori*, it will not be arrestable. What claims, then, cannot be assigned on the basis that they are personal to the holder? It has been held in South Africa that the entitlement of the State to payments of tax is personal to the Revenue and cannot be ceded.¹³⁹ However, in Scotland, it seems to be the case that the Revenue can transfer claims owed to it. Moreover, the statutory preference enjoyed by the Revenue seems to be accessory to their claim; consequently, it can be exercised by the assignee.¹⁴⁰ Social Security claims cannot be assigned. It has not been decided whether a right held under a contract by virtue of a *jus quaesitum tertio* can be assigned, but it is thought that where that right is a right to payment of a sum of money, it can be assigned. Intimation to the primary debtor should be sufficient. It has been held that a right accorded by statute is not assignable if the statute does not expressly authorise assignment;¹⁴¹ but these authorities cannot be taken to have established a general principle. Whether a right created by statute is assignable will depend on the particular legislative provisions and the intention of the legislature. While there is a presumption that money claims to payment are assignable without the debtor's consent, it has been suggested that obligations *ad facta praestanda*, are owed only to a particular creditor and, to that extent, the debtor is not required to perform to an assignee of the creditor:

Rights arising out of an illegal contract and rights deemed unassignable by statute are perhaps the only exceptions.

¹³⁸ *Mulvey v Secretary of State for Social Security* 1996 SC 8 aff'd 1997 SC (HL) 105. But see discussion in chapter 6, Part V, C.

¹³⁹ *Namex (Pty) Ltd v Commissioner for Inland Revenue* 1922 (2) SA 761 (C). It could be argued that the change of creditor places a greater obligation on the debtor, and any right on the part of the Revenue is to be construed restrictively: Cf. Lord President Clyde in *Ayrshire Pullman Motor Services v Commissioners of Inland Revenue* (1929) 14 TC 754: 'No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest shovel in his stores'. *A fortiori*, why should an assignee be able to enforce a preference which could be seen as personal to the Crown?

¹⁴⁰ *Villaswan Ltd v Sheraton Caltrust (Blythswood) Ltd* 1999 SCLR 199 OH discussed by R.G. Anderson and S. Eden, 'Transfer of Preferences on Payment' (2003) 7 *Edin LR* 398. The Crown preference for Revenue arrears has been abolished: Enterprise Act 2002, s. 251. The point may still be relevant: see e.g. *Jackson and Long, Noters* 2004 SC 474 OH. Some of the Roman-Dutch writers treat other ancillary benefits as accessory, e.g. Voet, *Commentarius* 11.4.12 (insolvency preference of funeral expenses). Cf. *Hood v Pedden* (1829) 8 S 208.

¹⁴¹ *MacKnight, Petr* (1875) 2 R 667 at 668 *per* Lord President Inglis; *Goodall v McInnes Shaw* 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary).

“It is the same to me, whether I pay money to my creditor or to his mandatory; but is not the same to me, whether I perform personal service to my superior or to his mandatory. If I obliged myself to lend my horse to John, there is a *delectus personae*, and I am not obliged to lend it to another.”¹⁴²

The employer’s right to service from an employee is perhaps the paradigm example of this doctrine.¹⁴³ However, like statutory rights, whether a particular obligation *ad factum praestandum* is assignable by the creditor will depend on the obligation. Some are assignable, others are not.

II. Assignment Distinguished from other Legal Institutions.

A. Succession: Universal and Singular; Transfer and Transmission.

The *inter vivos* transfer of claims by assignment is a species of singular succession. This can be contrasted with the concept of universal succession. This was held to occur on death, with the heir succeeding to the universality of the deceased’s assets and liabilities. Stair describes the difference between singular and universal succession thus:

“Heirs in law are called universal successors, *quia succedunt in universum jus quod defunctus habuit*, they do wholly represent the defunct, and are as one person with him, and so they do both succeed to him *activè*, in all the rights belonging to him, and *passivè*, in all the obligations and debts due by him; and when they do not orderly enter, they become successors *passivè*, liable to the defunct’s debt, but not heirs *activè*, having power to claim his right, till they be entered according to law: other successors are called singular successors, as assignees and purchasers, but heirs only are universal successors.”¹⁴⁴

That universal succession can render the successor actively liable for debts is a major difference from singular succession. The idea of universal succession is complicated.¹⁴⁵ It has not been properly studied in Scotland. Indeed, the succession

¹⁴² Kames, *Elucidations*, Art. 2, at 8

¹⁴³ *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1026 *per* Lord Atkin; *Ross v McFarlane* (1894) 21 R 396.

¹⁴⁴ Stair III.iv.23. See too Erskine II.vii.1.

¹⁴⁵ Cf. Reid, *Property* para 598 and T. Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) vol 1, para 42 ff, ‘De la Transmissibilité’.

of liabilities is not as complete as it might sound. For example, since Justinian's time, the heir can opt to limit his liability to the extent of the deceased's assets. There is much to be said for the view that on death there is neither a 'succession' of assets nor a cessation of legal personality. However, the point cannot be discussed here. In modern law, the concept has been developed beyond the limits envisaged by Stair; it being regularly invoked in business transfers. There is considerable authority for the proposition that where there is a transfer of all the assets of a business which continues trading under the same name, the transferee of the assets becomes jointly and severally liable for the debts of the transferor.¹⁴⁶ This principle is particularly important in any nationalisation process. It has been observed in the House of Lords that the concept of universal succession is a concept Scots law shares with other civil law countries; although it is unknown to English law.¹⁴⁷ However, in the last hundred years or so, the Court of Session has been more reluctant to admit the principle.¹⁴⁸ For present purposes it is sufficient to note that the *inter vivos* voluntary assignation of claims is a form of singular succession. Such an assignation is to be distinguished from a 'general' assignation which may, in fact, be a form of universal succession. In the Scottish sources, this conceptual distinction is sometimes expressed in a nomenclature which distinguishes transfer (singular succession) from transmission (universal succession).¹⁴⁹

¹⁴⁶ *McKeand v Laird* (1861) 23 D 846 at 855 *per* Lord Justice-Clerk Inglis; *Miller v Thorburn* (1861) 23 D 359; *Thomson & Balfour v Boag & Son* 1936 SC 2 at 10 *per* Lord President Normand; *Miller v McLeod* 1973 SC 172; *Ross, Harper & Murphey v Banks* 2000 SC 500 OH.

¹⁴⁷ *Metliss v National Bank of Greece and Athens* [1958] AC 509 at 530 *per* Lord Keith of Avonholm quoting Stair III.iv.23. For the comparative history, see generally, L. Sedatis, 'Universalsukzession' in *HRG* vol. 5 (1998), 490. Cf. the old German law under § 419 *BGB* which was repealed by the *InsO* in 1999. The corresponding Austrian provision, § 1409 *ABGB* remains in force.

¹⁴⁸ *Smith's Trs v AD Smith* (1899) 6 SLT 263 OH at 267; *Ocra (Isle of Man) Ltd v Anite Scotland Ltd* 2003 SLT 1232 OH.

¹⁴⁹ Cf. *Riley v Ellis* 1910 SC 934. As for Lord Dunedin's dissent in *Riley v Ellis*, see G.L. Gretton, *SME*, vol 8, 'Diligence' para 261. In German law, an *inter vivos* transfer, i.e. singular succession, is seen as just one part of the general concept of succession which may be universal as well as singular: see K.W. Nörr, R. Scheyhing and W. Pöggeler, *Sukzessionen*, (2nd ed. 1999). Cf. T. Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891), 70 ff.

B. Novation ¹⁵⁰1. *General*

B owes obligation *xy* to his creditor A. It is agreed, however, that it would be mutually preferable for B to owe A obligation *yz*. A discharges B from his obligation *x*, while B agrees to undertake to A obligation *z*. There has been the extinction of one obligation on the creation of another. There are still only two parties. The only difference in the relationship between the parties is the content of the obligation owed by the debtor to the creditor.¹⁵¹ A new obligation has been created with the consent of both parties. Of first importance, however, is the fact that there has been a discharge of the antecedent obligation.¹⁵² If there is no intention to discharge the old obligation then there is no novation but only corroboration, i.e. the creation of an additional obligation.¹⁵³ Importantly, where there is a discharge of the principal obligation, any accessory rights will also be discharged.¹⁵⁴ This incident of novation may considerably limit the practical application of the doctrine.¹⁵⁵ Where such a substitution of obligations occurs in a continuing contractual relationship between two parties, there is said to be novation:

¹⁵⁰ Or 'innovation': see the title in Morison's Dictionary. Cf. J. Chisolm (ed.) *Green's Encyclopaedia of Scots Law*, (2nd ed. 1909), vol 8, 560, s.v., 'Novation'. We will be concerned only with 'voluntary' novation. The Romans contrasted this with *novatio necessaria*, which occurred on *litis contestatio*. This will be ignored here on the grounds that this is not really a true form of novation at all: see *Coutts' Tr. v Coutts* 1998 SC 798; I.G. Farlam and H.W. Hathaway, *Contract: Cases, Materials and Commentary*, (2nd ed. 1988) at 733; L.R. Caney, *A Treatise on the Law of Novation*, (2nd ed. 1973) 66-67.

¹⁵¹ Cf. *De Montfert Insurance Co v Lafferty* 1997 SC 335 OH; *Baxter Clark & Paul v Tulloch Construction Group Ltd* 1999 GWD 37-1789.

¹⁵² Erskine, III.iv.22; Bankton I, 495, 37; *Blyth & Blyth v Carillion Construction Ltd* 2002 SLT 961 OH. Cf. F. Terré, P. Simler and Y. Lequette, *Droit civil: les obligations*, (8th ed. 2002) at para 1417: 'La spécificité de la novation réside dans son effet extinctif, plus précisément dans le lien indissociable établi entre l'extinction de l'obligation primitive et la création de la nouvelle obligation'. For the history, see R. Feenstra, 'L'Effet Extinctif de la Novation' (1961) 29 *TvR* 397 at 414.

¹⁵³ Ulpian D. 46, 2, 1, 1; *h.t.* 2; Stair I.xviii.8; Gloag and Irvine, *Rights in Security*, 653; *MRS Distribution Ltd v DS Smith (UK) Ltd* 2004 SLT 631 OH at 635.

¹⁵⁴ Erskine, III.iv.22; Bankton, I, 495, 37. Cf. J-L Boudouin, *Les obligations*, (5th ed. 1999) para 881; Louisiana Civil Code Art. 1884.

¹⁵⁵ P. van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *La Transmission des obligations* (1980) at 84.

“Obligations are also dissolved by novation or innovation, which, in the strict acceptation of the word, denoted the change of one obligation to another in such manner that both debtor and creditor continue the same.”¹⁵⁶

Novation is a method of extinction of obligations between the same debtor and creditor. It is different from assignation. An assignation requires the continued existence of the claim.^{156a}

Where there is a change of debtor with the creditor’s consent there is said to be a delegation:

“Innovation is the turning of one obligation into another; and if it be a third person becoming debtor for relief of the former debtor; it is called Delegation.”¹⁵⁷

There is seldom any distinction made between novation and delegation. It is common for the terms to be used interchangeably. Since however there is the tendency to confuse, in particular, sub-contracting and delegation, it is important to be clear that delegation is a method of extinction of obligations where three parties are involved. Delegation is a species of novation. For present purposes, however, it is delegation that is the more relevant of the two.

2. Substitution of Liabilities: Delegation

‘Delegation’ has more than one meaning. In everyday usage ‘to delegate’ is to entrust the performance of a responsibility to another e.g. an ability to delegate is

¹⁵⁶ Erskine III.iv.22.

^{156a} Compare the bizarre, if not nonsensical, passage in I.M. Fletcher and R. Roxburgh, *Greene and Fletcher: the Law and Practice of Receivership in Scotland*, (3rd ed. 2005) para 4. 07: ‘A deed of novation is the deed under which a contracting company in receivership, subject always to the consent of the employer as *delectus persona* is involved in such contracts, assigns its rights and obligations under a building contract to another contractor who takes over the role of contractor and completes the work’. Novation can only occur by consent, so references to *delectus personae* are meaningless. If what is happening is novation, why is there a reference to ‘assign’?

¹⁵⁷ Stair I.xviii.8; see also Mackenzie *Inst.*III.iv.8; Erskine III.iv.22; Bankton I, 486, 5; Bell *Prin* § 576; Pothier, *Traité des Obligations* (1761) §§ 584 and 600 in M Bugnet (ed.) *Oeuvres de Pothier* (Paris, 1861) vol 2, at 319; Voet, *Commentarius ad Pandectas* 46.2.2 (trans. Gane, *The Selective Voet, Being the Commentary on the Pandects* vol 7, (1957), 73); Ulpian D. 46, 2, 11, *h.t.* 13.

an attribute of a competent manager.¹⁵⁸ In Scots law, however, delegation is a term of art. Delegation is the method whereby a *liability* owed by B to A, can be substituted for a liability undertaken by C. It is a fundamental principle that a debtor cannot liberate himself from his obligations without his creditor's consent. Crucially, therefore, B's liability to A can only be substituted for C's, if A consents to B's discharge and to C becoming liable in B's place.¹⁵⁹ Delegation therefore effects a change of debtor. If the creditor does not obtain a right against the new debtor, there cannot be delegation.¹⁶⁰ While it is convenient to speak of the 'transfer' of liabilities as the converse of the assignation of rights,¹⁶¹ delegation is Scots law *transfers* nothing. Although the introduction of the new debtor may be at the instance of the original debtor,¹⁶² juristically speaking there is no 'transfer' of the obligation. Rather B is discharged on the constitution of an obligation between A and C (perfect delegation); alternatively, A acquires C as a new debtor without relinquishing his rights against B (imperfect delegation).¹⁶³ There are no Scottish cases where A discharges B but the obligation remains in force, to be performed by C. As will be

¹⁵⁸ It is in this sense that the prohibition *delegata potestas non potest delegari* applies in public law. In private law it is also relevant to e.g. a mandatory. He cannot give to another the authority conferred upon him by the mandant. Compare the issue of non-delegable duties in delict: see e.g. W. Stewart, *Reparation* (2000) para 3-3 ff.

¹⁵⁹ Cf. § 415 BGB: '...so hängt ihre Wirksamkeit von der Genehmigung des Gläubigers ab...'. In German law, although B is discharged from his liability, the debt itself is not discharged; rather, there is a genuine transfer of the debt (*Schuldübernahme*). The German code contains no provisions on novation. Rather the applicable principles are found under the guise of the *Anweisung* which developed from the principle of delegation: see Part C, below. But note that some accessory rights are still extinguished: § 418 BGB.

¹⁶⁰ *Pollock & Co v Murray and Spence* (1863) 2 M 14 at 16 *per* Lord President McNeill. Cf. *Calders Ltd v Inland Revenue* 1944 SC 433 where the First Division held that although there was an intention to delegate and a new debtor, there was no discharge of the debt as this was contrary to the intention of the parties. Lord Mackenzie was alone in understanding the nature and effect of delegation: see p. 444. See too *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 at 635 K-L.

¹⁶¹ As Bankton, I, 495, 37, does.

¹⁶² See Pothier, *Traité des obligations* (1761) § 583 and § 414 BGB. Cf. N. Whitty, 'Indirect Enrichment in Scots Law' 1994 JR 200 and 239 at 261, n. 45.

¹⁶³ For this reason there is no equivalent of the rule *assignatus utitur jure auctoris* in a case of delegation. See e.g. the arguments for the pursuer in *Hamilton v Earl of Kinghorn* (1674) Mor 2602. This causes some problems in French law which requires a *justa causa* for a binding obligation. However, where the new debtor is delegated by the original debtor, the delegated party can raise those exceptions (although not compensation) which the original party could have raised against the creditor, see § 417 I BGB. It should be remembered that German law does recognise the transfer of an obligation. Scots law is somewhere between the French and the German: our law of proper delegation

discussed below, however, there seems no reason in principle why this should not be allowed. Further, there seems no reason in principle why the creditor cannot discharge the original debtor conditionally, e.g. subject to a resolutive condition should the new debtor fail to pay.¹⁶⁴

To reiterate, then, delegation can only occur with the creditor's consent. At root is the solvency of the debtor. Insolvency is endemic. If the debtor were allowed to transfer his liabilities to another, without the consent of the creditor, the creditor would be forced to bear the risk of the transferee's insolvency.¹⁶⁵ However, while this rationale is appealing, the rule cannot be based purely on considerations of solvency; after all, a delict creditor has no choice but to accept his debtor, whether solvent or not. So, while in contract a creditor can carefully select solvent debtors, in delict or enrichment, the creditor may be stuck with a quite impecunious debtor. Nevertheless, it is undoubtedly the law that a debtor cannot alienate his obligations without the consent of his creditor:

“Generally, all obligations are intransmissible¹⁶⁶ upon either party directly without the consent of the other party, which is clear upon the part of the debtor, who cannot, without the consent of the creditor, liberate himself and transmit his obligation upon another, though with the creditor's consent he may, by delegation.”¹⁶⁷

The Scottish sources are not without their problems. Gloag apparently recognised the proper usage of delegation, quoting verbatim the above passage from

is like the French; but Scots law also recognises the *Anweisung*. Cf. PECL Art. 12: 102 (4). For the Roman law, see W. Buckland, *A Textbook of Roman law from Augustus to Justinian* (1921), 566.

¹⁶⁴ This is essentially the position in Scots law on payment by cheque, for which see n. 195 below.

¹⁶⁵ Cf. Gloag, *Contract*, (2nd ed. 1929), 416: ‘*Prima facie*, there is always *delectus personae* in the choice of a debtor’. It must be remembered that Gloag's treatment of this area of the law is not coherent and must be treated with caution.

¹⁶⁶ I.e. *inter vivos*.

¹⁶⁷ Stair III.i.2; See also Erskine III.iv.22; Bell *Principles* § 576; Voet, *Commentarius ad Pandectas* (trans Gane *The Selective Voet*, vol 7, at 83) 46, 2, 11; Ulpian D. 46, 2, 11. Cf. P. Gide, *Etudes sur la novation et le transport des créances en droit romain* (1879) at 436: ‘Il existe, en effet, une différence profonde entre le transfert de la créance et le transfert de la dette: si le changement de créancier est à peu indifférent au débiteur, on ne peut pas dire que, à l'inverse, le changement de débiteur soit indifférent au créancier, car il se peut que le nouveau débiteur soit moins solvable que l'ancien. Ce changement ne peut s'opérer par une simple convention entre l'ancien débiteur et le nouveau; il y faut encore le consentement d'une troisième personne, le créancier, en sorte que tout transfert de dette est, de sa nature, une opération de trios acteurs, c'est-à-dire une délégation’.

Stair.¹⁶⁸ However he conflates the concept with sub-contracting and admits of the assignation of *contracts*, i.e. the transfer not only of rights without the consent of the debtor, but also *liabilities* without the consent of the creditor.¹⁶⁹ McBryde accepts that delegation can mean sub-contracting as well as the 'transfer' of an obligation where a new debtor is substituted for the old with the consent of the creditor.¹⁷⁰ With respect, this is as unhelpful as it is infelicitous. One of the great problems in this area of the law is a lack of conceptual clarity. That a layman may mean sub-contracting though he labels it 'delegation' should not be allowed to confuse matters of principle.¹⁷¹ The distinguished former Chief Justice of South Africa lucidly articulates the distinction:

"There is no doubt that, generally speaking, a contractual obligation cannot effectively be transferred from the debtor to a third person by agreement unless the creditor consents thereto and agrees to accept the third person as his debtor in substitution for the original debtor. Such a transfer, therefore, involves the concurrence of the three parties concerned and is properly termed a 'delegation', which is a species of novation. Although the term 'cession' is sometimes used with reference to a transfer of obligations, particularly in cases where it is sought to substitute some third person for a party under a contract containing reciprocal rights and obligations, this is strictly a misnomer in that 'ordinarily rights can be ceded but obligations cannot'."¹⁷²

¹⁶⁸ Gloag, *Contract*, 258.

¹⁶⁹ His paragraph at 418 headed 'Assignation and delegation of work' is particularly unintelligible. He is hopelessly confused as to the distinctions between assignation of rights, delegation of liabilities and sub-contracting.

¹⁷⁰ McBryde, *Contract* para 12-14. In any event, delegation is a method of extinguishing obligations, not transferring them. Admittedly, there seems no reason why transfer of obligations, providing always that the creditor consents, should not be allowed.

¹⁷¹ Indeed McBryde, para 12-14, concedes, in footnote 24, that his usage has led to confusion, noting the disapproval of the treatment of delegation in the first edition of his work by Lord Justice-Clerk Ross in *W. J. Harte Construction Ltd v Scottish Homes* 1992 SC 99 at 111. Only Lord Murray in *Harte Construction* seems to have had a clear view of the distinction between sub-contracting and novation/delegation. See also the references to 'delegation' in *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH; sub-contracting is what is meant. Cf. E. Allan Farnsworth, *Farnsworth on Contracts*, (2nd ed. 1998; with Supplement 2000) § 11.1: he describes 'delegation' as, 'an obligor's empowering of another to perform the obligor's duty is known as a *delegation* of the performance of the duty. By a delegation, the obligor as *delegating party* (B) empowers a *delegate* (C) to perform a duty that the delegating party owes to the obligee (A)'. This is a reference to sub-contracting not *delegatio*. Cf. the opinion of Pound J in *Langel v Betz* 250 NY 159 (1929).

¹⁷² *Froman v Robertson* 1971 (1) SA 115 (A) at 122 *per* Corbett AJA (references omitted). See also *Dage Properties (Pty) Ltd v General Chemical Corporation Ltd* 1973 (1) SA 163 (A); *Milner v Union Dominions Corporation (SA) Ltd* 1959 (3) SA 674 (C) at 676F *per* Watermeyer J.

3. *Burdens of Proof and Business Transfers*

In practice, there are likely to be two situations where a party will seek to argue that a delegation has occurred. The first is the classic case of a *debtor* seeking to argue that he has been discharged. In this case it will be difficult to argue that the discharge was implicit. Normally, the intervention of the new debtor will have been at the behest of the original. The delegation will only have occurred because the original debtor wants to be discharged by the creditor (perfect delegation). The second case is where the *creditor* is seeking to argue that there has been a 'delegation' (imperfect delegation). This most commonly occurs on business transfers,¹⁷³ or between the creditors of a partnership and a retiring partner for pre-retirement debts.¹⁷⁴ For example, A Ltd has a contract to provide services to Origins Co. The entire property and undertaking of the Origins Co is sold as a going concern to New Co. For the services rendered by A Ltd to Origins Co, the latter had an obligation to pay. After the transfer, the services are rendered to New Co. New Co accepts performance. Is New Co liable in contract to A Ltd? Are the terms of the contract the same? Here the pursuer will be A Ltd. A Ltd will seek to argue that New Co has been 'delegated' and is now liable for the contractual obligations of Origin Co. There is usually been no intention on the part of A Ltd to discharge Origin Co. Indeed, Origins Co's liabilities are rarely a live issue: by the time the dispute occurs, Origins Co may no longer exist. The question is whether A Ltd now has an *extra*, rather than a *substitute*, debtor.

When can consent to a delegation be implied? Some sources suggest that the consent of the creditor to discharge the debtor in a case of perfect delegation may be readily implied.¹⁷⁵ So Stair tells us that novation is 'ordinarily inferred' where a

¹⁷³ *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 at 636D-E per Lord Drummond Young (Ordinary).

¹⁷⁴ See generally Anon, 'Partnership Liability Questions' (1925) 41 *Scottish Law Review* 65, 149 and 184.

¹⁷⁵ *Dunlop's Tr v McKechnie* (1845) 7 D 494 approved in *Campbell v Cruikshank* (1845) 7 D 548; *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631. Cf. *Code Civil*, Arts 1273 and 1275; *Code*

posterior security bears ‘in satisfaction of the former obligation’ or where a posterior bond bears to be ‘in full satisfaction of the sum for which the former was granted’, though there be no express reference to discharge, novation or the former security.¹⁷⁶ Hume states that ‘We admit of evidence, if in itself clear and satisfactory,¹⁷⁷ that such was truly the purpose of the parties – to innovate the claim of debt, though there be no explicit clause of discharge on the face of the new voucher; but the purpose appears only in the whole circumstances of the transaction and of the situation of the conduct of the parties’.¹⁷⁸ And, further, that ‘In general and ordinarily it may, perhaps, be said that novation is to be inferred from redelivery of the original document of debt to the original party debtor’.¹⁷⁹

The most recent case in Scotland distinguished between *expromissio* and *adpromissio*.¹⁸⁰ These terms are equivalent to perfect delegation and imperfect delegation respectively. The court readily inferred the consent of the new debtor (New Co) to be liable to the creditors of the old debtor (Origin Co). Hitherto, the issue of implication has been whether there was a discharge. In *MRS Distribution*¹⁸¹ what was implied was not whether there had been a discharge of the original debtor, but whether the New Co had undertaken the debtor’s contractual obligations by mere fact of accepting goods and paying for them. The Lord Ordinary held that New Co

Civil du Québec, Art. 1661; Louisiana Civil Code, Arts 1880-2; *Schweizerisches Obligationenrecht*, Art. 116 (1).

¹⁷⁶ Stair I.xviii.8 citing *Chisolm v Gordon* (1632) Mor 16472 and *Lawson v Scot of Whiteslade* (1633) Mor 11519 respectively. In an attempt to clarify the opinions of the classical jurists, Justinian determined by statute that the intention to novate had to be explicit: *Inst.* 3.29.3a, for which see D Daube, ‘Novation of Obligations giving a bonae fidei Iudicium’ (1948) 66 *ZSS (RA)* 91; R. Feenstra, ‘L’Effet Extinctif de la Novation’ (1961) 21 *TvR* 397 and A. Watson, ‘D.12.1.32 and Delegatio’ (1966) *TvR* 175, partly reproduced in A. Watson, *Studies in Roman Private Law* (1991), 219. Like Stair, Voet also departed from this rule: *Commentarius* 46.2.3. Cf. *Heritable Securities Investment Association Ltd v Wingates* (1891) 29 *SLR* 904 at 907 *per* Lord Wellwood (Ordinary) and Anon, ‘Partnership Liability Questions’ (1925) 41 *Scottish Law Review* 65 at 71.

¹⁷⁷ Cf. *Fox v Anderson* (1849) 11 D 1194 at 1197 *per* Lord Fullerton: ‘clear evidence’ is required; *Pollock & Co v Murray and Spence* (1863) 2 M 14 at 16 *per* Lord President McNeill: ‘I think, in a case where delegation is pleaded, that it is necessary to make a very clear case’.

¹⁷⁸ *Lectures*, vol. III, 61.

¹⁷⁹ *Ibid.*

¹⁸⁰ *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 OH.

¹⁸¹ *Ibid.*

become bound to perform Origin Co's contractual obligations on the same terms that Origin Co was bound to perform.

Where the new debtor comes in as an additional debtor (*adpromissor*), the analogy here is closer to caution than novation. Like imperfect delegation, the creditor has an additional debtor. There is no discharge of the original obligation. Here, it is the creditor who is seeking to argue that he has a new debtor by virtue of an agreement between Origin Co and New Co, to which the creditors of Origin Co were not a party.¹⁸² In this type of case, the creditors often seek to argue that there has been a universal succession of rights and obligations.¹⁸³ As far as delegation is concerned, however, there is no obvious need for a presumption in this case.¹⁸⁴ Difficulty arises on the insolvency of the new firm or business and the creditors seek to hold the original debtor liable. It is in this case that the categorisation of the new debtor as an *expromissor* or *adpromissor* will become important. If he is an *expromissor*, the old debtor will have been discharged; if an *adpromissor*, the old debtor will remain liable. In a partnership case, the retiring partner will remain liable (on a joint and several basis) for all the debts of the partnership prior to his retirement. It is thought that it is in such business transfer cases that it can be said that delegation (*expromissio*) is not to be presumed.¹⁸⁵ 'The mere fact that a new agreement was made' (between the Origin Co and New Co) is not enough to infer that the creditors discharged Old Co.¹⁸⁶ However, to continue to refer to *dicta* which state that in such a situation 'delegation is not to be presumed' takes us little further. In most of these cases, delegation in the orthodox sense of the term is not at issue.

¹⁸² It is an interesting point whether the creditors of the retiring partner could enforce an indemnity granted to the retiring partner by the continuing partners by way of a *jus quaesitum tertio*, cf. *Hill's Tr v Gowans* (1872) 9 SLR 397.

¹⁸³ See, *inter alia*, *McKean v Laird* (1860) 23 D 846; *Miller v Thorburn* (1861) 23 D 359; *Ireland v Montgomery* (1883) 10 R 974; *Hedde's Exrs v Marwick* (1888) 15 R 698; *Stephen's Trs v McDougal* (1889) 16 R 779; *Henderson v Stubbs* (1899) 22 R 51; *Smith's Trs v A.D. Smith* (1899) 6 SLT 263 OH; *Ocra (Isle of Man) Ltd v Anite Scotland Ltd* 2003 SLT 1232 OH.

¹⁸⁴ *MRS Distribution Ltd v Smith (UK) Ltd* 2004 SLT 631 at 636A *per* Lord Drummond Young (Ordinary).

¹⁸⁵ Mackenzie, *Inst.* III.iv.9; Erskine III.iv.22; *Dudgeon v Reid* (1829) 7 S 729; *Campbell v Cruikshank* (1845) 7 D 548; *Buchan, Wilson & Co v Adam* (1833) 11 S 762 at 770 *per* Lord Gillies; *Mowbray v White* (1824) 3 S 146; *Pollock & Co v Murray and Spence* (1863) 2 M 14 at 16 *per* Lord Curriehill; *McInotsh v Ainslie* (1872) 10 M 304 *per* Lord President Inglis.

There is no issue of discharge. In the case of an additional or corroborative obligation (*adpromissio*), reference to delegation at all is confusing. While every delegation must give rise to a new obligation, it is thought that a concomitant discharge of prior obligation is required for a delegation. Where the question is simply whether there is an *additional* obligant, cases referring to the implication of consent to discharge are simply not relevant.

4. *Insolvency*

The creditor bears the risk of the new debtor's insolvency. The original debtor's liability does not revive if the delegated debtor becomes bankrupt.¹⁸⁷ The original debtor may incur liability only on the grounds of fraud.

5. *Validity of the Original Obligation*

There can be no delegation of a void obligation. However if the original obligation is voidable only and it is delegated before rescission then consent of the creditor to the delegation may amount to a waiver of his right to rescind the original obligation.¹⁸⁸

C. *Delegation of performance.*

One can delegate *rights* as well as liabilities.¹⁸⁹ This is just another method of achieving what is usually done by assignation. One of the differences is the effect on

¹⁸⁶ *Holmes v Gardiner* (1904) 12 SLT 668 at 669 *per* Lord Stormonth Darling (Ordinary).

¹⁸⁷ Bankton I, 486, 5. Cf. Art. 1206 of the Spanish *Código Civil*: 'La insolvencia del nuevo deudor, que hubiese sido aceptado por el acreedor, no hará revivir la acción de éste contra el deudor primitivo, salvo que dicha insolvencia hubiese sido anterior y pública o conocida del dueñor al delegar su deuda'. Art. 1276 *Code Civil* is in similar terms.

¹⁸⁸ L.R. Caney, *A Treatise on the Law of Novation*, (2nd ed. 1973), 13.

¹⁸⁹ See the excellent discussion in *Scottish Law Commission Discussion Paper* No 95, 'Recovery of Benefits Conferred under Error of Law' (1993) vol II, 162. Much of this reflects the expertise of Niall Whitty, then one of the commissioners. There is, however, a typographical error in para 2.170. A corrected version is quoted by R. Evans-Jones, *Unjustified Enrichment* vol 1, *Enrichment by*

existing obligations. Delegation is an instance of extinction of obligations through substitution. Assignment is a method of transfer of rights; assignment *per se* does not discharge anything.¹⁹⁰ References to delegation of performance are common. However, care is needed. As we have seen, 'delegation' is rarely used precisely. It can mean many things. 'Delegation of performance' can refer to at least two types of case: proper delegation (which imports an immediate discharge of the original obligant, *delegatio obligandi*). In proper delegation, the new debtor undertakes a new obligation to the creditor which the creditor accepts in lieu of the original creditor's obligation. As a result, the original debtor is discharged. The introduction of the new debtor can occur without the consent of the original debtor.¹⁹¹ Alternatively, the introduction of the new debtor may be instigated by the original debtor. He can order one of his own debtors to pay the creditor (which does not involve the immediate discharge of the original obligant, *delegatio solvendi*). So, if X is indebted to R, and P to X, X may order P to pay R. If R accepts this obligation in lieu of X's obligation, X will be discharged. In other words, there must still be an intention to discharge X. This notion can be traced to the Roman notion of delegation. Alternatively, there is no immediate discharge of X. His discharge is conditional on P paying R.¹⁹² In this case, no new obligations are created, but two are discharged. This proceeding is the basis for the order to pay. It is important to make these distinctions at the outset, as there has been little consideration in the Scottish sources.¹⁹³

Deliberate Conferral (2003) para 8.37. Cf. L.R. Caney, *A Treatise on the Law relating to Novation*, (2nd ed. 1973), 2, 37.

¹⁹⁰ Erskine III.iv.22. This is a matter for agreement between cedent and assignee. Where the cedent is obliged to assign, the assignation will discharge that obligation. Cf. *Purnell v Shannon* (1894) 22 R 74.

¹⁹¹ E.g. Art. 1274 *Code Civil*.

¹⁹² Cf. Art. 1277 *Code Civil*. As will become clear below there is little difference between this conception of delegation and the *Anweisung*.

¹⁹³ See, in particular, the caution urged by J. Domat, *Les loix civiles dans leur ordre naturel*, (2nd ed. 1695) III.iv.pr, vol III, 582. See too, R.J. Pothier, *Traité du contrat de vente* (1762) §§ 551-552 who articulates the distinction particularly clearly.

D. Mandates to Uplift.

Roman law did not recognise a general concept of cession. Instead a type of mandate was resorted to. By this proceeding, the creditor would authorise the 'assignee' to uplift the claim and grant the debtor a discharge. Importantly, the mandate was in *in rem suam*. The assignee could retain the proceeds for his own benefit. Also, because the 'assignee' was a procurator and representative of the cedent, his position was precarious. The Scottish history of the law of assignation is confused. Regular parallels have been drawn between assignation and the mandate *in rem suam*; indeed, an assignation has been described as nothing more than a mandate *in rem suam*.^{193a} These issues will be discussed in detail in the following chapter.

E. Mandates to Pay (Anweisung).

If X is indebted to R, and P to X, X has a number of options to discharge his debt to R. He could assign his claim against P to R. R will intimate this to the debtor. P's consent is not required. But although creditors often accept a cession of a right against another instead of payment, the cession will not necessarily¹⁹⁴ extinguish the cedent's obligation to the assignee. This will always depend on the underlying contractual relationship of the parties. In any event, a cession may occur even although there is no pre-existing obligation to grant one. The order to pay, however, is different. It is based on the basic principle of delegation of performance. The intermediate creditor (X) directs his debtor (P) to pay his (X's) own creditor, R. On payment by P to R there is a double discharge: P-X and X-R. Before payment, however, the obligations of the respective parties remain unchanged. The order to pay is normally reduced to a writing delivered by X to R which is presented to P. A commonplace example would involve X drawing a cheque on his bank P in favour of his creditor R. The effect of the drawing of the cheque on the underlying obligation

^{193a} *Carter v McIntosh* (1862) 24 D 925 *per* Lord Justice-Clerk Inglis.

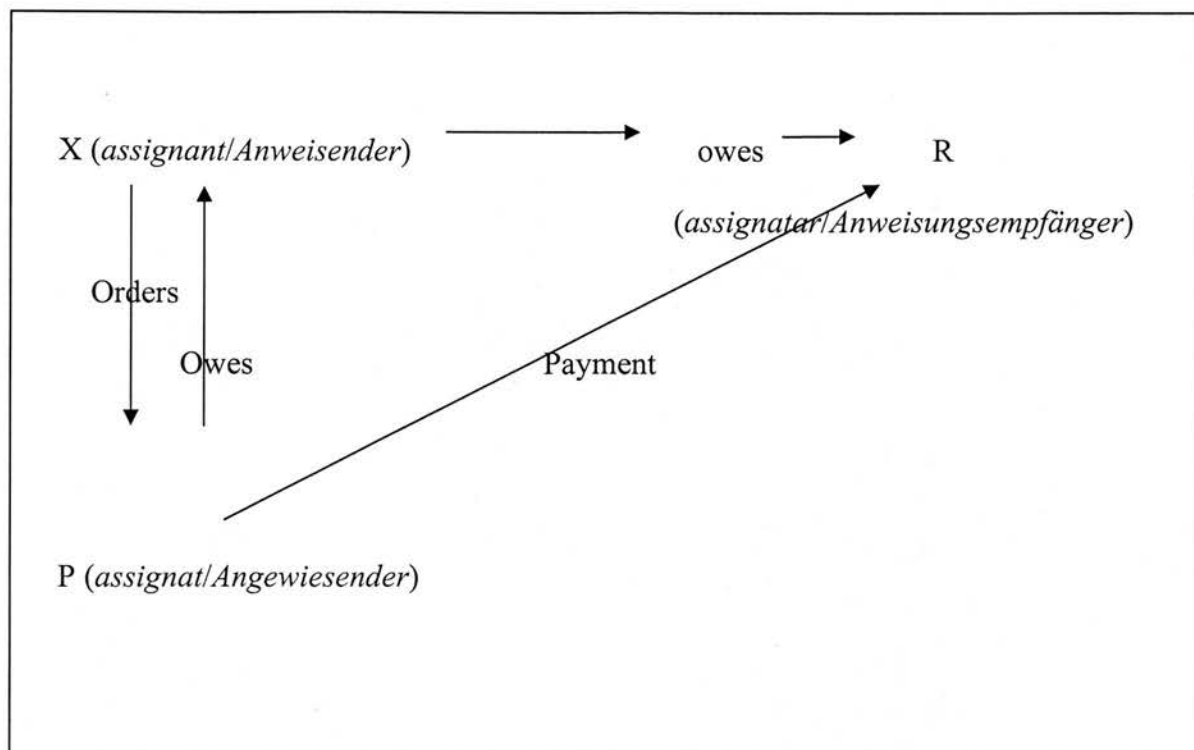
¹⁹⁴ It will always depend on the contract between the parties. The following assumes that there is no agreement.

at common law is controversial.¹⁹⁵ Particular provisions of the Bills of Exchange Act 1882, which apply only to Scotland, complicate matters.¹⁹⁶

¹⁹⁵ Gloag, *Contract*, (2nd ed. 1929), 273 suggests that payment by cheque discharges the debt subject to a resolutive condition that the cheque is honoured, citing *Leggat Bros v Gray* 1908 SC 67. See too, *Glasgow Pavilion Ltd v Motherwell*, (1903) 6 F 106 at 119 *per* Lord Young to the same effect. Cf. W. Forbes, *Bills of Exchange*, (2nd ed. 1718), 107; *Richardson v Fenwick* (1772) Mor 678; Hailes 471 *per* the Lord President (Dundas of Arniston): 'After a bill is accepted, the drawer is only subsidiarily liable'; *Herries & Co v Crosbie* (1775) Mor 2577; February 22nd 1775 FC; Hailes 616 at 617 *per* Lord Elliock: 'all bills are in effect in security, never *in solutum*; for the indorsee has recourse against an indorser. This would not be the case if they were *in solutum*'; *Walker & Watson v Sturrock* (1897) 35 SLR 26, and *McLauchlin v Allied Irish Bank* 2001 SC 485. See too the recent case of *Whitbread Group plc v Goldapple Ltd (No. 2)*, 2005 SLT 281, *per* Lord Drummond Young (Ordinary) at para [28]. Importantly, the Lord Ordinary states that once a creditor has received a cheque, the underlying debt cannot be enforced unless the creditor receives notice that the cheque has been dishonoured. Cf. *Décret-loi du 30 octobre 1936*, Art. 62 (France) to the same effect, now found in Art. L 131-67 *Code monétaire et financier* (2005): 'Le remise d'un cheque en paiement, acceptée par un créancier, n'entraîne pas novation. En conséquence, la créance originaire, avec toutes les garanties qui sont attachées, subsiste jusqu'au paiement du chèque'. In *Re Charge Card Services Ltd* [1987] Ch 150; [1989] Ch 497 it was held that payment by credit card amounted to an absolute discharge of the obligation to make payment. The seller had no claim against the buyer when payment was not forthcoming from the credit company.

¹⁹⁶ In particular, s. 53(2) and s. 75A, 1882 Act.

Fig. 1: Debt relationship in *Anweisung*.



Based on delegation, the order to pay is well-known to the law. Indeed, in the *Code Civil* there are no special provisions on the order to pay; while, even in the systematic BGB, one must move between the provisions on *Schuldübernahme* and *Anweisung* to get a full picture: there is no paragraph of the BGB which is dedicated to the novation or delegation.¹⁹⁷ Where it is reduced to writing, however, it has the potential to circulate as an item of credit. Indeed, in modern German law, the *Anweisung* must be embodied in a deed.¹⁹⁸ It occurs on a daily basis. X will normally draw an order on P in favour of R. X will deliver this to R. R will then present this to P either for acceptance or for payment. Not only is a cheque an order to pay, many

¹⁹⁷ H. Hahn, *Die Institute der Bürgerlichrechtlichen Anweisung der §§ 783 BGB und der 'Délégation' der Art 1275 f. C. Civ in Rechtsvergleichender Darstellung* (Thesis, Munich, 1965), 11.

¹⁹⁸ § 783 BGB. Cf. Windscheid, *Pandektenrechts*, vol 2, § 412, at 812, n. 13.

other banking transactions can be analysed in similar terms.¹⁹⁹ There are some differences between an order to pay and a cession. These must be highlighted, since the concepts have become confused in the Scottish sources. For example, statute now designates the effect of a presentment (which, of course, may not be accepted) by P as a cession rather than in terms of an order or mandate to pay.²⁰⁰ The majority of the famous nineteenth century Scottish cases ostensibly dealing with 'assignment' actually involved mandates to pay.²⁰¹ Importantly, where this order is accepted by P, this document can then be subsequently transferred.²⁰² This transfer operates as a transfer of the rights against the debtor.

The German jurist, Carl Friedrich Mühlenbruch²⁰³ highlights at least six differences between the order to pay and a cession:

- (i) In a cession the debtor must be indebted to the cedent. It is his right against the debtor that the cedent transfers. This is not the case in an order to pay. P need not be X's debtor.²⁰⁴
- (ii) With an order to pay, R obtains a right against P only on P accepting.²⁰⁵ R does not get a right against P by intimation (as in a Scottish assignment) or on presentation (as with a bill of exchange²⁰⁶).

¹⁹⁹ Detailed discussion is outwith the scope of this work, but compare *Mercedes-Benz Finance Ltd v Clydesdale Bank plc* 1997 SLT 905 and P Marburger, 'Anweisung' in *Staudingers Kommentar zum BGB* (Neuarbeitung, 2002) § 783, Rn 33-58.

²⁰⁰ Bills of Exchange Act, 1882, s. 53(2).

²⁰¹ See the discussion in chapter 3, 'History' below, Part IV, D.

²⁰² § 792 *BGB*.

²⁰³ Mühlenbruch, *Cession*, § 18, 226- 229. See also *idem*, *Lehrbuch des Pandektenrechts* (1840) vol 2, § 496. Mühlenbruch had an abiding influence on the German private law generally and the law of cession in particular. Klaus Luig has described him as the 'Father' of the German law of cession: Luig, *Geschichte*, 47.

²⁰⁴ See e.g. R.J. Pothier, *Traité du contract de change* (1763) § 226.

²⁰⁵ Cf. D. Medicus, *Schuldrecht II, Besonderer Teil*, (11th ed. 2003) § 119, n. 583 (1)

²⁰⁶ See Bills of Exchange Act 1882, s. 53(1). This statutory provision was based on the common law. The common law, however, had confused the mandate to pay with the mandate *in rem suam* which is a mandate to uplift: see generally G.L. Gretton, 'Mandates and Assignations' (1994) 39 *JLSS* 175.

- (iii) Fundamentally, an *Anweisung* does not involve the entry, or substitution, of R into the relationship of P and X, or a change in the existing debt relations of the parties.²⁰⁷
- (iv) The *Anweisung*, of itself, does not give to R those rights that X held against P. It transfers nothing.²⁰⁸ As a result, P cannot raise any defences against the R that he could have raised against X. R's right comes into existence only on acceptance by P. Because P is essentially paying on X's behalf, however, P can raise those defences that X could have raised against R.²⁰⁹
- (v) Acceptance by P has no effect of the relationship between the parties.²¹⁰ The existing obligations (i.e. usually the X-R and the P-X obligations) remain in force until P makes payment.
- (vi) An *Anweisung* to the order of R can be further transferred.

Admittedly, it is not clear how Mühlenbruch's sixth point differentiates the *Anweisung* from cession. Point (v) is controversial. Some authorities suggest that

²⁰⁷ See, in particular, Mühlenbruch, *Cession* § 18, n. 433.

²⁰⁸ See e.g. *Rechten en Coutumen van Antwerpen* (1582) Tit 64, 'Van Bethalinge, bewijsinghe etc' (2): '...midts dat bewijsinghe gheen betalinghe en is'; *ALR* I, 11 § 380: 'Die bloße Anweisung einer Schuldforderung ist noch für keine Abtretung derselben zu achten'; C.J.A. Mittermaier, *Grundsätze des Gemeinen Deutschen Privatrechts*, (7th ed. 1847) vol 2, § 561, at 816.

²⁰⁹ This point, though difficult, is important. Even the great Max Kaser did not appreciate the subtleties at the first attempt. In the first part of the first edition of his magisterial work, *Das römische Privatrecht* (1955) Part I, § 152 II, at 544, he wrote: 'Der Schuldner hat dem Neugläubiger gegenüber zwar die Exceptionen, die er dem Altgläubiger dem neuen entgegensetzen könnte'. In other words, the debtor (P) can plead those defences he had against the old creditor (X) against the new creditor (R). That is not correct. Compare the revised, and correct, approach in the second edition: Kaser, *RPR* I, § 152 II 3, at 652. In Scots law, the principle is properly articulated in Dirleton's report of the Court of Session's decision in *Grant v Lord Banff* (1676-1677) Mor. 1654 at 1657: '...if the suspender had been content to give bond to him, it would have been *delegatio*, in which case the exceptions competent against the *delegantem* would not have been competent against the person in whose favours the delegation was made'. The reference here to *delegatio* is to imperfect delegation. Cf. modern German law in § 417 I *BGB*: 'Der Übernehmer kann dem Gläubiger die Entwendungen entgegensetzen, welche sich aus dem Rechtsverhältnis zwischen dem Gläubiger und dem bisherigen Schuldner ergeben'. In French law, the new debtor cannot plead the defences that were available to the original debtor against the creditor: Neumayer, 'La transmission des obligations en droit comparé' in *La transmission des obligations* at 231-232. Cf. the decision of the Cour de Cassation in *Sté Calberson International c Sté Trans Ouest* 1998 *La Semaine Juridique* II-10050.

²¹⁰ But see the view to the contrary of R.T. Troplong, *Des privilèges et hypothèques ou, Commentaire du titre XVIII du livre III du code civil*, (4th ed. 1845) at 527-528.

acceptance effects a cession of sorts; others, that the double-discharge P-X and X-R occurs, that discharge being subject to the resolutive condition if P fails to pay R. Additionally, a mandate to pay is revocable prior to acceptance;²¹¹ a mandate to uplift is irrevocable. There are also some difficult cases:

- (a) Is P bound to pay R if ordered to do so by X? This will depend on the contractual relationship between X and P. In the standard example of a bank customer relationship, P will be bound to pay R providing X is in funds or has a suitable overdraft facility.
- (b) Is R bound to accept performance from his debtor's debtor? R is probably bound to accept payment of X's debt from P. However, if the payment is in anything other than legal tender, some sort of consent, probably implicit, is probably required. The position would be the same if X offered R payment in anything other than legal tender; the general principle being that creditors need only accept payments in legal tender.²¹²
- (c) What is the patrimonial effect of an order to pay compared to an assignation? This issue is best focussed with the question: what is the effect of the order on the insolvency of X?²¹³ Until payment there is no discharge either of the P-X debt or the X-R debt. If there is only an order to pay, which is retained by R, then there is also no *transfer* of any claims. If presented with the order after the

²¹¹ C.J.A. Mittermaier, *Grundsätze des Gemeinen Deutschen Privatrechts*, (7th ed. 1847) vol 2, § 561, 815. See too *Morrice v Sprot* (1846) 8 D 918 at 924 *per* Lord President Boyle and *Strang v Ross, Harper & Murphey* (Sh Ct) 1987 SCLR 10 to the same effect. *Strang* characterised the mandate to pay as an assignation. However, the result was correct: the mandate was revoked by the death of the granter. An uniniminated assignation is not revoked by the death of the cedent: Confirmation Act 1690 (12mo c. 26; APS, c. 56). See further n 539 below.

²¹² Cf. *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 474 *per* the Sheriff-Substitute (Gillespie Dickson).

²¹³ It has been suggested that since a delegation of rights is a dispositive act, it can be challenged by creditors if the delegating party subsequently becomes insolvent in the prescribed period: L Aynès, *La cession de contrat* (1984) at 50-51, notes 119 and 124. If P subsequently becomes insolvent, it is thought his payment could also be challenged since the effect of the payment was also to discharge his liability to X. Note, however, that it is only on acceptance or, failing which, payment, that X's liability



insolvency of X, P can and should refuse to accept. If X breaks after acceptance by P, P is nevertheless liable to pay R. Similarly, if P becomes insolvent, or fails to satisfy X's debt to R, X remains liable. After acceptance by P, however, it is probably the case that creditors of X can no longer arrest in the hands of P. This would suggest that the effect of acceptance is to discharge P's obligation to X subject to a resolutive condition which is triggered on P failing to perform to R.

- (d) What of P's defences? It seems that in cases of orders to pay, P is paying to discharge X's debt. This is different from the case of a cession. In a cession, the debtor, P is paying R to discharge his own debt: R is P's creditor. In the cession case, P can raise all defences he would have had against X, against R. In the order of payment situation, however, P is paying to discharge X's debt. The instruction is from X to P. There is no question of transfer. The difference to P is that he cannot raise any defences that he has in his relationship with X against R.²¹⁴ Similarly, if P overpays to R, or if it transpires that the relationship between X and P was void, P cannot recover from R. This is because R has received only that which is owing to him. The debt between X and R has been discharged. It is X who has then been enriched.²¹⁵
- (e) *Competition*. X orders P to pay his (X's) creditor R. Thereafter, X assigns his claims against P to a third party, Y. If Y intimates this assignation to P before P pays R, or P accepts the order to pay R, Y becomes P's creditor. Does this necessarily mean, however, that

to R is discharged. Until then, creditors of X can arrest in P's hands: cf. F. Roger, *Traité de la saisie-arrêt*, (2nd ed. 1860) at 193, para 209.

²¹⁴ Although it is not clear whether P can raise defences based on the relationship between X and R. As we will see, this is probably not permitted.

²¹⁵ Detailed discussion of three party enrichment situations is outwith the scope of this work, but see H L MacQueen, 'Payment of Another's Debt' in D. Johnston and R. Zimmermann (eds) *Unjustified*

P cannot still pay R or X. It could be argued that, since X ordered P to pay R, X's instruction can be raised against Y on the basis of the *assignatus* rule. However, the better view is that by virtue of the assignation (completed by intimation), X has thereby revoked his order. Unlike an assignation or mandate to uplift (which are irrevocable), the order to pay is inherently revocable before acceptance.²¹⁶ P must therefore now pay Y. Since P has never paid R, X will remain liable to R. A similar issue will arise if another creditor of X lays an arrestment in the hands of P after X has ordered P to pay R but before acceptance.

- (f) Can an unaccepted order to pay be transferred? The matter was somewhat controversial in the drafting of the German provisions. As has been stressed above, until there is acceptance by P, R has no rights against him to transfer.²¹⁷ After acceptance, R has an independent right against P. Indeed it is questionable why a specific provision in the codes dealing with *Anweisung* is required to state that such rights can be assigned.

Although there are few modern cases dealing with the order to pay, they are – at any rate, were – commonly used in Scottish practice. Private lawyers seldom reflect on the effect of taxation regimes on the development of private law. But the influence can be considerable. Take, for example, a contractor, A Ltd, employed by a local authority. There are a number of ways A Ltd may utilise its rights to payment. Prior to 2003,²¹⁸ a common method in practice was to instruct the local authority to pay such sums that were owing (rather than a particular sum) to a named creditor or

Enrichment: Key Issues in Comparative Perspective (2002), 458 and S. Meier, 'Mistaken Payments in Three-Party Situations: A German view of English Law' (1999) 58 *CLJ* 567.

²¹⁶ *Morrice v Sprot* (1846) 8 D 918 at 924 *per* Lord President Boyle. Cf. *Crockett v Brown* (1743) Elchies, *Assignation* No 5 and *ALR* I, 16 § 275.

²¹⁷ See U. Hüffer, 'Anweisung' in *Münchener Kommentar zum BGB*, (4th ed. 2004) § 792, Rn 2.

²¹⁸ When Stamp Duty was abolished.

order. The reason was simple: such an instruction was not liable to stamp duty;²¹⁹ an assignation would have been.²²⁰

F. Sub-Contracting.

While it is not possible for A to transfer his liabilities to B without the consent of his creditor (C), it is possible for A to enter into an agreement with B whereby B undertakes to perform A's obligations to C. *Sub-contracting* obligations is generally unobjectionable because the rights and obligations of the original parties (A and C) remain unchanged.²²¹ A, therefore, bears the risk of the insolvency of B.²²² Where there is no personal choice in the agreement between A and C, then C will be contractually bound to A to accept any satisfactory performance tendered on A's behalf.²²³ C probably also has no title to sue B, or vice versa. If there is personal choice, i.e. *delectus personae*, then A cannot enter into such a sub-contract; to do so would probably breach his contract with C (although it is difficult to see what loss merely entering into such a contract occasions C). In any event C would not be bound to accept the performance of anyone other than A. There will always be a practical question of what loss has actually be occasioned to C by performance of A's obligations by another. A clause in a lease barring assignation does not bar sub-

²¹⁹ 'Stamp Duty on Mandates' (1926) 42 *Scottish Law Review* 190; 'Mandates' (1938) 54 *Scottish Law Review* 37. It should be remembered that Stamp Duty was not a mandatory tax. However, non-stamped instruments could not be relied upon in court proceedings: see *Henty & Constable Brewers Ltd v IRC* [1961] 1 WLR 1504 at 1511 *per* Donovan LJ. For a recent case involving an assignment, see *Coflexip Stena Offshore's Patent* [1997] RPC 179.

²²⁰ Stamp Act 1891, schedule 1 (as amended); M.J.M. Quinlan, *Sergeant and Sim on Stamp Duties*, 12th edn (1998), 225 and 268.

²²¹ See e.g. *Hodge v Brown* (1664) Mor 2651. Cf. D.M. Walker, *The Law of Contracts and Related Obligations in Scotland*, (3rd ed. 1995) para 29.34. Walker's passage is confused: he would admit the assignation of obligations without the consent of the creditor. Cf. § 267 I BGB.

²²² *Borders Regional Council v J Smart & Co (Contractors) Ltd* 1983 SLT 164 at 168 *per* Lord Justice-Clerk Wheatley: 'The fact that someone else was actually doing the work did not alter that legal responsibility. Although the hand which was doing the work for them was chopped off when the sub-contractors went into liquidation and went out of business, the legal liability to see that the works were completed to the satisfaction of the architects remained with [the original contractor]'.

²²³ *West Stockton Iron Co Ltd v Neilson & Maxwell* (1880) 7 R 1055 at 1060 *per* Lord Gifford followed in *Johnson & Reay v Nicoll & Son* (1881) 8 R 437; *Stevenson & Sons v Maule* 1920 SC 335. To plead a relevant case of *delectus personae*, see *Ian McLaren Building Maintenance Ltd v Gordon* 1995 GWD 31-1629.

contracting.²²⁴ Some of the sources refer to the right of a contractor to ‘delegate’ performance of his obligations to another. This is a common and every-day usage of the term ‘delegation’.²²⁵ However, the term is apt to mislead. In Scots law, ‘delegation’, properly so-called, is a method of extinguishing obligations.

G. Adoption of Contracts on Insolvency.

One of the problems with the law of assignation in Scots law has been the continued reliance on cases that have nothing to do with transfer of claims. Three classic cases which accorded such importance to the principle of *delectus personae* in assignation, *Anderson v Hamilton*,²²⁶ *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation*²²⁷ and *Cole v Handyside*,²²⁸ were not assignation cases. All involved insolvency administrators. The question was whether the liquidator or trustee was entitled to ‘adopt’ contracts of the insolvent. This principle is of crucial practical importance, particularly in corporate insolvency.

Generally speaking, where a debtor has become insolvent, the insolvency administrator (including for present purposes liquidators, receivers and administrators) appointed on his estate has a choice as to whether to continue to perform the insolvent’s obligations under a contract.²²⁹ He may wish to do so in order to claim the counter-performance. But there may be no incentive for the administrator to perform. For example the insolvent may have an obligation to deliver goods which were paid for in advance. There is no adoption merely by claiming an accrued debt.²³⁰ And the insolvency administrator may have little to gain

²²⁴ For a case involving a lease, see *Rothead v Moodie* (1687) Mor 10392. See also *Lady Binnie v Sinclair* (1672) Mor 10382 (where sub-letting was prohibited).

²²⁵ *Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co* 1925 SC 796; *W.J. Harte Construction Ltd v Scottish Homes* 1992 SC 99.

²²⁶ (1875) 2 R 355.

²²⁷ 1907 SC 463.

²²⁸ 1910 SC 68.

²²⁹ For the general effect of insolvency on obligations, see D. Hutchison and F. Reid, ‘The Exercise of Contractual Rights or Powers Against an Insolvent Estate’ (2003) 120 *SALJ* 776. This writer would not agree with all of the authors’ conclusions.

²³⁰ *Sturrock v Robertson’s Tr.* 1913 SC 582; *Craig’s Tr. v Lord Malcolm* (1900) 2 F 541.

from adopting that contract (save from where the administrator is seeking to keep the business alive as a going concern and wishes to protect goodwill). But if the insolvency administrator decides to undertake performance of the insolvent debtor's obligations, this is known as 'adoption'. It has nothing to do with assignation. Nor is it likely to be a novation or delegation.²³¹ The other party is not discharging the debtor. Adoption is an independent concept. It allows the administrator to perform the debtor's obligations. While an insolvency administrator can decide to adopt one contract with a particular creditor but not another,²³² it seems that he cannot 'cherry-pick' particular rights in an individual contract.²³³

In English law, receivers were not, at common law, agents of the company. They were therefore personally liable on contracts. Court-appointed receivers were usually expressly appointed as agents of the company. Consequently, they had no liability on contracts which they either adopted or entered into on behalf of the company.²³⁴ The present law, in both Scotland and England, is that the liquidator, receiver or administrator is personally liable on adopted contracts of employment. Employees under such contracts therefore do not have to rank as creditors in the insolvency: they can sue the receiver himself for payment of wages, pension contributions and the like.²³⁵ As for other contracts, appointment of a receiver, *per se*, does not affect the existence of the contract; but the receiver does not adopt by

²³¹ Cf. R. Goode, *Principles of Corporate Insolvency Law*, (2nd ed. 1997), 243 ff. J. St. Clair and Lord Drummond Young, *The Law of Corporate Insolvency in Scotland*, (3rd ed. 2004) para 6-22 provide no guidance as to the juridical nature of adoption.

²³² *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation* 1907 SC 463.

²³³ *Powdrill v Watson* [1995] 2 AC 394 at 449 *per* Lord Browne-Wilkinson.

²³⁴ The history is recounted by Nicholls LJ in *Re Atlantic Computer Systems* [1992] Ch 505.

²³⁵ Insolvency Act ('IA') 1986, ss 57(1A) and (2A). The receiver is entitled to be indemnified out of the property in respect of which he was appointed. It is not immediately clear whether an adopted contract falls under the 'property in respect of which he was appointed'. This raises the issue of whether future property is attached by a floating charge. In *Ross v Taylor* 1985 SC 156, the Inner House held that future property is covered by a floating charge. However, since a floating charge attaches as if it were a fixed security (in the case of claims, an assignation in security) such future property must be assignable. Contracts can only be transferred in their entirety with the consent of the original parties. There are difficulties with the idea that a contract *in toto* can be assigned in security: the creditor would be taking on a *liability*. Admittedly, in English law at any event, the House of Lords has ignored such conceptual niceties: *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214. Crystallisation of a floating charge does not affect the *assignatus* principle; where the company is insolvent, balancing of accounts in bankruptcy will additionally be available to the debtor. See discussion in chapter 5 below, Part III, A.3.

mere reason of his appointment.²³⁶ Curiously, however, the legislation does not provide for the effect of adoption of a contract that is not an employment contract.²³⁷ A receiver has fourteen days to decide whether to adopt a contract of employment.²³⁸ By statute, the effect of adoption of a contract of employment by an administrator or receiver is prospective in effect only.²³⁹

The Scots law of adoption of contracts was further confused as a result of the introduction of receivership in 1972.²⁴⁰ A floating charge attaches ‘as if’ it were a fixed security. For debts due to the company in receivership the relevant ‘fixed security’ is an intimated assignation in security.²⁴¹ It was suggested that this view was problematic in the case of mutual contracts: a floating charge holder could thus become liable for the company (in receivership)’s *obligations*.²⁴²

“Many contracts would contain an element of *delectus personae* and would not be assignable. For example, if the effect of the appointment of a receiver to a construction company is to assign its contracts to the security holder, then a bank, while it would be able to recover certified payments, could be liable to complete the construction of a motorway or housing scheme. If, on the other hand, the suggestion is that only the company’s rights are assigned, while its obligations remain incumbent upon it (cf. Gloag, *Contract* (2nd ed.) p. 416), so as to enable the bank to recover the payments even though the company may be unable to fulfil its outstanding obligations, the result is plainly inequitable.”²⁴³

This opinion exemplifies the confusion in the Scottish authorities between the transfer of contracts and the assignation of claims. It is indeed absurd that an

²³⁶ IA 1986, s. 57(4).

²³⁷ Cf. *Re Newdgate Colliery Ltd* [1912] 1 Ch 468. Where a receiver retains property of another without paying hire charges and the like, the receiver is not liable for adopting the contract. There is nothing to stop the true owner retaking possession of the goods: *Re Atlantic Computer Systems* [1992] Ch 505 at 524C-G. But compare the older Scottish authorities cited in n. 246 ff, below. Where a company is in administration, the position may be different: IA1986, s. 19.

²³⁸ IA 1986, s. 57(5). This overrules the decision in *Nicoll v Cutts* [1985] BCLC 322. Cf. *Jamieson, Petr* 1997 SC 195 and *Re Antal International Ltd* [2003] 2 BCLC 406.

²³⁹ For administration, see s. 19 (6); for receivership, see ss 57 (2) – (2D), IA 1986.

²⁴⁰ Companies (Floating Charges and Receivers) (Scotland) Act 1972, s. 13 (7).

²⁴¹ W.A. Wilson, ‘The Receiver and Book Debts’ 1982 SLT (News) 129; *Forth & Clyde Construction Co Ltd v Trinity Timber & Plywood Co Ltd* 1984 SC 1.

²⁴² R.J. Reed (now Lord Reed), ‘Aspects of the Law of Receivers in Scotland’ 1983 SLT (News) 237.

²⁴³ Reed, *ibid*, 239.

assignee of receivables could be liable to construct a housing scheme. But the idea that an assignee of a claim can become liable for *any* of the cedent's liabilities is absurd. Assignment transfers only rights. Moreover, the result is not 'inequitable'. The debtor is not bound to make additional payments for what has not been performed. This is a basic application of the *assignatus* rule. In any event, where there is insolvency, unfairness is no argument; insolvency, by definition, ensures only unfairness.²⁴⁴ Where there is an existing contract, the insolvency administrator may voluntarily wish to perform the obligations incumbent on the debtor company for the simple reason that until the obligations are performed there will be no right to payment. The insolvency administrator can do this by adoption. However, if there is *delectus personae* in the company in receivership, the insolvency administrator himself – or, for that matter, the charge holder – *cannot* perform (without the debtor's consent). In this respect, adoption is like sub-contracting. Of course, where there is apparently *delectus personae* in a juristic (as opposed to a natural) person, the concept is emptied of much content. Legal persons have a personality only in the legal sense. Directors, shareholders and employees come and go. Therefore, if, in our example, the administrator is of the view that the contract may be of value, he can have the contract performed by employees or officers of the company.

The general principles of adoption of contracts at common law are even less clear than under statute.²⁴⁵ The issue is not limited to administrators and receivers. It will apply to the trustee in sequestration over the estate of an individual; to the judicial factor acting on the estate of, for example, a partnership; or a trustee acting under a trust deed for creditors.²⁴⁶ Moreover, adoption is not, for that matter, limited to contracts of employment. Many of the older Scottish authorities deal with the

²⁴⁴ See, in particular, G.L. Gretton, 'Ownership and Insolvency' (2004) 8 *Edin LR* 389.

²⁴⁵ *Edinburgh Heritable Security Co Ltd v Stevenson's Tr* (1886) 13 R 427 at 428 *per* Lord McLaren (Ordinary): "The ground of action is that the trustee has 'adopted' the subjects as his property. I am not sure that I understand exactly what is meant by this expression. It is a metaphysical expression borrowed from a different branch of the law; and after hearing argument I am still unable clearly to represent to myself what is the legal obligation whereby the defender is supposed to have rendered himself responsible for the payment of the heritable debt."

²⁴⁶ *Ford & Sons v Stevenson* (1888) 16 R 24.

adoption of leases by trustees for creditors.²⁴⁷ Adoption is not to be implied where the trustee has entered only into tentative possession,²⁴⁸ nor indeed if the trustee sells the lease subject to conditions, without having entered into possession himself.²⁴⁹ It has been the law since *Ross v Monteith*²⁵⁰ that a trustee who adopts a lease is personally liable for arrears of rent. And, further, since the trustee cannot possess without paying, the landlord need not rank on the tenant's bankrupt estate for arrears since these are expenses incurred by the trustee and, as such, expenses of the insolvency.²⁵¹ But where, for example, the landlord has acceded to the trust deed or conducted himself in such a way that he intended to claim as an ordinary creditor upon the funds, the preference may be lost.²⁵²

The concept of adoption is a fascinating one. It cannot be further discussed here. What should be evident, however, is that there is a long tract of authority dealing with this concept. Adoption and assignation are often confused. Many of the cases deal with leases where the law is anyone's guess. In any event, assignation of claims is distinct from the concept of the assignation of a lease. Finally, some of the cases are not consistent with the modern view of adoption handed down by the House of Lords in the context of the modern statutory framework applicable to administration and receivership and adoption of contracts of employment.²⁵³

²⁴⁷ See e.g. *Kirkland v Gibson* (1831) 9 S 596 aff'd (1833) 6 W & S 340 HL; *Kirkland v Cadell* (1838) 16 S 860 (Whole Court); Cf. the brief discussion by Professor Halliday in the Scottish Law Commission Memorandum *Examination of the Law Relating to Insolvency, Bankruptcy and Liquidation in Scotland* (SLC Memo No 16, 1971). There is neither reference to authority nor identification of the principles involved.

²⁴⁸ *Dundas (Lord Strathmore's Tr.) v Hood (Kirkaldy's Tr.)* (1853) 15 D 752.

²⁴⁹ *Imrie's Tr. v Clader* (1897) 25 R 15.

²⁵⁰ (1786) Mor 15290. This can be contrasted with adoption of contracts of employment under modern insolvency legislation which is prospective only.

²⁵¹ *Nisbet and Company's Tr., Petr.* (1802) Mor 15268 at 15270. See also *Dundas (Lord Strathmore's Tr.) v Hood (Kirkaldy's Tr.)* (1857) 20 D 225. Cf. *Lachlan MacLean's Tr. v MacLean of Coull's Tr.* (1850) 13 D 90 at 96 *per* Lord Mackenzie.

²⁵² *Lachlan MacLean's Tr. v MacLean of Coull's Tr.* (1850) 13 D 90. Interestingly, in *Lachlan* there was a suggestion that a trustee for creditors who adopts the lease may be liable only up to the value of the estate. Cf. *Wilson v Magistrates of Dunfermline* (1822) 1 S 417 (389 NE) and *Moncreiff v Ferguson* (1896) 24 R 47.

H. Sub-Participation and other Contractual Arrangements.

Only rights, and not obligations, are assignable. In the agreement between the ‘cedent’ and ‘assignee’, however, there may be a term that the assignee is to be responsible for the fulfilment of the obligations of the cedent towards the debtor. In so far as this imposes a contractual obligation upon the assignee towards the cedent the term is unobjectionable. While it is not inconceivable that the debtor could have a *jus quaesitum tertio* so as to allow him to require the assignee to fulfil the obligations in the agreement between cedent and assignee, the cedent will remain primarily liable for his obligations.²⁵⁴

As has been observed, in Scotland, the transfer of a claim is, usually, a three-step process.²⁵⁵ The contract to assign, like any other contract in Scotland, does not require consideration; strictly speaking, neither does the conveyance.²⁵⁶ In some other systems the contract and transfer are inseparable. In French-based systems, cession is seen as a sale. The sale becomes effective between the parties thereto on agreement being concluded. This will have effect with third parties on notification to the debtor. In Scotland, the contract and conveyance are separate. But whatever the consideration, transfer occurs only on intimation of the delivery of the transfer agreement. What, then, if there is a mere ‘sale’ of claims without assignation? What is the effect of an agreement to assign, which is never implemented by the cedent (by delivery of the transfer agreement) or by the assignee (by intimation)? In modern

²⁵³ *Powdrill v Watson* [1995] 2 AC 394, discussed in R. Goode, *Principles of Corporate Insolvency Law* (2nd ed. 1997), 243 ff. *Powdrill* was followed by the Inner House in *Lindop v Stewart Noble & Sons* 1999 SCLR 889.

²⁵⁴ Cf. A. Rey, ‘Cession de Créance’ in P. Raynaud and J.L. Aubert (eds) *Dalloz Encyclopédie Juridique* (2^e édition) Tome III, (1986) para 536 and J. Ghestin, ‘La Transmission des Obligations en droit positif français’ in *La transmission des obligations* (1980), 59, No 78: ‘Il peut y avoir tout d’abord, « cessionnaire » s’engage à l’égard du son « cédant » à payer la dette de ce dernier. Ce contrat reste tout à fait étranger au créancier, qui ne peut s’en prévaloir et qui garde la possibilité d’exiger le paiement du débiteur initial, s’il n’est pas payé par le « cessionnaire »’.

²⁵⁵ There may not be an initial contract as, for example, in a gratuitous assignation: consequently, the assignation would be a two-stage process consisting of delivery of the real agreement and intimation thereof.

²⁵⁶ But, it should be noted, a gratuitous conveyance may have serious transfer consequences. See the discussion in chapter 6 below, ‘Validity’, Part IV, A.

financial practice, non-notification debt factoring is termed 'sub-participation'.²⁵⁷ The claims are sold to the debt factor. There will either be an unintimated assignation in favour of the financier or the seller will purport to hold the receivables in trust for the factor. As for the first case, an unintimated assignation has few transfer consequences in Scots law. In other legal systems, special provisions are applicable to the sale of receivables. For example, in French law, the *Loi Dailly* gives third party effect to the sale agreement.²⁵⁸ Notification to the debtors is not required. In the second case, it has been held that the trust will effectively protect the beneficiary (i.e. the buyer or factor) against the insolvency of the seller.²⁵⁹ There are serious problems, however, with the view that a trust can be validly utilised for the stated purpose of defeating the rights of lawful creditors.²⁶⁰ In other situations, such behaviour would be categorised as fraudulent.

²⁵⁷ Cf. D. Desjardins, 'Assignment and Sub-Participation Agreements – A Basic Overview' (1986) 65 *Canadian Bar Review* 224. See R. Goode, *Commercial Law* (3rd ed. 2004), 146, Fig. 4.5 for a diagrammatic distinction between sub-participation and assignment.

²⁵⁸ *Loi facilitant le credit aux entreprises* of 2.1.1981, the so-called *Loi Dailly*, (taking its name from Senator Etienne Dailly who introduced the legislation), now found in the *Code monétaire et financier* (2005) Art. L 313-23 *sqq.*

²⁵⁹ *Tay Valley Joinery Ltd v CF Financial Services Ltd* 1987 SLT 207.

²⁶⁰ G L Gretton, 'Ownership and Insolvency: *Burnett's Tr v Grainger*' (2004) 8 *Edin LR* 389 at 394; K.G.C. Reid and G.L. Gretton, *Conveyancing 2004* (2005), 80 ff. There are also more technical reasons why a trust in favour of the 'assignee' should not defeat the rights of a creditor of the trustee holding a floating charge, for which see K.G.C. Reid, 'Trusts and Floating Charges' 1987 SLT (News) 113. Also, as is pointed out by A.J.M. Steven and S. Wortley, 'The Perils of a Trusting Disposition' 1996 SLT (News) 365 at 367, declaring a trust in favour of the putative transferee is the converse of transferring to the buyer; see too a case they cite: *Ewart v Hogg* (1893) 1 SLT 63 OH. Interestingly, J.G. Birrel gave no reasoned response to this argument in his reply at 1996 SLT (News) 395. Cf. J. Chalmers, 'In Defence of the Trusting Conveyancer' 2002 SLT (News) 231 and I.M. Fletcher and R. Roxburgh, *Greene and Fletcher: the Law and Practice of Receivership in Scotland*, (3rd ed. 2005) para 5.22: 'While there has always been resistance to the introduction of equitable principles into the law of Scotland, it seems clear that the courts in Scotland will be prepared to examine the reality of the transaction. If the right to payment of debts is truly vested in another person, even although a formal assignation of that interest has not been intimated to the third party, the court will apparently be prepared to give effect to the arrangement'. But that is no argument. There is no obligation to intimate an assignation, although the 'assignee' who does not takes a risk. Fletcher and Roxburgh argue that assignees who do not intimate should be absolved of that risk. That is a policy issue to be addressed by the law reformer, not the judge. In any event, compare Fletcher and Roxburgh, para 8.18. There the authors expressly state that in Scotland intimation is a prerequisite for a valid assignation.

I. Transfer of debts and contracts.

1. Introduction.

Assignment/cession is the transfer of rights against the debtor without the consent of the latter. Delegation is the discharge of an existing obligation on the undertaking of a new obligation by a debtor of the original debtor toward the original debtor's creditor. All parties must consent and there must be an intention on the part of the creditor to discharge. A double discharge of two debts by one payment can be achieved by an order to pay. This is all good and well in principle. But what if the parties wish to transfer both rights and liabilities, or just the liabilities? An assignment of the rights and a delegation of the liabilities would necessitate a discharge of the original liabilities followed by the constitution of new debts. This will have implications, for example, in matters of prescription and for any accessory securities. Logically, however, a further alternative should be available: transfer of a liability or a contract *in toto*. But though a logical possibility, such a concept raises difficult questions of legal principle.²⁶¹ We will here concentrate on the transfer of entire contracts rather than of debts, since the former is of greater practical importance, and the same principles apply *mutatis mutandis*. Although the Scottish sources are confused, it seems (albeit by default rather than as a product of critical reasoning) that Scots law recognises the possibility of the transfer of an entire contract.²⁶² There are, however, very few examples of a pure assignment of contract

²⁶¹ Cf. A.F. Schnitzer, *Vergleichende Rechtslehre*, (2nd ed. 1961) vol II, 626: "Die neueste Etappe der Entwicklung ist nun, ob nicht nur eine einzelne Forderung abgetreten, nicht nur eine einzelne Schuld übernommen wird, sondern ein ganzes Vertragsverhältnis übergehen kann. Die theoretische Begründung macht auf römisch-rechtlicher Grundlage Schwierigkeiten. Es sind verschiedene Theorien aufgestellt: Abtretung der Forderung und Novation der Schuldverbindlichkeiten, Globalzession, *Renovatio contractus*, and der Berichterstatter über das Problem auf dem Kongreß zu Barcelona, auf dem dieses Problem einer Gegenstände war, hat vorgeschlagen, die Möglichkeit zu schaffen, einen Vertrag an Ordre zu Stellen." To make sense this suggestion must mean that contractual *debtors* can undertake that they or their order will perform. The classic conception of order clauses involves a debt being payable to a named *creditor* or his order. For the history of an obligation to be undertaken by a debtor *or his order*, a so-called 'passive' order clause, see discussion by L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891), 400. Goldschmidt argued that an understanding of this concept was 'the key to the hitherto mysterious evolutionary history of the Bill of Exchange'.

²⁶² Some of the cases are discussed above at n. 105. See also McBryde, *Contract* paras 12-49 to 12-50. Only E.M. Wedderburn, 'Assignment' in Lord Dunedin et al (eds) *Encyclopaedia of the Laws of*

in Scots law.²⁶³ Most of the cases which mention the assignment of contracts are hopelessly confused with the assignment of claims. There are also many dozens of cases of the assignation of leases.^{263a} This, it seems, is the transfer of an entire contract. The discussion of leases is, however, outwith the scope of this work. Leases of heritage in Scots law bear some of the hallmarks of a real right. Although the term 'assignation' is used for the transfer of this and some other real rights (except ownership) a distinction can be drawn between the transfer of personal rights and the transfer of real rights. This thesis is concerned with the assignation of personal rights; and, in particular, money claims. This is a classical bipartite transfer. While it will affect a third party (the debtor), there is still only one transferor and one transferee. The transfer of contracts – *cession de contrat* in French – is different.²⁶⁴ It is difficult to formulate the juridical structure of this proceeding in terms of the law of transfer. Indeed, there are some fundamental theoretical difficulties with the concept of a 'transfer' of an obligation or liability. It seems to be the only type of transfer which, of its very nature, affects the patrimonies of more than two parties

Scotland (1928) vol 2, 12 correctly draws the distinction between assignable rights and assignable contracts, the consent of the creditor in the assigned obligations being required in an assignation of contract.

²⁶³ But see *Scottish Homes v Inverclyde District Council* 1997 SLT 829 OH. *Karl Construction Ltd v Palisade Properties Plc* 2002 SC 270 concerned a purported assignment of a contract under Art 19.1.1 of the JCT Standard Form Building contract. These contracts are standard in the construction industry. Cf. *Brown v Doctor* (1852) 1 Stuart 269.

^{263a} The cases are collected in A. McAllister, *Scottish Law of Leases* (3rd ed. 2002), 143 ff.

²⁶⁴ See L. Aynès, *La cession de contrat* (Economica, 1984), 59. However, this writer would not agree with all of the learned author's analysis. See also Art 12:201, *Principles of European Contract Law* (2003), which refers to 'Transfer of Contract' and UNIDROIT *Principles of International Commercial Contracts* (2004), Art. 9.3.1. There is little discussion of the concept in English; most references to 'assignment of contracts' are actually references to the assignment of claims. The position is better on the continent: see, e.g., Lehmann, 'Die Abtretung von Verträgen' in E. Wolff (ed.) *Deutsche Landessreferate zum III Internationalen Kongress für Rechtsvergleichung in London 1950* (1950); (Professor T.B. Smith, then of the University of Aberdeen, was present at this conference: 1951 SLT (News) 37). G. Teles, 'La Cession de Contrat' (1951) *Revue internationale de droit comparé* 217; J. Becqué, 'Vertragsabtretung im französischen Recht' (1953) 18 *RabelsZ* 631; *idem*, 'La Cession de Contrat' in *Etudes de droit contemporain, Contributions françaises aux III^e et IV^e Congrès internationaux de droit comparé*, (Paris, 1959) vol II, 89. The most detailed discussion is found in the various papers in *La Transmission des obligations, Travaux des 9 Journées d'études juridiques Jean Dabin* (Centre de Droit des Obligations de l'Université Catholique de Louvain, Brussels & Paris, 1980). Of existing European Codes, only the Italian *Codice Civile* fully recognises the concept of assignment of contract in the codal provisions: see H.P. Böttger, 'Die Vertragsabtretung nach italienischem Recht' (1971) 72 *Zeitschrift für vergleichende Rechtswissenschaft* 1 and (1972) 73 *ZvergRW* 1 (2 parts).

(ordinarily the transferor and transferee).²⁶⁵ In the case of *cession de contrat* there is no change in the existing contract which is the object of the transfer (like assignation but unlike a delegation); what changes are the parties to the relationship and the patrimonies in which the rights and obligations are held. If there is to be the transfer of a liability, the consent of the creditor in that liability, as in delegation, is crucial. Absent such consent the creditor will not be bound to accept any performance rendered by a third party but only from the original debtor;^{265a} the original debtor remains bound. If there is consent, there remains the further question as to what is the effect of this consent on the liability of the original debtor.²⁶⁶ Crucially, for the purposes of juridical classification, a *cession de contrat* seems to be achieved entirely by contract. In this respect it is similar to delegation or novation, but differs from cession, which is a conveyance. A conveyance requires a transfer agreement and perfection (by intimation of delivery of the transfer agreement). Only on the completion of all the formalities is there a transfer of the thing or claim. In a case of *cession de contrat*, however, rights and liabilities can move from patrimony to patrimony as a result of the agreement of the three parties. Nevertheless, while participation of the debtor is an equipollent to formal intimation of an assignation,²⁶⁷ this can give rise to problems of transfer. It may be difficult to establish the precise date at which the transfer occurred.^{267a} This can only be achieved by some public or extraneous act. In Scotland, an obvious way of ensuring that the transaction is of a

²⁶⁵ L. Aynès, *La cession de contrat* (1984), 96. Indorsation of an accepted bill of exchange does not affect the patrimony of the drawee. He is still indebted. The only uncertainty is the personality of his creditor. This is like cession. Presentment for acceptance, by virtue of s. 53 (2) of the Bills of Exchange Act 1882, seems to affect an assignation of funds. Acceptance, therefore, seems to be deprived of much patrimonial effect (although it remains important for the holder's remedies).

^{265a} Where there is no *delectus personae*, a creditor may be bound to accept performance which is tendered on his debtor's behalf. See discussion at 25 ff above.

²⁶⁶ See below.

²⁶⁷ See criticism of this rule in Chapter 4, 'Intimation' below.

^{267a} The transfer of employment contracts under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (implementing the Acquired Rights Directive 77/187/EC: see H. Kötz, *Europäisches Vertragsrecht* (1996) § 14, at 410, n. 29; in English as *European Contract Law* (1997, trans. T. Weir). The necessity of establishing a certain date of transfer in such cases has been recently highlighted by the European Court of Justice in C-478/03 *Celtec Ltd v Astley* [2005] ECR I-4389.

certain date would be to register the agreement in the Books of Council and Session or in the relevant Sheriff Court Books.

2. *International Recognition of Transfer of Contracts*

Where a creditor transfers a claim to payment, the debtor's consent is not required. With the transfer of an entire contract, however, the third party's consent (i.e. the debtor in the claims; creditor of the liabilities) *must* be obtained. Were it otherwise, all debtors could alienate their overdrafts to men of straw.²⁶⁸ It is therefore universally accepted that if a legal system admits the concept of transfer of entire contracts, the consent of both parties to the original contract, as well as between the transferor and transferee is required. Unlike in the cession of claims, therefore, (where a debtor may have a new creditor imposed upon him), in the assignment of a contract, a creditor cannot have a new debtor imposed upon him.²⁶⁹ In practice, standard contractual terms will seek to elicit the consent of the other party to the contract to a transfer of a contract or obligation in advance. Both the *Principles of European Contract Law*²⁷⁰ and the UNIDROIT *Principles of International Commercial Contracts*²⁷¹ expressly sanction this. However, bringing the agreement to the attention of the third party will be necessary in practice. Moreover, a date of transfer will be required. It is thought that the only way of properly achieving this is by registration in the Books of Council and Session. As in a cession of claims, where the debtor has consented in advance, but has not been informed of the transfer, the

²⁶⁸ Cf. W.M. Gloag, *Contract* (2nd ed. 1929), 416, whose comment that, 'There is no general principle of law by which a party who has entered into a contract can get rid of the liabilities it may involve by assigning it to a third party' raises rather than answers the question of whether consent is required. Normally, the transfer of an *asset* for no consideration may be subsequently attacked under their *actio pauliana*. With the transfer of a liability, however, any payment would be made by the *transferor*; while if there is no consideration, the transferor's general creditors would not be prejudiced: the transaction leaves one less creditor to pay.

²⁶⁹ Cf. Y.M.J.V. Boon, *Assignment of Contract: a Study in Comparative Law* (Unpublished M Litt Thesis, University of Aberdeen, 1972), 12. There are problems with Boon's analysis. For example, he describes (at 7 and 14) the concept of 'assignment' generally as 'the act of one party without the concurrence of the other party to the contract'; yet, he accepts that in the 'assignment' of a contract, all the parties must consent. Also, his analysis assumes that an 'assignment' occurs *solo consensu*.

²⁷⁰ Art. 12:101(2).

²⁷¹ Art. 9.3.4.

third party will be protected if he performs to the original party in good faith.²⁷² This point highlights the problems of attempting to achieve by private agreement the transfer of rights and obligations without at least the passive participation of the parties to the rights or obligations to be transferred. Whatever legal regime governs the formalities, practical necessity will demand that the original parties are at least notified.²⁷³

3. Scots law

(a) Authority

There is no meaningful discussion of these concepts in the Scottish sources;²⁷⁴ moreover, the existing sources are problematic. Much of the modern case law in Scots law on 'assignment' is couched in terms of assignment of contracts.²⁷⁵ The litmus test of assignability, according to these cases, is *delectus personae*. Yet these two ideas are incompatible. *Delectus personae* is an implication in fact what the parties are free to express in any situation. On occasion it can, therefore, be relevant to the assignment of claims. Assignment may occur without the debtor's consent. Although there may be no express provision in the relationship between debtor and creditor that a claim is not assignable, the law holds by implication that it

²⁷² See discussion of this principle in chapter 4, 'Intimation', below, Part IV.

²⁷³ Cf. the code edited by Professor M.L.R. Gandolfi, *Académie des privatistes européens, Code européen des contrats*, Livre Premier, (Preliminary Draft, 2001), Arts 118-120. This is based, to a large extent, on Italian law. An English version has been published, including revisions by Professor Harvey McGregor QC, in a special issue of the *Edinburgh Law Review*: (2004) 8 *Edin LR* 4-89. This translation poses some difficulties for the Scots lawyer. For example 'set-off' replaces 'compensation', although the former term is wider than the latter in Scots law. 'Non-opposability' is also dropped, although this is a helpful translation of the well-known term of art in Scots law, '*ad hunc effectum*'.

²⁷⁴ For comparative discussion, see Y.M.J.V. Boon, *Assignment of Contract: a Study in Comparative Law* (Unpublished M Litt Thesis, University of Aberdeen, 1972). Although Boon's English style is not always fluent, this thesis is nevertheless of considerable value, providing an English language introduction to the sources of French, Belgian, Dutch and German law. This writer would not agree with Boon's analysis of the Scottish sources.

²⁷⁵ For example, the leading comparative study suggests that Scots law recognises the assignment of contracts, citing *Cole v Handyside* 1910 SC 68: K.H. Neumayer, 'La transmission des obligations en droit comparé' in *La transmission des obligations* (1980), 260, n. 350. *Cole* involved adoption not assignment, whether of claims or an entire contract.

may not be assigned. Social security payments are perhaps the most obvious example. However, since *delectus personae* is merely an implication of what the parties can express, *delectus personae* cannot override the parties' manifest intention to transfer. Since the transfer of an entire contract, by its very nature, requires the consent of all the parties, this consent must trump the implied term. All the authorities in Scots law which refer to the concepts of assignment of contracts and *delectus personae* are, therefore, of limited utility. Either they sanction the assignment of *contracts*, in which case *delectus personae* is not relevant; or they refer to *delectus personae*. If so, they are cases dealing with assignation of claims or sub-contracting. The confusion is exemplified in Gloag and Henderson. It is suggested that 'where a *contract* is assigned the assignee acquires the right to sue and in some cases may be saddled with the liabilities arising under it'.²⁷⁶ But if 'assignation' is the transfer without the consent of the debtor this is problematic, as the authors recognise:

"In cases where both the contracting parties consent to the assignation there is no difficulty, but it is a question of some complexity how far one party to a contract can assign without the consent of the other."²⁷⁷

This conflates the transfer of contracts with the transfer of claims. If the principles applicable to each are kept in view, the complexity to which the authors refer cannot arise: for a valid transfer of a contract, both parties to the original contract, as well as the assignee, must consent.

(b) Effect of transfer

In principle, if all the parties have consented to the transfer, the new debtor becomes liable for the obligation. There need only be an intention to transfer; an intention to discharge the original debtor is not required.²⁷⁸ This is self-explanatory:

²⁷⁶ W.M. Gloag and R.C. Henderson, *The Law of Scotland*, (11th ed. by H L MacQueen et al, 2001) para 11.16 (emphasis added).

²⁷⁷ *ibid.*

²⁷⁸ See text at n. 159 above.

the debt is not being discharged but transferred. Therefore, on the transaction taking effect, the original debtor is no longer liable under the contract. The flip-side is that the transferee is liable. The transferee also becomes the creditor of the other party to the contract. Numerous points, however, are not clear. What is the warrandice in such a transfer? Is there a guarantee that the transferee is solvent? Or does the consenting party take that risk by actively consenting? The UNIDROIT *Principles* thus articulate a number of possibilities regarding the effect of the transfer on the transferor's liability: '(1) The other party [i.e. the creditor in the contractual obligations being transferred] may discharge the assignor; (2) The other party may also retain the assignor as an obligor in the case the assignee does not perform properly; (3) Otherwise the assignor remains as the other party's obligor, jointly and severally with the assignee.'²⁷⁹ The position in the *Principles of European Contract Law* is that consent to substitution of a new debtor is the same as consent to discharge of the original debtor.²⁸⁰ No account is taken of the third possibility, which appears in the UNIDROIT *Principles*, that the creditor may consent to a new debtor performing the original debtor's obligations without intending to discharge the original debtor. The third possibility is that the creditor may hold the old debtor jointly and severally liable with the new. It seems to this writer that any of the possibilities articulated in the UNIDROIT principles would be open to Scots law. The differences are important. If the original debtor remains jointly and severally liable, the creditor may accept performance from the new debtor but hold the original debtor responsible for any non-performance.

(c) Defences.

Where there is a transfer of claims, it is clear that the assignation cannot prejudice the position of the debtor: *assignatus utitur jure auctoris*.²⁸¹ What then in the case of the transfer of a contract? In German law, for example, the new debtor

²⁷⁹ Art. 9.3.5.

²⁸⁰ Art. 12:101(1).

²⁸¹ See chapter 5 below.

can raise those defences against the creditor which arise out of the original contractual relationship between the original parties to the transferred contract. The creditor will also be able to raise any defences arising out of the original relationship against the new debtor.

(d) Executed and Executory contracts: an alternative approach?

There is perhaps another way of analysing assignment of contract. One can distinguish between executed, or partially executed, contracts on the one hand; and, on the other, those on which performance is yet to occur, i.e. executory contracts. Arguably, in the case of the executory contract, the purported assignment of the whole contractual relationship by the debtor to another cannot prejudice the creditor. If the creditor is not satisfied with the performance of the new debtor he can simply refuse to perform his own obligations on the basis of the principle of mutuality.²⁸² The problem is whether the creditor would be *bound* to accept the new debtor, though the creditor has not consented to a new debtor, leaving the entire regulation of the relationship between the creditor and the new debtor to the law of mutuality. This is where the problems start. Suppose, for example, that it is the so-called creditor who is bound to perform first, e.g. to tender goods or services. The person, to whom performance is to be tendered, then purports to assign the contract *in toto* (including the obligation to pay the price) to another party. The original party knows nothing of this new debtor's solvency. Can it really be the case that the original creditor is bound to perform to this new party and hope that he gets paid? Would the original creditor even have a title to sue this new debtor? It seems to this writer that such a

²⁸² This is the approach suggested S. Woolman and J. Lake, *Contract*, (3rd ed. 2001) para 11.4 for the assignation of *rights*. See too, H. Weber, *Einführung in das schottische Recht* (1978), 81. However, like Gloag, the approaches of both Woolman and Weber are contradictory. They admit of the transfer of claims, not liabilities, without the consent of the other party; yet, in the same breath, suggest that *contracts* may be assigned *in toto*, the determinative factor being the presence or absence of *delectus personae*. In other words, they have confused the concepts of cession and sub-contracting. No mention is made of whether all the parties must consent. Since they view assignment as occurring without the consent of the debtor, in admitting assignment of contracts, they are admitting the assignment of liabilities without the consent of the creditor which, on their own analysis, is not permissible.

case exemplifies the problems of trying to find the basis of conveyances in the distinction between executed and executory contracts.

(e) Conclusion.

Assignment of contracts is important. The differing concepts of assignation of claims, delegation of liabilities, orders to pay, sub-contracting etc, are confused in the modern Scottish sources. There are numerous possible applications of the doctrine of assignment of contracts. Many statutory transfers can be analysed in terms of an assignment of a contract.²⁸³ The importance of this institution to commercial lawyers is great. Curiously, it has been entirely ignored by English lawyers. In English law, there are only two possibilities: assignment of claims or novation of liabilities.²⁸⁴ The development of this institution is therefore of great interest. But Scots law, in its underdeveloped state, has not yet grappled with the

²⁸³ For example, the Transfer of Undertakings (Protection of Employment) Regulations, 1981. Nevertheless, previous consideration in the United Kingdom of these provisions has tended to adopt a novation analysis. Importantly, however, the vesting provisions in Bankruptcy (Scotland) Act 1985, s. 31 are not such an example.

²⁸⁴ *Don King Productions Inc v Warran* [2000] Ch 291 at 318 *per* Morritt LJ: 'It is not possible (save pursuant to statutory authority) without a novation to transfer the burden of a contract to a third party'. See too Sir Guenter Treitel, 'Assignment' in P. Birks (ed.) *English Private Law* (2000), vol II, para 8.346.

paradigm assignation of claims. And it is only with this difficult subject that we will be henceforth concerned.

Chapter 3

History.

“If we were asked – Who made the discovery which has most deeply affected the fortunes of the human race? We think, after full consideration, we might safely answer – the man who first discovered that a Debt is a Saleable Commodity.”²⁸⁵

“Assignations are more frequent with us than anywhere; there is scarce mention of them in the civil law.”²⁸⁶

The ability to transfer claims is of considerable economic importance. Yet, in law as in life, before a revolutionary step is actually taken, that which seemed radical and impossible one day, may appear obvious and irreplaceable the next. With the circulation of debt, the law was slow to develop. Indeed, despite the commercial desirability of transfer, the law provided more hindrance than assistance. The laws of assignation, cession or assignment, from Rome to Scotland, are perhaps particularly striking examples of Alan Watson’s thesis on the dysfunctional nature of legal rules.²⁸⁷ It is only with some idea of the historical development of the law, in Scotland and abroad, that the reasons for this arrested development can be properly appreciated – if not always entirely understood.

I. Roman law.²⁸⁸

A. Background.

The lasting influence of Roman law on the concept of cession of claims in the civilian tradition proved almost unshakable, with thoroughly unhelpful consequences. Classical Roman law did not admit the transfer of claims. The relationship between debtor and creditor was deemed inherently personal. ‘The creditor could not be forced to accept another debtor

²⁸⁵ H. MacLeod, *Principles of Economical Philosophy*, (2nd ed. 1872), 481, quoted in E Allan Farnsworth, *Farnsworth on Contracts*, 2nd edn (1998, with Supplement, 2000) vol III, § 11.2, n. 1. Cf. Stryk, *De litterarum cambialium acceptione* (1698) who confidently stated that the development of the bill of exchange was the *fifth* element without which the modern world could not exist! Quoted by G. Schaps, *Zur Geschichte des Wechselindossaments* (1892), 4. Cf. Bell, *Commentaries*, (7th ed. 1870) I, 411.

²⁸⁶ Stair III.i.3.

²⁸⁷ See, in particular, A. Watson, *Society and Legal Change*, (2nd ed. 1994), 5 and 130; also *idem*, *Legal History and a Common Law for Europe* (2001), 101.

²⁸⁸ What follows is necessarily a selective summary of the Roman position. Of primary concern here is the influence of the probable Roman position on later legal development. For detailed discussion of the Roman position from pre- to post-classical times, and for references, see Kaser, *RPR* I §§ 152 and 153; II, §§ 275-276. See also Luig, *Geschichte*, 2-9 and Grosskopf, *Geskiedenis*, 1-23.

nor the debtor to submit to another creditor'.²⁸⁹ This is unsurprising. In Roman law,²⁹⁰ and for centuries thereafter, failure to perform one's obligations had personal consequences: enforced servitude and perhaps even death,²⁹¹ although the deleterious consequences of non-payment have perhaps been overemphasised:

"The details of personal execution are uncertain. It seems unlikely that a deeply obscure provision of the Twelve Tables (3.6) – 'let them cut up their shares' (*partes secanto*) actually referred, as used to be believed (perhaps by those who had recently read *A Merchant of Venice*), to the creditors actually carving up the debtor's body rather than his assets. But what personal execution did mean, was that the debtor, although not enslaved, was in the power of the creditor and could be imprisoned. It may be that this continued until he worked off his debt, although this is not certain."²⁹²

From the debtor's point of view, then, the person of the creditor could be particularly relevant. If the creditor were allowed to transfer his rights without his debtor's consent, the debtor could have found himself subjected to a harsher creditor. And a harsher creditor could spell ready imprisonment, enslavement or worse.

In modern law, cession is the transfer of a claim without the consent of the debtor. In the civil law, however, even if the debtor did consent, there was simply no mechanism to achieve *transfer*. Functional equivalents were possible. There were two. The first was delegation. This had the opposite effect from transfer. By delegation, the original debt was discharged and the debtor undertook his obligation to a new creditor.²⁹³ The consent of the parties removed the objection based on the personal nature of the obligation.²⁹⁴ Secondly, a form of procedural representation was invoked. The 'assignee' was constituted as the procurator of the cedent. The procurator was empowered to uplift the claim from, and discharge, the debtor on the creditor's behalf, i.e. in the original creditor's name. However, the procurator was also entitled in terms of the agreement to retain the proceeds for himself: the mandate was *in rem suam*.²⁹⁵ The constitution of the putative assignee as a procurator was,

²⁸⁹ C. Maynz, *Cours de droit romain*, (4th ed. 1877) vol 2, 78: 'le créancier ne peut être forcé d'accepter un autre débiteur, ni le débiteur de subir un autre créancier'. See too Windscheid, *Pandektenrechts* § 329.

²⁹⁰ For the Roman concept of obligation, see G. Long, 'Obligations' in W. Smith (ed.) *A Dictionary of Greek and Roman Antiquities* (London, 1875), 817-821. Compare the position in Jewish law: I. Herzog, 'Assignment of Rights in Jewish Law' (1931) 43 *JR* 127.

²⁹¹ Zimmermann, *Obligations*, 2. Cf. J.A. Crook, *Law and Life in Rome, 90 B.C. – 212 A.D.* (1967, Cornell University Press Paperback, 1985), 172-178.

²⁹² D. Johnston, *Roman Law in Context* (1999), 108-109.

²⁹³ See generally, W. Endeman, *Der Begriff der Delegatio im klassischen römischen Recht* (Marburg, 1959); Kaser, *RPR* I, § 152.

²⁹⁴ C. Maynz, *Cours de droit romain*, (4th ed. 1877) vol 2, 78.

²⁹⁵ Gaius II, 38 and 39.

of itself, insufficient to protect the assignee's position. It remained precarious. The cedent was still the creditor. He could revoke the mandate at any time.²⁹⁶ Further, the mandate would be revoked by the death of the cedent. Only on *litis contestatio*²⁹⁷ would the procurator become creditor of the debtor. This effect was an incident of the formulae system. The debtor was condemned to pay the procurator rather than the cedent: 'whatsoever the debtor ought to have paid to [the original creditor], he is condemned to pay it to [the new creditor].'²⁹⁸ There was some juridical difficulty in this proceeding. The ordinary contract of mandate in Roman law was supposed to be both gratuitous and, importantly, for the benefit of the mandatory.²⁹⁹ Arguably, then, the use of procedural representation to effect a transfer of a claim owed little, initially at least, to the mandate *in rem suam*, but rather everything to the novatory effect of *litis contestatio*.³⁰⁰ The procuratory *in rem suam*, at this stage, provided only minimal assistance. It allowed someone other than the original creditor to claim from the debtor and to retain the proceeds; but that was all. There was no protection from the insolvency, or even from voluntary acts, of the original creditor. Only by instituting proceedings against the debtor could the assignee ensure he would not be disappointed. Such conditions were not conducive to the free circulation of claims.

From the time of Antoninus Pius, (the middle of the second century) the cessionary was, in certain respects, protected. He was accorded an *actio utilis*, which allowed him to sue the debtor in his own name; further, and importantly, the cedent's demise would no longer have any adverse effect on the cessionary's position.³⁰¹ Moreover, because the cessionary's *actio utilis* was not transferred from the cedent, but was accorded to the cessionary in his own right, the cedent could not revoke it. Initially, the action was awarded only on the sale of an inheritance.³⁰² Subsequently, it was extended to the sale of other claims and the giving of a

²⁹⁶ Luig, *Geschichte*, 4. This factor seemed to support the proposition that claims were not transferable, see Luig, at 14.

²⁹⁷ For the *litis contestatio*, see generally J.M. Kelly, *Roman Litigation* (1966), 5 and M. Kaser and K. Hackl, *Das römische Zivilprozessrecht*, 2nd edn (1996) §§ 41 and 42. For *litis contestatio* in the context of *procuratio*, see Mühlbruch, *Cession* § 6, 48.

²⁹⁸ J-P Lévy and A. Castaldo, *Histoire de Droit Civil* (2002), 1009.

²⁹⁹ Zimmermann, *Obligations*, 61.

³⁰⁰ Luig, *Geschichte*, 4; Cf. L.R. Caney, *A Treatise on the Law of Novation*, (2nd ed. 1973), 66 ff.

³⁰¹ M Kaser, *RPR I*, § 153, 654. But see C. 4, 10, 1, cited by G.H. Maier, 'Zur Geschichte der Zession' in H. Dölle et al (eds) *Festschrift für Ernst Rabel*, vol II (Tübingen, 1984) at 207 which suggests that the cessionary was only protected from the cedent's death if *litiscontestatio* had occurred.

³⁰² D. 2, 14, 16, pr

claim in discharge of a debt.³⁰³ While the cedent lived, however, the cessionary's position remained invidious. The cedent, after all, continued to hold the *actio directa*; as a result, the cedent could still discharge the debtor. Therefore, by intimating (*denuntiatio*) to the debtor that he (the procurator), not the original creditor, was to be paid, the debtor could no longer validly pay the cedent.³⁰⁴ It has been suggested, therefore, that on notification the cessionary was in the same position as a transferee.³⁰⁵ It has been said that the *denuntiatio* took the place of the *litis contestatio*.³⁰⁶ Both destroyed the cedent's *actio directa*, or at least emptied it of content.³⁰⁷ The debtor who paid a cessionary after intimation of the *procuratio* had the *exceptio doli* against the cedent.³⁰⁸ Since the existence of a defence of good faith payment in Roman law is disputed,³⁰⁹ the *exceptio* provided some measure of debtor protection. If there had been no intimation, then the debtor was still entitled – indeed obliged – to pay the cedent. It is not entirely clear whether intimation to the debtor was a constitutive requirement of transfer or whether it was merely required to place the debtor in bad faith. There is no indication in the sources that there were any prescribed formalities for intimation.³¹⁰ In this respect, Roman law was more liberal than modern Scots or French law.³¹¹

Instead of intimation, the cessionary could also obtain a part payment from the debtor. This was often achieved by an acknowledgement from the debtor that the procurator was the new creditor.³¹² Again, this removed any rights the cedent would have had to claim payment from the debtor. By a constitution of Gordonian, the cessionary was given direct protection

³⁰³ C. 4, 39, 8; C. 4, 10, 2; C. 4, 15, 5. Constitution of the 'assignee' as a procurator *in rem suam* did not continue to be necessary for the assignee to entitle the assignee to an *actio utilis*: Windscheid, *Pandektenrechts*, § 329, n. 6. Mandate was seen, in Roman law, as just one method of achieving a cession: Windscheid, § 329, n. 11.

³⁰⁴ Quite when this practice began is not clear. C. 8, 41, 3 (Gordonian, AD 239) and C. 8, 16, 4 (Alex, AD 225) are often cited as examples of the practice in late classical law. However, it is difficult to understand their relevance.

³⁰⁵ See Luig, *Geschichte*, 7: he disagrees with the argument that intimation was required only to place the debtor in bad faith (see D. 2, 14, 16, pr); rather it was required to nullify the cedent's 'lingering' right and constitute the assignee as the sole creditor in the claim. Cf. C. 8, 41, 3, pr. and Luig, at 14. There are perhaps some parallels between this so-called 'lingering' right and the problematic so-called 'radical right' doctrine which bedevilled the Scottish law of property in the nineteenth century: see G.L. Gretton, 'Radical Rights and Radical Wrongs' 1986 *JR* 51 and 192 (2 Parts). Both doctrines arise from a difficulty in conceptualising a unitary transfer and its consequences.

³⁰⁶ M. Maynz, *Cours de droit romain*, (4th ed. 1877) vol 2, 90.

³⁰⁷ Luig, *Geschichte*, 15.

³⁰⁸ Luig, *ibid*, 19.

³⁰⁹ Cf. Kaser, *RPR* II, § 277, at 452, n. 9. For good faith payment in Scots law, see chapter 4, 'Intimation' below.

³¹⁰ C. Maynz, *Cours de droit romain*, (4th ed. 1877) vol 2, 90.

³¹¹ See chapter 4 below.

³¹² This continues to be a recognised equipollent to intimation in modern Scots and French law: see chapter 4 below, 'Intimation'.

against the cedent who fraudulently sold the same claim twice.³¹³ The cessionary was given an independent right, an *actio utilis*, by reason alone of the fact that he had been granted a mandate *in rem suam*.

B. Post-classical Roman law.

In post-classical times, however, the cessionary was given greater substantive protection. Justinian's awarded the cessionary an *actio utilis* where a claim was donated.³¹⁴ With the lapse of the formula system, it was no longer satisfactory to explain the cessionary's position on the basis of the *litis contestatio*. Moreover, enigmatic references to *actiones* after the formulae system's demise clouded the substantive position. For most scholars, the combined effect of these references to actional law was that, by the fifth century, Roman law in the west had reached the position that claims were transferable.³¹⁵

C. Problems with the Roman position.

For the modern lawyer, there are two issues which give cause for concern. First, the procedural nature of Roman law: the Roman jurists spoke in terms of actions. Abstract rights or claims were not concepts with which they concerned themselves. The second problem is the Roman sources. The *Corpus Iuris Civilis* was compiled in the sixth century. The *Digest* is made up of writings of the classical jurists. The last jurists belonging to the classical period of Roman law, however, had stopped writing in the middle of the third century. The law that is presented in the *Digest*, therefore, was some three hundred years out of date. The sources speak exclusively in terms of actions and of the procurator *in rem suam*. There is nowhere any discussion, never mind recognition, of the paradigm transfer of a money claim. There are,

³¹³ The double sale is an age-old problem for the law. For a discussion of the position in modern Scots law, see chapter 6 below, 'validity', Part IV, B.

³¹⁴ C. 8, 53, 33 (AD 528) is usually cited although C. 8, 54, 33 seems to be the relevant text. It is strange that gratuitous transfers were singled out for protection; the law is usually suspicious of transactions for no consideration.

³¹⁵ Mühlenbruch, *Cession* § 16; Luig, *Geschichte*, 5: 'Die weitere Entwicklung, die bei Justinian ihren Rechtsschluß findet, führt dazu, daß die *actio utilis* auf Grund aller Rechtsgeschäfte gegeben wird, die nach dem Willen der Parteien eine Übertragung der Forderungen zum Ziele haben. Dies ist als Regel im *Corpus iuris* nicht ausgesprochen, wird aber von der herrschenden Meinung angenommen.' (The further development, which occurred under Justinian, consisted of an *actio utilis* being given on the basis of any transaction by which the parties intended to achieve a transfer. This rule is not expressed in the *Corpus Iuris*; however, it is accepted by the prevailing opinion'); Grosskopf, *Geskiedenis*, 22; Zimmermann, *Obligations*, 63. For the position in the East: see, E. Levy, *Weströmisches Vulgarrecht, Das Obligationenrecht* (1956), 149-155

however, several examples in the Roman sources which indicate that there was, at least, no abstract prohibition on cession in Roman law:

The *Lex Anastasiana*.³¹⁶ The *Lex* provided that the buyer of a litigious claim could only claim from the debtor the sum that the buyer had paid the cedent, plus interest.³¹⁷ But why was there specific provision prohibiting the sale of litigious claims if it were the case that claims were not assignable at all?³¹⁸ What does ‘sale’ in this context mean? Did the sale of an incorporeal comprehend transfer or merely a contractual right to transfer? As will become clear below, we just do not know the answer to these questions. What can perhaps be asserted with greater certainty is that the very existence of the *Lex* might indicate that the fundamental objection that another, perhaps harsher, person could not exercise the rights of the original creditor no longer held sway.

Universal succession.³¹⁹ This could occur on death or in the *cessio bonorum*.³²⁰ In a universal succession, the transmission is of everything in the transferor’s patrimony; so, if there were claims, these would also transmit:

“Si la créance se transmette avec l’ensemble du patrimoine, pourquoi ne pourrait-elle pas tout aussi bien faire l’objet d’un transfert spécial? En général, tous les droits qui se transmettent à titre universel peuvent se transmettre également à titre particulier.”³²¹

³¹⁶ C. 4, 35, 22 (Anastasianus, 506). See too subsequent development by Justinian: C. 4, 35, 23.

³¹⁷ C. 4, 35, 22.1. See Mühlénbruch, *Cession* § 53; Kaser, *RPR*, II, § 277 at 453. Cf. Anon, ‘Lex Anastasiana’ (1913) 30 *SALJ* 290 at 291: ‘It would appear from the preamble of the *Lex* that [...] there came into existence a class of persons (perhaps legal practitioners of the baser sort) who made a practice of pestering creditors who were taking legal proceedings against their debtors, until the creditors reluctantly ceded their rights of action to such persons for a sum less than the original amount that was owing, and the cessionaries would then worry the debtors in various ways till they got paid the full amount. To this practice the *Lex* was calculated to put a stop’.

³¹⁸ The civilian prohibitions on cession on the grounds of public policy have some parallel with the English rules on champerty and maintenance. See also the discussion in Johannes Sande *Commentary on the Cession of Actions* (trans. P.C. Anders, 1906), 201 ff; Mühlénbruch, *Cession* § 31, 383.

³¹⁹ See too e.g. G. Köbler, *Lexikon der europäischen Rechtsgeschichte* (1997) v. ‘Universalsukzession’; and L. Sedatis, ‘Universalsukzession’ in *HRG* vol 5 (1998) col 489 and references there cited.

³²⁰ See P.F. Girard, *Manuel élémentaire de droit romain*, (8th ed. 1929), 776.

³²¹ ‘If the claim is transferred with the entirety of a patrimony, why can it not also be transferred individually? In general, all the rights that can be transmitted by universal succession can equally be transferred by singular succession’: P. Gide, *Etudes sur la novation et les transport des créances en droit romain* (Paris, 1879), 238. Cf. A.F.J. Thibaut, *System des Pandekten Rechts*, (6th ed. 1823) § 77 who says of the alleged general principle that ‘cessibel ist, was vererbt; nicht cessibel, was nicht vererbt werden kann, ist falsch’. The example he gives was of litigious claims. These passed by universal succession on death, but they were not freely assignable as a result of, for instance, the *Lex Anastasiana*. However, as J. Barr Ames observes (‘The Inalienability of Choses in Action’ in *Select Essays in Anglo-American Legal History* (1909) vol III, 580 at 581), universal succession ‘was hardly a

The *beneficium cedendarum actionum*: in Roman law the right of the payer of the debt of another (most often a cautioner) to step into the shoes of the principal creditor was recognised. This was called the *beneficium cedendarum actionum*. It was this principle which gave rise to the general principle of *cessio legis* (subrogation) in civil law systems. But the sources are not clear as to whether the *beneficium* operated a transfer. Indeed, the Roman texts analyse the payment by the third party as a sale of the creditor's rights.³²² Again, we are brought back to the difficult issue of sale. In Roman law, sale was a consensual contract. It was concluded by mutual stipulation. For corporeal moveable property, a physical conveyance of the property to the transferee (*traditio*) was required to transfer ownership. Such a proceeding is evidently ill-suited to claims.

Sale of *spes successionis*. It was accepted in Roman law that rights to inherit could be sold. There is an entire title in the *Digest* dealing with this.³²³ Since these rights could be sold, it has been suggested that it must have been supposed that the claims would be transferred to the buyer.³²⁴ The problem with this position is threefold. First, the language of sale is notoriously imprecise. Even in modern Scots law, 'sale' can mean many things.³²⁵ But a contractual right to a transfer is not the same as a transfer. Second, a buyer may be perfectly content to 'buy' and pay for an asset without the asset thereupon being transferred to him. Indeed in modern practice, this is common: non-notification debt factoring is an obvious example. Such a proceeding often takes place where the buyer is content to bear the risk of the cedent's insolvency. Third, modern research is hampered by the fact that there was curiously little discussion in Roman law of the effect of insolvency. It is on insolvency that the difference between the contract to transfer and the transfer itself becomes crucial. This is not the appropriate place to discuss this curious lacuna in Roman legal literature. For present purposes it sufficient to stare into the abyss. The juristic sources that have survived simply do

departure from the rule, since the representative was looked upon as a continuation of the persona of the deceased'.

³²² Paulus, D. 46, 1, 36, discussed by Lord President Rodger in *Caledonia North Sea v London Bridge Engineering* 2000 SLT 1123.

³²³ D. 18, 4, *De hereditate vel actione vendita*. Cf. the authorities cited in n. 334 below, which suggest that rights to inheritance could be transferred by *in jure cessio*.

³²⁴ T. Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1890) vol 1, 193.

³²⁵ Cf. Sale of Goods Act 1979, s 17 and s 18, rule 1; *Lord Advocate v Caledonian Railway Co* 1908 SC 566 at 575 per Lord President Dunedin; *Gibson v Hunter Home Designs Ltd* 1976 SC 23 and *Sharp v Thomson* 1995 SC 455 rev'd 1997 SC (HL) 66.

not consider the abstract question of transfer. Their concern was exclusively with *actiones*. It was this focus that would bedevil much subsequent development.

Perhaps the most important argument about the position in Roman law is at one and the same time the strongest and the weakest: from a modern view, it is almost inconceivable that Roman society could have functioned without claims being transferable. Claims are important assets. Roman society was, on one view, a commercial one.³²⁶ Practical necessity, it is argued, would have demanded that claims be exercisable other than by the original creditor. While the Roman sources seem to indicate that cession in the modern sense of the term was not admitted, 'it is, however, obvious that no society in which commerce plays even a minor role can do without it'.³²⁷ Tempting as this conclusion may be, it must be remembered that it has been repeatedly shown that Roman law was dysfunctional in other areas.³²⁸ It is perhaps not sufficient to throw one's hands up in exasperation at the prospect that a sophisticated and commercial society like Rome could have functioned without the concept of cession. We must be careful not to look at third century Rome or sixth century Constantinople from an unimaginative modern perspective. In particular, the commercial development of Rome at the time the classical jurists were writing can be overemphasised.³²⁹ In any event, by way of *delegatio* and *procuratio*, almost identical results could be achieved without a concept of cession. We do well to remember that the industrial revolution did not seem to be unduly hampered by the failure of English law to admit the assignment of choses in action at law until the Judicature Act in 1873.³³⁰

³²⁶ D. Johnston, *Roman Law in Context* (1999), 77 ff; *idem*, 'Law and Commercial Life in Rome' (1997) 43 *Proceedings of the Cambridge Philological Society* 53; F.P. Walton, 'The Growth of Commercial Law at Rome' (1893) 5 *JR* 332. Compare the statement by Bell, *Commentaries*, (7th ed. 1870) I, 506, writing in the context of the law of agency: 'In Rome, commerce and its relations and facilities were discouraged or not regarded with favour'.

³²⁷ P. van Warmwlo, 'Male Fide Cession, Stare Decisis and Abrogation by Disuse' (1974) 91 *SALJ* 298 at 301.

³²⁸ See, above all, A. Watson, *Society and Legal Change* (1977) chapters 2-4.

³²⁹ J.A. Crook, *Law and Life in Rome, 90 B.C. – 212 A.D.* (1967), 206: "Roman economic life remained overwhelmingly based on agriculture as its primary product; no industrial revolution, no 'take-off', ever occurred and no significantly big-business ever appeared. And the law both reflected this situation and reciprocally helped to condition and maintain it." See also Crook's comments at 207 regarding the primitive nature of Roman accounting practices.

³³⁰ See discussion at n. 403 below. It is, of course, impossible to know how a different legal regime would have affected economic development. Until recently, the development of legal norms occurred with remarkably little reference to economics. Nevertheless, the history of the law of cession demonstrates that an economy can find quite workable functional equivalents. The point is important. Some property law theorists, for example, assume that a concept of cession is indispensable: see e.g. W. Mincke, 'Property: Assets or Power? Objects or Relations as Substrata of Property Rights' in J.W. Harris (ed.) *Property Problems: From Genes to Pension Funds* (1997), 83: 'We need to be able to transfer obligations. Our economy would come to a halt without that possibility. So we have to model our legal tools according to that need. The outcome seems clear. It must be something like the general concept of property or *propriété* as it is found in English or French law'. The reference to 'obligations' is

Others have not been so cautious. It has been argued that the omission of cession from the Roman texts does not necessarily mean that claims were not transferable in Roman law. There are two main reasons for this position. First, the compilers of the Digest misunderstood Gaius (*obligationes nihil eorum recipient*).³³¹ This does not mean, according to Gide, that claims are not transferable at all. Rather, it must be taken in context; claims are simply not transferable either by the usual conveyances, i.e. *mancipatio*, *in jure cessio*, or *traditio*, or even by mere *stipulatio*.³³² When the compilers of the *Digest* encountered this fragment of Gaius, they forgot that the rule that claims were not assignable had since been superseded by piecemeal and incremental intervention by the praetor. In taking Gaius at face value they then sought to excise all the material on cession from the Digest.³³³

The next point follows from the last: it was because the recognised conveyances were unsuitable for transferring claims that an artificial analysis had to be employed; this turns the received interpretation on its head, i.e. the reason that ‘cession’ could be effected only by artificial means indicated that economic development had outpaced legal development. The special proceeding of constituting the assignee as a procurator *in rem suam*, Gide argues, occurred because claims had to be, and were, transferred in practice. There was no abstract prohibition on transfer, simply no other recognised conveyance. The existing institutions of *mancipatio*, *in jure cessio* and *traditio* were simply of no use in the case of the transfer of a claim.³³⁴

What conclusions can be drawn from these arguments? It seems to this writer that if it was the case that there was no proper legal mechanism whereby a transfer could be brought about, then one cannot even begin to suggest that Roman law recognised cession. It is not sufficient to say that there were suitable functional equivalents. Moreover, much discussion of the Roman sources is predicated on the modern view of cession, viz. that it occurs without the consent of the debtor. But there was still no way to bring about a *transfer* of the claim, even if

ambiguous: modern English law, for example, still does not recognise the transfer of *obligations*, as opposed to claims: *Pan Ocean Shipping Ltd v Creditcorp Ltd, the Trident Beauty* [1994] 1 WLR 161 HL; Sir Guenter Treitel, ‘Assignment’ in P. Birks (ed.) *English Private Law* (2000) vol II, para 8.346.

³³¹ Gaius, *Inst.* II, 38.

³³² T. Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1890) vol 1, 210.

³³³ P. Gide, *Etude sur la novation et le transport de créances en droit romain* (1879), 240-242.

³³⁴ It should be noted that there are also two difficult passages in the Roman sources which suggest that inheritance rights could actually be transferred outright *in jure cessio*: G. II, 35; Ulpian D. 19, 13 and 14. Cf. H Home, Lord Kames, *Principles of Equity*, (2nd ed. 1767), 206: ‘In our later practice an assignment has changed its nature, and is converted into a proper *cessio in jure*, divesting the cedent *funditus* and vesting the assignee’. Kames is referring to *cessio in jure* literally; he is not to be taken as suggesting that Scots law received the Roman process of *in jure cessio*.

the debtor did consent. Only *delegatio* was available. This would have destroyed the claim, not transferred it.³³⁵ The temptingly forceful argument that the debtor could not have another creditor imposed upon him without his consent is, therefore, emptied of much content. Even where there was to be no *imposition* of a new creditor (because the debtor consented), there was still no mechanism to achieve a transfer.

D. Post-Classical Roman law to the Glossators and Commentators.

As the law developed, it seems some claims were accepted as transferable. For example, claims which were held in respect of a thing that was transferred. Grosskopf draws attention to an example in a Lombard deed of A.D. 789 where rights of action for compensation for death were transferred to the buyer of slaves.³³⁶

A revival of the study of the Roman law found in Digest occurred in the west at the turn of the twelfth century. Beginning with Irnerius, (c. 1055-c.1130) the so-called Glossators³³⁷ sought to elaborate and expound on the law in the Digest. Their glosses on the original text contained much learning and, importantly, cross references without which the Digest would have remained largely impenetrable. Their work was consolidated by Accursius (who died in 1260) in the *gloss ordinaria*.³³⁸ The approach was rigorous but academic. They were unconcerned with the practice of law. Consequently, their views on cession were conservative and true to the Roman sources. The later Glossators were unequivocal that the *actio personalis* held by the creditor could not be transferred to another.³³⁹ Their approach was preserved for posterity with Accursius' striking comparison of the action-obligation relationship to the bond between spiritual soul and mortal body: 'the action arising from the obligation hinges on the bones and entrails of the creditor and can no more be separated from his person than the soul from his body.'³⁴⁰ It is to this literary quality (or 'dans leur langue

³³⁵ Windscheid, *Pandektenrechts*, § 329, 361.

³³⁶ Grosskopf, *Geskiedenis*, 31-32.

³³⁷ For the Glossators and Commentators generally, see: P. Stein, *Roman Law in European History* (1999). For their views on cession, see R. Fränkel, 'Zur Zessionslehre der Glossatoren und Postglossatoren' (1910) 66 *ZHR* 305-348; (1911) 67 *ZHR* 79-126 (2 parts).

³³⁸ For a concise introduction see B. Nicholas, *An Introduction to Roman Law* (1962), 46-47.

³³⁹ Grosskopf, *Geskiedenis*, 50 ff.

³⁴⁰ Zimmermann, *Obligations*, 58. The paraphrase was first invoked by the Glossators: Azo, Sum. Cod. 4.10 Nr. 19: *Si aliquis eam vult omnino a se separare per cessionem, non potest, adeo inhaeret ossibus eius*; Accursius, *Gloss in nominibus* on D. 15, 1, 16: *Quae nomina sive actiones non possunt separari a domino, sicut nec anima a corpore*; Accursius, Gloss on D. 17, 2, 3, pr: *ossibus...inherent*, cited by Luig, *Geschichte*, 12 and Grosskopf,

énérgetique et bizarre',³⁴¹) that Luig and Grosskopf attribute the later acceptance in the *ius commune* of the principle that claims were not transferable.³⁴² Indeed, of the otherwise practically orientated Commentators,³⁴³ even such great figures as Baldus (1327-1400) and Bartolus (1313-1357) were seduced by the poetic appeal of Accursius' exposition; as were many other scholars of renown in the centuries that followed. In the Glossators' opinions, the *actio directa* remained with the original creditor. A third party could only exercise these rights indirectly by way of a *procuratio in rem suam*. It was this view which coloured much subsequent legal development; in Scotland, it clouded investigations of the history and confused much of what came after.

II. National Developments

A. General

There are some difficulties in tracing the development of the concept of cession. The concept (or functional equivalents), it will be seen, is universal and ubiquitous. The sources are numerous. How should differences between case law and juristic writings be evaluated? The former is necessarily pathological, perhaps unrepresentative of non-contentious general principles; the latter, on the other hand, may be, and often are, detached from practical reality.³⁴⁴

B. French Customary Law.

The evolution of the law of cession in France is of particular interest to Scots lawyers. The French sources evidence the first and most important departures in the European sources from the strictures of Roman law. Heinrich Brunner has trawled the older French sources in his research on reified obligations in French law.³⁴⁵ Many of the sources touch on the law of

Geskiedenis, 50. See too, E. Genzmer, 'Nomina ossibus inhaerent' in Université de Lausanne, *Mélanges Philippe Meylan* vol 1 (1963), 159-165 and W. Ogris, 'Abtretung' in *HRG*, vol 1 (1971).

³⁴¹ P. Gide, *Études sur la novation et les transports de créances en droit romain* (1879), 233.

³⁴² Luig, *Geschichte*, 18-21; Grosskopf, *Geskiedenis*, 51.

³⁴³ See Grosskopf, *Geskiedenis*, 44 ff and references there cited.

³⁴⁴ This fundamental problem for legal history is identified by Alan Watson, *Ancient Law and Modern Understanding* (1998), 89: 'Evidence for legal history is the written record, occasionally archaeology, but never the spoken word not recorded in writing. So often the evidence for legal history misrepresents what actually happened',

³⁴⁵ H. Brunner, 'Das französische Inhaberpapier des Mittelalters und sein Verhältnis zur Anwaltschaft, zur Zession und zum Orderpapier' originally published in H. Brunner (ed.) *Festschrift im Namen und Auftrage der Berliner Juristen-Fakultät zum 50jährigen juristischen Doktorjubiläum von Heinrich Thöl* (Berlin, 1879) but

cession; otherwise, the basic concept of cession was not regularly invoked. Rather, obligations to pay were more often reified in a moveable bond.³⁴⁶ These were initially in the form of undertakings on the part of the debtor to pay the creditor. Sometimes the promise would include a clause that it was payable to order; sometimes that it was payable to bearer; in other cases, transfer seems to have been possible even without such a reference.³⁴⁷

However, Brunner has traced several cases from the early thirteenth century which deal expressly with issues arising out of cession.³⁴⁸ Take, for example, a decision of the Normandy Exchequer in 1219. The creditor transferred his claim against the debtor. The assignee then sought payment. The debtor countered the demand by producing a discharge from the cedent. However, this discharge was held to be ineffectual since it postdated the deed of cession. The debtor was therefore ordered to pay the assignee. It is not clear whether this was a double payment. There is also an example of a debtor arguing that he had agreed to pay the original creditor and the original creditor only; he should not be compelled, therefore, to enter into proceedings with an assignee.³⁴⁹ In another case of 1298, the assignee was constituted as a procurator *in rem suam*,³⁵⁰ while there is another referring to a mandate to uplift.³⁵¹ It seems, however, that in those areas where cession was admitted, where there was an intention to transfer, the style was irrelevant: a complete transfer was effected.³⁵² No distinctions were made, in the sources available, between the different types of mandate or between transfer and mandate. Apparently, Italian notaries,³⁵³ due to their focus on the Roman *actiones*, had originally invoked the language of *procuratio*. This practice had spread beyond Italy; others copied their styles as a precautionary measure. Drafters took what modern

reproduced in K Rauch (ed.) *Abhandlungen zur Rechtsgeschichte, gesammelte Aufsätze von Heinrich Brunner* (1931) vol I, 487. All further references to Brunner are to the pagination in the latter collection. There is much background to be gained from J.P. Dawson, *The Oracles of the Law* (1968). Grosskopf, *Geskiedenis*, chapter 5 is, to a large extent, based on Brunner's work: see 78, n. 1.

³⁴⁶ Brunner, 'Das französische Inhaberpapier', 494.

³⁴⁷ Brunner, *op. cit.*, 497 observes that the *Coutumes du Beauvoisis* (1283) 35, 19 recognise the transfer and transmission of moveable bonds.

³⁴⁸ Brunner, *op. cit.*, 495 ff.

³⁴⁹ Brunner, *op. cit.*, 496. At this time, it seems that the parties would have to consent to entering into proceedings with each other. Cf. the further examples adduced by Brunner, especially at 498, n. 2, a case involving a mandate to uplift which he distinguishes from cession.

³⁵⁰ Brunner, *op. cit.*, 496.

³⁵¹ Brunner, *op. cit.*, 498, n. 2 ('*Einkassierungsmandat*'). Both the *procuratio in rem suam* and the *Einkassierungsmandat* are mandates to uplift. A *procuratio in rem suam* is, as the name suggests, *in rem suam*; and *Einkassierungsmandat* may be *in rem suam*; but it need not be.

³⁵² Brunner *op. cit.*, 501, n. 345.

³⁵³ For whom, see Grosskopf, *Geskiedenis*, 34-42.

commercial practice calls the 'belt-and-braces' approach.³⁵⁴ Indeed, many deeds even purported to constitute transferees of immoveable property as procurators, though the transfer of immoveable property was not based on any theory of *procuratio in rem suam*.³⁵⁵ For Brunner, since such a disponent of immoveables was always considered as a transferee or singular successor and not merely as a procedural representative, so too should an assignee.³⁵⁶

C. The Sixteenth and Seventeenth Centuries: France and the Netherlands

The so-called 'practical' French Romanists, Petrus Rebuffus³⁵⁷ and Andreas Tiraquellus³⁵⁸ held that following a cession the cedent no longer had any claim against the debtor, though both jurists held that the *actio directa* remained with the cedent.³⁵⁹ As a result, a claim could only be transferred once.

The French Humanists, in their attempts to reconstruct the law of Justinian by close textual analysis, naturally took a more orthodox view of cession. By a mandate *in rem suam* a third party could exercise the cedent's *actio directa* in the cedent's name; by cession, the cessionary could pursue in his own name by virtue of the *actio utilis*. But their views were not always intelligible. When the leading French Humanist, Cujacius, conceded that issues involving cession were a '*quaestio subtilis, et satis difficilis*',³⁶⁰ he was at least honest; his treatment of cession was contradictory. On the one hand, he said that there was no difference between cession and a mandate *in rem suam*; on the other, he elaborated different results that followed from each. Further, he asserted in one place that after cession the *actio directa* remained with the cedent; elsewhere that after cession the cedent could no longer claim from the debtor.

³⁵⁴ Brunner, *op. cit.*, 502: 'Die Sitte der Notare, die Klausel des procurator in rem suam den verschiedenartigsten Urkunden einzufügen, hat ihren Ausgangspunkt in Italien. Schon die italienischen Notare liebten es, der Übertragung des Rechts vorsichtshalber die 'cessio actionum' anzuhängen, eine Klausel, die dann ihrerzeits wieder den procurator *in rem suam* hinter sich nachzog'.

³⁵⁵ Brunner, *ibid.* Although some feudal grants could, admittedly, be construed in terms of *procuratio*.

³⁵⁶ Note Brunner's reference (at 499) to a small compilation of the law of the office of justice in Poitou dating from the second half of the fourteenth century. This seems to suggest that at that time there were thought to be two ways to effect a cession: one was by a mandate to pay, the other by a true cession. The latter effected a transfer of the claim on the debtor becoming aware of the cession; the former was a functional equivalent. Interestingly, it is stated that a cession must be in writing.

³⁵⁷ P. Rebuffus (Pierre Rebuffi), *Tractus de cessionibus in idem, Commentarii in constitutionis seu ordinationis regias* (1554) Art. II. Rebuffus was born in 1487 and was Professor in Paris in 1557.

³⁵⁸ A. Tiraquellus, *de retrait lignagier* § 26 in *idem, Opera Omnia* (1588). Tiraquellus was born c. 1488 and died in 1558. But note Coing's reservations about these texts: H. Coing, *Europäisches Privatrecht*, Vol 1 (1985) § 86, n. 5.

³⁵⁹ Grosskopf, *Geskiedenis*, 88-89.

In the southern Netherlands of the sixteenth century, there was a greater inclination to accept cession. It was admitted that the cessionary had the right to claim in his own name from the debtor. The cessionary was also entitled to use diligence, although it was uncertain whether the cessionary could do this in his own name.³⁶¹ The Grote Raad van Mechelen also accepted that cession was a transfer.³⁶² The form, it seems, was derived from the Roman, with the cessionary being surrogated and substituted into the position of the cedent.³⁶³ This is more consistent with a theory of representation than with the idea of outright transfer. Writing was always required. It was also suggested that a claim could be ceded only once,³⁶⁴ why this should be so, however, is not articulated. It is consistent with the understanding that claims could not be transferred: the 'cessionary' was a mere representative and therefore could not 'delegate' to another what had been 'delegated' to him.³⁶⁵

Under the Humanist influence at the Leuven law school, the Dutch jurists of the day, such as Gudelinus,³⁶⁶ Zoesius³⁶⁷ and Perezius,³⁶⁸ continued to hold that the *actio directa* held by the cedent was not transferable. The cessionary could only make use of the cedent's right as a procurator *in rem suam*; as a result, the action had to be brought in the name of the cedent. The cessionary could sue in his own name only by virtue of the *actio utilis*.

In the northern Netherlands there were two different approaches. In Friesland, Roman law was more strictly adhered to than elsewhere in the Netherlands. The two best-known Frisian jurists, Ulrik Huber³⁶⁹ and Johannes van den Sande³⁷⁰ adopted the conservative view that claims were not transferable; only the mandate *in rem suam* was available. This can be

³⁶⁰ J. Cujacius (Jacques Cujas), *Opera, ad C. 4, 10, 1, 2*, quoted by Grosskopf, *Geskiedenis*, 91, n. 288.

³⁶¹ P. Peck (Petrus Peckius), *Opera Omnia* (Antwerp, 1679) 3.6, cited by Grosskopf, *Geskiedenis*, 100 and Y.M.J.V. Boon, *Assignment of Contract: a Study in Comparative Law* (Unpublished M Litt Thesis, University of Aberdeen, 1972), 183-184.

³⁶² Grosskopf, *Geskiedenis*, 101, n. 288.

³⁶³ H. Coing, *Europäisches Privatrecht*, Vol 1 (1985), 446-447.

³⁶⁴ See the opinion of Christinaeus (Paul van Christynen) cited by Grosskopf, *Geskiedenis*, 100.

³⁶⁵ 'Delegation' is used in a loose sense. It should not be confused with *delegatio*.

³⁶⁶ P. Goudelin (Petrus Gudelinus), *Commentarium de jure novissimo* (Arnhem, 1643) IV.4.

³⁶⁷ H. Zoes (Henricus Zoesius), *Commentarius ad D. 44, 7, 67* (Brussels, 1718).

³⁶⁸ A. Perez (Antonius Perezius), *Praelectiones in C. 4, 10, 13* (1639). Perezius was born in Spain. See discussion of these writers in Grosskopf, *Geskiedenis*, 103, n. 288.

³⁶⁹ *Heedendaegse Rechtsgeleertheit* (originally published, 1686; 4th edn enlarged and revised by Z. Huber, Amsterdam, 1742), in English as *The Jurisprudence of my Time* (P. Gane trans. Durban, 1939). See discussion in Grosskopf, *Geskiedenis*, 111 ff.

³⁷⁰ *Commenatrius de actionum cessione* (1623), in English as *Commentary on the Cession of Actions* (P.C. Anders trans. 1906). See discussion in Grosskopf, *Geskiedenis*, 105-110. Van den Sande's *de actionum cessione* has been cited in Scotland: see *Ewart v Latta* (1863) 1 M 905; while his *Theatrum practicanium, hoc est decisiones aerae sive rerum in suprema Frisiorum curia judicatarum* (originally published in 1615) is referred to by Kames, *Principles of Equity*, (3rd ed. 1778) II, 183 in the context of arrestment; Friesland being 'the country from whence we borrowed an arrestment'.

contrasted with the opinions of the Roman-Dutch jurists, such as Groenewegen, van Leeuwen, and Voet,³⁷¹ who were more receptive to the idea that cession effected a transfer. By virtue of the cession, the right of the cedent was transferred to the cessionary. No notice was required. The debtor would be protected if he paid the cedent in good faith. The basic principles enunciated by these writers are reflected in the law that is today found in South Africa.

The influence of these writers on the substantive law of assignation in Scotland does not appear to have been great; however, all of the works referred to in this section are to be found in the Advocates' Library.

D. French Law after the Coutumes

It was the *Coutume de Paris* of 1510 that contained the well known provision: 'le simple transport ne saisit point'.³⁷² Interestingly, this provision is found in the title on execution, not cession or sale. In 1580, the provision was supplemented with important practical details: 'et faut signifier le transport à la partie et en bailer copie auparavant que d'exécuter'.³⁷³ It is with these provisions that one could now speak of transfer of a claim only on intimation.

In the late fourteenth century and into the fifteenth there are cases dealing with good faith payment where the debtor pays in ignorance of the cession; but there seems to have been no good faith defence where the debtor had private knowledge of it.³⁷⁴ Under the *Coutumes* of Anjou and Maine of 1437, the debtor was accorded the right to demand evidence of the cession from the putative cessionary.³⁷⁵

It is under the heading of 'Subrogation' that Domat first touches on the issue of transfer of claims.³⁷⁶ He observes that the 'transport' could take two forms: universal succession or singular succession. Singular succession divided, again, into two: gratuitous or onerous. Like earlier sources, however, Domat is not specific about the nature of the

³⁷¹ See discussion in Grosskopf, *Geskiedenis*, 103, n. 288, (Sande); 118-122 (van Leeuwen and Voet). For information on the life and works of these well-known jurists, see D.H. van Zyl, *Geskiedenis van die Romeins-Hollandse Reg* (Durban, 1979), 356-357 (Groenewegen); 357-359 (van Leeuwen); 362-365 (Voet).

³⁷² Art. 170. Cf. the *Coutume de Xaintonge* of 1520, IV, 873, ch 42: 'transport simple sans apprehension de fait ne saisit', cited by Brunner, 'Inhaberpapier', 503, n. 2.

³⁷³ Art. 108.

³⁷⁴ Brunner, 'Inhaberpapier', 498.

³⁷⁵ Brunner, 'Inhaberpapier', 498. This is similar to the position that had been reached by Roman 'vulgar' law in the East: Kaser, *RPR* II, § 276, at 452.

'transport'.³⁷⁷ Pothier, on the other hand, identifies that there is a difference between a *transport-cession*, as he calls it, and *transport de simple délégation ou indication*.³⁷⁸

Interestingly, the language of assignation is evident:

« Le transport de simple délégation ne contient point de vente ; c'est une simple indication que je fais à mon créancier, *unde ipsi solvam*, en lui assignant un de mes débiteurs, et lui donnant pouvoir d'exiger de lui, **en mon nom**, ce qu'il me doit, pour être par lui reçu en déduction de ce que je lui dois. »³⁷⁹

If P is indebted to X, and X is indebted to R, Pothier observes that in *delegatio solvendi*, the intermediate creditor X bears the risk of the insolvency of P: until P pays R, neither P nor X are discharged.³⁸⁰ This is carried forward into the *Code Civil*.³⁸¹ However, in suggesting that R pursues P in X's name, Pothier seems to confound the *procuratio in rem suam* and the mandate to pay.

E. Early Codifications

It was natural law that strongly influenced³⁸² the *Codex Maximilianus Bavaricus* (1753),³⁸³ the Prussian *Allgemeines Landrecht* (ALR) (1794),³⁸⁴ and the Austrian *Allgemeines Bürgerliches Gesetzbuch* (1811).³⁸⁵ They all admitted the free transfer of claims. In so doing, the provisions on cession evidenced a fundamental shift away from the conservative view that

³⁷⁶ J. Domat, *Les Loix civiles dans leur ordre naturel*, (2nd ed. 1695) III.1.vi (vol. II, 261).

³⁷⁷ *Ibid*, 552-556 and 584.

³⁷⁸ R.J. Pothier, *Traité du contrat de vente* § 551-552 in M. Bugnet (ed.) *Oeuvres de Pothier* (1861) vol 3, 218.

³⁷⁹ *Ibid* § 551. Cf. *idem*, *Traité du contrat de change* (1763) § 226.

³⁸⁰ *ibid* § 551.

³⁸¹ *Code Civil* Art. 1277: 'La simple indication faite, par le débiteur, d'une personne qui doit payer à sa place, n'opère point novation. Il en est même de la simple indication faite, par le créancier ne les expressément réservés'. The Belgian provision is identical.

³⁸² For some general remarks on the history of these codifications, see O.F. Robinson, T. Fergus and W. Gordon, *European Legal History*, (3rd ed. 2000), 256 ff; H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen I, europäischen Kontext*, (9th ed. 2001) § 5.

³⁸³ Part 4, Cap. 15, § 7. For the Bavarian code generally, see K. Luig, 'Die Grundsätze des Vertragsrechts in Kreitmayers Codex Maximilaneus Bavaricus Civilis von 1756' in *idem*, *Römisches Recht, Naturrecht, Nationales Recht* (1998), 437 ff.

³⁸⁴ ALR I, 11, § 382: "Alle Rechte, welche nicht an die Person des Inhabers gebunden sind, können anderen abgetreten werden"; §§ 376/77: "Die Abtretung der Rechte setzt einen Vertrag voraus, wodurch jemand sich verpflichtet, einem Andern das Eigenthum seines Rechts, gegen eine Bestimmte Vergeltung, zu überlassen. Die Handlung selbst, wodurch das abzutretende Rechte dem Andern wirklich übertragen wird, wird Cession genannt." § 393: "Durch die Erklärung des Cedenten, dass der Andere das Abgetretene Recht von nun an als seinige auszuüben befugt sein soll, und durch die Annahme dieser Erklärung, geht das Eigenthum des Rechts selbst auf den neuen Inhaber über."

³⁸⁵ ABGB § 1392: "Wenn eine Forderung von einer Person an die andere übertragen und von dieser angenommen wird, so entsteht die Umänderung des Rechts mit Hinzukunft eines neuen Gläubigers"; § 1394: "Die Rechte des Übernehmers sind mit den Rechten des Überträgers in Rücksicht auf die überlassene Forderung eben dieselben."

claims could not be transferred without the consent of the debtor. Moreover, they also allowed transfer to occur without debtor notification. This was a radical change.

F. The German Pandectists

The German Historical School of the nineteenth century with its advanced and scientific study of Roman private law has had an enduring impact. However, much of this *Begriffsjurisprudenz* was criticised (most famously by Otto von Gierke) for ignoring practical realities in the relentless quest for dogmatic and scientific elegance. This criticism is particularly apposite with regard to the treatment of cession. Whatever the level of commercial development at Rome, it was hardly similar to the conditions of nineteenth century Prussia or Austria. Arguably, this was a case of lawyers presenting law ‘out of context’.³⁸⁶ It has been observed that, for any commercial society, the basic concept of cession is desirable. Indigenous Germanic law,³⁸⁷ as well as the Prussian *ALR* and the Austrian *ABGB*, provided for the transfer of claims. The *Allgemeine Deutsche Wechsel Ordnung* – which had been adopted by all the states in the German Bund in 1848³⁸⁸ – also admitted the transfer of claims. The German Pandectists did not. Such was their fanatical adherence to the Roman texts, they denied that there could be a change of creditor without the consent of the debtor.³⁸⁹ The Roman texts simply did not acknowledge the concept of a *transfer* of a claim.³⁹⁰ This led to a conflict of theory and practice and, frankly, an approach to cession that was incoherent.³⁹¹ A major shortcoming with the Pandectist approach was that it did not consider whether *transfer* would be possible if the debtor did consent.

Ultimately, it took the most famous of the Pandectist scholars, Bernard Windscheid, to drag academic lawyers from the toil of trying to apply old sources couched in terms of actions

³⁸⁶ See A. Watson, *Law Out of Context* (2000).

³⁸⁷ Cf. O. Stobbe, ‘Zur Geschichte der Uebertagung von Forderungsrechten und der Inhaberpapiere’ (1868) 11 *ZHR* 397 at 399. G. Dahm, *Deutsches Recht* (1951) suggests that the highly developed law of the central and northern cities was often considerably more advanced than the equivalent Roman law. For general discussion of the influence of Roman law in Germany, see J.P. Dawson, *The Oracles of the Law* (1968), 148-262.

³⁸⁸ *ADWO* §§ 9-10. It came into force in all the states of the Bund – with the exception of Austria, where it was adopted in 1850 and remained in force until 1938 – on 1 May 1849. It was expressly provided that the right to draw a bill was not limited to merchants. Indeed, anyone with contractual capacity could draw a bill: *ADWO* § 1.

³⁸⁹ See, e.g. C.F. Puchta, ‘Cession’ in J. Weiske (ed.) *Rechtslexikon für Juristen aller deutschen Staaten enthaltend die gesamte Rechtswissenschaft* (Leipzig, 1840) vol 2, 636 ff.

³⁹⁰ Mühelnbruch, *Cession*, § 4.

³⁹¹ See e.g. A.J.F. Thibaut, *System des Pandektenrechts*, (6th ed. 1823). At § 79 he states that cession transfers the entire right to the cessionary; yet, at § 78, he had pointed out that while cession can occur against the will of the debtor, the debtor remains bound to the cedent after cession; and the cedent can still validly demand payment.

to modern problems. His essay on *Die Actio des römischen Civilrechts vom Standpunkt des heutigen Rechts* in 1856 was a crucial development in nineteenth century German scholarship. The Roman sources were concerned primarily with *actiones*. This was a natural result of the formulae system in which the jurists worked. However, *actiones* were of little relevance to modern civil procedure. How, then, were modern lawyers to approach the sources? Windscheid sought to show that it was evident from the Roman sources themselves that, by the time of Justinian, claims were to all intents and purposes fully transferable.³⁹² Crucially, he asserted that the change of creditor did not destroy the nature and content of the obligation.³⁹³ Actions were the be-all and end-all for Roman lawyers. They were not concerned with the transfer of rights.³⁹⁴ For this reason no distinction could be made between action and right. He who held the action held the right.³⁹⁵ Moreover, a change in the person of the creditor need not destroy the content of the underlying obligation.³⁹⁶ Whether Windscheid's theory was entirely coherent need not be discussed here.³⁹⁷ For present purposes it is sufficient to note that it was his contribution that galvanised other jurists into reconsidering the traditional approach that claims were intrinsically non-transferable. However, it was only with the promulgation of the BGB – which came into force in 1900 – that free transfer of claims became accepted throughout Germany.

G. The German Code.

The BGB represented a major departure from the 'heutiges römisches Recht' with which civil law jurists had previously busied themselves. The first draft of the BGB explicitly stated that *Forderungsabtretung* was the transfer of a claim without the consent of the debtor.³⁹⁸ By the final draft, however, *Forderungsabtretung* was described merely as the transfer of a claim.

³⁹² Literally, that claims were 'nicht unübertragbar': B. Windscheid, *Der Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts* (1856), 168.

³⁹³ B. Windscheid, *Actio*, 182. For which see generally Luig, *Geschichte*, 90 ff; C. Hattenhauer, '§§ 398-413 Übertragung einer Forderung' in *Historisch-Kritischer Kommentar zum BGB* vol 2 (2006, forthcoming).

³⁹⁴ See generally Luig, *Geschichte*, 92-95.

³⁹⁵ Cf. Windscheid, *Pandektenrechts*, § 329, n. 7.

³⁹⁶ Windscheid, *Actio*, 169. As Hattenhauer, § 24, n. 142, points out, however, Windscheid later retreated from this view: *Pandektenrechts*, § 329, n. 2. A claim would only be unassignable if the content of the obligation went to the root of the obligation; in other words, if the debtor would be prejudiced. Mere change in the person of the creditor, although it changed the nature of the obligation, did not prohibit cession: Windscheid, *Pandektenrechts* § 329, n. 10.

³⁹⁷ Cf. J. Schmidt, "Actio". 'Anspruch'. 'Forderung'." in M. Martenik (ed.) *Vestigia Iuris: Festschrift für Günther Jahr zum 70 Geburtstag* (1993), 401 ff.

³⁹⁸ *Erster Entwurf eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (1887) § 293.

There was also a change in direction with regard to intimation. The requirement that only certain knowledge would interpell the debtor from paying the cedent was departed from in favour of a simple requirement of good faith. Private knowledge of cession therefore became relevant.³⁹⁹

H. English law.

It was not possible to transfer a claim (in English legal terminology, a 'chose in action') from one person to another at law until the Judicature Act in 1873.⁴⁰⁰ There were essentially two ways in which this prohibition was circumvented. One was similar to the civil law concept of appointing a procurator *in rem suam*: the assignor could appoint an 'attorney' to collect from the debtor, in the creditor's name.⁴⁰¹ Secondly, the Courts of Equity circumvented the apparent prohibition by giving effect to agreements to assign. There are two ways at looking at the enforcement of these agreements in equity. One is on the basis that equity holds as done that which ought to have been done.⁴⁰² In so doing, the distinction between contract and conveyance collapses. Private agreements can have third party effect. However, how could the Courts of Equity have been able to 'hold as done that which ought to have been done' if assignment was not recognised at common law?⁴⁰³ It is probably the case, therefore, that the development of the equitable assignment of choses in action owes its development to the

³⁹⁹ See generally Luig, *Geschichte*, 118-141 and, in particular, F. von Kübel, *Kommission zur Ausarbeitung eines bürgerlichen Gesetzbuches, Entwurf eines bürgerlichen Gesetzbuches für das Deutsche Reich* (1882) Book 2, Part 1, tit 4, 'Abtretung der Forderungen' on § 15, especially at 34 ff. The textual amendments can be traced in H.H. Jakobs and W. Schubert (eds) *Die Beratung des Bürgerlichen Gesetzbuchs, Recht der Schuldverhältnisse I*, §§ 241-432 (1978) especially at 757-769.

⁴⁰⁰ See n. 403 below.

⁴⁰¹ See S.J. Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 *LQR* 516; (1932) 48 *LQR* 248 and 547 (3 parts).

⁴⁰² J. McGhee, *Snell's Equity*, (30th ed. 2000) para 3-25. Cf. H.W. Elphinstone, 'Chose in Action: What is it?' (1893) 9 *LQR* 311.

⁴⁰³ F.C.T. Tudsbery, *The Nature, Requisites and Operation of Equitable Assignments* (1912), 6-7. Sir Guenter Treitel, *The Law of Contract*, (11th ed. 2003), 672 ff. It is probably going too far to say that there was a prohibition on assignment in English law. The legal history of the assignment of choses in action is perhaps even more complex than in the *jus commune*. The subject cannot be discussed here. Fortunately, some of the best legal minds in the Anglo-American tradition have addressed the subject. See, in particular, J. Barr Ames, 'The Inalienability of Choses in Action' in *Select Essays in Anglo-American Legal History* (1909) vol III, 580 ff; W.W. Cook, 'The Alienability of Choses in Action' (1915) 29 *Harvard LR* 816; S. Williston, 'Is the right of an Assignee of a Chose an Action Legal or Equitable?' (1916) 30 *Harvard LR* 97; W.W. Cook, 'The Alienability of Choses in Action; A Reply to Professor Williston' (1917) 30 *Harvard LR* 449; S. Williston, 'The word 'equitable' and its applicability to assignment of Choses in Action' (1918) 31 *Harvard LR* 822; W.S. Holdsworth, 'The History of the Treatment of Choses in Action by the Common Law' (1920) 33 *Harvard LR* 997; *idem*, *History of English Law* vol 8 (1926), 113 ff; A.L. Corbin, 'Assignment of Contractual Rights' (1926) 74 *U Pa L Rev* 207; S.J. Bailey, 'Assignments of Debts in England from the Twelfth to the Twentieth Century' (1931) 47 *LQR* 516; (1932) 48 *LQR* 248 and 547 (3 parts).

trust: on assignment, Equity recognises that the assignor is holding for the assignee. Equity recognises that the assignee is beneficially entitled to the claim. Where there is a double sale of the same claim, the first assignee to notify the debtor is preferred.⁴⁰⁴

III. 'Assignment': the Terminology

In Scots law, the transfer by a creditor of his claim against his debtor, without the consent of the latter, is usually called 'assignment'. The terminology calls for some explanation; not least because the term is used in a confusing multitude of senses. In Austria, 'Assignment' refers to the similar, but conceptually distinct, institution of *Anweisung*.⁴⁰⁵ 'Assignment' is also not uncommon in the Scottish sources.⁴⁰⁶ This is the terminology used in England. The English term dates from the fourteenth century and could also mean 'an order, request or directive'.⁴⁰⁷ The usage of 'assignment' to connote a transfer dates from the fifteenth century.⁴⁰⁸ The term 'cession' is also regularly used in Scots law. In particular, the assignee is frequently designated as the 'cessionary' in the Scottish sources.⁴⁰⁹

The etymological roots of the term 'assignment' are not clear. The word 'cession' is derived from the Latin '*cedere*' ('*cessio*'). This was used in the Roman legal sources.⁴¹⁰ Importantly, however, this never seems to have meant more than mere agreement, not transfer.⁴¹¹ 'Assignment' and 'Assignment' come, through old French, from the Latin

⁴⁰⁴ *Dearle v Hall* [1823-34] All ER Rep 232.

⁴⁰⁵ Cf. W. Schubert (ed.) *Die Vorlagen der Redaktoren für die erste Kommission zur Arbeitung des Entwurfs eines bürgerlichen Gesetzbuches* (15 unnumbered vols, 1980-1986) II, 4, 2, 'Anweisung'; 9, 'Terminologie'; A. Tobler (ed.), *Tobler-Lommantisch Altfranzösisches Wörterbuch* (1925) vol 1, 598, lines 18-28; *Brockhaus Enzyklopädie* (17th ed. 1966) vol. 1, 597. Cf. the Dutch 'assignatie' or 'aanwijzen': see *Winkler Prins Encyclopaedie*, (6th ed. 1948) vol 1, 542. This title is somewhat abbreviated in the 7th edn of 1966; and V.G. Hiemstra and H.L. Gonin, *Drietalige Regswoordeboek/Trilingual Legal Dictionary*, (3rd ed. Johannesburg: Juta, 1992), 11-12 s.v. 'assignment': (1) aanwysing, toewysing, vasstelling, bepaling... assignasie van skuld (skuldenaar A versoek sy skuldenaar B om regstreeks aan A se skuldeiser te betaal; deur De Groot en Van Leeuwen aanwysing genoem; ook: die dokument waarin die reëling verval is (veroudered)).

⁴⁰⁶ See McBryde, *Contract* para 12-05 for references. See too the 'Deeds of Assignment' of 22nd July 1786 and 17th April 1789, granted by the poet, Robert Burns, of his share in his farm at Mossiel, Ayrshire and the copyright in his works, in G. Ross Roy (ed.) *Letters of Burns* (1985) vol I, 33-34; and Kames, *Principles of Equity*, (3rd ed. 1778) II, 190.

⁴⁰⁷ H. Kurath and S.M. Kuhn (eds) *Middle English Dictionary* (1956), 453.

⁴⁰⁸ *Ibid*, 454.

⁴⁰⁹ E.g. Erskine III.v.1.

⁴¹⁰ Cf. Windscheid, *Pandektenrechts*, § 329, n. 11; See C. 4, 35, 22 cited by Zimmermann, *Obligations*, 58, n 108. For further references, see H.G. Heumann, *Handlexicon zu den Quellen des römischen Rechts*, 5th edn (1879), 66, 'cedere'.

⁴¹¹ Kaser, *RPR* II, 454, n. 4.

'assignare' (*assignatio*);⁴¹² in the Roman sources the term expressing the same idea is 'adsignatio'.⁴¹³ *Assignatio* or *Adsignatio* means to allot, appoint or to make over to. This is the meaning of the verb 'assign' in English.⁴¹⁴ In old French, 'assignation' could mean an order to pay money.⁴¹⁵ The French traditionally always used the term '*transport*' to refer to what is designated in modern French law as *cession de créance*.⁴¹⁶ The first reference to 'transport' in French law that Brunner traced is to an Ordinance of the fair of Champagne in 1334.⁴¹⁷ In France, 'cession' originally referred only to the *cessio bonorum*. It is only with the writings of Pothier, that the term *cession* began to be used for the transfer of claims,⁴¹⁸ although the language of cession had been used for some time to designate the debtor (the *debiteur cédé*) and the assignee (the *cessionnaire*) respectively.⁴¹⁹ In modern French law, 'assignation' refers to the proceeding whereby notice is given of legal proceedings. The word 'assignat' is one of the best known in European economic history. This was the instrument drawn on the French State in favour of their creditors or their order. (Unfortunately, there does not seem to be any connection between this usage and the important role played by the Scot, John Law, in the development of the French banking system). In the older sources, the 'assignat' is the person who is directed to pay, i.e. the drawee. There is a recent example of the Scots law of cession borrowing French terminology. Regulations dealing with the

⁴¹² C.T. Onions (ed.) *The Oxford Dictionary of English Etymology* (1966), 56. Cf. D. du Cange, *Glossarium mediae et infimae latinitatis* (1698) vol 1, 437, 'assignatus'; H.G. Heumann, *Handlexikon zu den Quellen des römischen Rechts*, 5th edn (1879), 42, 'assignatio'.

⁴¹³ H.G. Heumann, *Handlexikon zu den Quellen des römischen Rechts*, (5th ed. 1879), 42, v. 'assignare'; (9th ed. 1907), 18, v. 'adsignare'. Cf. I.J.G. Scheller, *Ausführliches und möglichst vollständiges lateinisch-deutsches Lexicon oder Wörterbuch*, (3rd ed. 1804), vol 1, 351 s.v. 'Adsignatio' cited by Mühlenbruch, *Cession*, 228, n. 437. Scheller's dictionary has been translated into English as *Lexicon totius Latinitatis = A dictionary of the Latin language: originally compiled and illustrated with explanations in German* (OUP, 1835) s.v. 'Adsignatio'.

⁴¹⁴ J.A.H. Murray, H. Bradley and W.A. Craigie, *The Oxford English Dictionary* (1933) vol 1, 508.

⁴¹⁵ See R.J. Pothier, *Traité du contrat de change* (1763) § 226; D. Lalande, *Lexique de chroniqueurs français (XIVe depuis du XVe siècle)* (1995), 30, v. 'Assignation': 'Mandate, ordre pour recevoir une somme assignée sur un certain fonds' (although, admittedly, this sounds like a mandate to uplift). Examples of the use of 'assignation' in this sense of an order to pay are cited from the early fifteenth century: E. Baumgartner and P. Ménard, *Dictionnaire étymologique et historique de la langue française* (1996), 52.

⁴¹⁶ A. Rey et al, *Le Grand Robert de la langue française*, (2nd ed. 2001) vol 6, 1421 suggests that 'transport' was used for 'cession de droits' as early as 1312. Cf. D. Lalande, *Lexique de chroniqueurs français (XIVe depuis du XVe siècle)* (1995), 66, v. 'cession'; 523 v. 'transport', who provides examples of the use of 'transport' in fourteenth and fifteenth centuries.

⁴¹⁷ H. Brunner, 'Das französische Inhaberpapier', 487 at 498.

⁴¹⁸ Compare J. Domat, *Les lois civiles dans leur ordre naturel*, (2nd ed. 1695) writing at the end of the seventeenth century and Pothier writing in the middle of the eighteenth. Domat, vol II, 587 refers to 'cession' only in the context of the *cessio bonorum*.

⁴¹⁹ See e.g. J. Domat, *Les lois civiles dans leur ordre naturel*, (2nd ed. 1695) vol III, 261. Interestingly, R.T. Troplong, *De la vente ou, Commentaire du titre VI du livre III du code civil*, (4th ed. 1845), vol 1, para 878, observes that cession is the generic term, *transport*, *délégation*, *subrogation* and *l'indication de paiement* being species.

controversial right to collect toll moneys payable for crossing the Skye Bridge refer to the assignee as the 'cessionnaire'.⁴²⁰

There are perhaps two points that can be taken from terminological confusion. Firstly, it may be that in Roman law, and for a long time thereafter, the different modes of effecting a transfer were not clearly demarcated. Roman law did differentiate between a *delegatio* (a form of *novatio*) and a mandate. However, the subtle distinctions between an outright transfer, the *procuratio in rem suam* (a mandate to uplift), and the mandate to pay, were never properly distinguished. The prevalence in the sources of the term *adsignatio* would support this. A general notion of 'making over' is consistent with all three of the concepts. Further refinement came only later. And, when it did come, the umbrella term of *adsignatio* gave its name to different species in different jurisdictions. In the Germanic areas of Austria and Hungary, the general concept of 'adsignare' can be traced directly to the order to pay, the *Anweisung* or, in the language of the ABGB, 'Assignment'. In Scotland, as will become clear below, 'assignment' was always used to refer to transfer. In France, too, *adsignatio* developed eventually into a transfer (*transport, subrogation*).⁴²¹ In France, Germany and Austria, the different concepts seem to have been relatively clearly distinguished. In any event the terminology in each jurisdiction has been consistent. This leads us to the second point. In Scots law, the terminology has varied. While varied Scottish usages may reflect the diverse influences on Scots law, and a practical rather than theoretical approach, the substantive law in Scotland has also been reasonably clear. Nevertheless, some of the deeper misunderstandings, in particular with regard to the difference between a mandate to pay and a mandate to uplift, are manifest in our imprecise and liberal use of language.

⁴²⁰ Assignment Statement (Prescribed Information) (Scotland) Regulations 1991, SI 1991/2152 (S 177). For the most recent attempt to argue that there is no valid right to collect the tolls, based on two charters granted by William the Lion in 1180 and James VI in 1587: see Sheriff Principal Sir Stephan Young QC's note in *Procurator Fiscal v Robbie the Pict*, 2004 GWD 31-643. The tolls were finally abolished on 22nd December 2004.

⁴²¹ J. Domat, *Les loix civiles dans leur ordre naturel*, (2nd ed. 1695) III.i.vi. But see discussion of Pothier, *Traité du contrat de change* (1763) § 226, in n. 454 below.

IV. Mandates to pay: Anweisung

The German, Austrian and Swiss Civil Codes contain provisions on *Anweisung*.⁴²² An *Anweisung* is essentially an order to pay. Suppose X is indebted to R. P is indebted to X. X (the *assignant* or *Anweisender*) can order P (the *assignat* or *Angewiesender*) to pay R (the *assignatar* or *Anweisungsempfänger*). Such an order has no effect on the respective rights of the parties until P either accepts the order or pays R. Crucially, the effect of this payment is two-fold: it extinguishes the debt P-X as well as the debt X-R. The concept is old.⁴²³ It is recognised in both Scots⁴²⁴ and South African law.⁴²⁵

In the *jus commune*, ‘assignation’ was the original term for *Anweisung*.⁴²⁶ Importantly, for present purposes, it has been accepted for many centuries that on acceptance by P, R obtains an independent right against P. R can transfer this right. If so, then this is a clear example of a transfer of a claim. The doctrine of *Anweisung* is crucial to the development of this area of the law since it is a functional equivalent of cession. Indeed, it seems that in Assyrian and Babylonian law, and in Egyptian law, the concept of the order to pay was used to facilitate a circulation of claims.⁴²⁷ Fundamentally, an *Anweisung* is a mandate addressed to

⁴²² See generally, chapter 2, Part II, C above; *BGB* §§ 783 ff; *ABGB* §§ 1404 ff; *OR* Art. 466. It should be noted that this doctrine draws on the Roman principle of delegation. It is under this heading that the doctrine is found in French law. In the Austrian *ABGB*, *Anweisung* is alternatively styled ‘*Assignation*’. This should not be confused with the Scottish notion of ‘assignation’ which corresponds to *Forderungsabtretung* in German. For a helpful introduction see, D. Medicus, *Schuldrecht II, besonderer Teil*, 11th edn (Munich, 2003) § 119; R. Welsch, *Grundriss des Bürgerlichen Rechts* vol II, (12th ed. Vienna, 2001), 148 ff; see too G. Ertl, ‘Anweisung’ in P. Rummel (ed.), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* (2002) vol 2, § 1399 ff. In South African law too, ‘assignation’ is the term given to orders to pay, not transfer; ‘cession’ being the institution corresponding to the Scottish assignation: see S. Scott, *The Law of Cession*, (2nd ed. 1991), 193. The older, i.e. pre-*OR*, codes, that were in force in the individual cantons of Switzerland, are of particular interest. For example, the *Code du canton de Berne* (1831) contained some twelve provisions on the *Anweisung*, yet only three on cession: see Arts 980-982 (cession) and Arts 983-995 (*Anweisung*). The Code is found (in French translation) in the helpful compilation by M.A. de Saint-Joseph, *Concordances entre les codes civiles étrangers et le code Napoléon* (Paris and Leipzig, 1840), sheet 89 ff. As usual, however, the Prussian *ALR* contains the largest number of provisions on *Anweisung*, no fewer than forty-eight: *ALR* I, 16, §§ 251-299.

⁴²³ Cf. W. Schubert (ed.) *Die Vorlagen der Redaktoren für die erste Kommission zur Arbeitung des Entwurfs eines bürgerlichen Gesetzbuchs* (15 unnumbered vols 1980-1986, originally 1874), II, 4, 2, ‘Anweisung’, 14.

⁴²⁴ See *Earl of Mar v Earl of Callander* (1681) Mor 2927. See also, *Annotations on Stair’s Institutions* (1824), 40-41, generally attributed to Patrick Grant, Lord Elchies. Although Elchies does not mention the *Earl of Mar* case, the example he gives uses the exact facts of the *Earl of Mar* case, with the Lord of Gloret, the Earl of Callander and the Earl of Mar substituted for Caius, Seius and Titius respectively. I am grateful to Niall Whitty for this reference. See also *Waller v Ramsay* (1904) 12 SLT 111 OH. These two cases are discussed in R. Evans-Jones, ‘Identifying the Enriched’ 1992 SLT (News) 25.

⁴²⁵ See P.M. Nienaber, ‘Cession’ in W.A. Joubert et al (eds) *The Laws of South Africa*, 2nd edn, vol 2, Part II (2003) para 17.

⁴²⁶ Cf. § 1404 *ABGB*; Ross, *Lectures*, 188-189(n) is the only Scottish writer to have appreciated this point: ‘the very word assignation in its original import, does not mean a conveyance, as Lord Kames supposes, but an appointment or constitution for a particular purpose’.

⁴²⁷ U. Wesel, *Geschichte des Rechts: von den Frühformen bis zum Vertrag von Maastricht*, (2nd ed. 2001), 91, n. 78; A.H. Preussner, ‘The Earliest Traces of Negotiable Instruments’ (1928) 44 *American Journal of Semantics*

the debtor (P) to pay R. This can be distinguished from the historical development of cession in most countries which evolved from the mandate *in rem suam*. This was a mandate addressed to the 'assignee' (R) to uplift the claim from the debtor (P). While it is disputed whether the mandate *in rem suam* can be viewed as a transfer,⁴²⁸ it is undisputed that an order to pay, of itself, transfers nothing; rather it effects a double discharge of the debt relationships P-X and X-P by a single payment P-R.

Admittedly, however, there is a subtle difference for the plea of *delectus personae creditoris* in the case of (i) cession and (ii) *Anweisung*. In the first case, the cessionary obtains a right against the debtor irrespective of the debtor's consent. The debtor may, therefore, be sued by the assignee. In the case of the *Anweisung*, P has the option of whether to accept the mandate. If he refuses, R will have no independent right against P. P can always refuse the order to pay. If R has no independent right, then he cannot obtain any judgment that can be forcibly executed on the debtor. Any right obtained by R, therefore, can be said to be based on P's consent.

What then of Roman law? It was the idea that there was always *delectus personae creditoris* in any debt in Roman law that necessitated the development of the *procuratio in rem suam*. Surprisingly, perhaps, it has been suggested that the Roman law knew nothing of the *Anweisung*; rather, the order to pay was only subsequently re-constructed in terms of the Roman contract of mandate.⁴²⁹ While this may explain subsequent Romanisation of the order to pay, it seems to this writer particularly unlikely that the idea was not recognised in Roman law, even if clear examples are not found in the sources. It was known to less developed legal

Languages and Literatures 92 (cited by O.R. Keister, 'Commercial Record Keeping in Ancient Mesopotamia' (1963) 38 *Accounting Review* 371); A.T. Olmstead, 'Materials for Economic History of Ancient Near East' (1930) *Journal of Economic and Business History* 224; W.L. Westermann, 'Warehousing and Trapezite Banking in Antiquity' (1931) *Journal of Economic and Business History* 49. Orders to pay were current in Ancient Greece, see L. Beauchet, *Histoire du droit privé de la République Athénienne* (1897) vol 6, 507-508; moreover, there was also no prohibition on cession there: see *ibid*, 537-41 and H.J. Wolff, 'Zur bedeutung der altgriechischen Rechtsgeschichte für die Rechtswissenschaft' in E. von Caemmerer (ed.) *Xenion: Festschrift für Pan J. Zepos* (1973) vol I, 757 at 763. The reader with Ancient Greek can peruse examples of such orders reproduced and discussed by L. Goldschmidt, 'Inhaber-, Order- und executorische Urkunden im classischen Alterthum' (1889) 10 *ZSS (RA)* 352. See also G.R. Driver and J.C. Myles, *The Assyrian Laws* (1935); C.H.W. Johns, *Babylonian and Assyrian Laws, Contracts and Letters* (Edinburgh 1904; rprinted 1987), 334-335. F.W. Maitland, 'The Mystery of Seisin' (1886) 2 *LQR* 481 at 489-90 argued that even at a comparatively late stage in English law, lawyers were incapable of conceptualising incorporeals, as opposed to corporeal things, being the object of transfer. That is overstated. From its inception, Scots law has allowed claims to be transferred. Cf. R.H. Lowie, 'Incorporeal Property in Primitive Societies' (1928) 37 *Yale LJ* 551.

⁴²⁸ Cf. Luig, *Geschichte*, quoted in n. 315 above; A.M. Bell, quoted in n. 583 below; and Huc quoted in n. 543 below.

systems than Rome, and has been found in almost every system since. In any event, active delegation (*delegatio solvendi*), as recognised in classical Roman law, provides much of the conceptual basis of the *Anweisung*.⁴³⁰ Although there is little trace of the Roman doctrine of *delegatio solvendi* in western vulgar law, in practice the order to pay was utilised: the reification of an obligation in a bond (*cautio*) was a known method of circulating debt.⁴³¹

In any event, the Romans did recognise an order to pay of sorts; moreover, an order drawn on one not necessarily debtor to the drawer. The letter of credit drawn by Cicero on a friend in Athens in favour of his son, who was studying there, is frequently cited.⁴³² And there are many other examples of orders to pay being used in commercial situations in Roman times.⁴³³ Further, early forms of orders to pay have been found similar to modern cheques.⁴³⁴ Of course, the admission of the order to pay does not, *per se*, mean that claims were transferable. That the Romans recognised the concept is a quite neutral piece of evidence which relating to the transferability of claims.

The crucial confluence between the distinct concepts of *Anweisung* and cession is found at the point of legal evolution when the *Anweisung* was admitted as transferable. If the *Anweisung* has been accepted, and an accepted *Anweisung* can be transferred, then every transfer of the *Anweisung* is a transfer of the rights of the holder against the drawee.⁴³⁵ Some have adduced evidence that the transfer of claims, by way of a transferable order to pay, did

⁴²⁹ See, W. Schubert (ed.) *Die Vorlagen der Redaktoren für die erste Kommission zur Arbeitung des Entwurfs eines bürgerlichen Gesetzbuchs* (1980-1986) II, 4, 2, 'Anweisung' at 1. Cf. the references to the Roman law by R.J. Pothier, *Traité des obligations* (1761) § 446.

⁴³⁰ Kaser, *RPR* I, § 152 III.

⁴³¹ E. Levy, *Weströmisches Vulgarrecht, Das Obligationenrecht* (1956) § 58; Kaser, *RPR* II, § 276, 452; Grosskopf, *Geskiedenis*, 22 citing, *inter alia*, the Theodosian Code, 2, 13, 1 (although this text seems to suggest that an attempt to transfer the *cautio* to another would result in the debt being discharged) and *ibid*, at 30 ff with examples from the seventh and eighth centuries.

⁴³² XII.24.1; XII.27.2; XV.20.4; XV.1.5 in D.R. Shackelton Bailey (ed. and trans.), *Cicero's Letters to Atticus* (1999), vol 3, 308-309; 314-315; vol IV, 261-262; 308-309 respectively. See A. Früchtl, *Die Geldgeschäfte bei Cicero* (1912), 25 and J. Andreau, *Banking and Business in the Roman World* (trans. J. Lloyd, 1999), 20-21; Ulpian, D. 38, 4, 1, 5. See also D. 38, 4, 3 and D. 36, 2, 7. Früchtl, 26 refers to a passage where Atticus 'überließ dem Cicero seine Forderung an Xenon'.

⁴³³ A. Früchtl, *Die Geldgeschäfte bei Cicero* (1912), 20 ff.

⁴³⁴ See J. Andreau, *Banking and Business in the Roman World* (trans. J. Lloyd, 1999) 42-43. Cf. *idem*, *La vie financière dans le monde romain* (1987), 561-563 and 702-703. The English version is not a complete translation of the much larger French original.

⁴³⁵ Früchtl, *op. cit.*, at 27 concedes that the written orders to pay used by Cicero were not bills of exchange; however, they do seem to have allowed a circulation of credit. Compare examples of transferable orders taken from sixteenth century Italy by G. Schaps, *Zur Geschichte des Wechselindossaments* (1892), 78 ff.

occur in Roman times.⁴³⁶ Once this is admitted, the assertion that the Romans prohibited transfer is exposed as erroneous. In reality, claims could be transferred.

There remains, then, only one possible difference between the transfer of an accepted order to pay, and cession in the modern sense of the term. This writer has suggested that cession is the transfer of a claim *without the consent of the debtor*. By definition, however, an *Anweisung* requires the consent of the drawee (*assignat*). In Scotland, 'Assignment' is the term used for cession. 'Assignment' is also used in the European sources. The Bavarian code of 1756 contains provisions on 'assignment'.⁴³⁷ It also contains provisions on 'delegation' and 'expromission'.⁴³⁸ The Bavarian provisions on assignment are a curious amalgam of the concepts of cession and *Anweisung*. For instance, the code provides that the debtor's consent is not required: it is immaterial whether he pays his creditor or his creditor's order.⁴³⁹ Moreover, there is no possibility of good faith payment where there has been notification to the debtor.⁴⁴⁰ This is the language of cession, not *Anweisung*. It should be remembered that any right that the payee may ever have against the debtor based on *Anweisung* is based on the consent of the debtor. Even if he has obliged himself to accept, he need not do so. In all other respects, however, the provisions in the Bavarian code are couched in terms of *Anweisung*. In mid-eighteenth century Bavaria, then, lawyers had not yet completely differentiated the order to pay (*Anweisung*) from cession. It is only with the Prussian and Austrian provisions at the turn of the nineteenth century that 'assignment' is clearly invoked to mean the order to pay, not cession.⁴⁴¹

⁴³⁶ R. Beigel, *Rechnungswesen und Buchführung der Römer* (1904), 214 cited by Früchtel, *op. cit.*, 27. Cf. H. Blümner, *Römischen Privataltertümer* (1911), 654. Admittedly, these works are not by lawyers. However, shorn of burdensome knowledge of the Roman formulae system, these writers may actually provide a more realistic picture of reality than that found in works by legal writers. Cf. the Roman law references in M.S. Lipmens, *Wetboek van Koophandel, Vergeleken met het Romeinsche en Fransche Regt* (Amsterdam, 1839), 46.

⁴³⁷ See *Codex Maximilaneus Bavaricus Civilis* (1756) Part IV, cap 15, § 7.

⁴³⁸ *Ibid.*, §§ 5 and 6.

⁴³⁹ *Codex Maximilaneus Bavaricus Civilis* (1756) Part IV, cap 15 § 7, sexto: 'Ist die Einwilligung des Debitoris assignati hierzu nicht erforderlich, weil ihm allzeit gleichgültig seyn ran, ob er Assignantem oder Assignatarium bezahlt'. ('The consent of the debtor is not necessary because it is of no consequence to him whether he pays the original creditor or the assignee').

⁴⁴⁰ *Ibid* § 7, 17mo and 18vo.

⁴⁴¹ *ALR* I, 11 § 380; *ABGB* § 1400 ff.

V. Commercial law.

A. Bills of Exchange in International Commerce.

Bills have been used for centuries. Early traces of the bill can be found in the period that the glossators, commentators and later writers of the *jus commune* were asserting that claims were intrinsically non-transferable. Yet, every endorsement transfers the holder's rights against the drawee. And there is a transfer without intimation to the debtor. This further suggests that the received position, that claims were originally not transferable is wrong. Indeed, it seems that there may be an interesting parallel here between the history of cession in the *jus commune* and the history of the assignment of claims in the English common law. James Steven Rogers has shown that the evolution of the bill of exchange in English law occurred to circumvent the common law prohibition on assignment.⁴⁴² This analysis contradicts the orthodox position that the attraction of the bill of exchange was the privileges accorded to an onerous bona fide transferee (a so-called holder in due course), who can obtain greater rights than those held by his author. In particular, the drawee cannot plead defences that he could have pled against the drawer, especially *compensatio*.⁴⁴³ Yet, in English law the defence of set-off was not admissible in the common law courts until 1729.⁴⁴⁴ Therefore, the most common defence which the holder in due course principle elides, did not appear in English commercial law for several centuries after bills had been in widespread use. Whether or not Rogers' analysis is accepted, his work highlights that traditional explanations of the genesis of the rights of the holder in due course are not satisfactory answers to what has been termed the most important question in the entire law of negotiable instruments.⁴⁴⁵

Others have recognised that the incidents peculiar to the bill of exchange were twofold: (1) summary diligence and (2) transfer without intimation. The first allowed holders to avoid prolonged court proceedings. Summary diligence (*anglicé*: 'execution') has been available on a bill of exchange from early times.⁴⁴⁶ If so, the holder's freedom from the

⁴⁴² J.S. Rogers, 'The Myth of Negotiability' (1990) 31 *Boston College Law Review* 265 especially at 277 and 285 *et seq.* This article is reproduced in R. Cranston (ed.) *Commercial Law* (1992) p. 287. See also J.S. Rogers, *The Early History of the Law of Bills and Notes* (1995), ch. 8. Cf. F. Pollock and F.W. Maitland, *The History of English Law before the time of Edward I* (2nd ed. 1898, repr. 1968) vol. II, 227.

⁴⁴³ See n. 972-973 below.

⁴⁴⁴ See Chapter 5 below, 'Assignatus utitur jure auctoris', n. 1132.

⁴⁴⁵ G. Schaps, *Zur Geschichte des Wechselindossaments* (1892) § 20, 117.

⁴⁴⁶ G.F. von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrechts* (1797, reprinted 1966) § 3, at 15 emphasises that this privilege was accorded to bills at the fairs and markets of continental Europe in the fourteenth century. A.J. Mackenzie Stewart, 'Moveable Rights' in *Stair Soc, Introduction to Scottish Legal History* (1958), 203 suggests that, in Scots law, registration for preservation and

debtor's defences (the so-called *assigntus utitur jure auctoris* rule) is obvious. Summary diligence is the equivalent to the warrant found in a court decree ordaining the debtor to pay. At this point it is clear beyond doubt that the debtor cannot belatedly raise a defence that he has a liquid claim against the creditor (or his assignee). It is simply too late. The point is a simple one. Yet it is completely at odds with the received history of the development of the bill of exchange. Those who emphasise that the holder in due course can take a better title than the transferor make little reference to the privilege of summary diligence.⁴⁴⁷ The holder in due course's freedom from the debtor's defences can also be explained in terms of an equally basic principle: the *Anweisung*. If the bill evolved from the basic concept of *Anweisung*, freedom from the debtor's defences is not exceptional; rather, it is a natural incident of the *Anweisung*. X orders P to pay R, P's creditor. P pays in X's name. As a result P cannot raise defences against the payee (R) which he might have had against X. Moreover, on acceptance by P to pay R, the discharge of the original debtor X is conditional on R being discharged. Therefore, R's so-called of right of recourse against X is unexceptional. The right to payment against X is the principal obligation which, if not discharged by P, continues to subsist.⁴⁴⁸ That these arguments do not seem to have been advanced before, perhaps underlines the lawyer's tendency to compartmentalise. First, academic lawyers seem to have ignored the substantive importance of what might be seen as an aspect of procedure: summary diligence. Second, commercial lawyers have ignored the basic principles of a foundation subject: those concerning the mandate to pay (*Anweisung*). Other sources, particularly in Scots law, when highlighting the privileges of the bill of exchange, focus on the transfer of

execution grew out of the practice of the church, citing the acts of 1449, c. 12; 1535, c. 9; 1551, c. 16; however, these acts are inconclusive. It appears more likely that summary diligence grew from the practice of preserving documents in court books, which gave them the same effect as a decree of the court. As a result, diligence could follow. Over time, these registrations became known as the Books of Council and Session: see generally J. Imrie, 'Public Records and Registers' in *SME*, vol 19 (1989), especially paras 837 ff and references there cited. Summary diligence was made available to the holder of a bill of exchange against the drawee by the Acts of 1681, c. 20 (foreign bills) and 1696, c. 36 (inland bills). This privilege is retained by the Bills of Exchange Act 1882, s. 98. Although Bell, *Commentaries* I, 411 (7th ed. 1870) and GWW, 'The Bills of Exchange Act 1882 and Summary Diligence' (1891) 7 *Scottish Law Review* 182 at 184, thought that summary diligence was 'peculiar to our law' and that there were no similar provisions on summary diligence in English law. In fact, there was an ingenious common law method whereby an identical result was achieved: by way of the 'warrant to confess judgment'. Here the debtor in a bill would appoint the creditor or bearer to act as the debtor's agent in any action for payment. The Scottish experience is reasonably consistent with R. de Roover and L. Laubenberger, 'Wechsel, Wechselrecht' in *HRG*, vol 5 (1998) at 1182, who suggest that it was only in the seventeenth century that the bill of exchange evolved to facilitate the free circulation of claims by excluding the debtor's defences.

⁴⁴⁷ Cf. *Byles on Bills of Exchange* (27th ed. 2002) para 1-06; D.V. Cowen and L. Gering, *Cowen's Law of Negotiable Instruments in South Africa* (5th ed. 1985), 32; J. Milnes Holden, *History of Bills of Exchange in English Law* (1955) has no entry for 'execution' in the index; nor does he look at the historical basis of the rule, cf. 182-183. In Scots law, the first case that authoritatively decided that the onerous *bona fide* indorsee was not subject to defences was *Stuart and Gordon v Campbell* (1699) Mor 1497.

claims without the need for intimation.⁴⁴⁹ For our purposes, however, to what extent does the admission of transfer of claims by way of bills of exchange affect the history of the law of cession?

The genesis of the bills of exchange in Europe has been the subject of detailed debate.⁴⁵⁰ The received history of the bill of exchange is that it originated in Italy. It was a response to the needs of merchants. They were naturally wary of sending money long distances. The bill of exchange, therefore, evolved in the thirteenth century as a means of settling large-scale international accounts.⁴⁵¹ In the fourteenth century they became widespread, particularly at the fairs of Champagne and Lyon, where there were a useful mechanism for merchants from foreign lands with different currencies to effect payment.⁴⁵²

Some continental writers have also noticed the similarities between the bill of exchange and the doctrine of *Anweisung*.⁴⁵³ For example, Pothier refers to older methods of payment on behalf of another (*rescriptions*). Strangely, however, he suggested that they were no longer in use. Yet, as can be seen from his own observations, the basic *Anweisung/rescription* seems quite indistinguishable from the bill of exchange:⁴⁵⁴

«Le principal espèce de rescription est celle par laquelle un débiteur mande à quelqu'un de payer une certaine somme pour lui à son créancier entre les mains duquel il remet à cet effet la rescription.

C'est ce qu'on appelle *adsignatio*.

Cette espèce d'affaire se passé entre trios personnes:

1. Le débiteur, *adsignans*, qui indique à son créancier une personne de qui il recevra une certaine somme qu'il doit ;
2. La personne qu'on indique au créancier pour recevoir d'elle la somme, *adsignatus* ;
3. Le créancier à qui on a fait assignation, *adsignatarius*.

⁴⁴⁸ Cf. L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891), 401 ff.

⁴⁴⁹ W. Forbes, *A Methodical Treatise concerning Bills of Exchange* (2nd ed. 1718), 80 ff and 212-227; W. Glen, *Treatise on the Law of Bills of Exchange, Promissory Notes and Letters of Credit* (2nd ed. 1824), 137 ff; Bell, *Commentaries* (7th ed. 1870) I, 413: 'The two great privileges of bills and notes are summary execution and transmission by endorsation'; R. De Roover, *L'Evolution de la lettre de change XIV^e – XVIII^e siècles* (Paris, 1953), 83 ff.

⁴⁵⁰ The leading treatment is in L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891), 383 ff. Goldschmidt was a remarkable figure. A brief synopsis of his life in English can be found in R. Zimmermann, 'Was heimat hieß, nun heißt es Hölle' in J. Beatson and R. Zimmermann (eds) *Jurists Uprooted, German-Speaking Émigré Lawyers in Twentieth Century Britain* (2004), 1 at 23. See too, K. Otto Scherrer, 'Goldschmidts Universum' in M. Ascheri et al (eds.) *'Ins Wasser geworfen und Ozeane durchquert': Festschrift für Wolfgang Nörr* (2003), 859-892.

⁴⁵¹ E. Jenks, 'Early History of Negotiable Instruments' (1893) 9 *LQR* 70; W. Holdsworth, 'Origins and History of Negotiable Instruments' (1915) 31 *LQR* 12, 173 and 376 (3 parts); J.M. Holden, *History of Negotiable Instruments in English Law* (1955).

⁴⁵² P. Huvelin, *Essai historique sur le droit des marches et des foires* (1897), 534 f.

⁴⁵³ G.F. von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrechts* (1797, reprinted 1966) § 9, at 30 and § 12, at 36.

⁴⁵⁴ *Traité du contrat de change* (1763) § 225.

Le personne indiquée, *adsignatus*, est ordinairement quelqu'un des débiteurs de l'indiquant ; mais ce peut être aussi quelqu'un de ses amis, qui, sans être son débiteur, veut bien avancer cette somme pour lui. »⁴⁵⁵

Modern writers have also emphasised the link between ancient law and modern payment instruments.⁴⁵⁶

Indeed, the most common, every-day instance of the order to pay in modern law is the cheque. The definition of *Anweisung* in the modern codes is almost identical to the definitions of a bill of exchange.⁴⁵⁷ If so, the attribution of the development of the bill to Italian merchants is only part of the story. As was noted above, the concept of the order to pay is old. It seems that in Arabia⁴⁵⁸ and in India⁴⁵⁹ this concept was developed for commercial purposes. Other writers have noted early examples of the order to pay.⁴⁶⁰ Therefore, although Italian merchants may be rightfully credited with the development of the modern bill of exchange in the thirteenth century,⁴⁶¹ the trail of development is much older. This seems to turn much of the accepted civil law history of the law of cession on its head. Many legal traditions have admitted that an obligation to pay, reified in a document, may be transferred. If so, it admits, contrary to the detailed teachings of the civil law, the concept of cession.

There are a number of examples of a transferable order or bill that are usually cited as the precursors to the modern development of bills: Pothier gives an example of a bill drawn during Louis' Crusade in 1256.⁴⁶² Von Martens refers to one drawn by Pope Gregory IX in 1233;⁴⁶³ while, in 1307, Edward I ordered certain money collected for the Pope to be remitted

⁴⁵⁵ *Ibid.* § 226.

⁴⁵⁶ P. Ourliac and J. de Malofosse, *Droit romain et ancien droit* (1957), 217-218.

⁴⁵⁷ Cf. the modern Wechselgesetz, § 1 and Scheckgesetz, § 1 (both introduced by the Nazis in 1933, implementing the Geneva Convention, itself largely based on the *ADWO*) and the provisions on *Anweisung* under § 783 ff *BGB*. A cheque can only be drawn on a bank: ScheckG § 3. The main difference between a bill/cheque and the general concept of an order to pay is that the former can be granted only for money; an ordinary order to pay may encompass money, 'Wertpapiere' or other fungible goods.

⁴⁵⁸ R. Grasshoff, *Die sufta 'ga und hawâla der Araber: ein Beitrag zur Geschichte des Wechsels*, Dr Iuris. Albertus-Universität zu Königsberg, (1899) [EUL Sp Col Serj. Coll. P. 2977 Gra]. But compare the doubts expressed by L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891), 410, n. 76 about an Arabian genesis. See also A. Cheron, 'Le transport de dette ('Lewala') en droit musulman (1919-20) 59 *Bulletin de la société de législation comparé* 571.

⁴⁵⁹ L. Levi, *International Commercial Law* (1863) vol 1, 351 hints at this, but does not elaborate.

⁴⁶⁰ E.g. A. Heeren, *Ideen ueber die Politik, den Verkehr und den Handel der vornehmsten Voelker der alten Welt* (1815) vol 1, 41-43.

⁴⁶¹ Pothier, *Traité du contrat de change* (1763) §§ 6 - 7 suggests that bills of exchange were not known to Roman law. He gives the example of 4, § 1 *de Naut foen* [D. 22, 2, 4, 1], saying that this would not have been necessary had the Romans known bills. All Pothier says with certainty is that bills have been in common usage since the 14th century.

⁴⁶² Pothier, *Traité du contrat de change* (1763) § 7, n. 1.

⁴⁶³ G.F. von Martens, *Versuch einer historischen Entwicklung des wahren Ursprungs des Wechselrechts* (1797, reprinted 1966), 24.

by bill rather than coin or bullion.⁴⁶⁴ James Buchan points to the assets left in 1268 by Ranieri Zeno, Doge of Venice, a large proportion of which was in 'city bonds'.⁴⁶⁵ Admittedly, the most distinguished writer on the subject, Levin Goldschmidt, dismisses suggestions that the discovery of bills of exchange can be attributed to any individual group, whether the Jews, Genoese, or Florentines, as fantasy.⁴⁶⁶ The fascinating area of comparative legal history that is the genesis and evolution of the bills of exchange is outwith the scope of this work. For present purposes, however, this writer would draw similar attention to the development of the civil law as Rogers has done for Anglo-American law,⁴⁶⁷ that there are important links between the history of cession, the concept of the order to pay and the law of bills of exchange. There were several methods known to various peoples, from diverse legal traditions, which enabled either the transfer of claims or a functional equivalent to be effected. If this is so, the standard history of the civil law of the *jus commune*, which was all too often divorced from practical reality – including the everyday practice of commercial law – is both flawed and misleading. There is perhaps some parallel here between the accepted history of the law of cession and the accepted history of the law of usury: prohibited by canon law yet actively practiced by the church.⁴⁶⁸ So too with cession: what was actively and fanatically prohibited by the jurists of the civil law, from post classical Rome to nineteenth century Prussia, was not only easily circumvented, but wantonly and profitably practised in commercial law. The only possible difference lay in the role of the consent of the debtor. However, as has been pointed out, the civil law apparently knew no mechanism of *transfer*, even with the consent of the debtor.⁴⁶⁹

B. Bills in England.

In England, meanwhile, all bills were originally taken to a named creditor 'or his assigns'. There is little discussion in the English sources of the possibility of other functional equivalents or the order to pay. All bills were originally non-transferable. Subsequently, they were held to be transferable if they contained the direction that the obligation was payable 'to

⁴⁶⁴ L. Levi, *International Commercial Law* (1863), 350.

⁴⁶⁵ J. Buchan, *Frozen Desire: An Inquiry into the Meaning of Money* (1997), 60. Buchan even goes so far as to describe them as 'negotiable', but this is probably not used in technical legal sense.

⁴⁶⁶ L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891), 409.

⁴⁶⁷ J.S. Rogers, *An Early History of the Law of Bills and Notes* (1995).

⁴⁶⁸ R. Zimmermann, *The Law of Obligations* (1996), 172 f.

⁴⁶⁹ Mühlenbruch, *Cession* § 4, 28 ff.

the order of the payee' or 'to bearer'. The absence of this clause would render the bill non-transferable, though it remained valid.⁴⁷⁰ This clause was never deemed to be necessary in Scotland.⁴⁷¹ As has been noted above, once it is accepted that a bill could be transferred, this that claims are indeed transferable. If this can be asserted with some degree of confidence, the implications of this point for the accepted history of the law of cession, assignation and assignment can only be guessed at. For example, in English law it seems that although merchants were drawing bills to settle complex international transactions, ordinary Englishmen could not transfer claims among one another. To say, as the accepted history of the English law of assignment does,⁴⁷² that the law evolved from the elaborate to the easy, does not appear to be at all likely.⁴⁷³ In a modern context one could scarcely imagine a securitization industry emerging without the basic concept of assignment.⁴⁷⁴ As is so often the case, it could be that English law was peculiar. European merchants developed the bill of exchange. English merchants traded with Europe. It could be argued that the concept was thus introduced to English law by way of mercantile interaction. Rogers' argument is that the bill of exchange evolved in England simply to facilitate the transfer of claims.⁴⁷⁵ Yet, this does not explain the general point for the history of the bill in international terms. It is still asserted that in Europe the bill evolved before the more mundane concept of transfer a claim by cession, or the transferable *Anweisung*, had been accepted.

⁴⁷⁰ *Smith v Kendall* (1794) 6 TR 123; 101 ER 469 cited by L. Levi, *Manual of the Mercantile Law of Great Britain and Ireland* (1854), 243, § 297. The modern position is found in the Bills of Exchange Act 1882, ss 8 (4) and (5).

⁴⁷¹ *Crichton v Gibson* (1726) Mor 1446; 1 Kames Rem Dec 154; 1 Ross LC 51(n) and authorities discussed in n. 504 below. In *MacWilliam v Mediterranean Shipping Co* [2005] 2 AC 423, Lord Rodger, observes (at para [67]) that the Bills of Lading Act 1855 was introduced to address problems of transfer of straight bills of lading in English law. It is interesting that when Lord Rodger examines Bell, *Commentaries* (3rd ed. 1821) I, 453, n. 3; (7th ed. 1870) I, 590, n. 5, Bell makes no mention of the need to address a bill of lading expressly to 'assigns' to render it transferable. This is unsurprising: in Scotland rights were always freely transferable.

⁴⁷² See W.S. Holdsworth, 'The Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* 12, 173 and 376 (3 parts).

⁴⁷³ W.T. Baxter, 'Credit Bills and Bookkeeping in a Simple Economy' (1946) 21 *The Accounting Review* 154 at 160, cited by J.M. Holden, *The History of Negotiable Instruments* (1955), 2.

⁴⁷⁴ Ironically, however, the subtleties of the English law of equitable assignments means that it is difficult to conceptualise any *transfer* of assets in a securitization: there is never debtor notification. If there is no notification, there is no transfer at law; but there is an equitable assignment. This is perfectly acceptable for the purposes of a securitization transaction. In Scottish terms, in so far as there is no debtor notification, there is simply no *transfer* of the assets to the single purpose vehicle (SPV).

⁴⁷⁵ J.S. Rogers, *The Early History of Bills and Notes* (1995).

C. Evolution of the concept of indorsation.

The history of indorsation reflects the complexity in the history of cession. There has been considerable debate about the nature of indorsement, especially of bearer bills, and how it interacted with the relevant procedural law.⁴⁷⁶ Importantly, most authors who have considered the subject of indorsation since conclude that an indorsement encompasses a cession of the claim.⁴⁷⁷ However, since cession is often seen as transfer without the consent of the debtor, some authors have dissented from this view.⁴⁷⁸ Again, the important point for present purposes is that bills of exchange, being indorsable, allowed claims to be transferred, albeit with the consent of the debtor.

VI. Assignment in Scots Law⁴⁷⁹

A. Introduction.

In one of the most extensive litigations in Scots law in modern times, *Caledonia North Sea Ltd v London Bridge and Engineering Ltd*,⁴⁸⁰ Lord President Rodger embarked on a historical *tour de force* through the history of the law of assignment. He observed that,

“Nowadays we think of the cedent transferring rights to the assignee. That causes us no difficulty since modern legal systems tend to recognise that rights are transferable. At an early stage in its history, however, Scots law regarded contractual rights as being, of their very nature, personal to the creditor and as therefore not capable of being transferred to other people. One device, which was adopted to avoid the resulting practical problems and to give the effects of a transfer, was for the creditor to agree that the other party could take proceedings to enforce the right, using the creditor’s name but keeping any sum which was recovered. In other words the creditor made the other party a procurator *in rem suam*. See, for example, Stair, *Institutions*, III.i.3; Bell’s *Principles* (10th ed. 1899), para 1459. As Lord President Inglis remarked, a procuratory *in rem suam* ‘is just one of the definitions of an assignment’: *British Linen Company Bank v Carruthers and Fergusson* at (1893) 10 R. 926.

⁴⁷⁶ See Brunner, ‘Das französische Inhaberpapier’, 533-546. The holders of bearer bills often had considerable difficulty before the French courts to establish that they were suitably authorised by the original creditor.

⁴⁷⁷ R.J. Pothier, *Traité du contrat de change* (1763) § 23; G. Schapps, *Zur Geschichte des Indossaments* (1892), 131-133 (France) § 40, at 179 (England); cf. § 32, at 158 (Germany). In Scots law, see in particular the anonymous case decided sometime in the 1720s reported at 1 Kames Rem Dec 190.

⁴⁷⁸ See e.g. L. Kuhlenbeck, *Von den Pandekten zum Bürgerlichen Gesetzbuch* (1899) vol 2, 162: ‘Hier ist nur zu bemerken: Das Indossament ist keine Cession’.

⁴⁷⁹ For a recent overview, see generally, K. Luig, ‘Assignment’ in K.G.C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland* (2000) vol 2, 399 ff.

⁴⁸⁰ 2000 SLT 1123 aff’d 2002 SC (HL) 117.

Signs of this approach survive today in the rule that an assignee may sue either in his own name or in the name of the cedent.⁴⁸¹

There is much truth in what the Lord President says here. His comments certainly seem to reflect accurately the historical development in Europe, on which he drew heavily.⁴⁸² The considerable influence exercised by the civil law and the *jus commune* on the Scots law of property and obligations was such that it is certainly tempting to draw the conclusion that Scots law developed in parallel with continental law. As will become clear, however, such a conclusion would be misleading. There is no evidence in the early Scottish sources, for example, of an argument that claims are personal to the creditor ever being sustained. Indeed, there is nowhere a genuine example of this point even being argued. Moreover, although the institutional writers referred to the position in Roman law in passing, there are relatively few references to the procurator *in rem suam* in the Scottish sources. Simple references to an assignation are not just common but ubiquitous. Where references to *procuratio* do appear, they were late on in the development of Scots law: few can be found prior to the nineteenth century. By this time the law of assignation in Scotland was settled. It is this writer's contention that Scots law had developed a general theory of the transfer of claims independently of ideas of *procuratio in rem suam*.⁴⁸³ The ancient order to pay was also part of Scots law before the reception of Roman law. As Scots lawyers began to take heed of the civil law, however, they sought to engraft the principle of *procuratio* onto their existing notion of transfer. The reasons for this are unclear; it may be variously ascribed to ignorance, a need for authority, or to open legal borrowing. This contributed more confusion than clarity to the Scots law of assignation.⁴⁸⁴ And it has come close to erroneously re-writing the history of this chapter of Scots law. In any event, the style of *procuratio* never impinged upon the general

⁴⁸¹ 2000 SLT 1123 at 1139L-1140A.

⁴⁸² 2000 SLT 1123 at 1140F-J; 1143K-1144B referring to R.J. Pothier, *Coutumes des Duché, Bailliage et Prévôté d'Orléans* (1740) 20.5.1-2; *Traité des obligations* (1760), 2.6.4 and 3.1.6.2. Pothier's Commentary on the *Coutumes des Duché, Bailliage et Prévôté d'Orléans* found in M. Bugnet (ed.) *Œuvres de Pothier* (1861) vol. 1, § 103, 672, chapter 20 is entitled 'du droit de execution', title 5, 'des opposition des créanciers'. There is comparison of subrogation and *procuratio in rem suam* in Bugnet's edition at § 84, 667. M. Bugnet, *Oeuvres*, vol 2, contains the *Traité des obligations*. The section corresponding to 2.6.4 is entitled 'Pour Qui envers qui, pour quelle, et comment le cautionnement peut-il être fait'; however, there is discussion of the *beneficium cedendarum actionum* at § 440, 237. The passage cited 3.1.6.2 is found in Bugnet's edition beginning at § 551, 290. See in particular, §§ 556-557, 291-296. Lord Rodger also cites Art. 1251 *Code Civil* (subrogation légale); § 774 (*cessio legis*) and § 426 II *BGB* (the creditor's obligation to assign his rights against a joint-obligant on payment by another).

⁴⁸³ Klaus Luig has taken a similar view in K.G.C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland* (2000) vol 2, 419.

⁴⁸⁴ See, again, Luig, *ibid* at 419.

theory of transfer. This continued, uninhibited by Stair's purported Romanization of Scots law.

B. Early references to Assignment in Scottish Sources.

It is not clear exactly when, or how, there was a reception of the Roman law notions of procuratory *in rem suam* in Scots law. The assignment sources are of considerable antiquity. Some of them are contemporaneous with the main reception^{484a} of Roman law in Scotland. It should be remembered that it is in the law of moveable property where the Roman influence was most keenly felt. Yet, even after the reception, there is remarkably little reference to the notion of *procuratio in rem suam*. Where these references are made, it is to explain the susceptibility of the assignee to the debtor's defences: compensation or other claims that would have been prestable against the cedent.⁴⁸⁵ There is no evidence that claims were non-transferable.

The earliest reference to assignment seems to have been found by Professor MacQueen who refers to an undated grant by Fergus, Earl of Buchanan (who died before 1212) which is addressed the grantee, 'his heirs and assignees'.⁴⁸⁶ However, this may not be of great importance if it is the case that 'assignee' is being used to refer to a grant of corporeal property. The first reference to an assignment of a personal right is to be found in an instrument in the Abbey of Couper Angus which has been dated to 1297.⁴⁸⁷ *Regiam Majestatem* says that homage has to be done for services and returns assigned in money and other things.⁴⁸⁸ Sir William Craigie refers to a deed dating from 1400 which refers to 'assigneii'.⁴⁸⁹ Ross refers to a bond granted by James, King of Scots to Henry VI of England 'his heirs, successors or to their certain attorney or depute', dated 8th March 1424.⁴⁹⁰ There are numerous examples of the use of the words 'assign, 'assignees' in Scottish deeds in the

^{484a} Dating the reception of Roman law in Scotland is, admittedly, controversial.

⁴⁸⁵ As in *Henderson v Birnie* (1668) Mor 1653 and *McDonnells v Carmichael* (1772) Mor 4974; (1772) Hailes 513.

⁴⁸⁶ Professor H.L. MacQueen, *SME*, vol 15, 'Obligations' (1995) para 854, n. 1 referring to the deed in J. Robertson (ed.) *Collections for a History of the Shires of Aberdeen and Banff* (Spalding Club, 1843), 407.

⁴⁸⁷ See D.M. Walker, *A Legal History of Scotland*, vol 1 (1988), 381 and K. Luig, 'Assignment' *op. cit.*, who points out that the assignment was in security.

⁴⁸⁸ III, 60 cited by D.M. Walker, *A Legal History of Scotland* vol 1 (1988), 381.

⁴⁸⁹ Sir William Craigie, *A Dictionary of the Older Scottish Tongue, from the twentieth century to the end of the seventeenth* (1937) vol 1, 122, v. 'assigné'. The deed in question is found in W. Fraser (ed.) *Memoirs of the Maxwells of Pollok* (1863), 141.

⁴⁹⁰ Ross, *Lectures* I, 27.

fourteenth century.⁴⁹¹ The second oldest case in Morison's Dictionary, in 1492, is an assignation case;⁴⁹² and there is another reported in 1493.⁴⁹³ Similarly, even the most superficial browse through *Morrison's Dictionary* will produce innumerable incidental references to assignations and assignees in cases on quite unrelated topics.⁴⁹⁴

C. Bonds, Mandates to pay, Procuratio in rem suam and Assignation.

In Stair's opinion, obligations were of their nature originally intransmissible and non-assignable without the consent of the parties. As a result, only obligations taken expressly to assignees were assignable.⁴⁹⁵ Hume makes a similar point:

“The notion that the obligation was to be ruled, in that respect, strictly and literally, by its own terms; so that the creditor in a bond (for instance) could as little devolve his claim and right of action upon another, as the debtor in the bond can free himself, and substitute another person as debtor in his room. It was thought that the conveyance of claims of debt, and rights of action, was rather unfit to be countenanced, as giving encouragement to litigation, and being often, in effect, the buying of a lawsuit.”⁴⁹⁶

Kames suggests that claims were only transferable where the obligation was taken expressly ‘to assignees’;⁴⁹⁷ Erskine, however, is more discerning.⁴⁹⁸ On this basis it seems that claims could be transferred if there was consent to that effect in the obligation. This is not dissimilar to an *Anweisung*. The debtor agrees to pay his creditor or his creditor's order. When the styles are examined it seems that the debtor almost always undertook to pay the creditor ‘or assignees’. It may be, therefore, that few ever considered whether an obligation was a personal tie between two parties. The right of the creditor to assign without the consent of the debtor was never important: as a matter of course, the debtor consented to a transfer. The

⁴⁹¹ Sir William Craigie, *A Dictionary of the Older Scottish Tongue, from the twentieth century to the end of the seventeenth* (1937) vol. 1, 122 v. ‘assign’, n. 2; at 122 s.v. ‘assigna’, ‘assignatioun’. Cf. *ibid*, at 474, v. ‘cessionar, cessioner’.

⁴⁹² *Drummond v Muschet* (1492) Mor 843; Balfour, *Practicks*, 169.

⁴⁹³ *Countess Crawford v Athilmer* (1493) ADC I, 313, cited in D.M. Walker, *A Legal History of Scotland* vol 2 (1990), 710.

⁴⁹⁴ Cf. D.M. Walker, *A Legal History of Scotland* vol. 2 (1990), 710: ‘It seems that by the later fifteenth century, rights created by contract were recognised as having a proprietary character so as to be assignable’. The reference to ‘proprietary’ is perplexing. Contract rights are not real rights, but personal rights.

⁴⁹⁵ Stair III.i.2.

⁴⁹⁶ *Lectures* vol. III, 1.

⁴⁹⁷ H. Home, Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1777) Art. 39, at 319. But see discussion of these opinions at n. 504 below.

⁴⁹⁸ Compare his approach at II.viii.7 and III.v.2.

balance of the evidence seems to point to this being the established practice.⁴⁹⁹ The important point to note, however, is that all the writers recognise that Scots law had a concept of *transfer*, even with the consent at the beginning of the nineteenth century, unlike the civil law which lacked a general concept of transfer by cession, even with the consent of the debtor.

The ubiquitous moveable bond⁵⁰⁰ is of particular interest. As in France, it seems that it was almost universal practice in Scotland to reify debts into bonds if transfer was desired. The original Scottish term was 'ticket'.⁵⁰¹ Normally the bond would bear to be granted in favour of the creditor, 'his heirs, executors or assignees'⁵⁰² or 'his heirs, executors, assignees, or any having his order'.⁵⁰³ Such a clause would leave it open to the creditor to 'make over' his claim against the debtor to another either by outright transfer or by ordering the debtor to pay. Indeed, such a clause seems to recognise expressly that universal succession on death ('heirs and executors'), singular succession by *inter vivos* voluntary transfer ('assignees') and the order to pay ('any having his order'), as distinct concepts. As for whether this recital was actually necessary, however, Stair, at least, was quite explicit. That an obligation did not mention assignees was immaterial. The creditor could still transfer by assignment.⁵⁰⁴ Indeed it

⁴⁹⁹ The styles will be examined below. Cf. *Code Civil*, Art. 1122: 'On est censé avoir stipulé pour soi et pour ses héritiers et ayant cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention'.

⁵⁰⁰ Macvey Napier, *Lectures on Conveyancing 1843-44* (Typescript in EUL taken from MS in Royal Faculty of Procurators in Glasgow), Lecture 10, 135 points out the difference between the moveable bond and the bill: bonds could be granted for obligations *ad factum praestandum*; bills were used only for money obligations. See also *Sharp v Harvey* (1808) Mor 'Bill of Exchange', App. 1, No. 22 and A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 486.

⁵⁰¹ *Bundie v Kennedy of Culzean* 11th June 1708, Forbes Dec; Mor 4907; Ross, *Lectures* I, 25 and 45. He also suggests that the term 'bond' is of Swedish or Gothic origin. This seems far-fetched. See also A.J. Mackenzie Stuart, 'Moveable Rights' in Stair Society, *Introduction to Scottish Legal History* (1958), 203, para 13; Macvey Napier, *op. cit.*, at 136.

⁵⁰² Sir George Dallas of St Martin, *Juridical Stiles* (1688, published 1774) vol I, 5, Dallas is described by W. Ross *op. cit.*, 2 as the 'Father of Scottish Forms'. See also Juridical Society of Edinburgh, *Juridical Styles* (3rd ed. 1794) vol III, 18. Ross, *Lectures, op. cit.*, 45, cites a deed from 'Carruther's Styles' which is in similar terms. The authorship of this work is mysterious. The Sweet and Maxwell, *Bibliography of the Commonwealth of Nations*, vol 5, *Scottish Law to 1956* (2nd ed. 1957, L.F. Maxwell ed.) attributes the *Compend or Abreviat of the most important ordinary securities of and concerning Rights Personal and Real, redeemable and irredeemable of common use in Scotland* (1702) to one Carruthers. The copy of this anonymous work in the Edinburgh University Library (EUL Sp Col E.B. .34 (4107)), is attributed to Sir Andrew Birnie of Saline, Lord of Session. Professor D.M. Walker, 'Judicial Decisions and Doctrine in Scots Law' in J. Dainow (ed.) *Judicial Doctrine and Precedent in Civil Law and Mixed Legal Systems* (1974), 207-208 attributes the title published in 1702 to Carruthers; the title of 1709 to Andrew Birnie. Cf. the respected bibliophile, historian and lawyer, David Murray, who, in his *Legal Practice in Ayr and the West of Scotland in the Fifteenth and Sixteenth Centuries* (1910), 34, n. 4, records both claims to authorship, but prefers neither.

⁵⁰³ Ross, *Lectures* I, 64. Compare the deed cited by Sir William Holdsworth, where the *granter* binds himself thus: 'I the said Thomas Thorne bynd me myne ayres executors and assignes and all my goods' (Holdsworth, 'Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* at 378). This is an example of nonsensical material appearing in styles. That the granter purports to bind his assignees to pay his obligations cannot have meant that he could transfer his liability to someone else without the creditor's consent.

⁵⁰⁴ Stair, III.i.16; see also W. Forbes, *Bills of Exchange* (2nd ed. 1718), 80 citing *Stewart v Stewart* (1669) Mor 4337; Erskine III.v.2; III.ii.27: 'Some foreign writers have maintained, that a bill which is taken payable only to

is notable that styles of other bonds, such as bonds of annuity, were not taken expressly to assignees,⁵⁰⁵ yet annuities seem to have been assignable.⁵⁰⁶ Further, one study of notarial protocols has indicated that in the fifteenth and sixteenth centuries, bonds were not granted to creditors at all; instead the debtor would appear before a notary and bind himself to make payment.^{506a} Walter Ross, moreover, enters into detailed discussion of the reasons that obligations were granted to ‘heirs, executors and assignees’. However, he does not once mention the personal nature of obligations; rather, the importance lay in the law of succession: executors were liable for the moveable debts of the estate.⁵⁰⁷ Therefore, a bond payable to X, ‘his heirs, executors and assignees’ could be distinguished from one payable to X, ‘secluding executors’.⁵⁰⁸ The latter type of bond was treated as a heritable debt. Consequently, it would not be subject to the *legitim* claims of the assignee’s issue.

Although recognised by them, the distinct concept of *Anweisung*, is not, however, fully discussed by the institutional writers. Stair, for example, focuses instead on the blank bond. This instrument seems to have been particularly fashionable in France and Scotland.⁵⁰⁹

the creditor, and not also to his order, is not indorsable; but if all rights, though they should not specially bear to assignees, pass by assignation, which is at least a general rule in commercial states, bills by the same rule, though they do not bear to order, must be transmissible by indorsation’; Bankton II, 193, 16: ‘All personal rights may be assigned, tho’ they mention not assignees’. In the same paragraph, Bankton observes – as do the other institutional writers – the anomalous position with reversions. These, apparently, had to bear expressly to assignees to be assignable; reversions, ‘being against the nature of property... are to be most strictly observed; and are *strictissimi juris*’: Mackenzie, *Inst.* (2nd ed. 1688) II.viii, at 165-166. As Mackenzie himself observes, however, reversions could be arrested though not expressed to assignees. Importantly, Erskine II.viii.7 doubts the view that reversions had to expressly mention assignees to be assignable; the distinction, in his view, appeared ‘to be without a real difference’: there are many types of right that are assignable though they do bear to be granted to assignees. Erskine observes that reversions are adjudgable (rather than arrestable); and adjudication is merely a ‘legal assignment’. Cf. Kames, *Principles of Equity* (2nd ed. 1767), 78. For judicial authority, see *Steuart v Steuart* (1669) Mor 30, *sub nom Stewart v Stewart* Mor 4337; *Barber v Barber* (1705) Mor 10327; Fountainhall II, 259, (both cases dealing with transmission); *Crichton v Gibson* (1726) Mor 1446; 1 Kames Rem Dec 154; 1 Ross LC 51(n); *Boswell v Arnott* 7th February 1759 FC; Mor 12578. Some two hundred years after Stair, in *Johnstone-Beattie v Dalzell* (1868) 6 M 333 at 344, Lord President Inglis made the same point: “It rather appears to me that when a right is conceived in favour of a party and his assignees, or a party or his assignees, which, without mention of assignees, would still have been assignable, the expression of assignees does not alter the nature of the right ... It is an unnaturally forced construction to say that the words ‘or to his assignees’ make the right anything better or worse than it would otherwise have been without them.”

⁵⁰⁵ Juridical Society of Edinburgh, *Juridical Styles* (3rd ed. 1794) vol III, 24.

⁵⁰⁶ A style assignation of the annuity follows the style for a bond of annuity in the *Juridical Styles* cited in the previous note.

^{506a} D. Murray, *Legal Practice in Ayr and the West of Scotland in the Fifteenth and Sixteenth Centuries* (1910), 24.

⁵⁰⁷ See Macvey Napier, *Lectures on Conveyancing 1843-44*, *op. cit.*, at 137 ff. Cf. Erskine II.viii.5-8.

⁵⁰⁸ See Macvey Napier, *Lectures*, 199.

⁵⁰⁹ For the developments in France, see H. Brunner, ‘Das französische Inhaberpapier’, 544-545; L. Goldschmidt, *Universalgeschichte des Handelsrechts* (1891), 397, n. 2; J. Brissaud, *History of French Private Law* (trans. R. Howell, 1912) § 394; W. Holdsworth, ‘Origins and Early History of Negotiable Instruments’ (1915) 31 *LQR* 12 at 24. Although there are examples in English law of the problems that arise where bills are drawn in favour of fictitious payees, they come much later: see e.g. *Tatlock v Harris* (1789) 3 TR 174; *Vere v Lweis* (1789) 3 TR 182; *Minet v Gibson* (1789) 3 TR 482; 100 ER 689 aff’d (1791) 1 Ross Lead Comm Cases 76; Lord Mansfield’s

The debtor would give a receipt of his indebtedness to the creditor. However, the name of the creditor would be left blank. The creditor could then transfer this bond by delivery. The debtor has granted what is in essence a bearer bill. Importantly, no mention is made in the bond that the debtor is granting the bond in respect of a debt to a particular creditor. As a result, the debtor in the bond was prevented from refusing payment to the holder by compensating the claim with a claim owed to the debtor in the bond by the original creditor.⁵¹⁰ Moreover, the bond could be transferred by mere delivery. No intimation was necessary,⁵¹¹ only presentment for payment. Yet the basic concept of *Anweisung*, where there is an order to pay a particular creditor, seems a basic pre-requisite for recognition of a blank bond. Drawing on the debtor to pay, but leaving the name of the ultimate payee blank, is just another way of reifying the debtor's obligation in such terms that he is to pay the creditor 'or his assignees'. Indeed, it is hard to believe that Scots law did not recognise the concept of the ordinary order to pay, whereby X asked his debtor, P to pay X's creditor R, 'or his order' or 'R, his heirs, executors or assignees' before it developed the concept of the blank bond.

Again, however, the primary reasons for the use of the blank bond seem to have had more to do with the political climate of the time and the legal penalties of forfeiture, than with circumventing any rule preventing the transfer of claims:

“The escheats or forfeitures of the moveable goods of individuals, so frequent and so distressing among our forefathers, together with the embarrassments occasioned by the private prohibitory diligences of inhibitions and arrestments, etc put the ingenuity of people to work to discover means of defeating the effects of these legal evils. The most effectual method devised for the purpose proved to be the execution and delivery of bonds blank in the creditor's name, which like the old tickets to bearer, went from hand to hand, without bearing a trace of their transmission; and consequently, eluded the effects of diligence of all kinds. The practice, it seems, increased with the internal commerce of the country, and grew up to a dangerous length towards the end of the seventeenth century.”⁵¹²

speech in *Stone v Freeland* is reported in a footnote to *Collis v Emett* (1790) 1 H Bl 313 at 317; 126 ER 185 at 187 and was quoted in Lord Herschell's speech in *Bank of England v Vagliano Bros* [1891] AC 107 at 152. Cf. *Gibson v Hunter* (1794) 2 H. Bl 187 and 288; 126 ER 499 and 557. See now Bills of Exchange Act 1882, s. 7(3). For the incidence of this form in German law, see H. Dölle, 'Bemerkungen zur Blankozession – Beitrag zur Lehre von der subjectlosen Rechten' in E. von Caemmerer et al (eds) *Festschrift für Martin Wolff* (1953), 23 ff.

⁵¹⁰ See, in particular, the arguments for the respondent in *Grant v Lord Banff* (1676-1677) Mor 1654 at 1655. See also *Grant v McIntosh* (1681) Mor 1653.

⁵¹¹ See e.g. *Grant v Lord Banff* (1676-1677) Mor 1654 and *Stair III.i.5. Telfer v Geddes* (1665) Mor 1664 and *Brown v Henderson and George* (1668) Mor 1665 are cases of good faith payment. However, there are numerous cases which indicate that intimation was required to transfer the claim in the bond: *Crawford v Crawford & Kniblo* (1627) Mor 1661; *McCulloch v Cleland* (1684) Mor 1666; *Campbell v Murray* (1697) Mor 970.

⁵¹² Ross, *Lectures I*, 65.

Only a debtor who was not in a strong bargaining position or who was ignorant of the law would have granted one. The blank bond had several disadvantages for the debtor. First, it seemed that in so doing he would lose any right to plead compensation.⁵¹³ Secondly, it is not clear whether the defence of good faith payment applied to blank bonds.⁵¹⁴ The problem of blank bonds was serious enough to provoke the Scottish Parliament into passing the Blank Bonds and Trusts Act 1696.⁵¹⁵ In France, the *Parlement* of Paris prohibited blank bonds and, in 1716, instruments payable only to bearer (except those issued by the state or by the bank founded by the Scot, John Law) were declared illegal.⁵¹⁶ With the increase in use of the bill of exchange at the beginning of the eighteenth century, the French realised that bearer bills were economically necessary. As a result, the edict of 1716 was repealed in 1721.⁵¹⁷

In Scotland, the first cases reported under the title of Bills of Exchange in *Morison's Dictionary* do not appear until after 1696.⁵¹⁸ Prior to then, the decisions on moveable bonds are collected under 'Blank Writ' or 'Assignment'. The 1696 Act proscribed bonds 'blank in the person or persons name in whose favors they are conceived'. It was not clear whether bearer bills fell within this definition; or, indeed, whether they fell within the exception at the end of the Act that 'this Act shall not extend to the indorsation of bills of exchange or the notes of any trading company'. Arguably bearer bills did not fall within this exception (they are not indorsed) and there is at least one case where a bearer bill was held void by the 1696 Act.⁵¹⁹ A bearer bill is functionally identical to a blank bond. Remarkably, the 1696 Act was

⁵¹³ *Henderson v Birnie* (1668) Mor 1653. In *Monteith v Earl of Gloret* (1666) Mor 832, the fact that the assignee had taken gratuitously seems to have influenced the court.

⁵¹⁴ Stair, *Institutions* (1st ed. 1681) Part II, title xxiii, at 6. The debtor would have had to have been so stupid as to have paid his original creditor without demanding the bond back. Cf. S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd ed. 1981), 250.

⁵¹⁵ Cap. 25 (both 12^{mo} and APS).

⁵¹⁶ See J.B. Brissaud, *History of French Private Law* (trans. R. Howell, 1968) § 396; W. Holdsworth, 'The Origins and Early History of Negotiable Instruments' (1915) 31 *LQR* 12 at 24.

⁵¹⁷ *Ibid.*

⁵¹⁸ The one exception being *Kennedy v Hutchison* (1664) Mor 1496. It involved an English debtor. Compare T.C. Smout, *Scottish Trade on the Eve of Union 1660-1707* (1963) 117 who observes that from 1660 bills 'became a regular feature of Scottish commercial life... Between 1660 and 1707, bills were common on the trades to England, Holland, France, Germany, Danzig and much of Scandanavia...'. This may have had much to do with the Money Act 1663 (APS, c. 29; 12^{mo} c. 11) which prohibited the export of money from Scotland except for payment for Norwegian timber or for corn in times of famine. However, Scottish merchants were initially suspicious of bills of exchange. As late as 1705, one Glasgow merchant could still write: 'I abhorred to send a ship in her ballast to purchase the goods on credit, which hath destroyed many unthinking men, when Bills of Exchange came upon them like an Thunder-Clap; although I confess at times it cannot be evited': J. Spreull, *An Accompt current betwixt Scotland and England in Miscellaneous writings of John Spreull (commonly called Bass John): with some papers relating to his history, 1646-1722* (1882), 49. See too J. Agnew, *Belfast Merchant Families in the Seventeenth Century* (1996), 158-159.

⁵¹⁹ *Walkinshaw's Exrs v Campbell* (1730) Mor 1684.

only finally repealed in 1995.⁵²⁰ The danger of falling foul of the statute was a real one. For example, one of the paradigm examples of the bearer bill, the low-value (relative to sterling) bank note (which was pioneered by the Scottish banks), was originally always granted to a named creditor or the bearer, presumably with the 1696 Act in mind.⁵²¹ These would then be indorsed in blank.⁵²² Immediately thereupon, the bill would be transferable by mere delivery; thus was the Act easily circumvented. Blank bonds did appear after the 1696 Act; however, by then their original attributes (compensation not pleadable and no intimation required) seem to have been forgotten.⁵²³ Furthermore, there is considerable authority for the view that where a debt is reified in a bond, the debt must always be transferred by intimated assignation; mere delivery of the bond will not transfer the claim: the bond is merely an accessory.⁵²⁴ However, this ignores the position of the debtor. If he has executed a bond (and he may well have consented to its registration for preservation and execution) he can withhold payment till it is tendered.

Nevertheless, the Scottish sources from an early date seem to distinguish the concept of *Anweisung* from assignation. Assignation is seen as a transfer (cession) of a claim. The order to pay is recognised as something different. The second oldest case in *Morrison's Dictionary*, reported in 1492, is an assignation case. It involved a question of intimation. The report reads:

“Gif ony creditour makes and constitutis ony persoun his cessioner and assignay to ony debt auchtand to him, the said assignay aucht and sould make lauchful intimatioun of the said assignatioun to the debtour, utherways gif the said debtour happinis to pay the creditour, *or ony utheris in his name, havand his richt and power before ony intimatioun maid to him* he onnawayis sould be compellit to mak ony payment to the said assignay be ressoun of his assignatioun.”⁵²⁵

⁵²⁰ Requirements of Writing (Scotland) Act 1995.

⁵²¹ W. Graham, *The One Pound Note in the History of Banking in Great Britain* (2nd ed. 1911) reproduces copies of such notes. There is also the interesting question of whether the banks would have fallen under the exemption in the 1696 Act for notes of a trading company. It is thought that the banks were financial companies, not trading companies, so they would not have fallen within the exemption. See too *Pentland v Hare* (1829) 7 S 640 and *Duncan's Trs v Shand* (1872) 10 M 984 where promissory notes were held void for failing to name a creditor.

⁵²² In Scots law, there seems never to have been a prohibition on indorsement in blank. Compare the position in France under the laws of 7 September 1660 and 9 January 1664: see G. Schaps, *Zur Geschichte des Indossaments* (1892) § 22, at 124. No such prohibition was included in the *Ordonnance de Commerce* of 1673. The position under the various laws in force in Germany was similarly hostile to blank endorsement: Schaps § 39, at 175, n. 1, though these provisions seem to have been much ignored in practice: Schaps, *ibid*.

⁵²³ See e.g. *Baillie v Dawson* (1733) Mor 1667; Elchies, *Bill of Exchange* No. 1; *Compensation*, No. 1.

⁵²⁴ Bell, *Commentaries* II, 24; *Christie v Ruxton* (1862) 24 D 1182 at 1186 *per* Lord Benholme, basing his opinion on his notes of Hume's *Lectures*.

⁵²⁵ *Drummond v Muschet* (1492) Mor 843 (my emphasis).

The case has always been referred to on the basis that it deals with the paradigm form of cession, i.e. a transfer of a claim by a creditor against his debtor to a singular successor. On a closer reading of the report, however, it seems that this case might actually have involved a mandate to pay, i.e. a delegation of performance or *Anweisung*. The italicised passage is not easy to follow as a result of the ambiguous use of the pronouns ‘his’ and ‘him’. However, it can be interpreted as referring to the case where the debtor was in double distress. The creditor assigns his claim against the debtor, i.e. transfers it. The question is: what then happens if the debtor is, before intimation of the cession, compelled to pay the original creditor, or ‘ony utheris in his name’, i.e. there is a competing order to pay? It is only in the case of such an *Anweisung* that payment is made in the creditor’s name rather than in the debtor’s own name.⁵²⁶ The answer is that until intimation there is no transfer. Therefore, the debtor remains obliged, and in good faith, to pay the cedent or the cedent’s order. It is of particular interest, then, that one of the earliest ‘assignment’ sources in Scots law recognises both concepts. Moreover, ‘assignment’ is used to refer to the cession, and not the order to pay.

D. Development of Scots law

1. Assignment and mandates to uplift: Scots law and the Civil law

Stair recounted the history of the transfer of claims in Scots law thus:

“Yet, obligations may become the more useful and effectual, custom hath introduced an indirect manner of transmission thereof, without the consent of the debtor, whereby the assignee is constituted procurator; and so as mandatar for the creditor, he hath power to exact and discharge, but it is to his own behoof, and so he is also denominated donatar; and this is the ordinary conception of assignments. The like is done amongst merchants, by orders, whereby their debtors are ordered to pay such a person their debt, which indeed is a mandate; but if it be to his own behoof it is properly an assignment...Assignations are more frequent with us than anywhere; there is scarce mention of them in the civil law.”⁵²⁷

For Stair, assignment was the transfer of the right (and, importantly, a transfer *without the consent of the debtor*), while the mandate to pay was an order among merchants. Stair suggests that it was because of the inconveniences of the old rule that claims were not transferable or transmissible that the law developed so as to admit of the assignment of claims

⁵²⁶ See chapter 1 above, v. ‘*Anweisung*’.

⁵²⁷ III.i.3.

in the modern sense.⁵²⁸ Stair suggests that the *procuratio in rem suam* was invoked to circumvent the old prohibition. There are five points, however, which undermine Stair's version of the historical development of Scots law. It will be shown that Stair's view of the historical development of the Scots law of assignation was thinly veiled Romanization.⁵²⁹

First, he suggests that the old prohibition on transfer was circumvented by the device of the mandate *in rem suam*. That statement certainly seems to be unarguable with regard to the development of the civil law. Crucially, however, Stair then cannot help but comment on the peculiarity of his own argument: 'Assignations are more frequent with us than anywhere; there is scarce mention of them in the civil law'. Stair could not understand why, if Scots law and the civil law shared the same history, assignations were so common here yet so seldom encountered there.

Secondly, it is not immediately apparent why the old rule – assuming it was a rule – proscribing transfer was so inconvenient. The use of the bond and, in particular, the blank bond, seems to have successfully circumvented it. Indeed, many of the cases involving blank bonds refer to their transfer by *assignation*. The introduction of the concept of *procuratio* seems, therefore, to have confused rather than assisted matters. Bonds were still granted debtors to the creditor, 'his heirs and assignees'. Moreover, until 1696, if a blank bond was used, intimation was not required. According to Stair, this was one of the major motivations for using blank bonds.⁵³⁰

Thirdly, despite Stair's assertion that the concept of *procuratio in rem suam* was invoked, the relative lack of discussion of 'assignations' in terms of *procuratio* in the Scottish sources is particularly striking. Indeed, the only substantive relevance that the characterisation of assignation in terms of *procuratio* had for Scots law was to explain why the debtor was able to plead defences he held against the cedent against the assignee⁵³¹ (an incident that is not, as it happens, dependent on the *procuratio* analysis);⁵³² and, perhaps, the right of the assignee to

⁵²⁸ Stair III.i.2-3. In *Muir v Ross' Exrs* (1866) 4 M 821 at 826, Lord Curriehill accepted this account of the law without question.

⁵²⁹ Professor Luig has written that 'the idea of a procurator *in rem suam*, which was borrowed from Roman law, had no apparent consequences for the rest of Stair's exposition': K. Luig, 'Assignation' in K.G.C. Reid and R. Zimmermann (eds.) *A History of Private Law in Scotland* (2000) vol 2, 412. The French apparently had a similar experience with jurists attempting to show that the provisions of the *Coutume de Paris* were consistent with the Roman texts: see Grosskopf, *Geskiedenis*, 83-84.

⁵³⁰ Stair III.i.5.

⁵³¹ See arguments in *Ruthven v Gray* (1672) Mor 31; *Henderson v Birnie* (1668) Mor 1653 and the opinions in *McDonnells v Carmichael* (1772) Mor. 4974; (1772) Hailes 513.

⁵³² See chapter 5 below.

sue in the name of the cedent.⁵³³ That is not to say that the concept of *procuratio* was foreign to Scots lawyers before then.⁵³⁴ However, wherever there is a characterisation of assignation in terms of mandate, it is not because *procuratio* was necessary to circumvent a prohibition on the assignation of claims. Rather these cases involved the incidental effects of characterising assignation in terms of a mandate *in rem suam*. This is similar to the French experience where although the transfer of claims was admitted, the language of *procuratio* was often retained.⁵³⁵

Fourthly, in Scots law an assignee was always viewed as a transferee.⁵³⁶ There are only two possible elements of the substantive law that have been explained in the basis of the *procuratio* theory. One is the right of the debtor to plead defences he held against the cedent against the assignee. The other is the effect of the cedent's death on an assignation. In 1690,⁵³⁷ the Parliament of Scotland legislated so as to provide that, although intimation had not been made in the cedent's lifetime, the assignation could still be intimated. The reason for the legislation may have followed from a misunderstanding of the law: it was thought that an unintimated assignation fell on the death of the cedent.⁵³⁸ The reason for this, it was said, was that the assignation was a mere *procuratio*, and such a mandate was revoked by the death of the cedent. In the Appendix to the Institutions, Stair refers to some Acts of Parliament passed in the session while the second edition of the *Institutions* was with the printer. Of the Act of 1693, 'anent Procuratories of Resignation and Precepts of Sasine',⁵³⁹ he says:

⁵³³ *Grier v Maxwell* (1621) Mor 828 and *Westraw v Williamson* (1626) Mor 859. See also *Shaw v Dunipace* (1629) Mor 3166 where the language of *procuratio* is invoked.

⁵³⁴ See, for example, the assignation reproduced by P. Goulesbrough, *Formulary of Old Scots Legal Documents* (1985, Stair Society vol 36), 2. In this deed, dated 29th February 1659, the cedent 'makis, constitutes and ordaines the said JE, his aires, executouris and assignais, my verie lafull wndowbtit [=undoubted] and irrevocable cessioneris, assignais, donatouris and procuratouris *in rem suam*...'

⁵³⁵ Pothier, *Traité du contrat de vente* § 550.

⁵³⁶ See, for instance, an early case, *Munro v Wishart* (1582) Mor 10337 where the assignee of a delictual claim sued in his own name.

⁵³⁷ Confirmation Act 1690, APS, c. 56; 12mo, c. 26.

⁵³⁸ See e.g. Erskine III.v.3; Hume, *Lectures* III, 4; Bell, *Principles* (10th ed. 1899) § 1467. It should be emphasised, however, that there is no strong judicial authority for the proposition; quite the contrary. In *Shaw v Dunipace* (1629) Mor 3166 it was held that payment by the assignee to the cedent had rendered the assignation irrevocable. In *McIlwraith v Rigg and Lessils* (1687) Mor 839 the assignee was entitled to raise an action after the death of the cedent. In *Ridpeth's Exrs v Hume* (1669) Mor 2792 (see Gosford's report) part payment from the debtor before death meant that the assignee was preferred to an executor-creditor. Analogously, *Hamilton v Ross* (1622) Mor 1667 sanctioned the filling up of the name of the assignee in a blank bond after the death of the cedent. Cf. the authorities which hold that an arrester who laid on the arrestment in the lifetime of the common debtor, who dies prior to forthcoming, is preferred to an executor-creditor confirming prior to forthcoming: *Riddell v Maxwell* (1681) Mor 783 and 2790; *Hume v Hay* (1688) Mor 2790 and *Russell v Balincreiff* (1688) Mor 2791.

⁵³⁹ APS, IX, 331, c. 73; 12mo c. 35. Although the act mentions mandates *in rem suam*, it applies only, as the title would suggest, to transfers of heritable property. See too the Confirmation Act 1690, (c. 26; APS c. 56), the Registration Act 1693 (c. 15; APS c. 24) and the Registration Act 1696, (c. 39; APS c. 41) which were also passed – in quick succession it must be observed – to declare the effect of death on various legal transactions.

“...but procuratories of resignation and precepts of seisin are irrevocable mandates in the behove of the mandatar; and they are no more revocable than assignations, which by their nature and style are procuratories by the cedent to the assignee *in rem suam*: for debtors are not obliged to pay any other but the persons mentioned in the obligation, or their heirs, (which *fictione juris* are esteemed the same persons with the creditors,) and therefore unless the obligation bear especially to assignees, the debtor is not the assignee’s debtor; and so the assignee obtains payment as being the procurator or mandatar of the creditor; yet the mandate is not revocable by the death of either cedent or assignee, even by our own former custom.”⁵⁴⁰

However, while such a theory is consistent the principles of *procuratio in rem suam*, it is insufficient. It fails to explain, for example, why other transfers, such as dispositions of heritage, also fell on the death of the disponer: the 1690 Act is not limited to assignations, while the Precepts of Sasine Act 1693 does not purport to apply to assignations at all. Stair is seeking to extend it by analogy. But, having done so, his conclusion – that obligations must bear to assignees to be assignable – has no relevance to the Act. As he himself recognises, before the 1693 Act assignations were irrevocable. The Act must have been merely declaratory.

Similar difficulties are found in Kames’ discussion of the same Act. Kames indicates that ‘An obligation for a sum of money, without mentioning assignees, is not assignable’.⁵⁴¹ Where this was missing, the procuratory *in rem suam* could be invoked. However, one of the problems with the procuratory, Kames argued, was that it would fall on the death of the granter; hence the need for the 1693 Act. Kames opinion of the statute was not a good one; he saw it as contrary to principle.⁵⁴² Further, Kames went on to suggest that the Act would have been completely unnecessary had lawyers resorted to the simple expedient of taking obligations expressly to assignees.⁵⁴³ Kames opinion follows Stair’s. It has the same

The flurry of legislative activity over this issue remains a mystery; all the more so since, as far as the writer is aware, there has been no regulation of the matter in Scots law since. Further still because, contrary to their preambles, the Acts appear declaratory of the common law.

⁵⁴⁰ Stair, *Inst.*, ‘Appendix’ (Tercentenary edition, 1981), 1087.

⁵⁴¹ Kames, *Elucidations*, Art. 39, at 319.

⁵⁴² Kames, *Elucidations*, 320: ‘To make this statute accord with principles, has not been attempted by any writer: nor does it seem to be an easy task; for surely the legislature could not mean to empower one to act *procuratio nomine*, without a constituent. I understand the statute as empowering these several acts to be done, not *procuratio nomine* but by express authority of the statute’.

⁵⁴³ *Ibid*, 320-321. Kames was at least unequivocal that assignation effected a transfer: ‘By our old law, derived from that of the Romans and from England, a creditor could not assign his claim: all he could do was grant a procuratory *in rem suam*, which did not transfer the *jus crediti* to the assignee ... In our later practice an assignment has changed its nature and is converted into a *cessio in jure*, divesting the cedent *funditus* and vesting the assignee’: *Principles of Equity* (2nd ed. 1767), 206. The second part of this passage is borrowed from counsel’s argument in *Sir James Carmichael v Carmichael of Mauldsly* (1719) 1 Kames Rem Dec 35 at 38. It is inconsistent with what Kames says about *procuratio* in his *Elucidations*. His passage in *Principles of Equity*, however, is correct in so far as it highlights that *procuratio* and assignation are not identical. See too T. Huc,

weaknesses. In particular, if obligations were of their nature intransmissible (as Stair, in one place, says⁵⁴⁴), why did the mere mention of assignees change that? It should be remembered that in Roman law, there was no method of *transfer* even with the debtor's consent. It was for that reason that the *procuratio in rem suam* was invoked. According to Stair, however, *procuratio* must be used, even where an obligation bears to assignees. Further, as Walter Ross⁵⁴⁵ has pointed out for Scots law, and as Heinrich Brunner⁵⁴⁶ has done for French law, style transfers of many different types of asset bore to be to assignees or invoked the language of *procuratio*, such as heritable grants. Yet, it was not suggested that other types of property would have to be transferred by the *procuratio in rem suam* merely because there was an omission of the word 'assigns' in the grant. The inclusion of the words 'assignees' for one purpose,⁵⁴⁷ was copied by conveyancers as a standard clause; and, as Walter Ross has wryly remarked, this 'proves that conveyancers were more attentive to the practice of each other, than to the sense of what they themselves were doing'.⁵⁴⁸

Finally, in the above-quoted passage,⁵⁴⁹ Stair seems to ignore everything he has said in his own work about assignation. He had emphatically stated that claims were assignable, *even though the obligation was not expressly in favour of the creditor's assignees*.⁵⁵⁰ In any event, mere mention of an obligation being payable to 'X, his heirs or assignees' would not make the debtor the assignee's debtor; intimation of an assignation or acceptance by the debtor is required for this.⁵⁵¹ Moreover, Stair's assertion that, by Scottish custom, mandates were not revocable by the death of the cedent is puzzling: it would suggest, first, that the Act was unnecessary; and, secondly, that the decisions of the Court⁵⁵² – which he had himself cited, as well as decided – were wrong. Moreover, all the 1690 Act says is that a deed

Traité théorique et pratique de la cession et de la transmission des créances (1891) vol I, § 151, 216: 'Il faut cependant reconnaître que le *procuratio in rem suam* ne réalise pas véritablement le transfert de la créance dans le patrimoine de l'acquéreur ou cessionnaire, puisque ce débiteur agit seulement au nom d'autrui'. Compare the modern South African authorities: *Ex parte Kelly* 1943 OPD 76 at 83; *Kotsopoulos v Bilardi* 1970 (2) SA 391 (C); *Portion 1 of 46 Wadeville (Pty) Ltd v Unity Cutlery (Pty) Ltd* 1984 (1) SA 61 (A) discussed by S. Scott, *The Law of Cession* (2nd ed. 1991), 154, n. 8.

⁵⁴⁴ Stair, III.i.2.

⁵⁴⁵ Ross, *Lectures* I, 187-188n.

⁵⁴⁶ H. Brunner, 'Das französische Inhaberpapier', 502, 531 ff.

⁵⁴⁷ See notes 507-508 above.

⁵⁴⁸ Ross, *Lectures*, II, 169: 'The moment a new term was invented by any body, and known, the ordinary list became enriched by it; in so much, indeed, that in many charters we find repetitions of the same thing, under different words; which proves that conveyancers were more attentive to the practice of each other, than to the sense of what they themselves were doing', cited by Reid, *Property* para 641, n. 4.

⁵⁴⁹ Stair, *Inst, Appendix* (Tercentenary edition), 1087.

⁵⁵⁰ Stair, III.i.16. And see Erskine III.v.2 to the same effect, discussed below.

⁵⁵¹ Stair, III.i.6.

⁵⁵² E.g. *Stuart v Stuart* (1679) Mor 4337.

delivered by the grantor who has since died can be intimated, in as much as a delivered disposition can be recorded after the death of the granter. If, however, the granter died bankrupt and his estate is sequestrated before intimation, the assignee will not be protected.⁵⁵³ A similar point was made by Kames. In Scots law, unlike Roman law, assignation operates as a *cessio in jure*.⁵⁵⁴

Stair's entire treatment of assignation is a mess. His various statements on the matter are contradictory: obligations are inherently intransmissible; therefore, a mandate *in rem suam* must be invoked. But, although obligations are, of their nature, inherently intransmissible, they can be assigned where they bear to assignees. Obligations to assignees are freely assignable; yet, any 'assignation' must take the form of *procuratio in rem suam*: something that is supposedly required only for non-assignable obligations. With the assertion that claims are freely assignable, even where they bear not to assignees, Stair comes full circle. Put simply, Stair's picture of the historical development of the law (unlike his discussion of the substantive law, which is perceptive), is incoherent and unintelligible.^{554a}

That Stair's treatment is simply wrong is evident from Erskine's decision, at least to some extent, to depart from it. Erskine accepts the early history that obligations were originally intransmissible. But in modern law, he notices, 'the general rule is, that whoever is in the right of any subject, though it should not bear *to assignees*, may at pleasure convey it to another.'^{554b}

That the development of the law of assignation caused such confusion even for the most distinguished of Scots jurists is remarkable. As he was wont to do, Walter Ross was careful to emphasise the indigenous elements of Scots law; yet he too was forced to shake his head in bewilderment at the effect of various influences – native, English, Roman and French – on the evolution of the concept of assignation in Scots law: 'It is these changes in our law, these mixtures of principles, which render the practice and decisions of our court...so contradictory, and to us almost inexplicable'.⁵⁵⁵

2. Assignability of Non-Contractual Claims

⁵⁵³ Cf. the confused opinion of Sheriff Erskine Murray in *Bank of Scotland v Reid* (1886) 2 Sh Ct Rep 376.

⁵⁵⁴ H. Home, Lord Kames, *Principles of Equity* (2nd ed. 1767), 206.

^{554a} Cf. Bell's comment (quoted in n. 1484 below) that he was often lost in some passages in Stair which he found to be 'deformed with a sort of confusion and rambling'.

^{554b} III.v.2.

⁵⁵⁵ Ross, *Lectures*, I,183.

The civil law did not know any way by which claims could be transferred (except, perhaps, with the debtor's consent by way of a reified obligation). In later European development, it was clear that claims were regularly transferred, contrary to the position of many civilian jurists. A combination of two factors underlies this development: (1) the tendency to reify obligations into bonds; (2) the tendency for all obligations to be granted to a creditor, 'his heirs and assignees'. It would seem, therefore, that whether the debtor consented to assignation was often not relevant. The question rarely arose. In any event, the law developed further. In modern legal systems, assignation occurs without the consent of the debtor.⁵⁵⁶ However, with regard to contractual claims, it is arguable that there is an implied consent to any transfer.⁵⁵⁷ But many claims that are assignable in modern law are not based on the consent of the debtor, such as damages claims for reparation. The history of the assignation of such claims is important, since any such assignation cannot be based on the consent of the debtor. Unlike the position in some continental systems, there has been no reception of the *lex Anastasiana*^{557a} in Scots law. As a result, the assignation of delictual or enrichment claims is not uncommon; further, the assignee is not limited in the amount that he can recover from the debtor. In some civilian systems, the transferee of a litigious claim can only recover from the debtor what he paid the cedent for the transfer. So while claims for solatium have never been assignable,⁵⁵⁸ delictual claims have long been assignable in Scots law.⁵⁵⁹

3. Cession Styles.

As was mentioned above, in the Scottish sources mention is made of assignment, assignation and cession. This perhaps emphasises the hybrid nature of the Scottish position. No doubt Scottish lawyers were aware of the prohibitions on cession in some parts of Europe.⁵⁶⁰

⁵⁵⁶ See e.g. H. Kötz, *Europäisches Vertragsrecht* (1996) § 14 (trans. T. Weir, *European Contract Law* (1997)).

⁵⁵⁷ See e.g. *Code Civil* Art. 1122: 'On est censé avoir stipulé pour soi et pour ses héritiers et ayant cause, à moins que le contraire ne soit exprimé ou ne résulte de la nature de la convention'.

^{557a} See n. 316 above.

⁵⁵⁸ In particular, claims for solatium. Discussion of this point is outwith the scope of this work. See generally, *Cole-Hamilton v Boyd* 1963 SC (HL) 1; R. Black in *SME*, vol 15 (1995), para 605; D.M. Walker, *The Law of Delict in Scotland* (2nd ed. 1981), 405 ff. Solatium claims do, however, now transmit on death: Damages (Scotland) Act 1993, s. 3. See generally, S. Forsyth, 'Transmissible Solatium after Death: a Reappraisal' 1999 SLT (News) 45.

⁵⁵⁹ *Wishart v Munro* (1582) Mor 10337. Munro was the assignee of a spulzie claim. The wrongdoer was dead. The question was whether the assignee could sue the wrongdoer's heir (who was eight years old!). It was held that the heir remained liable to make restitution of the goods, but had no delictual liability.

⁵⁶⁰ Many Scots studied in France and, following the Reformation, in the Netherlands. Cession ('transport') was permitted by French writers; but not by all the Roman-Dutch jurists.

Moreover, they seem to have been aware of the equally underdeveloped English position. It is not surprising, therefore, that there are styles where the assignee is constituted as the cedent's procurator, or 'surrogated' and 'substituted' into the cedent's place. Perhaps Scots lawyers wanted to ensure that the Scottish assignation would not fall foul of foreign prohibitions should the deed have to be founded upon abroad. This is not beyond the realms of possibility. The Scottish export trade to Europe was a vibrant one.⁵⁶¹ Such traders would have frequently have had the need to assign claims. Consequently, although all discussions of the substantive law strongly indicate that an assignation in Scots law was an outright transfer, the language of *procuratio* was often retained:

"Therefore wit ye me to have made, constitute and ordained, and by thir presents make, constitute, and ordain the said W. G., his heirs and assigneys my very lawful, undoubted and irrevocable cessioners and assigneys, in and to the said sum of [X] ... in and to the foresaid bond, decret interponed thereto, and letters of horning, poiding, caption, inhibitions, arrestment, and others following thereupon ... ; and I have surrogate, and by thir presents, surrogate and substitute the said W. G. and his foresaids, in my full right...; with full power to the said W. G. and his foresaids to intromit with, uplift, ask, crave and receive the foresaid sums of money."⁵⁶²

The high point of the view that the *procuratio* style was absolutely necessary can be found in an opinion of Lord Curriehill in the nineteenth century. He ventured that 'an assignation in its proper form does not contain a direct conveyance, but creates the grantee the cessioner, assignee and donatary of the granter'.⁵⁶³ But, as his Lordship then conceded,⁵⁶⁴ outright transfers were also allowed. There are many styles of this:

⁵⁶¹ See generally T.C. Smout, *Scottish Trade on the Eve of Union 1660-1707* (1963). This is the published version of his doctoral thesis, *The Overseas Trade of Scotland with particular reference to the Baltic and Scandinavian Trades 1660-1707* (University of Cambridge PhD, 1960). See too A.M.J. Rorke, *Scottish Overseas Trade, 1297-1597* (University of Edinburgh PhD, 2001) and J. Watson, *Scottish Overseas Trade 1597-1640* (University of Edinburgh PhD, 2004). There remains much work to be done. For example, there are traces of Scots involved in litigation in the Courts of the Hanseatic City of Lübeck in the fifteenth and sixteenth centuries: see e.g. W. Ebel (ed.) *Lübecker Ratsurteile 1421-1500* vol 1 (1950), cases 301 (1483) and 407 (1488), both cases involving a Scot, Albert Nickelsen or Nickessen; *Idem.*, (ed.) vol 2, *1501-1525* (1955), case no. 302 of 16th October, 1510 involving one Wylhelm Conner; Case no. 587 of 18th September 1517 involving several Dundonians and a ship, the 'Caledonia'. See too an example dating from 1667 in the National Archives of Scotland: an assignation of an obligation originally granted by a Scot to a Norwegian at Bergen for seven 'Rex Dollars'; and the subsequent assignation of it in Scottish form: NAS, GD 105/224.

⁵⁶² George Dallas of Saint-Martins, *A System of Stiles as now Practised within the Kingdom of Scotland* (1688, published 1774) vol I, 6-7. See also the deed in P. Goulesbrough, *Formulary of Old Scottish Legal Documents* (1985) p. 2 quoted in n. 534 above. It is of interest that in France distinguishing between a cession and a mandate to pay required some subtlety: K-H. Capelle, 'Anweisung' in F. Schlegelberger (ed.) *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* (1929) vol 2, 242 at 245, the style being: 'Le cédant cède et délègue au cessionnaire ses droits contre le cédé'.

⁵⁶³ *Muir v Ross's Exrs* (1866) 4 M 821 at 826.

“Therefore wit ye me as assigney, and having right in manner foresaid, to have assigned and transferred, and by their presents assigns and transfers to, and in favour of the said P. G. his heirs, executors and assignees, the foresaid sum of [X] ... and I have surrogate, and by thir presents surrogate and substitute the said P. G. and his aforesaid, in my full vice, right and place of the premises for now and ever: with full power to them, to intromit with, uplift, ask, crave and receive the foresaid sums of money above assigned and transferred, and to use and dispone thereupon at their pleasure....”⁵⁶⁵

The following is the style of a retrocession:

“I by my back bond subscribed with my hand, of [the date] for the causes herein specified, band [sic] and obliged me my Heirs, etc, *Not only* to make due Compt etc, *But also* to Transfer etc to and in favour of the said A ... Therefore I for me my Heirs etc hereby repone, restore and retrocess the said A and his foresaid in his full right, title, and places of the premises...”⁵⁶⁶

Matters would be complicated in the case of a retrocession if it was inconsistent with the initial ‘assignment’. If the initial assignment was a mere procuratory *in rem suam* and the translation purported to transfer, then the second deed ought to have been, strictly speaking, ineffectual. The procurator would have no claim to assign. While a procurator has a mandate to uplift the money from the debtor and to retain it for his own benefit, it is not clear that the procurator has the right to subsequently assign the claim to a further assignee.⁵⁶⁷ Even if a procurator does have such a right, the subsequent procurator or assignee would be at the risk of the original cedent’s insolvency. Conversely, if the original deed sought to transfer the claim to the assignee outright, but the translation only constituted the original cedent as a procurator, the original creditor’s right was now dependent on the assignee.

The deeds show that legal advisers did recognise there were differences between a transfer and a *procuratio in rem suam*, even if they did not perhaps fully understand what those differences were. For example, although the style assignments move readily between the language of *procuratio* and that of transfer, there is no deed known to this writer in the style books⁵⁶⁸ where it is purported to transfer the claim as well as constituted the putative

⁵⁶⁴ *Ibid.* at 827: ‘In our law that rigid rule of the common law [that claims are not transferable] is not enforced but this doctrine shows that a mandate *in rem suam* is *not an incompetent* form by which a creditor may transfer his right’ (my emphasis).

⁵⁶⁵ Dallas, *Stiles, op. cit.*, 8, ‘Translation’. See also the Deed of Translation in Goulesbrough, *op. cit.*, 4 which contains only words of transfer.

⁵⁶⁶ Birnie *op. cit.*, n. 502, p. 15.

⁵⁶⁷ Mühlenbruch, *Cession*, 491, for example, thought that the procurator did have such a right. However, he was not clear whether intimation to the debtor was required for this. Others thought that the right to further transfer (*scotice*: ‘translate’) was the consequence of the cessioner’s *actio utilis*: see Luig, *Geschichte*, 61 ff.

⁵⁶⁸ There are literally thousands of extant assignments in the National Archives of Scotland. Of the few that this writer has consulted, they are remarkably similar to the styles quoted above.

assignee as a procurator *in rem suam*.⁵⁶⁹ This may be a matter of chance. But there is good reason why such a form would not have been invoked: it would seek to achieve mutually contradictory things. The Scottish styles have changed little over the years despite the increase in the relative importance of incorporeals in commerce.⁵⁷⁰

Substantive Scots law has always admitted the out-and-out transfer of claims. So despite the assertions by many lawyers from Stair and to Lord President Inglis,⁵⁷¹ there was no substantive basis in Scots law for invoking this style. This is mirrored by the French experience.⁵⁷² Conversely, in those German-speaking areas where the civil law had been superseded by codification, deeds of cession used words of transfer; the language of *procuratio* was abandoned.⁵⁷³

4. Intimation.

It seems that in the *jus commune*, a procurator was constituted by mere consent between the mandatory and the mandant. It seems that the entitlement of the mandatory to sue the debtor and retain the proceeds, did not hinge on prior intimation. Intimation, it seems, only became relevant after the formulae system became obsolete when talk in terms of *actiones* became redundant; there was no praetor before whom these *actiones* could be exercised. The right, and perhaps requirement, to intimate (*denuntiatio*) to the debtor seems to have been to place the debtor in bad faith to pay the cedent, or perhaps to play the role that *litis contestatio* had under the formulae system.⁵⁷⁴ The meagre discussion of whether the protection accorded to

⁵⁶⁹ But see the deed in Goulesbrough, *op. cit.*, quoted in n. 534 above, where there appears to be an attempt to assign as well as constitute the 'assignee' as a procurator.

⁵⁷⁰ Juridical Society of Edinburgh, *Juridical Styles* (6th ed. 1908) vol II, 934 ff; D.P. Sellar, 'Legal Drafting' (1994) 39 *JLSS* 203.

⁵⁷¹ See e.g. *Carter v McIntosh* (1862) 24 D 925.

⁵⁷² Pothier, *Traité du contrat de vente* (1762) § 551.

⁵⁷³ Luig, *Geschichte*, 30, citing J. Schilter, *Praxis juris Romani in foro Germanico* (3rd ed. 1713) §§ 63-64. Schilter noted that the German courts did not use the language of *procuratio* but 'erb- und eigentümlich cediren'. Cf. the style cession in W.X.A.F von Kreittmayr, *Anmerkungen über den Codicem Maximilianeum Bavaricum Civilem*, Part II (Munich, 1761), Cap. 3, § VIII, Nr. 5 cited by C. Hattenhauer, in *Historisch-Kritischer Kommentar zum BGB* vol 2 (2006, forthcoming), Rn 16, n. 84 where the granter describes the assigned claim as one that he 'gänzlich cedirt und überlassen habe'.

⁵⁷⁴ C. Maynz, *Cours de droit romain* (4th ed. 1877) vol II, 90. He also observes that the idea of intimation had existed even during the currency of the formulae system, noting that the first reference to *denuntiatio* is found in a constitution of Severus in AD 226. The better view, however, is probably that of Brunner who was of opinion that there is no trace of any notification requirement in the Roman sources; rather, the source must be looked for in the mediaeval sources and, in particular, the theory of *sasine*: see H. Brunner, 'Das französische Inhaberpapier', 503-4: 'Es ist in hohem Grade zweifelhaft, was der Satz: *simple transport ne saisit point ursprünglich bedeutet*'.

the cessionary in the civil law, coupled with the continued unnecessary discussion in terms of *actiones*, means that it is difficult to determine whether the *denuntiatio* ever had the role accorded to it in modern Scots law. What is apparent, however, is that there were no particular requirements of form that the notification had to take, in contrast to the relatively onerous formal requirements of intimation in Scots law. It is of note, however, that in the courts of Flanders in the eighteenth century it was observed that the requirement of *signification* in French law had no place there; rather, the Roman law ruled and a 'simple cession d'une chose incorporelle rend le Cessionnaire possesseur de la chose cédée'.⁵⁷⁵ Stair assumed that intimation was a peculiar aspect of Scots law ('our proper custom'⁵⁷⁶) and not borrowed from elsewhere.

It is suggested by Walter Ross that it was a result of the French influence in Scotland that the intimation requirement was introduced into Scots law.⁵⁷⁷ Other writers have picked up on this point.⁵⁷⁸ However, they are probably merely following Ross. The apparent similarity between Scots and French law, in that both systems require notification to the debtor, coupled with the historical links between the two countries, certainly makes Ross's conclusion a tempting one. There is, admittedly, little historical evidence adduced by any of the other writers or by Ross himself. Like other continental European countries, France also invoked the concept of *procuratio* in the early history of their law of cession.⁵⁷⁹ It might be mentioned, however, that *Drummond v Muschet*,⁵⁸⁰ which concerned the intimation of an assignation, pre-dates the oft-quoted provision of the Coutume de Paris that 'le simple transport ne saisit point'.⁵⁸¹

⁵⁷⁵ J. Pollet, *Arrêts de Parlement de Flandre, sur diverse questions de droit, de coutume et de pratique* (1772), vol. II, case no. 18, cited by Grosskopf, *Geskiedenis*, 84, n. 31.

⁵⁷⁶ III.i.12. Professor Luig, 'Assignment' in K.G.C. Reid and R. Zimmermann (eds.) *A History of Private Law in Scotland* (2000), vol. 2, 413, has remarked: 'As earlier with the procurator *in rem suam*, it is surprising to find a typical Roman institution like intimation being regarded as an invention of the customary law of Scotland'.

⁵⁷⁷ For the French influence on Scots law, see F.P. Walton, 'The Influence of France on Scots law' 1895 3 SLT (News) 189; *idem*, 'The Relationship of the Law of France to the Law of Scotland' 1902 JR 19; T.B. Smith, 'The Influence of the 'Auld Alliance' with France on the Law of Scotland' in *idem*, *Studies Critical and Comparative* (1962), 28; *idem*, 'Influences françaises dans le droit écossais' (1965) 15 *La Revue Juridique Thémis* 43; W.M. Gordon, 'Scotland and France: the Legal Connection' (1994) 22 *Index* 557.

⁵⁷⁸ E.g. A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 297. For the clear French influence on the related subject of the *beneficium cedendarum actionum*, see the majority opinion of the whole court in *Sligo v Menzies* (1840) 2 D 1478 at 1490 which stated that Art. 2037 *Code Civil* represented the law of Scotland. Cf. J.J. Darling, *Practice of the Court of Session* (1833), 29-30 who suggests that the Court of Session was based on a French model.

⁵⁷⁹ See e.g. R.J. Pothier, *Coutumes des Duché, Baillage et Prévôté d'Orléans* (1740) in M. Bugnet (ed.) *Oeuvres de Pothier* (1861) vol 1, § 84, at 667.

⁵⁸⁰ (1492) Mor 843; Balfour, *Practicks*, 169.

⁵⁸¹ When it came to drafting the provisions of the *Code Civil*, the original draft allowed claims to be transferred by mere agreement. The requirement of debtor notification was inserted by an amendment proposed by the

From this early stage, Scots law has been clear: formal intimation was required. It has never been seriously doubted that intimation is anything other than a ‘solemnity requisite to’, and ‘as a full accomplishment of’, an assignation.⁵⁸² Moreover, because Scots law recognised the concept of transfer of a right from an early stage, there is some conflict with the concept of *procuratio in rem suam*. What is necessary for a valid procuratory *in rem suam* in Scots law? Assuming a mandate *in rem suam* is not a transfer, intimation becomes merely a practical rather than a constitutive requirement.⁵⁸³

Interestingly, some of the discussion of orders to pay and bills (as distinguished from assignations) involved intimation. Bills of exchange, for example, were transferred by indorsement. Each indorsement transferred the holder’s rights against the drawee but no intimation (to the drawee) was necessary. This had important consequences for competition:

“Intimation being our proper custom so necessary a solemnity, it holds not in the orders which stand for assignations among merchants, who act oft with strangers especially, *qui utuntur communi jure gentium*; and therefore the first order by merchants, direct to their debtor here, to pay the debt to the obtainer of the order, was preferred to arresters and assignees, using diligence before them, though there was neither intimation of the order nor acceptance by the debtor.”⁵⁸⁴

There are two cases to be distinguished. The first is where the drawer of a bill or order to pay, draws on his debtor. The second is where the bill is drawn on credit. In the first case, as has been noted, until payment by the debtor to the holder of the bill, the debt he owed to the drawer was not discharged. Creditors of the drawer should, therefore, have been able to competently arrest in the drawee’s hands before payment. Indeed, it is because the debt owed by the drawee to the drawer subsists that the drawee had a defence of good faith payment if he paid on presentment of a posterior order:

“Bills of Exchange are also transmitted, without any formal assignation or intimation, by a note on the bill itself, ordering it to be paid to such another... the first order carries the right of the sum in the bill, without necessity if

Tribunal de Paris. The rationale was the protection of third parties by requiring a certain external and public act. This is reflected in Art. 1690, which has remained unchanged since it was promulgated in 1804.

⁵⁸² Stair III.i.6.

⁵⁸³ Cf. A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 297: ‘It is obviously unnecessary in principle to make intimation of the mere appointment of an attorney, which, in strict law, infers no divesting of the party but leaves him in full legal right’.

⁵⁸⁴ Stair III.i.12. See too *Lord Ross v Gray of Newton* (1706) Mor 7724 cited by W. Forbes, *Bills of Exchange* (2nd ed. 1718), 83.

intimation, yet payment made bona fide by a posterior order, secures the payer.⁵⁸⁵

However, if this obligation to the drawer were arrestable, this could have deleterious consequences for the drawee if he had already accepted the bill. For his acceptance renders him liable on the bill, irrespective of his relationship with the drawer. Therefore, acceptance is the crucial moment for determining arrestability. Before acceptance, creditors of the drawer can arrest in the drawee's hands. After acceptance, creditors cannot arrest.⁵⁸⁶ It was perhaps for this reason that Gloag suggested that the effect of drawing a cheque in settlement of an obligation was to result only in a conditional discharge of the drawer in his obligation to the payee. The discharge was conditional on the cheque being honoured; if the cheque was not honoured the obligation would revive.⁵⁸⁷ In the second case, the drawee is not indebted to the drawer. As a result, there is no obligation to the drawer which is arrestable by the latter's creditors. It is not clear to which of these situations Stair is referring.

E. Modern Scots law.

The Court of Session in the nineteenth century followed the lead of the institutional writers. They accepted unquestioningly the accepted view that claims were originally not transferable. No one ever questioned whether Stair's view, that the mandate *in rem suam* had been introduced to circumvent the prohibition, was true. There are therefore numerous judicial dicta in the modern sources which state that an assignation is nothing more than a mandate *in rem suam*.⁵⁸⁸ Indeed, it is the nineteenth century cases which provide the most numerous references to *procuratio* in the Scottish sources. It was a view of which Lord President Inglis, in particular, was convinced.⁵⁸⁹

These *dicta*, however, were uttered unthinkingly. The judges copied what had been said before. None stopped to ask whether there might be substantive differences between the

⁵⁸⁵ Stair I.xi.7.

⁵⁸⁶ *John Ewing v Jo Geils & Ro Innes* (1698) Mor 1460; *Smith v Home* (1712) Mor 1502; Dalrymple's Dec 130; *Richardson v Fenwick* (1772) Mor. 678; Hailes 471 *per* Lord President (Dundas of Arniston): 'Practice is of much consequence. There is no practice authorising arrestment against the drawer when bills are accepted but not paid. After a bill is accepted, the drawer is only subsidiarily liable'. Cf. authorities cited in J. Graham Stewart, *The Law of Diligence* (1898), 79, n. 4.

⁵⁸⁷ Gloag, *Contract* (2nd ed. 1929), 273 cited in chapter 1 above at n. 195.

⁵⁸⁸ The most famous is probably that in *Carter v McIntosh* (1862) 24 D 925 *per* Lord Justice-Clerk Inglis. See too *Wyper v Harveys* (1861) 23 D 607 at 607 at 619 *per* Lord Justice-Clerk Inglis and Lords Wood, Cowan, Ardmillan, Mackenzie and Jerviswood.

different institutions. As with Stair's analysis, references to *procuratio* contributed nothing of value to the development of the law. And it is clear that the judges themselves did not fully understand or appreciate how a *procuratio in rem suam* might work. It was even suggested that the mandate *in rem suam* was the only proper style for an assignation.⁵⁹⁰

Originally, it was clear that no consideration was required to effect an 'assignation' in terms of a mandate *in rem suam*.⁵⁹¹ All these cases dealing with the 'mandate *in rem suam*', however, confounded the mandate to pay (*Anweisung*) with the mandate to uplift (*procuratio in rem suam*).⁵⁹² Indeed, most of the well-known and oft-cited nineteenth century Scottish cases on assignation have nothing to do with assignation in the conventional sense. The judges confounded quite different concepts. As a result, the sources are a mess. Some authorities suggested that the mandate must be irrevocable to effect an assignation and that the mandate becomes irrevocable only on it being proved that it was given for value.⁵⁹³ Yet it was also held that a mandate *in rem suam* is irrevocable without any additional proof of onerosity.⁵⁹⁴ Further, there was no consensus whatsoever as to when transfer is supposed to occur: protest,⁵⁹⁵ informal intimation,⁵⁹⁶ formal intimation where there are competing diligence creditors,⁵⁹⁷ presentation,⁵⁹⁸ and judicial intimation in a multiplepointing⁵⁹⁹ have all

⁵⁸⁹ *Carter v McIntosh* (1862) 24 D 925; *British Linen Bank v Carruthers* (1883) 10 R 923 at 926. Cf. *Lyon v Irvine* (1874) 1 R 512 at 518; (1874) 11 SLR 249 at 253.

⁵⁹⁰ *Muir v Ross* (1866) 4 M 821 at 826 *per* Lord Curriehill: 'an assignation in its proper form does not contain a direct conveyance, but creates the grantee the cessioner, assignee and donatory of the granter'. However, this assertion does not seem entirely consistent with his somewhat less assertive conclusion that a mandate *in rem suam* was a 'not incompetent' method of transferring a claim. But, on his own analysis, a *procuratio* is required because claims are not in any event transferable. Lord Curriehill was recognised by a contemporary Lord Advocate (George Young) as 'the most skilled adepts of our day in the mystery of Scotch conveyancing': (1870) 14 *Journal of Jurisprudence* 1 at 4. In *Wyper v Harvies* (1861) 23 D 607 at 613, Lord Curriehill did not follow his colleagues in characterising an assignation as a mandate *in rem suam*; rather, he recognised only two types of transfer: one, *inter vivos*, by assignation; the other, a judicial transfer, by arrestment.

⁵⁹¹ *Reid v Milne* 29th November 1808, Hume's Dec.

⁵⁹² Cf. *Ritchie v McLachlan* (1870) 8 M 815. See *Lyon v Irvine* (1874) 1 R 512 at 518 *per* Lord President Inglis. Cf. the similar confusion which seems to have arisen in France: see K-H. Capelle, 'Anweisung' in F. Schlegelberger (ed.) *Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes* (1929) vol 2, 242 at 245.

⁵⁹³ *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 479 *per* Lord Justice-Clerk Moncreiff; *British Linen Bank v Carruthers* (1883) 10 R 923 at 926 *per* Lord President Inglis. Cf. *Schlesinger, Davis & Co v Blaik* (1886) 2 Sh Ct Rep 295.

⁵⁹⁴ *Muir v Ross' Exrs* (1866) 4 M 821 at 828 *per* Lord Deas.

⁵⁹⁵ *Stirling Banking Co v The Representatives of Duncanson* (1790-92) Bell's Octavo Cases 111.

⁵⁹⁶ *Watt's Trs v Pinkey* (1852) 16 D 291 at 287 *per* Lord Ivory that 'Protest may be necessary, as a ground of summary diligence, but it is not necessary where the mere fact in question is the fact of presentment to the effect of certiorating the debtor that he has got a new creditor, and interpellating him from paying to any other; and the whole matter here is, whether there is any evidence of that presentment'. *Watt's Trs* involved a bill not a cheque.

⁵⁹⁷ *Watt's Trs v Pinkey*, *ibid.*

⁵⁹⁸ *Waterston v City of Glasgow Bank* (1874) 1 R 470 at 479.

⁵⁹⁹ *Carter v McIntosh* (1862) 24 D 925 at 935.

been stated as the moment at which this ‘virtual’⁶⁰⁰ or ‘implied’⁶⁰¹ assignation occurs. It is therefore doubtful whether anything useful can be taken from these authorities.

The Bills of Exchange Act 1882 has been hailed as ‘the best drafted Act of Parliament which was ever passed’⁶⁰² and ‘a work of art’.⁶⁰³ Scots law was forced to cope with a unique legal regime – s. 53 (2) marks the only significant departure from the law otherwise applicable throughout the UK, and, to a large extent, the law exported throughout the Empire – that was based on an unsound, nonsensical and commercially inexpedient proposition: that, on presentment to the drawee, a mandate to pay is somehow simultaneously a mandate *in rem suam* and as such operates as an assignation of any funds in the drawer’s hands.⁶⁰⁴ As a result the law provided a result that was completely contrary to what was desired. Bills and cheques could not be countermanded (to the extent that the drawee was in funds),⁶⁰⁵ and, on presentation of cheques drawn on accounts with insufficient funds, there was an assignment to the extent of the funds. This required banks to move these sums into suspense accounts. Unsurprisingly, the Scottish clearing banks did not appreciate this additional administrative burden. Alas, the misunderstanding has continued; but this has been recounted elsewhere.⁶⁰⁶

On a more general level, however, there is some difficulty with the acceptance of the opinions of the nineteenth century judges that, in Scots law, an assignation is nothing more than a mandate *in rem suam*. These cases are often, but uncritically, cited. Yet, contemporaneously, and for some time afterwards, the Court of Session placed a considerable emphasis on the role of *delectus personae* in assignability.⁶⁰⁷ Yet any theory of an assignation as mandate *in rem suam* is inconsistent with one which raises the idea of *delectus personae* to a decisive level. *Delectus personae* is predicated on the view that rights cannot be transferred

⁶⁰⁰ *Thorold v Thomson* 14th July 1768 FC; *McLeod v Crichton* 14th January 1779 FC; Mor. 16469. The *McLeod* case is reported under the title, ‘Virtual’.

⁶⁰¹ For example, *Campbell, Thomson & Co v Glass* 28th May 1803 FC is even reported in Morison’s Dictionary under the heading ‘Implied Assignation’, No. 2.

⁶⁰² *Bank Polski v Mulder & Co* [1942] 1 All ER 396 at 398 per MacKinnon LJ. The same judge had contributed the entry in the *DNB 1922-1930* for Sir MacKenzie Chalmers, the draftsman of the 1882 Act.

⁶⁰³ His Honour Judge Raleigh Batt in ‘Preface’ to Chalmers’ *Digest of the Laws of Bills of Exchange* (11th ed. 1947), vi, with whom J. Milnes Holden, *A History of Negotiable Instruments in English Law* (1955), 202, n. 5 concurs in preference to the harsh judgement of Sir John Paget: ‘The whole thing is, of course, a shocking piece of legislation’ (*Law of Banking*, 4th ed. 1930, 109; cited by Holden, 322, n. 1).

⁶⁰⁴ Bills of Exchange Act 1882, s. 53(2).

⁶⁰⁵ Only partially repealed by the insertion of s. 75A into the 1882 Act in 1985. See generally, G.L. Gretton, ‘The Stopped Cheque’ (1983) 28 *JLSS* 333 and 389; *idem*, ‘Stopped Cheques: the new law’ 1986 *SLT* (News) 25; *idem*, ‘Stopped Cheques’ 1986 *JBL* 229.

⁶⁰⁶ See G.L. Gretton, ‘Mandates and Assignations’ (1994) 39 *JLSS* 175. See the case law there cited, to which may be added *Bank of Scotland v Richmond* 1997 *SCLR* 303 and *Mercedes-Benz Finance Co v Clydesdale Bank* 1997 *SLT* 905 OH.

without the consent of the other party. This was exactly the basis for the evolution of the doctrine of the mandate *in rem suam* in the civil law. So, if the mandate *in rem suam* analysis were indeed an accurate portrayal of Scots law, reference to *delectus personae* would be superfluous. A mandate *in rem suam* is not an out-and-out transfer. It was, after all, because of a perceived *delectus personae creditoris* that the idea of the mandate *in rem suam* evolved. Indeed, arguably if one structures a transaction as a mandate *in rem suam*, then the principle of *delectus personae* – assuming for the moment that it is a principle – cannot apply.⁶⁰⁸

A more modern development can also be noted. The resurgence of the *procuratio in rem suam* is not limited to the dicta of Lord President Rodger in the Piper Alpha appeals.⁶⁰⁹ From 1985, mandates became exempt from stamp duty.⁶¹⁰ The formulation of an assignation in terms of a mandate should, therefore, have become the norm; especially since the authorities made no distinction between mandates *in rem suam* and assignations. From 1985, the difference was fiscal: a transaction with an identical purpose, appointing the ‘assignee’ as the mandatary of the cedent did not attract stamp duty. An outright assignation did. While there was no obligation to stamp an assignation, failure to do so would have prevented the assignation being relied upon in court.⁶¹¹ As a result, any well advised party between 1985 and 2003 would have couched an assignation transaction in terms of a mandate *in rem suam*. But it is difficult to see why mere terminology would mean that a transaction in the form of the mandate could have effect as an assignation (i.e. no longer subject to the cedent’s creditors), while at the same time claim an exception from stamp duty.

F. Appraisal of the Scottish position.

Unlike in much of Europe, however, the basic concept of transfer seems to have been recognised in Scots law from its inception. There are similarities between the Scottish and French evolution. Originally, it seems, obligations were always reified in a bond. For various reasons these would always be in favour of, *inter alios*, ‘assignees’. As a result there was

⁶⁰⁷ This has been discussed in Chapter 2 above.

⁶⁰⁸ But cf. *Goodall v McInnes Shaw* 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary) where an attempt to conceal the transfer of a non-assignable statutory right by way of a mandate was held to be ineffectual.

⁶⁰⁹ See n. 480 above.

⁶¹⁰ Finance Act 1985, schedule 24, 27 Part IX and text to n. 219 in chapter 2 above. See generally, M.J.M. Quinlan, *Sergeant and Sim on Stamp Duties* (12th ed. 1998), 225 and 268.

⁶¹¹ Although arguably the important point would have been the intimation, not the deed of assignation; it was always the assignation, not the intimation, that was deemed liable to stamp duty. However, intimation, being a formal act, could have allowed the intimation of an unstamped assignation to have been founded on in court.

never any consideration – in the Scottish sources at least – of whether assignation required the debtor’s consent. As a matter of course the debtor’s consent was apparent from the terms of the obligation. At least by the time of Stair, however, it became established that the debtor’s consent was not required.

The reasons for the evolution of the bill, and indeed the blank bond, in Scotland were primarily twofold: to avoid the major incidents of the law of assignation, viz. the formalities of intimation and the *assignatus* rule. The bill was not utilised to circumvent any prohibition on transfer. The blank bond seems to have been concerned primarily with frustrating the debtor’s defences, especially compensation, and arresting creditors. With the exception of statements in the institutional writings based on Roman law, Scots law does not ever seem to have had any difficulty with the transfer of rights. Writing at the end of the eighteenth century, Hume observed of the development of the law of assignation in Scots law that:

“Now, this article of history explains to us the reason for the old form and style of assignation. This was not, formerly, as it is now, a direct conveyance and transmission of the *jus crediti*, in favour of the assignee: it was in the form of a procuratory merely, or commission, or power of attourney granted by the creditor, and authorising the assignee to exact payment of the debt, as if for him, - in his name, and for his behoof. Men of business (so it appears) were naturally afraid of openly violating the old rule; and it had occurred to them, that, in this way, the real transaction would be sufficiently hidden, and the prohibition eluded, after this fashion, under cover of a form, which was calculated apparently from compliance with the law. Ross,⁶¹² says it was borrowed from French practice. “Being once fixed on this plan, it happened here, as in many other instances, that the style was continued after the original reasons for it had ceased to apply.”⁶¹³

Moreover, although Scottish assignations often invoked the form of *procuratio*, they did not to suffer from the consequences that were characteristic of a mere mandate *in rem suam*. For example, it was clear that the effect of the cedent constituting the assignee as his ‘cessioner’ was to effect a transfer. The cedent was denuded of the assigned claim on intimation of the assignation by the assignee to the debtor. The cedent could not recall it. The insolvency of the cedent was irrelevant: the assignee was now the creditor. The Scottish assignation also carried accessory rights. These points add considerable flesh to the skeleton theory presented by Lord

⁶¹² Ross, *Lectures* I, 180

⁶¹³ Hume, *Lectures* III, 2.

Rodger of the history of assignation in the Piper Alpha appeals.⁶¹⁴ The mandate *in rem suam* is distinct from the concept of assignation, although the boundary often becomes blurred.⁶¹⁵

This summary of the position of Scots law can be favourably compared with the European Codes drafted at the turn of the nineteenth century.⁶¹⁶ Generally speaking, they contained nothing of substance that had not been settled law in Scotland for two centuries. Interestingly, there seems to be a curious parallel between the position adopted up by the great German jurists⁶¹⁷ and the point which English law had reached by the mid nineteenth century with regard to their reluctance to admit the free transfer of claims. For German lawyers, the idea of transfer of claims flew in the face of the Roman sources presented in the *Corpus Juris*. These suggested that the relationship between creditor and debtor was inherently personal. In England, assignment was generally not recognised at law, while the rules against champerty and maintenance⁶¹⁸ jealously protected against what was perceived to be the potentially damaging trade in litigious claims. Scots law, on the other hand, seems to have been quite unconcerned with (or perhaps just oblivious to) these issues. There is almost no discussion of the personal nature of a claim. As far as litigious claims were concerned, although concerns were occasionally expressed, and particular measures taken,⁶¹⁹ the transfer of litigious claims in Scots law has proven relatively unproblematic. It is not clear whether this was because of the lack of systematic study, like that which characterised the *Pandektenrecht* movement, or whether it was a considered reluctance to support a legal rule which would proscribe an institution of such economic expediency as cession.

⁶¹⁴ See n. 480 above.

⁶¹⁵ Cf. R. Zimmermann, *Das römisch-holländische Recht in Südafrika* (1983), 66-69 discussing the decision of the Appellate Division in *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A). At 66, Zimmermann rightly remarks that the Digest texts (cited by the Court in *LTA*) could not have had any relevance to the modern law of cession since cession was not admitted in classical Roman law.

⁶¹⁶ For some general remarks on the history of these codifications, see O.F. Robinson, T. Fergus and W.M. Gordon, *European Legal History* (3rd ed. 2000), 256 ff; H. Schlosser, *Grundzüge der Neueren Privatrechtsgeschichte, Rechtsentwicklungen I, europäischen Kontext* (9th ed. 2001) § 5.

⁶¹⁷ It is, admittedly, almost impossible to determine to what extent the writings of the Pandectists actually represented law in force *anywhere*, in much the same way as great American works (like *Farnsworth on Contracts* or *Scott on Trusts*) represent a corpus of American law that is made up only of their (numerous) constituent volumes. The law expressed in these books is not actually in force anywhere; particular aspects of the law of trusts, for example, vary from state to state.

⁶¹⁸ For which, see P.H. Winfield, 'Assignment of Choses in Action in Relation to Maintenance and Champerty' (1919) 35 *LQR* 143. Maintenance is the funding of either party to an action without lawful excuse; champerty is maintenance coupled with an agreement to share the spoils. Indeed, until the Criminal Law Act 1967, s. 13(1), such an assignment was illegal. Yet the law of maintenance and champerty endures in English law: *Trendtex Trading Corp v Credit Suisse* [1982] AC 679; *Giles v Thomson* [1994] 1 AC 142 at 163 *per* Lord Mustill, and J. McGhee (ed.) *Snell's Equity* (31st ed. 2005) para 3-36 ff.

⁶¹⁹ In particular, the selling of litigious claims to advocates: Ramsay of Ochertyre, *Scotland and Scotsmen in the 18th Century* (1888) vol 1, 431 cited by McBryde, *Contract* para 19-46.

That Scots law took such a unitary approach to claims is again unusual. Where Roman law flourished, the prohibition on cession bore no relation to commercial reality. The same picture can be seen in England. The Civil law as well as the Common law evolved without regard to the developments in commercial law. Indeed, the practice of commercial lawyers flatly contradicted the heavy dogmatic debates of the civil lawyers on the civil law prohibition. There is a lesson here. Even now we see the UNIDROIT *Principles of Commercial Contracts* compared to the generally applicable PECL. In France and Germany, a peculiar duality of regimes persists for contractual prohibitions on cession: valid under ordinary civil law, but invalid in commercial law.⁶²⁰

Therefore, in the wider European context, the substantive Scots law of assignation can be seen to be a remarkably mature, and arguably unique, system. English law was underdeveloped as a result of the peculiar result of the division between law and equity. The common law did not admit the transfer of choses in action at law. Despite the best efforts of the courts of equity, the outright of transfer of a claim (if indeed it is possible for English law to think in such terms) was not possible until the unification of the courts of law and equity in 1873. Although the original European codes did finally admit the free transfer of claims (i.e. the Bavarian Code, the *ALR*, *ABGB* and *Code Civil*),⁶²¹ the evolution seems to have been more gradual. The order to pay ('assignation' in the European sense) seems to have been the more common interpretation of '*adsignatio*' than transfer. The detailed academic commentaries flatly refused to sanction transfers. The greatest Pandectist of them all, Bernard Windscheid, could write in 1875 (only a year before the coming into force of the Judicature Act in England, Wales and Ireland) that the prevailing opinion was still that enunciated by Mühlenbruch in the 1820s: claims were not transferable.⁶²² Scots law, in contrast, even in 1875, had been sanctioning the free transfer of claims for at least four hundred years.

One of the most influential Scots lawyers of the twentieth century, Professor Sir Thomas Smith, wrote in the early 1980s that, 'The Scottish Legal Genius at its best has been the selective and synthetic, adopting and adapting by comparative techniques solutions first

⁶²⁰ Cf. in Germany, §§ 399 *BGB* ff and § 354a *HGB*; in France, Arts. 1689 ff *Code Civil* and the *Loi Dailly* (see *Code monétaire et financier* (2005)) Arts. L 313-23 ff.

⁶²¹ For the earlier local codes such as the *Codex Maximilaneus Bavaricus Civilis* (1756) (Bavaria), see B. Huwiler, *Der Begriff der Zession in der Gesetzgebung seit dem Vernunftrecht* (1975).

⁶²² Windscheid, *Lehrbuch des Pandektenrechts* (4th ed. 1875) II, § 329, 257, n. 10, cited by Luig, *Geschichte*, 118.

developed in other systems'.⁶²³ This comment is only partly true for the law of assignation. Scots law in this area was indeed strongly influenced by the French position, but it is an influence that can be overstated. It is of particular interest that it is the terminology of the Germanic law that Scots law shares, not the French (although admittedly 'assignation', like so many English words, is of old French origin). While Scots law borrowed the formality of intimation from French law, much of the anterior and posterior development was indigenous. The sources evidence perhaps two particularly Scottish features. The first is the constant focus on the effect of insolvency on transfers.⁶²⁴ Assignation is considered as a transfer. This focus does not seem to be so evident in other systems. The benefit of this focus is that it highlights the distinction between contractual undertakings to act, and executed legal acts effecting a transfer. The second point of interest has been the unparalleled willingness of Scots lawyers to assign anything and everything. Stair's justified observation that 'assignations are more common with us than anywhere'⁶²⁵ should alert comparative lawyers to the importance of Scots law in this area. The liberal attitude of Scots legal writers and the courts to assignations was considerably before its time. As will become clear in the following chapters, much of the Scots law of assignation was settled by the mid to late seventeenth century. And the integral parts had been fixed since the fifteenth. If the law of assignation should develop concomitantly with the increase in the importance of incorporeals to modern economies, Scots law, alas, has bucked the trend. The major corpus of the Scots law of assignation was developed and entrenched at a time when Scotland was economically fragile. In these turbulent times assignations were ubiquitous. Following the union with England and the subsequent economic boom that industrialisation and empire brought, the assignation, though a ubiquitous commercial instrument, produced little litigation. This could be a measure of its success and practical utility. The sources were already rich. The principles were settled. Litigation was therefore unnecessary. If this is so, then Scots law has been both a winner and a loser: a winner because it provided its users with a functional body of law at a time when assignation was – in other jurisdictions at least – a controversial operation. But, on another view, Scots law has also lost out. It has been deprived of the litigation that some argue is the

⁶²³ T.B. Smith, 'Law, History of' in D. Daiches (ed.) *Companion to Scottish Culture* (1981), 205.

⁶²⁴ See, in particular, Bell's appreciation of Stair's approach in the *Institutions*: 'He seeks with a liberal and learned spirit for the principle of all his doctrines; but he is in general careful to submit them to the test of practice; and to examine rights and obligations with reference to their effects on purchasers or creditors' (Bell, *Commentaries* (7th ed. 1870) I, 260, n. 2).

⁶²⁵ III.i.5.

lifeblood of a modern legal system.⁶²⁶ What is important to realise, however, is something that has become, unfortunately, unfashionable: Scots law was workable and useful. At the turn of the nineteenth century it could be favourably compared to the emerging European codes. Paradoxically, however, this rich body of law, comprising settled principles, has generated little discussion. But the issues relevant to legal development then are not dramatically different today. The chapters that follow seek to stimulate debate and development of this practically vital chapter of Scots law.

⁶²⁶ Lord Rodger of Earlsferry, “‘Say Not the Struggle Naught Availeth’: The Costs and Benefits of a Mixed Legal System” (2003) 78 *Tulane LR* 419 at 424: ‘In any event, a Scots lawyer who hopes to see the law develop must hesitate before complaining of an abundance of cases. Any modern system lives on cases and dies without them: the real threat to the commercial law of Scotland is not too many cases but too few cases’. But the point can be overstated. It is understandable for a litigator to advance such a view. From the perspective of the users of a legal system, however, an effective and efficient system will *avoid* litigation. And, even where there is litigation, it may not produce helpful case law. In English law, it should be remembered, (where London, along with New York, can claim to be the litigation capital of the world) the law of assignment is no more developed than Scots law; in some respects it is less so. Yet assignment is crucial to commercial law. It is not apparent to this writer why it is desirable to look for the law in a source which is essentially pathological. In any event, law can endure without case law. Most legislation, mercifully, produces little or no litigation. But that does not mean it is ‘dead’ law.

Chapter 4

Intimation

I. Introduction

Voluntary *transfer* of an asset requires a conveyance. Only on intimation being made to the debtor, in due legal form, of the agreement to transfer the claim, does the transfer of a claim take effect. While an agreement to assign is often confusingly called an ‘assignment’, it is intimation which effectually transfers the right. Scots law is one of a number of legal systems which require notification to the debtor to effect the transfer of a claim.⁶²⁷ Mere delivery of the deed of transfer has few transfer consequences:

“There is such a thing as an imperfect right to a personal debt, as well as to land. A disposition to land without infestment, is only one step to a transmission of property. An assignation of a bond without intimation, is in like manner but one step to the transmission of a *jus crediti*: The cedent is not divested before intimation. The debt may be arrested by his creditor, and therefore not by the creditor of the assignee. After intimation, the debt is only arrestable by the creditor of the assignee.”⁶²⁸

⁶²⁷ The major system requiring debtor notification is French law and those systems that have drawn on it. The traditional principle was famously articulated in the *Coutume de Paris*: ‘le simple transport ne saisit pas le cessionnaire’ (Art. 170 in the 1510 edition; Art. 108 in the 1580 text). See O. Martins, *Histoire de la Prévôté et vicomté de Paris* (1925) vol 2, 574. The modern law is in Art. 1690 *Code Civil* and in the Dalloz commentary to the article. The similarity between French and Scots law is no accident; it is probably from France that Scotland took her substantive law on assignment. Interestingly, however, other systems originally based on the French have moved away from formal notification being a constitutive requirement. In Luxembourg, the law was changed in 1994, substituting the requirement of ‘signification’ derived from the French Code civil, for one of ‘notification’. This can be made informally: see Art. 1690 ff. *Code Civil Luxembourgeois* and discussion in G. Röhl, ‘Die Forderungsabtretung im Recht von Luxembourg’ in W. Hadding and U. H. Schneider (eds.) *Die Forderungsabtretung, insbesondere zur Kreditsicherung, in ausländischen Rechtsordnungen* (2nd ed. 1999), 441 ff. A similar reform was undertaken in Belgium, also in 1994; notification is only required to place the debtor in bad faith: *Code Civil Belge* Art. 1690 ff.; for which, see in particular, P. van Ommeslaghe, ‘Le nouveau régime de la cession et de la dation en gage des créances’ [1995] 114 *Journal des Tribunaux* 529 ff. and also P.A. Foriers and M. Grégoire, ‘Die Forderungsabtretung, insbesondere zu Sicherungszwecken, im belgischen Recht’ in Hadding and Schneider, *op. cit.*, 135 ff. Most recently, the Dutch *Burgerlijk Wetboek*, Art. 3: 94 was amended in October 2004, obviating debtor notification for security cessions: see J.W.A. Biemans, ‘Kritische kanttekeningen bij wetvoorstel 28 878 (cessie zonder mededelingsvereiste)’ [2004] 135 *Weekblad voor Privaatrecht, Notariaat en Registratie* 532. It should be noted that the notification requirement in France has been lifted for factoring transactions: *Loi facilitant le crédit aux entreprises* of 2.1.1981, the so-called *Loi Dailly*, (taking its name from Senator Etienne Dailly, who introduced the legislation), now found in the *Code monétaire et financier* (2005) Art. L. 313-23 ff. For other jurisdictions which have drawn on French law which are of interest, cf. *Code Civil du Québec* Art. 1641 and Louisiana Civil Code, Art. 2643.

⁶²⁸ *Creditors of Benjendward, Competing* (1753) Mor 743 at 744; 2 Kames Sel Dec 75 *per* Lord Kames. This view is preferable to Dewar Gibb’s statement that ‘to speak of a right to a right is redundancy’ (A. Dewar Gibb,

This has been the law since at least 1492 when *Drummond v Muschet* was decided.⁶²⁹ It should be remembered that assignation is the transfer of a claim without the consent of the debtor. Therefore, while the debtor's *consent* is not required to transfer a claim, his passive participation is: 'en un mot, le créance ne peut se transférer sans lui, mais elle peut se transférer malgré lui'.⁶³⁰ Some modern lawyers, however, are perplexed at what they see as an unnecessary and obsolete formality.⁶³¹ In some legal systems, the distinction between contract and conveyance seems to be clearly demarcated without the need for some additional step. Importantly, debtor notification is apparently seen as an impediment to the utilisation of incorporeal assets as collateral for finance, as well as an obstruction to the free movement of claims. The statement by the learned editor of the appropriate chapter in the *International Encyclopaedia of Comparative Law* is indicative of foreign perceptions of Scots law:

"In France and other countries whose civil law is based on the French model, the formalities needed to make assignments effective as against third parties are so cumbersome that assignment is ruled out as a generally available legal technique of organizing modern accounts receivables financing."⁶³²

Modern international codes therefore provide that the transfer of the claim occurs at the time of the conclusion of the agreement between the cedent and assignee.⁶³³ These are

A Preface to Scots Law (4th ed. 1964), 16. He admits, however, that contractual rights to payment can be classed in a general, if not technical, sense as 'property'.

⁶²⁹ (1492) Mor 843. See also *Competition betwixt Sinclair of Southdun and Sinclair of Braberdorran* (1726) Mor 2793; 1 Kames Rem Dec 175.

⁶³⁰ P. Gide, *Etudes sur la novation et le transport des créances en droit romain* (1879), 244. Cf. I.M. Fletcher and R. Roxburgh, *Greene and Fletcher: the Law and Practice of Receivership in Scotland* (3rd ed. 2005) para 4.80. They state that intimation of an assignation in Scotland must be accepted by the debtor. That is incorrect. The debtor is a passive party.

⁶³¹ Including civilian systems with which we have close affiliations: e.g. South Africa. S. Scott, *The Law of Cession* (2nd ed. 1991) ch 7 maintains that there is no transfer until there is notification to the debtor. This is probably not representative of the position in either Roman-Dutch or modern South African law; see P. Nienaber, 'Cession' in W.A. Joubert et al (eds.) *The Law of South Africa*, 2nd edn, vol 2, part II, (2003) para 6. Belgium and the Netherlands – as well as Germany, Austria, and Switzerland – now also allow a claim to be transferred without debtor notification.

⁶³² H. Kötz (ed.) vol 7, ch 13, 75, para 85. Cf. H. Kötz, *Europäisches Vertragsrecht* (1996) § 14 (trans. T. Weir, *European Contract Law* (1997) § 14); Professor Sir Roy Goode, 'Europe and English Commercial Law' in B. Markesinis (ed.) *The British Contribution to the Europe of the Twenty-First Century* (2002) at 19.

⁶³³ *Principles of European Contract Law* (Part III, 2003) Art. 11:202; UNIDROIT *Principles of International Commercial Contracts* (2nd ed. 2004) Art. 9.1.7; UNIDROIT *Convention on International Factoring* 1988 ('the Ottawa Convention') available at <<<http://www.unidroit.org>>>, Arts 5 and 7; UNCITRAL *Draft Convention on the Assignment of Receivables in International Trade* A/CN.9/489 available at <<<http://www.uncitral.org/en-index.htm>>> 'Commission Sessions – Vienna', Art. 10. H. McGregor, *Contract Code* (Milan, 1993) Art. 666; M.L.R. Gandolphi (ed.) *Code Européen des Contrats* Art. 122(6). International private law in this area is complex. Is an assignation a contract or a conveyance for the purposes of Art. 12 of the Rome Convention? *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] QB 825 involved the effect of an English assignment of a French insurance policy. The English Court of Appeal took the view that an assignment is contractual in nature. Art. 12 and, therefore, English law applied to the assignment. Accordingly there was no need to comply with the formal requirements of intimation of French law. Characterisation, however, can be more complex. Is intimation a question of formal or essential validity? A different connecting factor may apply

vigorous criticisms. And any analysis of the substantive rules can only occur against the backdrop of the underlying policies which any system must address in formulating the formal/essential⁶³⁴ requirements for the transfer of a claim. It is difficult (if not impossible) to consider fully policy arguments in the abstract. Different interest groups will highlight different policies with equal force. The following will therefore focus on what we can gauge, viz., judicial or juristic expressions of what is perceived to be the underlying rationale of the rules on intimation in Scots law.

II. Judicial Expressions of Policy.

A. Publicity.

The policy of publicity is pursued for the benefit and protection of creditors. There are many manifestations of this policy in property law. The law prescribes clearly defined ways of ascertaining whether there has been a change in ownership or the constitution of a right in security. Scotland has a particularly strong affection for the principle that people should be entitled to act on the faith of the public records, and rightly so. Yet the requirement for a physical – and therefore public – act has been dispensed with by most legal systems for the transfer of corporeal moveables.⁶³⁵ It is perhaps now recognised that there are innumerable bases on which goods can be possessed. The common law requirement of *traditio*, it could be said, is based on the presumption that the possessor of an article was the owner. Creditors can look to the assets in the possession of the debtor to ascertain his credit. However, the importance of this presumption has been much reduced,⁶³⁶ and it is clear that publicity has a relatively small role to play in the transfer of corporeal moveables.

to each question. Why must the proper law of the contract apply also to the legal act of transfer? Cf. *Bankhaus H. Aufhauser v ScotBoard Ltd* 1973 SLT (Notes) 87. Unfortunately the complexities of international private law in this area cannot be further discussed here.

⁶³⁴ This distinction, seldom made, is important. Characterisation for the purposes of international private law can be illuminating: cf. D. Pardoel, *Les conflits de lois en matière de cession de créance* (1997); W. Mangold, *Die Abtretung im europäischen Kollisionsrecht: unter besonderer Berücksichtigung des spanischen Rechts* (2001). European authors are more rigorous in their treatment of the subject than English language sources. The standard reference is M. Moshinsky, 'The Assignment of Debts in the Conflict of Laws' (1992) 108 *LQR* 591. The most recent Scottish contribution approaches the subject from an English perspective: J.M. Carruthers, *The Transfer of Property in the Conflict of Laws: Choice of Law Rules concerning inter vivos Transfers of Property* (2005).

⁶³⁵ See L. van Vliet, *Transfer of Moveables in German, French, English and Dutch Law* (2000). In Scotland, see Sale of Goods Act 1979, s. 17. At common law it is more accurate to say that property cannot pass without delivery. There can always be physical delivery without an *animus transferendi*.

⁶³⁶ *Hopkinson v Napier* 1953 SC 139; *Pragnall v O'Neill v Lady Skiffingdon* 1984 SLT 282. But in some cases the rule will remain important, cf. D.L. Carey Miller, 'Title to Moveables: Mr Sharp's Porsche' (2003) 7 *Edin LR* 221 discussing *Chief Constable, Strathclyde Police v Sharp* 2002 SLT (Sh Ct) 95.

What then of assignation? It has been said that the requirement for intimation in Scots law is based on an analogy with *traditio*⁶³⁷ for corporeal moveables or registration for immoveables:

“... the law of Scotland requires that conveyance of even such as a *jus crediti* shall, for its completion be accompanied by an extraneous and ostensible act, in order to render it effectual in questions with third parties, in the same manner as the transmission of a feudal right requires to be completed by saisine. The usual mode of completing a conveyance of a *jus crediti*, when the subject of it is a money claim is by *intimating* it to the obligant... The only purpose which is intended to be served by requiring the transference of such a *jus crediti* to be marked by some extraneous and ostensible act, is well effected by such a proceeding [registration], as notice of the transfer is thereby published to all the world in a record instituted for the very purpose of making such a publication.”⁶³⁸

Nevertheless, with the exception of rights relating to heritage,⁶³⁹ registration is not an accepted equipollent of intimation.⁶⁴⁰

Intimation has the advantage that creditors can approach the debtor for information as to his creditor. Nevertheless, intimation can be validly made even though the debtor may have no actual knowledge of the new creditor.⁶⁴¹ This seems irreconcilable with a policy of publicity. More prosaically, to suggest that a debtor will always be co-operative in informing inquisitive creditors of his creditor is probably naive. It is of no great surprise that the argument in favour of a notification requirement based on the need to publicise the transfer is generally given short shrift:

“Nor can notification be justified as a means to protect third parties, such as the assignor’s present and future creditors. It has been argued that these third parties can turn to the debtor and ask him whether he has been notified of any assignment. But this is impractical in cases where future accounts or a great number of accounts have been assigned or where the assignee does not for the present want to disclose the assignment to the debtor. Nor is the debtor obliged to give a correct answer or to answer at all. If there is a need to protect third parties against all or certain assignments, the validity of the assignment should

⁶³⁷ W.M. Gloag and J.M. Irvine, *The Law of Rights in Security* (1897), 476-477 approved in *Gallems Ltd (in receivership) v Barratt Falkirk Ltd* 1989 SC 239 at 243 per Lord Dunpark. Cf. G. Marty, P. Raynaud and P. Jestaz, *Droit Civil, Les obligations* (2^e édition, 1989) para 357; Pothier, *Traité du contrat de vente* (1762) § 554 in M. Bugnet, *Oeuvres de Pothier* (1861) vol 3, 219 and comments at n. 3.

⁶³⁸ *Edmund v Mags of Aberdeen* (1855) 18 D 47 at 55 per Lord Curriehill, aff’d (1858) 3 Macq 116.

⁶³⁹ *Miller v Brown* (1820) Hume’s Dec 540; *Edmund v Mags of Aberdeen* (1855) 18 D 47.

⁶⁴⁰ *Tod’s Trs v Wilson* (1869) 7 M 1100.

⁶⁴¹ For example if intimation to one of a body of trustees is sufficient to interpel them all: cf. *Jamieson v Sharp* (1887) 14 R 643, where the trustee to whom intimation was made was in sole control of the funds. Edictal intimation is another obvious example.

be made to depend on registration of the assignment in a publicly accessible register.”⁶⁴²

B. Debtor protection.⁶⁴³

The requirement of intimation can be commended from the point of view that it makes clear to the debtor who is the creditor in his obligation. Only the creditor in the obligation can give the debtor a discharge. The onus for making intimation is on the assignee. The debtor may not be aware of the assignation. Even if he is, how is he to know whether the whole right has passed? If it is generally accepted that some sort of notice to the debtor will be required to interpell the debtor from paying the cedent, then this is an admission that intimation is the proper time at which to draw the line, a line which must be crossed before there can be a transfer.

How is mere private knowledge on the part of the debtor to be treated? Will he be in bad faith? Maybe; but he is none the wiser. What is he to do? His creditor is the cedent. Indeed parties to the ‘assignment’ may have had no desire that payment was to be tendered to the assignee. The debtor is exposed to the possibility that a court may find much later that a particular payment that he made was in bad faith to the cedent, and he is thus still liable to pay to the assignee. If the debtor pays the putative assignee, he may not be discharged, if e.g. the conveyance from cedent to assignee is in some way defective.⁶⁴⁴

While many often attempt to rationalise the requirement for an additional, defined act for transfer with – inexplicably unfashionable – labels such as ‘debtor protection’ and ‘publicity’ it is submitted that these are facets of a more general policy underlying our conveyancing rules. In seeking to protect the debtor and ensure some form of publicity the

⁶⁴² H. Kötz (ed.) *International Encyclopaedia of Comparative Law*, chapter 13, vol 7 (1992), 82, para 90. The issue of a dishonest or non-cooperative debtor was recognised but not decided in *Black v Scott* (1830) 8 S 367. Compare the commentary to *Principles of European Contract Law* (Part. III, 2003), Art. 11:401: ‘the intending assignee, before giving value, can ask the debtor whether the debtor has received any prior notice of the assignment’. This leaves the priority provisions of the *Principles* open to criticism.

⁶⁴³ Cf. generally L. Miller and L. Sarna, ‘Assignment of Book Debts: Protection of Third Parties in Quebec’ (1981) 59 *Canadian Bar Review* 638.

⁶⁴⁴ If assignation in Scotland is an abstract conveyance, any invalidity of the underlying contract will be immaterial. Despite the fact that we derived our law from France, where *cession de créance* – since 1804 – is viewed as a sale, and therefore in causal terms, it is thought that the general theory of transfer in Scotland is abstract. There seems no reason to differentiate assignation from other transfers: see Reid, *Property*, para 612. The issue is however more complex in this area where the ‘assignment’ may incorporate both the obligatory and transfer agreements.

law is ensuring that which all its users – not just businessmen – are entitled to expect of the law: certainty.

C. Certainty on Insolvency and Competition.

It is this writer's view that it is the certainty that intimation provides on insolvency or competition that justify the apparently strict requirements of intimation. Where there is a requirement of formal intimation, it can be ascertained, with relative ease who the creditor in the claim actually is and to how much he is entitled. More importantly, this is a theme which is evident from the sources:

“It has been the policy of our laws so to regulate this matter [i.e. diligence] as to afford to the debtor the means of having the true amount of the debt due at the date of the proceeding ascertained and the diligence restricted to that amount; while other creditors have an opportunity of producing their claims to the effect of obtaining a share in the attached property in the case of the debtor's insolvency: and we have to submit that this principle ought to be declared and followed out completely in all the several diligences.”⁶⁴⁵

The earlier case reports are full of numerous and complex multiplepointings. Such competitions often give rise to notoriously complex questions of law at the best of times. The potential for fraud is always great where there are antagonistic claims and insufficient assets to go round: ‘Wherever there is commerce, there must be bankrupts. Wherever there are bankrupts there will be attempts to disappoint the law’.⁶⁴⁶ The law is therefore slow to accord one party preference over his fellow unfortunates.⁶⁴⁷ Only those who have complied with the requisite formalities will have rights.

‘Intimation ought to be legally made by a notary, before witnesses, which, as it was most solemn and requisite to be done, so these were the most probable means to eschew falset; for being otherwise done, by such privy ratifications, being deeds only done among the parties themselves, might have the greater

⁶⁴⁵ (1835) *Parliamentary Papers*, XXXV [63] *Second Report of the Commission for Inquiry into the Courts of Law in Scotland 1835*, 18. The report was prepared, chiefly, by George Joseph Bell, see W.M. Gordon in A.J. Gamble (ed.) *Obligations in Context: Essays in Honour of Professor D. M. Walker* (1990), 79. Cf. Lord Johnston in *Macpherson's JF v Mackay* 1915 SC 1011, quoted at n. 922 below.

⁶⁴⁶ *Mansfield, Hunter & Co v Macilmun* (1770) Mor. v. ‘Bill of Exchange’ App 1, No 1; Hailes 350 at 351 *per* Lord Coalston. This was the rationale behind the notification requirement in the *Coutume de Paris*, see O. Martins, *Histoire de la Coutume de la Prévôté et vicomté de Paris* (1925) vol 2, 574-575 ; and why it was carried on into the Code : see R.T. Troplong, *De la vente, ou Commentaire du titre VI du Livre III du code civil* (4th ed. 1845) vol 1, para 882, at 383. These passages highlight the problems experienced in France of fraud in competitions. In modern French law, however, intimation is seen by legal writers, if not yet the courts, as informative rather than constitutive. See in particular J. Ghestin, ‘La Transmission des obligations en droit positif français’ in *La transmission des obligations* (Louvain, 1980) 3 at 29 ff.

⁶⁴⁷ *Burnett's Tr. v Grainger* 2002 SC 580 at para [28] *per* Lord Coulsfield.

suspicion of falset or simulation, and had the more difficult means of trial and discovery of the same'.⁶⁴⁸

This same policy was behind the Citation Act 1540,⁶⁴⁹ which opened thus:

'For eschewing of great inconvenientes and fraude, done to our Sovereine Lordis Lieges, by summoning of them at their dwelling places, and oft times falslie, and gettis never knowledge thereof...'

The law relating to citation and service of charges for payment and arrestment continues to influence the law of intimation of assignations.

A rule that the transfer takes place when the parties intend to transfer their rights, introduces the potential for delicate and prolonged litigation.⁶⁵⁰ The idea that a debtor can pay someone who is not his creditor and still be discharged is exceptional.⁶⁵¹ Our law of conveyancing tends to favour bright-line rules; certainty over (individual) equity.⁶⁵² The desire to guard against fraud was the rationale behind the French principle, 'Simple transport ne saisit point'.⁶⁵³ That general suspicion of fraud on insolvency is found in Scots law too. Conveyances are instantaneous and unambiguous. An assignation is a conveyance. Only on intimation⁶⁵⁴ does the conveyance take effect.

⁶⁴⁸ *Stevenson v Craigmiller* (1624) Mor 858. The proceedings in this case are also reported at Mor 836 and 837. Compare the Preamble to the Act of 1617 c. 16, APS, c. 16, establishing the register of Sasines: 'Oure Souerane Lord Considering the gryit hurt sustened by his Maiesties Liegis by the fraudulent dealing of pairties ... which can not be avoided vnles the saidis privat rightis be maid publict and patent to his hienes lieges...' The detailed opinion of Lord Justice-Clerk Hope in *Donaldson v Ord* (1855) 17 D 1053 at 1069; (1855) 27 Sc Jur. 625 at 631 is the closest there is to a judicial examination of the policy underlying the requirement of formal intimation in the Scottish sources. The reports, however, are unsatisfactory.

⁶⁴⁹ Cap. 75; APS II, 359, c. 10

⁶⁵⁰ To borrow Lord Cameron's greeting to the statutory introduction of the floating charge in *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 at 173.

⁶⁵¹ Cf. Voet, *Commentarius ad Pandectas* (2nd ed. 1707) 18.4.15. But see the residual rule of good faith payment accorded to the debtor. There are many situations where a discharge can be received from someone other than the creditor himself, e.g. the creditor's agent, judicial factor, trustee in sequestration, or *curator bonis*. Indeed, in the case where the creditor is incapax, only his *curator bonis* will be able to discharge the debtor. Nevertheless, all these discharges are granted on the creditor's behalf. With the exception of the trustees in sequestration, whose appointment will be the equivalent of an intimated assignation, the right to payment remains in the creditor's patrimony, only he or someone acting on his behalf can grant a valid discharge. But see the principles applicable to good faith payment, *infra*.

⁶⁵² See *Sharp v Thomson* 1995 SC 455 (1st Div) rev'd 1997 SC (HL) 66; K.G.C. Reid, 'Jam Today: *Sharp* in the House of Lords' 1997 SLT (News) 79 at 83; Cf. M. Planiol and G. Ripert, *Traité pratique de droit civil français* (2^e édition, 1954) Tome VII para 1117.

⁶⁵³ P. Ourliac and J. de la Malafosse, *Droit romain et ancien droit* (1957) § 219, at 224. The formal requirements found in French and Scots law can be distinguished from the civil law. There no unitary concept of transfer was developed, but claims could be functionally 'transferred' (by a mandate *in rem suam*) without formal notification requirements: C. Maynz, *Cours de droit romain* (4th ed. 1887), 90. For later European development, which followed this trend, see H. Coing, *Europäisches Privatrecht*, vol 1, 1500-1800, (1985), 447.

⁶⁵⁴ Or one of the equipollents admitted by the law. These are few in number. See also, in the context of presentment of a bill of exchange, the opinions of Lord Eskgrove and Lord President Campbell in *Stirling Banking Co v The Representatives of Duncanson* (1790-92) Bell's Octavo Cases 111 and Bell, *Commentaries*

Furthermore, it is not out of place to mention that Scotland is a small jurisdiction. The rules need to be simple, clear and certain. As a legal system, therefore, we must seek refuge in principle. Whatever those principles are, they must be clear. Intimation provides a certain date of transfer. This is not to say intimation is the only way. There are others. One needs only to look to the position in some other European systems.⁶⁵⁵ The general principle of good faith payment could be given a more leading role at the expense of intimation. But the certainty that intimation gives to the date of transfer would need a replacement. Registration is the obvious candidate. But even those systems that eschew intimation as a constitutive requirement for transfer, find a need to retain intimation for practical purposes.⁶⁵⁶ An assignation involves a tripartite relationship. Debts are ephemeral A debtor can be discharged by a good faith payment. But when will the debtor not be entitled to protection? In other words, how can the assignee interpell the debtor from paying the cedent? This point is well recognised in the Scottish sources by Bankton:

“But it is adviseable to intimate them, to prevent *bona fide* payment, the intent of intimation being not only to complete the right, as is most cases, but likewise to put the party *in male fide* to pay; this last is expedient, where the former is not necessary.”⁶⁵⁷

If there are no prescribed formalities for non-constitutive intimation, uncertainty is introduced. If, then, intimation were to be abolished as a constitutive requirement in favour of registration, what is to become of the non-constitutive intimation which practical necessity demands must continue. There are two workable options; there is also a third, which is not.

1. If intimation is retained in a registration system, the assignee who chooses to intimate should do so formally, by an extract of the registered deed or in a prescribed form.
2. The alternative is to allow an informal notice. Often these are deliberately ambiguous: technical wording (perhaps unintelligible to the debtor) in illegibly small font. The ambiguity is deliberate because the assignee wants intimation to have legal effect (by interpellating the debtor and cutting off defences), but is reluctant, for example, for his customers to know that their debts have been factored. A most unsatisfactory situation.

(7th ed. 1870) I, 413-421 citing, *inter alia*, Pothier, *Traité du contrat de change* (1763) §§ 146-148 for the requisites of protest.

⁶⁵⁵ Notably Germany: see §§ 398 *BGB* ff.

⁶⁵⁶ *Principles of European Contract Law*, Art. 11:303; UNIDROIT *Principles of International Commercial Contracts* (2004) Art. 9.1.10

⁶⁵⁷ Bankton II, 193, 16.

3. Intimation is abolished in every sense. It has no effect. This, however, is somewhat inconsistent with a defence of good faith payment. How can a debtor claim to be in good faith if he has been informed that his debt has been assigned? Abolishing intimation in its entirety, therefore, may not be workable; at least not workable in a system containing a general principle of good faith payment. Complete abolition would require a principle that the debtor is discharged *whosoever* is paid: cedent, assignee, or fraudster.

Perhaps a trade off must be reached: assignees who are reluctant to intimate formally still receive protection from the cedent's insolvency (assuming they have registered their assignments), but the price is that they will be subject to debtor's defences that could have been cut-off by a formal intimation. This writer would prefer the first of the three possibilities. But these are issues of reform which are for the future. For the present, the question is what is the law of Scotland on intimation?

III. Scots Law de lege lata

A. Jurists

It is clear that intimation of the delivery of an assignment is essential to the validity of the transfer in Scots law. The point is especially well made by Stair:

“The assignment itself is not a complete valid right, till it be orderly intimated to the debtor, which, though at first, (it is like) hath been only used to put the debtor *in male fide* to pay the cedent, or any other assignee: yet now it is a solemnity requisite to assignments, so that though the debt remain due, if there be diverse assignments, the first intimation is preferable, though of the last assignment, and that not as a legal diligence, which can be prevented and excluded by another diligence, but as a full accomplishment of the assignment.”⁶⁵⁸

For Stair, then, intimation was a ‘solemnity requisite to assignments’, not just the method of putting ‘the debtor in male fide’; only on intimation was there a ‘full accomplishment of the assignment’. This is strong authority for the proposition that intimation is a pre-requisite of essential rather formal validity. Bankton is similarly unequivocal⁶⁵⁹:

“The assignment is not completed by executing and delivering it to the assignee, but it must likewise be intimated to the debtor, till which is done, the cedent is not understood in our law to be denuded. Intimation of an assignment,

⁶⁵⁸ III.i.6.

⁶⁵⁹ II, 191, 6.

is 'the assignee's giving notice of his right to the debtor', which regularly ought to be done, by causing it read to him, and thereon protesting, that the debtor may not pay the debt to any other ... Any onerous deed, executed by the cedent before intimation, will prejudice the assignee, and a second assignation for valuable consideration, first intimated will be preferable."

B. Assignation and Arrestment

It has been said that an arrestment, *per se*, is just a judicial assignation.⁶⁶⁰ This proposition, however, cannot be correct, although the subject is controversial. An intimated assignation operates as a transfer. An arrestment interpellates the arrested debtor from paying to another; it lays a 'nexus' on the obligation to account arrested to secure the arrester's preference to the fund *in medio*.⁶⁶¹ Only on forthcoming is the obligation of the arrestee to account to the common debtor transferred to the arrester.⁶⁶² This judicial assignation is to the extent of the common debtor's indebtedness to the arrester. A voluntary transfer only occurs on intimation of the transfer to the debtor; yet an arrestment prior to intimation will be preferred.⁶⁶³ There are illuminating parallels to be drawn between the law of intimation and the law on service of an arrestment although, admittedly, the service of the arrestment is not the precise equivalent of intimation of assignation. It is of interest that in France reference is made to the analogous rules of arrestment (*saisie-arrêt*; now, *saisie-attribution*⁶⁶⁴) for the purposes of intimation.⁶⁶⁵ Arrestment also provides a useful control for the debate as to whether the requirement of intimation should be retained. An arrestment, although it does not of itself operate as a transfer, takes preference over an unintimated assignation. An arrestment must always be served on the arrestee before it takes effect. Those who would argue for the abolition of intimation in assignations ought therefore, by parity of reasoning, to argue for the

⁶⁶⁰ Stair III.i.24.

⁶⁶¹ Cf. Stair III.i.39, this proposition is somewhat controversial and reflects the so-called 'attachment' theory. See generally, A.J. Sim, 'The Receiver and Effectually Executed Diligence' 1984 SLT (News) 25 and G.L. Gretton, *Stair Memorial Encyclopaedia* vol. 8, 'Diligence' (1992) para 285.

⁶⁶² Erskine III.vi.17: 'the decree of forthcoming, therefore, whatever the nature of the subject arrested be, is truly a judicial assignation to the arrester of that subject, even before the sentence is carried into execution'. See too Bankton, II, 190, 2 to the same effect.

⁶⁶³ *Strachan v McDougle* (1835) 13 S 954 at 959 *per* Lord Gillies and Lord Mackenzie; J. Graham Stewart, *The Law of Diligence* (1898), 141. These issues were drawn into sharp focus in *Lord Advocate v Royal Bank of Scotland* 1977 SC 155, but cf. *Iona Hotels Ltd (in receivership) v Craig* 1990 SC 330. A summary of the literature is in S. Wortley, 'Squaring the Circle' 2000 JR 325.

⁶⁶⁴ See *Loi no. 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution*, Art. 42 ff.

⁶⁶⁵ Planiol and Ripert, *Traité théorique et pratique de droit civil français*, (2nd ed. 1954) Tome VII, 499, n. 1. It is likely that the Scots law of arrestment also developed under French influence. Indeed, in some parts of France, the term *arrestation* was even used for their *saisie-arrêt*: see F. Roger, *Traité de la saisie-arrêt* (2nd ed. 1860), 4, n. 1.

abolition of the requirement of service of an arrestment in the hands of the debtor. The creditors of the assignee will be able to arrest in the hands of the debtor in the assignation; yet, the debtor will not recognise any connection between the arrester and the common debtor (the assignee).⁶⁶⁶ The assignation debtor will be understandably reluctant to comply with the arrestment. In an attempt to distil some common principles, reference will therefore be made to analogous cases dealing with the service of arrestments, and indeed of services of charges for payment and summons.⁶⁶⁷

C. Service of an Arrestment⁶⁶⁸

There are a number of situations where it is possible that an arrestee will have no actual knowledge of the arrestment. For example, personal service of an arrestment on a natural person should take place at their dwelling house. Service was by a messenger-at-arms or a sheriff officer in the presence of a witness.⁶⁶⁹ The officer would knock at the door and request to see the arrestee. He should exhibit his warrant which is usually found in the extract decree.⁶⁷⁰ If the debtor is not at home then the officer should leave the schedule with the servant or relative who is in the house. The execution should state that the arrestee or debtor could not be personally apprehended. If the officer could not find anyone at home after knocking on the door six times,⁶⁷¹ he may post the schedule through the door. This must be followed by postal intimation.⁶⁷² If the arrestee pays the common debtor in ignorance of the arrestment, he will be protected.⁶⁷³ There is no requirement for an acknowledgement on service of an arrestment; proof is afforded by the fact that service is effected by an officer of the court in the presence of a witness.⁶⁷⁴

⁶⁶⁶ Cf. R.T. Troplong, *De la vente ou, Commentaire du titre VI du Livre III du code civil* (4th ed. 1845) vol 1 para 882, 383 ; F. Roger, *Traité de la saisie-arrêt* (2nd ed. 1860), 194 f.

⁶⁶⁷ J. Graham Stewart, *The Law of Diligence* (1898), 320; Citation Act 1540, c. 75; APS, c. 10. The relevant rules for citation are now contained in the appropriate Ordinary Cause Rules and the Rules of the Court of Session.

⁶⁶⁸ Cf. the formalities in France for *signification*: *Nouveau Code de Procédure Civile* (1999 edition) Art. 655 ff.

⁶⁶⁹ Debtors (Scotland) Act 1838, s. 32.

⁶⁷⁰ *McKillop v Mactaggart* 1939 SLT 65 OH.

⁶⁷¹ At common law six knocks were essential: *Menzies* (1589) Mor 3773; *Stevenson v Innes* (1676) Mor 3788; *Hay v Laird of Pourie* (1680) Mor 3773 and 3790; *Duff v Gordon* (1707) Mor. 3775; *Gillies v Murray* (1771) Mor. 3795; G. Maher and D. Cuisine, *Diligence* (1991) para 7.09.

⁶⁷² Ordinary Cause Rules r. 5.4(4). Cf. *Nouveau Code de Procédure Civile* Art. 658.

⁶⁷³ Debts Securities (Scotland) Act 1856, s. 1, cited by W.A. Wilson, *The Scottish Law of Debt* (2nd ed. 1991) para 17.5; *Stair III.i.40*; *Laidlaw v Smith* (1838) 16 S. 367 aff'd (1841) 2 Rob 490.

⁶⁷⁴ Debtors (Scotland) Act 1838, s. 32. But see *Leslie v Lady Ashburton* (1827) 6 S 165.

D. Intimation and Private Knowledge

If the debtor has learned of the assignation before formal intimation has been made to him, can he still pay the cedent? The answer to this question is disputed; the controversy reaches back more than half a millennium.⁶⁷⁵ ‘Private knowledge’ can bear at least two interpretations. First, a wide interpretation: it could refer to all knowledge that the debtor has of the transfer, including intimation, which has been made to the debtor, whether by the assignee or cedent, but not in due legal form. A second interpretation would narrow the possibilities: it would be limited to knowledge that the assignee has required from extrinsic sources and not from the parties to the assignation.⁶⁷⁶ In the Scottish sources, little attempt is made to distinguish between the different types of private knowledge that could be relevant. The question always asked is whether private knowledge of the assignation – howsoever obtained – can obviate formal intimation. While some, especially commercial lawyers,⁶⁷⁷ favour a wide role for private knowledge, this is not the law.

The common law of Scotland is unambiguous when it comes to intimation of assignations. It must be notarial:⁶⁷⁸

“The knowledge of an assignation mad supplies not the necessary solemnitie of intimation thereof...”⁶⁷⁹

“Intimation is either made under form of instrument, or by a charge and that which is intimate must be shown. In assignations (albeit known to the cedent’s debtor) nothing can put one in male fide to deal with the cedent but a legal intimation.”⁶⁸⁰

⁶⁷⁵ See e.g. J. van de Sande, *Commentarius de actionum cessione* (1674), in English as *Commentary on the Cession of Actions* (trans. P. Anders, 1906), 12.18 who summarises some of the contradictory sources in the *jus commune*.

⁶⁷⁶ Cf. *Codice Civile* Art. 1264 (Italy).

⁶⁷⁷ E.g. L. Crerar, *The Law of Banking in Scotland* (1997), 295; E-M. Kieniger (ed.) *Security Rights in Moveable Property in European Private Law* (2004), 571 states that ‘Also, in Scotland, the strict requirement for notification has been lessened; today mere knowledge on the part of the *debitor cessus* is probably sufficient’. With respect, that is incorrect. Indeed, where a Scottish solicitor fails timeously to intimate an assignation, that omission may amount to professional misconduct: (2002) 47 *JLSS* December/30.

⁶⁷⁸ An acknowledgment is not an essential requirement; indeed an acknowledgement is an equipollent to intimation: see Part V.B below. But compare the opinions of Lord Justice-Clerk Hope in *Wallace v Davies* (1853) 15 D 688 at 696 and *Donaldson v Ord* (1855) 17 D 1053. Both opinions are ambiguous and the reports are unsatisfactory. A formal (i.e. notarised) acknowledgment by the debtor is an alternative to intimation in French law: *Code Civil* Art. 1690.

⁶⁷⁹ Hope, *Major Practicks* II, 12, § 9.

⁶⁸⁰ Robert Spotiswoode, *Practiks of the Law of Scotland* (2nd ed. 1706), 18. See also Bankton II, 191, 6.

Notarial intimation requires the participation of five people: a procurator⁶⁸¹ of the assignee, a notary public,⁶⁸² two witnesses and the debtor. The procurator reads the assignation, or the relevant parts of it, to the debtor, and protests that the debtor 'should hold the same duly and legally intimated, should not pretend ignorance thereof, or of the intimation, and should not make any payment to any other than the assignee, or those in his right'.⁶⁸³ The procurator then took instruments in the hands of the notary. This was achieved by the presenting the notary with a piece of money, and asking the notary to make out a formal notarial instrument recording what had been done. The debtor is furnished with a 'schedule' of intimation, which includes a copy of the assignation and the date and time of the intimation.⁶⁸⁴ This is signed by the procurator and the notary. There is also executed an 'instrument' of intimation which will be retained by the assignee as evidence of the intimation.⁶⁸⁵ The notary, procurator and witnesses was signed on every page. The witnesses attest not merely to the subscription but also to the facts narrated in the instrument. Provision is made in the Transmission of Moveable Property (Scotland) Act 1862 for notarial intimation, which remains competent.⁶⁸⁶ In such circumstances, a properly intimated assignation at common law will almost always have the effect of furnishing the debtor with *actual* knowledge of the assignation.⁶⁸⁷ It is clearly cumbersome. It is never used in practice.⁶⁸⁸

⁶⁸¹ Surprisingly, it never seems to be suggested that the assignee can act for himself. Whether the procurator was properly authorised has given rise to litigation: *Bruce v Smith* (1577) Mor 845; *The Queen and Abbot of Couper v the Laird of Duffus* (1558) Mor 846; *Scot v Drumlarig* (1628) Mor 846.

⁶⁸² The procurator and notary cannot be the same person: *Scott v Drumlanrig* (1628) Mor. 846. For the historical distinction between a procurator and a notary public, see Anon, 'The Notary Public' 1970 SLT (News) 77.

⁶⁸³ A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 311; A. Menzies, *Lectures on Conveyancing* (1856), 244; J. Sturrock (ed.) *Conveyancing according to the Law of Scotland, being the Lectures of the late Allan Menzies* (1900), 284.

⁶⁸⁴ A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 311; Menzies, *Lectures, ibid.* See the forms of the schedule and instrument of intimation in J.C. Murray, *The Law of Scotland relating to Notary Publics* (1890), 77 ff; *Juridical Styles* (3rd ed. 1794) vol II, 351; Cf. P. Gouldsbrough (ed.) *Formulary of Old Scots Legal Documents*, Stair Society vol 36 (1985), 3.

⁶⁸⁵ Surprisingly, it was held that it was not customary for notaries to insert these instruments into their protocol book: *Cheisly v Chiesly* (1681) Mor 848. For a style schedule of intimation, see Anon, *Ars Notariatus* (2nd ed. 1762), 256 ff.

⁶⁸⁶ s. 2, discussed below.

⁶⁸⁷ See *Tod's Tr. v Wilson* (1869) 7 M 1100 at 1103 *per* Lord Kinloch: 'Nothing else other than personal intimation will be sufficient. To hold anything else would lead to confusion inextricable'. In the context of bills of exchange cf. *Stirling Banking Co v The Representatives of Duncanson* (1790-92) Bell's Octavo Cases 111 and *Poor Irvine* (1790-92) Bell's Octavo Cases 120.

⁶⁸⁸ Notarial intimation was still used even after the passing of the 1862 Act: in *Watt v Scottish North Eastern Rly Co* (1866) 4 M 318 at 320, Lord President McNeill narrates that the assignation in question was intimated notarially. Cf. *Mackintosh's Trs v Davidson and Sharp* (1898) 25 R 554 regarding the Act of Sederunt of 19th February 1680 which requires notarial intimation in the case of inhibition of a heritable creditor. G.L. Gretton,

The principle of transfer only on intimation is enunciated with admirable clarity in Gloag and Henderson in a passage that has remained unchanged since the first edition of the work:

“In a competition between an unintimated assignation and other claims, the defect in the assignee’s title due to the absence of intimation will not be cured by the fact that the debtor was aware of the assignation.”⁶⁸⁹

This is reflected in the opinion of the Lord Justice-Clerk (Miller of Glenlee) in a case cited by Gloag and Henderson:

“Private knowledge has never been held sufficient when supported by no writing whatever. It would be dangerous to prove, by witnesses only, that a man had private knowledge of a deed; for knowledge is an act of the mind, and witnesses may differ in their opinion as to what will infer such knowledge. It would be going very far to refer private knowledge even to the oath of the party; for he might say, ‘I did know so and so; but I relied on the law, which, by assignation intimated, puts me in male fide, but not otherwise’.”⁶⁹⁰

It is sometimes asserted that intimation is required only in a competition between antagonistic assignees, but that as between the cedent and the assignee, intimation is not required:⁶⁹¹

The Law of Inhibition and Adjudication (2nd ed. 1996), 154-155 expresses no view as to whether the Act of Sederunt is still in force; McBryde, *Contract* para 12-132 refers to it without comment.

⁶⁸⁹ *The Law of Scotland* (11th ed. 2001) para 38-06; to which is footnoted: “*Lord Rollo v Laird of Niddrie* (1665) 1 Br Supp 510. It would seem (although the point is not altogether clear) that, according to the decisions even where there is no such competition, the debtor’s knowledge of the assignation will not render him liable to the assignee if he pay the debt the cedent while no intimation has been given. *Stair II.i.24*; *More’s Note CCLXXXI*; *Bell, Comm II*, 18; *Dickson v Trotter* (1776) Mor 873; *Faculty of Advocates v Dickson* (1718) Mor 866; *L. Westraw v Williamson & Carmichael* (1626) Mor 859; *Adamson v McMitchell* (1624) Mor 859; and cf. *Leith v Garden* (1703) Mor 865 and *Erskine III.v.5*.” Cf. Mackenzie, *Inst. III.v.6*: ‘The debtor’s private knowledge is not equivalent to an intimation’; *W. Forbes, The Institutes of the Law of Scotland* (1722) vol 1, Pt. III, Bk.1, Tit. 2 § 1 (3): ‘But his private knowledge of the assignation is not sufficient’; *Bell, Comm II*, 18: ‘mere private knowledge is not enough’. In a recent case, however, a proof before answer was allowed on the averment that the debtor had private knowledge of the assignation as a result of informal letters sent to him by the assignee: *Safdar v Saheed* 2004 GWD 28-586.

⁶⁹⁰ *Dickson and Dickson v Trotter* (1776) Mor 873; January 18th 1776 FC; *Hailes* 675 at 675-6. This dictum reflects the position set out in the anonymous work, *Ars Notariatus, or The Art and Office of a Notary Public, as the same is practised in Scotland* (1740) 227; (2nd ed. 1762), 252. See too the argument in *Charteris and Middleton v Sinclair* (1707) Mor 2876. Compare *Stair II.i.24*: ‘But private knowledge upon information, without legal diligence, or other solemnity allowed in law, at least unless private knowledge be certain, it is not regarded and nor doth constitute the knower in male fide’ (Emphasis added). It is not clear what *Stair* means by the italicised passage. Cf. *J. Rankine (ed.) Erskine’s Principles of the Law of Scotland* (21st ed. 1911), 525, which suggests that private knowledge is not enough to effect a transfer, but that it may be enough to bar the debtor paying the cedent; *E. M. Wedderburn, ‘Assignation’* in *Lord Dunedin et al (eds) Encyclopaedia of the Laws of Scotland* vol II (1926), 8.

⁶⁹¹ This argument is originally based on *Leith v Garden* (1703) Mor 865 and approved by *Erskine III.v.5*. The earlier case of *Stirling v White and Drummond* (1582) Mor 1689 and 7127 involved payment by the debtor in breach of an interdict, the knowledge was therefore judicial, not private. Cf. *McBryde, Contract* para 12-102, n. 70 citing *Cochrane v Cochrane* (1836) 14 S 1040 at 1046-1047 per *Lord Gillies*; *McBryde Contract* para 12-

“But the debtor’s private knowledge of the assignation is not sustained as intimation; since that imports neither publication nor possession on the part of the assignee. This doctrine is however confined to the case where there is a competition of creditors; for where there is no creditor in the field, and the sole question is between the assignee and the debtor, the debtor’s private knowledge of the conveyance is a sufficient interpellation to him, and puts him *in male fide* to make payment to the cedent.”⁶⁹²

Such an approach, however, is incoherent. As Erskine recognises, an unintimated assignation is liable to be defeated by the cedent’s bankruptcy.⁶⁹³ But what if the debtor has private knowledge of the assignation but, before intimation, one of the cedent’s creditor’s arrests? If the *debitor cessus* is *in male fide* to pay the cedent, must the arrestee not also be *in male fide* to pay the arrester?⁶⁹⁴ The arrester’s position is no better than the common debtor’s.⁶⁹⁵ If the debt cannot be effectually arrested by the cedent’s creditors, Erskine’s view is contradictory. On one view, only an intimated assignation will protect against the cedent’s creditors; on the other, an unintimated assignation will defeat an arrestment where the debtor has private knowledge of the assignation. Unsurprisingly, therefore, the law has not followed Erskine’s approach: until there is intimation, the creditors of the cedent can still arrest in the hands of

114, n. 99 and authority there cited; *Donaldson v Ord* (1855) 17 D at 1062 *per* Lord Deas (Ordinary). Cf. Hope, *Major Practicks* II, 12, § 7. This is now the position in Belgium: *Code Civil Belge* Art. 1690.

⁶⁹² Erskine III.v.5. See also Erskine *Principles*, cited in n. 690 above; and Stair, *Inst* (1st ed. 1681), Part, II, title xxiii, at 15 to the same effect. Such an approach has also been suggested in France where *cession de créance* is seen as a sale. Sale is effected *solo consensu*. The cessionary becomes the creditor on the conclusion of the agreement. Signification is required purely to render the cession opposable against third parties, including the debtor: see e.g. F. Terré, P. Simler and Y. Lequette, *Droit civil: les obligations* (8th ed. 2002) para 1289; H. de Page, *Traité élémentaire de droit civil belge* (3rd ed. 1967) vol III, 360 (Belgian law now requires only simplified notification to interpell the debtor; the cession is otherwise opposable *erga omnes* on conclusion of the transfer agreement). However, if the assignee’s right pending intimation can be defeated by third parties, it seems wrong to style him as the creditor of the debtor. This confusion is one of the consequences of analysing an assignation in causal rather than abstract terms. Cf. ‘The delivered but unintimated assignation’ below.

⁶⁹³ Bankruptcy (Scotland) Act 1985, s. 31(4); *Wood v Weir* (1900) 16 Sh Ct Rep 356; A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 310; *Tod’s Trs v Wilson* (1869) 7 M 1100; *Struthers v Commercial Bank* (1842) 4 D 460 at 467 *per* Lord Fullerton; *Strachan v McDougle* (1835) 13 S 954; *Freugh* (1714) *Kames Dict.* vol 1, 92; *Burnett v McLellan* (1685) *Mor Sup Vol*, Harcase, 53. The holder of an unintimated assignation cannot rank on the debtor’s bankrupt estate: *Glen v Borthwick* (1849) 11 D 387 at 389 *per* Lord Robertson (Ordinary); *Taylor v Drummond* (1849) 10 D 3. Cf. Pothier, *Traité du contrat de vente* (1762) § 556 in M. Bugnet, *Œuvres de Pothier* (1861) vol 3, 220. Bugnet points out in n. 2 that the introduction of the principle in French law that property passes *solo consensu* probably renders Pothier’s view outdated. Cf. J.L. Baudouin and P.G. Jobin, *Les obligations* (5th ed. 1998) para 907. For many, the advantage of the equitable assignment in English law is that the assignment will prevail over the creditors of the cedent. Until 1986, however, where the assignor was a natural person, the assignee would not have prevailed on the assignor’s bankruptcy without notice to the debtor: Bankruptcy Act 1914, s. 38.

⁶⁹⁴ *Burnett’s Tr v Grainger* 2004 SC (HL) 9 holds that creditors who have knowledge of competing creditor’s rights cannot be penalised. The debtor in an assignation, however, is not a competing creditor, but a passive party.

⁶⁹⁵ J. Graham Stewart, *Diligence* (1898), 233.

the debtor.⁶⁹⁶ The debtor's private knowledge cannot be relevant.⁶⁹⁷ The position is the same where the cedent grants a second assignation of the same claim before the assignee of the first assignation has intimated: 'Any onerous deed', says Bankton, 'executed by the cedent before intimation, will prejudice the assignee'.⁶⁹⁸ It is incontrovertible that the date at which the assignee becomes the creditor in the debtor's obligation, is the date on which the requisite intimation is made to the debtor.⁶⁹⁹ Notarial intimation at common law, an equipollent, or intimation in terms of the 1862 Act, is required in Scotland to *transfer* the claim being assigned, and not merely to place the debtor *in male fide* to pay the cedent.⁷⁰⁰ Unlike Scots law, some other systems have dispensed with formal notification requirements to effect a transfer.⁷⁰¹ Transfer is effected by a mere agreement vis-à-vis all parties other than the debtor; if the latter pays the cedent in good faith prior to notification he will be discharged.

The date of the transfer is also of importance where the cedent becomes insolvent and the *actio Pauliana* applies.⁷⁰² Scots law has oscillated in its approach to the relevant date for the purposes of the *actio Pauliana*. At the beginning of the nineteenth century, Bell advanced the view that the date of intimation was the relevant date:

"But questions have arisen, respecting the dates of conveyances of moveables; and these, I now proceed to explain: Debts are conveyed by assignation; and the assignation is held to be complete, only when it has been intimated to the debtor. Now, although the statute [1696 Act] made no exception to the rule, that the date of the conveyance itself should regulate computation of the sixty days,⁷⁰³ excepting only in the case of seisine, the idea was not perhaps unnatural, of extending the spirit of this exception, to the case of assignations; for, when the act speaks of 'dispositions, assignations etc. made and granted', it may be understood well to mean, complete and effectual deeds, having the force of conveyance; which an assignation has not, till intimated. The debtor himself, and his heirs, are indeed, barred by personal exception from objecting

⁶⁹⁶ *Strachan v M'Dougle* (1835) 13 S 954; *Creditors of Benjendward, Competing* (1753) Mor 743 at 744; Kames Sel Dec 75 *per* Lord Kames; *Graham v Campbell* (1724) Mor 2776.

⁶⁹⁷ For which, see below.

⁶⁹⁸ III.i.7. See also Erskine, III.ii.43 and 44: 'A writing, while it is in the granter's own custody, is not obligatory; for so long as it is in his own power, he cannot be said to have come to a final resolution of obliging himself by it'. Cf. *McGill v Laurestoun* (1558) Mor 843.

⁶⁹⁹ *Scot v Lord Drumlanrig* (1628) Mor 846; *Creditors of Benjendward, Competing* (1753) Mor 743 at 744; Kames Sel Dec 75 *per* Lord Kames; authority cited at notes 689 and 690 above; *Campbell's Trs v Whyte* (1884) 11 R 1078.

⁷⁰⁰ *Liquidators of Union Club Ltd v Edinburgh Life Assurance Co* (1906) 8 F 1143 at 1146 *per* Lord McLaren.

⁷⁰¹ E.g. *Code Civil belge*, Arts 1689 and 1690; *Code Civil luxembourgeois*, Art. 1691. Cf. Louisiana Civil Code, Art. 2643, introduced in 1995. See also *Code Civil du Québec* Art. 1641 and *Principles of European Contract Law*, Art. 11: 303 (4).

⁷⁰² Ss 34 and 36, Bankruptcy (Scotland) Act 1985 and ss 242 and 243, Insolvency Act 1986.

⁷⁰³ The period is now six months in the case of unfair preferences: s. 36, 1985 Act and s. 243, 1986 Act; and two years or five years in the case of gratuitous alienations: s. 34, 1985 Act and s. 242, 1986 Act.

to the conveyance; but it has no effect in competition with any other diligence or voluntary right, completed before it. Till intimation, the assignation is an unfinished, ineffectual conveyance and therefore, independently of any idea of publication to the creditors at large, an assignation seems hardly even under the words of the act, to entitle the creditor to found on it as a conveyance, till it be intimated. In the case of *Hay against Sinclair & Co*⁷⁰⁴ already quoted upon another point, the Court found the date of the assignation, not that of the intimation to be the rule.”⁷⁰⁵

Over the course of the nineteenth century, however, the courts wrestled with various alternatives. The Court was particularly pressed where there was a contract to give security for a debt if asked, but this was asked for within the sixty days: was the delivery of an assignation pursuant to this obligation a voluntary act?⁷⁰⁶ The authorities cannot be reconciled.⁷⁰⁷ There are a number of possibilities.⁷⁰⁸ The contract to transfer could fall outwith, but delivery of the assignation and intimation within, the sixty days; or the contract and delivery of the assignation could be outside the sixty day period, but the intimation within. Wherever the contract is outside the sixty days, it has been argued, the transaction cannot be reduced because the bankrupt does no voluntary act within the 60 days;⁷⁰⁹ or delivery is voluntary, but intimation is not an act of the bankrupt;⁷¹⁰ alternatively, delivery and intimation are voluntary acts of the bankrupt.^{710a} Whatever the older authorities may say,

⁷⁰⁴ *Hay v Sinclair & Co*, 8th July, 1788 FC; Mor. 1194; Hailes 1046. See also *Scottish Provident Institution v Cohen* (1888) 16 R 112 at 117 *per* Lord President Inglis, followed in *Caledonian Insurance Co v Beattie* (1898) 5 SLT 349 OH.

⁷⁰⁵ G.J. Bell, *A Treatise on the Law of Bankruptcy* vol I (1800), 188.

⁷⁰⁶ *Gibson v Forbes* (1833) 11 S 916 at 929 *per* Lord Fullerton followed by the consulted judges in *Taylor v Farrie* (1855) 17 D 639 at 650-1. Curiously, the wrong statute is reported to have been cited in argument in *Taylor*, the Session Cases report indicating that reference was made to 54 Geo III, c. 87, i.e. the Duties on Glass (Ireland) Act 1814!

⁷⁰⁷ *Moncreiff v Hay* (1851) 14 D 200 at 203-204 *per* Lord Fullerton: ‘It would be a fruitless task to attempt to reconcile the various decisions pronounced at different times on this much vexed question’. Cf. Bell, *Comm* (7th ed. 1870) II, 207 and Bankruptcy (Scotland) Act 1913, s. 4; Bankruptcy (Scotland) Act 1856, s. 6. For the position of *nova debita*, see *Houston & Co v Claud and Charles Stewarts* (1772) Hailes 468, especially *per* Lord Gardenston and Lord Pitfour at 469; D. Antonio, ‘Nova Debita’ 1956 SLT (News) 13 and *MacArthur v Campbell’s Tr* 1953 SLT (Notes) 81. But cf. *Creditors of Menzies* (1715) Mor 981. In France, it seems that the date of the deed, not the date of the intimation, is the relevant date for insolvency purposes. But this may stem from the fact that cession is seen as a sale in French law. See generally, J.B. Blaise and R. Desgorces, ‘Die Forderungsabtretung im französischen Recht’ in Hadding and Schneider, *op. cit.*, n. 627, at 258. But compare, by analogy, Art. L 621-50 *Code du commerce* (2005).

⁷⁰⁸ Cf. W.M. Gloag, ‘Securities’ in Lord Dunedin et al (eds) *The Laws of Scotland* vol 13 (2nd ed. 1932) para 784.

⁷⁰⁹ *Taylor v Farrie* (1855) 17 D 639 at 648-9 *per* Lord President McNeill and Lords Ivory, Curriehill, Deas, Handyside, Neaves, Benholme and Ardmillan; W.M. Gloag, ‘Securities’ in Lord Dunedin et al (eds) *The Laws of Scotland* vol 13 (2nd ed. 1932) para 836.

⁷¹⁰ See, in particular, the argument by John Inglis, then Dean of Faculty, in *Taylor v Farrie* (1855) 17 D 639 at 643.

^{710a} Erskine III.vi.19 quoted but queried in *Lord Advocate v Royal Bank of Scotland* 1977 SC 155 at 170 *per* Lord President Emslie.

the wording of the Bankruptcy (Scotland) Act 1985 is explicit.⁷¹¹ The relevant date is the day on which the alienation becomes ‘completely effectual’.⁷¹² The rationale for this provision is no different than that which underlay the corresponding section in the 1839 Act:

“These enactments passed in 1839, have applied the axe to the root of the evil. They will check and put an end to the many unseemly attempts previously made to defeat the important Act of 1696 by deeds executed on the eve of bankruptcy on the professed authority of personal and latent obligations at a prior period. For every conveyance and assignation is now to be held at the date of the sasine and intimation respectively.”⁷¹³

E. Intimation by Whom?

“The deed to be intimated is the assignee’s. He is the party interested in completing his own title; and though, no doubt, intimation given in due form by the cedent, and proved in writing, would be good and effectual, and proceedings heretofore in use to be adopted in intimations have always, and in strict correct principle, in name and on behalf of the assignee.”⁷¹⁴ There are only two cases where intimation by the cedent has been held good.⁷¹⁵ There are another two cases which seem to hold that there need not be delivery of the assignation, providing there is intimation.⁷¹⁶ Such a proposition, however, cannot be

⁷¹¹ See W.W. McBryde, *Bankruptcy* (2nd ed. 1995) paras 12-114 to 12-116 and references there cited.

⁷¹² Bankruptcy (Scotland) Act 1985, s. 34 (3): ‘The day on which the alienation took place shall be the day on which the alienation becomes completely effectual’ applied in *Accountant in Bankruptcy v Orr and Malcolm*, 2005 SLT 1019 OH. See also sections 36 (3), 1985 Act and sections 242 (3) and 243 (3), Insolvency Act 1986. See too *Grant’s Tr. v Grant* 1986 SLT 220, decided under the Bankruptcy (Scotland) Act 1913. An arrestment served sixty days before liquidation is good: *Commissioners of Customs and Excise v John D Reid Joinery Ltd* 2001 SLT 588; but an arrestment served sixty days before receivership is not ‘effectually executed diligence’: *Lord Advocate v Royal Bank of Scotland* 1977 SC 155. Cf. *Houston & Co v Claud and Charles Stewarts* (1772) Hailes 468 especially *per* Lord Pitfour: ‘An antecedent obligation is good against inhibition, but not against bankruptcy. An actual formal security granted before bankruptcy is good for nothing, if security is not given until after bankruptcy. Shall we say that an obligation to dispone is of more weight than an actual disposition?’ A point often overlooked is that the common law (where there are no time limits) has not been superseded: *Johnston v Peter H Irvine Ltd* 1984 SLT 209 and *Bank of Scotland, Petrs* 1988 SLT 690

⁷¹³ *Moncreiff v Hay* (1851) 14 D 200 at 205 *per* Lord Cunninghame on Bankruptcy (Scotland) Act 1839 (2 & 3 Vict. c. 41), s. 35.

⁷¹⁴ A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 310.

⁷¹⁵ *A v B* (1540) Mor. 843 and *Libertas Kommerz GmbH v Johnson* 1977 SC 191 OH. It is likely that *A v B* is the same case found in Sinclair’s *Practicks* No. 107. Cf. *Wylie’s Trs v Boyd* (1891) 18 R 1121 at 1126 *per* Lord Kincairney (Ordinary) and *Paul’s Tr v Paul* 1912 2 SLT 61 OH where proof was allowed on the allegation that the cedent had been fraudulent in failing to intimate the assignation.

⁷¹⁶ *McLurg v Blackwood* (1680) Mor 845 approved in *Jarvie’s Tr v Jarvie’s Trs* (1887) 14 R 411 at 416 *per* Lord President Inglis. Inglis’ *dictum* is *obiter*. *Bain v McMillan* (1678) Mor 9128 may be a third case. *Smith v Place D’Or 101 Ltd* 1988 SLT (Sh Ct) 5, cited by Reid, *Property* (1996) para 655, n. 14 and McBryde, *Contract* para 4-30, n. 62, involved a lease which may have specialities. For delivery of the assignation, see discussion in chapter 6, ‘Validity’ above.

correct.⁷¹⁷ First, it conflicts with the law on delivery of deeds; secondly, without delivery of the assignation the assignee cannot effect intimation because he cannot exhibit a copy of the assignation to the debtor.⁷¹⁸ From the converse perspective, the debtor will be wary of paying a creditor who claims to be an assignee without that person producing some sort of deed: 'knowledge of an assignment, where it falls short of ocular evidence, will scarce be sustained to put the debtor *in male fide*'.⁷¹⁹ Thirdly, it conflicts with the opinion of Bankton who rightly states that if the cedent 'retain the writings in his own hand, he is not understood divested, since the assignation is still in his power, and which he may destroy'.⁷²⁰ Indeed, in one old case, the date of intimation, made initially by the cedent, was postponed until the deed of assignation was delivered to the assignee.⁷²¹ Certainly, in the case of the double assignation of the same right, priority is always regulated by the first intimation *by the assignee*.⁷²²

The view just articulated is consistent with an important legal principle: the assignee cannot have the claim transferred into his patrimony without his consent, or at the precise moment he intends transfer to occur. But this view also poses one important problem. The rules on intimation often ignore the debtor. The Scottish authorities hold that if the debtor pays the cedent after intimation (assuming that he has actually received it), the debtor will not

⁷¹⁷ E.M. Clive, *The Law of Husband and Wife in Scotland* (4th ed. 1997) para 14.064 comments that, 'The law in this whole area seems incoherent'.

⁷¹⁸ The failure to exhibit a copy of the assignation was fatal in *Forbes v Watson* (1714) Mor 3687, 3753 and 7173 where the intimation was edictal.

⁷¹⁹ Lord Kames, *Principles of Equity* (2nd ed. 1767), 61; (3rd ed. 1778), 59; *Lawrie v Hay* (1696) Mor 849; *Gallems Ltd (in receivership) v Barratt Falkirk Ltd* 1989 SC 239 at 242 *per* Lord Dunpark. Kames' view is particularly important since he was of opinion that equity should ameliorate the common law necessity of notarial intimation. In *Rodgers Roofing Ltd v Hall & Tawse Scotland Ltd* 2000 SC 249, the First Division held that there could still be a preliminary proof even where the putative assignee had not produced his assignation in an arbitration; the respondents were not prejudiced because they could obtain an order for recovery of any documents in the assignee's hands or the proceedings could be sisted until it was produced. In modern German law, cession occurs by mere agreement; but the debtor is not obliged to pay until the assignee provides a copy of the cession: § 410 *BGB*; failing which, the debtor will be free to pay the cedent (assuming the cedent has not intimated): see, generally, K. Luig, 'Zession und Abstraktionsprinzip' in H. Coing and W. Wilhelm, *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* (1977), 112 at 137. Cf. M. Planiol and G. Ripert, *Traité théorique et pratique de droit civil français* (2^e éd. 1954) vol 7, 497, n. 2.

⁷²⁰ III, 191, 7; and see III, 202, 46. See too Erskine III.ii.43. Admittedly, if there has been a transfer (i.e. an intimated assignation), it is not clear why subsequent destruction of the assignation is of much relevance. See also, Macvey Napier, *Lectures on Conveyancing*, 202: 'Intimation requires to be done in the name of the assignee, a statement so long and so well established as to make it difficult to conceive how a lawyer like Lord Kames could fall into the error of saying (*Elucid.* No. 39) that the intimation should be made in the name of the creditor'. The citation from Kames does not seem to deal with the point. In any event, the use of the term 'creditor' is ambiguous. Before intimation, the cedent is creditor; on intimation, the assignee becomes the debtor's creditor.

⁷²¹ *Hisselside v Littlegill* (1685) Mor 11496; Sup Vol, Harcase, 25. It is on citation of this case that Erskine, *Principles* III.v.2 states that 'Assignations must not only be delivered by the assignee, but intimated *by him* to the debtor' (my emphasis).

⁷²² Cf. P. van Ommeslaghe, 'Le Nouveau Regime de la cession et de la dation en gage des créances' [1995] 114 *Journal des tribunaux* 529 at 533, No. 12.

be discharged. Do these rules not perhaps expect too much of the debtor? It took some of the most learned jurists in Europe and England some fifteen hundred years to admit the transfer of claims. Their view was that contracting parties expect to pay only their co-contractor. Might this not be the view of ordinary contract debtors? To the debtor, the assignee is an unknown quantity, a stranger. But it is notification from this stranger with which the debtor must comply. If the debtor ignores the assignee's intimation, the debtor is not discharged. Only if considerable formal requirements for intimation are retained is it realistic to expect debtors to understand fully the important legal consequences intimation has for them.

There are also older cases which suggest that inter-spousal assignments require no delivery since the husband is custodian of his wife's deeds.⁷²³ This rule has probably been superseded. But since delivery is a question of fact, it may well be that delivery between cohabiting spouses could be entirely notional.⁷²⁴ Generally speaking, an assignee must, at the very least, have passive legal capacity⁷²⁵ to take the rights granted to him by the cedent. However, if ordinary legal capacity is required to make intimation, mere passive capacity is not enough. Intimation, of course, is necessary to transfer the claim to the assignee. This raises the issue of whether representatives of the assignee can effect intimation for him. In the case where there is no appointed guardian and time is of the essence, intimation can be made on the assignee's behalf on the basis of *negotiorum gestio*.⁷²⁶

F. The Transmission of Moveable Property (Scotland) Act 1862, 25 & 26 Vict, c.85.

The genesis for a statute regulating the intimation of assignments is mysterious. There is no trace of any recommendation in the four *Reports of the Law Commissioners of Scotland* chaired by George Joseph Bell in the 1830s. The Bill was introduced to Parliament by James Moncreiff,⁷²⁷ the Lord Advocate, who, unusually, was concurrently the Dean of Faculty.⁷²⁸

⁷²³ E.g. *Munro v Munro* (1712) Mor 5052 and cases cited in chapter 6 below, 'Validity'.

⁷²⁴ See generally, E.M. Clive, *The Law of Husband and Wife in Scotland* (4th ed. 1997) para 14.035.

⁷²⁵ For this concept, see D.N. MacCormick, 'General Legal Concepts' in *Stair Memorial Encyclopaedia*, vol 11 (1989), para 1035.

⁷²⁶ In *Cockburn v Craigvar* (1672) Mor 11493; 2 Stair 56, intimation was made in the name of a third party allegedly acting as *negotiorum gestor* for the assignee.

⁷²⁷ Moncreiff was then MP for Edinburgh.

⁷²⁸ Moncreiff was appointed Lord Justice-Clerk in 1869. As Lord Advocate, he was responsible for the passage of many important pieces of Scottish legislation. See generally G.F. Millar, 'Moncreiff, James Wellwood, first Baron Moncreiff of Tulliebole (1811-1895)', *DNB* (2004); and (1895) 11 *Scottish Law Review* 153. The link between the Moncreiff family and the Scots law of assignment extends further. After the death of Moncreiff's

He was assisted in its preparation by David Mure, later Lord Mure⁷²⁹ as well as another legally qualified MP, Alexander Dunlop of *Session Cases*-fame.⁷³⁰ The Bill had its first reading on 10th March 1862,⁷³¹ and Second Reading on Thursday 3rd April, where it was committed to a committee of the Whole House. It was finally considered on Monday 12th May. It was read for a third time on Wednesday 14th May whereupon it was sent to the Lords where it was passed without amendment on 31st July. The un-amended Bill received Royal Assent on 7th August 1862. It is perhaps justifiable to infer that the legislation was not subjected to great scrutiny.⁷³²

The Act allows assignments to be validly intimated in two ways.⁷³³ First, by a notary public delivering a copy of the assignment, certified as correct,⁷³⁴ to the debtor.⁷³⁵ This essentially supersedes the common law on notarial intimation. A written certificate in the form annexed to the Act⁷³⁶ is said to be sufficient evidence of such intimation being made. Secondly, it allowed the holder⁷³⁷ of an assignment, or any person authorised by him, to transmit a copy of the assignment⁷³⁸ by post to the debtor. Where the debtor has more than one ordinary residence known to the assignee, it would be wise to ensure that the intimation is sent to both. Intimation sent to one address, however, should be sufficient.⁷³⁹ However,

brother in 1895, the purported assignment of rights conferred by his brother's will even reached the First Division. Somewhat ungratefully, the Division declined to decide the intimation point: see *Moncreiff's Tr. v Balfour* 1928 SN 139 aff'g 1928 SN 64 OH.

⁷²⁹ MP for Bute. He had also been Solicitor-General from 1858-9 and, briefly, Lord Advocate for two months in 1859. See F.J. Grant (ed.) *The Faculty of Advocates in Scotland 1532-1943 with Genealogical Notes*, (Scottish Record Society CXLV, Edinburgh, 1944).

⁷³⁰ He was then MP for Greenock. Along with Patrick Shaw, Dunlop was one of the first editors of the *Session Cases*: see G.F. Miller, 'Dunlop, Alexander Colquhoun-Stirling-Murray- (1798-1870)', *DNB* (2004). The twenty-four volumes of the *Session Cases*, from 1838 to 1862, are to this day cited by a volume number and the letter 'D' for Dunlop. The last MP with responsibility for the preparation of the bill was the Member for Perth, Arthur F. Kinnaird: see F. Prochaska, 'Kinnaird, Arthur Fitzgerald, tenth Lord Kinnaird of Inchture and second Baron Kinnaird of Rossie (1814-1887)', *DNB* (2004).

⁷³¹ See 10th March 1862, *Commons Journal*, 88.

⁷³² For example, the bill is reproduced without comment in the first issue of the *Scottish Law Magazine*: (1861) 1 *Scottish Law Magazine* 31. The Act as passed is reproduced, again without comment, at 55.

⁷³³ s. 2.

⁷³⁴ The Act does not enlighten us as to *who* is competent to certify the copy of the assignment as correct. It is perhaps implicit that a notary is to certify the copy as correct.

⁷³⁵ The precise wording of the Act is 'the person or persons to whom intimation may in any case be requisite'.

⁷³⁶ See Schedule C.

⁷³⁷ This term is undefined in the Act. Such a term could include the cedent.

⁷³⁸ There is a tension here between the formalities required for a valid intimation and those for execution. The Requirements of Writing (Scotland) Act 1995, s. 11(3)(a) states that no writing is required for an assignment. While that may be so, it is (almost) impossible to intimate an assignment without writing. Therefore, while the obligatory agreement does not require writing, the transfer agreement must.

⁷³⁹ Cf. *Irvine of Kincoussie v Deuchar of Comrie* (1707) Mor 3703; *Baillie of Larington v Menzies* (1710) Mor 3704; *Home v Creditors of Lady Eccles* (1725) Mor 3704; *Douglas and Heron v Armstrong* (1779) Mor 3700; *MacDonald v Sinclair* (1843) 5 D 1253 and a contributed note at 1981 SLT (News) 293 and reply at 1982 SLT (News) 65. There may be international private law issues if the debtor, though he has a residence in Scotland, is

where the debtor has two addresses, postal intimation to one address only involves the danger that the debtor may not in fact become aware of the intimation for some time thereafter. A written acknowledgement by the debtor would be sufficient evidence of intimation having been duly made.⁷⁴⁰

G. Competition.

Fundamentally, the last point highlights that the Act is not clear as to the exact moment of intimation. In particular, it does not spell out whether there is valid and effectual intimation by simply posting the intimation to the debtor or whether actual receipt by the debtor must be established. If the Act is to be assumed to have introduced a change in the law, then the former position must have been intended. If so, then the potential of payment being made by a debtor to the cedent in good faith, though there has been a proper intimation to the debtor, is greatly increased. The Act did not supersede the common law forms of intimation (where an acknowledgement from the debtor is usually obtained).⁷⁴¹

It is probably the case that the date of the intimation is the date of receipt and not the date of posting. The presumption will be that the debtor received the intimation on the day following posting.⁷⁴² However, for the purposes of assignments in security made by companies, which require to be registered in the Register of companies, the Registrar will accept a recorded delivery receipt as evidence of the intimation being duly made.⁷⁴³ Yet, if intimation is made by post then there is no way of determining the precise hour of the day on which intimation was made. Even if the intimation is sent by recorded delivery, the time of delivery being noted by the postman, this is not necessarily evidence that the debtor has read the intimation. If there is a competing arrestment which is served personally on the arrestee by a court officer, then the precise time of the arrestment can be ascertained. In a competition between an arrestment and assignment, it is the time of intimation and the time of service

not domiciled in Scotland for the purposes of citation: *Trowsdale's Tr. v Forcett Railway Co* (1870) 9 M 88 at 93 *per* Lord Cowan.

⁷⁴⁰ Since such an acknowledgement is only 'sufficient' evidence, other adminicles may be relevant, e.g. a recorded delivery receipt. This will however prove only that the intimation was delivered, not that it has been read by the debtor. Note that Interpretation Act 1978, s. 7 has no application to the 1862 Act, it being prior to 1889: Interpretation Act 1978, s. 22(1) and Sch 2, para 3. Interpretation Act 1889, s. 26, states that it does not apply to pre-1889 Acts.

⁷⁴¹ Section 3.

⁷⁴² This is in accordance with the law of citation in the Court of Session: RCS r. 16.4(6); and the Sheriff Court, OCR, 5.3(2). Cf. *Allan v MacDougall* (1887) 18 R 78; *Smith v Conner & Co Ltd* 1979 SLT (Sh Ct) 25.

⁷⁴³ 'Registrar of Companies: Assignations in Security' 1983 SLT (News) 173.

which are relevant.⁷⁴⁴ The earlier will be preferred. For Stair there had to be a discernible gap of three hours between the intimation and arrestment if one was to be preferred over the other, otherwise they ranked *pari passu*.⁷⁴⁵ But the better view is that ‘when we go to examine minutes and hours, there must be a demonstrative priority: without that arrestments must come in *pari passu*’.⁷⁴⁶ In *Cust v The Carron Company*⁷⁴⁷ it was held that the same principles apply to the competition between intimation of an assignation after the death of the cedent with the confirmation of an executor-creditor:

“A *pari passu* preference is given when the court cannot know which competitor is preferable. When there is a probability, or even a possibility, that the diligence in appearance posterior may be the first, the Court will give a *pari passu* preference, because it must determine, and in such cases knows not how to determine, otherwise than by dividing the subject in controversy. In this case I have no doubt that the assignation was completed before the confirmation was expedite ... Lord Stair wished that no time less than three hours might be regarded: he meant that there should be such interval as to prevent all ambiguity. What he wished for is *here* – if the assignation must have been at nine at the latest, and the confirmation at ten at the earliest, the priority is as exactly ascertained as if the assignation had been twenty-four hours before the confirmation.”⁷⁴⁸

Any consideration paid by the assignee to the cedent for the assignation is of no relevance to competition. Unlike the position in English law, payment of the price for the assignation does not create a trust, constructive or otherwise. In *Robertson v Wright*,⁷⁴⁹ Lord President Inglis suggested that a trust may be involved in an assignation. This would have important consequences for competition. But while Inglis’ dictum is sometimes referred to, it is, with respect, incorrect.⁷⁵⁰ Lord Inglis is reported to have opined:

⁷⁴⁴ *Rollo v Brownley* (1676) Mor 2653; 2 Stair 436; *Davidson v Balcanqual* (1629) Mor 2773. However, in *Inglis v Edwards* (1630) Mor 2773 the arrestment and intimation bearing to be made on the same day they ranked *pari passu*. In *Adie v Scrimzeor* (1687) Mor 2775 only the intimation bore to have been made at a particular hour. The arrestee deponed that the arrestment had been first. The Lords ordered them to be ranked *pari passu*.

⁷⁴⁵ Stair IV.xxxv.7 and followed in *Dougals v Mason* (1796) Mor 16213. Cf. R. Spotiswoode, *Practicks of the Law of Scotland* (1706), 19 discussing a case involving *Robert Balcanqual*, 30th January 1629, *sub nom Balcanqual v Davidson* (1629) 1 Br Sup 165.

⁷⁴⁶ *Wright v Anderson and Laurie* (1774) Mor 823; Hailes 558 at 558 *per* Lord Pitfour; *Cameron v Boswall* (1772) Mor 821; Hailes 470 *per* Lord Kennet, disapproving Stair. *Cameron* was approved in *Gibson & Balfour v Goldie* (1779) Mor 824; Hailes 828 by Lord Hailes.

⁷⁴⁷ *Cust v The Carron Company* (1774-5) Mor 2795; Hailes 627. See also *Smith’s Trs v Grant* (1862) 24 D 1142.

⁷⁴⁸ *Cust, ibid.*, Hailes 627 at 629 *per* Lord Hailes. See too F. Roger, *Traité de la saisie-arrêt* (2nd ed. 1860), 197, para 212 to the same effect. Cf. *Sutie v Ross* (1705) Mor 816; 28th June 1705, Forbes Dec. In *Sutie*, two arrestments made on the same day were ranked *pari passu* although one of the arresters offered to prove the hour of service; the court commenting that witnesses would be apt to mistake or forget the hour. This view of witnesses is outdated; proof would now be admitted.

⁷⁴⁹ (1873) 1 R 237. The facts of the case are set out in chapter 2 above.

⁷⁵⁰ McBryde, *Contract* para 12-31 quotes selectively from Inglis’ opinion.

“It is no doubt the effect of an intimated assignation of a *nomen debiti*, that the debtor becomes the debtor of the assignee, and *the creditor* becomes entitled to recover his debt *from him* just as he could have recovered it from the cedent. And so in the case of an assignation of a fund the assignee becomes on intimation *the owner of the fund, and the holder of it a trustee for the assignee*, and liable to account to him alone. But the reason why in these cases the intimation has such effect is, that the person to whom it is made is under a legal obligation to the cedent.”⁷⁵¹

This passage is unintelligible. First, the reference to creditor must be to the assignee; but an assignee will not always be the creditor of the cedent: an assignation can be gratuitous. Secondly, the reference to ‘from him’ must be a reference to the debtor. Thirdly, assignation does not transfer ownership of anything. It transfers claims.⁷⁵² Fourthly, his reference to a trust is incomprehensible. Lord Inglis is suggesting that on intimation of the assignation the debtor becomes trustee for the assignee. But a trustee of what? The transferred right is a liability as far as the debtor is concerned. A trust must have assets. I cannot create a trust in favour of another over my liabilities.⁷⁵³ Furthermore, an assignation is the transfer of a claim against a debtor without the consent of the latter. Any trust impressed on the debtor by virtue only of the assignation would, therefore, have to arise by operation of law. But there is no justifiable basis for such a trust. While the Inner House has recently reminded the profession that the *Session Cases* are the authoritative reports,⁷⁵⁴ it must be concluded that the report in the *Session Cases* cannot, on this occasion, be accurate. It simply makes no sense. Compare a very different, but at least intelligible, opinion attributed to Lord Inglis in the *Scottish Law Reporter*:

“Now, no assignation of a *nomen debiti* is such that the holder becomes debtor to the assignee if he were not so to the cedent; and so in the case of an assignation of a fund, the assignee becomes owner of the fund, and the holder becomes liable to account to him; but the reason why intimation of assignation has such an effect is because the legal obligation is transferred.”⁷⁵⁵

This passage is, then, strong authority for the proposition that transfer occurs only on intimation. If the debtor pays the cedent after intimation, the debtor is not discharged: he has

⁷⁵¹ At 245, my emphasis. This idea was not conjured up by Lord Inglis. Earlier authorities are similar: see, e.g., *Brierly v McIntosh* (1843) 5 D 1100.

⁷⁵² As to whether rights can be owned, see chapter 1 above. Cf. F.A. Mann, *The Legal Aspect of Money* (5th ed. 1992) at 5: ‘Bank accounts, for instance, are debts, not money and deposit accounts are not even debts payable on demand’.

⁷⁵³ In *Watt’s Trs v Pinkney* (1853) 16 D 279 at 288, Lord Rutherford makes the same mistake in suggesting that the debtor can become a trustee of his own *liability* without some declaration of trust by the creditor of that that obligation. See also *Style Financial Services Ltd v Bank of Scotland* 1996 SLT 421 and crucial discussion by G.L. Gretton, ‘Constructive Trusts’ (1997) 1 *Edin LR* 281 (Part 1) at 308.

⁷⁵⁴ *McGowan v Summit at Lloyds* 2002 SC 638 at 660-661, paras [57]-[58] *per* Lord Reed.

not paid his creditor. Consequently, the debtor remains liable to the assignee. As far as the payment to the cedent is concerned, this is a payment of a debt that is not due. The debtor may have a *condictio indebiti*. But there is no room for any trust.

III. Intimation to Whom?

A. General

In an arrestment, the officer can serve the schedule of arrestment in various ways: at the arrestee's address, on a servant of the arrestee, by affixing a copy to the front door of the arrestee's address, or posting it through the door.⁷⁵⁶ It has been held that service of an arrestment at a merchant's counting house is insufficient,⁷⁵⁷ although this would be sufficient today. Would these methods be sufficient for intimation of an assignation? In principle there seems to be no reason why intimation cannot be made to one with the debtor's authority to receive such documents.⁷⁵⁸ This should be ruled by the general principles of agents' ostensible authority.⁷⁵⁹ While ostensible authority involves a representation of sorts from the debtor that he has authorised his agent, good faith protection is subjective. As a result should the debtor pay in actual ignorance of the intimation, he ought still to be protected. Nevertheless, it has been held that where a debtor has left the country with his man of business in charge of all his affairs, intimation to the latter interpellated the debtor from paying

⁷⁵⁵ (1873) 11 SLR 94 at 97.

⁷⁵⁶ *Fraser, Reid & Sons v Lancaster and Jamieson* (1795) Bell's Folio Cases 135; Mor 3706; January 14th 1795 FC. Again there is an analogy with the law of citation: see the Citation Act of 1540, c. 75; APS, c. 10. Note that 'The purpose of serving personally, or at the dwelling-place, is (as the Act of 1540 inferentially states [sic]) to ensure that the writ or summons shall be brought to the knowledge of the person interested – it has no other purpose', *per* Lord Trayner in *Glasgow Corporation v Watson* (1898) 25 R 690 at 695-6. See now, OCR r. 5.4(3) and (4); RCS r. 16.1(1).

⁷⁵⁷ *Fraser, Reid & Sons v Lancaster and Jamieson* (1795) Bell's Folio Cases 135. Cf. *Countess of Cassills v Earl of Roxburgh* (1679) Mor 2857 and 3695; *Nisbet v McLelland* (1686) Mor 3696; *Bruce v Sir James Hall* (1708) Mor 3696.

⁷⁵⁸ *Home v Pringle* (1706) Mor 734; *Earl of Aberdeen and Creditors of Merchiston, Competing* (1729) Mor 867 *rev'd sub nom Earl of Aberdeen v Earl of March* (1730) 1 Pat App 44. The point was debated but not decided in *Dougal v Gordon* (1795) Mor 851.

⁷⁵⁹ See generally, *Freeman & Lockyer v Buckhurst Park Properties Ltd* [1964] 2 QB 481 *per* Diplock LJ. There are, however, some older cases which held that service of an arrestment in the hands of a factor was insufficient: *Muirhead and McMitchell v Miller* (1610) Mor 732 and 2599; Hope, *Major Practicks* VI, 44, § 6; *Donaldson v Archibald-Cockburn* (1709) Mor 735; cf. *Lady Hisselside v Littlegill* (1685) Mor 11496; Sup Vol, Harscase, 25. The modern authorities on arrestment would suggest that, where free proceeds are to be arrested after the sale by a heritable creditor, the arrestment should be laid in the hands of the bank not the solicitors acting as agents for the bank in the sale: see e.g. *Abbey National Building Society v Strang* 1981 SLT (Sh Ct) 4; *Abbey National Building Society v Barclays Bank* 1990 SCLR 639; *Lord Advocate v Bank of India* (Sh Ct) 1991 SCLR 320 at 332 *aff'd* 1993 SCLR 123.

the cedent.⁷⁶⁰ Where an agent has a claim against his client, and this is ceded, the assignee is not absolved from making intimation because the cedent is the debtor's agent.⁷⁶¹

A distinction may also fall to be made between the kinds of money claim being assigned. If a claim has already been assigned in security, the debtor (i.e. the cedent of the security) will have a claim to any reversion against the assignee in security. This is itself a claim. In the transfer of the reversion, the debtor to whom intimation must be made is the transferee 'in security'. It is he who is the debtor in the obligation to account for any reversion.⁷⁶² If the assignation is a retrocession, there must still be intimation to the debtor.⁷⁶³

B. Debtor is a party to the assignation.

It seems that where the debtor is a party to the assignation there is no need to make intimation.⁷⁶⁴ The debtor who actively intervenes does not need the same protection as the passive debtor.⁷⁶⁵ It is not sufficient that the debtor is merely a witness.⁷⁶⁶ There is, however, the problem that this equipollent does not fulfil the requirement of certainty or publicity. In *Campbell's Trs v Earl of Beadlabane*,⁷⁶⁷ there was some reluctance to give countenance to the proposition that intimation or an equivalent is not required:

“Judgement must of course be pronounced in conformity to the opinion of the consulted judges; but I am not prepared to assent to all the propositions contained in that opinion. I have the greatest repugnance to the transference of

⁷⁶⁰ *Dougall's Creditors Competing* (1794) Bell's Folio Cases 41.

⁷⁶¹ See, analogously, *Campbell v McCreath* 1975 SC 81 OH.

⁷⁶² *Ayton v Romanes* (1895) 3 SLT 203 OH; *Whittall v Christie* (1894) 22 R 91. Cf. *Union Bank v National Bank* (1885) 13 R 380 rev'd (1886) 14 R (HL) 1. For the transfer and transmission of rights of reversion generally, see Erskine II.viii.9-15. See too Balfour, *Practicks*, 448.

⁷⁶³ Cf. *Microwave Systems (Scotland) Ltd v Electro-Psychological Instruments Ltd* 1971 SC 140 OH; *Bentley v McFarlane* 1964 SC 76. These cases are, however, confused. *Craig v Edgar* (1674) Mor 838 involved a general assignation on marriage. This required no intimation.

⁷⁶⁴ See e.g. *Creditors of Ballenden v Countess of Dalhousie* (1707) Mor 865; *Turnbull v Stewart and Inglis* (1751) 2 Kames Rem Dec 260; Mor 868; *Campbell's Tr. v Earl of Breadlabane* (1822) 2 S 62, on appeal (1825) 1 W & S 620, remitted to the Second Division in consultation with the other judges, (1827) 5 S 891; remitted to the Lord Ordinary, the reclaiming motion and appeal to the House of Lords: (1829) 7 S 767 aff'd (1831) 5 W & S 256; *Paul v Boyd's Trs* (1835) 1 Ross LC 511.

⁷⁶⁵ See e.g. *Turnbull v Stewart and Inglis* (1751) 2 Kames Rem Dec 260; Mor 868; Elchies, *Annualrent* No. 13; *Finlay's Trs v Alexander* (1866) 1 SLR 111 aff'd *sub nom Miller v Learmonth* (1870) 42 Sc Jur 418 at 421 *per* the Lord Chancellor; *Ayton v Romanes* (1895) 3 SLT 203 OH.

⁷⁶⁶ Hope, *Major Practicks* II, 12 § 9; *Mackalzean v Mackalzean* (1586) Mor 854 (inserted in notairal instrument of intimation as witness); *Murray v Durham Winton* (1622) Mor. 855; *Low v Currie* (1687) Mor Sup Vol., Harcase 25; *Graham v Livingston* (1611) Mor 13089.

⁷⁶⁷ (1827) 5 S 891.

the share of a partner kept concealed from the world, the partner being allowed to go on with management.”⁷⁶⁸

There seems much to commend this reservation. It is, of course, offset by the practical difficulties of someone in the dual position of transferee and debtor intimating to himself.⁷⁶⁹ Nevertheless such an idea is not unknown to the law.⁷⁷⁰ The writer would advocate a requirement of registration in the Books of Council and Session where the debtor is himself a party to the assignation. Again, this is based on a desire to protect against fraud.⁷⁷¹ Registration provides a certain date at which the transfer occurred, against which competing claims can be judged.⁷⁷²

C. Special Parties.

1. Trusts.

It seems that, where a trust is the debtor, intimation to one of the trustees is insufficient to transfer the claim to the assignee.⁷⁷³ Even if there is entry in the sederunt book, it seems that if this is not brought to the attention of the trustees, there cannot be sufficient intimation. This is overly formal. As was pointed out by counsel in one case, ‘the pursuer has

⁷⁶⁸ Per Lord Justice-Clerk Boyle (1827) 5 S 891 at 893. Compare Lord Fullerton in *Hill v Lindsay* (1846) 8 D 472 at 479. In the latter case Lord Fullerton made a distinction between the intimation that was required where the subject was a share in the partnership and where the partnership was a company, when the debtor was a party to the cession. Only in the first case did there require to be formal intimation. See also the comments by Lord Dreghorn in *Hay v Sinclair* (1788) Mor 1194; 10 Fac Coll 45; Hailes 1046 at 1046.

⁷⁶⁹ Bankton II, 192, 10 suggests that it is ‘absurd that one should intimate a right to himself’.

⁷⁷⁰ See, for example, in the field of company law: *Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald* [1996] Ch 274. Cf. *Moffat v Longmuir* 2001 SC 137; *James Prain & Sons Ltd* 1947 SC 325 at 329 per Lord Moncreiff: ‘A meeting at which only one member is present to play multiple parts may be thought to be nothing other than a pantomime’; *East v Bennett Bros Ltd* [1911] 1 Ch 163 and sections 267 (2) and 371 (2) Companies Act 1985.

⁷⁷¹ A beneficiary under a trust may also be a trustee (i.e. a trustee-beneficiary). He may want to assign his rights. This involves two complex questions of intimation: first, since the debtor is a party to the cession, is formal intimation to him necessary? Secondly, is this assumed intimation sufficient to bind any other trustees? See in this regard the dubious case of *Browne’s Tr. v Anderson* (1901) 4 F 305.

⁷⁷² Compare the doctrine of *data certa* in some continental European systems: see e.g. *Código Civil* Arts 1218-1220 and Art. 1526 (Spain); Art. 1328 *Code Civil/Code Civil belge*. This same principle underpins the requirement in France for a notarised deed to express the exact date on which payment was made, where the payer seeks to be subrogated (*subrogation personnelle*) to the payee’s rights under Art. 1250 *Code Civil* (*subrogation conventionnelle*). See also the Dalloz commentary thereto. This is because, unlike *cession de créance*, no intimation is required to the debtor to achieve a transfer. It is interesting that, although Scotland does not seem to have a developed doctrine of *data certa*, it has the mechanism to give effect to it in the Books of Council and Session and the Sheriff Court Books.

⁷⁷³ *Kyle’s Tr v White* (1827) 6 S 40; *Browne’s Trs. v Browne* (1901) 9 SLT 128 (OH) rev’d on a different point *sub nom Browne’s Trs v Anderson* (1901) 4 F 305, where it was noted that *Jamieson v Sharp* (1887) 14 R 644 was a special case (only one trustee was effectively acting and intimation was made to him); *Watt’s Trs v Pinkney* (1853) 16 D 279. Many of the cases involving trustees are complicated by the fact that they involve assignations of a ‘*spes successionis*’ for which see W.W. McBryde and G.L. Gretton ‘Sequestration and the *Spes Successionis*’ (2000) 4 *Edin LR* 129. But cf. the *obiter dicta* of Lord Kinneir in *Gracie v Gracie* 1910 SC 899.

no means of knowing the precise number of trustees named under the private trust; and even if he did discover this, he could not know how many had accepted'.⁷⁷⁴ In furtherance of their fiduciary duties to the beneficiary, the trustees have a duty to cooperate with each other. It would seem, then, that if one trustee receives intimation of an assignation failure by him to circulate this information among the other trustees is *res inter alios acta* in relation to the assignee. This would be consistent with the view that the trust is a *quasi-juristic* person in Scots law.⁷⁷⁵ Moreover, Erskine⁷⁷⁶ suggested that intimation to one of several 'joint-debtors' was sufficient, and this has been approved by the First Division.⁷⁷⁷

It is sometimes suggested that, since trusts require a quorum to act, intimation to one trustee is not sufficient.⁷⁷⁸ This argument fails to recognise that an assignation of a right in which the trustees are the debtors does not require their consent. In the case of service of an arrestment, it makes no difference if the debtor refuses service.⁷⁷⁹ However, since an officer of the court, in the presence of a witness, serves an arrestment, there is not the problem of requiring the debtor to acknowledge receipt. The officer merely notes that the arrestee refused to accept service.⁷⁸⁰ In the case of arrestments (and, therefore, assignations), then, intimation to one trustee binds all. It does not require a juridical act on the part of any trustee. Where a trustee pays after intimation made to another trustee, however, then, providing the paying trustee was in good faith, the trust will be protected. Any intimation to the trustee should state that the intimation is being made to him in his capacity as trustee, in respect of a trust debt.⁷⁸¹ The same principles would seem to apply to executors and judicial factors.⁷⁸²

2. Incapacitated Debtor: trustees in sequestration, judicial factors etc.

⁷⁷⁴ Per the Solicitor General (Hope) *arguendo* in *Black v Scott* (1830) 8 S 367.

⁷⁷⁵ *Alexander's Tr v Dymock's Trs* (1883) 10 . 1189 at 1195 per Lord President Inglis. See also an anonymous article at (1878) 22 *Journal of Jurisprudence* 617 especially at 622. It is unclear whether a trust can commit a criminal offence. But there is provision in the Criminal Procedure (Scotland) Act 1995, s. 141(2)(c) for service of a summary complaint on a trust. Remarkably, service on one trustee suffices. *A fortiori* intimation to a single trustee should be sufficient for the purposes of the civil law.

⁷⁷⁶ III.v.5.

⁷⁷⁷ *Mantach v Sharp* (1887) 24 SLR 453 at 455 per Lord President Inglis. In *Finlay's Trs v Alexander* (1866) 1 SLR 111 aff'd *sub nom Miller v Learmonth* (1870) 42 Sc Jur 418 HL there seems only to have been a single executor debtor who was also a party to the assignation in another capacity.

⁷⁷⁸ *Black v Scott* (1830) 8 S 367 per Lord Balgray at 369.

⁷⁷⁹ J. Graham Stewart, *The Law of Diligence* (1898) 320 citing Stair IV.xxxviii.15.

⁷⁸⁰ *Busby v Clark* (1904) 7 F 162.

⁷⁸¹ *Henderson's Trs v Drummond's Trs* (1831) 9 S 618; *Burns v Gillies* (1906) 8 F 460

⁷⁸² Cf. *Mitchell v Scott* (1881) 8 R 875.

Where the debtor has been sequestrated, all his assets are transferred to the trustee in sequestration.⁷⁸³ While the trustee does not become liable for the debts, the trustee must pay the creditors out of the assets. It therefore makes sense to intimate to the trustee. Since the debtor remains the obligant, any intimation to him will still be good in law if not in practice. There are difficult issues where the debtor has granted a trust deed for creditors; in particular whether non-acceding creditors can still use diligence.⁷⁸⁴

Where an individual lacks capacity and has a curator *bonis* or guardian⁷⁸⁵ acting for him, the *incapax* remains vested in his estate. If for any reason the ward were an assignee, it would be the curator or guardian who would have to intimate the assignation.⁷⁸⁶ Where a debtor has become incapacitated, intimation should be made to the curator or guardian. It is he or she who is responsible for the management of the debtor's affairs. Only the curator or guardian could make a payment.⁷⁸⁷ Again, however, it the *incapax* who remains the debtor; and intimation to an incapacitated debtor is still competent: as with intimation to a single trustee, no juristic act is required by the debtor. Practical considerations, however, strongly support intimation to the guardian: only the guardian will be paying the debts and only the guardian will be able to grant an acknowledgment. In the case of a judicial factor appointed over the estates of a partnership, or indeed a company,⁷⁸⁸ intimation should, for the avoidance of doubt, be made to the judicial factor.^{788a} Intimation made in the usual way will be effectual notwithstanding the appointment of the judicial factor, but there is the danger that the judicial factor will be able to intromit with the estate in good faith if intimation is not made to him.

3. Partnerships.

As in the case of a company (see below) it should be sufficient to post the intimation of the assignation to partnership's place of business. Partnerships have legal personality but, unlike companies, need not have a registered office. If intimation is to be made by notary,

⁷⁸³ Bankruptcy (Scotland) Act 1985, s. 31.

⁷⁸⁴ See in particular the conflicting opinions of the members of the Court in *Johnson and Colquhoun v Trustees of Fairholm's Creditors* (1770) Mor v. 'Bankrupt' App. No. 5; Hailes 386.

⁷⁸⁵ Adults with Incapacity (Scotland) Act 2000.

⁷⁸⁶ See Part III of the 2000 Act.

⁷⁸⁷ Bell, *Principles* (10th ed. 1899) § 2121; *Yule v Alexander* (1891) 19 R 167 at 168 *per* Lord President Inglis; Part III of the 2000 Act.

⁷⁸⁸ D. Bennett et al (eds) *Palmer's Company Law* para 15.601 (release dated September 2001).

^{788a} Cf. *Cross & Bogle v Mure* (1775) Mor 757; Hailes 615 *per* Lord Kames: 'I arrest in the hands of a debtor, to hinder him to pay to the common debtor. To what purpose is it to arrest in the hands of a bankrupt, who cannot pay, rather than in the hands of the factor who can? By the late statute [the 1772 Sequestration Act], the factor is *vested*, in truth and in words, a factor like the present one in truth, though not in words'.

therefore, the question arises: to whom can intimation be made? One of the characteristics of a partnership is mutual agency.⁷⁸⁹ Intimation to one of the partners will be sufficient. There seems no reason why intimation to one of the partners should have to be made at the firm's place of business.⁷⁹⁰ The legal incidents of a partnership demand that this proposition must be correct. A partner is jointly and severally liable for the debts of the partnership.⁷⁹¹ As is explained below, intimation to one co-obligant is intimation to all; however, should one of the partners, to whom intimation was not made, pay the cedent in good faith, the firm will be discharged. In the same vein, it has been held that a decree against a partnership is sufficient to charge an individual partner for payment of the whole debt.⁷⁹² The provisions of the Partnership Act 1890 should be sufficient to render evidence of ostensible authority unnecessary. Section 16 provides that notice to any partner of the firm who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm. In a case where one of the parties to the assignation and the debtor are both partnerships with a common partner, the knowledge of the debtor should be an insufficient equipollent to intimation. This is really no different from any other case where the debtor is a party to the assignation. Again, however, some additional act should be required to ensure that the transfer has a certain date.

4. Companies.⁷⁹³

(a) General

The Companies Act provides a general rule that service of documents on a company is effected by leaving it at, or sending it by post to, the company's registered office.⁷⁹⁴ Best practice is to post any intimation to the registered office. It is probably the case, however, that

⁷⁸⁹ Partnership Act 1890, s. 5.

⁷⁹⁰ Cf. the law on service of an arrestment and a charge for payment: J. Graham Stewart, *The Law of Diligence* (1898) 32 and 325; and citation: *Wordie v McDonald* (1831) 10 S 142.

⁷⁹¹ Partnership Act 1890, s. 4(2).

⁷⁹² *Selkrig v Dunlop & Co* (1804) Hume's Dec 477; *Thomson v Liddell & Co* 2nd July 1812 FC; *Knox v Martin* (1847) 10 D 50 at 55 *per* Lord President McNeill; *Ewing v McClelland* (1860) 22 D 1347 at 1351-2 *per* Lord Wood.

⁷⁹³ There is a wealth of jurisprudence under the analogous provisions of the *Nouveau Code de Procédure Civile* (Dalloz, 1999), Art. 651 ff. In France *signification* is even more formal than in Scotland: an officer of the court (*d'huissier en justice*) must perform the intimation. Much of what follows is also applicable *mutatis mutandis* to partnerships.

⁷⁹⁴ Companies Act 1985, s. 725(1). See also *Hannan v Kendal* 30th March 1897, Outer House, unreported. An extract of the Lord Ordinary (Kincairney)'s opinion is reproduced in an appendix to J. Graham Stewart, *The Law of Diligence* (1898) 849. The contractual aspects of the case are reported at (1897) 5 SLT 4.

intimation made at the 'proper place',⁷⁹⁵ which is not the registered office, will also be sufficient. If intimation is personal instead of postal, it may be delivered to an employee at this proper place.⁷⁹⁶ This must be a place where the business is habitually carried on.⁷⁹⁷ Intimation to the branch of a bank where an account is held would therefore be appropriate where an account holder assigns a right to payment against his bank on a credit account.⁷⁹⁸ This will not, however, transfer the liabilities which are owed by the bank on accounts which are held at other branches.⁷⁹⁹ In theory, intimation made at the head office of the bank should cover liabilities owed at all branches in Scotland. It is probably sufficient to hand the intimation to an employee at the branch.⁸⁰⁰ According to one Outer House case, money held on deposit receipt⁸⁰¹ is transferred by indorsation and delivery of the deposit receipt.⁸⁰² But the better view is that intimation to the bank is required.⁸⁰³

The company, if the cases are correct, will become bound to the assignee from the moment the employee receives the intimation.⁸⁰⁴ Again, there is likely to be no actual knowledge of the intimation at that time by other employees of the company who are responsible for making payment. Generally speaking, however, unless the debtor company can show that this bona fide payment was made through no fault of its own, the general principle should be that the company would be bound to pay the assignee from the time that the intimation was received.

⁷⁹⁵ *Glasgow Corporation v Watson* (1898) 25 R 690 at 695; *sub nom Campbell v MacAlister* 1898 SLT No. 417; (1898) 35 SLR 508 at 511 *per* Lord Young. It is submitted that this is still good law for the purposes of the law of intimation despite the observations of the First Division in *Rae v Calor Gas Ltd* 1995 SLT 244 on the issue of 'personal' citation; see also *Rachkind v Donald & Sons* 1916 SC 751 cited in a contributed note at 1982 SLT (News) 65; *Hay v London & North Western Rly Co* 1909 SC 707. But cf. *Ewing v McLelland* (1860) 33 Sc Jur 1 OH and *Graham v McFarlane & Co* (1869) 7 M 640.

⁷⁹⁶ *Glasgow Corporation v Watson*, *op. cit.*

⁷⁹⁷ *Aberdeen Railway Co v Ferrier* (1854) 16 D 422; *Hepper & Co v Walker & Co* (1903) 20 Sh Ct Rep 137; *Corson v McMillan* 1927 SLT (Sh Ct) 13.

⁷⁹⁸ *Dalrymple of Waterside v Bertram* (1762) Mor 752; Kames Sel Dec 263 cited with approval by Erskine III.vi.16; *Lord Advocate v Bank of India* (Sh Ct) 1991 SCLR 320 at 332 *aff'd* 1993 SCLR 123.

⁷⁹⁹ *Stewart v Royal Bank of Scotland* 1994 SLT (Sh Ct) 27. Cf. *McNairn v McNairn* 1959 SLT (Notes) 35; *Stevenson v T. Dixon Ltd* 1924 SLT (Sh Ct) 45; *London, Provincial and South-Western Bank v Buszard* (1918) 35 TLR 142.

⁸⁰⁰ *McIntyre v Caledonian Railway Co* (1909) 25 Sh Ct Rep 329. Cf. *Watt v Governor & Co of the Bank of Scotland* 1989 SCLR 548.

⁸⁰¹ These are now rare in practice.

⁸⁰² *Shawbridge's Trs v Bank of Scotland* 1935 SLT 568 OH.

⁸⁰³ *Muir v Ross* (1866) 4 M 820 at 826 *per* Lord Benholme.

⁸⁰⁴ Interestingly, it has been held in England that it is insufficient to serve a summons at the registered office by merely leaving it with a security guard or receptionist. Rather service must be to a 'managing agent' who has a discretion to accept service: *Amerada Hess v Rome* (2000) 97 (10) LSG 36 (QBD). Quite what is discretion to refuse service is unclear. Moreover how is the assignee to determine who such a person in the company is?

Evidence of acknowledgment is desirable. The best evidence is a written acknowledgement that binds the company. Here we encounter problems. There is a conflict of two legal principles: on the one hand there is the law relating to the subscription of deeds, on the other the company law relating to authorised agents. Determining whether there is a good acknowledgment is a two-stage process. First, is the deed validly executed? The relevant law is found in schedule 2 of the Requirements of Writing (Scotland) Act 1995. A deed is signed by a company if it is signed on its behalf by a director, or the secretary, or a person authorised to sign on the company's behalf.⁸⁰⁵ The acknowledgment is presumed to have been so granted if the signature is witnessed.⁸⁰⁶ Where the company has validly signed, but this has not been witnessed, the acknowledgment will be presumed to have been so granted if it was subscribed by two directors, a director plus the secretary, or two persons authorised to act on its behalf.⁸⁰⁷ The second stage is a question of authority.⁸⁰⁸ Only the board of directors have capacity to bind the company. So an acknowledgement which bears to be valid, and indeed possibly probative, will be meaningless if the signatories did not have authority to perform such an act on the company's behalf.⁸⁰⁹ Whether they were, in fact, so authorised, is a question of the ordinary law of ostensible authority. It should be noted that a single director generally has little or no authority to bind the company *per se*. But it is suggested that directors are, ordinarily, authorised to 'clothe documents with formal validity which has already been authorised by the board or the managing director'.⁸¹⁰ Since an acknowledgement is essentially just a receipt rather than a juridical act, signature by a director would seem to be sufficient.⁸¹¹ Acknowledgment by the company's secretary will almost certainly be good evidence against the debtor company.⁸¹² It has been held that intimation to a treasurer of a hospital was good intimation to the whole company,⁸¹³ but that service of an arrestment on a clerk to certain Waterworks Commissioners was invalid.⁸¹⁴ Nevertheless, it is thought that intimation to an official such as a clerk would be more than sufficient today.

⁸⁰⁵ Requirements of Writing (Scotland) Act 1995, schedule 2, para 3(1).

⁸⁰⁶ Requirements of Writing (Scotland) Act 1995, s. 3(1) as substituted by para 3(5) of schedule 2.

⁸⁰⁷ Requirements of Writing (Scotland) Act 1995, s. 3(1A), as substituted by para 3(5) of schedule 2.

⁸⁰⁸ See also the *Law Commissions' Joint Consultation Paper on Partnership* (Law Comm CP No.159; SLC Discussion Paper No. 111, 2000).

⁸⁰⁹ Even a probative deed does not prove that the person signing does in fact hold their designated office: s. 3(1C) 1995 Act.

⁸¹⁰ See R. Potts (ed.) *Gore-Browne on Companies* para § 5.3.3.

⁸¹¹ Again, there may be a distinction to be made if the written acknowledgement required at common law is more than purely evidentiary and is an *essential*, rather than a *formal*, requirement.

⁸¹² *Panorama Developments (Guilford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711.

⁸¹³ *Menzies' Creditors v Law* (1739) Mor 738 and 850; 5 Br Sup 656.

⁸¹⁴ *Gall v Stirling Waterworks Commissioners* 1901 9 SLT 123 OH.

As far as other officers are concerned there is a difficult distinction to be made between their ostensible authority to bind the company and their ostensible authority to communicate decisions of the company. While a putative agent cannot represent his own authority,⁸¹⁵ the assignee must be able to ask someone, other than the board itself, who has authority to bind them. That person (to whom the inquiry is made) himself must have ostensible authority to make that representation. The distinction is therefore between authority to bind the company and authority to make representations of fact.⁸¹⁶ Again, since an acknowledgment is not a juridical act on the part of the company, but essentially an evidentiary representation that a certain document has been received (i.e. a copy of the assignation) this type of ostensible authority should be sufficient.

These rules, however, do not reflect commercial (or indeed any other) reality. The idea that good evidence of a good intimation to e.g. the Royal Bank of Scotland could only be provided in writing by a member of the board is not only unrealistic, but preposterous. The common sense approach is that found in *Glasgow Corporation v Watson*: intimation to an employee and an acknowledgment from him is sufficient.

(b) Companies in Liquidation, Receivership or Administration.

Where a company is in liquidation, administration or receivership should not affect the method of intimation. In the case of large companies at least, it is unlikely that intimation would ever be made to a director in any event. The fact that a liquidator, administrator, administrative receiver or receiver has superseded all or some of the director's powers is therefore immaterial for the purposes of intimation. The company, after all, remains the debtor in the obligation.⁸¹⁷

(c) Crown as a debtor.

⁸¹⁵ *Armagas Ltd v Mundogas SA, the Ocean Frost* [1986] AC 717.

⁸¹⁶ *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] BCLC 1409 at 1422d (Steyn LJ); 1425h (Evans LJ); 1427c (Nourse LJ). Cf. *Nouveau Code de Procédure Civile* (1999) Art. 654, Dalloz commentary, n. 5.

⁸¹⁷ Cf. *Nouveau Code de Procédure Civile* Art. 654, Dalloz commentary n. 3.

Where the Crown is a debtor, intimation should be made to the 'appropriate law officer'.⁸¹⁸ The appropriate law officer is the Lord Advocate where the debtor is part of the Scottish administration; otherwise intimation should be made to the Advocate General for Scotland.⁸¹⁹ The Advocate-General is based in London. This has the peculiar result that intimation of the assignation of a Scottish debt may be made in another jurisdiction.⁸²⁰

(d) Unincorporated Associations.

Unincorporated associations have no legal personality. There is some theoretical difficulty with the idea that an entity can contract a debt while at the same time lack personality. Be that as it may, it is perhaps doubtful that intimation can be made by sending a copy of the assignation to the address of the association or given to an employee, although, in principle, there seems no good reason why this should not be possible. For the avoidance of doubt, however, intimation should probably be made to an office bearer.⁸²¹

IV. Good Faith Payment

A. General

It was suggested above that a requirement of formal intimation had the virtue of certainty. A system based on a transfer at the date of delivery of the deed or purely in the intention of the parties suffers from the problem that the debtor is unlikely to know of the transfer until after it has been made. Such a system may, however, satisfy the goal of certainty by requiring an authentic or notarised deed of a certain date before the law will hold the claim to be transferred. But, even then, there is a real possibility that the debtor, in ignorance of the transfer, may pay his former creditor on the basis of a genuine understanding that the cedent is

⁸¹⁸ Cf. Crown Proceedings Act 1947, s. 46; Crown Suits (Scotland) Act 1847, s. 1 (as amended by Scotland Act 1998, Sch 8, para 2) cited by G.L. Gretton, 'Diligence' in *Stair Memorial Encyclopaedia* vol 8 (1992) para 259. These provisions apply only to the bringing of proceedings against the Crown; they are relevant to intimation only by analogy. See also *Cameron v Lord Advocate* 1952 SC 165 OH.

⁸¹⁹ Crown Suits (Scotland) Act 1857, s. 4A. See also the Transfer of Functions (Lord Advocate and Advocate General for Scotland) Order 1999 SI 1999/679; Scotland Act 1998 (General Transitory, Transitional and Savings Provisions) Order 1999, SI 1999/901.

⁸²⁰ On her website, the Advocate General asks for the service of all documents to be made to the Solicitor to the Advocate General, whose office is in Edinburgh (see <www.oag.gov.uk>). Arguably, however, because intimation is a substantive legal requirement – with its own rules and legislation – advantage cannot be taken of the Advocate General's sensible request and intimation must be made to the proper place which, for the Advocate General, is London. For intimation outwith the jurisdiction, see McBryde, *Contract*, para 12-125 and R.G. Anderson, 'A Note on Edictal Intimation' (2004) 8 *Edin LR* 272.

⁸²¹ Cf. *Renton Football Club v McDowall* (1891) 18 R 670 at 674 *per* Lord McLaren.

still his creditor. In this situation the debtor should be discharged.⁸²² In Scotland, where it has been suggested the requirements for formal intimation are strict, there are still some clear situations where some element of good faith protection will be required.⁸²³ We are here dealing with voluntary assignments. Occasionally, there occurs the equivalent of an intimated assignment by force of law, e.g. the act and warrant confirming a trustee in sequestration.⁸²⁴ In this situation there is no actual intimation to the debtor.⁸²⁵ If the bankrupt's debtor pays the bankrupt in good faith, he will be discharged.⁸²⁶ However, some large commercial undertakings, such as banks, will have knowledge of any notice of sequestration in the Edinburgh Gazette imputed to them. So, where a bank paid out sums to the bankrupt that the latter held on credit with the bank, after publication of a notice of his sequestration, the bank was liable to make a second payment to the trustee.⁸²⁷ It was irrelevant that the individual teller making the payment was in good faith. Generally speaking, however, the guiding policy here is one of debtor protection. The principle of good faith payment was recognised by Stair:

“The third common exception in personal actions is, payment made *bona fide* to him who had not the true right, but where there was another preferable right, which the defender neither did, nor was obliged to know, and therefore the law secures the payer, without prejudice to the pursuer to insist against the obtainer of the payment.”⁸²⁸

This principle is fundamental. It is the basis of debtor protection in systems where notification is not a constitutive requirement for transfer. Potentially this principle could form the basis for future development of the law if were decided to abolish intimation as a constitutive requirement.

⁸²² *Hume v Hume* (1632) Mor 848. Cf. Art. 6: 34 *BW*; Art. 1643 *Code Civil du Québec* where the debtor who pays the cedent in good faith is discharged even if the formalities required for the cession (which usually encompass debtor notification) are fulfilled.

⁸²³ Cf. P. Nienaber, 'The Inactive Cessionary' 1964 *Acta Juridica* 99 at 118 ff who argues that any protection of the debtor should be based on the assignee being personally barred. But there can be situations where the assignee does everything in his power to bring the assignment to the debtor's attention, but is nevertheless unsuccessful. The debtor then pays the cedent in good faith: *Hume v Hume* (1632) Mor 848.

⁸²⁴ Bankruptcy (Scotland) Act 1985, s. 31(4). It is also the equivalent of an arrestment followed by forthcoming: s. 37(1)(b).

⁸²⁵ There are other situations where there may be a transfer by force of law. Even so, intimation may be of some practical importance. Cf. Bankton II, 193, 16.

⁸²⁶ s. 32(6) (*acquirenda*) and s. 32(9) (all other dealings). See also Erskine III.v.7; J.J. Gow, *Mercantile and Industrial Law of Scotland* (1964), 70; *Adam v McRobbie* (1845) 7 D 276; *McDonald v McIntosh's Tr.* (1852) 14 D 937; *Gray v Gray's Tr.* (1895) 22 R 326; *Mishas's Tr. v Bank of Scotland* 1990 SLT 23; *Rankin's Tr. v H C Somerville & Russell* 1999 SC 166 OH. Cf. the position on the appointment of a judicial factor: Judicial Factors Act 1889 (as amended by Act of Sederunt 17th March 1967); *Campbell's JF v National Bank of Scotland* 1944 SC 495.

⁸²⁷ *Watt v Bank of Scotland* 1989 SCLR 548.

B. Edictal Intimation / Execution.

Edictal intimation, according to the books, is the method by which intimation is effected of an assignation of a claim in which the debtor is abroad or cannot be found. Although the point seems to have escaped the attention of academics, practitioners and, most importantly, the legislature, it is no longer competent to effect an edictal intimation.⁸²⁹ Assuming – perhaps with naïve sanguinity – that the oversight will be corrected, then the law is as follows. Edictal intimation is, at present,⁸³⁰ the only recognised instance of registration as an equivalent of intimation in Scots law. Registration is allegedly the paradigm method for implementing a policy of publicity. Yet utilisation of edictal intimation presupposes that the debtor has *no actual knowledge* of the assignation or diligence used against him. The idea that all Scots maintain an agent (or procurator) with knowledge of the Register is fictional. Edictal citation has been described as ‘highly artificial’.⁸³¹ Not even the most fanatical adherent of a doctrine of constructive notice would maintain that the debtor or arrestee should be imputed with knowledge by virtue of registration at the Office of Edictal Citations.⁸³²

So does the law protect the debtor’s position? Compare the analogous position of arrestment. Take the example of a fund in the hands of a person (George) subject to the jurisdiction of the Scottish Courts who cannot be found. He has an obligation to account to John. Jessica is John’s creditor. She has extracted a decree for payment against John. She seeks to serve an arrestment in the hands of George. This has to be done edictally. George reappears. Having no knowledge of the arrestment he has accounted in good faith to John. John now disappears. Is George liable for breaching the arrestment? It is the potential for abuse that perhaps underlies Erskine’s statement that where an arrestment is properly served on a debtor, it does not matter that he does not have actual personal knowledge of the proceeding, ‘for the admitting pretences of ignorance might evacuate the lawful diligence of creditors’.⁸³³ This is consonant with the general principle, that the law is concerned with

⁸²⁸ Stair IV.xl.33. See also Stair, I.viii.3. Cf. Erskine III.iv.3.

⁸²⁹ See R.G. Anderson, ‘A Note on Edictal Intimation’ (2004) 8 *Edin LR* 272. For edictal intimation in the Haseatic City of Hamburg before the BGB, see H. Baumeister, *Das Privatrecht der Freien und Hansestadt Hamburg* (1856) I, 89.

⁸³⁰ However, as has been argued, where there would otherwise be no certain date of intimation (as in the case where the debtor is a party to the assignation) registration in the Books of Council and Session is wise, despite the decision in *Tod’s Tr v Wilson* (1869) 7 M 1100.

⁸³¹ *Corstorphine v Karsten* (1898) 1 F 287 at 292 *per* Lord President Robertson.

⁸³² Registration at least provides certainty.

⁸³³ III.vi.14, citing *Robert Blackwood v The Earl of Sutherland* (1703) Mor 1793, a case involving edictal citation of an army officer serving abroad. In ignorance of the arrestment the officer paid the common debtor. He

objective and not subjective knowledge. However, statutory protection for arrestees abroad upon whom there had been only edictal service, was subsequently introduced.⁸³⁴ A *bona fide* payment would not render them liable for breach of the arrestment. This was reflected in a later case, where a trustee lacked private knowledge of an arrestment which had been properly served at his dwelling place.⁸³⁵ Arrestees are now protected generally.⁸³⁶ It seems desirable that the law should have some sort of exception for the debtor who can prove that he made payment to the cedent after intimation in good faith.⁸³⁷ The burden, however, should be on the debtor.⁸³⁸

C. Co-debtors.

“Where there are many obligants whether joint debtors, or principals or cautioners, intimation made to any one is sufficient for completing the conveyance; but such intimation is not effectual for interpellating those to whom no intimation was made from making payment to the cedent; and therefore assignees ought in prudence to make intimation to all of them.”⁸³⁹

The situation of co-debtors is difficult. The creditor in their obligation can seek performance of the total obligation from one of the debtors. If intimation were required to all, the deisreability of a joint and several obligation would, from a creditor's point of view, be considerably reduced. Conversely, if co-debtors were ignorant of each other, then it would be harsh to have the knowledge of one of their number imputed to the others. Any payment in ignorance should therefore have a good faith defence. This writer agrees with Professor Reid:

was nevertheless held liable for breach of the arrestment. Cf. *Mackie v Dunbar* (1628) Mor 1788 and *Hume v Hume* (1632) Mor 848.

⁸³⁴ Payment of Creditors (Scotland) Act 1783 (23 Geo III, c. 18) s. 3; Payment of Creditors (Scotland) Act 1793 (33 Geo III, c. 74), s. 4; Payment of Creditors (Scotland) Act 1814 (54 Geo III, c. 137) s. 3; Bankruptcy (Scotland) Act 1856, s. 2 (both provisions have been repealed). Arrestees furth of Scotland were also protected in some older cases: e.g. *Scott v Fludyer & Co* (1770) Mor v. ‘Arrestment’ App. No. 1; Hailes 348 at 349 *per* Lord Coalston: to require a second payment to the assignee ‘would be to introduce a new and unknown hypothec into the law’. *Scott* was approved in *Laidlaw v Smith* (1841) 2 Rob 490 at 503 *per* Lord Cottenham LC.

⁸³⁵ *Laidlaw v Smith* (1838) 16 S 367 *aff'd* (1841) 2 Rob 490. Cf. *Leslie v Lady Ashburton* (1827) 6 S 165.

⁸³⁶ Debts Securities (Scotland) Act 1856, s. 1 cited by W.A. Wilson, *The Scottish Law of Debt* (2nd ed. 1991) para 17.5.

⁸³⁷ Cf. J. Russell, *Theory of Conveyancing* (1788), 173.

⁸³⁸ See *per* the Lord Justice-Clerk in *Laidlaw* at 373: ‘I could conceive a case of *presumptio juris et de jure* of an arrestee’s knowledge of an arrestment having been used’; Lord Glenlee: ‘if the party appears *desiisse possidere dolo malo*, he must acquit himself of all suspicion’.

⁸³⁹ Erskine III.v.5, approved in *Montach v Sharp* (1887) 24 SLR 453. Erskine cites Stair III.i.10 which is quoted in the text below. Stair deals expressly with correality.

‘in the case of joint debtors, intimation to one completes the transfer, but intimation to all is necessary to prevent payment to the cedent’.⁸⁴⁰

D. Cautioners.

Suppose A is the creditor, D is the debtor and G is the cautioner. A assigns his right against D to B. This is intimated to D. Assignment of a claim carries any accessory obligations.⁸⁴¹ Caution is an accessory obligation. It is rarely suggested that there must be intimation to the cautioner as well as to the principal debtor.⁸⁴² Stair suggests that intimation to one is intimation to all:

“Where there are many, *correi debendi*, principal or cautioners, Intimation made to any will be sufficient to all; yet this will not exclude payment made by another of the debtors, *bona fide*, to whom no intimation was made to secure which, it is safest for assignees to intimate to all the *correi debendi*.”⁸⁴³

What, then, if A (the cedent) calls upon G to pay after the intimation of the assignation to D, but before G is aware of the transfer? Does a good faith payment to the cedent discharge the cautioner, G? If so, is he entitled to relief against the debtor? If relief is based on the *beneficium cedendarum actionum* then the cedent has nothing to assign. He no longer has any rights against the debtor. This would suggest that payment to the cedent after intimation does not discharge the cautioner. The principal debtor’s obligation, after all, is no longer owed to the cedent but to the assignee. The assignee, on this analysis, would still be entitled to call upon the cautioner. The assignee may not even have been aware of the existence of the cautioner. How can an assignee be expected to intimate then? The cautioner’s remedy is to bring the *condictio indebiti* against the cedent for recovery of the double payment, and to demand an assignation of the assignee’s rights against the principal debtor.

Nevertheless, such a result is harsh on the cautioner. He has paid the cedent in good faith. Should this not provide a defence against a demand from the assignee? If so, the assignee has the *beneficium cedendarum actionum* of the cautioner’s *condictio* against the

⁸⁴⁰ K.G.C. Reid, ‘Unintimated Assignations’ 1989 SLT (News) 267 at 269. See also the opinion of Stair quoted at n. 843 below; and T.M. Taylor, ‘Bona et Male Fides’ in Viscount Dunedin (ed.) *Encyclopaedia of the Laws of Scotland* vol. 2 (1927) para 686.

⁸⁴¹ Stair III.i.17; Erskine III.v.8; Bankton II, 197, 7; *Wilson v Burrel* (1748) Kilkerran 1. See generally authority cited in chapter 2 above, n. 40.

⁸⁴² Hope, *Major Practicks* II, 12, § 8 takes the view that intimation to the principal puts the cautioners *in male fide* even if they are ignorant of the transfer. *Mosman v Bells* (1670) 2 Br Sup 457 is also authority for this proposition. See also *Lyall v Christie* (1823) 2 S 288 and Montgomerie Bell, *Lectures* (3rd ed. 1882), 313. Cf. Art. 1645 *Code Civil du Québec*.

⁸⁴³ Stair, III.i.10.

cedent. As a matter of policy, the onus should be on the assignee to make intimation to the cautioner if the assignee wants to ensure the benefit of the accessory obligation. Were it otherwise, would threaten the free transfer of cautionary obligations on the basis of potential prejudice to the cautioner.⁸⁴⁴

E. Miscellaneous.

There must also be a residual category. As has become evident above, Scots law still insists on a formal intimation requirement to transfer the claim being assigned. Nevertheless, there are some instances where formal intimation may have been properly made, resulting in the transfer of a claim, but the debtor, as a matter of fact, remains ignorant of it. The most common example will be postal intimation to the debtor. If the debtor pays the cedent in good faith because he never received the intimation before payment, he must have a defence of good faith payment. This miscellaneous category should also cover cases which would fall within a claim of *assignatus utitur jure auctoris* or the corresponding (identical) rule for arrestment, viz. that the arrestee should not be prejudiced by the arrestment.⁸⁴⁵ So, for example, where the debtor sends a cheque to the cedent on day 1, and receives intimation of the assignation on day 2, the debtor should not be forced to countermand the cheque or bear the risk that any countermand will be too late. If his cheque clears on presentment by the cedent, then the debtor shall be discharged.⁸⁴⁶ If the cheque in favour of the cedent does not clear, then the assignee can demand payment; there is only a difficulty because of the time lag involved in a payment by cheque – discharge is conditional on the cheque being honoured.⁸⁴⁷ The position with credit cards may be different.⁸⁴⁸

⁸⁴⁴ See J-L. Baudouin and P.G. Jobin, *Les obligations* (5th ed. 1998) para 918. In the converse situation it was held that bona fide payment by the principal debtor to the cedent when there had been only intimation to the cautioner, was a good defence when the principal was sued by the assignee: *Lyon v Law* (1610) Mor 1786.

⁸⁴⁵ J. Graham Stewart, *Diligence*, 233: 'Arrestment cannot have the effect of making the arrestee's position worse'.

⁸⁴⁶ These were the facts in *Bence v Shearman* [1898] 2 Ch 582.

⁸⁴⁷ *Leggat Bros v Gray* 1908 SC 67; *McLauchlin v Allied Irish Bank* 2001 SC 485 and authority cited in n. 195 above.

⁸⁴⁸ *Re Charge Card Services Ltd* [1989] Ch 497 CA.

V. Equipollents.⁸⁴⁹

A. General

The policy of the law is certainty. The Courts are – or at least traditionally were – reluctant to expand the categories of equipollents to notarial or statutory intimation. Verbal intimation is almost certainly insufficient.⁸⁵⁰ A written acknowledgement by the debtor is probably essential if there is to be an equipollent of notarial intimation.⁸⁵¹ This leaves little room for confusion. There are, admittedly, several cases where the requirement of intimation has been relaxed to such an extent that if the reasoning in those cases were to be followed, transfer could hardly be said to be based on intimation.⁸⁵² However, these cases are of limited utility since they confound mandates to pay with mandates to uplift. In a mandate to pay, since there is nothing to intimate, it is hardly surprising that informal intimation was held to be sufficient.

B. Acts of the debtor.

The position is concisely stated by Stair:

‘Any writ under the debtor’s hand, acknowledging the *production of the assignation*, will be sufficient intimation, as if he gave a bond of corroboration to the assignee, or gave discharges of the annualrent, or any part of the principal sum’.⁸⁵³

⁸⁴⁹ Francophone lawyers use the same terminology: see P. van Ommeslaghe, ‘La transmission des obligations en droit positif belge’ in *La transmission des obligations* (1980), 96.

⁸⁵⁰ *The Queen and the Abbot of Couper v The Laird of Duffus* (1558) Mor 846 has never been doubted.

⁸⁵¹ *McGill v Hutchison* (1630) Mor 860; *Home and Elphinston v Murray* (1674) Mor 863; *Newton & Co v Cologan & Co* (1785) Mor 850; *Donaldson v Ord* (1855) 17 D 1053 at 1070 *per* Lord Justice-Clerk Hope. But compare his earlier opinion in *Wallace v Davies* (1853) 15 D 688 at 696.

⁸⁵² *Wallace v Davies* (1853) 15 D 688 at 696 *per* Lord Justice-Clerk Hope; *Finlay’s Trs v Alexander* (1866) 1 SLR 111 at 112 *per* Lord Justice-Clerk Inglis. Lord Justice-Clerk Hope departed from this view in *Donaldson v Ord*. Inglis’ opinion in *Finlay’s Trs* is not easy to follow. Cf. *Watt’s Trs v Pinkney* (1853) 16 D 279 at 287 *per* Lord Ivory: he maintained that assignation occurs only on intimation, but that intimation could be informal. The *dicta* in *Libertas-Kommerz GmbH v Johnston* 1977 SC 191 OH were *obiter*; while in *Lombard North Central Ltd v Lord Advocate* 1983 SLT 361, the court failed even to consider the requirement of intimation: see K.G.C. Reid, ‘Unintimated Assignations’ 1989 SLT (News) 267.

⁸⁵³ III.i.9 (emphasis added). In modern law, production of the assignation to the debtor will suffice for intimation alone, no additional acknowledgment being requirement. In Stair’s time, however, the intimation had to be notarial. See also *L. Dunipace v Sandis* (1624) Mor 859. In France, such an acknowledgement by the debtor will have important consequences: the debtor will be deprived of the right to plead compensation of debts, due by the cedent to the debtor, against the cessionary: see Art. 1295 *Code civil*; L. Aynès, *La cession de contrat* (1984) 40, n. 70. Cf. Art. 1295, *Code civil belge*.

In *Newton v Colloghan*⁸⁵⁴ it was held that intimation was effected by holograph writing of the debtor on the back of a bond, even though this was neither attested nor dated. The Court was apparently influenced by the usage of the banking profession. Nevertheless, several members of the Court were apparently of opinion that the intimation was insufficient in law and the practice should not be encouraged. An acknowledgement, if it is just that, must be distinguished from a promise to pay (an independent unilateral obligation). In one case it was successfully argued that ‘intimation cannot be supplied without a document in writ [sic], or at least a promise of payment upon communing’.⁸⁵⁵ In modern law, something less than a promise to pay would suffice as an acknowledgement. However, it is likely that some written deed will be required so that there is an ascertainable date on which the transfer can be said to have occurred. Payment or part-payment by the debtor to one holding a delivered but otherwise unintimated assignation is an acknowledgment, as recognised by Stair in the above-quoted passage.⁸⁵⁶ In some other legal systems, equipollents are of more limited utility in that they have only limited effect: while a debtor who acknowledges the assignation thereby becomes bound to the assignee, creditors of the cedent are not.⁸⁵⁷ There is no trace of such limited effect being accorded to an equipollent in Scots law.

The equipollent of acknowledgment does give rise to a theoretical problem. Acknowledgment – whether in writing or by payment – is a unilateral act of the debtor.⁸⁵⁸ As a result of this (perhaps unwanted) intervention by the debtor, the holder of the delivered but unintimated assignation becomes the assignee, perhaps against his will. Indeed, this incident has an unexpected consequence for the principle of good faith payment in assignation: assuming the assignation is valid, good faith payment can apply only to a payment made to the cedent. A payment made to the assignee after delivery of the assignation, but before intimation, renders the holder of the assignation the debtor’s creditor. As a result there is no issue of good faith payment: the debtor, by his act of payment, renders the assignee his creditor.

⁸⁵⁴ 23rd November 1785 FC; Mor 850; Cf. *Earl of Selkirk v Gray* (1708) Mor 4453; (1709) Rob 1; *Watson v Murdoch* (1755) Mor 850; 19th November 1755 FC; *Selkirk v Davies* (1814) 2 Dow 230.

⁸⁵⁵ *Faculty of Advocates v Dickson* (1718) Mor 866; Dalrymple’s Dec 246.

⁸⁵⁶ See too *Livingstone v Lindsay* (1626) Mor 860; *Ridpeth’s Exrs v Hume* (1669) Mor 2792; 1 Stair 647.

⁸⁵⁷ P. van Ommeslaghe in *La transmission des obligations*, *op. cit.*, n. 849, at 96-97. Grosskopf, *Geskiedenis*, 85 suggests that this equipollent was introduced into French law by Pothier, (*Traité du droit de domaine de propriété* (1771) § 215). But this may be doubted. In any event, unlike modern French law, Pothier gave full effect to an acceptance: it was good *erga omnes*; further, for Pothier, acceptance has no effect on the debtor’s right to plead compensation.

⁸⁵⁸ P. van Ommeslaghe in *La transmission des obligations*, *op. cit.*, n. 849, at 93.

C. Correspondence between Assignee and the Debtor.

Recently it has been suggested that as long as the debtor has been made aware of the intimation, the courts 'will not require anything formal by way of intimation'.⁸⁵⁹ This is based chiefly on an Outer House decision in 1977.⁸⁶⁰ The point, however, was not a live one: counsel had conceded the point. In any event, the raising of the action was sufficient formal intimation.⁸⁶¹ There is perhaps authority for the proposition that if there is informal intimation such as correspondence, then provided that there is a written acknowledgment from the debtor 'which does acknowledge the interpellation,'⁸⁶² then there is good intimation. Nevertheless, since this requires the participation of the debtor, this is not a true method of informal intimation. Acts of the debtor are well established as equipollents.⁸⁶³ The correct position is stated in the one line report of an old case: 'Found the writing a letter to the debtor not a sufficient intimation of an assignation'.⁸⁶⁴ Nevertheless, in a recent case a proof before answer was allowed on the basis of averments that intimation had been made merely by letter.⁸⁶⁵

D. Judicial Intimation.

Production of an assignation in judicial proceedings is said to be the best of intimations⁸⁶⁶ in that 'the publication of the conveyance is still more solemn than in the case of a notarial instrument; for they are judicial acts, exposing the conveyance of the right in

⁸⁵⁹ R. Bruce Wood, 'Special Considerations for Scotland' in F. Salinger, *Factoring: the Law and Practice of Invoice Finance* (3rd ed. 1999) para 7.41. In a similar vein see *Wallace v Davies* (1855) 17 D 688 at 693 per Lord Robertson (Ordinary).

⁸⁶⁰ *Libertas-Kommerz GmbH v Johnston* 1977 SC 191. The decision is inconsistent with the opinions expressed in the Inner House, albeit probably *obiter*, in *Gallems Ltd (in receivership) v Barrat Falkirk Ltd* 1989 SC 239. It was explicitly held in *Faculty of Advocates v Sir Robert Dickson* (1718) Mor 866; Dalrymple's Dec 246 that correspondence was insufficient intimation. See also *John Laurie v Hambly Ltd*, 15th April 1992, Outer House, unreported, Lord Penrose. Lord Penrose was counsel in *Libertas-Kommerz*.

⁸⁶¹ Although this does not seem to have been argued by counsel for the pursuer (a Mr. Hope).

⁸⁶² *Wallace v Davies* (1855) 15 D 691 at 696 per Lord Justice-Clerk Hope; see also Lord Rutherford (Ordinary) at 692-3. Cf. *Microwave Systems (Scotland) Ltd v Electro-Physiological Instruments Ltd* 1971 SC 140 OH.

⁸⁶³ See above, and also Hope, *Major Practicks* II, 12 § 33.

⁸⁶⁴ *Bayne v Cunningham McMillan* (1679) Mor 863 and 9131. See further the unsuccessful arguments for the Faculty of Advocates, suing as assignees, in *Faculty of Advocates v Sir Robert Dickson* (1718) Dalrymple's Dec 246: 'Sir Robert [the debtor] took the advantage to raise a process before intimation, which can afford him no advantage; because it was a point of civility in the Faculty, not to intimate or charge, but to acquaint him in discreetest manner of an onerous right in order to obtain payment...'

⁸⁶⁵ *Safdar v Sahid* 2004 GWD 28-586.

⁸⁶⁶ *Carter v McIntosh* (1862) 24 D 925 at 934 per Lord Justice-Clerk Inglis.

favour of the pursuer to the eye of the judge as well as the debtor'.⁸⁶⁷ The principle is deeply rooted in Scots law:

“Intimation may be by any legal diligence, as by arrestment, by a charge or process upon the assignation: yea, though the process be not sustained, because all parties having interest were not called⁸⁶⁸ it will stand as an intimation...”⁸⁶⁹

There are two important issues which follow. First, there must, as a general rule, have been a deed of assignation; otherwise there will be nothing to produce.⁸⁷⁰ Secondly, what exactly is the relevant date on which intimation is made? Only if there is a certain date on which an assignation, intimated by the production of the deed in proceedings,⁸⁷¹ can judicial intimation be said to be the ‘best’. Here we encounter difficulties. There are a number of possibilities: the service of the initial writ,⁸⁷² the lodging of the assignation in process, the closing of the record,⁸⁷³ the date of the decree, or the date of the extract of the decree. There is some difficulty with the proposition that the date of intimation can be held to be the date of service of the initial writ.⁸⁷⁴ At this date the debtor will have no idea on what basis the assignee has a title to sue:

“I hesitate, however, to believe (what some of the older judgements point at) that the mere act of citation to such a process, not followed with judicial production of the assignment, shall be equally effectual; because that step does not carry evidence to the debtor of the verity of the alleged assignment, or the ground of his claim.”⁸⁷⁵

The leading case is *Carter v McIntosh*.⁸⁷⁶ This is probably the most cited case in the Scots law of assignation. Unfortunately, the facts of the case are difficult. They must therefore be recited

⁸⁶⁷ Erskine III.v.4.

⁸⁶⁸ This surely cannot mean that the debtor can fall into the category of all parties not called.

⁸⁶⁹ Stair III.i.7; Cf. Erskine III.v.4; Bell, *Comm* II, 18; Bell, *Prin* § 1465. Cf. *Lord Elphinston v Ord* (1624) Mor 858; *Oglivie v Oglivie* (1681) Mor 863; Sup Vol 21.

⁸⁷⁰ Somewhat subverting the theory that an assignation does not have to be in writing according to the Requirements of Writing (Scotland) Act 1995, s. 11(3)(a); but cf. *Gams v Russel's Tr.* (1899) 7 SLT 289 OH. The advantage that the omission does have is to allow a development of a doctrine of *cessio legis*. In such a situation detailed averments as to the basis of the pursuer's position might suffice. In terms of Art. 1644, *Code Civil du Québec*, any other evidence of the assignment can be produced in the process. The interesting point is made in Quebec that if the debtor pays between service and the actual appearance in court, the assignee alone will be liable for any expenses, unless the debtor had not complied with an earlier intimation: J.-L. Baudouin and P.G. Jobin, *Les obligations* (5th ed. 1998) para 895.

⁸⁷¹ *Thomas Dunn's Tr* (1896) 4 SLT 46 OH.

⁸⁷² *Whyte v Neish* (1622) Mor 854; *Murray v Durham* (1622) Mor 855.

⁸⁷³ This seems to be the only certain date for intimation in *Carter v McIntosh*.

⁸⁷⁴ The date preferred in *Nigel Lowe Holdings Ltd v Intercon Construction (Pty) Ltd* 2004 GWD 40-816, para [54] *per* Sheriff Principal Dunlop QC. This is discussed below.

⁸⁷⁵ Hume, *Lectures* vol. III, (Stair Society vol 15, 1952), 9. Cf. Stair III.i.45 and *Royal Bank v Dickson* (1868) 6 M 995.

⁸⁷⁶ (1862) 24 D 925.

at some length. The case was a multiplepinding. The fund *in medio* was the estate of a Mr Fyfe who died in 1838. He had left some heritage to his daughter (Mrs. Wright) in liferent. The fee was to go equally to his two nieces M. Fyfe (Mrs Vass) and E. Fyfe (Mrs. Ducat). The two nieces were also appointed residuary legatees. Mrs Vass was married in 1844. Mrs Wright died in 1858. Mrs Vass's marriage contract purported to assign in 1844 her rights under the will to her marriage contract trustees. There was an initial dispute as to whether Mrs Vass herself or her marriage contract trustees were entitled to rank in the multiplepinding. The Lord Ordinary (Kinloch)'s first interlocutor dealt with this matter. He held that the trustees were entitled to the ranking.⁸⁷⁷ The rest of the case, however, is not concerned with the claims on Mrs Vass's share of the estate. The remaining claims were made on Mrs Ducat's share. For our purposes the relevant claims on this share were four:

1. Mrs Ducat herself
2. A claim for some £818 made by the representatives of a firm of solicitors, McIntosh & Ducat WS ('McIntosh'). The firm had advanced certain sums to Major Ducat in 1841. The Major and his wife had jointly granted these claimants an assignation in security of all of Mrs Ducat's rights under the trust. For reasons that are not explained in the reports, a second assignation was granted in 1842. On the death of the liferentrix, Mrs Wright, in 1858, McIntosh's representatives raised an action against Mrs Ducat. Arrestments were served on Mr Fyfe's trustees on the dependence of the action. Before the action was called, a compromise agreement was reached in 1858. As a result, Mrs Ducat 'instructed and authorized'⁸⁷⁸ Mr Fyfe's trustees to pay the sum of £818 to McIntosh's representatives (who already held an assignation from her). This was apparently intimated to Mr Fyfe's trustees.
3. Arnott ranked for payment of £150 he had advanced to Mrs Ducat. She had drawn a bill for this sum on the trustees, dated March 1856. This was duly presented and protested for non-acceptance in June 1856.⁸⁷⁹
4. After the record had been closed,⁸⁸⁰ Mrs Ducat was sequestrated.⁸⁸¹ Her trustee, Carter, successfully craved to be sisted in the process as a claimant.

⁸⁷⁷ (1862) 24 D 925 at 927-928. Unfortunately, the Lord Ordinary confused an obligation to assign with an assignation. This failure has had far-reaching consequences for the development of Scots law. Unfortunately the point cannot be discussed here; but see G.L. Gretton, 'Assignation of Contingent Rights' 1993 *JR* 23.

⁸⁷⁸ (1862) 24 D. 925 at 928; (1862) 32 Sc Jur 418 at 418.

⁸⁷⁹ (1862) 32 Sc Jur 418 at 418.

⁸⁸⁰ In June 1859.

With an additional claim in his name, with answers from the competing parties, a second record was made up and closed in February 1861. Carter sought to be preferred for the whole amount on the basis of his act and warrant.⁸⁸²

The Lord Ordinary (Kinloch) repelled Carter's claim. He held that the second (McIntosh) and the third (Arnott) claimants were entitled to be preferred for their whole claims. These rested, he held, 'on absolute assignments, duly completed by intimation, anterior to the date of the sequestration'.⁸⁸³ He continued,

"In the case of [the McIntosh claim], the right rested on a minute of agreement by which Mrs Ducat not only become bound to pay the sum claimed out of her share of Mr Fyfe's estate, but granted an express direction and authority to Mr Fyfe's trustees forthwith to pay the amount to the holders of the deed; and the date of this minute of agreement, it will be remembered is considerably subsequent to the time when, by the death of Mrs Wright, the lifrentrix, the right of Mrs Ducat had fully vested. There appears sufficient evidence that this mandate *in rem suam* was immediately intimated to the trustees, but it is unnecessary to go curiously into this point, for the production of the minute of agreement containing this mandate in the multiplepinding raised by the trustees was, according to the authorities, judicial intimation of the assignment.... In the case of Mr Arnott there is not a deed of assignment, but there is what in law is *equivalent* – a draft on the trustees, payable three months after date, protested for non-acceptance. This, it is well-known, is *equivalent* to an assignment of the funds of the drawer in the hands of the drawee, completed by intimation."⁸⁸⁴

When the matter reached the Second Division, however, Lord Justice-Clerk Inglis referred to the issue of judicial intimation, but not with respect to the McIntosh claim. He accepted that they had already intimated their assignments.⁸⁸⁵ Lord Inglis refers to judicial intimation only with respect to Mr Arnott's alleged assignment.⁸⁸⁶ But it had already been proved that Arnott had protested his bill for non-acceptance.⁸⁸⁷ Surprisingly, Lord Inglis seems to assume that this did not amount to intimation, (though he does not even mention the proceeding). Indeed, Lord Inglis seems to suggest that it was only as a result of production of the bill in the multiplepinding that it operated as an assignment. In *Carter*, then, the *dicta* on judicial

⁸⁸¹ In July 1860.

⁸⁸² He also founded on the decision in *Gordon v Millar* (1842) 4 D 352.

⁸⁸³ (1862) 24 D 925 at 931.

⁸⁸⁴ *Ibid.*

⁸⁸⁵ At 933: 'that assignment was intimated long before the sequestration of Eliza Ducat's estate'.

⁸⁸⁶ (1862) 24 D 925 at 934.

⁸⁸⁷ That this operated as a 'virtual' assignment does not even seem to have been in dispute at the time, see e.g. *Stewart v Ewing* (1745) Mor 1493.

intimation were *obiter* with regard to both successful claimants: they had both already intimated their assignations.

In the absence of authority to the contrary, the only certain date is either the date of production of the deed in process, or the date of closing of the record.⁸⁸⁸ The most recent case to deal with the matter, however, has raised a logical difficulty with judicial intimation. The Sheriff Principal held that the date of service of the initial writ was the date of the intimation.⁸⁸⁹ He then commented:

“I approach the issue on the basis that it was argued, namely that intimation was required at latest by the time of the raising of the action. I make that point specifically because it seems to me that there is at least an argument that the assignation gives the pursuers a substantial interest in the subject matter of the litigation, requiring only formal completion by intimation, such that title to sue can be sustained even though intimation is only made in the course of the process (see *Symington v Campbell*⁸⁹⁰ at p. 437 and *Bentley v McFarlane*⁸⁹¹ at p. 79). For the sake of completeness I should say that *Alderwick v Craig*⁸⁹² and *Bank of Scotland v Liquidator of Hutchison Main & Co Ltd*⁸⁹³ can be distinguished as the foundation of the claimed title was merely an agreement to assign (or equivalent) and not, as with this case, an assignation.”⁸⁹⁴

This statement highlights a tension between the cases on title to sue on the one hand; and the principles regulating transfer on the other. Some of the cases suggest that an unintimated assignation will provide a sufficient title to sue. The general principle is that transfer only occurs on intimation. The law of intimation itself, however, says that intimation can occur judicially. Suppose the action is raised. Any debtor served with a writ from someone other than his creditor will be bound to refuse to pay, lest he be found liable to make a second payment to the true creditor. The pursuer is not his creditor. Even if the pursuer is claiming on the basis of an assignation, there will be no copy of it in the initial writ. The Sheriff in *Nigel Lowe Holdings* was untroubled by this: ‘I accept that the defenders were entitled to call upon the pursuers to vouch these matters and to give greater specification, but I do not consider that the vouching and specification were required contemporaneously with the initial writ’.⁸⁹⁵ In other words, the date of intimation is deemed to be a date at which the

⁸⁸⁸ *Dougal v Gordon* 17th November 1795 FC; (1795) Mor 851; *Thomas Dunn's Tr* (1896) 4 SLT 46 OH.

⁸⁸⁹ *Nigel Lowe Holdings Ltd v Intercon Construction (Pty) Ltd* 2004 GWD 40-816, para [54] *per* Sheriff Principal Dunlop QC.

⁸⁹⁰ (1894) 21 R 434.

⁸⁹¹ 1964 SC 76.

⁸⁹² 1916 2 SLT 161.

⁸⁹³ 1914 SC (HL) 1.

⁸⁹⁴ At para [53].

⁸⁹⁵ Para [54].

debtor has no proof that the putative assignee has any title whatsoever to sue. This would suggest that validity of the intimation, on this analysis, must be retrospective. That the Sheriff Principal's analysis gives rise to these difficulties, added to the weight that should be accorded to Hume's opinion, suggests that the soundness of his decision is open to question.

How, then, does judicial intimation work? Initially, the debtor will be bound to plead that the action is irrelevant: whatever the authorities on title to sue say,⁸⁹⁶ the debtor cannot pay the pursuer for the simple reason that, until intimation, the pursuer is not the defender's creditor. At the very least, the pursuer's action is almost certainly not necessary.⁸⁹⁷ The pursuer then lodges the assignation in process. The defender may have no substantive defence to the claim. The defender should then adjust his pleadings once the assignation has been lodged. It is the date of lodging in process of the assignation that must be taken as the date of intimation of the assignation. Even if the defender has adjusted so as to state no substantive defence, the pursuer will be liable for the debtor's expenses. As a result, judicial intimation is an expensive way of intimating an assignation.

VI. What is assignable – the relevance of intimation.

The question of whether intimation is actually *possible* is helpful in focussing the issue on what can be assigned. If there can be no effective intimation, then there can be no conveyance of the claim. This does not mean that there cannot be concluded an effective contract to assign, or even delivery of the assignation. However there can be no completion of the conveyance until there is intimation. So where intimation was made of the assignation of a legacy to the executor before the death of the testator, this was held to be ineffectual. There was no vested right to assign until death. An arrestment served on the executor after death was therefore preferable.⁸⁹⁸ However this topic cannot be considered here.⁸⁹⁹

⁸⁹⁶ These cases are dubious. They are contrary to the general principles of Scots law. As a result they can give rise to strange results. They were most recently followed in *Tayplan v D & A Contracts* 2005 SLT 195 OH.

⁸⁹⁷ If the pursuer has a written deed of assignation, there should have been nothing to prevent him from intimating the assignation conventionally. If there is no deed, it is difficult to see how the pursuer can claim to be an 'assignee'

⁸⁹⁸ *Bedwells and Yates v Tod*, 2nd December 1819 FC.

⁸⁹⁹ See G.L. Gretton, 'Assignation of Contingent Rights' 1993 *JR* 23.

VII. The Effect of the Delivered but Unintimated Assignment.

A. Discharges.

Until the delivery of the transfer agreement is intimated, the cedent can still grant a valid discharge of the debt.⁹⁰⁰ Whether the debtor who pays the cedent in the interim period between delivery of the assignment and intimation is discharged, raises questions more complex than might initially appear.⁹⁰¹ Subsequent to the delivery of the assignment, the cedent may compromise all his claims with the debtor. The cedent has no idea whether there has been intimation. He grants a general discharge to the debtor. Does this include the assigned claim? Ultimately, the matter is a question of construction of the discharge agreement. It has been held that a general discharge covers an assigned but unintimated claim,⁹⁰² but there are also cases where the contrary has been held.⁹⁰³ In *Mitchells v Sinclair*⁹⁰⁴ the Court held that, if there is no mention of the assigned debt in a general discharge, it will be assumed that it was not included and is not discharged. This may be unfair on the debtor. If the discharge is in general terms, and the cedent has not told the debtor of the assignment, why should the debtor be forced to pay again to the assignee on intimation? Indeed, where the compromise is for onerous causes, the effect of the decision in *Mitchell* is to require the debtor to make a double payment. By parity of reasoning, a gratuitous discharge will not prejudice an onerous assignee (there can be no question of double payment here as, *ex hypothesi*, the debtor gave no consideration for the discharge);⁹⁰⁵ but, that an onerous discharge will prejudice the assignee (the debtor has given consideration for the discharge; so he cannot be compelled to pay again to the assignee).⁹⁰⁶ If a cedent discharges the assigned debt, he will find himself liable for breach of warrandice.⁹⁰⁷ Creditors who are entering into a general compromise of claims with a debtor should therefore be careful to exclude any assigned claims from the discharge.

⁹⁰⁰ *Drummond v Muschet* (1492) Mor 843; *McGill v Laurestoun* (1558) Mor 843; *McDowall v Fullerton* (1714) 2 Ross LC 709; Mor 576; *Hope and McCaw v Walsh* 12th June 1816 FC; *Safder v Sahid* 2004 GWD 28-586.

⁹⁰¹ For the position of an arrested claim prior to furthcoming, see *Pitcairn v Fraser* (1836) 14 S 1101.

⁹⁰² *Alexander v Agnew* (1713) Mor 5041.

⁹⁰³ *Munro v Munro* (1712) Mor 5052; *Logan v Affleck* (1736) Mor 5041.

⁹⁰⁴ (1716) Mor 5031.

⁹⁰⁵ *Blair of Bagillo v Blair of Denhead* (1671) Mor 940

⁹⁰⁶ See *Ritchie v The Scottish Automobile and General Insurance Co* 1931 SN 83, also reported as an addendum to *Todd v Anglian Insurance Co Ltd* 1933 SLT 274 OH.

⁹⁰⁷ *Alexander v Agnew* (1712) Mor 5041.

B. General.

The sequestration of the cedent prior to intimation will spell disaster for the assignee. In all likelihood, both the price and the claim will be swallowed up by the cedent's insolvency. Quite what is the juristic effect of the delivery of the deed of assignation – or, for that matter, delivery of a disposition of heritage – is therefore one of the burning questions for modern Scots law. There are precious few answers to this question in the sources.

It is often said that there are only two types of rights in Scots law: real rights and personal rights. The real right/personal right dichotomy is fundamental, especially on insolvency. However, how does it explain the delivery of the assignation? It has been said that on delivery of the deed, the transferee thereof is vested in a personal right to the asset (*jus in personam ad rem acquirendam*) over and above his personal right under the contract.⁹⁰⁸ This is insufficient – personal rights are, by definition, rights against persons, not rights in things. But, if one thing is clear, it is that the person to whom an assignation or disposition is delivered does not get *more* personal rights, but *fewer*. On conclusion of the contract to assign the assignee has a contractual right against the cedent to execute and deliver an assignation. The cedent complies. The assignation is delivered. The cedent has performed the primary obligations incumbent upon him under the contract. Performance discharges obligations. Therefore, on delivery of the assignation, the assignee has fewer rights against the cedent than he had before. The assignee can no longer sue the cedent for specific implement. What then is the position of the assignee? Until intimation there is still no transfer of the asset. Importantly, if the debtor pays the cedent prior to intimation, he is discharged.⁹⁰⁹

It has been suggested that there is a distinction between the contractual right to delivery of the assignation (a *jus crediti*) and the right to a complete the transfer by intimation (a *jus ad rem*⁹¹⁰):

“I must confess upon this subject that I think that there is a great deal of doubt and obscurity, from the want of anything definitely explaining the distinction between *jus ad rem* and *jus crediti*, because I think I find that these words are used interchangeably, without any clear distinction of the one from the other; but there may be this practical distinction, that the *jus ad rem* is a right which the person possessing it may make a complete right by his own act which he

⁹⁰⁸ See e.g. *Edmund v Gordon* (1855) 18 D 47 at 57 *per* Lord Deas; *Gibson v Hunter Home Designs Ltd* 1976 SC 23 at 27 *per* Lord President Emslie; *Burnett's Tr. v Grainger* 2004 SC (HL) 19 at para 40 *per* Lord Hope of Craighead. Cf. G. Lubbe, 'A Doctrine in Search of a Theory: Some Reflections on the Doctrine of Notice in South African Law' 1997 *Acta Juridica* 246 at 248.

⁹⁰⁹ UNIDROIT Ottawa Convention, Art. 8; UNCITRAL, Art. 19, and see authority cited at n. 828 above.

⁹¹⁰ For general discussion of the amorphous nature of this right, see generally R. Michaels, *Sachzuordnung durch Kaufvertrag* (2002).

may compel another, without a suit, to perform: whereas a *jus crediti* may be defined as a right which the holder of it cannot make available, if it is resisted, without a suit, to compel the person to do something else in order to make the right perfect.”⁹¹¹

It is not surprising that Lord Cranworth found the distinction difficult. The distinction, if indeed there is one, is subtle. Nevertheless, the crucial incidents of delivery of the assignation seem to this writer to be these: *First*, as far as a competition with the trustee in sequestration over the estate of the cedent is concerned, delivery of the deed has no effect.⁹¹² *Secondly*, in terms of personal rights, the assignee does not get ‘more’ personal rights on delivery of the assignation. On the contrary, he gets less. This occurs by virtue of the fact that the cedent has extinguished his contractual obligations by performance.⁹¹³ *Thirdly*, although having a delivered but unintimated assignation will not assist on insolvency of the cedent, the position is preferable to having a mere contractual right to delivery. This is the crux of the matter. Possession of the deed of assignation gives the assignee the power to intimate. The assignee is, to some extent, in control of his own destiny. If he fails to intimate and creditors of the cedent arrest in the hands of the debtor, the assignee has only himself to blame. Delivery of the deed, then, gives the transferee thereof the power and privilege to rely on himself rather than someone else to comply with the requirements of the law; in the Hohfeldian terminology employed by Professor Reid, the assignee has a ‘power’.⁹¹⁴ *Fourthly*, it is probably the case that the holder of a delivered but unintimated assignation can still translate a good right to a second assignee. It will be necessary, however, for the cedent to deliver a copy of the original assignation in the translation. This will have to be intimated to the debtor as well as the second assignation. Otherwise, the second assignee will be founding his right against the debtor on the basis of an assignation from a creditor who is unknown to the debtor. If the first assignation is not intimated to the debtor, the debtor can withhold payment from the assignee. The well-advised debtor would raise a multiplepounding.^{914a} The same principle applies to

⁹¹¹ *Edmund v Mags of Aberdeen* (1855) 18 D 47 aff’d (1858) 3 Macq 116 at 122 per Lord Cranworth. Cf. *Wilson’s Trs v Pagen* (1856) 18 D 1096 at 1104 per Lord Benholme.

⁹¹² Cf. *Strachan v McDougle* (1835) 13 S 954 at 959 per Lord Mackenzie: ‘it is an important general principle of our law, and there is none more vital, that the delivery of the corpus of a deed or instrument will not carry the real right that is contained within such a deed or instrument’. Although, *quaere* whether the ‘real right’ is ever contained in the deed or instrument. A real right is the relationship of a person to a thing. It should be noted that delivery of the deed does, apparently, have an effect in a competition with a floating charge holder: see below. However, this will be of limited practical importance in the future following the effective abolition of receivership.

⁹¹³ A point made by R. Michaels, *Sachzuordnung durch Kaufvertrag* (2002), 42.

⁹¹⁴ Reid, *Property* para 644.

^{914a} Cf. Art. 6: 37 BW.

every successive assignation. The failure of the cedent to deliver the original assignation is a breach of warrandice.

In the case that only a contract to assign has been concluded, this gives the putative assignee a personal right against the cedent. As a personal right this is in itself assignable^{914a} (assuming that there is no *pactum de non cedendo*). For example, A enters in a contract with B for the assignation of B's claim against C. Before delivery of the assignation, A could assign his right to receive a delivered assignation (of B's claim against C) to D. The debtor in this obligation is not C but B. There seems to be no good reason why D could not compel B to assign and deliver an assignation of the claim against C. Moreover, D should be able to have this delivered in his own name.

C. Assignations and Floating Charges.

It has been argued that the effect of the speeches in *Sharp v Thomson*⁹¹⁵ is to render intimation necessary only for the purpose of interpellating the debtor from paying the cedent.⁹¹⁶ Mere delivery of the assignation, it is argued, gives the holder of the first contractual right an insolvency preference. The argument is not new.⁹¹⁷ On the basis of *Sharp*, however, it has been suggested that the analogy between the failure to register a delivered disposition of heritage for almost a year and invoice discounting 'is seemingly irrefutable'.⁹¹⁸ The argument is no doubt partly motivated by a desire of commercial lawyers to bring Scots law into line with English law.⁹¹⁹ With respect, such an analogy does not seem to this writer to be so

^{914a} See 'Case Commentary' 2005 SLT (News) 119.

⁹¹⁵ 1997 SC (HL) 66. The debate sparked by this decision has been great. The academic literature is voluminous; the judicial limitations to any *ratio* numerous. See, *inter alia*, K.G.C. Reid 'Equity Triumphant' (1997) 1 *Edin LR* 464; G.L. Gretton 'Equitable Ownership in Scots Law?' (2001) 5 *Edin LR* 73; *Fleming's Tr. v Fleming* 2000 SC 206; *Lady Fforde v McKinnon* 1998 SC 110. Lord Hope of Craighead, who, as Lord President, was overruled by the House of Lords in *Sharp*, has commented extra-judicially that the appellate committee's decision, 'was not well founded in principle': Lord Hope of Craighead, 'The Place of a Mixed System' (2001) 35 *Israel LR* 1 at 18. *Sharp* was distinguished by the House of Lords in *Burnett's Tr. v Grainger* 2004 SC (HL) 19.

⁹¹⁶ See e.g. J.G. Birrell, '*Sharp v Thomson*: the Impact on Banking and Insolvency Law' 1997 SLT (News) 151; R. Bruce Wood, in F. Salinger, *Factoring: the Law and Practice of Invoice Finance* (3rd ed. 1999) paras 7.51 – 7.52; and, most pertinently, D.P. Sellar, 'Current Law Case Update' Law Society of Scotland PQLE Conference, 22nd May 2001, 56. The cases cited by Sellar were, however, disapproved by the First Division in *Sharp v Thomson* 1995 SC 455 at 480 *per* Lord President Hope. See also Kames, *Principles of Equity* (2nd ed. 1767), 61.

⁹¹⁷ Traces of this theory can be found in *Grigor Allan v Urquhart* (1888) 15 R 56 at 61 *per* Lord Young; and in *Browne's Tr. v Anderson* (1901) 4 F 305 at 311 *per* Lord Trayner. The argument was successful in *Till v Jamieson* (1763) Kames Sel Dec 273; Mor 2858 and 5946. But the facts were special. Cf. *Macioca v Alma Holdings Ltd* 1993 SLT 730 OH.

⁹¹⁸ R. Bruce Wood, 'Special Considerations for Scotland' in F. Salinger, *Factoring: the Law and Practice of Invoice Finance* (3rd ed. 1999) at para 7.52.

⁹¹⁹ For English law, see M. Bridge, *Personal Property Law* (3rd ed. 2002) at 148 ff.

apparent. Even if there is an intelligible *ratio* which can be taken from *Sharp*, it is limited to the floating charge.⁹²⁰ There are no ‘equities’ with the finance company.⁹²¹ They have not been the victims of careless solicitors. As invoice financiers, by definition, they are acutely aware of the legal position. Individuals are required to intimate; so too should companies. The general principle is clear: in Scots law intimation is essential to the transfer:

“I think that the law of Scotland and the law of England, in the matter of assignations, start from diametrically opposite bases. I think that, in this matter, the law of Scotland is preferable to the law of England. The object of the law of Scotland is as in the case of heritable securities – to effect security by creating a definite system of completing title on which people can rely. Accordingly for 300 years at least it has been the law of Scotland that an assignation is of no use to the assignee until it is intimated, but that once it is intimated, it gives him an absolute and preferable right to what is assigned to him against all concerned.”⁹²²

The only protection the assignee can gain in this situation is to suggest that the cedent holds the funds he has received in some sort of trust. There are two problems with this analysis. First, this seems to be an example of a trust being used to defeat the claims of a lawful creditor.⁹²³ Secondly, since a floating charge attaches as if it is a fixed security, on one theory at least, it should defeat the personal rights of any beneficiaries of a trust.⁹²⁴ Moreover, if delivery of the assignment is the relevant date of preference, the stated policy of the law is subverted. Any competition becomes a free-for-all. The genuine assignee can be defeated by wet ink bearing a prior date to the intimation by the true assignee.

Extracting a ratio from *Heritable Reversionary*⁹²⁵ or *Sharp* may be impossible. On one view – a view, it must be added, that is quite inconsistent with the history and principles of

⁹²⁰ In *Burnett's Tr. v Grainger* 2002 SC 580, Lord Coulsfield suggested that he found the reasoning in Lord Clyde's speech ‘difficult to follow’ (at para [23]).

⁹²¹ *Burnett's Tr. v Grainger* 2002 SC 580 at para [28] *per* Lord Coulsfield.

⁹²² *Macpherson's JF v Mackay* 1915 SC 1011 at 1015 *per* Lord Johnston.

⁹²³ G.L. Gretton, ‘Ownership and Insolvency: *Burnett's Tr v Grainger*’ (2004) 8 *Edin LR* 389.

⁹²⁴ K.G.C. Reid, ‘Trusts and Floating Charges’ 1987 SLT (News) 113. Admittedly, however, even if one does not accept the dual patrimony theory of trusts (for which see G.L. Gretton, ‘Trusts without Equity’ (2000) 49 ICLQ 599) it is arguable that since the company has no ‘beneficial interest’ in assets it holds on trust for another, these assets will not be subject to the charge: *Sharp v Thomson* 1997 SC (HL) 66; *Bank of Scotland v Liquidators of Hutchison, Main & Co Ltd* 1914 SC (HL) 1; *Heritable Reversionary Co Ltd v Miller* (1892) 19 R (HL) 43 and D. Cabrelli ‘Can Scots Lawyers Trust Don King? Trusts in the Commercial Context’ (2001) 6 SLPQ 103.

⁹²⁵ (1891) 18 R 1166 *rev'd* (1892) 19 R (HL) 43. Lord Watson's speech is the basis of much of the recent confusion. It is difficult to see how much of Lord Watson's speech can still be considered good law following the decision of the House of Lords in *Burnett's Tr. v Grainger* 2004 SC (HL) 9. It is to be regretted that the House in *Burnett's Tr.* was not asked to overrule *Heritable Reversionary*.

Scots law – it is the passing of ‘beneficial interest’ that is crucial.⁹²⁶ For present purposes, however, what is the effect of these decisions on the competition between a floating charge holder and the holder of a delivered but unintimated assignation? According to *Sharp*, the floating charge does not attach to assets in which the company has no ‘beneficial interest’. It is, however, unclear what this beneficial interest is, or when, exactly, it passes. We can only guess. Two possible alternatives may be suggested. The first is on payment implementing an agreement to assign (often also referred to, confusingly, as an assignation). The second is on delivery of the deed of assignation to the assignee. The beneficial interest probably passes only with the latter.⁹²⁷ No writing required for an assignation⁹²⁸ (though writing is required for intimation, so the statutory abolition is somewhat strange). So an assignee’s claim, founded on a verbal assignation, if proved, could be preferred.⁹²⁹ But, if that is correct, an assignee is accorded a preference on the insolvency of a cedent who is a company (or limited liability partnership⁹³⁰), even though he could not have done so if the cedent was an individual, partnership or trust which had been sequestrated.⁹³¹ Moreover, it gives an assignee a right which he would not have had if the cedent was solvent: Assume that the receiver did not demand payment, so the debt is still extant. An assignee with no deed will have great difficulty in getting payment from the debtor. The debtor will demand to see a copy of the assignation before he pays this alleged assignee; a demand the debtor is entitled to make: ‘knowledge of an assignment, where it falls short of ocular evidence, will scarce be sustained to put the debtor *in male fide*’.⁹³² The assignee whose claim is based on a verbal assignation, however, will have nothing to produce. As has been described above, the only way that this ‘assignee’ will be able to demand payment will be if he brings an action of payment against the debtor, raises a multiplepinding in the name of the debtor, or stakes a claim in a multiplepinding raised by the debtor. In the latter two cases a claim will then have to be submitted. So there is the strange situation of an ‘assignee’, who would have difficulties claiming from the debtor if the latter was solvent, being potentially accorded a preference in

⁹²⁶ Cf. *Brownlee v Robb* 1907 SC 1302 at 1313 *per* Lord Pearson; *Tayplan Ltd v D & A Contracts Ltd* 2005 SLT 195 at para [23] *per* Lord Kingarth (Ordinary).

⁹²⁷ But compare O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds.) *Principles of European Contract Law* (Part III, 2003) Art. 11:202, which sides with the first alternative.

⁹²⁸ Requirements of Writing (Scotland) Act 1995, s. 11(3) (a).

⁹²⁹ But the Civil Evidence (Scotland) Act 1988 may be a small hurdle to overcome.

⁹³⁰ Since they can grant floating charges: Limited Liability Partnerships (Scotland) Regulations 2001, SSI 2001/128, reg. 3, schedule 1.

⁹³¹ Since they cannot grant floating charges. It is clear that the trustee in sequestration will be preferred to an assignee who holds an unintimated assignation, see above.

the cedent's insolvency. Put shortly, a wide application of *Sharp* to an assignation is problematic.

What, then, is the position if the debtor pays the receiver? Receivers are notorious for asserting their (perhaps dubious) rights to assets in furtherance of their duty to the floating charge holder.⁹³³ If a receiver were to demand payment of a debtor after an assignation by the company but before intimation by the assignee, the debtor would be discharged were he to pay. The only right that the assignee then has is a personal right against the company for the money. The receiver cannot take the benefit of the claim since it is not an asset in which the company had a beneficial interest. But a company which is in receivership is likely to be in financial difficulties. It is not clear what effect this passing of beneficial interest has in a competition with other creditors who do not hold a floating charge. The other creditors' claims may be greater than the assets. The assignee will therefore only have his contractual right against the company. The company will probably be in no position to fulfil its obligation owing to its practical insolvency.

But matters may be more complicated still. Suppose A Ltd assigns a claim for value against Eve to John. The assignation is delivered. Before going into receivership, A Ltd then assigns the same claim to Jack, also for value. Jack receives a delivered assignation. Neither assignation is intimated. A Ltd then goes into receivership. Thereafter, Jack intimates to Eve. On the *Sharp* reasoning, John is preferred to Jack. Following intimation, Jack is preferred to John. This seems incongruent. Such a position may occur under English law; although, even the great Lord Reid was at a loss to see how A Ltd can grant a valid assignment to Jack under English law if it has already assigned all its 'beneficial interest' to John.⁹³⁴ It is therefore disappointing to see these confused rules reproduced in the *Principles of European Contract Law*.⁹³⁵ Furthermore, what would be the position, on the foregoing analysis, if John is sequestrated in the interim period between delivery of the assignation from A Ltd and intimation by Jack? That there is no clear way ahead here should set the proverbial alarm bells ringing. Such arbitrary, nay, whimsical rules of competition hardly inspire confidence in the law.

⁹³² Lord Kames, *Principles of Equity* (2nd ed. 1767), 61; (3rd ed. 1778) I, 59. Kames' view is important since he was of opinion that equity should ameliorate the necessity of *notarial* intimation.

⁹³³ See S. Wheeler, *Retention of Title* (1990).

⁹³⁴ *BS Lyle v Rosher* [1959] 1 WLR 8 HL.

⁹³⁵ O. Lando, E. Clive, A. Prüm and R. Zimmermann (eds.) *Principles of European Contract Law*, (Part III, 2003) Art. 11:401.

There is also some difficulty with the attachment of the floating charge. It attaches 'as if' it is a fixed security.⁹³⁶ There is, however, a problem: it is not possible to create a fixed *security* over incorporeal moveable property in Scotland, in the true sense of the term. The assignation in security is not, strictly speaking, a security; though it may function as such. It is a case of absolute transfer qualified by a personal obligation to re-convey (*fiducia cum creditore*). It is the converse of the sale of corporeal moveables by retention of title.⁹³⁷ It is notable that other instances of *fiducia cum creditore* do not require registration as 'charges'; after all, they are not subordinate real rights in security.⁹³⁸ The provisions of the Companies Act are construed strictly, like taxation legislation.⁹³⁹ Terms employed by the Act are to be given their precise legalistic meaning.⁹⁴⁰ If this principle is applied to the provisions regarding the floating charge, then one could perhaps argue, albeit perhaps not with force, that a floating charge does not attach to those incorporeal moveables over which it is not possible to create a right in security, most importantly of which is the paradigm money claim.

How, then, to judge competing unintimated assignations? In a competition with a trustee in sequestration, or liquidator, the trustee or liquidator will be preferred to the 'assignee' who has not intimated. As for a competition with a floating charge holder, it seems that, providing a claimant can prove that he was the 'assignee' of a verbal, though unintimated assignation, or that he had paid, then the beneficial interest has passed and the claim is not attached by the floating charge. It remains to be seen how individual assignees, who fail to intimate before the attachment of the floating charge, will be treated by the courts in competition with a receiver or floating charge holder. In the opinion of the writer, however, there seems little to support their position in principle; after all, 'if hardship justified exemptions from *pari passu* ranking there could be no insolvency proceedings in Scotland'.⁹⁴¹

⁹³⁶ *Forth & Clyde Construction Ltd v Trinity Timber & Plywood Co* 1984 SC 1.

⁹³⁷ *Allan & Son v Turnbull* (1833) 11 S 878 aff'd (1834) 7 W & S 281 HL; *Braithwaite v Bank of Scotland* 1999 SLT 25 at 29 A-B per Lord Hamilton (Ordinary).

⁹³⁸ See generally, G.L. Gretton, 'Registration of Company Charges' (2002) 6 *Edin LR* 146. So, retention of title clauses in sales of corporeal moveables are not registrable in Scotland, although they are in England: *Compaq Computer Ltd v Abercorn Group Ltd* [1993] BCLC 602.

⁹³⁹ E. Ferran, *Company Law and Corporate Finance* (1999), 380 and authority there cited.

⁹⁴⁰ See in particular *Barclays Bank plc v British & Commonwealth Holdings* [1996] 1 BCLC 1 and 29, and *NZI Bank v Euro-National Corporation Ltd* [1992] 3 NZLR 528 at 539, per Richardson J. approved by McKay J. in *Hovard Industries Ltd v Supercool (1991) Ltd* [1995] 3 NZLR 577 at 583 line 40.

⁹⁴¹ N. Whitty, '*Sharp v Thomson*: Identifying the Mischief' 1995 SLT (News) 79.

D. Conclusion.

On any analysis, intimation to the debtor is required at some point to interpell his payment to the cedent. Intimation is the relevant date for transfer. It is certain. The potential for fraud is always reduced by the necessity for a formal act. With formal intimation requirements, detailed rules for the protection of the debtor, who pays in good faith, are unnecessary.

Yet, as we have seen, there are often situations where intimation is either not possible, or is apparently unnecessary. Moreover, when other parties are introduced into the equation, the law does not require intimation to them to transfer the cedent's rights against them to the assignee. The law engenders respect through clear and intelligible rules. Certainty is synonymous with such rules. This policy is inherently equitable. But our devotion to certainty should not be unfailing. It should not prevent the law attaining equally legitimate objectives. So where devotion to certainty will lead to unfairness, a reappraisal is necessary. Cautioners are a case in point. Intimation is required to the debtor. This provides a certain date of transfer. All accessories follow from the date of intimation to the principal debtor. The goal of certainty has been attained. This being so, there is no need to maintain that a cautioner who pays the cedent in good faith is still liable to the assignee. The cautioner should not be prejudiced. The same can be said of co-debtors who are ignorant of each other.

If certainty is the goal, why should a requirement of registration not be adopted? As Scots law has demonstrated in the case of edictal intimation, registration is a workable alternative to intimation.⁹⁴² Arguably it is preferable: it provides genuine publicity as well as a certain date of transfer. Certainty having been achieved, all questions involving the debtor can be settled by a general principle of good faith payment. Debtor notification can either be retained as an alternative to registration or eschewed entirely. But, if there are no formal intimation requirements, how does the assignee demand payment? More importantly, how is the debtor to respond to perhaps vague demands if there are no rules governing what form the assignee's demand must take? A lack of formal rules places the debtor in an invidious position: when can he rely on the notice? Any regime has to address the practicalities of the assignee's demand to the debtor.

The present Scottish rules may not be perfect; they do, at least, have the benefit of certainty.

⁹⁴² For which, see R.G. Anderson, 'A Note on Edictal Intimation' (2004) 8 *Edin LR* 272.

Chapter 5

Assignatus utitur jure auctoris.

I. The Maxim.

Where there is a transfer of a claim against a debtor by assignation, the debtor can raise all the defences he has against the cedent against the assignee: *assignatus utitur jure auctoris*. This is variously described as ‘a law maxim, importing that the assignee comes into the right and place of his cedent’;⁹⁴³ ‘the assignee exercises the right of the cedent’;⁹⁴⁴ or, ‘the cedent’s right must be the measure of the right in the assignee’.⁹⁴⁵ In the American Bar Association work, *Latin for Lawyers*, it is said that the maxim applies ‘generally to all property, real and personal’.⁹⁴⁶ In Scotland, however, it is said to be ‘peculiar’ to the law of assignation,⁹⁴⁷ and it has been held that the principle does not apply either to heritable property,⁹⁴⁸ corporeal moveables, or to negotiable instruments.⁹⁴⁹ Indeed, it has been observed that it is the exemption from the *assignatus* rule which is the distinguishing feature of a negotiable instrument.⁹⁵⁰ Whatever the shortcomings of the maxim, it is preferable to the

⁹⁴³ G. Watson (ed.) *Bell’s Dictionary and Digest of the Law of Scotland* (1882), 66.

⁹⁴⁴ A.G.M. Duncan (ed.) *Trayner’s Latin Maxims* (4th ed. 1894, reprinted 1993), 53. Cf. W.J. Stewart, *Collins Dictionary of Law* (2nd ed. 2001), 33-34; W. Burton, *Legal Thesaurus* (2nd ed. 1979), 36; R.H. Kersley, *Broom’s Legal Maxims* (10th ed. 1939), 302.

⁹⁴⁵ *Robertson v Wright* (1873) 1 R 237 at 243 per Lord Ardmillan.

⁹⁴⁶ H. Jackson (ed.) *Latin for Lawyers* (1915, reprinted, Lawbook Exchange Ltd, 2000), 127, no.77, founding on P. Halkerston, *A Collection of Law Maxims and Rules in Law and Equity* (Edinburgh, 1823), 14. There is no reference by Halkerston at 190 as to the origin of the term. The statement in the former work that ‘the thing assigned takes with it all the liabilities attached to it in the hands of the assignor at the time of the assignment’ is inaccurate.

⁹⁴⁷ McBryde, *Contract* para 12-84 citing Kames, *Elucidations*, 13-14; Scottish Law Commission Memorandum No 42, *Defective Consent and Consequential Matters* (1978) para 3.137: ‘...it is possible to argue that apart from settled practice there are today no convincing reasons for making an exception to the general rule [that personal obligations of the transferor are not prestatable against the transferee]’. Cf. Reid, *Property* para 660.

⁹⁴⁸ *Scottish Widows Fund v Buist* (1876) 3 R 1078 at 1082 per Lord President Inglis. In fact, feudalism provided a tripartite situation of superior, vassal and transferee, to which the maxim was applied: e.g. *Governors of Heriot’s Trust v Caledonian Railway Company* 1915 SC (HL) 52 at 62 per Lord Dunedin; see also the dictum of Lord Young in *Whyte v Lee* (1879) 6 R 699 at 701 quoted in Reid, *Property* para 705. Cf. *Arnott’s Tr v Forbes* (1881) 9 R 89.

⁹⁴⁹ But cf. *London Joint Stock Bank v A Stewart & Co* (1859) 21 D 1327.

⁹⁵⁰ *Scottish Widows Fund v Inland Revenue* 1909 SC 1372 at 1375 per Lord Dunedin. But cf. discussion in chapter 3 above Part V, A, and James Steven Rogers, *An Early History of the Law of Bills and Notes* (1995) for refutation of this proposition in Anglo-American law.

expression used in English law, 'subject to equities' which is inherently inaccurate, since these 'equities' take effect at law as well as in equity.⁹⁵¹

The source of the *assignatus* formula is obscure. It was not referred to by Stair himself. It is absent from both the first (1681) and second (1693) editions of his *Institutions*. It was, however, found in some of Stair's manuscripts in the Advocates Library and was included by William Johnstone in the third edition of the *Institutions* published in 1759:

"...the common rule of law is more rational, that the assigny *utitur jure auctoris*, and is in no better case than the cedent, unless it be in the matter of probation, that the cedent's oath will not prove against him *nisi in jure litigiosa*, and therefore *in personalibus* all exceptions against the cedent are competent against the assignee, even compensation itself."⁹⁵²

However, subsequent editors of Stair have returned to the text found in the first and second editions.⁹⁵³ Andrew MacDouall, Lord Bankton, refers to '*utitur jure auctoris*' in his *Institute* published between 1751 and 1753.⁹⁵⁴ However, it seems that the first recorded use of the full term '*assignatus utitur jure auctoris*' in Scots law is Morison's report of a case in 1755.⁹⁵⁵ As a result of this inclusion, the first writer to refer to the maxim in its full form is Erskine (whose *Institute* was published posthumously in 1773).⁹⁵⁶ The maxim, as used by Erskine, has been approved by the House of Lords.⁹⁵⁷ It is also employed by Bell.⁹⁵⁸ It has been suggested⁹⁵⁹ that the term was used by Voet.⁹⁶⁰ But there is no trace of the term in the

⁹⁵¹ W.W. Cook, 'The Alienability of Choses in Action' (1917) 30 *Harvard LR* 449; L.C.B. Gower (1956) *Butterworth's SA Law Review* 228, both cited by D.V. Cowen and L. Gering, *Cowen's Law of Negotiable Instruments in South Africa* (5th ed. 1985), 21.

⁹⁵² J. Gordon and W. Johnstone (eds) Stair, *Institutions* (3rd ed. 1759), I.x.16. Bell was strongly critical of this passage, see the quote in n. 1484 below. The main reason for this criticism was the fact that Stair's passage failed to take account of the apparent freedom that an assignee has from a latent trust. Bell's view was confirmed by the House of Lords in *Refearn v Sommervails* (1813) 1 Dow 50.

⁹⁵³ Brodie's edition, (4th ed. 1826), 120. See his note thereto. Brodie seems to have been the first to notice the irregularity in the text of the third edition. Cf. More's edition, (5th ed. 1832); and D.M. Walker's Tercentenary edition, (6th ed. 1981). This issue was the subject of full argument in the leading case of *Scottish Widows Fund v Buist* (1876) 3 R 1078.

⁹⁵⁴ III.i.8. He also refers to the formulation in the civil law: *non dabeo melioris conditionis esse quam autor meus*, which K. Luig, 'Assignment' in K.G.C. Reid and R. Zimmermann (eds) *A History of Private Law in Scotland* (2000) vol 2, 415 helpfully identifies as D. 50, 17, 1, 175(4), 1: 'I cannot be in a better condition (have a better title) than my author by whom the right to me is transferred', *Trayner's Latin Maxims* (4th ed. 1894), 393.

⁹⁵⁵ *Irvin v Osterbye* (1755) Mor 1715 at 1716.

⁹⁵⁶ III.v.10.

⁹⁵⁷ *Redfearn v Sommervails* (1813) 1 Dow 50 at 66.

⁹⁵⁸ G. J. Bell, *Commentaries on the Law of Scotland* (3rd ed. 1816) I, 184.

⁹⁵⁹ A. Milne et al, *Bell's South African Legal Dictionary* (3rd ed. 1951), 68.

⁹⁶⁰ J. Voet, *Commentarius ad Pandectas* (2nd ed. 1707) 11.4.12.

passage. In *Mansfield v Walker's Trs*,⁹⁶¹ a decision of the Whole Court, it was asserted that Scots law borrowed the term from the civil law.⁹⁶²

The peculiarities of the term may be found in the history of the law of cession. Where the terms 'assignatio' or 'adsignatio' or 'assignatus utitur jure auctoris' appear in European dictionaries, all references are to the related concept of the order to pay (*Anweisung*).⁹⁶³ The important differences between the concepts of cession and *Anweisung* were not always appreciated. It is the *Anweisung* that was labelled 'Assignment' in the Germanic sources. However, this leads us to another historical mystery. The debtor in the cession of the claim can raise his defences against a transferee of the original creditor (*nemo plus, assignatus, call it what you will*); in an *Anweisung*, the creditor orders the debtor to pay the creditor's creditor; as a result, the debtor cannot raise defences based on his relationship with the original creditor.⁹⁶⁴

II. The Debtor's Defences.

A. General.

As we have seen, the *assignatus* rule operates in the peculiar tripartite factual situation involved in an assignation. It is just one facet of the better-known principle, *nemo plus juris ad alium transferre potest quam ipse habet*.⁹⁶⁵ This is in line with the approach taken in other legal systems.⁹⁶⁶ The substantive manifestations of the rule embody the need to protect the debtor who is a passive party to the arrangement. She should not be prejudiced. In the law of arrestment, the principle is simply articulated by Graham Stewart: 'Arrestment cannot have the effect of making the arrestee's position worse'.⁹⁶⁷ In Quebec, the import of the principle is easily understood in the formulation adopted by the Civil Code, that the cedent 'may not,

⁹⁶¹ (1833) 11 S 813 aff'd (1835) 1 S & McL 203; *sub nom Stewart's Trs v Walker's Trs* (1835) 3 Ross LC 139.

⁹⁶² (1833) 11 S 813 at 822.

⁹⁶³ D. Liebs, *Lateinische Rechtsregeln und Rechtswörter* (6th ed. 1998), 37, No. 104, v. 'Assignatus utitur jure auctoris': 'Der Angewiesene übt ein Recht des Anweisenden aus. Er leistet Rechnung des Anweisenden aus. Er leistet für Rechnung anweisen'; R. Lieberwirth, *Latein im Recht* (4th ed. 1996), 36: 'assignatio' = *Anweisung*. Cf. § 783(2) BGB'. Cf. *Bell's South African Legal Dictionary*, n. 959 above.

⁹⁶⁴ Compare chapter 2, n. 209 above.

⁹⁶⁵ *Mackenzie v Watson & Stuart* (1678) Mor 10188. Cf. J.S. Muirhead, *An Outline of Roman Law* (1937), 150 who sees the *assignatus* rule as a just one facet of the general *nemo plus* principle.

⁹⁶⁶ Cf. M. Planiol and G. Ripert, *Traité pratique de droit civil* (2nd ed. 1954) para 1126; J. Ghestin, 'La transmission des obligations en droit positif français' in *La transmission des obligations* (1980), 19; P. Engel, *Traité des obligations en droit Suisse* (1973) § 276; G. Marty, P. Raynaud and P. Jestaz, *Droit civil: Les obligations* (2^e éd. 1989) para 359; S. Scott, *The Law of Cession* (2nd ed. 1991), 70, 115, 221.

⁹⁶⁷ J. Graham Stewart, *The Law of Diligence* (1898), 233.

however, make an assignment that is injurious to the rights of the debtor or that renders his obligation more onerous'.⁹⁶⁸ In Scotland, by contrast, the principles are not immediately apparent from the so-called *assignatus* rule. It has been subjected to almost no critical analysis. There is, to some extent, a tension between the defences that a debtor can raise under the *assignatus* rule, and those defences that could be raised on the basis of the simple rule that the debtor should not be prejudiced.

It is the right of the debtor to raise defences that was one of the important factors⁹⁶⁹ in the utilisation in earlier Scots law of first, the blank bond and, subsequently, negotiable instruments.⁹⁷⁰ Exceptionally, where such an instrument is negotiated in good faith and for value, the indorsee (assuming it is an order bill) is not subject to the debtor's defences.⁹⁷¹ It is the applicability or otherwise of the *assignatus* rule, which demarcates the distinction between 'negotiation' (in the strict sense of the term)⁹⁷² and 'transfer' of a bill of exchange.⁹⁷³

B. Juristic Writers.

As has been mentioned, although Stair did not actually use the brocard *assignatus utitur jure auctoris* himself, he acknowledged the existence of the principle: 'Except in the matter of probation,⁹⁷⁴ he observes, 'all exceptions competent against the cedent before the assignation or intimation, are relevant against the assignee'.⁹⁷⁵ However, the principle is perhaps most fully articulated by Erskine:

⁹⁶⁸ *Code Civil du Québec* Art. 1637; J. Baudouin and P. Jobin, *Les Obligations* (5th ed. 1998) para 901 and authority there cited. This is the position in Belgian juristic writing: see P. van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *La transmission des obligations* at 100. In the Netherlands, the civil code provides that the cession leaves the debtor's defences (*verweermiddelen*) undisturbed (*onverlet*): Art. 6: 145 *BW*.

⁹⁶⁹ See D. Cowen and L. Gering, *The Law of Negotiable Instruments in South Africa* (5th ed. 1985), 21. Cf. J.S. Rogers, *An Early History of the Law of Bills and Notes* (1995) who shows that in Anglo-American law, where the transfer of claims was not admitted at law, the negotiable instrument initially evolved simply to facilitate the transfer of claims.

⁹⁷⁰ See general discussion in chapter 3 above.

⁹⁷¹ *Herries & Co v Crosbie* (1775) Mor 2577; Hailes 616.

⁹⁷² R. Goode, *Commercial Law* (3rd ed. 2004), 49, n. 164; *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (A) at 493 E-G per Holmes JA; *OK Bazaars Stores (1929) Ltd v Universal Stores Ltd* 1972 (3) SA 175 (C) at 179 per Corbett J (as he then was).

⁹⁷³ D.V. Cowen and L. Gering, *The Law of Negotiable Instruments in South Africa* (5th ed. 1985), 22. Cf. N. Elliot, J. Odgers and J.M. Phillips, *Byles on Bills of Exchange and Promissory Notes* (27th ed. 2002), 79: "The terms 'transfer' and 'negotiable' are hopelessly mixed up in the Act and in the judgement in *National Bank v Silke* [1891] 1 QB 435."

⁹⁷⁴ This refers to the rule that reference could not be made to the oath of the cedent to establish the assignation.

⁹⁷⁵ III.i.20. He cites *Swintoun v Brown* (1668) Mor 3412 and 8408; 1 Stair 547 for the proposition that even extrinsic defences are pleadable. Stair's own report of this case is detailed but unintelligible. *Cumming v*

“All defences competent to a debtor in a moveable debt against the original creditor, which he can prove otherwise than by his oath, continue relevant against even an onerous assignee, whether those defences arise from a separate backbond granted by the creditor at constituting the debt, or from other grounds; Stair, Jan.14th 1663 [*Scot v Montgomery* Mor. 10187]⁹⁷⁶ because no assignee can be in a better condition than his cedent *utitur jure auctoris*; for the assignment gives him merely the right as it stood in the cedent or original creditor. And this doctrine extends also to mutual contracts, in which the assignees are subjected to all the burdens which affect the right while it was vested in the cedent, not only where the mutual obligations are inserted into the contract itself (for these the assignee cannot be ignorant of), but even where they are partly formed by a separate backbond, if it shall appear by witnesses that the contract and backbond have a relation to and are mutual causes of one another; Stair I.x.16.”⁹⁷⁷

Erskine suggests that every plea which the debtor could have raised with the cedent can be raised against the assignee. However, he does not seem to discriminate between defences which can be pled against third parties, i.e. by the debtor against an assignee, and those which can be pled against fourth parties, i.e. creditors of either the cedent or the assignee.⁹⁷⁸

One of the earliest reported cases on the *assignatus* rule states that ‘The Lords found that the assignee could be in no better case than the cedent, albeit it was answered that the cedent could only be excluded by a personal exception’....⁹⁷⁹ This comes remarkably close to simply articulating the crux of the modern law. The object of the transfer is a personal right itself. The general principle, therefore, is that only those defences which are connected with the personal right that is assigned may be pled. But what does this mean? What sort of defence is one ‘connected with’ the claim transferred? George Joseph Bell draws the distinction between those which are *extra corpus juris* and those which are *in corpore juris*:

“It is necessary to distinguish between such conditions as are incorporated with the right (*in corpore juris*), and such are extraneous to it. 1. Conditions of the former kind, inherent in the nature of the right, or (in the case of debts) existing as exceptions or counterclaims by the original debtor against his creditor, are effectual both against creditors and purchasers coming in place of the original

Cumming (1628) Mor 9207 and 9147 comes close to suggesting that extrinsic defences are pleadable. Stair’s reference to assignation ‘or’ intimation is poorly expressed.

⁹⁷⁶ This case involved a back bond which was of its very nature extrinsic.

⁹⁷⁷ III.v.10.

⁹⁷⁸ This question is normally viewed in terms of the *nemo plus* rule: see Reid, *Property* para 660. In this writer’s view, the principles are identical, irrespective of the varying Latin. Compare the cases which hold that the assignee’s right is subject to trust rights to which the cedent was subject: *Keith v Irvine* (1635) Mor 10185; *Scott v Dickson* (1663) Mor 5799; *Mackenzie v Watson & Stuart* (1678) Mor 10188 (arrester); *Black v Sutherland* (1705) Mor 10190; *Monteith v Douglas* (1710) Mor 10191.

⁹⁷⁹ *Schaw* (1622) Mor 829. See also *Muir v Calder* (1635) Mor 831; Spotiswood, (Assignment), 22.

holder of the right. 2. Conditions of the latter species, collateral obligations, or latent trusts extraneous to the deed (*extra corpus juris*), and of which the new holder of the right has no notice, have given occasion to great diversity of opinion among our lawyers.’⁹⁸⁰

As will be seen, Bell’s formulation is the embryonic basis of much that follows. This crucial passage, however, is not without its problems. First, Bell’s exposition is vague. What is meant by ‘conditions which are incorporated with the right’, ‘*in corpore juris*’ and ‘inherent’? Do these mean the same thing? What about vices of consent which arise prior to the existence of the right? Are they included? Second, his reference to counterclaims is simply wrong. The debtor cannot bring a counterclaim he would have against the cedent against the assignee. Third, his reference to latent trusts is irrelevant. Latent trusts raise issues with fourth parties, not the debtor and defences which may be available to him. Fourth, the issue of notice, in the sense of good faith, is again of little relevance to the defences which are available to the debtor. Again, this is a fourth party issue. Fifth, Bell suggests that ‘collateral’ or ‘extraneous’ rights (those which are ‘*extra corpus juris*’) cannot be raised by the debtor against the assignee. What, then, of compensation? While compensation may be based on a money claim due and owing to the debtor out of the same contractual relationship which is the basis of the assignee’s claim, this is unusual. It is more common for the debtor to plead compensation of unrelated debts which he alleges are due to him by the cedent.

Nevertheless, despite the problems with his formulation, Bell was on the right track. The distinction between intrinsic and extrinsic claims was not original to Bell. It is, indeed, common sense. Lawyers probably took heed of the principle for centuries prior to Bell. For example, in Balfour’s *Practicks*, there is a case of an assignee of reversionary interest who was held to take the right free of an extrinsic agreement between debtor and creditor.⁹⁸¹

⁹⁸⁰ *Commentaries* (7th ed. 1870) I, 302. A portrait of Bell can be viewed at (1893) 5 *JR* 104.

⁹⁸¹ *Laird of Drumquhassil v Laird of Minto* (1577) *Practicks*, C.xvii, 449. See also *Gordon v Skein and Crawford* (1676) Mor 7169; and *Achinleck v Williamson* (1667) Mor 6033 which held that a deed *ex corpus juris* did not bind singular successors. There are explicit references to the intrinsic/extrinsic dichotomy by Lords Monboddo and Pitfour in *Arbuthnot v Colquhoun* (1772) Mor 10424; Hailes 464. See too *King v Douglas* (1636) Mor 10186 at 10187 referring to a deed ‘*in corpore primi juris*’; *Cockburn v Trotters* (1639) Mor 4187; *Brown v Sibbald* (1669) Mor 10204 (‘*in corpore juris*’); *Crichton v Murray*, 10th March 1686, Fountainhall, I, 407 which refers to ‘extrinsic’ debts.

C. Intrinsic/Extrinsic Dichotomy.

The basic principle applicable to the debtor's defences is that only defences which are intrinsic to the claim assigned can be pled against the assignee. What, then, is an intrinsic defence? The most obvious is that which arises out of the contract which the debtor has with the cedent. It is these rights which the cedent has transferred to the assignee. The right to plead intrinsic defences is a manifestation of the mutuality principle. So, a right of retention or a right to rescind for material breach can be pled against an assignee.

More difficult is the position of vices of consent, which induced the debtor to contract. These will have arisen prior to the conclusion of the contract.⁹⁸² Nevertheless, if there was a vice of consent which induced the debtor to enter into a contract, then it is of fundamental importance to the debtor. The debtor has the right to reduce the contract with the cedent. If the debtor is not to be prejudiced by the assignation, it is necessary that he is able maintain this right against the assignee. As far as the debtor is concerned a vice of consent in the original contract is manifestly intrinsic to the very basis of the cedent's rights against him. The vice of consent is an inherent qualification to the title of the assignee to sue the debtor. If the cedent assigns, then the debtor can raise vices of consent against the assignee. Similarly, if the putative cedent is not the creditor in the right assigned, then the debtor can plead this against the assignee. This a defect which is intrinsic to the claim assigned.⁹⁸³ If the putative cedent had attempted to sue the debtor, the debtor could have defended on the basis of this fundamental flaw in his title to sue. Consequently, this can be raised against the assignee. The same applies to factors which would render the contract null, for example, illegality. All factors which are intrinsically concerned with the constitution of the right or the continued prestability of the right assigned, and as such would afford the debtor a defence against the cedent, or putative cedent, can be raised against the assignee.⁹⁸⁴

What, then, are extrinsic defences? Where the debtor has rights against the cedent which arise out of transactions which are distinct from, and separate to, the contract out of which the ceded right arose, then they are extrinsic. In other legal systems, such extrinsic

⁹⁸² Where there is no assignation, and the creditor sues his debtor, such a vice cannot found a counterclaim by the debtor. It does not arise out of the contract but from 'something which preceded' it: *Smart v Wilkinson* 1928 SC 383, followed in *Sutherland v Barrie* 2002 SLT 418. See criticism of these decisions below. Cf. RCS r.25.1; OCR r.19.1, and also *Borthwick v Dean Borthwick Ltd* 1985 SLT 269 OH and *Anderson v Spence* (1683) Mor 10286.

⁹⁸³ Cf. Reid, *Property* para 660 for a different view.

claims are described variously as those which are based on the personal relationship of the debtor with the cedent.⁹⁸⁵ They are not inherently connected with the right assigned. In the words of one judge, rights which are based on an 'independent personal obligation of the cedent' cannot be pled against an assignee.⁹⁸⁶ This formulation obviously raises the question as to what obligations are sufficiently 'independent' or 'unconnected'.

In principle, the intrinsic/extrinsic division provides a neat rationalisation. But neat the law is not. There is one important defence which will usually be extrinsic to the right assigned, which the debtor can nevertheless plead against the assignee: compensation. Although compensation may arise out of the same contractual relationship as the right which is assigned, this is unusual. More often than not, compensation will be founded on an independent and unrelated obligation. It is an important right for the debtor. It not only allows him to resist the claim of the assignee; if it is sustained in court it discharges his obligations to the cedent in so far as they are mutual debtors and creditors.

The defences which the debtor can plead against the assignee are these: all those defences which are intrinsic to the claim assigned plus compensation. The 'intrinsic plus compensation'⁹⁸⁷ formula is applicable equally to diligence creditors and trustees in sequestration. These creditors are said to take *tantum et tale*. This maxim is notoriously slippery. It has been invoked to mean much more than is understood than the *assignatus* rule

⁹⁸⁴ Again, compare the similar test for a valid counterclaim: *J W Chafer (Scotland) Ltd v Hope* 1963 SLT (Notes) 11 OH; RCS r.25.1; OCR r.19.1.

⁹⁸⁵ Compare the formulation of the first draft of the *BGB*, *Erster Entwurf eines Bürgerlichen Gesetzbuches für das Deutsche Reich* (1887) § 302: 'Der Schuldner kann dem neuen Gläubiger Einreden nicht entgegensetzen, welche eine ausschließliche Beziehung auf die Person des Bisherigen Gläubigers haben'. Cf. A.J.F. Thibaut, *System des Pandekten-Rechts* (6th ed. 1823) § 79 and cf. S. Scott, *The Law of Cession* (2nd ed. 1991), 222-225. The modern German provisions are §§ 404 *BGB*.

⁹⁸⁶ *Marshall's Trs v Bank* 1934 SC 405 at 411 *per* Lord Murray. Cf. Bills of Exchange Act 1882, s. 38(2) 'Where he is a holder in due course, he holds the bill free from any defect in title of prior parties as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all the parties on the bill'; *Loi uniforme concernant la lettre de change et le billet à l'ordre* 1932 (the 'Geneva Convention' on Bills of Exchange) Art. 17 states that persons liable on a bill cannot plead 'defences founded on their personal relations with the drawer' against a holder. While this is axiomatic in relation to a holder in due course, it is not so in the case of a simple holder who is not entitled to the privileges held by the former. *Byles on Bills of Exchange* (27th ed. 2002) paras 18-32 to 34 adopt the analysis of an early edition of D.V. Cowen and L. Gering, *The Law of Negotiable Instruments in South Africa* (4th ed. 1966) 271-274 between defences *in rem* and *in personam*. However, this is merely to incorporate the common law cession of South Africa (see S. Scott, *The Law of Cession* (2nd ed. 1991), 222-225); put another way, such an interpretation of s. 38(2) would mean that holder in due course would still be subject to the *assignatus* rule, i.e. subject to defences which in the South African sense, would be described as defences *in rem*. This is roughly equivalent to Scottish 'intrinsic' defences.

⁹⁸⁷ This statement is subject to the major qualification of balancing of accounts in bankruptcy. Further, the development of the *assignatus* rule in Scots law in terms of intrinsic and extrinsic defences is not entirely consistent with an approach which is formulated in simple terms that the assignation cannot prejudice the debtor. Indeed, in other jurisdictions, the intrinsic/extrinsic dichotomy has been abandoned for this reason: see, for

or the *nemo plus* rule. However, in principle, all these maxims amount to one and the same thing.⁹⁸⁸ For instance, extrinsic claims cannot be pled against an arrester,⁹⁸⁹ adjudger, or heritable creditor under a decree of maills and duties.⁹⁹⁰

D. Intrinsic Defences: the paradigm situations.

The classic case is payment of all or part of the debt to the cedent prior to intimation of the assignation.⁹⁹¹ So if the right has been discharged prior to the purported assignation, nothing is transferred.⁹⁹² The position may, however, be different where the discharge is granted between assignation and intimation for no consideration.⁹⁹³ If the debtor reduced the obligation which she owed to the cedent prior to intimation of the assignation, this will be good against the assignee.⁹⁹⁴ If the right is inherently unassignable, the debtor need not pay anyone other than the original creditor.⁹⁹⁵ If the cedent is only a conjunct creditor, the assignee will also only be a conjunct creditor.⁹⁹⁶ Where the benefit of an insurance policy is assigned, the assignee takes the rights of the cedent. So, if the cedent was guilty of a misrepresentation, the insurer can plead this against the assignee.⁹⁹⁷ The *assignatus* principle will be particularly relevant in insurance cases. Where an insured person is insolvent, injured

instance, P. van Ommeslaghe, 'La transmission des obligations en droit positif belge', in *La transmission des obligations* (1980), 100.

⁹⁸⁸ *Chamber's JF v Vertue* (1893) 20 R 257 at 258 per Lord Wellwood (Ordinary), approved in *Marshall's Trs v Bank* 1934 SC 405.

⁹⁸⁹ *Montgomery v Creditors of Glendinning* (1745) Kilkerran 44; Mor 2573; Kames Rem Dec 102; *Gibson v Wills* (1826) 5 S 74; *Brodie v Wilson* (1837) 15 S 1195 at 1196 per Lord Gillies; *Houston v Aberdeen Town and County Banking Co* (1849) 11 D 1490 (no opinions reported); *Chamber's JF v Vertue* (1893) 20 R 257 at 258 per Lord Wellwood (Ordinary). The opinions of the majority in *Park, Dobson & Co v William Taylor & Son* 1929 SC 571 are wrong.

⁹⁹⁰ *Marshall's Trs v Bank* 1934 SC 405 held that such a creditor was merely a judicial assignee of the rights of the proprietor: Lord Justice-Clerk Aitchison at 410-411; Lord Murray at 414; *Stewart v McRa* (1834) 13 S 4; *Turner v Nicolson* (1835) 13 S 633; *Elmslie v Grant* (1830) 9 S 200. A summons of poinding of the ground is not a judicial assignation: *Royal Bank v Dickson* (1868) 6 M 995.

⁹⁹¹ *Farquharson v Hutchison* (1895) 11 Sh Ct Rep 225; *McGill v Laurestoun* (1558) Mor 843; *McDowall v Fullerton* (1714) 2 Ross LC 709; Mor 576; *Hope and McCaw v Walsh* 12th June 1816 FC. See generally, D. Girsberger, 'Defences of the Account Debtor in International Factoring' (1992) 40 *Am. J. Comp. Law* 467.

⁹⁹² *Smiths Gore v Reilly* 2003 SLT (Sh Ct) 15; 2001 SCLR 661 at 668D-E per Sheriff Principal Nicolson.

⁹⁹³ *Blair of Bagillo v Blair of Denhead* (1671) Mor 940. See also chapter 4 above, 'Intimation', n. 900.

⁹⁹⁴ Hume, *Lectures* III, p.15; *Houston v Nisbet* (1708) Mor 8329; *Thom Scott v Peter Bain*, 9th February 1821 FC; (1825) 3 S 400.

⁹⁹⁵ *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228, discussed in chapter 6 below, 'Validity'.

⁹⁹⁶ *Cairnis v Leynis* (1533) Mor. 827; Balfour, *Practicks*, 169. There is no mention of the *assignatus* rule in the reports; but this is the basis of the decision.

⁹⁹⁷ *Scottish Widows Fund v Buist* (1876) 3 R 1078. Cf. where the insurance company has notice of the breach and continues to accept premiums nevertheless: *Armstrong v Turquand* (1858) 9 Irish Common Law Reports 32. Insurance policies have specialities which cannot be discussed here.

parties may claim directly against the insurer.⁹⁹⁸ The basis of this claim is a statutory assignation of the insolvent insured's rights against the insurer.⁹⁹⁹ Any defence which the insurer would have had against a claim for indemnity by the insured, is good against the statutory assignee.¹⁰⁰⁰ The insurer will often seek to claim that the insured was in material breach of the insurance contract, thus absolving them from liability.¹⁰⁰¹ If the cedent was personally barred from claiming payment from the debtor, the same defence will be available to the debtor against the assignee,¹⁰⁰² at least in so far as the bar arises out of the same agreement. Nevertheless, where the bar is not intrinsic to the right assigned, but arises from some other relationship between the debtor and the cedent, it is arguable that the bar will not bind the assignee. Where the assignee has obtained an assignation of the debtor's obligation secured by a standard security, the debtor is not bound to pay the assignee the cost of obtaining an assignation.¹⁰⁰³ It is usually said that it is the date of intimation which is the crucial date for determining the relevancy of the debtor's exception to the assignee's claim.¹⁰⁰⁴

Generally speaking, the principle is the same whether it is expressed in terms of the 'assignatus' rule or the 'nemo plus' rule. However, there may be cases where the debtor cannot plead defences against the assignee which he could against the cedent.¹⁰⁰⁵ The leading case is *Macpherson's JF v Mackay*.¹⁰⁰⁶ A beneficiary under his father's will assigned part (£1000) of his entitlement to a share of the residue to marriage contract trustees. This was intimated to the trustees under his father's trust, of which the beneficiary was one. At the date of intimation of the assignation to the marriage contract trustees, although certain advances had been made to the beneficiary in virtue of his legacy, there remained in excess of £1000 due to him. It subsequently transpired that he had thereafter overdrawn from his father's estate

⁹⁹⁸ Third Parties (Rights Against Insurers) Act 1930, s. 1.

⁹⁹⁹ *Greenlees v Port of Manchester Insurance Co Ltd* 1933 SC 383 at 400 per Lord Justice-Clerk Alness; *Cheltenham & Gloucester plc v Sun Alliance & London Insurance plc* 2001 SC 965 at 970D, para 10 per Lord President Rodger; *Cheltenham & Gloucester plc v Sun Alliance & London Insurance plc* 2001 SLT 347 OH; *Aitken v Independent Insurance Co Ltd* 2001 SLT 376 OH; *Aitken v Financial Services Compensation Scheme Ltd* 2003 SLT 878 at 883H OH.

¹⁰⁰⁰ Cf. *Mackay v Duke of Sutherland's Trs* 1971 SLT (Land Ct) 2 for an example of the *assignatus* rule being invoked in a statutory transfer.

¹⁰⁰¹ For examples see the cases cited in n. 999 above.

¹⁰⁰² The authority is sparse, but see E. Reid, 'Personal Bar: Case Law in Search of Principle' (2003) 7 *Edin LR* 340 at 347.

¹⁰⁰³ *G. Dunlop & Sons JF v Armstrong* 1994 SLT 199.

¹⁰⁰⁴ *Sheills v Ferguson, Davidson & Co* (1876) 4 R 250 at 240 per Lord Deas; *O'Hare v Reaich* 1956 SLT (Sh Ct) 78.

¹⁰⁰⁵ Cf. G. Marty, P. Raynaud and P. Jestaz, *Droit Civil, Les obligations* (2nd ed. 1989) para 360: 'Le situation du cessionnaire peut ne pas être toujours absolument identique à celle du cédant'.

by some £1244. The marriage trustees then sued the testamentary trustees for payment in terms of the assignation. The testamentary trustees sought to compensate their claim against the cedent for repayment. It was held, however, that while the cedent would have had no claim to the £1000 – indeed he would have been liable to repay his excessive drawings – the assignee was entitled to payment. At the date of intimation, there was no claim to compensation.

Some inherently personal characteristics of the cedent may not be applicable to the assignee. For example, suppose that on being sued by the cedent, the debtor could have demanded the cedent be ordered to find caution. If the solvency of the assignee is unimpeachable, then the debtor will not be able to demand that the assignee find caution on the basis of the *assignatus utitur* doctrine.¹⁰⁰⁷ It is not just the debtor who has title to plead *assignatus utitur*. In a multiplepounding, competing creditors can object to the claim of an assignee on the basis that he can have no better right than the cedent had.¹⁰⁰⁸ A right of reduction held by a creditor which is extinguished by payment cannot be enforced by an assignee of the creditor.¹⁰⁰⁹ Similarly it is conceivable that some inherently personal characteristics of the assignee will accord him additional rights that would not have been available to the cedent.^{1009a}

A few words should be said about the history. Under the old rules of proof, the debtor's defence that the claim had been extinguished, which was to be proved by the cedent's oath, was only available before intimation.¹⁰¹⁰ There was an exception to this. Where the object of the assignation had been rendered litigious prior to intimation, the cedent's oath could be admitted after intimation to the prejudice of the assignee.¹⁰¹¹

E. Assignatus utitur: Applicable to every Assignation?

It is generally assumed that the maxim is applicable to *all* assignations of money claims with the exception of the assignation effected on the negotiation of a bill of exchange

¹⁰⁰⁶ 1915 SC 1011.

¹⁰⁰⁷ *Moore v Little* (1899) 7 SLT 43 OH.

¹⁰⁰⁸ *Briggs v Briggs* 1923 SLT 755 OH.

¹⁰⁰⁹ *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 365.

^{1009a} See e.g. *McKintosh v Brodie* (1826) 4 S 729: assignee, being a Solicitor to the Supreme Courts, entitled to pursue in the Court of Session, thought the cedent could not have.

¹⁰¹⁰ *Erskine III.v.10*.

¹⁰¹¹ *Erskine, ibid.*

(whether by indorsement and delivery, or delivery¹⁰¹²), or on acceptance.¹⁰¹³ In *Scottish Widows Fund v Buist*,¹⁰¹⁴ Lord President Inglis observed that:

“It appears to me to be long ago settled in the law of Scotland – and I have never heard of any attempt to disturb the doctrine – that in a personal obligation, whether contained in a unilateral deed or in a mutual contract, if the creditor’s right is sold to an assignee for value, and the assignee purchases in good faith, he is nevertheless subject to all the exceptions and pleas pleadable against the original creditor...But it seems to be said that this doctrine admits of some exceptions. Now, that I entirely dispute. [...] I think the true view of the law is that these things that are called exceptions are classes of cases to which the doctrine does not apply.”¹⁰¹⁵

However, in the report of his opinion found in the *Scottish Law Reporter*, the following is present in the bracketed part of the above passage: ‘the application of the maxim *assignatus utitur jure auctoris* may be subject to some exceptions’.¹⁰¹⁶ Nevertheless, assignation is a transfer. It is thought that where there is an assignation of a money claim, then the ordinary principle of property law applies, and on the facts of an assignation, *assignatus utitur jure auctoris*.

III. Defences and Counterclaims.

Assignation is the transfer of a creditor’s rights against the debtor, without the consent of the latter. The assignee will be able to enforce the cedent’s rights against the debtor. The *assignatus* rule circumscribes the right of the assignee, however, so as to allow the debtor to plead those defences that were relevant against the cedent against the assignee. Nevertheless, this does not mean that the assignee becomes liable for the cedent’s obligations. This much seems common sense. As one South African judge concluded, ‘should the cessionary be liable for the full counterclaim in excess of the debt ceded, the cessionary’s position would be very risky. If this were the law, little will hereafter be heard of cession’.¹⁰¹⁷ It seems unlikely, then,

¹⁰¹² Bearer bills are not indorsed.

¹⁰¹³ Bills of Exchange Act 1882, s. 53(2). Note that only time bills are presented for acceptance. Why presentation should operate as an assignation is a result of a failure to appreciate the difference between an order to pay and a mandate to uplift. See discussion in chapter 3 above, part VI, E.

¹⁰¹⁴ (1876) 3 R 1078.

¹⁰¹⁵ At 1082.

¹⁰¹⁶ (1876) 13 SLR 659 at 662.

¹⁰¹⁷ *Regional Factors (Pty) Ltd v Charisma Promotions* 1980 (4) SA 509 (C) at 512 per Burger J. Cf. *Anderson v Spence* (1683) Mor 10286 where the debtor sought to render the assignee liable for damages for the cedent’s conduct in taking advantage of the debtor’s minority in inducing him to contract. This was refused on the basis that the assignee was a singular successor. Interestingly, the Court was considerably influenced by the fact that the cedent remained solvent.

that it can be the law that the assignee is liable for the obligations of the cedent. Yet, before we examine the cases in Scots law which consider the paradigm examples of the principle, it is necessary to examine two ancillary points which potentially subvert it.

A. Judicial Definitions of Assignment.

There are numerous judicial dicta, which, if taken literally, would unsettle the idea that the assignee has no active liability for the debts of the cedent. For example, the only contemporary judicial dictionary in Scotland¹⁰¹⁸ explains the term assignment in reference to a dictum of Sheriff Principal McLeod in relation to the use of the term 'assignment' in the Conveyancing and Feudal Reform (Scotland) Act 1970, s. 20(5):

"I am therefore inclined to think that the technical meaning of the word 'assigned' is the meaning intended ... in law, the ordinary rule is that a personal right vests in an assignee subject to all the contingencies affecting his author's right. If it is correct, as I believe it to be, to give the word 'assigned' its technical legal meaning, the subsection operates to assign to a creditor not only the proprietor's rights but his obligations as author of the right assigned."¹⁰¹⁹

This is incorrect. While it may be true to say that an assignee is 'subject to all the contingencies affecting his author's right', it does not necessarily follow that an assignment transfers not only the rights of the cedent, but also his obligations.

B. The Assignee and Counterclaims.

The fundamental basis of an assignment is the transfer of the cedent's rights against the debtor to the assignee without the consent of the debtor. The cedent's obligations do not transfer. The debtor remains protected. He can still raise all those defences he could have raised against the cedent against the assignee. As for counterclaims, it could be argued that the effect of an assignment is to put the assignee in a better position than the cedent. The debtor cannot bring a positive counterclaim against the assignee. In the often-quoted words of Sheriff Brydon, 'A counter claim is a sword, whereas compensation is only a shield, and the right to

¹⁰¹⁸ W.J. Stewart (ed.) *Scottish Contemporary Judicial Dictionary* (1995), 48 'assigned'.

¹⁰¹⁹ *David Watson Property Management v Woolwich Equitable Building Society* 1989 SLT (Sh Ct) 74 at 76 rev'd 1990 SLT 764 aff'd 1992 SC (HL) 21. Reported at first instance at 1989 SLT (Sh Ct) 4. Cf. also D.M. Walker, *The Law of Contracts and Related Obligations in Scotland* (3rd ed. 1995) para 29.29, which contains two errors: first, transfer by assignment is not effected merely by contract; second, the cedent does not by assignment transfer his liabilities.

defend oneself with the latter does not imply the right to wield the former'.¹⁰²⁰ This analysis has been followed,¹⁰²¹ and rightly so.¹⁰²²

Professor McBryde forcefully argues for a re-examination of the rule and accentuates the legitimate concern that the debtor should not be placed in an inferior position by virtue of the assignation. He postulates the situation of the illiquid claim for damages that the debtor may have against the cedent in the latter's capacity as a seller of goods. The seller assigns his right to payment. The assignee demands payment from the assignee. McBryde argues that in such situation it would be unfair on the debtor if he could not bring his counterclaim against the assignee. If the debtor has no defence against the claim of the assignee then he is in a worse position than he would have been but for the assignation.¹⁰²³ However, this overstates the difficulties of the debtor. The argument fails to account for the debtor's right to plead retention. At the heart of the debtor's claim for damages is an allegation that the cedent failed to perform his part of the bargain. If the cedent sought payment of the price, the debtor could refuse. He is not willing to pay the price until the seller performs his obligations under the contract; this is the defence of the unperformed contract (*exceptio non adimpleti contractus*).¹⁰²⁴ Since this is a defence (a shield), there is no problem in allowing it to be pled by the debtor.¹⁰²⁵ It seems well established that in Scotland the debtor may refuse a demand

¹⁰²⁰ *Binstock, Miller & Co v E. Coia & Co Ltd* 1957 SLT (Sh Ct) 47 at 48 *per* Sheriff Brydon. The Sheriff indicated he was merely borrowing the phrase adopted by Sir George Jessel MR in *Birmingham Estates Co v Smith* (1883) 13 Ch D 506 at 509. The Master of the Rolls did not, however, formulate his opinion thus. The phrase was invoked by Cockburn CJ in his detailed opinion in *Stooke v Taylor* (1880) 5 QBD 569 at 575. Counterclaims were first introduced into English law by the Judicature Act 1873. The phrase was employed earlier by Lord Neaves in *Menzies v Menzies* (1863) 1 M 1025 at 1037 in the context of a plea of *bona fides*.

¹⁰²¹ *Alex Lawrie Factors Ltd v Mitchell Engineering Ltd* 2001 SLT (Sh Ct) 93 *per* Sheriff Taylor, declining to follow McBryde, *The Law of Contract in Scotland* (1987) para 17-87. The substantive issue as to the rights of assignees was not decided by the Inner House in *Tods Murray WS v Arakin Ltd* 2001 SC 840.

¹⁰²² See also H.L. MacQueen 'Assignment and Breach of Contract' (1997) 2 *SLPQ* 114; *idem*, 'Assignment' in *SME* vol 15 (1995), para 864; H.L. MacQueen and J.M. Thomson, *Contract Law in Scotland* (2000) para 2.85 drawing on *Pan Ocean Shipping Ltd v Creditcorp Ltd, The Trident Beauty* [1994] 1 WLR 161 HL, for which see G. J. Tolhurst, 'Assignment, Equities, the *Trident Beauty*, and Restitution' (1999) 58 *CLJ* 546. See also A. Deutsch, 'Swords or Shields? Counterclaims and Assigned Debts' 1996 *Greens Civil Law Practice Bulletin* 11-4.

¹⁰²³ McBryde, *Contract*, para 12-88, points (2) and (5). Cf. S. Scott, *The Law of Cession* (2nd ed. 1991), 196 who suggests that if the cedent is in a position to pay, then the debtor must bring his counterclaim against the cedent. However, if the cedent is unable to pay, then it is presumed that the cession was effected with the intention of depriving the debtor of his counterclaim and was made *male fide* and therefore invalid. This, however, is not consistent with the South African cases: *Goodwin State Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) at 617 E-H.

¹⁰²⁴ *Ross v Ross* (1895) 22 R 461 at 464-465 *per* Lord McLaren; *Lovie v Baird's Trs* (1895) 23 R 1 at 3 *per* Lord McLaren. See discussion below *v.* 'Retention'.

¹⁰²⁵ This possibility was adverted to by Sheriff Taylor in *Alex Lawrie*, *op. cit.*, n. 1021 above, at 97B. The Appellate Division in *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 also expressly noted that the debtor there was seeking only to counterclaim; he had pled neither retention nor compensation.

for payment from the assignee of the cedent's rights under a mutual contract on the basis that the cedent has failed to perform his part:

'An assignee to a contract, or bond, if he charge the other party to fulfil to him as assignee, his part of said contract, the defender may allege that the cedent must first fulfil his part, or at least per *simul et semel*; whilk the Lords allow, for that contract whereunto the charger is made assignee; but if the cedent be obliged to the defender by another contract or bond, the assignee is not holden to answer for the same'.¹⁰²⁶

It is conceded that an assignation of a seller's right to the price of goods will prevent the debtor from exercising his right to retain the goods and claim damages¹⁰²⁷ against the assignee. But the effect of allowing a plea of retention is to ensure that the debtor is not prejudiced.¹⁰²⁸ If the debtor is sued he does not have to pay until the cedent performs his part of the contract for the sale of goods. Stair suggested that the debtor could compel the assignee to compel the cedent to perform.¹⁰²⁹ If the debtor wants to keep the goods he has bought and claim damages then he can still do just that. The assignation makes no difference to the situation. For example, the debtor is still entitled to invoke the terms of the Sale of Goods Act 1979 in relation to consignation¹⁰³⁰ against an assignee.¹⁰³¹ Admittedly, the debtor may still have problems of satisfying the conditions of mutuality. In particular, the debtor must show that his suspension of performance is on the basis of a failure of the cedent to perform an obligation which is a counterpart of the debtor's obligation to pay. In general, a defender who is sued for a liquid sum cannot withhold payment on the ground that he has an illiquid claim against the pursuer arising out of a different contract.¹⁰³² A defence of retention is unproblematic. At heart, retention has nothing to do with liquidity.¹⁰³³ Counterclaims are procedural in nature. The introduction of counterclaims into Sheriff Court,¹⁰³⁴ and eventually into Court of Session,¹⁰³⁵ procedure effected no change in the law of retention on the basis of

¹⁰²⁶ *Hamilton v Hamilton* (1629) Mor 830. Cf. *Lawrie v Lawson* (1685) Mor 9210; *Shearer v Cargill* (1686) Mor 9210 and Stair I.x.16, followed by *Erskine III.v.10* and *Johnston v Robertson* (1861) 23 D 646 and following cases discussed below.

¹⁰²⁷ Sale of Goods Act 1979, s. 15B (1)(a).

¹⁰²⁸ Cf. comments in *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 (C) at 617E-H per Selikowitz J.

¹⁰²⁹ Stair I.x.16.

¹⁰³⁰ s. 58.

¹⁰³¹ *Lithgow Factoring Ltd v Nordvik Salmon Farms Ltd* 1999 SLT 106.

¹⁰³² *Grewar v Cross* (1904) 12 SLT 84 OH.

¹⁰³³ *Graham v Gordon* (1843) 5 D 1207; *Earl of Galloway v McConnell* 1911 SC 846.

¹⁰³⁴ Sheriff Courts (Scotland) Act 1907, schedule 1, r. 55.

¹⁰³⁵ Administration of Justice (Scotland) Act 1933; Rules of Court 1936, r. II,13; Rules of Court of Session, 1964, AS 10th November 1964 r.84 (see also SI 1965/321 and SI 1965/1090). See now RCS r 25.1. Counterclaims were first introduced in England, along with a unified concept of set-off, under the Judicature Act 1873. See generally the opinion of Cockburn CJ in *Stooke v Taylor* (1880) 5 QBD 569 at 573 ff.

the *exceptio non adimpleti contractus*.¹⁰³⁶ Rather, they allow decree for any balance due to the defender to be pronounced in the same action.¹⁰³⁷

C. Mutuality: *exceptio non adimpleti contractus*.¹⁰³⁸

1. General.

Retention is one facet of ‘the principle of mutuality which applies to all contracts’.¹⁰³⁹ It is a simple and desirable doctrine: a contractor who seeks to enforce his rights must have performed or be willing to perform the obligations which are incumbent upon him before he can demand counter performance. If the pursuer has not performed, then the defender can ‘retain’ or ‘suspend’ his counterperformance. The terminology in Scottish sources is confused and we will refer to the doctrine as ‘suspension’ rather than ‘retention’. Unsurprisingly, the doctrine is old.¹⁰⁴⁰ Suspension merely postpones the performance of obligations, although it is of course possible that performance will never take place. The respective obligations of the parties continue to exist.¹⁰⁴¹ Suspension can only be invoked where the retained performance is a counterpart of the right claimed by the pursuer.¹⁰⁴² There is a presumption that the obligations contained in a single contract are counterparts of each other.¹⁰⁴³ Not every

¹⁰³⁶ *Christie v Birrells* 1910 SC 986 at 991 *per* Lord Mackenzie; at 992 *per* Lord Dundas; at 994 *per* Lord Justice-Clerk MacDonald.

¹⁰³⁷ *British Motor Body Co Ltd v Thomas Shaw (Dundee) Ltd* 1914 SC 922 at 930 *per* Lord Skerrington. The leave of the Court will be required to bring a counterclaim against a company in liquidation: Insolvency Act 1986, s. 113.

¹⁰³⁸ See generally, P.D. O’Neill and N. Salam, ‘Is the *exceptio non adimpleti contractus* part of the new *Lex Mercatoria*?’ in E. Gaillard (ed.) *Transnational Rules in International Commercial Arbitration* (International Chamber of Commerce, 1993) at 147 ff. Cf. D. Girsberger, ‘Defences of the Account Debtor in International Factoring’ (1992) 40 *Am J Comp Law* 467.

¹⁰³⁹ The Scottish cases in this area are a mess. The reader is referred to the helpful overview in McBryde, *Contract* para 20-67 ff.

¹⁰⁴⁰ In the first edition of his *Institutions* (1681), Part II, title xxiii, at 16, Stair observes of the authorities – of which he cites: *Laird of Keirs v Mr James Marjoribanks Leidington*, 27th July 1546, Mor 5036; *James Crichton v Marion Crichton*, 19th November 1565, Mor 1702; *Lord Herries v Provost of Limluden* July 1581; *Laird of Ker v Panter*, 19th February 1548; *Earl of Glencairn v Commendatar of Kilwinning*, December, 1563 – that ‘our decisions have been exceeding various in this matter’. The cases are not cited in the second edition: I.x.16.

¹⁰⁴¹ Erskine III.iv.20; *Ballantyne v East of Scotland Farmers Ltd* 1970 SLT (Notes) 50.

¹⁰⁴² Stair, I.x.16; *Bank of East Asia v Scottish Enterprise* 1997 SLT 1213 HL; *Macari v Celtic Football and Athletic Club* 1999 SC 628; Cf. *Lawson v Drysdale* (1844) 7 D 153 at 155 *per* Lord Cockburn: ‘You can’t stop the decree by a vague general statement of claim that may be sustained in another process’. A debtor who is also cautioner for the cedent apparently can refuse to pay the assignee on the basis that he is entitled to retain to secure his relief against the debtor: *Sibbald v Turnbull* (1683) Mor 2608. Cf. the English position: J. Philips, ‘When Should a Guarantor be Permitted to rely on the Principal’s Set-Off?’ [2001] LMCLQ 383.

¹⁰⁴³ *Hoult v Turpie* 2004 SLT 308 at 312.

obligation will be a counterpart of the others.¹⁰⁴⁴ Suspension can be raised against a pursuer who is in default in respect of a non-material¹⁰⁴⁵ element of the contract.¹⁰⁴⁶ In a recent Outer House case, the Lord Ordinary explicitly limited suspension to cases where there has been a material breach.¹⁰⁴⁷

Either way, suspension is an important and forceful remedy. It is particularly important for debtors of a pursuer who is an assignee, since a plea of retention is not subject to the rules of liquidity which govern compensation. The leading case where the distinction between 'retention' and compensation is brought out is *Johnston v Robertson*.¹⁰⁴⁸ Here the pursuer had completed work and claimed for payment of the balance of the contract. He obtained decree in absence. The defenders brought this decree under suspension. They argued, *inter alia*, that the pursuer had been late in completing the contract, that the pursuer was subject to contractual penalties, and that the defenders were entitled to other damages for breach. The defenders attempted to plead compensation. As we have seen, compensation cannot be pled where the claims are not liquid. The issue was therefore simply whether the defenders were entitled to refuse payment on the basis that the pursuer had not carried out his corresponding obligations under the contract. The defence was successful:

"The plea of the defenders is based mainly on the rule of the law of Scotland, that one party to a mutual contract, in which there are mutual stipulations, cannot insist on having his claim under the contract satisfied, unless he is prepared to satisfy the corresponding and contemporaneous claims of the other party to the contract. I think that the rule of law, that an illiquid cannot be set-off [i.e. compensated] against a liquid claim, does not apply to such a case; and that, at all events, if one claim can be liquid, and the other partly illiquid, yet contemporaneous, the rule should suffer some qualification or relaxation if the claims arose under one contract. The counterclaims must be contemporaneous, for, if not, the rule would apply."¹⁰⁴⁹

¹⁰⁴⁴ *Bank of East Asia v Scottish Enterprise* 1997 SLT 1213; *Macari v Celtic Football and Athletic Club* 1999 SC 628.

¹⁰⁴⁵ See McBryde, *Contract* paras 20-88 ff. for discussion of this term.

¹⁰⁴⁶ Gloag, *Contract*, 628; H.L. MacQueen and J.M. Thomson, *Contract Law in Scotland* (2000) para 5.10. This is somewhat controversial. In *Marshall's Trs v Bank* 1934 SC 405, Lord Justice-Clerk Aitchison referred to the 'cardinal' conditions in the contract, reflecting the approach of Lord Wellwood (Ordinary) in *Chambers JF v Vertue* (1893) 20 R 257 at 258. Lord Anderson in *Marshall's Trs* referred to claims 'connected with' the contract.

¹⁰⁴⁷ *Hoult v Turpie* 2004 SLT 308 at 314L-315D. The Lord Ordinary is wrong.

¹⁰⁴⁸ (1861) 23 D 646. See also *McBride v Hamilton* (1875) 2 R 775 partly overruled in *British Motor Body Company v Thomas Shaw (Dundee) Ltd* 1914 SC 922; *Turnbull v McLean* (1873) 1 R 730; *Pegler v Northern Agricultural Implement Co* (1877) 4 R 435; *Christie v Birrels* 1910 SC 986; *Dingwall v Burnett* 1912 SC 1097; *Haig v Boswell Preston* 1915 SC 339 and *Graham v United Turkey Red Co* 1922 SC 533.

¹⁰⁴⁹ At 652 *per* Lord Benholme; cf. Lord Cowan at 654 and Lord Justice-Clerk Inglis at 656. Benholme's dictum was approved in *Redpath Dorman Long Ltd v Cummins Engine Co Ltd* 1981 SC 370 and *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 HL.

In so far as the claims have to be contemporaneous, then the availability of a plea of suspension to an assignee fits in with the distinction previously discussed between intrinsic and extrinsic claims. It has been suggested that, for the plea to be successful, it is necessary that the defender actually counterclaims.¹⁰⁵⁰ Otherwise, it is said, retention ‘would obviously give rise to all kinds of abuses’ since a defender could retain for a non-material breach while otherwise enjoying the use of delivered goods about which he has no complaint.¹⁰⁵¹ There may be something to be said for this general point. In terms of the authorities, however, a counterclaim is probably not necessary. Providing the defender offers to prove that the pursuer is in breach of contract this should be sufficient for the action for payment to be dismissed.¹⁰⁵² Admittedly, it is an approach that is not free from difficulty. In *Sutherland v Barry*,¹⁰⁵³ landlords sued for outstanding rent. The tenants admitted that the sums sued for were due and owing. But they pled retention on the ground that they had been induced to enter the lease by the pursuer’s fraudulent misrepresentations. The tenants counterclaimed¹⁰⁵⁴ for the value of the wet and dry stock which was to be valued and paid for by the landlord at the date of termination of the lease. The pursuer in turn answered the defenders’ counterclaim with his own defence of retention, based on the principal claim for rent. This pleading process shows how the concept of retention as a complete defence resulting in dismissal is circuitous; in some situations it could postpone the resolution of a dispute *ad infinitum*. The Lord Ordinary held that since the misrepresentation must logically have occurred prior to the conclusion of the contract, and was essentially based on delict, it could not found a valid plea of retention.¹⁰⁵⁵ On the facts, however, he held that since the rent was due and owing, and since the landlord admitted that he was bound to pay the tenants the value of the wet and dry stock, these amounts should be set-off and the balance payable to the pursuer. This was a

¹⁰⁵⁰ *Ure & Menzies Ltd v Summerville* 1946 SLT (Sh Ct) 23.

¹⁰⁵¹ *Ibid per Sheriff-Substitute* (Arch. Hamilton) at 24. *Alex Laurie Factors Ltd v Mitchell Engineering Ltd* 2001 SLT (Sh Ct) 93 at 95C-D is predicated upon the assumption that retention is only a valid defence “to the extent that the pursuers’ claims might be extinguished.” But suspension does not extinguish anything. Cf. *Principles of European Contract Law*, Art. 9:201.

¹⁰⁵² *Peglar v Northern Agricultural Implement Co* (1877) 4 R 435 at 441 *per* Lord Shand (dissenting) approved by Lord Jauncey in *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 at 1217E; *McDonald v Kyd* (1901) 3 F 923; *McNab v Nelson* 1909 SC 1102 at 1101 *per* Lord President Dunedin. These averments will have to be established if there is a proof: *Kilmarnock Gas Light Co v Smith* (1872) 11 M 58 at 61 *per* Lord Justice-Clerk Moncreiff. It is unclear why the plea of retention was unsuccessful in *Dod’s Trs v Fortune* (1854) 16 D 478. In *Ure* the conclusion of the defender was for absolvitor which obviously could not have been granted.

¹⁰⁵³ 2002 SLT 418 OH.

¹⁰⁵⁴ This was also raised as a separate action *sub nom Barry v Sutherland* 2002 SLT 413 OH. No doubt the defenders raised a separate action for payment based on a provision of the lease since so as not to be approbating and reprobating the lease in the same action.

¹⁰⁵⁵ At 419K-L, para [9] following *Smart v Wilkinson* 1928 SC 383.

perfectly sensible way to dispose of the case. Yet, in following *Smart v Wilkinson*,¹⁰⁵⁶ the Lord Ordinary's conclusion in *Barry*, that the defender could not retain against the original contracting party, is inconsistent with the position that would have arisen had the pursuer assigned his right to payment. It is clear beyond doubt that the defender could have pled the fraudulent misrepresentation as a defence to a claim by the assignee on the basis of *assignatus utitur jure auctoris*.¹⁰⁵⁷

Some landlord and tenant authorities suggest that a liquid claim for rent can be compensated by a 'counterclaim' by the tenant for damages. These are better categorised as retention cases.¹⁰⁵⁸

2. Intimation as a cut-off point.

Is intimation relevant to a claim based on mutuality? Suppose Keith assigns a claim from a mutual contract with Murray to Mary. Mary intimates to Murray on day 1. On day 2, Keith breaches his contract with Murray. On day three Mary demands payment from Murray. Can Murray plead retention on the basis of a breach which has occurred after intimation? This issue has given rise to considerable debate in Belgium. There it has been held that any breach by the cedent of his contract with the debtor after the completion of the assignation may still be raised against the assignee. The debtor's right to retain performance on a breach by the creditor is said to arise from the moment that the contract was concluded.¹⁰⁵⁹ This solution has much to commend it.¹⁰⁶⁰

3. Contemporaneous but Extrinsic claims.

¹⁰⁵⁶ 1928 SC 383.

¹⁰⁵⁷ *Scottish Widows Fund v Buist* (1876) 3 R 1078.

¹⁰⁵⁸ E.g. *Graham v Gordon* (1843) 5 D 1207 especially at 1211 *per* Lord Cockburn. The opinion of Lord Fullerton in *Graham* was approved in *Lovie v Baird's Trs* (1895) 23 R 1 at 3 *per* Lord Kinnear. See also *Fingland v Mitchell & Howie* 1926 SC 319.

¹⁰⁵⁹ P. van Ommeslaghe, 'La transmission des obligations en droit positif belge' in *La Transmission des obligations*, 102-103; *idem*, 'Le Nouveau Regime de la cession et de la dation en gage des créances' [1995] 114 *Journal des tribunaux* 529 at 531, n. 29.

¹⁰⁶⁰ Compare the position in Scots law on a balancing of accounts in bankruptcy for which, see below.

What is the position in a case of complex transactions where the mutual stipulations are actually in a different contract?¹⁰⁶¹ Gloag observes that ‘there is a general presumption that the reason why the parties have not recorded their agreement in separate documents is that they intended them to be dependent on each other’.¹⁰⁶² This would suggest that there can be no retention of performance of an obligation on the basis that the party is in breach an obligation contained in another document. The introduction of an assignation may complicate matters. What if the assignee is unaware of the counter stipulations which are contained in a different document? The debtor’s argument would be based on an extrinsic claim. Yet, why should the debtor be prejudiced by the mere fact of an assignation? In *Caddagh Steamship Co v Steven & Co*¹⁰⁶³ it was held that one party was entitled to retain performance under one contract where there was a failure of the other party to perform on another contract. There is partial support for such an approach in Erskine. Of the *assignatus* rule, he observes,

“And this doctrine extends also to mutual contracts, in which the assignees are subjected to all the burdens which affect the right while it was vested in the cedent, not only where the mutual obligations are inserted into the contract itself (for these the assignee cannot be ignorant of), but even where they are *partly formed* by a separate backbond, if it shall appear by witnesses that the contract and backbond have a relation to and are mutual causes of one another: Stair I.x.16.”¹⁰⁶⁴

On Erskine’s reasoning, then, a defence ‘partly’ based on an extrinsic backbond would be admissible where it can be established by evidence that the stipulations are truly contemporaneous of each other. Erskine further suggests that the assignee’s knowledge of any backbond may be relevant. Such an approach, however, would lead to considerable uncertainty.¹⁰⁶⁵

¹⁰⁶¹ A counterclaim has been allowed on an averment of breach of a separate but ancillary contract to a claim against a claim on the principal contract since they were all related to the same transaction: *Borthwick v Dean Borthwick Ltd* 1985 SLT 269 but there was no discussion of the point. Cf. *Stewart v Lindsay* 1961 SLT (Sh Ct) 31 and *Hopkirk v Pririe* 1958 SLT (Sh Ct) 9.

¹⁰⁶² Gloag, *Contract* (2nd ed. 1929), 595. This passage was approved in *Hoult v Turpie* 2004 SLT 308 at 312 by the Lord Ordinary (Drummond Young).

¹⁰⁶³ 1919 SC (HL) 132. See also *Cumming v Cumming* (1628) Mor 9147 and 9207, and *Dick v Skene* 1946 SN 64; Erskine III.v.10 and Bell, *Commentaries* (7th ed. 1870) I, 222.

¹⁰⁶⁴ III.i.20 (my emphasis). Cf. UNCITRAL, Art. 20(1): ‘In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself of such claim were made by the assignor’ (my emphasis); and PECL, Art. 11:307(2): ‘The debtor may assert against the assignee all rights of set-off ... in respect of claims against the assignor... (b) closely connected with the assigned claim’ (emphasis added); and UCC § 9-318.

¹⁰⁶⁵ Cf. *Park, Dobson & Co v William Taylor & Son* 1929 SC 571 and *Marshall v Nimmo & Co* (1847) 10 D 328.

It is sometimes suggested that suspension can be pleaded at any time, even after decree has been pronounced against the debtor.¹⁰⁶⁶ This is quite unusual. There would be no end to disputes if, after being given the opportunity to state defences, the defender can wait until he is served with a charge for payment before pleading suspension.¹⁰⁶⁷ The case cited by Erskine¹⁰⁶⁸ was, in any event, pled in terms of compensation (which discharges obligations); while *Glendinning* involved an insolvency and the retention of a corporeal moveable.¹⁰⁶⁹ There was no suggestion that a plea of retention would prevent diligence following on the decree.

The requirements that the debtor will have to satisfy for retention are, on one view of the requirement of liquidity, less onerous than those for compensation. But the different requirements for a successful plea of retention may be more onerous:¹⁰⁷⁰ in particular, a defence of retention against an assignee will have to be an intrinsic qualification to, and contemporaneous with, the pursuer's claim. Retention cannot be pleaded where the right to do so is excluded by agreement.¹⁰⁷¹ Retention probably cannot be sustained where the counter performance due is conditional and the condition has not yet been purified.¹⁰⁷²

IV. Set-Off

A. Compensation, Contractual Set-Off and Balancing of Accounts in Bankruptcy.

1. General.

Perhaps the most important defence open to a debtor against a claim by an assignee is to plead some form of set-off.¹⁰⁷³ In Scots law, set-off is not a term of art. It will be used here

¹⁰⁶⁶ Erskine III.iv.20 citing *McLaren v Bisset* (1736) Mor 2646; *Creditors of Glendinning v Montgomery* (1745) Kames Rem Dec 102; Kilkerran 44; Elchies, *Arrestment* 24; Mor 2573 followed by Lord Ormidale in *Paul and Thain v Royal Bank of Scotland* (1869) 7 M 361 at 365. The principle applies only to decrees for payment, not decrees of constitution: *Lockhart v Ferrier* (1842) 4 D 1253 at 1258 *per* Lord Moncreiff.

¹⁰⁶⁷ Where a multiplepointing was raised by a claimant (the real raiser) in the name of the fundholder (as nominal raiser), the fundholder was nevertheless bound by the decree: *Downie v Rae* (1832) 11 S 51. Cf. J. Millar, 'Multiplepointings' 1997 *Greens Civil Law Practice Bulletin* 13-8.

¹⁰⁶⁸ *McLaren v Bisset* (1736) Mor 2646.

¹⁰⁶⁹ Cf. the law on retention by an owner, see *Glendinning*, *op. cit.*, n. 1066 above; *Mein v Bogle*, 17th January 1828 FC; 6 S 360; 2 Ross Lead Com Cas 648 approved by the majority in *Melrose v Hastie* (1851) 13 D 880.

¹⁰⁷⁰ This has not always been kept in view. In *Crawford v Hamilton* (1735) Mor 2548, it was successfully argued that a plea of retention should be refused as it would allow a plea of compensation by the back door.

¹⁰⁷¹ *Harper v Faulds* (1791) Mor 2666; Bell's Octavo Cases 440 at 464-465 *per* Lord Dreghorn.

¹⁰⁷² *Ibid*, at 469 *per* Lord Eskgrove.

¹⁰⁷³ See generally *Laing v Lord Advocate* 1973 SLT (Notes) 81.

in a loose and general sense; a convenient expression which brings together the distinct claims of compensation, contractual set-off and balancing of accounts in bankruptcy. Any attempt at analysis is an uphill struggle – the sources in Scots law on set-off are desperately confused; the law of compensation and retention especially so.¹⁰⁷⁴ Professor McBryde concisely identifies the true distinction between the last two: ‘the purpose of retention is to enforce obligations; compensation extinguishes them’.¹⁰⁷⁵

2. Compensation.

(a) History.

It has been suggested that prior to the Compensation Act 1592,¹⁰⁷⁶ compensation was not available.¹⁰⁷⁷ Such a suggestion seems to be reinforced in the decisions collected prior to the Act.¹⁰⁷⁸ However, there are problems with this theory. Compensation is based on common sense and justice. It can be traced at least as far back as Roman law.¹⁰⁷⁹ It would be surprising that a system, which borrowed as heavily from this area of the civil law as the Scots, did not recognise such a substantive doctrine. Granted, there may have been procedural problems with giving effect to the doctrine, but it does not therefore follow that the substantive principle was not recognised prior to 1592. This point was forcefully made in the dissenting opinions of Lords Eskgrove and Braxfield in *Harper v Faulds*:¹⁰⁸⁰

‘I assume it as a principle, that the law of Scotland is a branch of the civil law, especially with regard to contracts: it is enough, therefore, if the civil law establishes the principle of retention; and both compensation and retention were received in that law. They are founded on a principle of common justice between man and man; not the creature of statute. They must have been recognised in our law long before the statute 1592, which only allowed the principle to operate by way of exception. Before the act, had two parties come,

¹⁰⁷⁴ See generally McBryde, *Contract*, paras 20-68 ff.

¹⁰⁷⁵ *Ibid*, para 20-64. Note, however, that the pursuer pleading compensation is seeking to discharge his own obligations; the pursuer pleading retention is seeking to enforce the defender’s obligations.

¹⁰⁷⁶ Cap. 143; APS, c. 61. Of the statute, it has been described as, ‘...a just and positive statute, most creditable to the wisdom and sound views of the ancient Scottish legislature, as it was centuries before such a law was recognised in England’ in *Donaldson v Donaldson* (1852) 14 D 849 at 855 *per* Lord Cunninghame.

¹⁰⁷⁷ Stair I.xviii.6; Erskine III.iv.12.

¹⁰⁷⁸ *The Queen v Bishop of Aberdeen* (1543) Mor 2545; Balfour, *Practicks* (Exception), 349, c.xxxii; Hope, *Major Practicks*, VI. 44 § 1: Be the old pratique of this kingdom the exception of compensation was not admitted, albeit de liquido in liquidum (A 306), befor the Act of Parliament 1592, c. 143. Nota be the Act of parliament compensation is onlie receavable in the first instance and not in suspension or reducitone of decret: C 786’.

¹⁰⁷⁹ See Zimmermann, *Obligations*, 760 ff.

¹⁰⁸⁰ (1791) Bell’s Octavo Cases 432 at 440; Mor 2666.

each with decree in his hand, must both have gone to prison? Surely not; or could this have taken place, though one was a decree for delivery, while the other was a decret for payment? It cannot be. Retention^{1080a} must have existed before the act of Parliament; the case from Balfour proves it.”¹⁰⁸¹

The report of the case by Balfour¹⁰⁸² states only that compensation was ‘*not available by way of exception*’. The case is similarly reported in Sinclair’s *Practicks*.¹⁰⁸³ If appropriate stress is placed on the procedural qualification to the statement that compensation was not available until 1592, then the position is more acceptable.^{1083a} In any event, as Bell points out, the report by Balfour ‘bears no evidence of any such plea or judgement’.¹⁰⁸⁴ Bell was apparently unimpressed by Balfour’s suggestion that Scots law did not recognise compensation prior to 1592: ‘From the prevalence of the Roman jurisprudence in Scotland, one should not expect to find a period in her law where the doctrine of compensation was unknown’.¹⁰⁸⁵ After all, as he had just argued, compensation is ‘not only expedient, it is required by the plainest principles of equity’.¹⁰⁸⁶ In a footnote, Bell refers to an excerpt from the Records of Scotland¹⁰⁸⁷ furnished to him by the Deputy Clerk Register, Thomas Thomson.¹⁰⁸⁸ This shows that far from refusing the plea of compensation, the Lords of Council responded by allowing the allegation to be proved. They stated,

‘assignis to the [procurator for the Bishop, the defender] procurator foresaid ye xxvij day of Maij instant with continuatioun of dais for proving thereof And

^{1080a} The use of ‘retention’ instead of ‘compensation’ is indicative of the confusion in this area of the law.

¹⁰⁸¹ At 467-8 *per* Lord Eskgrove. It is interesting that counsel was confident enough to label Stair’s suggestion that compensation was not part of Scots law prior to 1592 as a ‘ridiculous notion’ (see argument at 438). For fascinating, and amusing, information about David Rae, Lord Eskgrove, see: H. Cockburn, *Memorials of His Time* (1856), 118-125.

¹⁰⁸² *The Queen v Bishop of Aberdeen* (1543) Mor 2545; Balfour, *Practicks*, 349. For the authority of Balfour’s *Practicks* generally, see H. McKechnie, ‘Balfour’s Practicks’ (1931) 43 *JR* 179; for Sinclair’s *Practicks* see generally: A. Murray, ‘Sinclair’s Practicks’ in A. Harding (ed.) *Law Making and Law Makers in British History* (1980), 90.

¹⁰⁸³ See the annotated provisional version by Professor G. Dolezalek available at <<www.uni-leipzig.de/~jurarom/scotland>>, nos. 323, 324 and 539. Bell, *Commentaries* (7th ed. 1870) I, 120 cites page 50 of a MS copy. Dolezalek criticises Balfour’s wide proposition also: see his n. 262.

^{1083a} Cf. H. Dernburg, *Geschichte und Theorie der Kompensation* (2nd ed. 1868; repr. 1965) § 30, at 266 who suggests that it was only procedural difficulties that prevented a reception of compensation, expressly admitted by the Canonists, in municipal law. Dernburg was familiar with the Scottish position: he cites the 1592 Act (at 278, n. 1) as one of the earliest recognitions of compensation in municipal law.

¹⁰⁸⁴ *Commentaries* II, 120 (7th ed. 1870).

¹⁰⁸⁵ *Ibid*, II, 120. Contrast the position in England, which did not admit set-off at law until it was introduced by statute in 1729, see R. Derham, *The Law of Set-Off* (3rd ed. 2003) para 2.01.

¹⁰⁸⁶ *Ibid*, II, 118.

¹⁰⁸⁷ *Register of Acts and Decrees* vol. June 26, 1542 – February 13th 1543 fol. 325 and fol. 360. The excerpt is reproduced in footnote 6.

¹⁰⁸⁸ Note 6. For Thomas Thomson, see *Guide to the National Archives of Scotland*, Scottish Record Office, (Stair Soc Supplemental vol. 3, 1996), xiii and J. Imrie, *Stair Memorial Encyclopaedia* vol 19 ‘Public Registers and Records’ (1990) para 810. It is fitting that Bell opens his note with a tribute to Thomson, ‘to whom Scotland is so much indebted for the restoration of her records’.

ordanis him to haue letters summond sic writtis rychtis resonis & documentis as he has or will vse for preving of ye said allegeance agane ye said day’.

It seems that the Bishop failed to prove that he had made any payment whatever, and decree was pronounced against him. There was no dispute that his plea was relevant; the Lords were careful to narrate the fact that they had continued the cause to provide the opportunity to the defender to prove his plea of ‘contentatioun & payment’. Moreover, there is further positive authority for the proposition that compensation was available at common law prior to 1592. In *Colyn v Sleich*,¹⁰⁸⁹ a Frenchman, one Colyn, sued Sleich, of Leith, for freight. Both parties compeared and the defender alleged that the pursuer was in turn indebted to him. In response to this the Lords allowed both parties a proof to prove their allegations; it was reported that ‘Sleich enacts himself to pay to Colyn what is found just’. It is thought that this is another early case where compensation would have been given substantive effect had the plea been sustained.

(b) Claims must be *de liquido in liquidum* or at least able to rapidly liquidated.

The Act provides that compensation is proponable only by exception where the debts are *de liquido in liquidum* at the time of time when the plea is entered.¹⁰⁹⁰ However subsequent cases relaxed this doctrine. Stair noted that the terms of the statute could be interpreted loosely following the Courts Act 1672¹⁰⁹¹ which sought to expedite the settlement of disputes before the court and obviate continual hearings.¹⁰⁹² Erskine articulates the principle: *quod statim liquidari potest, pro jam liquido habeteur*.¹⁰⁹³ But how is ‘statim’ to be construed? There are several cases where the cause was sisted to allow liquidation to take

¹⁰⁸⁹ 21st January 1499, reported in G. Neilson (ed.) *Acta Dominorum Concilii: Acts of the Lords of Council in Civil Causes* vol. II (1918), 307, cited by D.M. Walker, *A Legal History of Scotland* vol III (1995), 709.

¹⁰⁹⁰ *Colonel Fullerton v Viscount Kingston* (1663) Mor 2558 1 Stair 152; *Earl of Linlithgow v Laird of Airth* (1616) Mor 2564; *Tait v McIntosh* 26th Feb 1841 FC; 13 Sc Jur 280. Cf. G. Watson (ed.) *Bell’s Dictionary and Digest of the Law of Scotland* (1882) v. ‘Liquid’: ‘A liquid debt is a debt the amount of which is ascertained and constituted against the debtor, either by a written obligation or by the decree of the court. Stair I.xviii.6; Erskine III.iv.16; Bankton I, 492’. In *Peglar v Northern Agricultural Implement Co* (1877) 4 R 435 at 439, Lord President Inglis is reported to have opined ‘It is quite settled that it is only against an illiquid claim, that a plea of compensation [founded on an illiquid counterclaim] may be set up’. The bracketed part is excised in the report at (1877) 14 SLR 302 at 305. Irrespective of which report is correct, the opinion makes no sense: both statements are manifestly contrary to the 1592 Act.

¹⁰⁹¹ 1672, c. 16; APS c. 40.

¹⁰⁹² Stair IV.xl.37.

¹⁰⁹³ [‘That which may be immediately liquidated, is held as liquid’] Erskine III.iv.16 approved by the First Division in *Munro v Macdonald’s Exrs* (1866) 4 M 687 at 688 *per* Lord President McNeill and Lord Curriehill.

place. Cases have been sisted for between two weeks¹⁰⁹⁴ and three or four months;¹⁰⁹⁵ while in another it was mentioned in argument that Menochius¹⁰⁹⁶ observed that Bartolus¹⁰⁹⁷ allowed 2 months to liquidate the claims – the Lords allowed a period five weeks.¹⁰⁹⁸ A claim is liquid if the defender admits that it is due and owing in his pleadings. A pursuer will also be absolved from having to prove that a debt is due if the response to his averments from the defender is ‘believed the account to be correct’.¹⁰⁹⁹ However, where this is followed by averments that the pursuer was in breach of his corresponding obligations, the pursuer’s claim is not liquid. The admission cannot be divorced from the qualification.¹¹⁰⁰ Where a contract contains an arbitration clause, it may be difficult to establish a liquid claim.¹¹⁰¹ In such a situation perhaps a court would sist the proceedings in which compensation is pled to allow liquidation of the alleged debt in arbitration proceedings.

(c) Other Substantive Rules of Compensation.

There must be a *concursum debiti et crediti*.¹¹⁰² Both claims must form part of the respective creditors’ private patrimonies. A claim which is part of another patrimony, like a trust, cannot found a good claim of compensation. Similarly, where the debtor’s claim against the cedent has been arrested by one of the debtor’s creditors, this will prevent the debtor using it for the purposes of compensation. Compensation is not proponible after decree.¹¹⁰³ This

¹⁰⁹⁴ *Hisselside v Littlegill* (1685) 2 Br Sup 72; Sup. Vol. *Harcase* 25.

¹⁰⁹⁵ *Selton* (1683) Mor 2566; Fountainhall I, 244.

¹⁰⁹⁶ *Lib 2. centur. 1 casu 14.*

¹⁰⁹⁷ *Ad. L.46. § 4 de iure fisci.*

¹⁰⁹⁸ *Brown v Ellis* (1686) Mor. 2565; Fountainhall I, 391 and 429. See also *Ross v Magistrates of Tayne* (1711) Mor 2568; Fountainhall II, 636.

¹⁰⁹⁹ *Scottish North Eastern Railway Co v Napier* (1859) 21 D 700. Cf. *Binnie v Roderij Theodoro* 1993 SC 71.

¹¹⁰⁰ *Armour Melvin Ltd v Melville* 1934 SC 94 at 96 per Lord Justice-Clerk Aitchison; *John Robertson & Co v Bird & Co* (1897) 34 SLR 867 at 869 per Lord Kinnear (1st Div). The case is also noted at (1897) 5 SLT 80. See earlier statements to the same effect by Lord Wood (Ordinary) in *Campbell v Macartney* 27th June 1843, to which the First Division adhered. His opinion is reported in an appendix at 14 D 1086 and approved by the First Division in *Donaldson v Donaldson* (1852) 14 D 849 and *Picken v Arundale & Co* (1872) 10 M 987.

¹¹⁰¹ This issue has arisen in England: *Glencore Grain Ltd v Agros Trading Co* [1999] 2 Lloyd’s Rep 410. The English authorities on set-off must be treated with caution since English law rests on a different doctrinal and historical basis.

¹¹⁰² Erskine III.iv.12.

¹¹⁰³ Sir George Mackenzie of Rosehaugh, *Observations on the Acts of Parliament...*(1687), 269; *Viscount of Stormont v Duncan* (1626) Mor 2638; Spotswood, (*Compensation*) 40; *Walker v Mainqair* (1632) Mor 2639; *Earl of Marshall v Brag* (1662) Mor 2639; *Naismith v Bowman* (1707) Mor 2645; *Creditors of Paterson v Maculay* (1742) Elchies, *Compensation* No. 9; Mor 2646; *Wilson & Co*, 15th Dec 1808, cited by J. Graham Stewart, *Diligence*, 234, n. 2; *Cunninghame, Stevenson & Co v Archibald, Wilson & Co*, 17th January 1809 FC; *Lawson v Drysdale* (1844) 7 D 153 at 155 per Lord Cockburn; *Thomson v Whitehead* (1862) 24 D 331 at 346 per Lord Cowan. Cf. Erskine III.iv.19, approved by J.A. MacLaren, *Court of Session Practice* (1916), 402, who

includes a decree in absence,¹¹⁰⁴ but not an order of a baron court¹¹⁰⁵ or a decree-arbitral.¹¹⁰⁶ Clearly, if the defender was not called to the action in which decree was pronounced against him, he may still plead compensation.¹¹⁰⁷ The position of awards of expenses seems to be different since these only come into existence on decree being pronounced. There is no opportunity to plead compensation against an award of expenses during the process.¹¹⁰⁸ Where the creditor is bankrupt there is no issue of compensation, rather the question is one of balancing of accounts in bankruptcy. The Act of 1592 introduced compensation by way of exception. It must therefore be pleaded and sustained. Failure to do so will be fatal to the plea. Unlike some other legal systems,¹¹⁰⁹ in Scotland, compensation is ‘the operation of the judge rather than of the law’.¹¹¹⁰ Stair asserted that compensation operated *ipso jure* on concurrence.¹¹¹¹ However, this approach had been departed from before Bankton¹¹¹² and Erskine¹¹¹³ were writing. Nevertheless, on being sustained, the plea of compensation operates retrospectively to the time of concurrence:

“Upon a more mature consideration of the nature of compensation, and the reason of the thing, in this case, a very different notion prevailed; namely, that compensation is not the operation of the law, but of the Judge; and that it had no effect till it is applied by the Judge: That it is true, when it is applied, the law, upon principles of equity, gives effect to it *retro* to stop the course of annualrent; and that, in that sense only, is the common maxim to be understood, that compensation operates *retro et ipso iure*; and this being so,

says that if compensation ‘has been pleaded by the debtor in the course of the process and repelled by the judge, it may be received, either by suspension or reduction,’ and also the arguments for the suspender in *Beatson and Lumsden v Beatson* (1747) Kilkerran 195; Mor 4345. In *Thoms v Thoms* (1868) 5 SLR 561 there was an attempt to plead compensation after decree. Only Lord Deas seemed to base his decision on the fact that the plea was too late. The other judges simply based their opinions on the principle that compensation could not be founded on an illiquid claim. See also *Burrell v Burrell* 1916 SC 729 to the same effect. Balancing of accounts in bankruptcy may be pled after decree; in other words, a charge for payment can be suspended on a demand for balancing of accounts.

¹¹⁰⁴ *Creditors of Robert Paterson v Mcaulay* (1742) Mor 2646; *Wright v Sheill* (1676) Mor 2640; *Logan v Coutts* (1678) 2641; *Gordon v Melvil* (1697) Mor 2642.

¹¹⁰⁵ *Earl of Marshall v Brag* (1662) Mor 2639.

¹¹⁰⁶ *McEwan v Middleton* (1866) 5 M 159. Much will depend on the terms of reference.

¹¹⁰⁷ *Corbet v Hamilton* (1707) Mor 2642; *A v B* (1747) Mor 2648.

¹¹⁰⁸ *Fowler v Brown* 1916 SC 597 at 603 *per* Lord Salvensen, following *Fleming v Love* (1839) 1 D 1097.

¹¹⁰⁹ See R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002).

¹¹¹⁰ Erskine III.iv.12. Cf. *confusio* which operates *ipso jure*: *Craig v Mair’s Trs* 1914 SC 893. Although it should be noted that confusion operates only to suspend obligations; it does not discharge them: *Competition between Murray, Chapel and Lanark* (1728) 1 Kames Rem Dec 196. It is probably the case that if payment is made in ignorance of the right to plead compensation, there will be no grounds for an unjustified enrichment claim: the debt would only have ceased to be due had compensation been pled and sustained, see generally R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002), 38 ff.

¹¹¹¹ I.xviii.6. Cf. Lord Elchies, *Annotations on Lord Stair’s Institutions on the Law of Scotland* (1824), 101.

¹¹¹² I.xxiv.23.

¹¹¹³ See the cases prior to Erskine which departed from Stair: *Cleland v Stevenson* (1669) Mor 2682; 1 Stair 598 approved in *Inch v Lee* (1903) 11 SLT 374 OH; *Maxwell v Creditors of McCulloch* (1738) Kilkerran 133; Elchies, *Compensation* No. 6; Mor 2550; *Campbell v Carruthers* (1756) Kames Sel Dec 158; Mor 2551.

that it is optional to the party to plead it or not, or, if he be creditor in more debts, to plead it on which of them he pleases... Where one is creditor in more debts, why should he not have it in his power to compensate upon the debt which is least secure?"¹¹¹⁴

The retrospective effect ascribed to compensation has been the subject of fierce criticism by Professor Zimmermann.¹¹¹⁵ The requirement in Scots law that compensation must be pled in court and sustained does at least provide some certainty which is absent in systems where compensation is effected by an informal declaration.

It has been held that, in a competition, other creditors can claim than a competing creditor's claim has been extinguished by compensation.¹¹¹⁶ However, if compensation is the operation of the judge and not the law, then this cannot be correct. As was explicitly held in *Maxwell*,¹¹¹⁷ it is the debtor's prerogative to plead compensation or not. If the debtor has not invoked compensation, it is difficult to see how or why third parties can rely upon it.¹¹¹⁸ Generally, compensation can be pled against all debts irrespective of the person of the creditor.¹¹¹⁹ However, certain Crown claims cannot be answered with a plea of compensation.¹¹²⁰ In cases of contractual set-off, extinction will not necessarily operate retrospectively from the date of concurrence. Interest may, therefore, continue to accrue.¹¹²¹ Since shareholders should be paid last on any winding up, they cannot compensate debts due to them by the company on any calls made on them.¹¹²² Generally speaking, where a partnership is charged for payment, they can plead compensation on a debt owed to one of the partners, or a debt due to another partnership where the partners are the same.¹¹²³

¹¹¹⁴ *Maxwell v Creditors of McCulloch* (1738) Kilkerran 133; Elchies, *Compensation* No. 6; Mor 2550. See also the opinion of Lord Kyllachy (Ordinary) in *Inch v Lee* (1903) 11 SLT 374.

¹¹¹⁵ R. Zimmermann, *European Foundations of a European Law of Set-Off and Prescription* (2002), 36, especially at 42-43. See also B. van Niekerk, 'Some Thoughts on the Problems of Set-Off' (1968) 85 *SALJ* 31.

¹¹¹⁶ *Middleton v Earl of Strathmore* (1743) Kilkerran 134; Mor 2573. See also *Briggs v Briggs* 1923 SLT 755 OH.

¹¹¹⁷ *Maxwell v Creditors of McCulloch* (1738) Kilkerran 133; Elchies, *Compensation* No. 6; Mor 2550 and approved in *Turner v Inland Revenue Commissioners* 1994 SLT 811 at 819 *per* Lord Kirkwood (Ordinary).

¹¹¹⁸ Cf. *Scottish Fishermen's Organisation v McLean* 1980 SLT (Sh Ct) 76, a retention case.

¹¹¹⁹ *Taylor v Scott and Universal Newspapers Ltd* 1981 SC 408 at 415 *per* Lord Ross (Ordinary).

¹¹²⁰ Crown Proceedings Act 1947, s. 50. See *Smith v Lord Advocate (No. 2)* 1980 SC 227. Cf. *Code Civil du Québec* Art. 1672: compensation is not pleadable against a claim by the state. J-L. Baudouin and P-G Jobin, *Les obligations* (5th ed. 1998) para 968 also query whether compensation is available against an inherently personal debt such as an alimentary obligation. Cf. *Code Civil* Art. 1293(3).

¹¹²¹ *Campbell v Caruthers* (1756) Mor 2551; Kames Sel Dec 158.

¹¹²² *Cowan v Gowans* (1878) 5 R 581; *Cowan v Shaw* (1878) 5 R 680; *Miller v National Bank* (1891) 28 SLR 884 OH.

¹¹²³ See *Williams Trustees v Inglis, Borthwick and Co*, 13th June 1809 FC and *Mitchell v Canal Basin Foundry Co* (1869) 7 M 480 especially at 489 for the authority cited by Lord Deas. In *Heggie v Heggie* (1858) 21 D 31 at 32, Lord Cowan observed that 'Very difficult questions have been raised in cases of this kind, and perhaps there is no class of cases in which more ingenious argument has been used in compensatory questions – as between a

Can compensation can be pled on the basis of a conditional or future debt? For example, if Helen is sued for payment, can Sara compensate on the basis of a debt admittedly due to her from Helen payable in 14 days; 3 months; or 3 years down the line? Bell says no;¹¹²⁴ but this may be doubted. If Bell's position does state the law, then the position of debtor where the creditor assigns is weakened.¹¹²⁵ Nor is Bell's view consistent with the practice of the Court in allowing up to three months for a claim to be liquidated.¹¹²⁶

(d) *Assignees.*

(i) General

Compensation of a debt due by the cedent to the debtor has been a relevant defence to a claim by an assignee at least since 1592 Act¹¹²⁷ and probably before.¹¹²⁸ However, such a defence is exceptional. As was suggested above, only defences intrinsic to the claim assigned may be asserted against the assignee. A plea of compensation is not necessarily intrinsic to the claim assigned. It may be; but, more often than not, the defence of compensation will be founded on a wholly extrinsic relationship between the debtor and the cedent. At first blush it is questionable why such a defence is available to the debtor. Before there can be compensation there must be a *concursum debiti et crediti*.¹¹²⁹ Yet, as soon as the creditor assigns his rights against the debtor, there is no longer a *concursum debiti et crediti*. The creditor of the debtor is now the assignee, not the cedent:

“...we begun [sic] with sustaining compensation against an assignee for a valuable consideration, in quality of procurator; not adverting, that though his title did not protect him from compensation, his right as a purchaser ought to have had that effect: and by force of custom we have adhered to the same erroneous practice, even after our law is changed, when now the title of an assignee protects him from compensation, as well as the nature of his right when he pays value for it.”¹¹³⁰

debt due by or to the individual partners of a company, and a debt due by or to the company'. See also Lord Ivory's footnote to Erskine III.iv.13 (5th ed. 1824).

¹¹²⁴ *Comm* II, 122. Cf. *Paul and Thain v Royal Bank of Scotland* (1869) 7 M 361 at 364 *per* Lord Ormidale.

¹¹²⁵ See the discussion below.

¹¹²⁶ Cf. *Principles of European Contract Law*, Part III, (2003), Art. 13:102.

¹¹²⁷ Hope, *Major Practicks* VI, 44, § 3; *Muirhead and McMitchell v Miller* (1610) Mor 2599; *Carnoway v Stewart* (1611) Mor 2600; *Anchindinnie v John Murray*, 17th June 1626, Spotswoode, *Practicks* (2nd ed. 1706), 18.

¹¹²⁸ See above.

¹¹²⁹ Erskine III.iv.12.

¹¹³⁰ Kames, *Principles of Equity* (2nd ed. 1767), 206. Cf. Kames, *Elucidations*, Art. 3, at 14.

It is perhaps ironic that Kames objected to the plea of compensation against a purchaser on the grounds of equity. In England, it was only on the grounds of Equity¹¹³¹ that set-off could be pled against an assignee prior to 1873.¹¹³² Nevertheless, Kames' point is a good one. The assignee has paid the cedent for the assignation. If compensation on an extrinsic claim were to be excluded, then the debtor would still have two options: first, to pay the assignee and sue the cedent who should be in funds; second, if the cedent is not in funds for the reason that there was no value given, then the debtor (as a creditor of the cedent in the counterclaim) would have a title to reduce the assignation and assert the counterclaim against the cedent.¹¹³³

Since compensation is usually an example of an extrinsic claim by the debtor, where there is no *concursum debiti et crediti*, as is the case in an assignation, the admission of the claim can have some unexpected results. This is especially so in complex cases which involve successive assignations. Suppose Jack and Jill are mutual debtors and creditors. Jill assigns her claims against Jack to Keith. Under the present law, Jack can plead compensation against Keith, even if the debt he seeks to compensate is extrinsic to the claim assigned. But what happens if instead of demanding payment himself, Keith translates his right to Murray? Can Jack still plead compensation against an unrelated subsequent assignee? Murray has bought a right against Jack. Murray will appreciate that any deficiencies in the right itself will affect him in turn. But what of claims against previous cedents of whom he has little knowledge?

Moreover, if it is the case that both the cedent and the debtor can actively acquire unrelated extrinsic claims to defeat a claim by the other, this is potentially subversive. Again, take the example of successive transfers. Jill transfers to Keith. On intimation, Keith becomes creditor of Jack. What if Jack has extrinsic counterclaims against Keith which fulfil the requirements of compensation? If Keith then assigns, is it the case that Jack can plead compensation not just of extrinsic claims he has against the original creditor Jill, but also intermediate assignees who assigned in turn?¹¹³⁴ If it is the case that the debtor is not to be

¹¹³¹ R. Derham, *The Law of Set-Off* (3rd ed. 2003) para 2.01 ff.

¹¹³² Assignments *at law* were not available in England until the Judicature Act 1873, with the exception of bills of exchange: see *Minet v Gibson* (1789) 3 TR 482; 100 ER 689 aff'd 1 H. Bl. 569; 1 Ross Lead Com Cas 76 at 93. Set-off against a solvent plaintiff was only first admitted in English law by statute in 1729: Relief of Debtors with Respect to the Imprisonment of their Persons Act 1729 (2 Geo II, c. 22). Where there was an equitable assignment, however, the debtor's right to raise a set-off was an 'equity' that was equal to the assignee's equity; and, where it was earlier in time than the assignee's, could be raised against the assignee. See generally, Derham, *op. cit.*, para 17.03.

¹¹³³ This occurred in *Alison v Duncan* (1711) Mor 2657.

¹¹³⁴ See generally discussion in F. von Kübel, *Erster Kommission zur Ausarbeitung des Entwurfes eines bürgerlichen Gesetzbuches* (1882) Absch. I, Tit. 4, § 22, at 49, reproduced in W. Schubert (ed.) *Vorentwürfe der*

prejudiced by the assignation, then this must be the case. However, if this is the law, multiple transfers of the right itself multiply the risk of non-payment. Risk of non-payment owes more to the position of the preceding cedents vis-à-vis the debtor, than to the solvency of the debtor himself. If this be an incident of the law of assignation, then claims which it is envisaged will be the subject of successive transfers should always be embodied in a negotiable instrument; although it seems that negotiable instruments are becoming less and less frequent in domestic debtor-creditor relationships.¹¹³⁵

Similarly problematic is the effect of the principle that compensation operates retrospectively to the date of concurrence where the plea is sustained. Jill again assigns to Keith who, in turn, assigns to Murray. Murray intimates to Jack. Jack has a debt he can compensate against Murray. Murray does not demand payment, instead he retrocesses to Keith. Even if the assignation from Keith to Murray was in security, Keith may now be defeated on the basis that Jack can now plead compensation of any liquid debts that Murray owed to Jack between the date of intimation from Murray and intimation from Keith of the retrocession in Keith's favour.¹¹³⁶

There is, then, perhaps much to be said for the reservations advanced by Kames. The law, however, has not taken this approach. Nor is it an approach which is advocated by any other writers. Kames' analysis is incontrovertible in terms of the intrinsic/extrinsic theory. An onerous assignee is only subject to intrinsic claims. Compensation is usually extrinsic. The law, however, has pursued a policy rather than a principle: the transfer should not prejudice the debtor. Usually, legal principle and policy are co-extensive. Where these paths diverge, however, the law tends to take the path of the 'no prejudice' policy. As we have seen, even where the debtor is unable to exploit some of the remedies against the assignee that would have been available against the cedent (such as damages), he is not thereby substantively

Redaktoren zum BGB, Recht der Schulverhältnisse (1980), 979. In England the debtor is not permitted to raise such a set-off. However, this is probably due to the peculiar history of English law which was reluctant to admit either set-off or assignment: see A. Tettenborn, 'Assignees, Equities and Cross-Claims: Principle and Confusion' [2002] LMCLQ 485 at 491 and R. Derham, *The Law of Set-Off* (3rd ed. 2003) para 17.47.

¹¹³⁵ Cf. I.F.G. Baxter, 'What is the Future of the Cheque: North American Use of Commercial Paper' in J. Tittel (ed.) *Multitudo Legum ius unum: Festschrift für Wilhelm Wengler zu seinem 65. Geburtstag* (1973) II, 151; D. Pardoel, *Les conflits de lois en matière de cession de créance* (1997), 1, n. 5; R. Goode, *Commercial Law* (3rd ed. 2004), 482. The decline of the negotiable instrument is mysterious since this is the one sure way of excluding the debtor's defences; in other words, the negotiable instrument ensures a 'clean' claim. One would have thought that the commercial demand for such a result would be great.

¹¹³⁶ The *ex tunc* effect attributed to compensation in continental legal systems has been criticised as a hangover from the *jus commune*: P. Pichonnaz, 'The Retroactive Effect of Set-Off (Compensatio)' (2000) 68 *TvR* 560, cited in R. Zimmermann, *Comparative Foundations*, 40. See also Pichonnaz's monograph, *La Compensation* (2001).

prejudiced. He can still bring the claim against the cedent, and may well be able to take exception to a demand for performance by the assignee. A failure to allow a plea of compensation would be, it is argued, prejudicial to the interests of the debtor.

For compensation to operate against an assignee, intimation is the relevant moment for concurrence.¹¹³⁷ A debt contracted by the cedent to the debtor subsequent to the delivery of the assignation, is relevant against the assignee if prior to intimation.¹¹³⁸ If the debtor seeks to plead compensation against the assignee on a money claim obtained against the cedent, this must be intimated to the cedent before there is intimation by the assignee of the cedent's assignation.¹¹³⁹ Some authorities suggest that the deliberate acquisition of claims against the cedent, so as to frustrate the claim of the assignee, if in bad faith, will not be sustained.¹¹⁴⁰ However, these authorities are unclear. Compensation can also be pled against a receiver,¹¹⁴¹ although the assignee (in security) is the charge holder.¹¹⁴²

The position of conditional or future debts is difficult. Bell holds that the debtor can only compensate a claim by the assignee with a debt against the cedent which is presently due.¹¹⁴³ However, what if the debtor extended credit to the cedent prior to intimation of the assignation, repayable in, say, 14 days? The assignation is intimated on day 13. Surely the debtor should be entitled to compensate the claim by the assignee with the debt due to him by the cedent on the following day? The problem here is one of liquidity. Most of the cases place

¹¹³⁷ Bell, *Commentaries* (7th ed. 1870) II, 131; *Shiells v Ferguson, Davidson & Co* (1876) 4 R 250 at 254 *per* Lord Deas; *Chamber's JF v Vertue* (1893) 20 R 257 at 259-260 *per* Lord Adam; or the date of arrestment: J. Graham Stewart, *Diligence*, 175. See also *Code Civil* Art. 1298 and UNCITRAL Art. 20(2). Previously, where the death of the cedent prior to intimation required the assignee to confirm, the debtor could acquire claims against the cedent to found compensation until confirmation was obtained: *Alison v Dumfries* (1682) Mor Sup Vol *Harcase* 51.

¹¹³⁸ *Oglivly v Napier* (1610) Mor 2600; *Relict of Inglis v Eral of Murray* (1662) Mor 2602.

¹¹³⁹ *A v B* (1676) Mor 2603; *Wallace v Edgar* (1663) Mor 837 and 2651; *Rollo v Brownlie* (1676) Mor 2653; 2 Stair 436 cited with approval by Stair I.xviii.16.

¹¹⁴⁰ *Finlayson v Russell* (1829) 7 S 698; *Munro v Hogg* (1830) 9 S 171; *Lawson v Burman* (1831) 9 S 478; *Mitchell v Canal Basin Foundry Co* (1869) 7 M 480 *per* Lord Barcaple (Ordinary) at 481 (reversed by a Bench of seven judges on a different point); Bell, *Comm* II, 124. Cf. *Code Civil du Québec* Art. 1676.

¹¹⁴¹ Although there is a conflict of authority, the better view is that a receiver cannot avoid a plea of compensation by suing for recovery of debts, due to the company over which a floating charge has attached, in his own name: *Taylor v Scott and Universal Newspapers Ltd* 1981 SC 408 OH and *Myles J Callaghan Ltd (in receivership) v Glasgow District Council* 1987 SC 171 OH, both declining to follow *Macphail v Lothian Regional Council* 1981 SC 119 OH.

¹¹⁴² *MacPhail v Cuninghame District Council* 1983 SC 246 OH. The bases for the last four mentioned decisions are conflicting. The intimated assignation in security is judicial in terms of the Act. There is no actual intimation. It is not clear whether the debtor of a company in receivership can acquire debts against the company after appointment of a receiver, but prior to any notification, to found compensation. See chapter 4 above, 'Intimation', n. 826 for the analogous position of a trustee in sequestration.

¹¹⁴³ Compare J. MacLaren, *Court of Session Practice* (1916), 402 who desiderates three cumulative elements for a successful plea of compensation: (i) debts be of the same nature, (ii) each of them be liquid, and (iii) each be presently exigible.

emphasis on the right rapidly to 'liquidate' a claim so as to place a certain value on it. However, there is no discussion as to what sort of time periods should be allowed to the debtor who has a claim of a certain sum, but is due at some date in the future. By analogy, if (as is the case in some of the authorities¹¹⁴⁴) a period of weeks or months is allowed to liquidate a claim so as to give it a certain value, a debtor should be allowed the same latitude to raise a defence of compensation on a debt payable to him by the pursuer at a certain date in the future.

(ii) Good Faith and Bad Faith Assignees.

Stair suggested that certain defences that would not otherwise be available to the debtor, would be sustained against the assignee of a gratuitous assignation: 'And compensation was sustained against an assignee, upon a debt due by the cedent, though liquidate after the assignation, in respect the assignation was gratuitous'.¹¹⁴⁵ He cited *Crokat v Ramsay*.¹¹⁴⁶ It should be remembered that at the date *Crokat* was decided, there had been little relaxation of the terms of the 1592 Act. At that time, it was exceptional for the Court to allow subsequent liquidation. In *Alison v Duncan*¹¹⁴⁷ the debtor was required to reduce the gratuitous assignation first and raise his defences with the cedent. Professor McBryde queries two cases where it is said that an onerous assignation takes preference over a gratuitous one.¹¹⁴⁸ These were cases of competition. Where a transferor subsequently becomes insolvent, conveyances for no consideration are presumed to have been in fraud of creditors. There is also one case where the debtor (one of the partners of the indebted partnership) was allowed to suspend a claim for payment where it was proved that the pursuer was neither a *bona fide*, nor an onerous, assignee; but a trustee for the defender's ex-partner.¹¹⁴⁹ The juridical basis for this decision is not clear. Lack of consideration is of little relevance to the debtor. He can plead the same defences against an onerous assignee as against a *male fide* one.¹¹⁵⁰

¹¹⁴⁴ See notes 1094 f. above.

¹¹⁴⁵ I.xviii.6.

¹¹⁴⁶ (1676) 2 Stair 400; Mor 2652.

¹¹⁴⁷ (1711) Mor 2657.

¹¹⁴⁸ *Contract* para 12-101, n. 58, citing *Campbell's Trs v Whyte* (1884) 11 R 1078 and *Gam's Trs v Russel's Tr* (1899) 7 SLT 289.

¹¹⁴⁹ *Knox v Martin* (1850) 12 D 719.

¹¹⁵⁰ *Scottish Widows Fund v Buist* (1876) 3 R 1078 at 1082 *per* Lord President Inglis. Cf. *Davidson v Scott* 1915 SC 924 at 929, where the Lord Ordinary (Hunter) subjected an assignee to the debtor's defences on the ground that the assignee was not in good faith. It is clear, however, that these defences could have been pled even against an onerous bona fide assignee; see too *Johnstone v Irving* (1824) 3 S 163 (NE 110) and *Meggat v Brown* (1827) 5 S 343 at 344 *per* Lord Craigie.

In South Africa, the assignee is bound to 'defend' his cedent against the debtor's counterclaims, when he (the assignee) is in bad faith.¹¹⁵¹ Bad faith includes a deliberate attempt to deprive the debtor of counterclaims.¹¹⁵² If the principle in the *LTA* case is to mean anything, the only counterclaims to which this rule can apply are to extrinsic, illiquid counterclaims which the debtor had against the cedent, which the cedent has in *male fide* attempted to deprive the debtor.¹¹⁵³ Intrinsic defences can be pled against an assignee, while liquid claims will found a defence of compensation. Yet, in *LTA*, it is not clear from the facts whether the debtor's claim was an extrinsic or intrinsic illiquid one. It may well be that the debtor's claim actually arose out of the same contract. There are two possible interpretations that can be given to the *LTA* case. First, the debtor can simply retain payment on the basis of an extrinsic illiquid claim that he has against the cedent. Alternatively, the debtor can actually hold the assignee liable for the counterclaims. But this alternative view flatly contradicts the orthodox position that *bona fide* assignees cannot be made actively liable for the cedent's obligations;¹¹⁵⁴ although it must be conceded that view is predicated on a *bona fide* cession. But what is the content of the cessionary's duty to 'defend'¹¹⁵⁵ the cedent after a *male fide* cession? On balance, there is no persuasive argument for holding the assignee actively liable for the cedent's obligations. The debtor in a bad faith cession should be allowed to retain, even if the counterclaim is illiquid, extrinsic and not a counterpart of the creditor's right which has been assigned. This is sufficient to protect the debtor. To hold the assignee actively liable is to go too far, even if the cedent is now insolvent. Had no cession occurred, the debtor would only have been entitled to retain.¹¹⁵⁶ There are traces in the Scottish sources of a

¹¹⁵¹ *LTA Engineering Co Ltd v Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (AD).

¹¹⁵² *LTA Engineering, ibid* at 770A per Jansen JA; Sande, *De Actionum Cessione* (trans. Anders, 1906) 10.2 on D. 3, 3, 34 discussed by R. Zimmermann, *Das römisch-holländische Recht in Südafrika* (1983), 66-69 who rightly questions the relevance of the citation of Roman authority

¹¹⁵³ Cf. Windscheid, *Pandektenrechts* § 332 at 377: where a cession is in bad faith the debtor will even be able to plead defences based on the personal relationship between the debtor and the cedent, i.e. extrinsic illiquid defences.

¹¹⁵⁴ *Munira Investments (Pty) Ltd v Flash Clothing Manufacturers (Pty) Ltd* 1980 (1) SA 326 (D) at 330D-E per Howard J; *Regional Factors (Pty) Ltd v Charisma Promotions* 1980 (4) SA 509 (C) at 512A-C per Burger J; *Goodwin Stable Trust v Duohex (Pty) Ltd* 1998 (4) SA 606 (C) at 617E-H.

¹¹⁵⁵ Jansen JA explicitly reserved his opinion the precise nature of the duty to defend: see 772C-F. For the technical nature of 'defendere' in Roman law, see: P. van Warmelo, 'Male Fide Cession, Stare Decesis and Abrogation by Disuse' (1974) 91 *SALJ* 298 at 303.

¹¹⁵⁶ In Scots law, by virtue of a balancing of accounts in bankruptcy. Cf. the analysis of S. Scott, *The Law of Cession* (2nd ed. 1991), 196 ff., although this writer would not agree with all of Scott's analysis. See too the analogous civil law requirement that a buyer must defend his vendor against any claims from third parties asserting that they have a better title to the article sold, before the buyer can have a claim for breach of warrandice against the vendor: J.B. Moyle, *The Contract of Sale in the Civil Law* (1892, reprinted 1994), 118. This might mean simply that the buyer must show that he has been evicted, or that he (the buyer) cannot assert his rights *as against* a party with a better claim; in other words, the transfer is valid only *ad hunc effectum*. So

distinction been made between the defences available to a debtor where the assignation is *male fide*. The furthest that these cases have gone is to accord the debtor in a *male fide* assignation the same rights that he would have had against a *bona fide* assignee.¹¹⁵⁷

Unlike in some legal systems, there is no equivalent in Scots law of the *Lex Anastasianus*, i.e. the assignee of a litigious claim is not limited to recovering from the debtor what he paid to the cedent.¹¹⁵⁸

(iii) Compensation of Expenses and the Agent Disburser.

For compensation to operate there must be a *concursum debiti et crediti*. Moreover the relevant date for the concurrence is the date of intimation or arrestment. The plea must be sustained by the judge. Further, compensation cannot be pled after decree. Nevertheless, where an award of expenses has been made in favour of the debtor, though the decree may have decreed her to pay the principal sum, this award of expenses will be able to be compensated against the claim for the principal sum.¹¹⁵⁹ This will be the case even where the award of expenses was made subsequent to the date of an arrestment.¹¹⁶⁰ The principle is also important in the cases dealing with the 'agent disburser'. That is, where counsel and agents act for litigants who are *in forma pauperis*, they are entitled to ask the court to make any award of expenses in their own names. The effect of this principle is to constitute the agent the assignee of the litigant.¹¹⁶¹ As a result the debtor in the award of expenses can subject the agent to a plea of compensation. However, unlike ordinary pleas of compensation, only strictly intrinsic pleas will be sustained. In practice this means that the debtor will only be allowed to plead awards made against the other party in the same action:

“Accordingly an extrinsic claim for compensation does not prevent decree going out in the name of the agent-disburser, and in my opinion a claim for compensation must be deemed to be extrinsic when it relates to the a transaction different from that which gives rise to the action in which the award of expenses is made. On the other hand, if the claim for compensation and the award of expenses arise out of the same transaction or *negotium*, then

too with the case of cession designed to deprive the debtor of his counterclaims: the cessionary cannot assert his rights *as against* the debtor. It is otherwise valid. This analysis requires some development of a doctrine of *inopposabilité* or *relative Unwirksamkeit*. This issue, however, cannot be explored further here.

¹¹⁵⁷ See authorities cited at n. 1150 above.

¹¹⁵⁸ See generally, H. Kötz, *Europäisches Vertragsrecht* (1996), 408 (trans. T. Weir, *European Contract Law* (1997), 268).

¹¹⁵⁹ *Livingston v Reid* (1833) 11 S 878.

¹¹⁶⁰ *Lennie v Mackie & Co* (1907) 23 Sh Ct Rep 85.

¹¹⁶¹ *Gordon v Davidson* (1865) 3 M 939. See also *Fleming v Love* (1839) 1 D 1097.

compensation is intrinsic and the agent is not entitled to decree in his own name.”¹¹⁶²

A claim will be intrinsic in such a case if (1) cross awards of expenses are made in the same action, either at the same or different times; (2) when there are cross awards of expenses in different actions pending at the same time and relating to the same subject matter; (3) where there has been a decree for the principal sum in favour of the party in one and the same action.¹¹⁶³

(iv) Contractual Set-Off Arrangements.

The debtor can plead compensation against the assignee even where the debt being compensated is extrinsic to the claim assigned. In this regard, compensation is exceptional. What, then, if the basis of the right of set-off is not the ordinary law of compensation but the contract out of which the assigned right arose, or a separate contract? Most of the cases in Scotland have dealt with *compensation légale*. In one case dealing with contractual set-off, however, the ordinary rules as to retrospective extinction were not applied; although it was held that no interest would accrue in the interim period between the concurrence and the dispute.¹¹⁶⁴ If it is the case that the assignee takes the right of the cedent, the debtor can plead any rights of contractual set-off against the assignee. Yet, as was noted at the outset, compensation is exceptional. There will be no problem if the contractual right to set-off is found in the same contract as the assigned claim. The difficult case is that of an extrinsic contractual right to set-off which covers the claim assigned. It is arguable that this is ‘an independent personal obligation of the cedent’;¹¹⁶⁵ from the debtor’s point of view, on the other hand, the right to set-off will be fundamental to his relations with the cedent. The debtor will regard the contractual right to set-off as an intrinsic qualification to the right assigned. Surely it would prejudice the debtor if he could not plead contractual set-off against the assignee? Again, however, to admit extrinsic contractual set-off, arguably subverts the entire intrinsic/extrinsic dichotomy. The basis for a contractual right to set-off is, by definition, contractual. The ordinary rules on mutuality of contracts must therefore apply. In so far as the

¹¹⁶² *Holt v National Bank of Scotland* 1927 SLT 664 per Lord Fleming (Ordinary) at 666.

¹¹⁶³ Cf. further, *Smyth v Gemmill and Henderson* 9th July 1802 FC; *Paterson v Wilson* (1883) 11 R 358; *Stuart v Moss* (1886) 13 R 572; *Paolo v Parais* (1897) 24 R 1030; *Strain v Strain* (1890) 17 R 566; *Lochgelly Iron and Coal Co Ltd v Sinclair* 1907 SC 442; *Grieve’s Trs v Grieve* 1907 SC 636; *Fine v Edinburgh Life Assurance Co* 1909 SC 636; *Masco Cabinet and Bedding Co Ltd v Martin* 1912 SC 896.

¹¹⁶⁴ *Campbell v Carruthers* (1756) Mor 2551; Kames Sel Dec 158 at 159.

¹¹⁶⁵ *Marshall’s Trs v Bank* 1934 SC 405 at 411 per Lord Murray.

right is extrinsic, set-off cannot be effected against the assignee. In so far as it is a counterpart of the right assigned,¹¹⁶⁶ however, it will found a mutuality defence and the debtor can retain payment.¹¹⁶⁷

3. *Balancing of Accounts on Bankruptcy.*

(a) **General Principles**

The principles regulating the retention or compensation of claims are, to some extent, relaxed when the party against whom the plea is to be advanced is insolvent.¹¹⁶⁸ No longer do the claims have to be liquid or intrinsic. Any plea or counterclaim¹¹⁶⁹ held by the defender against an insolvent pursuer will be upheld:

“...[F]or the policy of our law has long been that a person who is both debtor and creditor of a bankrupt cannot be compelled to pay his debt in full and to receive in exchange only a ranking for the bankrupt’s debt due to him. That policy may be said to give that person a preference; but the opposite view could equally be said to give the other creditors a preference.”¹¹⁷⁰

This doctrine is known as ‘balancing of accounts in bankruptcy’. It is a peculiar doctrine.¹¹⁷¹ With the greatest of respect to Lord President Cooper, his analysis of the rationale of the doctrine is not without difficulty. The doctrine of balancing of accounts applies to pleas which would not otherwise have afforded the proponent a valid defence. If the defender were forced to pay, it is indeed correct that he would probably not be able to have his counterclaims against the bankrupt satisfied in full. However, it is not true to say that the other creditors are

¹¹⁶⁶ It is most unlikely, however, that a right which is extrinsic to the assigned right will ever be sufficiently contemporaneous.

¹¹⁶⁷ Cf. *Ross v Ross* (1895) 22 R 461 at 464-465 per Lord McLaren.

¹¹⁶⁸ Receivership does not necessarily involve insolvency and the rules on balancing of accounts do not apply: *Taylor v Scott and Universal Newspapers Ltd* 1981 SC 408.

¹¹⁶⁹ For example, a claim for payment can be met with a claim for delivery: Bell, *Commentaries* II, 122; while a debt which arose before insolvency can be adduced, though it may become due to the defender only after insolvency: McBryde, *Contract* para 25-62. Indeed, it is thought that a claim for reparation arising out of a delictual act which is subject to the three year limitation period could be raised on a balancing of accounts in bankruptcy; though a prescribed claim could not.

¹¹⁷⁰ *Atlantic Engine Co (1920) Ltd (in liquidation) v Lord Advocate* 1955 SLT 17 at 20 per Lord President Cooper (Ordinary). See also Bell, *Commentaries* II, 122; H. Goudy, *A Treatise on the Law of Bankruptcy in Scotland* (4th ed. 1914), 555; Gloag, *Contract* (2nd ed. 1929), 649; *Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation* 1907 SC 463 at 474 per Lord McLaren; the application of the law to the facts in *Asphaltic* is criticised by W.A. Wilson, *The Scottish Law of Debt* (2nd ed. 1991) para 13.10. See also the opinion of Lord McLaren in *Ross v Ross* (1895) 22 R 461; *Ross* was described as a ‘very special case’ by the Lord Ordinary in *Barton Distilling (Scotland) Ltd v Barton Brands Ltd* 1993 SLT 1261.

¹¹⁷¹ Surprisingly, it seems to be present in most legal systems: R. Zimmermann, *Comparative Foundations of a European Law of Set-Off and Prescription* (2002), 43 ff.

thereby accorded a preference. They will still only receive a dividend, albeit a larger one. But it is the same dividend to which the defender would be entitled. Arguably the doctrine of balancing of accounts in bankruptcy is arbitrary: it favours those who have not yet paid a debt, over those who have.

The important factor for balancing of accounts in bankruptcy is time. The relevant date is not intimation, but insolvency. Post-insolvency debts cannot be pled against pre-insolvency debts.¹¹⁷² On sequestration, the main reason for this is a lack of concurrence. The act and warrant assigns the bankrupt's claim to the trustee. Any counterclaims acquired by the bankrupt's debtor after this date will be of no use against a trustee. Even where there is no vesting, however, the date of insolvency is the crucial date.¹¹⁷³ However, unlike in a case of compensation, it may be possible to prevent diligence following on a decree held by the bankrupt as a result of a right to balance accounts.¹¹⁷⁴

There are three situations where the rule might be relevant in the context of assignation. In the first, the cedent's solvency is in issue. For example, the cedent was *vergens ad inopiam*¹¹⁷⁵ when the assignation was made, and intimation is made prior to sequestration or liquidation.¹¹⁷⁶ Alternatively, there could be an intimated assignation of a claim. After intimation, the cedent becomes insolvent. The assigned claim was in a mutual contract. The cedent breached the contract before his insolvency but after intimation. Can the debtor plead a balancing of accounts? While intimation is the cut-off date for the debtor's defences in the

¹¹⁷² *Taylor's Trs v Paul* (1888) 15 R 313. Cf. *Powdrill v Murrayhead Ltd* 1997 SLT 1223 OH for a case where the distinction between pre- and post-insolvency was difficult to draw. It has been suggested that two post-insolvency debts can be set-off against each other: *Liquidators of Highland Engineering Ltd. v Thomson* 1972 SC 87 OH.

¹¹⁷³ What is the date of insolvency? Practical insolvency? Apparent insolvency? Absolute insolvency? In this writer's view, it is consonant with the policy of the law that the only relevant date can be apparent insolvency. It is then that the debtor can be sequestered. The other relevant date may be where the debtor is *vergens ad inopiam* in terms of the common law rules.

¹¹⁷⁴ *Highland Council v Construction Centre Group Ltd* 2004 SC 480. Admittedly, this was an application for the suspension *ad interim* of a charge for payment.

¹¹⁷⁵ Bell, *Commentaries* II, 127 seems to suggest that balancing of accounts in bankruptcy is available where the pursuer is *vergens*; so does *Barclay v Clerk* (1683) Mor 2641. Importantly, *Barclay* allowed a balancing of accounts to be pled against a party seeking to enforce a decree.

¹¹⁷⁶ In *Bank of East Asia Ltd v Scottish Enterprise* 1997 SLT 1213 at 1215 F-G it was conceded by the debtor, Scottish Enterprise, that they could not claim a balancing of accounts in bankruptcy as against the pursuer who held an assignation in security (the cedent being insolvent). This concession was probably unwise. Matters are complicated by the fact that the case was pursued in the English courts so, until the appeal to the House of Lords, Scots law was treated as a matter of fact. Since there is little authority in Scots law, it may be that the position in English law, where insolvency set-off is not available against an assignee (*De Mattos v Saunders* (1872) LR 7 CP 570; *Re Arthur Saunders Ltd* (1981) 17 BLR 125), was assumed to represent Scots law. This perhaps reflects the amorphous and contradictory nature of assignment in English law: see the comments of Lord Reid in *BS Lyle v Roscher* [1959] 1 WLR 8 HL.

case of compensation, it is the date of insolvency that is the relevant date for a balancing of accounts. Moreover, if the debtor were not allowed to plead a balancing of accounts in this situation, he is arguably prejudiced by the assignation: he must pay to the assignee, yet is unlikely to get anything in return from the cedent.

The second situation is the converse of the first. The cedent is solvent. He assigns his claim against the debtor. The assignee then becomes insolvent. Is the debtor entitled to defend any claim by the assignee or the latter's trustee on the basis of extrinsic illiquid claims he holds against the cedent, i.e. is he allowed to balance accounts in bankruptcy with the insolvent assignee on the basis of claims he holds against the solvent cedent?¹¹⁷⁷ If the debtor is allowed to do so, the doctrine comes close to unjustifiably frustrating the rights of the assignee's creditors: the debtor in the assignation has, after all, a claim against the cedent who may be solvent. It is consistent with the exceptional nature of the doctrine of balancing of accounts that the debtor should not be entitled to raise claims against the assignee that he could not have raised against the cedent. Therefore, if the cedent is solvent, the assignee's trustee or liquidator can demand payment from the debtor and the debtor can still raise his counterclaims against the cedent. Were it otherwise, the creditors of the assignee could receive nothing though the debtor has a perfectly good remedy against a solvent party. Conversely, if the debtor cannot satisfy his claims against the cedent (because the cedent is insolvent), then the debtor may rightfully plead a balancing of accounts on a demand by the assignee.

The third situation is where the debtor is insolvent and the assignee seeks to claim a balancing of accounts. In *Smith v Lord Advocate*,¹¹⁷⁸ the debtor (Upper Clyde Shipbuilders) was in liquidation.¹¹⁷⁹ Thereafter, there was a statutory transfer of the assets and liabilities of the creditor (the Shipbuilding Industry Board) to the Secretary of State. The liquidator sought payment from the Secretary of State in respect of work carried out on certain naval vessels. This claim was met with a defence of 'set-off' on behalf of the Secretary of State. While the Court and commentary on the decision have characterised the statutory transfer as one of

¹¹⁷⁷ It should be remembered that we are here concerned only with illiquid and extrinsic counterclaims, i.e. claims which would not otherwise afford a defence of retention or compensation. Where the debtor has such a defence against the cedent, it can be raised against the assignee whatever the assignee's solvency.

¹¹⁷⁸ 1980 SC 277.

¹¹⁷⁹ Leave of the Court does not appear to be necessary to plead balancing of accounts in bankruptcy against a company in liquidation: *G & A Hotels Ltd v THB Marketing Services Ltd* 1983 SLT 497, although leave is required to bring a counterclaim: Insolvency Act 1986 s. 113.

assignment,¹¹⁸⁰ this is unhelpful. It was rather a universal succession: both assets and liabilities were transferred. The case, therefore, is of limited relevance to assignment. The only reason that the liquidator was able to sue the Secretary of State was on the basis that the government department was liable for the debt. That liability arose as a result of the statutory transfer. Moreover, contrary to Mr. Sellar's argument,¹¹⁸¹ there was a *concursum debiti et crediti*. The insolvency did not disrupt it: there is no transfer of the assets of the company to the liquidator as in sequestration or in a trust deed for creditors.¹¹⁸² Moreover, as a result of the universal succession, the Secretary of State stood in the shoes of the Shipbuilding Industry Board. In other words, despite the statutory transfer (which, admittedly, occurred *after* liquidation) the position was the same as before liquidation. In any event, as explained by Lord Avonside, the relevant 'personality' of the debtor was the Crown. In Scots law, the Crown is regarded as an 'indivisible entity'.¹¹⁸³ The Lord Advocate represents these departments. The only effect of the Crown Proceedings Act 1947,¹¹⁸⁴ therefore, is that the leave of the court is required where debts nominally owed to one department may be used for the purposes of set-off or compensation by another. On this analysis then, it matters not what transfers of assets and liabilities occurred as between government departments and whether these occurred before or after insolvency.

V. Invalidity.

A. General.

If sued by the assignee, the debtor will be entitled to plead that the contract out of which the assigned claim arose was void.¹¹⁸⁵ This is a paradigm application of the *assignatus* rule. The debtor could and would have pled this against the cedent; similarly, he may do so against an assignee. If the underlying contract is voidable, the position may be more complicated. In general, a voidable contract can only be reduced where *restitutio in integrum* is possible. The

¹¹⁸⁰ See generally D.P. Sellar, 'Assignment and Retention in Liquidation' 1985 SLT (News) 41. Sellar's analysis is not always easy to follow. It is also not entirely consistent: he adopts the analysis of the Lord Ordinary in *Smith* that the effect of the universal succession by statutory transfer was to effect a 'statutory assignment' (at 41); but later (at 45) argues that a 'statutory subrogation' is 'surely different in its effect from an assignment'. This is incorrect. Subrogation is merely cession *ex lege* (*cessio legis*).

¹¹⁸¹ See preceding note.

¹¹⁸² As a general rule; exceptionally, however, assets may be vested in the liquidator: Insolvency Act 1986, s. 145; Titles to Land (Consolidation) (Scotland) Act 1868, s. 25.

¹¹⁸³ Cf. F.W. Maitland, 'The Crown as a Corporation' (1901) 17 *LQR* 131.

¹¹⁸⁴ Crown Proceedings Act 1947, s. 50(2)(d).

¹¹⁸⁵ See McBryde, *Contract* for the applicable principles.

effect of reduction is retrospective. It is perhaps arguable that, since there has been an assignment of one party's rights under the contract, this is no longer possible. The cedent will typically have received money for the assignment. Generally speaking, where corporeal property is concerned, a *bona fide* transferee cannot be prejudiced if title has passed to him prior to any reduction. It is arguable that a *bona fide* assignee, who has duly intimated, is in a similar position. If the contract were reduced the cedent would then be in breach of warrandice vis-à-vis the assignee. If the assignee has translated his right to a subsequent assignee, the debtor cannot reduce.

B. Debtor's title to challenge the assignment.

Professor McBryde observes that, in England, there is a conflict of authority on whether the debtor can challenge the assignment.¹¹⁸⁶ Irrespective of issues of title, the debtor clearly has an interest: he will want to ensure that he pays the correct creditor. However, where the debtor gets it wrong and pays the wrong person in error, he will still be protected on the basis of the general principle of good faith payment:

“The third common exception in personal actions is, payment made *bona fide* to him who had not the true right, but where there was another preferable right, which the defender neither did, nor was obliged to know, and therefore the law secures the payer, without prejudice to the pursuer to insist against the obtainer of the payment.”¹¹⁸⁷

The issue of whether the debtor is in good faith is a difficult one. Is he in bad faith if the cedent intimates an allegation of a defect of consent? In cases of doubt, the debtor can always consign the money on a multiplepointing. The test, it is thought, is a subjective one. Provided the debtor honestly thought that he was paying his creditor, he will be protected.

VI. A Special Case: Arbitration Clauses.

A. General

One of the parties to a contract assigns his rights to payment. Can the debtor plead that the sum is in dispute and invoke an arbitration clause in the contract? If a court has no jurisdiction to hear such a defence and the assignee cannot be heard in any arbitration, the

¹¹⁸⁶ *Contract* para 12-98.

¹¹⁸⁷ *Stair IV.xl.33.*

debtor can refuse payment though he may have no substantive defence to the pursuer's claim.¹¹⁸⁸ In the case of a sub-contract, it is clear that a clause incorporating the provisions of the main contract, which contains an arbitration clause, does not subject any disputes between the main contractor and the sub-contractor to arbitration.¹¹⁸⁹ However, what of the position where rights under a contract are transferred – does this right continue to be subject to arbitration? The issue has perplexed modern writers: 'the situation is far from clear'¹¹⁹⁰ concludes the leading Scottish writer; while Lord Mustill has expressed similar sentiments in his work on the subject.¹¹⁹¹ There is no problem with an assignation of an arbitral award.¹¹⁹² The claim is then liquid. It can be assigned like any other money claim. The problem arises if there is an assignation at any time before decree-arbitral has been pronounced.¹¹⁹³ The answer will depend on the type of arbitration clause in question. First, it will be necessary to determine whether the agreement between the cedent and the debtor to submit to arbitration is in the contract out of which arose the assigned right. If it is not, then the claim is extrinsic. References to extrinsic documents, which in turn contain arbitration clauses, are not uncommon. However the courts, in Scotland at least, have taken a strict approach to the issue of incorporation of these terms.¹¹⁹⁴ If this approach represents the law,¹¹⁹⁵ then it is thought that such an arbitration clause will not provide a good provisional defence against a demand for payment by an assignee. Assuming that there is an arbitration clause in the same contract

¹¹⁸⁸ It should be noted, however, that the Court has been reluctant to hold that it has no jurisdiction where there is, in Lord Adam's phrase, no 'real' dispute to go to the arbiter: *Mackay & Son v Leven Police Commissioners* (1893) 20 R. 1093.

¹¹⁸⁹ *Goodwines, Jardine & Co Ltd v Charles Brand & Son* (1905) 7 F 995. Cf. *East Kilbride DC v Whatlings (Building) Co Ltd* 1990 SLT 492.

¹¹⁹⁰ F.P. Davidson, *Arbitration* (2000) para 7.26.

¹¹⁹¹ Lord Mustill and S.C. Boyd, *Commercial Arbitration* (2nd ed. 1989, with 2001 supplement), 138, 'The decided cases on the rights of parties in this situation are far from clear'. There is an excellent comparative discussion in English by D.L. Girsberger and C. Hausmaniger, 'Assignment of Rights and Agreement to Arbitrate' (1992) 8 *Arbitration International* 121. See also, Werner, 'Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause' (1991) 8 *Journal of International Arbitration* 13.

¹¹⁹² J.P. Wood and J.R.N. Macphail, *The Law of Arbitration in Scotland* (1900), 77.

¹¹⁹³ Such an assignation may also raise taxation issues: *Commissioners for Inland Revenue v Forrest's JF* (1924) 8 TC 595 (1st Div). This case was the result of the proceedings in the well known litigation of *Boyd & Forrest v. Glasgow & South-Western Railway Company*, 1911 SC 33 and 1050; 1912 SC (HL) 93; 1914 SC 472; 1915 SC (HL) 20; 1918 SC (HL) 14.

¹¹⁹⁴ F.P. Davidson, *Arbitration* (2000) para 7.04 citing *McConnell and Reid v Smith* 1911 SC 635 at 638 per Lord Dundas: 'I think it requires clear and distinct language to oust the ordinary jurisdiction of the courts and substitute procedure by way of arbitration... A mere reference to the rules is... quite insufficient to import such a condition into the contract'. *McConnell* was approved in *Babcock Rosyth Defence Ltd v Grootcon (United Kingdom) Ltd* 1998 SLT 1143 at 1150F per Lord Hamilton. See also *Montgomerie v Carrick and Napier* (1848) 10 D 1387 at 1392 per Lord Ivory (Ordinary).

¹¹⁹⁵ Although it is perhaps an outdated analysis, see F.P. Davidson, *Arbitration* (2000) para 7.04 referring to the English courts' reaction to *McConnell*. Cf. UNCITRAL Model Law on International Commercial Arbitration, art. 7 (1), adopted in Scotland by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, s. 66.

as that from which the assigned right arose, the clause may be specific or universal. If the clause is specific, then the debtor will only be able to invoke the clause if it relates to the claim assigned. This is fairly obvious. This then raises the question as to what is to happen if the assignee's claim does fall within such a clause. If the arbitration clause is general or universal in so far as it submits all the disputes that may arise between the parties to an arbiter,¹¹⁹⁶ then the question will be more complicated. For our purposes it will be assumed that the contract, out of which the assigned right arose, contained a universal arbitration clause. In terms of the intrinsic/extrinsic dichotomy, it seems that such a clause is intrinsic and in principle could found a plea of *assignatus utitur* from the debtor.¹¹⁹⁷

B. Comparative background.

The issue has vexed the courts in most European jurisdictions.¹¹⁹⁸ At the outset, it is necessary to make the distinction between assignation of claims (i.e. *cession de créance*) and a transfer of a contract *in toto* (*cession de contrat*). Many of the continental sources deal with the latter. Nevertheless, it is only with the cession of claims that we are here concerned. In Germany, Austria, France and Switzerland, an agreement to submit to arbitration seems to be construed as an agreement which is accessory to the right assigned.¹¹⁹⁹ Therefore, the right and duty to arbitrate passes to the assignee.¹²⁰⁰ However these jurisdictions all admit exceptions to this rule where there is *delectus personae* (what Francophone lawyers refer to as '*intuitus personae*').¹²⁰¹ Moreover, the idea that the assignee automatically becomes a party to the agreement to arbitrate by virtue of the cession has been criticised by many continental commentators.¹²⁰² The general view is that there must be an acceptance to enter into arbitration by the assignee as well as the debtor.¹²⁰³ While the difficulties cannot be discussed

¹¹⁹⁶ See the example given in *Styles and Arbitration Rules of the Law Society of Scotland* reprinted as an appendix to Lord Hope of Craighead's title on 'Arbitration' in *SME*, Reissue 1 (1999).

¹¹⁹⁷ *Palmer v South East Lancashire Insurance Co Ltd* 1932 SLT 68 at 69 per Lord Murray (Ordinary): 'The arrester cannot, in my opinion, at once invoke the contract and reject the inherent condition'.

¹¹⁹⁸ See generally, P. Mayer, 'La 'circulation' des conventions d'arbitrage' (2005) 132 *Journal du droit international* 251.

¹¹⁹⁹ § 401 *BGB*; § 1394 *ABGB*; Art. 1692 *Code Civil*; Art. 170(2) *OR*.

¹²⁰⁰ See the authorities cited by D.L. Girsberger and C. Hausmaniger, *op. cit.*, n. 1191, at 126-131.

¹²⁰¹ P. Mayer (2005) 132 *Journal du droit international* 251 at 256.

¹²⁰² D.L. Girsberger and C. Hausmaniger, *op. cit.*, n. 1191, at 126-131.

¹²⁰³ P. Fouchard, *L'arbitrage commercial international* (2nd ed. 1997), cited by Mayer, *op. cit.*, n. 1201.

here, it must be remembered that the complications multiply when there are different laws applicable to the principal claim, the agreement to arbitrate and the cession.¹²⁰⁴

C. Scottish Sources.

Of the Scottish cases, perhaps the least complex is *Henry v Hepburn and Burns*.¹²⁰⁵ Henry and Burns submitted their accounts to arbitration. Burns had acted as Henry's law agent for some years. There was a large account outstanding, the quantum of which was the subject of submission. In the course of the arbiters' deliberations, Burns assigned his claim to Hepburn. This was intimated to Henry. The assignation included a clause which empowered Hepburn to take decree from the arbiters in his own name. Intimation of the assignation (which was acknowledged by the debtor) was made more than one year before the arbiters finally drew up the outstanding account. Before decree-arbitral was pronounced, Hepburn appeared and produced his assignation and craved that the arbiters pronounce decree in his name. The debtor Henry objected. Arbitration, so Henry argued, was a personal contract which was coloured with *delectus personae*.¹²⁰⁶ On occasion, this objection may have some force. In this case, however, the argument for the assignee that 'even if there could be *delectus personae* in respect of the litigious temper of an opponent throughout a discussion, there could be none as to the name of person in whose favour a decree should be pronounced'¹²⁰⁷ was rightly preferred. The submission had been concluded. As the Lord President observed, 'the cedent remains effectually bound, notwithstanding the assignation'.¹²⁰⁸ There was therefore no potential prejudice to the debtor. Lord Mackenzie observed that it was 'a mere formal objection'.¹²⁰⁹ The Court was considerably influenced by the fact that if one of the parties to an arbitration becomes bankrupt their trustee had a right to be received into the arbitration.¹²¹⁰ Indeed, where a party to an arbitration was sequestrated but decree-arbitral was

¹²⁰⁴ Mayer, *op. cit.*, n. 1201, at 260.

¹²⁰⁵ (1835) 13 S 361.

¹²⁰⁶ This argument found favour with the Lord Ordinary (Moncreiff); his opinion is reproduced verbatim by J. Montgomerie Bell, *Treatise on the Law of Arbitration in Scotland* (2nd ed. 1877), 117-118. See also *Climat c. SCA* (1^{er} Chambre Civil, Cour de Cassation, 28 May 2002), noted by N. Coipel-Carbonnier, (2002) 91 *Revue critique de droit international privé* 758 especially at 769 and in Mayer, *op. cit.*, n. 1201 at 258. For discussion of the effect of *delectus personae* on the law of assignation generally, see chapter 2 above.

¹²⁰⁷ At 363.

¹²⁰⁸ At 355.

¹²⁰⁹ At 366.

¹²¹⁰ *Grant v Girwood*, 23rd June 1820 FC.

pronounced without giving the trustee the opportunity to be heard, the decree was reduced.¹²¹¹ Since a judicial assignee could appear in the proceedings, there seemed no reason to prevent a voluntary assignee from doing so.¹²¹² These cases are, however, inconclusive. In none of them was there any indication that the debtor had refused to enter into the proceedings and thereby potentially frustrate the claim of the assignee. It could be argued, therefore, that the debtor had waived any *delectus personae* that might have been implied.

An analogous issue arises where one of the parties to an arbitration dies. There is authority for the proposition that death has no effect.¹²¹³ But this view may mean no more than that a decree-arbitral is binding upon the heirs of the deceased. It has been held that the death of one of the parties in an arbitration will necessarily bring the proceedings to an end, unless there is a clause specifically binding executors.¹²¹⁴ In *Robertson v Cheynes*¹²¹⁵ claims between a tenant and his landlady were submitted to arbitration in terms of the lease. The cautioners for rent, who had already been required to make advances, consented to the submission. The tenant had purported to assign his claims against the landlady to the cautioners. The landlady acknowledged the assignation. The cautioners had meanwhile raised an action against the tenant for their relief and had arrested in the hands of the landlady on the dependence of the action. They obtained decree against the tenant and again arrested in the hands of the landlady. Prior to the conclusion of the arbitration, both the tenant, one of the cautioners and the landlady's husband died. The remaining cautioner presented a minute craving to be sisted in the submission. The arbiter proceeded and found a balance due to the tenant. He pronounced decree-arbitral in favour of the cautioner. The landlady thereupon raised an action for reduction. The First Division held that the effect of the death of the parties was to bring the arbitration to an end and it was incompetent for the arbiter to proceed and pronounce decree-arbitral. It was held that the assignation was ineffective (it was in the terms of a mandate to pay). However, even if it had been valid, the only effect of an assignation of a claim, which is the subject of arbitration, is to allow decree-arbitral to be pronounced in the name of the assignee,¹²¹⁶ and this, apparently, can only be done with the concurrence of the

¹²¹¹ *Barbour v Wright*, 21st November 1811 FC.

¹²¹² *Henry v Hepburn and Burns* (1835) 13 S 361 at 366 *per* Lord Balgray. Cf. the French case of *Banque Worms* (1^{er} Chambre Civil, 5th January 1999), noted at (1999) 88 *Revue critique de droit international privé* 537.

¹²¹³ *Earl of Selkirk v Naismith* (1778) Mor 627; Hailes 780.

¹²¹⁴ *Watmore and Taylor v Burns*, 17th May 1839 FC, at 824 *per* Lord Mackenzie.

¹²¹⁵ (1847) 10 D 559.

¹²¹⁶ At 604 *per* Lord Fullerton.

cedent.¹²¹⁷ Lord Mackenzie¹²¹⁸ held that if either of the parties to the arbitration dies before decree-arbitral is pronounced, both parties are released. If decree has been pronounced, then death will have no effect and the estate of the debtor will be bound.¹²¹⁹ In an *obiter dictum*, Lord Mackenzie suggested that if the assignation had been valid, perhaps the assignee could have proceeded in the name of the cedent.¹²²⁰ It is difficult to extract a *ratio* from the decision. It seems to be at odds with the right of a trustee in sequestration to submit to an arbitration in which the bankrupt was involved.¹²²¹

Leases often include arbitration clauses. These may be specific, for example, regarding the valuation of an outgoing tenant's crops, or general.¹²²² In *McConnell v Carrick and Napier*¹²²³ a mineral lease contained a universal arbitration clause. The property was sold. The tenant then decided to exercise his right to sink another mine. This required the consent of the landlord. The singular successor refused to give it so the tenant took his request to the arbiter. The singular successor subsequently sought reduction of the decree-arbitral allowing the tenant to proceed. The case therefore involved a transferee (the landlord's singular successor) arguing that he was not subject to the arbitration clause in the original lease to which he had, by statute,¹²²⁴ become a party. The tenant successfully argued that 'the clause of reference was not a personal obligation extrinsic to the lease, but in a measure necessary to it, since it was impossible to extricate a mineral lease without an arbiter'.¹²²⁵ The Court held that the successor was personally barred from challenging the decree-arbitral. They also made some observations on the effect of an arbitration clause on successors. Lord President Boyle asserted that 'it was most plain and obvious...that there is a distinction between those stipulations which are extrinsic to a lease, and do not transmit against singular successors, and those other stipulations which are the essence of the contract, and do therefore of necessity transmit against them'.¹²²⁶ The universal clause before him was, he held, 'in the essence of the

¹²¹⁷ At 603 *per* Lord President Boyle. Though one would have thought a voluntary assignation of the whole claim subject to the arbitration was indication enough of consent.

¹²¹⁸ Who delivered the leading opinion in *Watmore*, n. 1214 above.

¹²¹⁹ *Robertson v Cheynes* (1847) 10 D 559 at 603.

¹²²⁰ At 604. For the apparent right of the assignee to sue in the name of the cedent, see discussion in chapter 2, Part I, C above.

¹²²¹ As in *Barbour v Wright*, 21st November 1811 FC.

¹²²² See *Sanderson & Son v Armour & Co* 1922 SC (HL) 117 at 125 *per* Lord Dunedin.

¹²²³ (1848) 10 D 1387.

¹²²⁴ See the terms of the Leases Act 1449, cap. 6. Only those terms which are *inter naturalia* of the lease [i.e. intrinsic] transmit against successors. See *Optical Express (Gyle) Ltd v Marks & Spencer plc* 2000 SLT 644 and authority there cited.

¹²²⁵ At 1394.

¹²²⁶ At 1395.

lease'.¹²²⁷ Two able judges, Lords Fullerton and Jeffrey, however, disagreed (although they concurred in the decision). Lord Jeffrey thought that an arbitration clause was one which 'bore reference to the private relation of the contracting parties'.¹²²⁸ He agreed with Lord Fullerton's suggestion that a singular successor could not be expected to submit to arbitration on a matter such as whether a tenant could retain a portion of his rent.¹²²⁹ An arbitration clause relating to the ordinary matters of landlord and tenant would, however, transmit. It is impossible to take any clear ratio from these opinions.

Positively, an assignee, judicial or voluntary, has the right to rely on an arbitration clause and invoke it himself.¹²³⁰ Moreover, if there is an agreement between the cedent and the debtor to submit to arbitration after intimation, this will not affect the assignee.¹²³¹ It has been held in the Outer House that an insurer can refuse a claim of a statutory assignee under the Third Parties (Rights Against Insurers) Act 1930 on the basis that there is an arbitration clause in the policy and only the original contractor can enter into the arbitration.¹²³² However, such a result seems unworkable. The insured is insolvent and, if it is a company, may no longer even exist. If, as Lord President Hope suggested in *Henry* above, the obligation to submit to arbitration remains with the cedent, then it seems that in the case of insolvency of the cedent, the claim of the assignee could be frustrated by an arbitration clause. The issues were brought into focus in *Rutherford v Licences and General Insurance Co Ltd*.¹²³³ The pursuer arrested in the hands of the insurer rather than rely on his statutory rights under the 1930 Act. On furthcoming, the insurer pled that the claim by the insured had to be settled by arbitration. The pursuer objected on two grounds. First, since the wrongdoer's policy was only for third party risks, the insured had little interest in the arbitration. There was a danger, therefore, that he could prejudice the pursuer's claim. Consequently, the pursuer sought to interdict the arbitration proceedings taking place in the pursuer's absence as well as an order that the pursuer be allowed to enter into the submission. Second, the pursuer was equally

¹²²⁷ *ibid.* Lord Mackenzie delivered a concurring opinion.

¹²²⁸ At 1396. Compare *A Alfred Herbert Ltd v Scottish Bricks Ltd* (1945) 62 Sh Ct Rep 23 where there was an arbitration clause in the feu-contract to which neither the pursuer nor the defender were party.

¹²²⁹ As in *Ross v Duchess of Sutherland* (1838) 16 S 1179.

¹²³⁰ *Boland v White Cross Insurance Co* 1926 SC 1066, cited in Davidson, *Arbitration* para 7-26. See the discussion of *Boland* in *Palmer v South East Lancashire Insurance Co Ltd* 1932 SLT 68 OH.

¹²³¹ *Whately v Ardrossan Harbour Co* (1893) 1 SLT 382 (1st Div). This report is thoroughly unsatisfactory. There is a fuller report, but of earlier proceedings only, before the First Division at (1893) 30 SLR 493.

¹²³² *Cunningham v Anglian Insurance Co Ltd* 1934 SLT 273 OH.

¹²³³ 1934 SLT 31 OH.

concerned that the arbiter chosen by the insured and insurer was not independent.¹²³⁴ The pursuer was successful on the first ground. The arbiter, being a sheriff, was confirmed. The Lord Ordinary accepted the argument that by virtue of the fact that the pursuer was a judicial assignee, 'he and he alone had a consequent right to control and be a party to any arbitration proceedings relative to the claim'.¹²³⁵ Similarly, in *Palmer v South East Lancashire Insurance Co Ltd*,¹²³⁶ the Lord Ordinary observed,

"The arrester cannot, in my opinion, invoke the contract and reject the inherent condition. He may be entitled, by virtue of the 'judicial assignation' implied in his arrestment to force the arrestees to join issue with him on the question of liability...."¹²³⁷

It is thought that the modern cases, albeit emanating only from the Outer House,¹²³⁸ are preferable to the opinions to the contrary in *Robertson and McConnell*, which may be seen as outdated.¹²³⁹

It seems, then, that where the rights transferred to the assignee divest the cedent of all his interest in arbitration; and, if the submission has not yet begun, the assignee will be entitled to proceed¹²⁴⁰ and take decree in his own name.¹²⁴¹ This right will be particularly important where the cedent is insolvent or is a liquidated company.¹²⁴² Where the cedent is solvent and retains an interest in the arbitration proceedings, the assignee, it seems, must be able either to compel the cedent to enter into the arbitration; or, to furnish the assignee with all information that might be necessary for him to conduct arbitration proceedings respecting

¹²³⁴ In *A Alfred Herbert Ltd v Scottish Bricks Ltd* (1946) 62 Sh Ct Rep 23, the Sheriff held that there was no *delectus personae* in an arbitration agreement in a feu-contract since the successors in title would still be able to exercise the right to appoint an arbiter. See also *Holburn v Buchanan* (1915) 31 Sh Ct Rep 178.

¹²³⁵ At 32.

¹²³⁶ 1932 SLT 68 OH.

¹²³⁷ At 69 *per* Lord Murray (Ordinary).

¹²³⁸ See also *Cant v Eagle Star and British Dominions Insurance Co* 1937 SLT 444 OH, where an action of forthcoming was sisted to allow the arrester to enter into an arbitration with the insurer.

¹²³⁹ *Rodgerson Roofing Ltd v Hall & Tawse Scotland Ltd* 2000 SC 249 involved an assignee of rights under a sub-contract in which there was an arbitration clause. The assignee seemed to be participating in the arbitration proceedings although there was doubt about whether he even had a title to sue. There was no discussion, however, of whether the assignee was entitled to submit to arbitration agreed upon between the cedent and the debtor.

¹²⁴⁰ In England it has been held that an assignee must submit to the arbitration before he can become a party to it. Assignment *per se* will not have that effect: *Baytur SA v Finagro Holding SA* [1992] 1 Lloyd's Rep 135 at 150 *per* Lloyd LJ. A party who submits to arbitration will be bound by the decree-arbitral: *Brown v Gardner* (1739) Mor. 5659.

¹²⁴¹ In South Africa an attempt to enter into arbitration in the name of the cedent after cession was held to be void: *Goodwin Stable Trust v Duchex (Pty) Ltd* 1998 (4) SA 606 at 618E *per* Selikowitz J.

¹²⁴² Cf. *McGruther, Noter* 2003 SCLR 144 OH *aff'd* 2004 SC 514. Here one of the parties to an arbitration was in liquidation. The liquidator successfully sought a sist of the liquidation to allow the directors of the company, rather than the liquidator himself, to prosecute the company's claims.

the claim. After all, the assignee will be a complete stranger to the contractual history between the parties. In some legal systems, the assignee is entitled by virtue of the assignation to require the cedent to assist by furnishing all relevant information and material that may be necessary to pursue the claim against the debtor.¹²⁴³ If, on the other hand, the assignee can compel the cedent to enter into proceedings, this then raises the crucial question of who is to pay for this arbitration. On the one hand perhaps the assignee is liable as *doiminus litis*; on the other, perhaps the expense should fall on the cedent: after all he has warranted (assuming there was no stipulation to the contrary) that the debt is presently due and owing; but, until arbitration is successfully concluded, this is not the case. It should be noted that as far as arbitration clauses in insurance policies are concerned, most insurers have now undertaken not to enforce arbitration clauses in standard form policies if the insured prefers to have questions of coverage determined by the Court.¹²⁴⁴

D. Anglo-American position.

The older English authorities treated an agreement to arbitrate as 'a personal covenant'.¹²⁴⁵ As such, the assignee could not become a party to it; although it is not clear what effect the decision had on the assignment. One would assume that a finding that the arbitration clause was 'a personal covenant' would prevent the assignee entering into the arbitration. However, some American authorities come to the surprising conclusion that the effect of an assignment of a right under a contract which has an inherently personal arbitration clause, to which the assignee will not agree, is to frustrate the agreement to arbitrate: the assignee is not bound by it and has an unencumbered claim against the debtor.¹²⁴⁶ But this seems to run contrary to the principle that the debtor should not be prejudiced by the

¹²⁴³ See, for example, the Swiss *Obligationenrecht* Art. 170 (2). But note that in Switzerland this may not apply where a *delectus personae* in the original party to the arbitration agreement can be shown: see Mayers, *op. cit.*, n. 1201, at 256.

¹²⁴⁴ Law Commission and Scottish Law Commission Report, *Third Parties – Rights Against Insurers* Law Com Report No. 272, Scottish Law Commission Report No. 184 (2001), para 5.40 citing the ABI/Lloyd's Arbitration Agreement 1956 (confirmed in 1986).

¹²⁴⁵ *Cottage Club Estates Ltd* [1928] 2 KB 463.

¹²⁴⁶ *Lachmar v Trunkline LNG Co* 753 F.2d 8, 9-10 (2d Cir. 1985) cited by Girsberger and Hausmaniger, *op. cit.*, n. 1191, at p. 124. The authors comment, at 135, of the Common Law authorities that, 'Those courts, however, that hold that the assignee is not bound by the arbitration agreement focus on the relationship between assignor and assignee, not between the original parties, to determine whether the assignee should be bound by the arbitration agreement'.

assignment. Later English cases have held that the arbitration clause can bind the assignee, where the *debtor* agrees.¹²⁴⁷

In England, it seems that in notifying the assignment and seeking decree, the assignee implicitly accepts that he is potentially liable for costs.¹²⁴⁸ However, in England it seems that the consent of the arbitrator is required before the assignee can take part in the proceedings.¹²⁴⁹ Why the arbitrator's consent should be important is not clear. In terms of the Arbitration Act 1996, a reference to an 'arbitration agreement' includes a reference to any person claiming under or through a party to the agreement'.¹²⁵⁰ It is not clear whether the older authorities have been superseded. For example, it has been suggested that to allow an assignee to get decree without being liable for a counterclaim would be unjust; otherwise an insolvent party to an arbitration could assign away his right to an associated company leaving the other party with a worthless claim against the assignor.¹²⁵¹ The issue is not peculiar to arbitration.¹²⁵² Such an approach ignores what an assignment is. It transfers rights, not liabilities.¹²⁵³ If an assignment is gratuitous and the cedent becomes insolvent then it can be reduced; *a fortiori* can one which is both gratuitous and to an associated company.¹²⁵⁴ In Scotland, the law relating to the *dominus litis* will regulate issues of expenses.¹²⁵⁵

E. Interpretation

It seems, then, that there are two tests to be fulfilled. First, one must look at the position of the assignee. The traditional approach of the civil law is to ask if the agreement to arbitrate is accessory to the assigned claim; if so, it will transfer automatically. On this analysis, the assignee is entitled to submit to arbitration. In the modern law of arbitration,

¹²⁴⁷ *Shayler v Woolf* [1946] Ch 320.

¹²⁴⁸ *The Jordan Nicolov* [1990] 2 Lloyd's Rep 11 at 19 *per* Hobhouse J.

¹²⁴⁹ *Baytur SA v Finagro Holding SA* [1992] 1 Lloyd's Rep 135 at 151-152 *per* Lloyd LJ, a case dealing with an equitable assignment.

¹²⁵⁰ Section 82 (2). Obviously, if there is a prohibition on assignment in the underlying contract, an assignee cannot possibly seek to submit to arbitration: *Bawejan Ltd v M C Fabrications* [1999] 1 All ER (Comm) 377 CA.

¹²⁵¹ *Baytur SA v Finagro Holding SA* [1992] 1 Lloyd's Rep 135 at 151 *per* Lloyd LJ. This reflects the *dicta* of Lord Hobhouse in *Government of Newfoundland v Newfoundland Railway Company* (1888) 13 App Cas 199 at 212.

¹²⁵² *The Smaro* [1999] 1 Lloyd's Rep 225 at 243 *per* Rix J.

¹²⁵³ This was accepted by Lloyd LJ: 'It is elementary that an assignment, whether legal or equitable, cannot transfer the burden of a contract' (at 151).

¹²⁵⁴ Indeed, if the assignee company is associated with the director, he may be personally liable: see Companies Act 1985, sections 320 and 322.

¹²⁵⁵ For which, see chapter 2 above, part I, C.

however, it now seems to be generally accepted that the agreement to arbitrate may, and very often will, lead an existence entirely separate from the contract to which it relates. Such an autonomous agreement is unaffected by the invalidity of the terms of the contract.¹²⁵⁶ As a result, issues relating to validity and termination are still subject to arbitration. This would suggest that an autonomous agreement to arbitrate is not accessory to the main claim; the assignee is, therefore, neither bound by it, nor able to invoke it.¹²⁵⁷

Second, one must focus on the debtor. Assuming the claim is assignable, the fundamental principle of the law of assignation must be complied with, namely, that the debtor must not be prejudiced by the assignation. Consequently, if the debtor could have defended a claim by the cedent for payment in the arbitration, so too can he plead this against an assignee. Focus on the debtor raises the fundamental question of whether claims subject to arbitration clauses are assignable at all. If the debtor agreed to arbitrate only with the cedent, there is an element of *delectus personae*; therefore the assignee of a claim *cannot* submit to the proceedings, even he wants to, without the consent of the debtor.¹²⁵⁸ (It should be noted in parenthesis that the assignee who wants to submit to arbitration in a situation where the debtor is arguing that it is subject to *delectus personae*, could argue that he is entitled to arbitrate in the name of the cedent.¹²⁵⁹ The right to litigate in the name of the cedent has been confirmed in some Scottish cases, although, in this writer's opinion, this line of authority should not be followed; in any event, suing in the cedent's name carries its own risks). If there is *delectus personae* in the agreement, the claim is unassignable. The assignee may then recur against the cedent for breach of warrandice.

F. The Assignee in Arbitration proceedings: the debtor's defences.

If the debtor's right to submit to arbitration does bind the assignee, the question remains: what pleas can the debtor plead before the arbiter? Depending on the wording of the

¹²⁵⁶ Moreover, it may be subject to a different law than the principal contract. Assignment introduces the possibility of a third law (if the international private law rules of the *lex fori* apply a connecting factor other than the law of the principal claim). See the discussion by Grisberger and Hausmaniger, *op. cit.*, n. 1191, at 151 ff.

¹²⁵⁷ See discussion by Girsberger and Hausmaniger, *op. cit.*, 1191, at 136 ff.

¹²⁵⁸ After all, the arbitration agreement will impose duties on both parties. If there is an assignation of a right subject to the arbitration agreement, the cedent cannot be discharged from his liabilities under that arbitration agreement without the consent of the debtor.

¹²⁵⁹ See chapter 2, above.

arbitration clause, the pleas available to the debtor may be wider or narrower than if the assignee's claim had been pursued before a court. If the terms of arbitration are not sufficiently wide, then the arbiter has no jurisdiction to give effect to a plea of compensation.¹²⁶⁰ Conversely, it seems that counterclaims which the debtor has against the cedent may be pled in the arbitration.¹²⁶¹ If counterclaims are allowed, there will be problems in giving effect to these. The assignee is not responsible for the obligations of the cedent, so a decree cannot be awarded against the assignee. Therefore, unless specific provision is made in the arbitration agreement there could be a situation of continuous retention, for which see the above discussion.

VII. Fourth Parties.

A. Fourth Parties and Fraud.

In the transfer of assets, the general principle is that the transferee is unconcerned with the personal obligations of the transferor. The assignation of personal rights is, apparently,¹²⁶² different:

“But in personal rights the fraud of authors is relevant against singular successors though not partaking or conscious of the fraud when they purchased; because assignees are but mere procurators, albeit *in rem suam*: and therefore they are in the same case with their cedents, except that their cedents' oaths after they were denuded, cannot prejudice their assignees.”¹²⁶³

This passage is somewhat contradictory. If assignees are only mere procurators, then why does Stair refer to the cedent being ‘denuded’? Stair's analysis was strongly criticised by Bell in his *Commentaries*.¹²⁶⁴ Assignation today is understood as a transfer. That the outdated language of *procuratio* is still used is unfortunate and confusing. Once it is accepted that assignation is a transfer then the position should, in principle, be the same as in the transfer of other assets. Where the fraud has been perpetrated against the cedent, but not in the contract out of which the assigned claim arose, then this should not affect subsequent *bona fide* onerous assignees.

¹²⁶⁰ *McEwan v Middleton* (1866) 5 M 159 followed in *Wilson v Porter* (1880) 17 SLR 675 at 676 per Lord President Inglis.

¹²⁶¹ See e.g. Rules of International Commercial Arbitration of the International Chamber of Commerce (1998, ICC publication no. 581) Art. 5, reproduced in Davidson, *Arbitration*, Appendix IV, at 525.

¹²⁶² Reid, *Property* para 694.

¹²⁶³ Stair IV.xl.21. See also Gosford's report of *Duff v Fowler* (1672) Mor 10282.

¹²⁶⁴ *Commentaries* (2nd ed. 1810), 150, note n; (3rd ed. 1816) I, 182; (7th ed. 1870) I, 303, in reference to the earlier passage at I.x.16, for which see n. 1484 above.

In *McDonnells v Carmichael*¹²⁶⁵ C1 assigned to C2 a debt owed to C1 by D. C2 then assigned to C3. C3 was in good faith and took for value. C1 then sought reduction of the assignation. C3 claimed his position was unassailable. The defect was extrinsic to the claim assigned. The pursuers, however, argued that the distinction was between *dolus dans causam contractui* and *dolus incidens in contractum*. Fraud of the former type rendered the transfer null and void. A *bona fide* onerous transferee was therefore unprotected.¹²⁶⁶ This distinction arguably confuses two matters. First, it was argued that *dolus dans causam contractui* was in the transfer rather than in the claim assigned. It is unclear whether even an essential error, induced by fraud, in the transfer should prejudice third parties.¹²⁶⁷ The consensual argument is that there is a total exclusion of consent; therefore, since there is no *consensus in idem*, there can be no *animus transferendi*. The contrary view is that fraud is a vice of consent and renders any conveyance only voidable. *Bona fide* transferees for value are therefore protected. Secondly, if such fraud were to be effective against third parties, it can only be on the basis that fraud is real vice.¹²⁶⁸ The court, however, granted the reduction. Lord Kames, though not dissenting, had difficulty with the decision:

“The difference between the case of *nomina debitorum* and the other cases is this, and it is mentioned by Lord Stair, - An assignee is nothing else than a procurator *in rem suam*. Hence, in England, at this day, an assignee must pursue in the name of his cedent. With us an assignee is now held to have the total right. In that respect the law has changed. Why should not the effects of assignations also be changed? For want of this change, our law is, in one particular, a sort of hotch-potch; but we cannot help that.”¹²⁶⁹

¹²⁶⁵ (1772) Mor 4974; Hailes 513.

¹²⁶⁶ *Resolutio jure dantis resolvitur jus accipientis* (the right of the giver having ceased or become void, the right of the receiver ceases also). This apparent principle is not an accurate statement of law then or now, although it is discussed by the Court in *Heron v Stewart and Hawthorn* (1749) Mor 1705; Kilkerran 389; Elchies, *Fraud*, No. 21 aff'd (1749) 1 Craigie, Stewart and Paton 432. It was also invoked in *Livingston v Menzies* (1705) Mor 14004; *Sinclair v Shaw* (1739) 5 Br Sup 658; Elchies, *Arrestment* No. 11; Kilkerran 36; *Countess of Moray v Stewart* (1772) Mor 4392; *Elliot v Wilson* 9th February 1826 FC and in *Johnstone-Beattie v Dalzell* (1868) 6 M 333 at 346 *per* Lord Ardmillan. Cf. T. Huc, *Commentaire héorique et pratique du code civil* (1894) vol VII, 299-300 and P. Malaurie and L. Aynès, *Droit civil: obligations* vol 3 (11^e éd. 2001) para 82.

¹²⁶⁷ Compare McBryde, *Contract*, para 13-08. There is controversy in the sources, see in particular *Morrison v Robertson* 1908 SC 332; *McLeod v Kerr* 1965 SC 253 at 256 *per* Lord President Clyde; T.B. Smith, *Short Commentary on the Law of Scotland* (1962), 816; *idem*, ‘Error and the Transfer of Title’ (1967) 12 *JLSS* 206; *idem*, *Property Problems in Sale* (1978), 170 ff; McBryde, *Contract* paras 15-83 ff; Reid, *Property* para 617 notes that error as to *persona* may be a real vice.

¹²⁶⁸ See J. van den Sande, *De Actionum Cessione* (trans. P. C. Anders, 1906, *Commentary on Cession of Actions*), 240 and see below.

¹²⁶⁹ Hailes 513. Cf. Kames, *Principles of Equity* (2nd ed. 1767), 206.

Professor McBryde has charted the history of the effect of fraud on assignees.¹²⁷⁰ He suggests that the Court probably first gave effect to the law as articulated by Stair in *Burden v Whitefoord of Dundass*.¹²⁷¹ This case however can only be fully understood in light of the comment by Lord Pitfour in *McDonells v Carmichael*.¹²⁷² *Burden* apparently involved a reduction of a disposition elicited from one Kennedy while he was drunk, 'in so far as the property was not vested in a third party by infeftment'.¹²⁷³ Since the third party transferee was not infeft, there could be no problem with reduction.¹²⁷⁴ There was no *bona fide* onerous transferee. In any event, it is not apparent what relevance a case dealing with the disposition of heritage has to a rule which is said to be peculiar to assignation.

The other relevant case is *Irvin v Osterbye*.¹²⁷⁵ Here there was a competition between an assignee to a bond and an arrester. The arrester was the insurer of a ship. The ship had been damaged. The arresters had paid out to the master on the basis that the ship had been a total loss. In fact the ship was repaired and sold. A representative of the master bought it. The whole circumstances of the case were fraudulent. The master bought the ship back from his representative and granted him a bill for the price. This was assigned to the assignees. The insurers arrested the bill. It seems that the arrester was preferred to the bond but the basis of the decision is unclear. There was no mention of intimation of the assignation, so it may be that the arrester was preferred on the ordinary principle that an arrestment is to be preferred to an unintimated assignation.

***B. Redfearn v Sommervails*.¹²⁷⁶**

This case can be seen as one of the most controversial, or at any rate important, decisions of the House of Lords in the private law of Scotland. It is as a result of the decision

¹²⁷⁰ *Contract* paras 14-93 to 14-101. See also McBryde's contribution to K.G.C. Reid and R. Zimmermann (eds.) *A History of Private Law in Scotland* (2000) vol II, 72, v. 'Error'.

¹²⁷¹ (1742) Elchies, *Fraud* No. 11.

¹²⁷² (1772) Hailes 513 at 514.

¹²⁷³ Lord Pitfour, *ibid*.

¹²⁷⁴ Though Lord Pitfour was nevertheless in favour of reduction in *McDonnells* on the ground that 'an assignation to a mere personal right gives no security: it is extinguishable by compensation or by payment. In it the assignee wholly relied on the warrantice of the cedent'.

¹²⁷⁵ (1755) Mor 1715; 6th March 1755 FC.

¹²⁷⁶ (1813) 1 Dow 50; 5 Pat App 707. The reports are unsatisfactory. Dow's report is not a verbatim report of the speeches, but a second-hand account. Paton's report contains no trace of the arguments presented before the House. A full transcript of the arguments can be found in *House of Lords Cases* vol 45 in the Signet Library. Attempts to track down the session papers of the proceedings before the Court of Session have been unsuccessful. Note that in the *General Index of Names* the parties are listed under '*Sommerville v Redfearn*'.

in *Redfearn* that it can be stated with certainty that the position in modern law is that an assignee (with one exception) is not subject to the extrinsic obligations of the cedent. Although the point had previously been decided by the Court of Session,¹²⁷⁷ there are several *dicta* which suggest that their Lordships in *Redfearn* paid scant regard to the existing Scottish authorities and imposed a new rule,¹²⁷⁸ albeit one ‘for the benefit of society’.¹²⁷⁹ Hostility to *Redfearn* stems from the opinion of Lord President Hope in *Gairdner v Royal Bank of Scotland* where he stated that, ‘You must know the situation of the party with whom you transact. Look to the case of *Sommervail*, founded upon by the defenders ... Even as matters stood, I think the case was wrong [sic] decided in the House of Lords. I thought that the cedent could only communicate to the assignee of the right *tantum et tale* as he possessed it’.¹²⁸⁰ However the position was not as clear as the Lord President imagined. The history of the law on the effect of the personal obligations of an author on a transferee is confused. As far as creditors are concerned, the matter has only recently been authoritatively resolved.¹²⁸¹ The issue, however, is a general one. It is not peculiar to assignments; as a result, it cannot be discussed further here.

¹²⁷⁷ See e.g. *Anderson v Dempster* (1702) Mor 10213.

¹²⁷⁸ Lord Balgray in *Gordon v Cheyne* (1824) 3 S 566 at 568; Lord Gillies at 570 and Lord President (Hope) at 571; *Littlejohn v Black* (1855) 18 D 207 at 219 *per* Lord Ivory; *North British Railway Co v Lindsay* (1875) 3 R 168 at 176 *per* Lord Justice-Clerk Moncreiff: ‘it was conceded that the previous rule of the law of Scotland was otherwise [prior to *Redfearn*] and the judgement proceeded on views of expediency which prevailed in the law of England’. This was quoted with approval by Lord Keith of Avonholm in the English appeal *BS Lyle v Rosher* [1959] 1 WLR 8 HL, who then commented that, ‘though a Scots decision [i.e. *Redfearn*] I have little doubt that Lord Eldon LC and Lord Redesdale were applying English law and would have reached the same decision in like circumstances in an English case’. This seems to be the only situation since *Heritable Reversionary* in which *Redfearn* has been considered by the House of Lords. However, compare the (perhaps more accurate) opinion of Lord Moncreiff, in *Burns v Lawrie’s Trs* (1840) 2 D 1348 at 1356: ‘The case of *Redfearn* was decided on the general ground, and on a principle not new to the law, though previously overruled’.

¹²⁷⁹ Lord Balgray, *ibid.*

¹²⁸⁰ June 22nd 1815 FC.

¹²⁸¹ *Burnett's Tr. v Grainger* 2004 SC (HL) 19.

Chapter 6

Validity

I. Contract and Conveyance: causal or abstract relationship.

A. General.

There is almost no consideration in the Scottish sources of the relationship between the constituent elements of an assignation. This relationship is crucial for the purposes of any discussion on validity. If the contract to assign (the obligatory agreement) and the assignation (the transfer agreement)¹²⁸² are separate, then invalidity of the contract does not necessarily entail the invalidity of the conveyance, and vice versa.¹²⁸³ This is the principle of abstraction (*Abstraktionsprinzip*). By contrast, if an assignation is causal in nature, i.e. that a valid transfer requires valid basis or cause (*justa causa*), invalidity of the underlying obligatory agreement will invalidate the transfer.¹²⁸⁴ In the case of the transfer of immoveables, Scots law probably follows an abstract approach.¹²⁸⁵ The transfer of corporeal moveables at common law¹²⁸⁶ is probably the same, but the point is not undisputed.¹²⁸⁷ The

¹²⁸² This distinction is important. In the transfer of real rights, the distinction is between obligatory agreement and real agreement. The distinction was first recognised by C.F. von Savigny, *System des heutigen römischen Rechts* (1840-1849) III, 313; although traces can also be found in R.J. Pothier, *Traité du droit de domaine de propriété* (1771) § 231. See discussion in C.G. van der Merwe, *Sakereg* (2nd ed. 1989), 301 ff. ‘Real agreement’ is not appropriate for the transfer of claims: cession (properly so-called) transfers personal, not real, rights; ‘transfer agreement’ is therefore preferred.

¹²⁸³ Cf. *Dobie v McFarlane* (1854) 17 D 97 where the reduction of the whole transaction was held to be unnecessary; reduction of the title on which the defender held the claim was sufficient.

¹²⁸⁴ Cf. McBryde, *Contract* para 13-01 ff. and Reid, *Property* para 608. The history of the abstraction principle in the *jus commune* is complex. It only emerged in its modern form in the nineteenth century. The Scottish history may be different, but the point cannot be explored here. In the early *jus commune*, where outright transfer of claims was not possible, the maxim was *cessio sine causa facta non valet*: K. Luig, ‘Zession und Abstraktionsprinzip’ in H. Coing and W. Wilhelm (eds.) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert* (1977) 112 at 121. Luig attributes this to Rolandinus’, *Summa artis notariae* (1255). See too Grosskopf, *Geskiedenis*, 65, n. 156.

¹²⁸⁵ Reid, *Property* para 611, citing Stair II.iii.14. Cf. D.L. Carey Miller, *Corporeal Moveables in Scots Law* (1991) para 8-06 and *idem*, ‘Systems of Property: Stair and Grotius’ in D.L. Carey Miller and D.W. Meyers (eds) *Comparative and Historical Essays in Scots Law* (1992) 28-30.

¹²⁸⁶ The Sale of Goods Act 1893, and now the Sale of Goods Act 1979 (as amended), introduced an essentially causal theory into the sale of corporeal moveables – but not completely. For example, A agrees to sell a camera to B. B gives a cheque and takes delivery. There is no specific agreement as to the date of transfer; however, rule 1 of s. 18 states that property passes on conclusion of the contract. B’s cheque bounces. A does not regain ownership by the mere act of rescinding the contract: B is the owner. To reinvest A with ownership, B will have to redeliver the camera to A (it is not a sale so common law applies). Cf. Erskine III.iii.11 and some of the *obiter dicta* in *McLeod v Kerr* 1965 SC 235 which deal with the (irrelevant) arguments presented to the court, for which see: T.B. Smith, *Property Problems of Sale* (1978) and Reid, *Property* para 610. Cf. L.P.W. van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (2000) at 24 who suggests that rescission of a causal sale has real resolutive effect; and, for the position in Roman law, Zimmermann, *Obligations*, 716 ff., especially at 731 f.

abstract approach is consistent with the methods by which a transfer is achieved in Scots law; in particular, the sale of heritable property: the completion of missives, the delivery of the disposition, followed by the recording or registration of it, being the three distinct elements. The missives and the disposition are quite distinct. They usually occur at different times. By contrast, while in principle the three stages, which should occur prior to the transfer of a money claim, (contract to assign, delivery of written assignation, and intimation)¹²⁸⁸ are similarly distinct in principle, this is not always the case in practice. It is not unusual for the contract to assign and the assignation to be combined in the one deed.^{1288a} This is potentially problematic. It is common for commercial agreements to embody only an agreement or undertaking to assign.¹²⁸⁹ Such an agreement, however, is only the first stage of a three-stage process.¹²⁹⁰ It is a typical example of the overemphasis on the contractarian approach to commercial transactions.¹²⁹¹ Similarly, a clause whereby the cedent 'agrees to assign' is inconsistent with one in which the cedent 'hereby assigns'¹²⁹² a claim. The first is an obligation to perform a juridical act in the future; the latter a *de praesenti* conveyance.¹²⁹³

Matters are complicated by the fact that Scots law, on the predominant view, subscribes to the *Abstraktionsprinzip* with regard to immoveables and corporeal moveables (at common law), yet the law of assignation evolved under the influence of French law.¹²⁹⁴

¹²⁸⁷ Cf. Reid, *Property* para 609 and McBryde, *Contract* para 13-08.

¹²⁸⁸ Although where there is a donation or an assignation by an executor there may be no contract.

^{1288a} R. Bruce Wood, 'Special Considerations for Scotland' in F. Salinger, *Factoring: the Law and Practice of Invoice Finance* (3rd ed. 1999) para 7-39. It should be observed, however, that his need not of itself be problematic. For example, in German law on the transfer of immoveables, the *Kaufvertrag* and the *Auflassung* are often found in the one deed. But German lawyers are well-versed in the importance of the *Abstraktionsprinzip*; many Scots lawyers are not.

¹²⁸⁹ See e.g. *Bank of Scotland Cashflow Finance v Heritage International Transport Ltd* 2003 SLT (Sh Ct) 107. Cf. S. Scott, *the Law of Cession* (2nd ed. 1991), 8-9.

¹²⁹⁰ *Bank of Scotland v Liquidators of Hutchison, Main & Co* 1914 SC (HL) 1. Cf. McBryde, *Contract* para 12-58 who speaks of a two stage process. This seems to overlook the fact that the conveyance only occurs on intimation of the transfer agreement to the debtor and that it is the transfer agreement that must be intimated, not the contract to transfer.

¹²⁹¹ K.G.C. Reid, 'Unintimated Assignations' 1989 SLT (News) 267 discussing *Lombard North Central Ltd v Lord Advocate* 1983 SLT 361. This writer would not, however, agree with all Reid's conclusions; in particular, that an implied assignation (*cessio legis*) is never possible.

¹²⁹² See e.g. Bell, *Commentaries* (7th ed. 1870) II, 16.

¹²⁹³ The following egregious example is taken from the standard publishing agreement which the author was required to subscribe by W. Green, the Scottish Law Publisher, for publication in the *Juridical Review* in March 2003: 'In consideration of the above payment, I hereby agree to grant licence and assign to W. Green the sole and exclusive right to publish the work for commercial gain...'. How can one simultaneously grant licence and assign? If there is an assignation, the cedent has no title to grant licence. Alternatively, this clause succeeds in granting a licence, with only a personal obligation to assign in the future ('I hereby agree...to assign'). Does this really reflect the intention of the parties?

¹²⁹⁴ See chapter 3 above.

Cession de créance in French law is treated as a sale.¹²⁹⁵ Sale in French law is causal in nature.¹²⁹⁶ While French law requires intimation in the same way that Scots law does, the causal nature of the transaction means that cession takes effect ‘as between’ the parties on conclusion of the agreement, but only in respect to third parties on formal intimation to the debtor.¹²⁹⁷

What, then, of the Scottish sources? Professor Reid refers to Stair’s ‘masterly’¹²⁹⁸ analysis:

“There may be three acts of the will about the disposal of rights: a resolution to dispone, a paction, contract or obligation to dispone, and a present will or consent that that which is the disponent’s will be the acquirer’s. Resolution terminates with the resolver, and may be dissolved by contrary resolution, and so *transmits* no right: paction does only constitute or *transmit* a personal right or obligation, whereby the person obliged may be compelled to *transmit* the real right. It must needs then be the present dispositive will of the owner, which conveyeth the right to any other...”¹²⁹⁹

The controversial element in this passage is the repetition of the verb ‘transmit’. Where corporeal or immovable property is being transferred, the contract will create a personal right in favour of the intended transferee whereby he is entitled to demand that the transferor executes a real agreement which will allow him to effect a transfer (in Stair’s example, the real right of ownership). Does this analysis fit where the object of the transfer is a personal right itself? According to Stair, ‘paction does only constitute or transmit a personal right’. There are two ways of looking at this passage. First, since an assignation is the transfer of a personal right, what Stair is saying is that mere agreement is necessary: ‘paction ... does transmit a personal right’.¹³⁰⁰ The second – and, it is submitted, the correct – approach would be to look at the reference to ‘transmit’ in the context of the first line: ‘there may be three acts

¹²⁹⁵ Art. 1690 *Code Civil*. This article is in the final part of Title 6 on ‘*Vente*’. A similar structure is found in the Spanish code: Art. 1526 f *Código Civil*. However, this does not mean that a gratuitous cession is impossible in French law. See F. Terré, P. Simler and Y. Lequette, *Droit civil: Les obligations* (8th ed. 2002) para 1275 and H. Kötz, *Europäisches Vertragsrecht* (1996) § 14, at 405, n. 12 (trans. T. Weir, *European Contract Law* (1997) § 14, n. 12). In Scots law, a donation of a right must be effected by an intimated assignation: *Alderwick v Craig* 1916 2 SLT 161 OH.

¹²⁹⁶ Arts. 1134 and 1583 *Code Civil*. See generally L. van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (2000) p. 74. Cf. Pothier, *Traité du contrat de vente* (1762) §§ 307-312.

¹²⁹⁷ The debtor is also a third party. The respective positions in France and Germany provide an interesting parallel: Germany requires registration for the transfer of land, but only delivery of the transfer agreement for claims; France does not require registration for the transfer of immovables but insists on relatively formal intimation to the debtor for the transfer of claims. Scotland, characteristically, exhibits elements of both systems.

¹²⁹⁸ Reid, *Property* para 606.

¹²⁹⁹ Stair III.ii.3 (emphasis added).

¹³⁰⁰ Cf. *Keith v Grant* (1792) Mor 2933; 3 Ross LC 308 at 315; 14th November 1792 FC it is reported that it was observed from the bench that, ‘In personal rights the law holds an obligation to convey and conveyance to be the

of the will about the disposal of rights'; and the reference to personal right as contradistinguished from the real right. In transfers of corporeal moveables or immoveables, the transfer is of ownership. Ownership is a real right. Analysing the stages of transfer in assignation requires some sophistication: the object of the transfer is a personal right. Stair's usage of 'transmit' is ambiguous. From the context, however, it is clear that he is actually referring to the *creation* ('constitution') of a personal right, i.e. the personal right to demand an assignation. Since an assignation is just a transfer of a personal right, Stair is referring to stage two, i.e. a personal right to a personal right.¹³⁰¹

Before leaving this passage from Stair, one point of criticism may be levelled. Stair makes no mention of the need for completion of the transfer, i.e. recording (immoveables); delivery (moveables); intimation (claims). A mere resolution to transfer on the part of the transferor and a resolution to accept transfer on the part of the transferee generally not sufficient to effect a transfer at common law, as Stair himself vigorously asserts elsewhere.¹³⁰²

B. Intention and Revocable assignations.

Many Scottish cases involve assignations made by a father in favour of his children, or a wife in favour of her husband, 'for love and favour and affection'.¹³⁰³ Historically, donations made between husband and wife (*donatio inter virum et uxorem*)¹³⁰⁴ were revocable during the lifetime of the donor.¹³⁰⁵ This was the case even where they bore to be

same; and, therefore, everybody liable in absolute warrandice is bound to grant the same'. However, *Keith* was an accretion case.

¹³⁰¹ *Creditors of Benjenward, Competing* (1753) Mor 743 at 744; Kames Sel Dec 75 per Lord Kames: 'there is such a thing as an imperfect right to a personal debt...'

¹³⁰² E.g. Stair II.iii.16: 'nulla sasina nulla terra' (land); III.ii.5 (moveables); III.i.6 (claims). Cf. Reid, *Property* paras 619 (A.J. Gamble); 644 and 652; and G.L. Gretton, 'Assignation of Contingent Rights' 1993 *JR* 23.

¹³⁰³ See generally the excellent work by D. Murray, *The Law Relating to the Property of Married Persons* (Glasgow, 1891). Not only was Murray a scholar of great ability, he was also one of the founding partners of McLay, Murray and Spens, solicitors. See generally, M.S. Moss, 'Murray, David (1842-1928)' *DNB* (2004).

¹³⁰⁴ For which see A.G.M Duncan (ed.) *Trayner's Latin Maxims* (4th ed. 1894, reprinted 1993) and authority there cited.

¹³⁰⁵ Following the rule in Roman law, as it had evolved in the *jus commune*, marriage was viewed as a product of love and harmony and could not be bought: see e.g. Ulpian, D. 24, 1, 3 pr. See, generally, D. Murray, *The Law Relating to the Property of Married Persons* (1891) §§ 14 ff citing, *inter alios*, R.J. Pothier, *Traité des donations entre mari et femme* in M. Bugnet (ed.) *Œuvres de Pothier* (Paris, 1861) vol 7, 499 ff. The French *Coutumes* seem to have been particularly influential on the seventeenth century Scottish rules on matrimonial property: see E.M. Clive, *The Law of Husband and Wife in Scotland* (4th ed. 1997), 219 and authority there cited; and, in particular, D. Murray, *op. cit.* Cf. *Inglis v Loury* (1676) Mor 6131: 'The Lords found that the assignation of an heritable bond being a donation by a wife to her husband during the marriage, that the same was revocable by the wife at any time in her life, even after the husband's death, by a posterior assignation, which was effectual against every singular successor, though acquiring bona fide from the husband for onerous cases; and found, that albeit a provision to the wife, during the marriage, where there was no contract or prior provision, is not revocable, the man naturally obliged to provide his wife, this does not hold in an assignation in favours of a wife

irrevocable.¹³⁰⁶ In modern law, inter-marital assignments¹³⁰⁷ are as irrevocable as an assignment made to an unrelated assignee.¹³⁰⁸

As a general principle, however, revocability can only apply to the personal obligation to assign.¹³⁰⁹ Revocation is simply ineffective after the assignment has been intimated. A judicial reduction will be required and the debtor will have to be called as a party to the action. In approaching these issues, a useful starting point is to ask: is assignment a unilateral or a bilateral act in Scots law? This is an issue of some nicety. Whether transfer is a unilateral or bilateral act goes deep into the fundamentals of the law of transfer; well beyond the boundaries of the law of assignment. It is thought that assignment is a bilateral act. Acceptance of delivery of the assignment by the assignee, even implicitly, is necessary.¹³¹⁰ That the *debtor* has consented to the assignment is not relevant: the assignee's consent is an essential requirement; the debtor's is not.¹³¹¹ Fortunately, in the Scots law of transfer, it is difficult to voluntarily *transfer* a right without the consent of the assignee. An additional step (registration, delivery, intimation) is usually required to effect the transfer. And it is the putative transferee who ought to carry out this act: registration of the disposition in the case of land; intimation of the assignment in the case of claims.¹³¹² (Were it otherwise, the cedent could transfer claims into the patrimony of the assignee without the latter's consent¹³¹³). A transferee or donee may have good reasons for not wanting the benefit to be transferred to, or

granted to her husband, though there were no contract, unless the assignment did bear to implement her contract of marriage'.

¹³⁰⁶ *Cousin v Caldwell* (1838) 16 S 109; *Jardine v Currie* (1830) 8 S 937.

¹³⁰⁷ We should perhaps not stray into the realm of extra-marital 'assignments'.

¹³⁰⁸ Married Women's Property (Scotland) Act 1920, s. 5.

¹³⁰⁹ See e.g. *Scot v Scot* (1665) Mor 1344. In *Trotters v Lundy* (1667) Mor 11498 it was held that after intimation a father could not revoke an assignment to his daughter. This much is uncontroversial and, indeed, obvious: the assignee is now the creditor.

¹³¹⁰ See Reid, *Property* para 613. In *Bailey's Trs v Bailey* 1954 SLT 282 at 287, Lord President Cooper stated that 'as [the assignment] has been accepted, intimated and acted upon, it is now irrevocable by the grantor'. This one of the few instances where there is a suggestion that *acceptance* of the assignment (i.e. the transfer agreement) is required. This is not the same as a contractual acceptance. Acceptance of delivery will be necessary, otherwise the assignee will have nothing to intimate to the debtor. But must there also be an intention to transfer *at the moment of transfer*, i.e. on intimation? The point is rarely made, though it is by Windscheid, *Pandektenrechts* § 330, at 366, and C.G. van der Merwe, *Sakereg* (2nd ed. 1989), 302-303. Contracts are often formed despite a lack of consensus on conclusion: for example, an offeror seeks to revoke an offer. Before the revocation reaches the offeree, the offeree's acceptance is communicated. There is a contract though one of the parties had done everything in his power not to be bound: Costigan, 'Constructive Contracts' (1907) 19 *Green Bag* 512.

¹³¹¹ Lord Chorley and J. Milnes Holden, *The Law of Banking* (6th ed. 1974), 42 remark that, 'Conversely an assignment is not effective until the *assignee* has notice of it, though the *debtor* may have assented to it' (my emphasis). It is difficult to accept that, in English law, an assignment is a unilateral act and that an assignee can have a right forced upon him by mere notice. But this is the prevailing view: Sir Guenter Treitel, *The Law of Contract* (11th ed. 2003), 680.

¹³¹² Adopting a bilateral analysis is consistent with the view that only the assignee can intimate the assignment; otherwise, the cedent could force the transfer on the assignee. This is discussed in chapter 4, 'intimation' above.

conferred upon, him. These may be moral or immoral, rational or irrational, honourable or dishonourable. Whatever the reason, the basic tenet of individual autonomy which underlies the legal principles applicable to consensual transactions require *consensus*. It is objectionable that a transferee's patrimony can be enlarged by the act of another contrary to the transferee's wishes. How can anyone then refute accusations of accepting bribes? Are unilaterally conferred benefits taxable? Indeed, for this reason, it seems to this writer that the unilateral promise found in Scots law, binding without acceptance, is objectionable. It is not sufficient to argue that the transferee can always renounce any rights or property given to him. Indeed, if this is all a transferee can do, the process of donation and renunciation could go on indefinitely.¹³¹⁴

What, then, if the transferor purports to intimate or register, i.e. complete the transfer? This occurred in *Burnett v Morrow*.¹³¹⁵ H was to assign a bond and disposition in security he held to M. H instructed his agent, B to do so. B prepared the assignation and recorded it. M was ignorant of this until sometime after. M demanded delivery of the assignation from B. B refused: he had not received instructions from his client to do so; further, H had not paid B for his work, so he was entitled to retain the assignation. M then offered to settle the account in return for delivery. Still B refused. The disposal of the case turned on issues of proof. However, Lord Deas made some important remarks about the role of delivery of a conveyance in effecting a transfer:

“It is quite true that registration of a deed may be delivery – particularly registration which is equivalent to infestment. But registration after all is only constructive and not actual delivery.... The object of constructive delivery is open to evidence...^{1315a} The import of [that evidence] here is, that neither the grantee, nor any one entitled to act for him, knew anything till long afterwards, either of the granting or recording of the assignation. This being so, did the recording bind the grantee? Certainly not. It might have been a deed which it was neither convenient nor profitable for him to accept, but the reverse; and if he would not in that case have been held to have accepted delivery, it is hard to see how the mere act of registration can be conclusive against the granter, that he intended such registration to be delivery.”¹³¹⁶

¹³¹³ See discussion below and in chapter 4 above, ‘Intimation’.

¹³¹⁴ Cf. *HMV Fields Properties Ltd v Bracken Self Selection Fabrics Ltd* 1991 SLT 31. Admittedly, however, there are other examples. For example, rights of beneficiaries under trusts are conferred without the beneficiary's consent.

¹³¹⁵ (1864) 2 M 929.

^{1315a} What Lord Deas understands by delivery here is ambiguous. Registration cannot be the equivalent to delivery of the disposition: on Lord Deas' own argument, delivery is needed for Registration to take effect. Lord Deas must mean that registration is the equivalent to delivery in the case of corporeal moveables.

¹³¹⁶ *Ibid* at 934. Cf. *Burnett's Tr. v Grainger* 2004 SC (HL) 19 at para [88] *per* Lord Rodger of Earlsferry.

A deed recorded in the Register of Sasines is subject to the ordinary principles of property law. An application for registration must be made by the grantee or a solicitor acting for the grantee. The reservations expressed by Lord Deas might not be applicable to a title registered in the Land Register; although arguably the register would be inaccurate. However, what if the assignation in the *Burnett* case had been of a personal right? There is no delivery of the assignation and the cedent intimates.¹³¹⁷ The reservations expressed by Lord Deas would apply equally in that situation: there would be no transfer (although the debtor could doubtless validly pay the assignee). As a result, in this writer's view, an intention to transfer must be accompanied with an intention to receive (*animus accipiendi*). The consent may be implied as well as expressed.¹³¹⁸ The general principle is that there must be an intention to transfer and a concomitant intention to receive. The intention to transfer is manifested in the delivery of the assignation by the cedent:¹³¹⁹ 'Delivery to the grantee, whereby the granter puts the voluntary deed beyond his own power, is the expression of his final purpose concerning such deed'.¹³²⁰ This principle is common sense and efficacious.¹³²¹ It would suggest that after delivery, a disposition or assignation is irrevocable. While this seems inconsistent with the underlying principle that voluntary conveyances require consent and that this consent be present at the moment of transfer, it is certain. Registration of the assignation in the books and Council of Session would suffice for delivery.¹³²²

Assuming assignation to be a bilateral act, can the cedent revoke his assignation before intimation of the assignation? At the very least, this revocation must be intimated to the debtor to be effectual. There is no problem if revocation occurs prior to delivery of the assignation (i.e. before there is a transfer agreement); although revocation may be a breach of contract.¹³²³ If the assignation has been delivered, the issue is more problematic. Must the

¹³¹⁷ In *Jarvie's Tr. v Jarvie's Trs* (1887) 14 R 411 at 416, Lord President Inglis suggested that delivery of the assignation is not necessary if there is intimation by the cedent. This cannot be correct. See discussion in chapter 4 above, 'Intimation'.

¹³¹⁸ In some cases silence may denote acceptance. Cf. *Commaille v Steyn* 1914 CPD 1100 at 1103: 'Silence is equivalent to consent where it is one's duty to speak' approved in *Seeff Commercial and Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 SCA.

¹³¹⁹ It has been held that the raising of diligence in the name of the assignee is equivalent to delivery: *Dick v Oliphant* (1677) Mor 6548; but this is contrary to principle: the assignation needs to be lodged in process for an effectual judicial intimation.

¹³²⁰ A.M. Bell, *Lectures on Conveyancing* (3rd ed. 1882), 102.

¹³²¹ Cf. McBryde, *Contract*, para 4-09: "The requirement of delivery is in the interests of the granter. It enables the granter to prepare documents but to have a change of mind up to a certain point. Documents can be redrafted or destroyed. A draft, even if signed, is not binding. The law has taken the view that delivery is the irrevocable stage, rather than signature in the solitude of the granter's study. At least, that is the normal rule."

¹³²² *Tennent v Tennent's Trs* (1869) 7 M 936 at 948 *per* Lord President Inglis.

¹³²³ Cf. *Sinclair v Purves* (1707) Mor 11572 where warrandice from fact and deed was held to exclude a power of revocation. Analogously, a donation is only revocable up to and until delivery: Erksine III.iii.90.

animus transferendi be present only on the delivery of the deed? Or must it be continuously present until intimation? Can the cedent intimate to the debtor prior to intimation of the assignation that he has revoked?¹³²⁴ It is not usually suggested that the transferor of immovable property could prevent the passage of property to the disponee by intimating the revocation to the Keeper after delivery of the disposition but before recording or registration.¹³²⁵

Take four situations:

- (i) Capricious revocation
- (ii) Justified revocation (e.g. fraud on the part of the assignee)
- (iii) Incapacity supervening between delivery and intimation
- (iv) Death supervening between delivery and intimation

Capricious revocation is the type of revocation that the rule on delivery of deeds seeks to prevent. Justified revocation depends on whether it is actually possible to rescind a transfer agreement on the basis of unlawful inducement. However, it is thought that, as far as the transfer agreement is concerned, unilateral rescission will be ineffectual. A judicial reduction is required. So, if prior to intimation by the assignee, the cedent learns that he was fraudulently induced into delivering the assignation, he could interdict the assignee from intimating; or, more likely, bring an action to reduce the assignation. Calling the debtor as a party will similarly interpell him from paying the assignee. Where the validity of the assignation is questioned, the debtor must always be protected.¹³²⁶ Therefore, providing he can show that he paid in good faith he will be discharged. (It should be remembered that

¹³²⁴ Interestingly, L. Aynès, *Cession de contrat* (1984) at 99 suggests that the resolution of a cession will not have any effect vis-à-vis the debtor. Therefore, '...résolution[s] du contrat de cession – lorsque la cession est conventionnelle – sont, en elles-mêmes, sans effet sur ces relations, à moins qu'une nouvelle cession – rétrocession – rétablisse le rapport cédé-cédant. Dans les rapports internes du cédant avec le cessionnaire, la convention de cession, comme tout contrat translatif, donne naissance à une obligation de garantie, que la nullité, ou la résolution de la cession aux torts du cédant permet le cessionnaire d'invoquer. Mais elle ne produit aucun effet sur le droit et l'obligation du cessionnaire envers le cédé'.

¹³²⁵ The question has rarely been focused far less answered. In principle, however, this writer does not see why a unilateral revocation after delivery of the disposition will be of any avail to the disponent. If the disponent realises that he has been fraudulently induced to deliver the disposition he could seek to interdict *ad interim* (pending reduction) the disponee from registering. However, it seems unlikely that the same result can be achieved without judicial intervention. Lord Inglis, when Dean of Faculty, once argued that, after delivery of the disposition, there is nothing the disponent can do to prevent registration: *Taylor v Farrie* (1855) 17 D 639 at 643 *arguendo*. Cf. Stair III.ii.3. That the disposition cannot be revoked may not be the end of the world. What the disponent could do is to grant a disposition of the same subjects to a company controlled by him and attempt to register first. There is the doubt that the disponent would be in breach of warrandice or that the second disponee would be subject to the offside goals rule. However, if the disponent has granted the second disposition in order to protect himself against fraud, it is unlikely that a fraudster could either seek damages for breach of warrandice or seek to invoke the offside goals rule.

¹³²⁶ *Hall v Campbell and Gordon* (1708) Mor 11350 involved a revocable assignation which was revoked. However there was no discussion as to the effect of such a revocation on the debtor.

payment to the assignee on a valid assignation is an equipollent of intimation). It is too much to ask the debtor to inquire into whether the purported revocation was justified. But leaving the issue of debtor protection to one side, the legal question remains: can a revocation have any effect? That a judicial sanction is required for an effective revocation answers the question: a purported capricious revocation, of itself, has no effect; further, it will not be upheld by a court. A justified revocation also requires the judicial sanction; and, because it is justified, the court will give effect to it. Where incapacity intervenes before delivery, the assignee may have no remedy. The assignee cannot intimate conventionally without a deed of assignation. There is authority for the view that if the cedent dies before delivery of an *inter vivos* assignation, it is revoked by his death.¹³²⁷ If the cedent becomes *incapax*, there will be difficulties in proving that there has been an assignation (especially where it cannot be found) even if judicial intimation is resorted to. Where incapacity supervenes after delivery there seems no reason why intimation cannot follow.¹³²⁸ It is provided by statute that intimation can follow if the cedent dies between delivery and intimation.¹³²⁹

Where there is an express power of revocation in the assignation, the position may be different. For example, in *Crockett v Brown*¹³³⁰ an assignation which reserved a power of revocation to the cedent was duly intimated. The right of revocation was subsequently renounced but not intimated. Although the right to revoke had never been exercised, a posterior assignee for value duly intimated was preferred. The basis for this decision is unintelligible. But the general principle should prevail: following delivery of the assignation there is no power to revoke, whether such a power is conferred in the transfer agreement or not. In this sense, an assignation, i.e. the transfer agreement, is intrinsically irrevocable.¹³³¹

¹³²⁷ *Stamfield's Creditors v Scot* (1696) 4 Br Sup 344. But see n. 1329.

¹³²⁸ Cf. § 130 II *BGB*: 'Auf die Wirksamkeit der Willenserklärung ist es ohne Einfluss, wenn der Erklärende nach der Abgabe stirbt oder geschäftsunfähig wird'.

¹³²⁹ Confirmation Act 1690, c. 26; APS, c. 56 and the Registration Act 1696, c. 39; APS, c. 41. Registration in the Books of Council and Session may also follow after the death of the cedent: Summary Registration Act 1693, c. 15, APS, c. 24. See, again, § 130 II *BGB*. *Strang v Ross, Harper & Murphey* (Sh Ct) 1987 SCLR 10 involved a mandate to pay, not an assignation, as was assumed in argument and by the Sheriff. It was held that the mandate was revoked by the death of the granter. Had the mandate really been an assignation, the decision would have been inconsistent with statute.

¹³³⁰ (1743) *Elchies, Assignation* No. 5. Compare those cases involving resolutive conditions where the court invoked the maxim *resolutio jure dantis, resolutorius jus accipientis* ('The right of the giver having ceased, the right of the receiver also ceases'): see e.g. *Sinclair v Shaw* (1739) 5 Br Sup 658; *Elchies, Arrestment* No. 11; *Kilkerran* 36. And see discussion in chapter 5 above, 'the Debtor's Defences', Part VI, 'Fourth Parties'. Cf. K. Luig, 'Zession und Abstraktionsprinzip', *op. cit.*, n. 1284, 112 at 128, notes 63 and 64; and 130.

¹³³¹ Cf. *Arklay's Trustees v. Arklay's Testamentary Trustees* 1909 2 SLT 120 OH. The cedent transferred his rights under two insurance policies to trustees for his family: his children in fee and his wife in liferent. He reserved the right to bonus payments that may have become due under the policies. Some years later – after two of his four children had died – the cedent purported to renounce the earlier reservation of bonus rights and

The purported revocation of an assignation can lead to confusion. In *Johnstone-Beattie v Dalzell*,¹³³² the pursuer entered into an ante-nuptial marriage contract with her husband to which both their fathers were party. The bride's father agreed to transfer on his death a large proportion of his assets to the trustees. The trustees were directed to pay a sum of £5000 to the husband, six months after the death of the truster. The husband assigned this right in security for advances. This was intimated to the trustees. Before the bride's father died, but after intimation of the assignation, the marriage was dissolved by reason of the husband's adultery. The bride and her father purported to revoke the transfer to the trustees. After the father's death, the assignees demanded payment from the trustees. The wife sought declarator that the assignations were null and void; that the marriage contract was dissolved before the sums vested; and, that the assignations were subject to the implied condition that the marriage would not be dissolved by reason of the husband's adultery.¹³³³ The Lord Ordinary (Kinloch) found that the assignees were entitled to prevail. He was of opinion that the whole purpose of the arrangement was to aliment the newly-weds. However, 'if [the father] lived inconveniently long, it might come to be very necessary for them to raise money, in order simply to get along';¹³³⁴ he continued, 'At the time of granting the assignation, [the husband] was under no disqualification or forfeiture. He *ex hypothesi* validly divested himself at this time of right in favour of his creditor. The right lay in his person unforfeited and undivested, and it was assigned as such...It would be ludicrous to say that [the husband] could grant an assignation, and straightaway render it ineffectual by going and committing adultery'.¹³³⁵ Had the assignation not been granted, however, the husband would have been obliged to retransfer any assets he had received under the marriage contract. This was an obligation personal to him. The First Division reversed, but the reasons are unclear. While Lord President Inglis accepted that 'no one doubts that the provisions of £5000 vested in the husband an assignable interest',¹³³⁶ he preceded this comment with this passage:

"It is very important to notice, in the first place, that this is a provision which stands entirely in the form of an obligation to be performed after [the father's] death; and, as will be seen, hereafter it is in some degree contingent even

transfer them in pursuance of the first assignation to the trustees. The issue was whether the estates of the two children who had died in the interim were entitled to the proceeds. It was held that they were.

¹³³² (1868) 6 M 333. See the earlier proceedings reported at (1865) 5 M 340.

¹³³³ See pursuer's pleas nos. (1), (4) and (6) at 335.

¹³³⁴ At 338.

¹³³⁵ At 339. For the law regarding the obligation of a husband to restore the tocher on a divorce on the ground of adultery, see *Justice v Murray* (1761) Mor 334; Kames Sel Dec 172 and discussion in Ivory's footnote to Erskine I.vi.48

¹³³⁶ At 343.

beyond that, because the performance of the obligation at all is dependent on [the father] leaving sufficient means to discharge it.”¹³³⁷

This dictum is hardly illuminating. The obligation to pay was granted by the marriage trustees. If the obligation was rendered contingent by the mere fact that the trust funds may have been insufficient, then all personal obligations are thereby contingent. Lord Inglis’ answer to this was, ‘[a]ny interest, however contingent, is assignable; but; of course the right of the assignee depends on what is the right of the cedent’.¹³³⁸ The first part of this statement is wrong;¹³³⁹ the second part unhelpfully simplistic. By the marriage contract, the bride’s father bound himself to transfer assets to the trustees. If he had failed to do so, then the beneficiaries could have required the trustees to sue the truster for implement of the contract. The only contingency to which the right of the husband was subject was a temporal one: the money was only payable six months after the truster’s death. The right vested. The trustees had been appointed. There was a debtor to whom intimation was made. Lord Inglis, however, was ultimately persuaded by the Lord Ordinary’s point that the husband, had he not assigned, would have forfeited his right to the money. The assignee, therefore, could be in no better position. However, on what basis would the husband have forfeited the right? If the husband had breached the contract he would have been liable in damages. But how does this affect the assignee’s right of recovery? The assignee is not subject to the obligations of the cedent. In any event, the pursuers argued that the marriage contract had come to an end, and had been revoked.

The *Johnstone-Beattie* case is an example of how discussions of validity can over complicate matters. Fortunately, Lord President Inglis took a common sense view. Since the cedent could not have claimed the money, the assignee could not. This is a simple application of the *assignatus* rule. The cedent was in breach of an implied term of the contract. The debtor (the trustees) could therefore retain against the assignees. It was quite unnecessary, however, to enter into a consideration of the assignation’s validity.

¹³³⁷ At 342.

¹³³⁸ At 343.

¹³³⁹ Unless Lord Inglis means assignable in the contractual sense; otherwise it is hard to see how unvested rights (if this is not a contradiction in terms), which are liable to revocation, and where there is no debtor to whom to intimate, can be *transferred*.

II. General Grounds of Invalidity

A. Void and Voidable Assignations

1. General.

If an assignation is void, it is of no effect. There is no need to bring a reduction. An action of declarator of nullity is appropriate. A conclusion for an order of retrocession in such a case is a logical non-sequitur.¹³⁴⁰ Assuming the debtor has not paid, if an assignation is void, *restitutio in integrum* is irrelevant: the transfer was ineffectual and there is nothing to return.¹³⁴¹ If the assignee has procured payment from the debtor on the basis of a void assignation, the debtor is discharged if he was in good faith. But there is no basis on which the assignee can retain the money: the assignee will have an obligation to pay this to the cedent.

Vices of consent will render the contract,¹³⁴² conveyance¹³⁴³ or both voidable. It is said that a voidable contract may be rescinded. Rescission of a voidable contract must be distinguished from rescission for material breach.¹³⁴⁴ It is questionable whether a unilateral rescission of a voidable contract would be effective.¹³⁴⁵ There is House of Lords authority for the proposition that rescission takes effect from the date of intimation of the rescission rather than any judicial determination.¹³⁴⁶ However the authority is problematic.¹³⁴⁷ A completed, but voidable, conveyance, by contrast, will effect a transfer of the claim. For a unilateral declaration to effect a re-transfer of property is contrary to principle; in any event, it could be

¹³⁴⁰ Cf. *Pender v Commercial Bank of Scotland* 1940 SLT 306 OH at 308 per Lord Robertson (Ordinary).

¹³⁴¹ Cf. *Balls v J & W MacDonald* 1909 2 SLT 310 OH where the argument was that the pursuer had no power to assign an alimentary liferent. If correct, the assignation would have been void. Nevertheless, there was an (unsuccessful) argument that since *restitutio* was not offered, there could be no reduction.

¹³⁴² See McBryde, *Contract*, chapter 13.

¹³⁴³ See Reid, *Property* para 614 ff. The distinction was recognised in the pleadings in *Wood v MacDonald* 1970 SLT (Notes) 46 OH.

¹³⁴⁴ McBryde, *Contract* para 13-21, n. 88 highlights the crucial distinction between rescission for material breach and rescission of a voidable contract: 'Rescission of a voidable contract operates retrospectively. Rescission for material breach is largely prospective in operation'.

¹³⁴⁵ Cf. McBryde, *Contract* para 13-21: 'It is an unsettled question whether rescission of a voidable contract requires a court order or merely the act of the party rescinding'. But, at para 20-05, McBryde states that, 'Rescission in cases where the contract is affected by invalidities of consent is an action of the court; following material breach rescission is the act of the innocent party (and *restitutio in integrum* is not required)'.

¹³⁴⁶ *Westville Shipping Co v Abram Steamship Co* 1923 SC (HL) 68 at 73 per Lord Atkinson. In the Outer House in the *Westville* case (1922 SC 571 at 578), the Lord Ordinary (Hunter) suggested that 'when the [assignees] definitely intimated rescission, they regained their substantial title, and the decree in the English action operating as a re-assignation was pronounced before the record in the present action was closed, and all formal objections were thereby removed'. The conduct of counsel before the House of Lords in the *Westville* case caused their Lordships some consternation: see (1923) 15 Lloyd's L Rep 97. Compare *Robinson v Robinson* 1934 SLT 183 at 186.

¹³⁴⁷ See discussion of the *Westville* case below.

prejudicial to the party purporting to rescind: the transferor would be reinvested with the property *and* continue to hold any price paid for it.¹³⁴⁸ A completed voidable conveyance, therefore, must be judicially reduced. Before reduction, the assignee can assign the claim to an onerous *bona fide* transferee who will not be subject to reduction by the original cedent;¹³⁴⁹ conversely, if the cedent unlawfully induced the assignee to accept the assignation, the assignee will lose the right to reduce the assignation if he (the assignee) in turn translates the right.¹³⁵⁰

Before a contract can be rescinded or a conveyance reduced, *restitutio in integrum* must be possible.¹³⁵¹ In the case of an assignation, then, if the debtor has paid the assignee on the basis of a voidable assignation, then *restitutio* is no longer possible. The claim, (i.e. the object of the assignation) no longer exists: payment discharged the debt. If the debtor has not yet made payment, the debtor must be called as a defender in any action of reduction so as to bring the matter to his attention judicially. Where he has been duly cited and while such a process is pending, it is thought that the debtor would not be able to pay the assignee in good faith. He should consign the money into court. Even if the assignation has not been reduced to writing,¹³⁵² reduction probably can,¹³⁵³ and should, still be pursued. An assignation, like any other conveyance, can be reduced partially.¹³⁵⁴

¹³⁴⁸ A point ignored by Lord Atkinson in *Westville*.

¹³⁴⁹ *Redfean v Sommerville* (1813) 1 Dow 50. The *obiter dicta* in *McLeod v Kerr* 1965 SC 253 which suggest that a valid rescission by a defrauded seller of the *contract* of sale will reinvest the seller with ownership are wrong. See T.B. Smith, *Property Problems in Sale* (1978).

¹³⁵⁰ *Westville Shipping Co v Abram Steamship Co* 1922 SC 571 at 581 *per* Lord President Clyde: '[The first assignees] were precluded, by granting the sub-assignation, from doing anything inconsistent with the right than to impugn the original assignation upon the validity of which the validity of the sub-assignation depended. In short, the granting of the sub-assignation deprived the pursuers of their title....' The *Westville* case is problematic. Throughout the case, it is assumed that the assignation was a contract which could be unilaterally rescinded. There is nowhere in the reports any indication that any of the assignations were ever intimated. Indeed, it is not clear whether there were actually two successive assignations. The Lord Ordinary suggests that the first agreement might have been a direct sale of goods; in the Inner House the Lord President described the first agreement as an 'agreement for the original assignation' (1922 SC 571 at 581); while, in the House of Lords (1923 SC (HL) 68 at 71), Lord Dunedin had described the first agreement as an 'agreement of assignation'.

¹³⁵¹ See generally J.S. McLennan, 'Restitutio in integrum and the Duty to Restore' (1973) 90 *SALJ* 120 cited by McBryde *Contract* para 13-22, n. 1.

¹³⁵² According to Requirements of Writing (Scotland) Act 1995, s. 11 (3)(a) writing is not required; although it will be necessary to effect an intimation in terms of the Transmission of Moveable Property (Scotland) Act 1862 and at common law.

¹³⁵³ The authority is conflicting. *Brown v Hamilton District Council* 1983 SLT 397 at 401 *per* Lord Justice-Clerk Wheatley; at 410 *per* Lord Dunpark, followed in *M & I Instrument Engineers Ltd v Varsada* 1987 SCLR 700 OH holds that partial reduction is competent. The Court in *Brown* declined to follow the decision of the First Division in *McLean v McLean* 1976 SC 11 since the judgment there followed from a concession from counsel. See also *Lennox v Scottish Branch of the British Show Jumping Association* 1996 SLT 353 OH. The comments of the Second Division in *Short's Tr v Chung* 1991 SLT 472 at 476, that reduction is not appropriate where there is no deed, were perhaps *obiter*. In any event there was no argument on the point. The position in *Varsada* is preferable to that expressed by Lord Young in *McLaren's Tr v National Bank of Scotland Ltd* (1897) 24 R 920 at 927 apparently approved by the Lord Ordinary in *Boyle's Tr v Boyle* 1988 SLT 581 at 583C. Lord Young's

In discussing so-called vices of consent and real vices it is important to distinguish two different relationships. The first is the effect of some vice on the present conveyance, i.e. some imposition upon the cedent. On the other hand, there may be numerous reasons why the assignation is null which are not the result of any imposition on the cedent. For example, the cedent may not be the debtor's creditor or the assignation may be forged.¹³⁵⁵ Underlying these distinctions, however, is the position of the debtor. The debtor may be able to validly discharge the debt though the recipient may not be the debtor's creditor due to the invalidity of the assignation.

2. Void Assignations.

(a) Nullity: Vices of Consent

Claims are incorporeal. If they cannot be owned,¹³⁵⁶ far less possessed, they cannot be stolen. Theft cannot be a relevant vice for the law of assignation claims.¹³⁵⁷ It is probably the case that force and fear renders an assignation (the real agreement) null.¹³⁵⁸ Fraud is a vice of consent and not a real vice.¹³⁵⁹ A *pactum illicitum* is usually void. But what of a transfer which follows on an illegal agreement? It has been held that an assignation may be void for illegality. The classic situation in the sources is where the cedent assigns his rights against a gambling debtor.¹³⁶⁰ The law holds that the underlying gambling debt is void for illegality, as

dictum was directed at an alleged gratuitous alienation. His decision may have been coloured by the fact that reduction was in the privative jurisdiction of the Court of Session and by the fact that reduction can also be achieved in such a case by a conclusion for a declarator: see *Raymond Harrison & Co's Tr v North West Securities* 1989 SLT 718 at 724L *per* Lord Clyde (Ordinary).

¹³⁵⁴ *McConachy v McIndoe* (1853) 16 D 315; *Bain v Lady Seafield* (1887) 14 R 939; *Ball v J & W MacDonald* 1909 2 SLT 310 OH; *Broadley v Wilson* 1991 SLT 69 OH. It is of some interest that § 139 BGB suggests that partial reduction is not competent under German law. As it happens, partial reduction is competent, providing severance is possible: the residual part of the transaction (*Rechtsgeschäft*) must be capable of existing as a transaction of itself. See generally Palandt, BGB (63rd ed. 2004) § 139, Rn 10 and § 142, Rn 1.

¹³⁵⁵ As in *William Dick of Grange v Sir Lawrance Oliphant of Gask* (1677) Mor 13944.

¹³⁵⁶ See discussion in chapter 1 above.

¹³⁵⁷ Moreover, since they are incorporeal, they cannot be possessed, rendering the real vice of *spuilzie* (for which see *Hay v Leonard* (1677) Mor 10286) irrelevant. A blank bond could be stolen. As could a true deed of assignation with the assignee's name blank. There is no issue of forgery here. Nor is there any vice which impairs the cedent's expression of intention. Arguably, under the abstract theory of transfer, such an assignation would not be void. It would be voidable for fraud.

¹³⁵⁸ Cf. *Stair IV.xl.28* cited by Reid (W.M. Gordon), *Property* para 615.

¹³⁵⁹ Reid (Gordon), *Property* para 616.

¹³⁶⁰ The rule that bonds granted for gambling debts are void was statutory: Gaming Act 1710, (9 Anne c. 19). The application of the rule can be traced to *Bouyer v Bampton* (1742) 93 ER 1096; *Strange* 1155, through the opinions of Lord Mansfield in *Lowe v Waller* (1781) 2 Doug 736; 99 ER 470 (a usury case) and *Peacock v Rhodes* (1781) 2 Doug 636; 99 ER 402, to their adoption by the Court of Session in *White's Tr. v Johnstone's Tr.*, 22nd June 1819, (reported in a footnote to *Elliot v Cocks* (1826) 5 S 40) and *Hamilton v Russel* (1832) 10 S

is any bond granted by the debtor to the creditor in a gambling debt.¹³⁶¹ However, it is not immediately apparent why the assignation (i.e. the transfer) of an unrelated debt in consideration of the gambling debt is also necessarily void.¹³⁶² Some authorities give countenance to the proposition that the debtor in an assignation would be entitled to plead that the assignation was made for an illegal consideration against a claim by an assignee.¹³⁶³ The debtor can withhold payment against an assignee. But it has nothing to do with the invalidity of the assignation; rather, it is a simple application of the *assignatus* rule. The cedent could not have sued to enforce a *pactum illicitum*. The assignee can have no greater right. Where the assignation is *ex facie* valid, the debtor will be protected if he pays the assignee in good faith.

Although little discussed, there is, in principle, the possibility that an assignation could be void by reason of error. Professor McBryde has charted the complex history of this doctrine in the law of contract;¹³⁶⁴ however, error may also affect the validity of the transfer agreement.¹³⁶⁵ With the exception of gratuitous transfers, uninduced unilateral errors are of little relevance. More important are situations of mutual error, common error and induced error. There could also be an error in expression.¹³⁶⁶ Where the error is such that there cannot be said to be consent on the part of the transferor, then the assignation will be void. For example, there is one case where a husband required his wife to subscribe an assignation of a policy of insurance over the husband's life. This assignation was held invalid (although the basis of the decision is not clear).¹³⁶⁷ This can be distinguished from a situation where the

549. In *Bouyer*, a *bona fide* indorsee of a bill granted for a gambling debt was debarred from suing the granter but was allowed recourse against the indorser.

¹³⁶¹ *McKenzie v Hamilton* (1745) Elchies, *Pactum Illicitum* No. 18. In *Nisbet's Creditors v Robertson* (1791) Mor 9554; Bell's Octavo Cases 349 it was held that since a heritable bond granted for smuggled goods would be void against the cedent, so too was it void against the assignee.

¹³⁶² Prior to *Bouyer v Bampton* (1742) 93 ER 1096; *Strange* 1155, the Court of Session had held that the Game Act could not be invoked against an onerous indorsee of a bill: *Cornelius Nelson* (1740) Mor 9507; Elchies, *Pactum Illicitum* No. 10; *Neilson v Bruce* (1740) Mor 9507; *Kilkerran* 70; *Stewart v Hislop and Clerk* (1741) Mor 9507 and 9510; Elchies, *Pactum Illicitum*, No. 13. Cf. *Pringle v Biggar* (1740) Mor 9509; *Robertson v Ainslie's Trs* (1837) 15 S 1299 and *Universal Import Export GmbH v Bank of Scotland* 1995 SC 73 (banker's draft unaffected by fraud of third party). For the history of illegality on contracts generally, see L.J. Macgregor, 'Illegality' in K.G.C. Reid and R. Zimmermann (eds.) *A History of Private Law in Scotland* (2000) II, 129.

¹³⁶³ *Biggar v Pringle* (1740) Mor 9509; Elchies, *Pactum Illicitum*, No. 12 found that the plea of illegality founded on the Gaming Act 1710 was good against an arrester.

¹³⁶⁴ Firstly in 'A History of Error' 1977 *JR* 1, but see now a more nuanced analysis in R. Zimmermann and K.G.C. Reid (eds) *A History of Private Law in Scotland* (2000) vol 2, 72 and incorporated into *the Law of Contract in Scotland* (2nd ed. 2001) chapter 15.

¹³⁶⁵ Unfortunately, in the one case where this issue arose in the context of an assignation there was no consideration of the effect of the error on the transfer as opposed to the contract to assign: *Westville Shipping Company Ltd v Abram Steamship Co Ltd* 1922 SC 571 aff'd 1923 SC (HL) 68.

¹³⁶⁶ Cf. McBryde, *Contract* para 8-98 ff.

¹³⁶⁷ *Scottish Life Assurance Association Co Ltd v John Donald Ltd* (1901) 9 SLT 200 OH. The Lord Ordinary summarised the evidence thus: 'the wife signed a folded paper at the request of her husband, without seeing what was in it or being told by him what its nature was. Accordingly, so far as she was concerned, the assignation was

cedent consents to the transfer, but this consent is unlawfully induced. Where consent is so induced, the transfer will be voidable. These latter situations are considered below.

Common error, i.e. where the parties have a common intention but this common intention is mistaken, could cover the situation where the parties purport to assign a non-assignable claim. This assignation is ineffective for the reason that the claim is not assignable. However, it could also be said to be void on the ground of common error. As a ground of invalidity, common error will be relevant where the cedent and the putative assignee purported to conclude and implement an agreement to assign a claim which did not in fact exist. The non-existence of a claim will render the cedent liable for breach of warrandice. Absent any inducement on the part of the assignee, or a stipulation to the contrary, the cedent will not be able to escape liability for breach of warrandice on the basis of a common error. A similar position can be envisaged where the parties conclude an agreement to cede a claim but, before the claim is transferred, assignation of such claims is declared illegal by statute.

(b) Other Instances of Nullity.

Professor McBryde draws attention to the number of statutes which provide that a purported assignation shall be void and of no effect:¹³⁶⁸ pay and pensions in the armed forces,¹³⁶⁹ the police¹³⁷⁰ or other occupational pensions,¹³⁷¹ social security benefits,¹³⁷² claims against the Criminal Injuries Compensation Board,¹³⁷³ incorporeal moveables, rights of action or negotiable instruments to, or from, an enemy of the Crown, or any transfer on behalf of an enemy;¹³⁷⁴ and the office of the company director.¹³⁷⁵ There are also provisions dealing with

not a tested deed; and although she may be held as admitting the genuineness of her signature, her admission must be taken along with the qualification that her act in signing the deed was wholly unintelligent'. However, it seems that the assignation was void on the separate ground that it was not, at that time, in a woman's capacity to alienate a policy which fell under the Woman's Policies of Assurance Act 1880. Today, this case would fall under the *Smith v Bank of Scotland* 1997 SC (HL) 111 principle. Bad faith, in terms of the *Smith* decision, on the part of the assignee would render the assignation voidable.

¹³⁶⁸ McBryde, *Contract* para 12-54.

¹³⁶⁹ Armed Forces Act 1991, s. 16; Army Act 1955, s. 203; Air Force Act 1955, s. 203.

¹³⁷⁰ Police Pensions Act 1976, s. 9.

¹³⁷¹ Pensions Act 1995, s. 91, for which see D. Mackenzie-Skene, *Insolvency Law in Scotland* (1999), 166 at n. 60 and *idem*, 'Whose Estate is it Anyway? The Debtor's Estate on Sequestration' 2005 *JR* 311 at 324. See too *Mulvenna v The Admiralty* 1926 SC 842.

¹³⁷² Social Security Administration Act 1992, s. 187. This includes pension credits: s. 187(1) (ab) (as amended). It is thought that, at common law, tax credits would not be assignable.

¹³⁷³ Criminal Injuries Compensation Act 1995, s. 7.

¹³⁷⁴ Trading with the Enemy Act 1939, s. 4 (see s. 13 for application to Scotland).

¹³⁷⁵ Companies Act 1985, s. 308. This is not a paradigm claim to payment. Arguably the purported cession of an office would be void at common law, being in breach of the principle *delegata potestas non potest delegari*.

the purported assignation of by a seaman of his future wages.¹³⁷⁶ There are examples in case law of rights conferred by statute which have been held to be personal to the grantee and unassignable.¹³⁷⁷ Often, statutory provisions will provide that a salary or pension is not arrestable.¹³⁷⁸ If a claim is not arrestable then it is reasonable to assert that a purported assignation of it will not be effective. The converse position is more controversial. If it is provided by statute that particular benefit is not assignable, can it still be transferred by involuntary assignation, i.e. by arrestment or sequestration? It has been held that, since there are examples of statutory provisions which expressly proscribe involuntary, as well as voluntary, assignment,¹³⁷⁹ where the statute proscribes only assignment, such a benefit may, in principle, fall within the bankrupt's sequestrated estate.¹³⁸⁰

At common law the most important example of a void assignation will be the purported transfer of an unassignable right. At common law, where there is *delectus personae* in the person of the creditor, the rights against the debtor will not be assignable. The purported assignation of such a right is invalid and void. An important example is the right that bears to be alimentary. The accepted view is that alimentary rights can be neither transferred by assignation nor arrested.¹³⁸¹ But a grant which is stated to be alimentary can still be validly transferred to the extent that it is not required for aliment.¹³⁸² Against this, there are other authorities which hold that rights which are otherwise alimentary can be assigned, if for good consideration.¹³⁸³ Similarly, some older authorities held that the wife's

¹³⁷⁶ Merchant Shipping Act 1995, s. 34.

¹³⁷⁷ *MacKnight, Petr* (1875) 2 R 667 at 668 in respect of Trusts (Scotland) Act 1867, s. 14. See now Trusts (Scotland) Act 1921, sections 22 and 24. Other statutes make specific provision for assignees: e.g. Late Payment of Commercial Debts (Interest) Act 1998, s. 13. Whether a right is assignable or not will depend on the nature of the statutory right. Compare *Leith Dock Commissioners v Colonial Life Assurance Co* (1861) 24 D 64 and *Goodall v McInnes Shaw* 1912 1 SLT 425 at 428 *per* Lord Skerrington (Ordinary) (statutory right to object neither assignable nor exercisable by another by way of a mandate *in rem suam*).

¹³⁷⁸ Cf. J. Graham Stewart, *Diligence* (1898), 100.

¹³⁷⁹ E.g. Police Pensions Act 1921, s. 14 (1); Social Security and Pensions Act 1975, s. 48 (1) and (2); Social Security Act 1986, s. 2 (7) and (8); Pension Schemes Act 1993, s. 159 (4) and (5); Pensions Act 1995, s. 91 (3); Welfare Reform and Pensions Act 1999, s. 11 and s. 13 and Occupational Pension Schemes (Bankruptcy) (No 2) Regulations 2002, SI 2002/836.

¹³⁸⁰ *Kresner v Dennison* [2001] Ch 76 (CA). See generally Bankruptcy (Scotland) Act 1985, ss 36A-36F. There may, however, be considerable practical difficulties for the trustee in realising future pension rights: see W.W. McBryde and G.L. Gretton, 'Sequestration and the *Spes Successionis*' (2000) 4 *Edin LR* 129.

¹³⁸¹ J. Graham Stewart, *Diligence* (1898) 93 and authority there cited. Cf. *W J Hughes v Lord Advocate* 1993 SCLR 155.

¹³⁸² *Claremont's Trs v Claremont* (1896) 4 SLT 144; *Cuthbert v Cuthbert's Trs* 1908 SC 967

¹³⁸³ E.g. *Ker's Trs v Weller* (1866) 3 SLR 2; *Waddall v Waddall* (1836) 15 S 151; *Rogerson v Rogerson's Trs* (1885) 13 R 154. It has been held that they are not assignable *omnium bonorum*: *McDonnell v Clark*, 25th November 1819 FC. Cf. *Erskine III.v.2* and *Mackenzie*, 19th May, 1791 FC; Mor 10413 and authorities cited in McBryde, *Contract* para 12-32 and Graham Stewart, *Diligence*, 100. See also Juridical Society of Edinburgh, *Juridical Styles* (3rd ed. 1794) III, 235 which contains a style assignation of a salary.

tocher (*anglicé*: dowry) was not assignable by the husband.¹³⁸⁴ It is probably the case that only periodical payments can be held to be alimentary, and the right must have been conferred gratuitously.¹³⁸⁵ An assignation which purports to assign claims which are assignable as well as claims which are not assignable is valid to the extent of the assignable claims; in other words, invalid aspects can be severed from the valid transfer.

The prohibition is particularly relevant for creditors. Take the debtor who has a valuable right against another. He may wish to use this as collateral and assign it in security. The assignee in security advances the money. Nevertheless, where the right is stated to be alimentary, or granted for love, favour, and affection,¹³⁸⁶ the assignation will not be valid.¹³⁸⁷ Alimentary rights are unassignable. This can be seen as an example of *delectus personae*. The granter is willing to aliment his errant son, but not his errant son's errant friends or unscrupulous moneylenders. But, on one view, this could be unjust on a creditor who advances money in return for an assignation in security of an alimentary right. The beneficiary of the alimentary right gets his money on the strength of the right. The purpose of the gratuitous payment (to put the son in funds) is therefore satisfied. Nevertheless, there is little to commend weeping for the creditor who takes such a right as security. Similar issues arise where the grantee of an alimentary right becomes insolvent. If such a right is not assignable, by parity of reasoning, it is not arrestable; it cannot vest in a trustee in sequestration and it cannot be transferred to a trustee for creditors.¹³⁸⁸ As will be discussed below, there may be a distinction to be drawn between voluntary and involuntary assignations.

(c) Nullity and the Debtor

¹³⁸⁴ *Logan v L. Kinblechmont* (1623) Mor 4386. But cf. *Hall of Douglas v Lorimer* (1692) Mor 4387.

¹³⁸⁵ J. Graham Stewart, *Diligence* (1898), 94.

¹³⁸⁶ *Robertson v Wright* (1873) 1 R 237 at 244 *per* Lord Armillan: 'Affection is necessarily personal. It cannot be transferred as debt can be transferred from one to another. A gift to one for whom I have an affection cannot be assigned as to make me donor for one whom I have a dislike...the demand that, after payment of a donation to one I did love, I shall be ordained to pay it a second time to one I do not love, has, in my opinion, no foundation in reason, equity or law'. For a second payment to be required, as envisaged by Lord Ardmillan, the granter of the alimentary obligation would have had to have paid the grantee after receiving intimation of an assignation.

¹³⁸⁷ Cf. *Rogerson v Rogerson's Trs* (1885) 13 R 154 and *Ball v J & W MacDonald* 1909 2 SLT 310 OH.

¹³⁸⁸ *Clarke v Jas McDonnell*, 25th November 1819 FC. But see discussion below with regard to the rights of creditors to claims which are subject to a *pactum de non cedendo*.

There are numerous reasons why an assignation may be void: forgery, force and fear applied to a previous cedent, or incapacity of the cedent.¹³⁸⁹ Where the assignee has demanded payment on the basis of an assignation which is void and the debtor has paid, the allegation that the assignation was void is serious: the debtor has paid the wrong person. But, it must be remembered, invalidity of the assignation must not, in general, prejudice the debtor. Where the debtor pays one with the apparent right, he will have the defence of *bona fide* payment:

“Payment is the most proper loosing of obligations, and therefore retaineth the common name of solution, [D. 46, 3, 49 and 80]. In many cases payment made *bona fide* dissolveth the obligation though he to whom it was made had no right for the time. So payment made to a procurator was thought sufficient, albeit the procuratory were thereafter improvan, seeing there was no visible ground of suspicion of the falsehood of it, February 1st, 1665, *Elphinstoun v Lord Rollo and Laird of Niddery*, [Mor. 17018; 1 Stair 262].”¹³⁹⁰

3. Voidable Assignations

(a) Effect of reduction.

There has been little consideration of the remedy of reduction in Scots law.¹³⁹¹ In theory a reduction should only be brought of a voidable conveyance. A void conveyance does not require a court order to give effect to the nullity.¹³⁹² ‘A declarator of nullity concludes, that the author had no power to convey the subject; and therefore that the purchaser has no right: a reduction admits that the subject was conveyed; but, concludes that the purchaser did wrong in making the purchase, and therefore that he ought to be deprived of the subject’.¹³⁹³ In practice, however, reduction can be relevantly pled in order to declare a contract or conveyance void, while a declarator can, on the authorities, be invoked to reduce a conveyance. Matters are complicated in the case of an assignation because of the presence of

¹³⁸⁹ See *Alexander v Lundies* (1675) Mor 940 approved by Bankton II, 192, 8 where the cedent was not *compos mentis* when he granted the assignation. Cf. *Donaldson v Jeffrey* 1905 13 SLT 379 OH.

¹³⁹⁰ Stair I.xviii.3. See also the cases dealing with the right of an executor to pay out to the beneficiaries after a period of six months in good faith without incurring personal liability to creditors of whom they were ignorant: *Muir v Fleming* (1634) 1 Br Sup 86; Sup Vol, *Durie* 76. There is protection in terms of the Act of Sederunt of 28th February 1662 (still in force). However, the authorities often deal with this right of the executor in terms of the general doctrine of *bona fide* payment: *Stewart's Trs v Evans* (1871) 9 M 810.

¹³⁹¹ G.L. Gretton, ‘Reduction of Heritable Titles’ 1986 SLT (News) 125. Cf. L. Loewensohn, ‘The Action of Reduction in Scotland: A Comparative View’ (1942) 58 *Scottish Law Review* 4, who deals with the unitary concept of reduction in Scots law: a decree can be reduced as much as a transaction. This is not the case in many European legal systems.

¹³⁹² See also D.M. Walker, *The Law of Civil Remedies in Scotland* (1974), 145.

¹³⁹³ H. Home, Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1777), art. 3, p. 12. Kames overemphasises the need for wrongdoing on the part of the transferee. Cf. *Ball v J & W MacDonald* 1909 2 SLT 310 OH.

the debtor who is a passive third party. Unlike the position for (Sasine) land,¹³⁹⁴ there is no register for decrees of reduction of conveyances of moveables. To ensure that the assigned debt is not discharged by a good faith payment by the debtor to the assignee, it is essential that any action of reduction of an assignation calls the debtor as a party to the action.¹³⁹⁵

The effect of a reduction in Scots law has not been investigated. There are at least two possibilities. The reduction may have catholic (i.e. *erga omnes*) effect or it may be *ad hunc effectum effectum* (i.e. relative effect). The voluntary transfer of heritage in breach of a pre-existing inhibition is the best-known example of the latter.¹³⁹⁶ The law of reduction is crucial to private law generally. But for the law of assignation it is particularly regrettable that this area of Scots law is underdeveloped. For instance, it is simply not possible to appreciate fully the modern laws of cession in France and Germany without an understanding of their respective doctrines of (*in*)*opposabilité* and *relative (Un)Wirksamkeit*.¹³⁹⁷ The idea of a reduction having only relative effect can be useful. Take the example of an owner of land who binds himself to grant a standard security. In breach of that obligation he disposes to his wife for no consideration. To require the disposition to be reduced *in toto*, for the standard security to be properly granted, and for an almost identical disposition to be re-granted, is hardly expeditious. What is required is a simple mechanism whereby the transferee's position is

¹³⁹⁴ See Conveyancing (Scotland) Act, 1924, s. 46. The Land Register is a register of title. To some extent, therefore, it operates outwith the ordinary principles of property law. The reduction of a conveyance registered in the Land Register may not be of much benefit to the pursuer. The position is complicated: see K.G.C. Reid, 'A Non Domino Titles and the Land Register' 1991 *JR* 79; *idem*, 'Void and Voidable Deeds and the Land Register' (1996) 1 *SLPQ* 265; A.J.M. Steven, 'Problems of the Land Register' 1999 *SLT* (News) 163.

¹³⁹⁵ Cf. G.L. Gretton, 'Reduction of Heritable Titles' 1986 *SLT* (News) 125. A case is reported in *The Scotsman*, for 30th March 1948 where there was a purported reduction of an assignation on the ground of undue influence. It is not clear whether the debtor was called. In *Mitchell v Johnston* (1703) Mor 8326, the debtor raised a reduction of a bond he had granted. Suspecting that the creditor in the bond had assigned it, the debtor also called the alleged assignee as a party to the reduction. Within hours of the assignee being cited, the debtor received a formal intimation of the assignation. It was held that the effect of the citation was to render the bond '*litigious ad hunc effectum*' and gave the debtor the benefit of the cedent's oath against the assignee. See too *Glazier v Hamilton* (1707) Mor 8327 and the remarkable case of *Houston v Nisbet* (1708) Mor 8329. In modern law, such cases would be decided in terms of the *assignatus* rule. Previously, however, it was a rule of proof that debtor's defences could only be proved by writ or the oath of the cedent prior to intimation; after intimation of the assignation, the cedent's oath was not admissible. Litigiosity was an exception to this rule. Where the matter had been rendered litigious before intimation, the cedent's oath could prejudice the assignee: see generally Erskine III.v.10.

¹³⁹⁶ See G.L. Gretton, *The Law of Inhibition and Adjudication* (2nd ed. 1996), 129 ff ('Gretton, *Inhibition*'). On payment of another's debt, the payer is entitled to an assignation of the creditor's rights against the original debtor (*beneficium cedendarum actionum*). Where those rights are secured by a heritable security, and the creditor is inhibited, an assignation of it to the payer does not breach the inhibition as it is not voluntary act: *Mackintosh v Davidson & Garden* (1897) 5 *SLT* 234 OH.

¹³⁹⁷ See, for example, H. Eidenmüller, 'Die Dogmatik der Zession vor dem Hintergrund der internationalen Entwicklung' (2004) 204 *Archiv für die civilistische Praxis* 457; E. Cashin-Ritaine, *Les cessions contractuelles de créances de sommes d'argent dans les relations civiles et commerciales franco-allemandes* (2001), 42 : 'L'étude de la notion d'opposabilité en droit français est essentielle pour comprendre le mécanisme de la cession de créance'.

weighed-down rather than cut-down; in a question with the grantee of the security, the transferee of the property must acknowledge the former's security right.¹³⁹⁸

Although Scots law is underdeveloped, it is likely that a successful action of reduction will re-invest the cedent;¹³⁹⁹ at least where the reduction is brought by one of the parties to the assignation.

(b) Examples of voidability.

(i) Assignations in breach of arrestment not voidable.

Take a common practical problem: A is a creditor of C1. C1 is creditor of D. A arrests in D's hands. Before C1 is notified of the arrestment, C1 purports to assign to C2. C2 intimates to the debtor. C2 is in good faith.¹⁴⁰⁰ The debtor is in double distress. By virtue of the arrestment, D cannot pay the C2; by virtue of the intimation, D cannot pay C1. Until forthcoming, D cannot pay A. If D wrongly pays C2 in the knowledge of the arrestment, this payment cannot prejudice the arrester; in other words, D will be liable to make a double payment to A. A validity question will only arise if, after D pays C2, D becomes insolvent. Can A then reduce the assignation to C2? Is the assignation voidable?¹⁴⁰¹ Must the transferee recognise the arrester's preference? Reducing the assignation to C2 may not be of much benefit to the arrester if the reduction were catholic: the insolvent common debtor would be reinvested. Requiring the assignee to recognise the arrester's rights would be of more value. The point is of some difficulty and the sources are not consistent. Matters are hindered by the controversy in Scots law as to the effect of an arrestment.¹⁴⁰² If an arrestment (even without forthcoming) is a judicial assignation, there is no issue. After arrestment, C1 has nothing to

¹³⁹⁸ Whether a reduction *ad hunc effectum* can actually affect the *property* as opposed to the owner of the property, or the right as opposed to the holder of it, has not been properly focussed in Scots law. The difference is important. Is a good faith transferee taking from one who has been subject to an *ad hunc effectum* reduction similarly bound to give effect to the security?

¹³⁹⁹ *Ruthven v Gray* (1672) Mor 31; *Duncan v Miller* (1713) Mor 39. These cases also highlight that a retrocession carries accessory rights.

¹⁴⁰⁰ A gratuitous or *male fide* transferee must recognise the rights of an arrester: J Graham Stewart, *Diligence* (1898), 128 citing Kames, *Principles of Equity* (3rd ed. 1778) II, 189.

¹⁴⁰¹ J. Graham Stewart, *Diligence* (1898), 126 says that a conveyance of corporeal moveables in breach of an arrestment is 'reducible'.

¹⁴⁰² The differing views are discussed in S. Wortley, 'Squaring the Circle: revisiting the receiver and effectually executed diligence' 2000 *JR* 325.

assign. If, however, an arrestment lays a 'nexus' (whatever that might mean) on the arrested fund, the cedent will still be able to assign.¹⁴⁰³

The sources are confused. Stair says that

"...not only will he [the arrestee] be decerned to make furthcoming, though it infer double payment, but he to whom he paid unwarrantably will be compelled to restore and satisfy the arrester, the subject having been litigious by his arrestment before the other party recover the same albeit he have recovered it *bona fide* without any fault in him, but by the litigiousness of the subject."¹⁴⁰⁴

This suggests that the arrester will have rights against the assignee. Graham Stewart, however, prefers the views of Bankton,¹⁴⁰⁵ Kames¹⁴⁰⁶ and Bell¹⁴⁰⁷ to the effect that a *bona fide* transferee is not bound to recognise the rights of the arrester.¹⁴⁰⁸ With some contradiction, however, Stewart then interjects that, with regard to incorporeal moveables, 'it is settled beyond all question that the arrester will prevail over a subsequent assignee'.¹⁴⁰⁹ He cites no authority. This writer prefers Stair's view. Arrestment will have no effect on the *validity* of an assignation in breach of it (at least where the assignation is of claims or other fungibles). The arrester may have arrested a debt of £10m owed to C1 for C1's debt to the arrester of £1000. There is no reason why a subsequent assignation by C1 should be *invalid*, i.e. it is neither void nor voidable.¹⁴¹⁰ Rather, the arrester is preferred for his arrested debt. The arrestment will be opposable against the assignee even if he had no knowledge of the pre-existing arrestment.¹⁴¹¹

(ii) Assignations in breach of trust.

¹⁴⁰³ But cf. J. Graham Stewart, *Diligence* (1898), 125-126. He holds that an arrestment of itself is inchoate; but that it does operate as a prohibition. Stewart says that any transfer by the common debtor in breach of the arrestment is voidable.

¹⁴⁰⁴ III.i.40-42. See to IV.xxxv.6.

¹⁴⁰⁵ II, 197, 32. Bankton is here referring to the unusual and irregular situation where arrestment is made in the hands of the common debtor.

¹⁴⁰⁶ Kames, *Principles of Equity* (3rd ed. 1778) II, 182. It must be observed, however, that Kames' views on the nature of arrestment are characteristically unorthodox.

¹⁴⁰⁷ Bell, *Principles* (9th ed. 1889) § 2278. Bell too refers to corporeal moveable property.

¹⁴⁰⁸ See too *Turner v Mitchell & Rae* (1884) 28 *Journal of Jurisprudence* 440 at 443 *per* the Sheriff (bona fide transferee of pointed property takes free from rights of poinder).

¹⁴⁰⁹ J. Graham Stewart, *Diligence* (1898), 127.

¹⁴¹⁰ See, generally, G.L. Gretton, 'Breach of Arrestment' 1991 *JR* 96.

¹⁴¹¹ This situation is another which would benefit from the development of a theory of relative invalidity.

An assignation made in breach of trust is voidable and not void.¹⁴¹² Although some of the older cases treat such a transfer as if it were an illegal transaction and thus void,¹⁴¹³ the position is now ruled by statute.¹⁴¹⁴

(iii) Extrajudicial Rescission of voidable Conveyances ineffective.

Unlike voidable contracts, a voidable conveyance cannot be rescinded unilaterally. Once the conveyance has taken effect a judicial reduction will be required. An extrajudicial rescission will be ineffective.¹⁴¹⁵ At most, rescission is the act which gives rise to a personal obligation on the assignee to retrocede.¹⁴¹⁶

The clearest statement of the law is found – perhaps surprisingly – in Jacob J’s opinion in *Coflexip Stem Offshore’s Patent*.¹⁴¹⁷ The case involved a global assignment of intellectual property rights. The assignment had not been stamped. Instead of subsequently submitting it for stamping, a second assignment was executed and duly stamped. The parties simply purported to rescind the first assignment. Mr Justice Jacob explained the problems with such an approach:

“If a transaction passes property, then it does. If the parties wish to rescind that transaction, then they can. But this means no more than that if property had passed under the transaction, it must be passed back. If that requires some formal

¹⁴¹² *Thorburn v Martin* (1853) 15 D 845 at 850 *per* Lord Cockburn (dissenting). Compare Lord Wood: he seemed to agree that the assignation was not absolutely void: see 851. However, an assignee, who takes in good faith and for value, will be protected. Cf. *Fraser v Hankey & Co* (1847) 9 D 415.

¹⁴¹³ Cf. *Meff v Smith’s Trs* 1930 SN 162 OH; *Clark v Clark* 1989 SC 84 OH cited by McBryde, *Contract* para 12-57.

¹⁴¹⁴ Trusts (Scotland) Act 1921, s. 4 (1) (h) and s. 7; Trusts (Scotland) Act 1961, s. 2.

¹⁴¹⁵ *Coflexip Stem Offshore’s Patent* [1997] RPC 179

¹⁴¹⁶ Where the contract, transfer agreement, or both are voidable as a result of some wrongful conduct perpetrated by the party who is now seeking to assign, this may give rise to an obligation to make reparation. However, it is thought that, until the party who was unlawfully induced to transfer rescinds, there is no obligation on the recipient to reconvey. That is the significance of the act of rescission. To place the wrongdoer under an obligation to reconvey, it seems that a verbal rescission could occur. This would rescind the contract. This would render the transfer agreement *sine causa*. The assignee will be obliged to reconvey. Where he does not, however, judicial reduction will be required. This point is important for third parties. It is usually said that a *bona fide* onerous transferee will take a good title from a transferor whose title was voidable (see e.g. Reid, *Property* para 607 and Conveyancing (Scotland) Act 1924, s. 46(1) cited by Reid, para 607, n. 10). However, even if the subsequent transferee is not in good faith, why should his title be voidable if the unlawfully induced party never exercised his right to reduce? Further, would the fourth party’s position be assailable if he knew that the wrongfully induced party had exercised his right of rescission, though no judicial reduction had yet occurred? There is no statutory provision corresponding to the 1924 Act for the transfer of claims. It is thought – although the point is not free from difficulty – that, providing the subsequent assignee is in good faith when he enters into the obligatory agreement, his position will be unassailable.

¹⁴¹⁷ [1997] RPC 179.

conveyance, then such conveyance will be needed. The answer to [counsel]'s point was supplied long ago by Old Khayyám¹⁴¹⁸:

‘The moving finger writes; and having writ,
Moves on; nor all thy piety nor wit
Shall lure it back to cancel half a line,
Nor all thy tears wash out a word of it’.

Moving fingers wrote [the first unstamped assignment]. Nor all [counsel]'s piety nor wit can cancel half a line. He did not try tears but they would not have worked either. The assignment by the parties to ‘replace’ [the first assignment] with [the second assignment] (assuming that is the effect of [the second assignment], which I am not sure it is) does not mean that [the first assignment] had no effect in law. It did, and the execution of [the second assignment] does not mean that it did not.”¹⁴¹⁹

Mr Justice Jacob’s opinion is a clear endorsement of the consequences of the abstraction principle. Where there has been an assignation which is voidable, an attempted unilateral rescission will not reinvest the cedent. The assignee will have to retrocess; in Scots law, that retrocession being intimated to the debtor (assuming that retrocession is of claims). If the assignee will not retrocess voluntarily, a reduction will be required. If the assignation was not of claims, there could be no intimation; but the same principles apply, intimation being obviated. The principles should also apply to other transfers. For example, a transfer of ownership in corporeal moveables can be effected by mere intention where the *causa* is sale. The transfer of ownership in corporeal moveables on other bases, however, will have to conform to the common law. This requires an intention to transfer and delivery. So where there is a transfer of corporeal moveables which is voidable, mere rescission will not reinvest the transferor. Since any retransfer is not a sale delivery in terms of the common law will be required.¹⁴²⁰

(c) Voidability and the Debtor: can the debtor invoke invalidity?

The general principle is that the debtor will be discharged where he pays *in good faith* the person he perceives to be his creditor.¹⁴²¹ Before formal intimation, the only person that the

¹⁴¹⁸ Omar Khayyám was an influential Persian scholar who died around 1123. His scholarly reputation was earned from his works on algebra. But he is perhaps better known as a poet from for his collection of epigrams in distinctive Persian style, first translated into English by Edward Fitzgerald in 1859: *Encyclopaedia Britannica* (11th ed. 1911). They have been recently translated into Scots: see R. Wilson, *The Ruba’iyat of Omar Khayyam in Scots* (Edinburgh: Luath Press, 2004).

¹⁴¹⁹ [1997] RPC 179 at 192.

¹⁴²⁰ Cf. n. 1286 above.

¹⁴²¹ See chapter 4, ‘Intimation’, above, and authority there cited.

debtor can validly pay is the cedent.¹⁴²² It has been observed above that in the matter of transfer, private knowledge is irrelevant: until formal intimation, the debtor is free to pay the cedent. However, what if, after intimation, the debtor has private knowledge of a fact that calls into question the validity of the assignation? If the assignation is invalid and the debtor pays the assignee, then the debtor has, *prima facie*, paid the wrong person. The debtor must therefore rely on the defence of good faith payment. There are a number of issues. First, what private knowledge is sufficient? Second, what grounds of invalidity might be relevant? There are different types of vices. Some will affect the contract, others the conveyance. The conveyance may be rendered void, or merely voidable.

Issues affecting the underlying agreement or *causa* between the cedent and assignee are of no concern to the debtor.¹⁴²³ However, if the debtor knows that the conveyance is invalid, can he invoke the invalidity to refuse payment to the assignee? Is the debtor's right to invoke the invalidity dependent on the type of invalidity? These are difficult questions. There is little discussion of these issues in the Scottish sources; perhaps the main reason being the availability of the multiplepounding. Any well-advised debtor who is unsure whom to pay will raise a multiplepounding, consign the money into court and thus receive his discharge. Nevertheless, there may be situations where this does not happen. What then is the position?

We can start with absolute nullity. Where the debtor knows that the assignation is void, it is difficult to see how the debtor can simply ignore this knowledge and pay the assignee regardless. So if the debtor is aware that the cedent's signature is forged there can be no valid payment to the assignee.¹⁴²⁴ The debtor who pays an 'assignee' on the basis of an invalid assignation must rely on the rules of good faith payment. The test of good faith is subjective. But the debtor who has paid the wrong person must be able to show that he was in good faith. In practice, it is unlikely that a debtor will know whether an assignation is

¹⁴²² Although, if the debtor pays the 'assignee' after the assignation but before intimation, his payment is considered as an equipollent to intimation. As a result, the debtor cannot be required to pay again the cedent. This equipollent of intimation means that *where the assignation is valid*, there can usually only be good faith payment to the cedent: a payment to the assignee after delivery of the assignation but before intimation, being an equipollent, effects a transfer. There is then no issue of good faith payment: the debtor has paid his creditor. Where the assignation is invalid, however, and the debtor pays the assignee before intimation, there is a difficulty. On the one hand he should have waited for formal intimation; on the other, formal intimation cannot validate an otherwise invalid assignation. This writer's view, then, is that the debtor who pays an 'assignee' even before formal intimation on the basis of an invalid assignation should nonetheless be discharged.

¹⁴²³ Cf. F. von Kübel, *Erster Kommission zur Ausarbeitung des Entwurfes eines bürgerlichen Gesetzbuches* (1882) Absch. I, tit. 4, 'Uebertragung der Forderungen', § 18, at 41 and Erskine III.v.10 who points out that under the old rules of proof, following intimation, the debtor was entitled to refer to the assignee's oath whether the assignation had been gratuitous or in trust for the cedent.

¹⁴²⁴ See e.g. *Dick of Grange v Oliphant of Gask* (1677) Mor 13944 which involved a forged assignation. It is also cited by Elchies, *Annotations on Stair's Institutions* (1824), 40.

valid.^{1424a} It is thought that a suspicion is not enough to prevent the debtor validly discharging his obligation to the assignee. Where the deed is not void, the debtor who pays on an assignee intimating a voidable assignation is not concerned with rules on good faith payment. A voidable conveyance is a good conveyance until reduced. Even after it has been reduced, if the debtor has not been called as a party to the process, payment may still be validly made to the assignee. An alternative is that some informal notice of the reduction given to the debtor will be enough to interpellate the debtor from paying in good faith.¹⁴²⁵ It is thought that it is more consistent with the traditional approach of Scots law, however, to favour the certainty that flows from requiring the debtor to be called as a party to the action for his *bona fides* to be impaired.

What of the purported assignation of an unassignable right? Say there is a *pactum de non cedendo* in the underlying contract.¹⁴²⁶ A purported assignation in breach will be invalid. But suppose the clause was inserted at the behest of the debtor. The cedent purports to assign in breach of this prohibition. The debtor then pays the assignee. It is thought that the debtor will be discharged in such a situation. The cedent cannot quarrel his own deed;¹⁴²⁷ similarly, it is always open to the holder of a right to waive it. In other words, in such a situation, the debtor has the choice to pay either the cedent or the assignee.

^{1424a} It must be observed that if this is the rule, it offends against the presumption that one acts in good faith.

¹⁴²⁵ Cf. F. von Kübel, *Erster Kommission zur Ausarbeitung des Entwurfes eines bürgerlichen Gesetzbuches* (1882) Absch. I, tit. 4, 'Uebertragung der Forderungen', § 20, at 42: 'Will der Cedent sich dagegen schützen, so ist es seine Sache, den Schuldner von seiner Anfechtung der Abtretung in Kenntnis zu setzen'.

¹⁴²⁶ More of which below.

¹⁴²⁷ Erskine II.iii.27. Cf. F. von Kübel, *Erster Kommission zur Ausarbeitung des Entwurfes eines bürgerlichen Gesetzbuches* (1882) Absch. I, tit. 4, Uebertragung der Forderungen, § 20, at 42: 'Der Schuldner hat zwar in diesem Fall an einen Nichtgläubiger gezahlt, aber er hat es gethan auf Grund einer Erklärung des ursprünglichen Gläubigers selbst, und diese Erklärung muß der Gläubiger gegen sich gelten lassen'. However, what if the cedent became insolvent after the debtor's payment? Although the claim is not-assignable, the creditors of the cedent would still be entitled to the proceeds. Would a trustee in sequestration on the cedent's estate be bound by the invalid assignation? *Burnett's Tr. v Grainger* 2004 SC (HL) 19 holds that creditors can do diligence in full knowledge of competing rights. The trustee, then, is arguably not subject to any bar that would have prevented the cedent from claiming a second time from the debtor. But that is not the end of the matter. If the cedent were required to pay again to the cedent, it must be on the assumption that the cession was invalid. If the cession was invalid, but the debtor paid the assignee nevertheless, the debtor has discharged the cedent's liability in warrandice to the assignee. The debtor therefore holds a claim in unjustified enrichment against the cedent. As a result, any claim by the trustee in sequestration against the debtor for a second payment will be met with a set-off.

III: Conditional Assignment – Suspensive and Resolutive Conditions.¹⁴²⁸

A. General

At common law property in corporeal moveables passes on the concurrence of delivery and a concomitant intention to transfer. Sales subject to a suspensive condition are therefore unproblematic.¹⁴²⁹ Under the Sale of Goods Act,¹⁴³⁰ which provides that property passes in a sale of corporeal moveables when the parties intend it to pass, conditional sales were developed. The buyer could retain title to the goods in respect of all sums due and to become due to the seller by the buyer.¹⁴³¹ In contrast, in the transfer of immoveable property in Scotland, transfers subject to a suspensive condition are unknown.¹⁴³² What then of claims? Any condition which is inherent in the claim assigned is unaffected by an assignation. This is a simple application of the rule *assignatus utitur jure auctoris*.¹⁴³³ There is also no problem in placing a condition in the contract to assign, as opposed to the conveyance.¹⁴³⁴ If there is a suspensive condition in the contract, then it is only on purification of the condition that the

¹⁴²⁸ For South African law, see S. Scott, *The Law of Cession* (2nd ed. 1991), 148 ff, especially at 151: 'The question whether the cession itself (the transfer agreement) can be subject to a condition has never been specifically addressed by the South African courts and poses very serious problems'. For potestative conditions see D. Daube, 'Condition Prevented from Materialising' (1960) 28 *TvR* 296.

¹⁴²⁹ Stair I.xiv.4; Erskine III.iii.11.

¹⁴³⁰ First introduced into Scots law by, The Sale of Goods Act 1893. It was actually only passed in 1894: 56 and 57 Vict. c. 71. Exceptionally, it applied retrospectively. The present legislation is the Sale of Goods Act 1979, as amended.

¹⁴³¹ *Armour v Thyssen Edelstahlwerke AG* [1991] 2 AC 339; 1990 SLT 891 HL. There is no reason why these clauses should not have been valid at common law: G.L. Gretton and K.G.C. Reid 'Romalpa Clauses: the Current Position' 1985 SLT (News) 329; *idem*, 'All Sums Retention of Title' 1989 SLT (News) 185. The so-called 'Romalpa clause' will be discussed below.

¹⁴³² Cf. *Young v Dun* (1785) Mor 14191. The same is true in Germany: § 925 II *BGB*: 'Eine Auflassung, die unter einer Bedingung oder einer Zubestimmung erfolgt, ist unwirksam'. Nevertheless, transfers subject to a resolutive condition were common in Scots law. A transfer subject to a reversion is a transfer in which there is an obligation to reconvey in certain circumstances. The debtor's reversionary interest had to be protected by legislation: Reversions Act 1469, c. 27, APS c. 3. Prior to the Act, the debtor's reversionary interest could be defeated where the reversion was not *ex facie* of the deed. As a result of this 'excellent statute' (Stair II.x.3), singular successors were subject to the reversion. In other words, reversions were accorded the status of real rights (Stair II.x.3). The Act also provided for the first instance of registration of heritable rights in Scots law (see D. Murray, *Legal Practice in Ayr and the West of Scotland in the Fifteenth and Sixteenth Centuries* (1910) 25); further, the Act provided that an extract should have the same force as the principal. It has been disputed whether registration of the reversion was a constitutive requirement: Sir George Mackenzie, *Observations on the Acts of Parliament ...* (1687), 67 states that registration was required where the reversion was not in the body of the deed (as, indeed, was the case under the 1617 Act); however, Ross, *Lectures* II, 336 disputes this, though he agrees that 'it is the first dawning of a record to be met with' in Scots law. On one view, Stair I.xiv.4, also suggests that registration was a constitutive requirement; but it is more likely that he was referring to the requirement of registration under the Real Rights Act 1617. See, generally, the discussion in L. Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942), 65-72.

¹⁴³³ See e.g. *Logan v Kilbrackman* (1627) Mor 9207.

¹⁴³⁴ Cf. Voet, *Commentarius ad Pandectas* (2nd ed. 1707), 18.4.9 who envisages a condition only in the obligatory agreement. For a discussion of the contractual issues, see J.M. Thomson, 'Suspensive and Resolutive Conditions in the Scots Law of Contract' in A.J. Gamble (ed.) *Obligations in Context: Essays in Honour of Professor D.M. Walker* (1990), 126.

intended transferee has the right to demand that the putative cedent executes and delivers an assignation. But what is the effect of a condition in the conveyance?¹⁴³⁵ For example, what of an assignation which bears that only on the occurrence of a future uncertain event will the claim transfer to the assignee, i.e. a suspensive condition; or, on the occurrence of a future uncertain event the claim will revert to the cedent, i.e. a resolutive condition? The assignation containing the condition is intimated to the debtor. Matters are complicated by this tripartite relationship: how is the debtor supposed to know whether the condition has been purified or not? Despite the presence of a passive party (the debtor) who must be protected, there is no reason in principle why conditions should not be as effective in the transfer of claims as they are in the transfer of corporeal moveables.

B. Suspensive Conditions. ¹⁴³⁶

Although unheard of in practice, there seems nothing wrong in principle with the insertion of a suspensive condition in the transfer agreement. As far as fourth parties are concerned (the debtor is a third party, to whom we will return below), the suspensive condition will be effectual. For example, suppose C1 assigns to C2 subject to the condition that the transfer will only take effect on payment of the full price by C2. On accepting delivery of the assignation, C2 intimates this to the debtor. If, before payment, C1 becomes insolvent, the claim will fall into C1's insolvency. Take the same example, except C1 remains solvent. C2, before full payment to C1, assigns in turn to C3. C3 intimates. Now C2 becomes

¹⁴³⁵ See generally, T. Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) vol 1, 47. The general principle in France is that one cannot by contract fetter the right of an owner to alienate his property or cede rights held by him (Art. 1594 *Code Civil*). However, a decision of the Cour de Cassation (cited by Huc at para 31) sanctioned the insertion of a resolutive condition in the transfer. It is not clear, however, how this condition would have operated had it been triggered. Cf. *Johnstone v Irving* (1824) 3 S 163 (NE 110) where there was a purported conditional assignation of a lease.

¹⁴³⁶ It is suggested by Professor Gretton, 'Diligence' in *SME*, vol 8 (1992), para 285 that, 'if money is arrested, the arrestment is regarded as a conditional assignation to the arrester, to be purified at forthcoming...'. However, this analysis is not of assistance in determining the juridical nature of an arrestment. If every arrestment is an assignation subject to the (suspensive) 'condition' of forthcoming, then this is merely a complicated way of saying that an arrestment *per se* is not a transfer, but arrestment plus forthcoming is. One would not say that a delivered assignation is a transfer subject to the condition that the assignation is intimated, or that delivery of a disposition is a transfer subject to the suspensive condition that the disposition is registered. Moreover, if there is a condition in the *transfer* agreement, it can only possibly have effect if the transfer agreement has effect. The transfer agreement only takes effect on registration (heritage) or intimation (claims). Admittedly, an arrestment, of itself, is effective: an arrestment prior to forthcoming takes precedence over an unintimated assignation. The crucial question is *why*?

insolvent. Until C2's insolvency administrator pays C1 in full, there will be no transfer to C2.¹⁴³⁷

What then of the position of the debtor? The debtor receives intimation of an assignation. The assignation contains a suspensive condition. How is the debtor ever to know whether the condition has been fulfilled? Sometimes a condition may be worded in such a way that it will take effect on the expiry of a specific time period. But many more will be in terms of events about which the debtor cannot reasonably be expected to inform himself.¹⁴³⁸ In this regard, as in others, the debtor's interests are paramount. He must not be prejudiced; nor should he be placed under onerous duties to make enquiries. The general principle of good faith payment will therefore apply. If the debtor pays the wrong party as a result of his ignorance as to the operation of a condition, he will be protected. Of course, the debtor who wishes to ensure the correct party is paid can always raise a multiplepinding.

C. Resolutive conditions.

Unlike a suspensive condition, a resolutive condition in the transfer agreement has only personal effect.¹⁴³⁹ A transfer agreement subject to a resolutive condition will operate as a transfer. The claim will pass to the assignee. Should the resolutive condition be triggered, this merely places the assignee under a personal obligation to retrocede the claim. On purification, a resolutive condition will not automatically divest a singular successor. It has no effect on the creditors of the transferee.¹⁴⁴⁰ They can attach the asset after purification of the resolutive condition as they could have done before. So, if the assignee is sequestrated after the occurrence of the condition but before he has retrocessed,¹⁴⁴¹ then the assigned claim will form part of the assignee's estate.

¹⁴³⁷ If C2's insolvency administrator does pay, will the claim automatically transfer to C3? After all, he has intimated his assignation before C2's insolvency administrator was appointed. However, in so far as C3's position is based on accretion, or the principle in *Edmund v Mags of Aberdeen* (1855) 18 D 47 aff'd (1858) 3 Macq 116, it is accepted that the intervening insolvency of the transferor prevents transfer to C3.

¹⁴³⁸ Cf. E. Cashin-Ritaine, *Les cessions contractuelles* (2001), 44, n. 123.

¹⁴³⁹ Bell, *Commentaries* I, 260 (7th ed. 1870) following Stair I.xiv.5 observes that even if a singular successor has knowledge of the prior right of another in terms of a resolutive condition, it will not affect the asset transferred. But see n. 1472 below: fraudulent acquisition by another, frustrating the creditor in the condition could render the acquirer liable to make reparation. See general discussion in n. 1581 below.

¹⁴⁴⁰ Bell, *Commentaries* (7th ed. 1870) I, 260.

¹⁴⁴¹ I.e. an intimated retrocession, for which, see chapter 4 above, 'Intimation'. In the Scottish sources the verb, 'to retrocess', is common: see, e.g., Scottish Law Commission Report No. 197, *Report on Registration of Rights in Security by Companies* (2004), 26. However, since one 'cedes' a claim where there is a cession, on retrocession it seems more natural to say that the assignee 'retrocedes'. But the usage is irregular: the past participle is 'retrocessed', not 'retroceded'.

In speaking of sale, Stair questions whether conditions can have ‘real’ as well as obligatory effect. For Stair, the general principle is that conditions suspending the passing of property are real; resolutive conditions take effect only between the parties to the agreement: they cannot divest singular successors.¹⁴⁴² The reason is clear. Where the condition is suspensive in nature and the putative transferee purports to transfer to a third party prior to the satisfaction of the condition, he has no title to transfer.¹⁴⁴³ An assignation subject to a resolutive condition is a transfer nonetheless. C assigns to C1 subject to a resolutive condition if payment is not made within 14 days. If C1, in turn, assigns within that 14 day period, the assignation is effective. It would be repugnant for a singular successor to be involuntarily divested as a result of an agreement between prior holders. Subject to the offside goals caveat, the position of a singular successor is unassailable:

“The doubt remains if such personal conditions with such clauses resolutive be in the body of the bargain,¹⁴⁴⁴ whether it be effectual against singular successors, who cannot know their author’s rights? And, therefore, are *in dolo et male fide*, if they acquire such rights in prejudice of the conditions thereof; and so *ex dolo*, at least such clauses will be effectual against singular successors...”¹⁴⁴⁵

Bell summarises Stair’s position thus:

“...such conditions have not the effect of a real burden, even when mentioned in the body of the contract, and where, of course, the condition appears openly; that they have no effect against creditors taking voluntarily conveyances *ex necessitate*, having no other probable way of payment; nor even against voluntary acquirers, who, if they see the condition, are entitled to consider it as a *jus ad rem*, not a *jus in re*. There may, indeed, be fraud in such a voluntary acquisition, which may expose the acquirer to a claim of damages; but even that claim is merely personal and will not pass with the property.”¹⁴⁴⁶

¹⁴⁴² Stair I.xiv.5. But what of the assignation of a *jus quaesitum* (as opposed to a *spes successionis*) which is subject to defeasance/return? This problem is less complicated than it first sounds, because the resolutive condition is intrinsic to the right assigned. As such the debtor (the executor) will always know of its nature. The situation discussed here is of a condition in the transfer rather than a condition in the right assigned. The tract of authority dealing with bonds of provision is discussed in Part V below. Cf. *William Morton & Co v Muir Bros* 1907 SC 1211.

¹⁴⁴³ Accretion is considered below.

¹⁴⁴⁴ He assumes in the previous paragraph that conditions which are not in the body of the bargain are not good against singular successors, but only between the parties themselves.

¹⁴⁴⁵ Stair I.xiv.5. This passage is qualified by three exceptions, viz, (i) where the transfer is involuntary, but in satisfaction of debt, as by diligence; (ii) where the purchaser is a creditor and there is no other way of obtaining payment; and (iii) where the acquirer is aware of the resolutive condition but is unsure whether the present right of the transferor is merely personal or real, the acquirer’s right will be good in so far as he will be able to transmit a good right to a bona fide transferee (i.e. voidable). In the third case the acquirer is fraudulent, but this being a merely personal obligation he can still transfer a good right.

¹⁴⁴⁶ Bell, *Commentaries* (7th ed. 1870) I, 260.

This passage goes a considerable way to support the view that the 'so-called' offside goals rule is of much narrower compass than some have previously supposed: even a fraudulent acquirer who seeks to deliberately frustrate the rights of the party is whose favour the resolute condition is couched is only bound to make reparation. His title is not subject to reduction.

D. Romalpa Clauses.

In the sale of goods, the so-called *Romalpa* clause is well-known.¹⁴⁴⁷ '*Romalpa* clause' can be used in two senses in Scots law. One is all-sums retention of title; the other, an attempt to impose a trust on the proceeds of any sub-sale concluded by a buyer in possession. Both senses fall under an English *Romalpa* clause. There, the clause, *inter alia*, additionally purports to assign to the original seller the proceeds of any unauthorised sale by the buyer in possession. The buyer in possession is also obliged to hold any proceeds in trust for the seller. In English law, the equitable assignment can only be understood on the basis of trust law;¹⁴⁴⁸ in Scots law, an attempt by a cedent to hold an asset in trust for X is the converse of transferring that asset to X. The Court of Session has been hostile to any attempt to impress a trust in this situation.¹⁴⁴⁹ However, would a clause whereby a buyer in possession undertakes to assign any proceeds to the original seller be effective in Scots law? While it is often asserted that no words of conveyance are necessary to effect an assignation,¹⁴⁵⁰ there is an important distinction between an undertaking to assign and the execution of it. A mere agreement to assign is not an assignation. In any event, there must be intimation to the debtor.¹⁴⁵¹ The question is whether the original seller could validly intimate the assignation (the clause in the sale agreement) to the sub-purchaser and effect an assignation of the price. There is an abstract issue about whether intimation to the debtor of an agreement to assign without intimation of an actual deed of assignation would be sufficient. Such intimation would not comply with the style in the schedule to the Transmission of Moveable Property

¹⁴⁴⁷ *Aluminium Industrie Vaasen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676. See in particular the comment by Professor Goode, 'The Right to Trace in Commercial Transactions' (1976) 92 *LQR* 528.

¹⁴⁴⁸ However, the law in England in this area is unsatisfactory. Such an equitable assignment would create a registrable charge in English law, but *Romalpa* clauses are never registered: see R. Goode, *Commercial Law* (3rd ed. 2004) p. 608. At p. 459, n. 55, Goode observes that the *Romalpa* case has, in this respect, 'been distinguished almost out of existence'. See too *Re Goldcorp Exchange Ltd* [1995] 1 AC 74 PC.

¹⁴⁴⁹ *Clark Taylor & Co v Quality Site Development (Edinburgh) Ltd* 1981 SC 111 discussed by W.A. Wilson, 'Romalpa and Trust' 1983 SLT (News) 106.

¹⁴⁵⁰ *Carter v McIntosh* (1862) 24 D 925 at 933 *per* Lord President Inglis.

¹⁴⁵¹ *Bank of Scotland v Liquidators of Hutshison, Main & Co* 1914 SC (HL) 1.

(Scotland) Act 1862. While the debtor cannot be prejudiced if he pays the putative assignee pursuant to this intimation, the assignation is invalid.

IV. Lack of Consideration and Bad faith – the Transfer Consequences.

A. *Gratuitous assignments.*

While consideration is not necessary for a binding contract in Scots law, where an assignation is made gratuitously this may have serious *transfer* consequences. Where an assignation bears to be for no consideration it cannot compete with an antedated assignation even if the gratuitous assignation is intimated first.¹⁴⁵² These dicta are consistent with the general approach in the law of transfer to equiparate lack of consideration with bad faith.¹⁴⁵³ Since bad faith has transfer consequences (for which see the following section) so too does lack of consideration. Therefore, those rules which apply to male fide transferees, similarly apply to gratuitous transferees.¹⁴⁵⁴ Bad faith and lack of consideration are, for the purposes of the law of transfer, one and the same thing. It is of some note that in his discussion of competing onerous and gratuitous transfers, Bankton discusses the same authorities which form the basis of his discussion of the off-side goals rule (see below), and indeed his discussion of the *actio Pauliana*. Yet, there are some cases which penalise gratuitous transfers which would not fall to be penalised if the transferee was merely in bad faith. For example, a gratuitous assignation, it seems, cannot compete with a post-dated and post-intimated onerous assignation.¹⁴⁵⁵ This would suggest that the rule *prior tempore potior jure est* applies only to

¹⁴⁵² *Frazer v Phillworth* (1662) Mor 938; *Alexander v Lundies* (1675) Mor 940; *Blair v Austin* (1695) Mor 941; *Hay v Hays* (1699) Mor 942 cited by Bankton II, 191, 8; *Wilson v Saline* (1706) Mor 942; *Executors Creditors of Meldrums v Kinnier* (1717) 1 Kames Rem Dec 17. See also *Campbell v Riddoch* (1675) Mor 1011. The effect of the insolvency of the granter will, however, have serious consequences which may prevent even the onerous assignee from receiving a transfer of the claim, for which see 'Offside Goals' below.

¹⁴⁵³ See Reid, *Property* para 699. Cf. *Anderson v Lowes* (1863) 2 M 100 at 104 per Lord Curriehill: 'The rule that the fraud of an author is not pleadable against a singular successor does not operate if that successor be either *male fide*, or be not an onerous successor. The rule of the civil law is also the law of Scotland. *Dolus auctoris non nocet successori nisi in causa lucrative*'. Interestingly, in *Le Neve v Le Neve* (1747) 1 Ves Sen 64; 27 ER 893, Lord Hardwicke LC states that the doctrine of notice in English law is based on fraud. Whatever might constitute fraud in modern English law, in *Le Neve*, Lord Chancellor Hardwick invoked the standard civilian definition of *dolus malus* made by Labeo in D. 4, 3, 1, 2. This is the same notion of fraud that allowed Scots law to develop a wide general principle of fraud, for which see generally McBryde, *Contract* para 14-02.

¹⁴⁵⁴ Indeed a gratuitous obligation, exceptionally, can be set aside on the grounds of uninduced unilateral error: *Dickson v Halbert* (1854) 16 D 586; *Mercer v Anstruther's Trs* (1871) 9 M 618; *Hunter v Bradford Property Trust Ltd* (1960) reported at 1970 SLT 173 HL.

¹⁴⁵⁵ *Patrick Finlay v Jhone Park* (1621) Mor 895; Hope, *Major Practicks* VI, 44 § 16; Bankton II, 191, 8. In *Craw v Irvine* (1623) Mor 2771, an anterior assignee was required to prove that he had given good consideration before he could take preference over a posterior arrestment. Cf. *Meggat v Brown* (1827) 5 S 343.

rights granted for a good consideration.¹⁴⁵⁶ These cases are not to be confused with those where the assignments themselves were onerous, but the right or bond assigned bore to have been gratuitous.¹⁴⁵⁷

In *Bells v Mason*,¹⁴⁵⁸ Lord Kames, in discussing the evolution of the law of assignation in Scotland, stated that ‘in our later practice an assignation, *with respect to deeds for valuable consideration*, has obtained the force and effect of a *cessio in jure*’¹⁴⁵⁹ and later he especially observes that ‘Obligations for valuable consideration, it is true, are always transmissible to heirs and assignees’.¹⁴⁶⁰ An obligation granted for no consideration may be reducible for various reasons. That it has been assigned several times will not make it any less liable to reduction.

There is one major caveat which must underpin this entire discussion (and that which will follow on the offside goals rule). As has been emphasised above, issues of validity or otherwise of the assignation cannot prejudice the debtor. The debtor’s position would be intolerable if, after paying a gratuitous assignee, he was subsequently found liable to pay a posterior onerous assignee. The debtor must at all times be protected. Providing he pays in good faith he will be discharged. Therefore the principles discussed in the previous paragraphs, which regulate the competition between gratuitous and onerous assignees, apply only to competition between competing transferees where there has been no payment by the debtor. The most common situation will be where a multiplepinding has been raised; often, the real raiser will be the debtor.

B. Bad Faith: Offside Goals.^{1460a}

Following Lord Justice-Clerk Thomson’s dubious analogy with the beautiful game,¹⁴⁶¹ Scots private law contains the so-called ‘offside goals’ rule. The situation is, typically,¹⁴⁶² the

¹⁴⁵⁶ Bankton II, 191, 6: ‘...and a second assignation, *for valuable consideration*, first intimated, will be preferable’ (my emphasis). See also *Andersons v Lows* (1863) 2 M 100.

¹⁴⁵⁷ *Hay v Jamison* (1672) Mor 1009. Cf. *Thomson v Jolly Carters Inn* 1972 SC 215 OH where a proof before answer was allowed. On an averment that the bill had been granted for no consideration, the question arose whether a countermanded bill of exchange still operated as an assignation of the funds.

¹⁴⁵⁸ (1749) Mor. 6332; 2 Kames Rem Dec 188.

¹⁴⁵⁹ 2 Kames Rem Dec 188 at 191 (emphasis added).

¹⁴⁶⁰ *Ibid* at 191-192.

^{1460a} The following section appears at 2005 *Juridical Review* 277.

¹⁴⁶¹ *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 501 *per* Lord Justice-Clerk Thomson: ‘[The transferees] assumed that their title would be safe once the goal of the Register House was reached. But in this branch of the law, as in football, offside goals are not allowed’.

notorious double sale. S contracts to sell property to A1. In breach of that agreement S then sells to A2. A2 completes the transfer first. If A2 was aware of A1's prior contractual right, then A1 can reduce any conveyance to A2. The analogy with football is imperfect since an offside goal is never a goal. In the double sale situation, the title of A2 is only voidable.¹⁴⁶³ If he sells to X before A1 reduces, and X is in good faith and gives value, X's title is unimpeachable.

In many respects this rule is exceptional. One of the dogmatic principles of the law of property is that a transferee is not concerned with the personal obligations of his author.¹⁴⁶⁴ It is from these foundations that the possibility of a race to the register ensues: where there are two creditors with contractual rights to property, the first to complete title, i.e. become owner, is preferred. The offside goals rule flies in the face of these apparent axioms. The recent case of *Alex Brewster & Sons Ltd v Caughey*¹⁴⁶⁵ concerned a point raised in *obiter dicta* in *Rodger Builders*. Suppose a buyer contracts in good faith. He subsequently learns of the seller's prior contract to sell the same property. He runs to the register. Is his title voidable? If so, it comes very close to saying that transfers of property are to be regulated by the date of the contract to transfer,¹⁴⁶⁶ or that knowledge of another's contracts may render property rights open to challenge. Surprisingly, despite the increasing interest in the offside goals rule, its historical development in the Scottish sources has not been fully explored. This is unfortunate. The history sheds considerable light on the relative importance of the doctrine to Scots law.

1. History of 'Offside Goals'.

¹⁴⁶² The doctrine may also affect a transferee of property who is aware of pre-existing obligation on the part of the transferor to grant a subordinate real right, for which see: *Bowack v Croll* (1748) Mor 1695 and 15280; Elchies, *Fraud* No. 18 (I am grateful to Scott Wortley for this reference); *Trade Development Bank v David W Haig (Bellshill) Ltd* 1983 SLT 510.

¹⁴⁶³ While one would have hoped that no authority would be required for this proposition, see Law 10 of the *Laws of the Game*, published by FIFA, at <<http://www.fifa.com/en/game/laws.html>>: 'A goal is scored when the whole of the ball passes over the goal line, between the goalposts and under the cross bar, provided that no infringement of the laws of the game has been committed previously by the team scoring the goal'. A goal scored from an offside position is an 'infringement' in terms of Law 11. Appropriately, Scott Wortley labels *Rodger Builders*, 'The Offside Trap, or The Case of the Inappropriate Metaphor' in, *100 Cases Every Scots Law Student Should Know* (2001), 79.

¹⁴⁶⁴ Reid, *Property* para 688.

¹⁴⁶⁵ 2002 GWD 15-506, ('*Alex Brewster*').

¹⁴⁶⁶ Cf. English equity jurisprudence: J. McGhee, *Snell's Equity* (31st ed. 2005) para 5-25: 'Equity looks on that as done which ought to have been done'. It may be that South African law is not of great assistance in this area, as the doctrine of notice there developed under a strong English influence. In the most recent case in the Supreme Court of Appeal, a majority of the judges suggested that the doctrine is based on equity: *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 at 788D-E *per* Cloete JA. But compare the opinion of

The problem of double sales in Scots law is old. The Parliament of Scotland found it necessary to pass the Stellanate Act as early as 1540.¹⁴⁶⁷ Older still is the voluminous continental literature on the subject.¹⁴⁶⁸ Indeed, according to the preamble of the Registration Act of 1617,¹⁴⁶⁹ the main motivation behind the creation of the Register of Sasines was the problem of the seller who, ‘concealing of sum privat Right’, sought to sell the property again.

(a) Stair.¹⁴⁷⁰

Stair treats the offside goals rule in the context of the effect of a resolutive condition (*pactum legis commissoriae*) on the transfer of an asset. As he perceptively points out, it is not possible for a resolutive condition to have ‘real’ effect. The transfer of property is unitary and (probably)¹⁴⁷¹ abstracted from the provisions of the agreement which it may implement. The effect of such a condition is, therefore, only personal: on the occurrence of the event, the transferee may be subject to a personal obligation to reconvey to the seller. With regard to the effect of a singular successor’s knowledge of a prior right, Stair makes an important distinction. On the one hand is private knowledge. Where a subsequent transferee has prior knowledge of a prior right this may give rise to an obligation of reparation, i.e. A1 may have a personal right to damages. On the other hand, is *certain* knowledge, i.e. knowledge which A2 has acquired as a result of some legal interpellation, such as citation. Only in this (perhaps unusual) situation will there be a right of reduction for A1. He also states that creditors doing diligence need not be in good faith¹⁴⁷²:

“These who acquire such rights without necessity, and see therein such conditions in themselves personal, though having resolutive clauses, do not

Olivier JA, especially at 791I-J, who warned that to appeal to ‘equity’ as the basis of the rule would ‘degenerere ons reg tot ‘n kasuïstiese, arbitrêre en sisteemlose benaderingswyse’.

¹⁴⁶⁷ APS, c. 23; 12*mo*, c. 105.

¹⁴⁶⁸ For a full survey, see R. Michaels, *Sachzuordnung durch Kaufvertrag* (2002). The genesis of the rule, however, remains obscure: see Michaels, 107.

¹⁴⁶⁹ Cap. 16 (same chapter number in both APS and 12*mo*).

¹⁴⁷⁰ Stair I.xiv.5. Unless otherwise indicated, all references are to D.M. Walker’s Tercentenary edition. This is essentially a reprint of the second edition of 1693.

¹⁴⁷¹ Whether Scots law subscribes to the *Abstraktionsprinzip* or to the doctrine of *justa causa traditionis* is somewhat controversial. Compare McBryde, *Contract* para 13-01 ff. and Reid, *Property* para 608. D.L. Carey Miller, *Corporeal Moveables in Scots Law* (1991) para 8-06 and *idem*, ‘Systems of Property: Stair and Grotius’ in D.L. Carey Miller and D.W. Meyers (eds) *Comparative and Historical Essays in Scots Law* (1992), 28-30 concludes that Stair adopts the abstract theory.

¹⁴⁷² This has always been accepted in principle. But the authorities were conflicting and the point was authoritatively confirmed only recently: *Burnett’s Tr. v Grainger* 2004 SC (HL) 19 at para 141 *per* Lord Rodger of Earlsferry.

thereby know that the third party¹⁴⁷³ hath the right *jus in re*, but *jus ad rem*; and, therefore, if they acquire such rights, the property is thereby transmitted. And though there may be fraud in the acquirer, which raiseth an obligation of reparation to the party damnified by that delinquence, yet that is but personal; and another party acquiring *bona fide* or necessarily, and not partaking of that fraud is *in tuto*. [***]¹⁴⁷⁴ But certain knowledge, by intimation, citation, or the like, inducing *malem fidem*, whereby any prior disposition or assignation made to another party is certainly known, or at least interruption made in acquiring by arrestment or citation of the acquirer, such rights acquired, not being of necessity to satisfy prior engagements, are reducible *ex capite fraudis*, and the acquirer is the partaker of the fraud of his author, who thereby becomes a granter of double rights; but this will not hinder legal diligence to proceed and be completed and become effectual, though the user thereof did certainly know any inchoate and incomplete right of another.”¹⁴⁷⁵

On examination of the third edition of the *Institutions*, we find an important additional passage:

“But for the matter of the fraud itself, tho’ in equity, private knowledge may be sufficient to infer reparation; yet, in many cases, positive law, and our custom, respects not private knowledge, but such only as by publick acts, which is specifically allowed in the law; and, therefore he who knows another to have an imperfect right, doth yet validly acquire in prejudice thereof, as he who knows an assignation un-intimated, and takes another, is preferred June 15th 1624 *Adamson*.¹⁴⁷⁶ Nor doth the private knowledge of an assignation supply intimation to the debtor, March 14th 1626, *Westraw*; ¹⁴⁷⁷ Had[dington] Jan 10th 1611, *Graham*¹⁴⁷⁸; and he who knows another to have a disposition of lands without publick infeftment, if he acquire right, and be first publically infeft, is preferred, Feb 24th 1636, *Oliphant*.¹⁴⁷⁹ Neither is an executor obliged to call the debtor of a defunct having done no legal diligence, but may safely pay to other creditors doing diligence, tho’ the executor had paid him a part of the debt. July 16th 1629 *Telzifer*.^{1480,1481}

Useful¹⁴⁸² reference may often be had to the third edition of Stair. The editors liberally added to the text of the second edition from the manuscripts of the *Institutions*¹⁴⁸³ on which Stair

¹⁴⁷³ I.e. the original seller: on the occurrence of the specified event, the property will not automatically revert to the original seller. Admittedly, this passage is not easy to follow.

¹⁴⁷⁴ The text as quoted here is from the second edition. As will be seen below, some of the later editions insert additional text in this bracketed part.

¹⁴⁷⁵ I.xiv.5. Emphasis added. This passage is quoted from D.M. Walker’s Tercentenary edition, 1981, essentially reprinting the second edition of 1693, the last completed by Stair himself.

¹⁴⁷⁶ *Adamson v McMitchell* (1624) Mor 859.

¹⁴⁷⁷ *Westraw v Williams and Carmichael* (1626) Mor 873.

¹⁴⁷⁸ (1611) Mor 13089.

¹⁴⁷⁹ (1636) Mor 10547; Spotiswoode 233.

¹⁴⁸⁰ *Sub nom Telfer v Wilson* (1629) Mor 2190 and 3868.

¹⁴⁸¹ J. Gordon and W. Johnstone (eds) *Stair’s Institutions* (3rd ed. 1759), I.xiv.6. This passage is reproduced in italics in More’s (5th ed. 1832) edition.

¹⁴⁸² The adjective is Professor Walker’s: see his ‘Introduction’ to the Tercentenary edition, at 45.

apparently had been working before his death and which were deposited in the Advocates' Library.¹⁴⁸⁴ Stair looks to the law of assignation as his paradigm example of transfer. Assignation is a particularly slippery word in the Scottish sources. It is not merely limited to the transfer of claims without the consent of the debtor (*cession de créance*; *Forderungsabtretung*), but may be applied to the transfer of incorporeal heritable rights, corporeal moveables,¹⁴⁸⁵ as well as to a universal disposal of assets (as in a *cessio omnium bonorum*). Two of the authorities cited by Stair (*Westraw* and *Graham*) hold that the debtor's mere private knowledge of an assignation by the cedent is insufficient to prevent the debtor from lawfully paying the cedent. Transfer only occurs on legal intimation of the assignation.¹⁴⁸⁶ Put another way, the debtor is interpellated only by a formal legal act; private knowledge is irrelevant. Stair seeks to apply the same principles to the double sale situation by analogy.¹⁴⁸⁷ It is often said that the double sale is fraudulent. This is certainly consistent with the very general concept of fraud in Scots common law. But a double sale is also a breach of warrandice. The obligation to repair this wrong is personal to the wrongdoer, the contract-breaking seller. However, unless there is some legal interpellation bringing the pre-existing contractual obligation to A2's notice, the latter's position is unassailable. This holds true both for assignations (*Adamson*) and for land (*Oliphant*). Thus the importance of this passage, if genuine,¹⁴⁸⁸ cannot be overstated: Scotland's foremost institutional writer deprives the so-called 'offside-goals' rule of almost all practical effect. And there is good reason to consider the passage authentic. It bears a considerable resemblance to Stair's discussion of real rights:

¹⁴⁸³ The addition of this text, like others, is vigorously attacked by Brodie in his (4th ed. 1826) edition, I.xiv.6, note b, 148-149. As Professor Walker points out, however, Brodie was equally guilty of innovating on Stair's text, despite his assertions to the contrary: see Tercentenary edition, 'Introduction', 47. The text added in the third edition does, at least, seem to be written very much in Stair's style.

¹⁴⁸⁴ A detailed comparison of the various manuscript copies of the *Institutions* remains to be done. This is unfortunate, as many passages in Stair appear contradictory. Of a later passage (I.x.16, for which see n. 952 above), George Joseph Bell, *Commentaries* (2nd ed. 1810), 150, note n, observes – with some irritation – 'There are passages in Stair's work which are deformed with a sort of confusion and rambling, that suggests the notion of having been originally put down amidst the hurry of business, to be afterwards more fully considered, and correctly written, and, from carelessness, having found their way into the hands of the printer.'

¹⁴⁸⁵ See e.g. Erskine III.v.1 and J. Craigie, *Scottish Law of Conveyancing: Moveable Rights* (1894), 250 ff.

¹⁴⁸⁶ See also the authority cited in the note to H.L. MacQueen et al (eds) W.M. Gloag and R.C. Henderson, *The Law of Scotland* (11th ed. 2001) para 38-06, which has remained unchanged since the first edition of the work.

¹⁴⁸⁷ Although, as Erskine II.i.28 points out, the analogy is not a perfect one: the debtor in an assignation is not a competing transferee. Cf. *Bairdy v Henderson* (1688) Mor 8395 where it was successfully argued that private knowledge, even if acquired before A2 contracted with S, is not relevant.

¹⁴⁸⁸ And the point may be debateable. Stair covers the issue of supervening knowledge expressly (see nn. 61 and 62 below). This would be a strange thing to do if the offside goals rule was not part of the law at all. But it should be remembered that Stair was not always consistent: see Bell's comment at n. 1484 above. Further, although it could be argued that the excised passage was deliberately omitted by Stair, the contrary can be argued with equal force: this was a passage that he wanted to include but was lost.

“This right [to fruits] is only competent to possessors *bona fide*, who do truly think that which they possess to be their own, and know not of the right of any other.¹⁴⁸⁹ But private knowledge upon information, without legal diligence, or any other solemnity allowed in law, at least unless the private knowledge be certain, is not to be regarded, nor doth constitute the knower in *male fide*, March 14, 1626, *Nisbet and Westraw v Carmichael* [Mor. 859].”¹⁴⁹⁰

For Stair, then, transferees are required to take cognisance only of public information or formal legal acts.¹⁴⁹¹ Admittedly, it is not evident what Stair means by ‘unless the knowledge be certain’. One would have thought that an equivalent to such a solemnity would at least be required; for instance, a copy of the deed, on which the competing party founds, being produced to A2. The moment up to and until such a notice can be effectually made will be discussed below.

(b) Bankton.

Andrew McDouall, Lord Bankton, published his *Institutes* in 1751-53. Like Stair, Bankton first encounters the question of private knowledge of a prior right in the context of the *pactum legis commissoriae*:

“...according to the dictates of the civil law, the paction in sale, whereby, ‘if the price is not paid in or on or before a precise day, the bargain may be voided by the seller’, is *Pactum legis commissoriae*. The nature of this paction is, that the property indeed passes in virtue of the sale and delivery, but may thereafter be revoked by the seller, upon the buyer’s not paying the price at the day; therefore it is only personal upon the buyer, and will not affect singular successors in the case of lands purchased, unless upon a lucrative title, or that the matter was rendered litigious, or the provision duly recorded as a reversion, or ingrossed in the seisin duly registered: nor is it effectual against one who purchases from him, who bought species of goods upon such condition, by the often mentioned rule, that *mobilia non habent sequelam*.”¹⁴⁹²

Bankton’s approach is fascinating. His view of the effect of a resolute condition on singular successors and creditors is almost identical to Stair’s approach in the omitted

¹⁴⁸⁹ Citing D. 50, 16, 109.

¹⁴⁹⁰ II.i.24.

¹⁴⁹¹ It is notable that *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 (SCA) both parties held only a *jus ad rem*: A1 obtained an interim interdict preventing registration of the conveyance of the property to A2. Therefore, although A2 alleged that he was in good faith at the time of the conclusion of the contract, he took subject to the servitude that the S had bound himself to grant to A1. Scots law is not clear. Some statements by the institutional writers suggest that where the matter has been rendered ‘litigious’, i.e. registration is prohibited by legal process, A2 will be bound by A1’s prior right. The question remains open, however, whether, and on what basis, A1 could properly interdict A2 from registering where A2 has contracted in good faith.

¹⁴⁹² Bankton I, 417, 31.

passage. Even where the resolutive condition has been purified, thus giving rise to the personal obligation to reconvey (*jus ad rem*), any knowledge of this prior personal right has no effect on a singular successor; unless, that is, the knowledge is certain (the matter has been rendered litigious;¹⁴⁹³ the reversion is registered¹⁴⁹⁴) or the successor is a gratuitous transferee.

Bankton returns to the lack of consideration when, like Stair, he discusses the law of assignation. Again, private knowledge of a prior right is immediately addressed in this context. After speaking of the *assignatus utitur iure auctoris* rule, he continues:

“And, for the same reason, if the second assignation be gratuitous, tho’ first intimated, it must yield preference to the first; for the objection that lay against the cedent, of granting double rights,¹⁴⁹⁵ is good against the second gratuitous assignee, without distinction whether the first assignation was gratuitous or not, since the first assignee is creditor to the cedent, by the express or implied warrandice in the right. (*Alexander* July 15th 1675);¹⁴⁹⁶ and no creditor can be prejudiced by a subsequent gratuitous deed in relation to the same subject, which is manifestly fraudulent.”¹⁴⁹⁷

Importantly, Bankton makes the link between the offside goals rule and the *actio Pauliana* (the action accorded to creditors to reduce gratuitous alienations or unfair preferences). The offside goals rule can be invoked where A2 is in bad faith *or* where he has given no value. While many cases dealing with the *actio Pauliana* deal with single gratuitous alienations, several involve the classic double grant: the claimants in a multiplepounding, one holding a gratuitous and the other an onerous assignation of the same claim.¹⁴⁹⁸ Admittedly, there are

¹⁴⁹³ As far as land is concerned, only an inhibition or adjudication can bring about litigiosity: *Morison and Company v Allardes* (1787) Mor 8335; *Duchess of Douglas and Walter Scot, Competing* (1764) Mor 8390.

¹⁴⁹⁴ Post-1617 when the Register of Sasines was instituted. By virtue of the Reversion Act 1469 singular successors were subject to reversions, although it has been disputed whether registration was necessary where the reversion was not in the body of the deed: see n. 1432 above. Prior to the 1469 Act, it seems that a singular successor was bound by a reversion in the body of the deed; but not by an extrinsic one. Interestingly, therefore, where a purchaser contracted in good faith for the transfer of property and only subsequently learned of the reversion on examination of the deeds, the purchaser would nevertheless be bound by the reversion though he learned of it only subsequently.

¹⁴⁹⁵ See, APS 1540, c. 23; 12mo, c. 105.

¹⁴⁹⁶ *Alexander v Lundies* (1675) Mor 940.

¹⁴⁹⁷ II, 191, 8. At II, 243, 8, Bankton compares the position to that in the English counties of York and Middlesex where registration had been introduced for the transfer of land (Land Tax Act, 1707, 6 Anne c. 35; and Middlesex Registry Act, 1708, 7 Anne c. 20) as does Henry Home, Lord Kames, *Principles of Equity* (3rd ed. 1778) II, 41. Kames cites *Merry v Abney and Kendal* (1663) 1 Chan Cas 38; 1 Eq Cas Abr 330, Ch 42, Sect A, § 1; 21 ER 1081 and 22 ER 682; *Ferrars v Cherry* (1700) 1 Eq Cas Abr 331; Ch 42, Sect A, § 5; 2 Vern 384; 21 ER 1081; 23 ER 845; *Blades v Blades* (1727) 1 Eq Cas Abr 358, Ch 47, Sect B, § 12; 21 ER 1100. The writer is indebted to Scott F. Dickson for these references. *Blades* was approved in *Le Neve v Le Neve* (1747) 1 Ves Sen 64; 27 ER 893 by Lord Hardwicke LC and in *Agra Bank Ltd v Barry* (1874) LR 7 HL 135 at 148 *per* Lord Cairns LC. See also the opinion of Lord Shand (Ordinary) in *Stodart v Dalzell* (1876) 4 R 236 at 240 who cites *Le Neve* and *Holmes v Powell* (1856) 8 De G M & G 572; 44 ER 510 in 2 White and Tudor’s Leading Cases in Equity p. 37 especially at 64. *Le Neve* was cited in *Roger (Builders) v Fawdry* 1950 SC 483.

¹⁴⁹⁸ See references in n. 1452, above; and *Ireland v Neilson* (1755) 5 Br Sup 286 (Kilkerran) and 828 (Monboddo). *Ireland* was cited by Lord Monboddo in his dissenting opinion in the well-known case of *Mitchells*

differences between the *actio* and the offside goals rule. For example, proof that an alienation was made for good consideration is generally a good defence to action based on the *actio Pauliana*. Knowledge of other creditors' rights is not relevant; knowledge of insolvency is.¹⁴⁹⁹ Where a transfer is alleged to be in breach of the offside goals rule, however, a plea of good consideration, apparently, will be of no avail. The cases on the *actio Pauliana*, however, are relevant in so far as they demonstrate that a gratuitous alienee is presumed to be a party to the fraud of the granter of double rights, even although he may have been totally oblivious to the insolvency of the granter.¹⁵⁰⁰

More generally, where an assignation is made gratuitously this may have serious transfer consequences. In a competition (most likely in a multiplepinding), the holder of an antedated assignation can reduce a posterior gratuitous assignation, even if the gratuitous assignation was intimated first.¹⁵⁰¹ These dicta are consistent with the general approach of the law on insolvency to equiparate lack of consideration with fraud:¹⁵⁰²

“It is likewise the common law that a prior gratuitous alienee is intitled to reduce a second disposition granted to another for a lucrative¹⁵⁰³ cause who was first infeft, in the same manner as a first onerous disponee, last infeft, is preferable to a second gratuitous disponee first infeft. This shall hold even tho' the disponer, at the time of granting these rights, was solvent, in respect that the second disposition, in both cases is fraudulent (July 15th 1675 *Alexander* [Mor. 940]; December 11th 1695 *Blair* [Mor. 941]; February 7th 1699 *Hay* [Mor. 942]); for a first disponee, tho' gratuitous is creditor in the warrandice express or implied and therefore intitled to reduce the second fraudulent right: but if the second disposition was onerous, and made to a *bona fide* purchaser, he, being first infeft, is preferable even to a prior onerous disponee, unless the granter was bankrupt at the time, and inchoat diligence used against him (December 11th 1695 *Blair* [v *Austin* Mor. 941]; February 5th 1671 *Blair* [v *Blair* Mor. 940] ; July 23rd 1662 *Lord Fraser* [Mor. 938]; January 24th 1706,

v *Ferguson* (1781) 3 Ross LC 120. See also *Executor Creditors of Meldrum v Kinnier* (1717) 1 Kames Rem Dec 17; *Elliot v Wilson*, February 9th 1826 FC and *Meggat v Brown* (1827) 5 S 343. Cf. Stair III.i.6 and Bankton I, 265, 90 for the effect of a gratuitous deed. Interestingly, Kames also draws the parallel between stellionate and gratuitous alienations on bankruptcy: *Principles of Equity* (3rd ed. 1778) II, 202-205.

¹⁴⁹⁹ See discussion of the *actio Pauliana* in *Street v Mason* (1672) Mor 4911 and *Bateman and Chaplane v Hamilton* (1686) Mor 1067. Someone attempting to acquire a security in the knowledge that the debtor is insolvent is rightly viewed as '*particeps fraudis*'. It is an unfair preference.

¹⁵⁰⁰ Bankton I, 259, 65; I, 264, 84-85 and I, 265, 90.

¹⁵⁰¹ See authorities cited in n. 1452 above. In *Craw v Irvine* (1623) Mor 2771, a multiplepinding, an anterior assignee was required to prove that he had given good consideration before he could be preferred to a posterior arrester. There are authorities which suggest that a post-dated, post-intimated onerous assignation is to be preferred in a competition to an anterior intimated assignation which was gratuitous: *Patrick Finlay v Jhone Park* (1621) Mor 895; Hope, *Major Practicks* VI, 44 § 16; Bankton II, 191, 8. Cf. *Meggat v Brown* (1827) 5 S 343 and *Anderson v Lows* (1863) 2 M 100.

¹⁵⁰² See Reid, *Property* para 699. Cf. *Anderson v Lowes* (1863) 2 M 100 at 104 *per* Lord Curriehill. See too, for English law, n. 1453 above.

¹⁵⁰³ In Scots law, 'lucrative' means gratuitous: see Stair III, title 7: 'Lucrative Successors'.

*Neilson*¹⁵⁰⁴; and all objections competent against the author are good against his gratuitous successor.”¹⁵⁰⁵

In other words, where a conveyance dated second is completed first, but is gratuitous, that second transfer may be reduced by the holder of an antedated conveyance.¹⁵⁰⁶ Knowledge is not relevant. Bankton discusses the same authorities which form the basis of his discussion of the offside goals rule, and indeed his discussion of the *actio Pauliana*.¹⁵⁰⁷ The cases on bankruptcy in Scotland contain many references to debtors defrauding creditors. Indeed, until 1790,¹⁵⁰⁸ simply becoming bankrupt within three days of accepting goods without payment was deemed fraudulent.¹⁵⁰⁹ While Bankton makes an analogy with the *actio Pauliana* and gratuitous transfers, there is little discussion of the relevance of mere knowledge of prior rights. In the insolvency situation it is readily understandable that dispositions for no consideration should be attacked. All the good faith in the world is no comfort to the bankrupt's creditors. What is important is whether there has been payment for the transfer. If the transferee has paid for the disposition or assignation, then, in the insolvency situation, it seems that a transferee who knew of a prior right but who completed the transfer first will not be prejudiced by his knowledge (provided always that he has given good consideration and the transfer or security did not amount to an unfair preference). Indeed, in a double sale situation, even if A2 were to attack A1 this is likely to be of little assistance on S's insolvency. Any reduction will benefit only S's creditors.¹⁵¹⁰ And there is no reason that A2 should have any preferential claim on S's estate.

What then of the double sale where S is solvent? Bankton clearly bases the doctrine on fraud. Wortley discounts 'fraud' as a relevant basis for the doctrine on the basis that 'mere

¹⁵⁰⁴ Not found.

¹⁵⁰⁵ Bankton I, 265, 90. Cf. Erskine II.iii.27, who notes that a cedent cannot even expressly reserve the right to sell to another: 'a clause exempting the granter from warrandice in the most express terms, is not sufficient to secure him if he shall afterwards grant an inconsistent deed; for no agreement, let it be ever so explicit ought to protect against the consequences of fraud or deceit'.

¹⁵⁰⁶ See too Stair III.i.6 to the same effect.

¹⁵⁰⁷ Bankton I, 259, 65; I, 264, 84-85 and I, 265, 90.

¹⁵⁰⁸ *Jeffrey v Allan, Stewart & Co* (1790) 3 Pat App 191; 2 Ross' Lead Com Cas 585 rev'g *Stewart v Creditors of James Stein* (1788) Mor 4949.

¹⁵⁰⁹ See in particular *Inglis v Royal Bank of Scotland* (1736) Mor 4936; 5 Br Sup 193; Elchies, *Bankrupt* No.9. This was also the basis for the decisions in *Prince v Pallet* (1680) Mor 4932; 2 Stair 823 (cited with apparent approval by Stair I.ix.14) and *Main v Keeper of the Weigh House Glasgow* (1715) Mor 4934.

¹⁵¹⁰ Assuming the reduction is catholic. Cf. the almost contemporary view of R.J. Pothier, *Traité des obligations* (1761) § 153, in M. Bugnet (ed.) *Oeuvres de Pothier* (1861) vol 2, 72. Where the defender contracted for the transfer of property in the knowledge of the seller's obligation to grant a subordinate real right over it to another, any reduction here would be *ad hunc effectum*.

bad faith' is sufficient; this, he argues, is of some lesser degree than fraud in modern law.¹⁵¹¹ However, according to Bankton, mere knowledge on the part of the seller that he is breaching a pre-existing obligation is also fraudulent. In so far as A2 is aware of the breach of this obligation, then 'his [A2] perfecting of the right will not avail him; for he is accessory to the party's granting double rights, which not only is a ground for annulling the second as fraudulent but likewise subjects the offenders, and all accessories, to the guilt of stellionate'.¹⁵¹² A2's position is one of 'statutory presumptive fraud'.¹⁵¹³

Stellionate was indeed a crime.¹⁵¹⁴ The criminal was the seller, not the transferee.¹⁵¹⁵ As for the transferee, what is so fraudulent about knowledge of a prior right? Providing A2 has paid good consideration where is the prejudice to A1? S is manifestly in breach of contract but should now be in funds. A1 has a good claim for damages against S.¹⁵¹⁶

(c) Bell.

¹⁵¹¹ S. Wortley, 'Double sales and the offside trap: some thoughts on the rule penalising private knowledge of a prior right' 2002 *JR* 291 at 301 citing *Petrie v Forsyth* (1874) 2 R 214 and *Morrison v Sommerville* (1860) 22 D 1082. Compare the statement in *Battison v Hobson* [1896] 2 Ch 403 at 412 where, in a case dealing with the English doctrine of notice, Stirling J characterised fraud as that which carried 'grave moral blame'. But, in Scots law, fraud has a much wider meaning: '...the Scottish courts, with a background of civilian texts, applied a wide definition of fraud which looks at practical result rather than to the precise nature of the act. The motive is probably irrelevant and it is not necessary to show an intention to cheat': McBryde, *Contract* para 14-02.

¹⁵¹² Bankton II, 192, 9. In French, the seller who makes a double sale is labelled 'stellionataire': G. Ripert, *La règle morale dans les obligations civiles* (4th ed. 1949) para 171 cited by G. Cliopath, 'Quelque problèmes relatifs à la double vente, spécialement en matière immobilière' (1970) 66 *Schweizerische Juristen-Zeitung* 49 and 65 (2 parts) at 50, n. 6. *Le Grand Robert de la langue française* (2nd ed. 2001) vol 6, 712 records the first use of the term 'stellionataire' in 1655; and 'stellionate' in 1680. 'Stellionataire' was used in the original Art. 2059, *Code Civil* in the context of personal arrestment. It denominated fraud in general. The article was repealed in 1868. Their earliest reference to the Latin, 'stellionatus' in France is given in *Le Grand Robert* as 1577. It is not clear when Scots law began to use the term. It is used by Sir George Mackenzie, *The Laws and Customes of Scotland, in Matters Criminal* (1678) l.xxviii.1 and is adopted by Erskine, *Principles* (21st ed. 1911) IV.iv.41. See too *OED* (2nd ed. 1989) s.v. 'stellionate'. Both authors use the term in a general sense to denote any type of innominate fraud; as well as more specifically to mean the double sale. The HMSO, *Chronological Table of the Statutes* (2001) part II, p. 2218, for example, refers to the 1540 Act as the 'Fraud' Act, not the Stellionate Act. The term *stellionatus* is found in the Digest: D. 47, 20 *de stellionatus*; and the Code: C. 9, 34; see H.G. Heumann, *Handlexicon zu den Quellen des römischen Rechts* (5th ed. 1879), 550. Erskine, IV.iv.79, says that the etymological root of 'stellionate' is 'stellio': 'a serpent of the most crafty kind'; but he refers only to Pliny, and that reference appears to be incorrect.

¹⁵¹³ Bankton I, 264, 85. Although he is here referring to the 1621 Bankruptcy Act (cap. 18, APS c. 18), Bankton states that the basis of the 1540 Act is the same: I, 259, 65.

¹⁵¹⁴ Until 1964: Statute Law Revision (Scotland) Act 1964, schedule 1.

¹⁵¹⁵ Act 1540, cap. 105; APS, c. 23.

¹⁵¹⁶ S's liability, being based on fraud, is one from which he will not be discharged through bankruptcy: Bankruptcy (Scotland) Act 1985, s. 55(1)(c).

Brief mention can also be made of Bell's treatment of the offside goals rule in the context of resolutive conditions. In preference to some loose statements in Erskine,¹⁵¹⁷ Bell adopts Stair's analysis¹⁵¹⁸:

"...such conditions have not the effect of a real burden, even when mentioned in the body of the contract, and where, of course, the condition appears openly; that they have no effect against creditors taking voluntarily conveyances *ex necessitate*, having no other probable way of payment; nor even against voluntary acquirers, who, if they see the condition, are entitled to consider it as a *jus ad rem*, not a *jus in re*. There may, indeed, be fraud in such a voluntary acquisition, which may expose the acquirer to a claim of damages; but even that claim is merely personal and will not pass with the property."¹⁵¹⁹

Again, this passage is consistent with both Stair and Bankton. Bell does not mention gratuitous transferees. Importantly, however, Bell's contribution is to extend protection for a singular successor: where A1 assigns to A2, and A2 is bad faith (i.e. has private knowledge of S's right by resolutive condition in his agreement with A1), A2's title is good, however, it seems, that knowledge was acquired. At most A2 has a personal obligation to make reparation.

2. Alex Brewster.

Wortley's article followed the decision in *Alex Brewster*.¹⁵²⁰ That case revisited an issue of principle which was raised *obiter* in *Rodger Builders*: if, after the conclusion of the missives with A2, A2 learns of the pre-existing obligation on the part of the grantor to dispense to A1, and A2 registers first, is A2's title voidable in terms of the offside goals rule?¹⁵²¹ These facts seem to illustrate a classic, perhaps paradigm, race to the register. Yet, the *obiter dicta* of Lord Justice-Clerk Thomson, followed by the Lord Ordinary in *Alex Brewster*, suggest that private knowledge of a pre-existing obligation acquired *after* the conclusion of the missives is sufficient to render a following transfer voidable.¹⁵²² There are major difficulties with such a

¹⁵¹⁷ III.iii.11. See too Lord Ivory's criticism of Erskine's text: (5th ed. 1824), 648, n. 108.

¹⁵¹⁸ I.xiv.5.

¹⁵¹⁹ Bell, *Commentaries* (7th ed. 1870) I, 260.

¹⁵²⁰ 2002 GWD 15-506.

¹⁵²¹ *Roger (Builders) Ltd v Fawdry* 1950 SC 483 at 500 *per* Lord Jamieson; at 501, *per* Lord Justice-Clerk Thomson. Cf. *Alex Brewster*, transcript, para [71]. The facts of *Alex Brewster* were complicated. See the caveat at n. 83 below.

¹⁵²² *Alex Brewster*, *ibid*. There are a number of possibilities for the moment after which the offside goals rule cannot apply: missives, payment, delivery of the disposition etc. These possibilities are discussed in Part V, below.

suggestion.¹⁵²³ The axiomatic principle of Scottish property law is that ownership of heritable property passes only on recording or registration.¹⁵²⁴ It is this basic rule which gives rise to the possibility of a ‘race to the register’. Leaving involuntary transferees out of the equation (such as trustees in sequestration), the effect of the Lord Ordinary’s decision is to say that the only legitimate race to the register is a blind man’s race: one in which one of the participants has no idea whom he is racing or even whether he is racing at all. According to the *Alex Brewster* case, if A2 learns that he is indeed running a race to the register with one who holds a prior personal right (i.e. A1), his title is subject to reduction. With respect, such a view is undesirable. The offside goals rule is an exception to the principle *prior tempore potior jure est*.¹⁵²⁵ In Scots law, competition of titles is regulated in terms of the date of transfer: recording or registration (immovables); delivery (corporeal moveables at common law) and intimation of delivery of the transfer agreement (claims). Where A2 contracts to buy property in good faith, pays the price and receives a disposition in ignorance of a pre-existing obligation, why should he be prejudiced by subsequent knowledge? Stair, more than once, resolves the issue of subsequent knowledge clearly, concisely and in accordance with principle:

“...But certain knowledge, by intimation, citation, or the like, inducing *malem fidem*, whereby any prior disposition or assignation made to another party is certainly known, or at least interruption made in acquiring by arrestment or citation of the acquirer, such rights acquired, *not being of necessity to satisfy prior engagements*, are reducible *ex capite fraudis*, and the acquirer is the partaker of the fraud of his author, who thereby becomes a granter of double rights...”¹⁵²⁶

“...fraud is not competent by exception but by reduction ... fraud being of a criminal nature, it is not relevant against singular successors, not partakers of the fraud, but only against the committers of the fraud, and these representing them, especially as to feudal rights: for so it is expressly provided by the fore-mentioned statute; the reason whereof is, to secure land rights, and that purchasers be not disappointed; and therefore no action can be taken effectual against them, upon the fraud of their authors, unless they were accessory

¹⁵²³ Although it does seem to be consistent with Professor Carey-Miller’s important contribution, ‘Good Faith in Scots Property Law’ in A.G.M. Forte (ed.) *Good Faith in Contract and Property Law* (1999) at 109, with which this writer would disagree.

¹⁵²⁴ Abolition of Feudal Tenure (Scotland) Act 2000, s. 4. In parenthesis, it is interesting to note that both Bankton II, 243, 2 and Kames, *Principles of Equity* (3rd ed. 1778) II, 41 referred comparatively to the counties of England which had introduced registration for the transfer of land, see n. 36 above.

¹⁵²⁵ Or, for those who like to summarise principles in Latin maxims, *Qui primus jus suum insinuaverit praeferetur*. See A. Menzies, *Lectures on Conveyancing* (1856), 243.

¹⁵²⁶ I.xiv.5, emphasis added. An edited version of this passage, importantly including the italicised part, is quoted by Reid, *Property* para 695, n. 8. The italicised passage is emphasised by Reid in para 697, n. 1.

thereto, at least by knowing the same when they purchased: *but supervenient knowledge will not pre-judge them.*"¹⁵²⁷

These passages fit neatly with the passage attributed to Stair by the editors of the third edition:¹⁵²⁸ private knowledge is insufficient; only certain legal interpellation will prejudice a second purchaser. So, creditors doing diligence are not affected by private knowledge. This is again in line with the Scots law of assignation, where private knowledge is not relevant in the matter of payment by the debtor to the cedent after delivery of the assignation to the assignee but prior to intimation.¹⁵²⁹ While some sources would admit private knowledge,¹⁵³⁰ there is no reason why the passage of Stair dealing with supervening knowledge is not still good law.¹⁵³¹

3. English Law

At the outset of this paper, it was mooted that the decision in *Alex Brewster* comes close to regulating the transfer of heritage by the date of the contract, since 'equity will hold as done that which ought to have been done'.¹⁵³² Yet, even the law of Equity in England would be of no assistance to A1 in the *Alex Brewster* situation.¹⁵³³ In English law, priorities are also regulated by the well known equitable principle: *qui prior tempore est, potior jure est*. But equity converts agreements to transfer into transfers. Therefore, it is the date of the contract that is relevant. However, this principle is subject to an exception in the case of the bona fide purchaser without notice. So, where A1 contracts for the sale of property and pays the price, S becomes a constructive trustee for A1. If A2 then contracts with S for the sale of the same property and pays the price in good faith and without notice of the prior sale to A1, then he is also entitled to Equity's protection. The equities are equal; and, where the equities are equal, the law should prevail.¹⁵³⁴ A2 will 'prevail over a prior equity if he subsequently gets into a legal estate, even if he then has notice of the equity. Between himself and the owner of the

¹⁵²⁷ Stair IV.xl.21, my emphasis. Logically, there is the possibility that Stair could be referring here only to knowledge acquired after recording of the disposition. However, while this is a possible explanation, it is not consistent with the traditional Scottish approach to the 'race' to the register.

¹⁵²⁸ But cf. the caveat in n. 1488 above.

¹⁵²⁹ See n. 1486 above.

¹⁵³⁰ See e.g. Erskine II.i.28; Bankton I, 265, 90; *Clark v Loudon* (1856) 18 D 499 at 505 per Lord Justice-Clerk Hope. Cf. *McGowan v Robb* (1862) 1 M 141.

¹⁵³¹ Cf. the position in modern French law: P. Simler and P. Delebecque, *Droit civil, les sûretés: la publicité foncière* (3rd ed. 2000) para 749: 'S'il n'a été informé de l'existence d'un acte antérieur non publié que postérieurement, mais avant d'avoir lui-même procédé...le premier acte lui est inopposable'.

¹⁵³² See n. 1466 above.

¹⁵³³ It should be noted that, following the Land Registration Act 2002, equitable rights have a far smaller role to play. Equitable principles remain important, however, in the transfer of personal property.

prior equity, the equities are equal, and there is no reason why the purchaser should be deprived of the advantage he may obtain at law'.¹⁵³⁵

4. Cut-off Point for the Offside Goals Rule

There remains one question. Stair says that supervening knowledge of a prior right will not prejudice a *bona fide* second purchaser. However, what does Stair mean by 'purchaser'? He does not elaborate. Like 'assignment', 'purchase' can mean many things: conclusion of the missives;¹⁵³⁶ delivery of the disposition;¹⁵³⁷ payment of the price;¹⁵³⁸ transfer of the keys; or transfer of dominium or of a claim. This brings us back to an evaluation of the constituent three-stage (in the case of immoveables and the assignment of money claims in any event) process of transfer. What if A2 contracts in good faith, but before delivery of the disposition learns of the prior contractual right in favour of A1? Until A2 has a disposition, he cannot run the race to the register. If, after contracting in good faith, A2 subsequently learns of a prior agreement between S and A1, can A2 nevertheless demand delivery of the disposition in terms of his second contractual right? All A2 is doing is exercising his contractual rights. If A2 has contracted in good faith, why should he be prejudiced by subsequent knowledge? A1 might never register. After all, there is no normative requirement that a disponee must record or register. The same is true of a grantee of a heritable security. Certainly failure to register will have thoroughly deleterious consequences; but the law does not impinge on a creditor's prerogative to waive his rights. If A1 neglects to register, more fool him: *vigilantibus non dormientibus jura subveniunt*.

This approach can be seen in Stair, who suggests that A2's position may only be attacked where A2 has received an assignment or disposition 'not being of necessity to satisfy

¹⁵³⁴ Snell's third maxim of Equity: J. McGhee (ed.) *Snell's Equity* (30th ed. 2000) para 3-08; (31st ed. 2005) paras 4-03 ff. Cf. *Glasgow Feuing and Building Company v Watson* (1887) 14 R 610 at 619 *per* Lord Young.

¹⁵³⁵ J. McGhee (ed.) *Snell's Equity* (30th ed. 2000) para 4-16; cf. (31st ed. 2005) para 4-03. As English law evolved, unregistered land moved away from the position stated in *Le Neve v Le Neve* (1747) 1 Ves Sen 64; 27 ER 893; see *Wyatt v Barwell* (1815) 19 Ves Jr 436; 34 ER 578; *Chadwick v Turner* (1866) LR 1 Ch App 310; *Re Monolithic Building Co Ltd* [1915] 1 Ch 643. The policy arguments for this approach are articulated by Lord Wilberforce in *Frazer v Walker* [1967] 1 AC 569 at 582. However, see now the Land Registration Act 2002, s. 28(1).

¹⁵³⁶ Sale of Goods Act 1979, s. 17 and s. 18, rule 1. This seems to be the cut-off point for the doctrine of notice in South African law, although the point is not clear: *Wahloo Sand Bk v Trustees, Hambly Parker Trust* 2002 (2) SA 776 (SCA) at 787 H *per* Cloete JA. Like Scots law, South African law uses similarly ambiguous language: *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 582 C-D *per* Hoexter JA ('bought').

¹⁵³⁷ Cf. *Gibson v Hunter Home Designs Ltd* 1976 SC 23 and *Sharp v Thomson* 1995 SC 455 rev'd 1997 SC (HL) 66.

¹⁵³⁸ *Lord Advocate v Caledonian Railway Co* 1908 SC 566 at 575 *per* Lord President Dunedin.

prior engagements'.¹⁵³⁹ In other words, where A2 has in good faith entered into a contract for the transfer of the asset prior to learning of the prior right, he will not be prejudiced by this knowledge. Delivery of the disposition to A2 is necessary to satisfy a prior engagement. Such an approach reduces the role of the offside goals rule to what must be an unusual situation where A2 enters into a contract in bad faith, knowing that there is a prior agreement to transfer between S and A1.

In any event, it is not clear why, in the case of an onerous disposition, A2's title should ever be rendered voidable by virtue of mere knowledge acquired after he has contracted in good faith. This brings us to a more general point. The offside goals rule has always been limited to the case where the granter, with the acquiescence of the grantee, does that which he has bound himself not to do.¹⁵⁴⁰ As the discussion of resolute conditions demonstrates, merely knowledge of contingent rights in favour of another are not relevant; moreover, even where a resolute condition is purified (giving rise to a personal obligation to reconvey), this will not render the title of the singular successor voidable, provided the contract was entered into in good faith. The rule in Scotland is not as wide as the so-called doctrine of notice in English law.¹⁵⁴¹ To enlarge the Scottish rule would be counter-productive. It would introduce considerable uncertainty. The idea that mere knowledge of prior contractual rights may form a basis to attack a transferee's position is subversive. It is at odds with the traditional Scottish focus on certainty on transfer and competition. Particularly with regard to heritable property, almost every buyer of any asset will have some vague and uncertain knowledge of previous, and perhaps future, contracts that others may have entered into with regard to the property. It is simply not intelligible, however, *why*, or *how*, such knowledge can impugn property rights.¹⁵⁴²

¹⁵³⁹ I.xiv.5.

¹⁵⁴⁰ G.L.F. Henry, 'Personal Rights' (1961) 2 *Conveyancing Review* 193 properly suggested that the rule could only apply to rights that were capable of being made real, founding on *Mann v Houston* 1957 SLT 89. One problem with this formulation, however, is that the offside goals rule applies equally to the double assignation of a personal right. A right to payment is not capable of becoming a real right in anything. It is not immediately clear how to resolve a competition where the competitors hold only personal rights to demand a transfer, and they both contracted in good faith. Arguably, there is no competition for property law to resolve. The court can order specific implement though implement would require a breach of contract: *Plato v Newman* 1950 SLT (Notes) 29. Cf. B. Beinart, 'Fideicommissum and Modus' 1968 *Acta Juridica* 157 at 211n and Kames, *Principles of Equity* (3rd ed. 1778) II, 194: 'In these cases, I cannot discover a rule for preference; nor can I extricate the matter otherwise than by dividing the subject between the competitors. And, after all, whether this may not be cutting the Gordian knot instead of untying it, I pretend not to be certain'.

¹⁵⁴¹ For which see, for example, P.S. Atiyah, *Introduction to the Law of Contract* (2nd ed. 1995), 389, 'Obligations running with Property'.

¹⁵⁴² Cf. *Andrew Melrose & Co v Aitken, Melrose & Co Ltd* 1918 1 SLT 109 at 110-111 OH *per* Lord Cullen (Ordinary): "A is not bound by a personal obligation granted by B to C merely because he knows B has granted

5. Conclusions.

The offside goals rule does not sit easily with Scots law. The principle has evolved from one that, though long discussed in Scots law, was perhaps not well-known until the football metaphor was employed in *Rodger Builders*. Since then the rule has taken a more leading role in the development of the Scots law of property.¹⁵⁴³ There is much to be gained from the institutional writers' approaches. They show that the principle is not as wide as the modern authorities assume. Certainly Stair, Bell and, in some passages, Bankton accord little relevance to private knowledge. It is not clear why damages should not be sufficient for the disappointed buyer. In any event, subsequent knowledge acquired *after* A2 has contracted in good faith is irrelevant. In football terms, runs made after the ball is kicked cannot be offside. Providing A2 is in good faith when he enters into the contract, he can set off toward his ultimate goal – in the case of land, the register – without regard to any private knowledge that may subsequently come his way. In this limited respect,¹⁵⁴⁴ the *Alex Brewster* case was incorrect and should not be followed.

Whether this writer's view is accepted or not, it is incontrovertible that the offside goals rule is distinct from the English doctrine of notice. This poses difficulties in interpreting United Kingdom statutes that are framed in terms of the English doctrine of notice.¹⁵⁴⁵

V. Contractual Prohibitions on Assignment.

A. General

The general principle is that all claims are assignable with the exception of those which are inherently personal to (i.e. there is *delectus personae* in) the putative cedent.¹⁵⁴⁶ *Delectus*

it. And if, in this knowledge, A acquires from B all his assets, I cannot see how this can entitle C to sue A on B's personal obligation."

¹⁵⁴³ See *Burnett's Tr. v Grainger* 2004 SC (HL) 19 at para 67 *per* Lord Rodger of Earlsferry.

¹⁵⁴⁴ There is little to fault the Lord Ordinary's treatment of the complicated facts. The writer's analysis assumes that A2 contracts in good faith. In *Alex Brewster*, there was a suspicion that A2 (a limited company) was nothing more than a corporate veil used by the defender to defraud the pursuers (see para [57]). There was the further suspicion that the missives, under which A2 claimed to have obtained his rights, were dishonestly antedated (see para [60]).

¹⁵⁴⁵ See, for example, Sale of Goods Act 1979, s. 25(1) and *Re Highway Foods International Ltd* [1995] 1 BCLC 209: would this case be decided the same way if a Scottish court interpreted s. 25 (1) in terms of the offside goals rule? See too Patents Act 1977, s. 33.

¹⁵⁴⁶ See chapter 2 above. See too, so-called 'change of control' clauses. Such a clause provides that should the majority of a contracting party's share capital be acquired by a third party, the other party will have the right to terminate the contract. Here there is *delectus*, but not in the *personae* of the other party: the personality of the

personae proscribes transfer. But it is possible to express in words what, in other situations, the law would imply. An express restriction can therefore be placed in the contract out of which otherwise assignable claims may arise, i.e. a so-called *pactum de non cedendo*.¹⁵⁴⁷

In Scots law, 'a purported assignation of an unassignable right is ineffective either to invest the assignee or divest the assignor'.¹⁵⁴⁸ The purported transfer is invalid *erga omnes*, although the underlying contract may subsist; if so, the cedent may be liable to the assignee for breach of warrandice.¹⁵⁴⁹ It has been held that it makes no difference whether the rights arising out of the contract can be said to have 'accrued'.¹⁵⁵⁰ Yet, if a party to a contract has sued and obtained decree, there seems no reason to assume why the right to payment under the decree cannot be assigned, even if the underlying contract contained a prohibition on assignation. It is too late for the debtor to raise defences which he might have been able to raise against the other party that he might not have been able to raise against an assignee.¹⁵⁵¹

company remains constant, only the shareholders that have changed. See generally, M. Müller-Chen, 'Abtretungsverbote im internationalen Rechts- und Handelsverkehr' in I. Schwenzer and G. Hager (eds.), *Festschrift für Peter Schlechtriem* (2003) 903 at 906, n. 20.

¹⁵⁴⁷ *James Scott Ltd v Apollo Engineering Ltd* 2000 SC 228 following English authority; *Marquis of Breadalbane v Whitehead* (1893) 21 R. 138; *Duke of Portland v Baird & Co* (1865) 4 M 10. *Duke of Portland* was referred to with approval by the House of Lords in the English appeal of *Linden Gardens Trusts Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 107. For English law, see R. Goode, 'Inalienable Rights?' (1979) 42 *MLR* 553; B. Allcock, 'Restrictions on the Assignment of Contractual Rights' (1983) 42 *Cambridge LJ* 328; G. McMeel, 'The Modern Law of Assignment: public policy and contractual restrictions on Assignability' [2004] *LMCLQ* 483.

¹⁵⁴⁸ *W & A Geddes Ltd v Ewen Stewart* 1991 GWD 13-752 OH *per* Lord Coulsfield (Ordinary) (transcript available on Lexis-Nexis). See too the authorities in the preceding note. The earliest example in Scots law seems to be *Abbot of Kilwinning v Auchinleck* (1533) Mor. 827; Balfour, *Practicks* p. 205 § 130. Scots law is, in this respect, similar to German law (see § 399 *BGB*) and unlike French law. For comparative discussion, see U. Goergen, *Das Pactum de non cedendo* (2000) 42 ff (Germany) and 116 ff (France) and references there cited. For a helpful introduction to Austrian law in English, see F. Raber, 'Contractual Prohibition of Assignment Clauses in Austrian Law' (1989) 64 *Notre Dame LR* 171. A *pactum de non cedendo* does not, of itself, prevent sub-contracting: *Rothead v Moodie* (1687) Mor 10392.

¹⁵⁴⁹ It is open to question whether a contract, the obligatory agreement, to transfer an unassignable right is void for impossibility. The doctrine of frustration in Scots law applies to supervening (as opposed to antecedent) impossibility. In McBryde's view, 'if the subjects are inalienable, a contract for their sale is void': McBryde, *Contract* para 3-07. He cites *Magistrates of Kirkaldy v Marks & Spencer Ltd* 1937 SLT 574 at 577 *per* Lord Jamieson (Ordinary). But these remarks were *obiter*. Further, they did not address the underlying rationale for such a rule: in the civilian tradition, specific implement was the primary remedy for non-performance; so a court would not compel the impossible. There was never any such rule in English law, where specific performance was an equitable remedy; contracts to do the impossible could, therefore, be treated as valid with damages being awarded for non-performance: see generally Sir Guenter Treitel, *Frustration and Force Majeur* (2nd ed. 2004) paras 1-001 to 1-002. As it happens, German law was amended in 2002 so that a contract to do the impossible is not void; but no order for implement can be made: §§ 311a and 275 I *BGB*. Scots law is somewhere between the traditional civilian position and the English: specific implement is awarded as of right; but, where performance is impossible, the pursuer has no right to implement. This writer would suggest that in Scots law a contract to assign an unassignable right would be valid; the cedent being liable in damages for non-performance. For a different view, see McBryde, *Contract* para 20-11.

¹⁵⁵⁰ *Linden Gardens Trusts Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 105A *per* Lord Browne-Wilkinson.

¹⁵⁵¹ See R.M. Goode, 'Inalienable Rights?' (1979) 42 *MLR* 553 at 555 to similar effect.

Some, however, have expressed reservations as to such a rule on the ground that it has the potential to undermine the free circulation of assets. The abolition of prohibitions on transfer has been identified as one of the aims of the French revolution.¹⁵⁵² The ability to freely transfer one's assets being one of the fundamental tenets of individual liberty; consequently, the contractual prohibition on the transfer of a right cannot be given effect:

« Or la propriété individuelle est la base principale de notre organisation sociale. Son attribut constitutif est la liberté de disposer ; donc toute convention qui tendrait à détruire ou même seulement à restreindre cette liberté en dehors des cas autorisés par la loi doit être considérée comme radicalement nulle. Pour conséquence, dans la vente, tout clause qui tendrait à restreindre dans la personne de l'acheteur la liberté d'aliéner à son tour serait nulle et de nul effet. »¹⁵⁵³

Modern French law continues to take this approach.¹⁵⁵⁴ But does it apply to claims? It could be argued that the *pactum de non cedendo* was not an evil which the revolution sought to remedy. The proscription on free alienation is primarily concerned with land. Nevertheless, it must be remembered that in French law – in this respect like Scots law – *cession* was then common. It was seen as just one type of sale. It is perhaps, therefore, not sufficient to argue that the *pactum de non cedendo* can be treated differently than provisions seeking to restrict the transfer of immoveables. Other jurisdictions give effect to contractual prohibitions in general,¹⁵⁵⁵ but refuse to accord validity to such stipulations in commercial contracts.¹⁵⁵⁶ Scholars have voiced the concern that the cost of giving effect to contractual prohibitions, the

¹⁵⁵² H. Kötz, *Europäisches Vertragsrecht* (1996) § 14, 416 (trans. T. Weir, *European Contract Law* (1997), 273)

¹⁵⁵³ T. Huc, *Traité théorique et pratique de la cession et de la transmission des créances* (1891) vol 1 para 34. The same author concedes (at para 37) that different considerations apply to a gratuitous obligation: 'on peut admettre en effet que dans les contrats à titre onéreux la situation des parties est égale; chacun défend sa position et la clause illicite paraît être l'œuvre des deux contractantes. Il n'en pas de même dans les dispositions à titre gratuit. L'auteur de la libéralité impose sa loi; la bénéficiaire la subit'.

¹⁵⁵⁴ Cass.com, 21 November 2000, D. 2001, 123, noted by V. Avena-Robardet. Cf. Art. 544 *Code Civil*: 'la propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements'. Would claims (*créances*) be regarded as '*propriété*' in French law? Cf. S. Ginossar, *Droit réel, propriété et créance* (LGDJ, 1960). Similarly, U. Goergen, *Pactum de non cedendo* (2000), 118, states that in French law, all claims are, in principle, freely transferable, referring to Art. 1598 *Code Civil*. This article of the *Code Civil* merely states that 'tout ce qui est dans le commerce, peut être vendu lorsque des lois particulières n'en ont pas prohibé l'alienation'. However, that one can enter into a contract of sale in respect of a claim does not mean that a purported cession in breach of a contractual prohibition will necessarily be effectual. This is one of the problems of the causal system. Similarly problematic is the location of 'cession' in the *Code Civil* under the title of sale. Cf. § 137 *BGB* which is in similar terms. The provisions on cession under § 399 *BGB* (which allow a prohibition on cession to take effect) are seen as a derogation from the general principle that the power to alienate assets cannot be circumscribed by contract: see Goergen, *Das Pactum de non cedendo* (2000), 49.

¹⁵⁵⁵ See e.g. § 399 *BGB*.

¹⁵⁵⁶ § 354a *HGB*. This amendment was introduced in 1994. See generally, M. Müller-Chen, 'Abtretungsverbote im internationalen Rechts- und Handelsverkehr' in I. Schwenzer and G. Hager, *Festschrift für Peter Schlechtriem* (2003), 903.

free circulation of claims, is a price not worth paying. Free circulation, they argue, is crucial to economic development, is a price not worth paying.¹⁵⁵⁷ This point, though often repeated, can be overstated. Bills of exchange, for example, are always available to facilitate free circulation.

Huc's approach is similar to that taken by Bankton¹⁵⁵⁸ and Erskine.¹⁵⁵⁹ They refer to an important tract of Scottish authority for the proposition that a prohibition on assignation is ineffective; at any rate ineffective to prevent an onerous assignation. These authorities seem to have been forgotten.¹⁵⁶⁰ They are collected in Morison's dictionary under a title that is not immediately obvious: 'Fiar, absolute, limited'. The cases deal with so-called 'bonds of provision' which contained resolutive clauses. Such clauses were borrowed from the feudal system, to signify 'the granter's intention, that the succession shall not be altered to his prejudice, but that the subject shall return to him, when the heirs named are exhausted'.¹⁵⁶¹ It is one of these causes that Forbes cited for the wide proposition that 'even bonds secluding assigneys may for onerous and necessary causes be assigned'.¹⁵⁶² However, the authorities cited for this proposition deal with something that is quite separate: substitution. A *pactum de non cedendo* renders a voluntary assignation in breach of it invalid; a substitution is evacuated on an inconsistent conveyance by the initial grantee.¹⁵⁶³

"A clause of return, is that by which a sum in a bond or other right, or any part of it, is provided in a particular event to return to the granter and his heirs: It is therefore truly a species of substitution, by which the granter provides, that the right shall, in default of the grantee, go, not to a third person, as in a common

¹⁵⁵⁷ See, in particular, H. Kötz, *Europäisches Vertragsrecht* (1996) § 14, 416-417 (trans. T. Weir, *European Contract Law* (1997), 274); R. Goode, 'Inalienable Rights' (1979) 42 *MLR* 553.

¹⁵⁵⁸ III.i.20.

¹⁵⁵⁹ III.viii.38-45. See too, Y.M.J.V. Boon, *Assignment of Contract: a Study in Comparative Law* (Unpublished M. Litt. Thesis, University of Aberdeen, 1972), 170, citing D.M. Walker, *Principles of Scottish Private Law* (1970) vol 2, 1505.

¹⁵⁶⁰ For example, none were cited in the most recent decision on the subject: *James Scott Ltd v Apollo* 2000 SC 228.

¹⁵⁶¹ Kames, *Elucidations*, Art. 12, 79. Other cases (e.g. *Woollen Manufactory at Haddington v Gray* (1781) Mor 9144) involve a husband granting a contingent liferent in favour of his wife in bonds, should he predecease her, which he then assigns. These cases are interesting in so far as they suggest that it is possible to have a liferent in a debt. It must be assumed that this is a reference to an improper liferent.

¹⁵⁶² W. Forbes, *Bills of Exchange* (2nd ed. 1718), 80 citing *Strachan v Barclay* (1683) Mor 4310; W. Forbes, *The Institutes of the Law of Scotland* (Edinburgh, 1722), Part III, Book 1, Chapter 1, Title 2, § 1.2.

¹⁵⁶³ *Sinclair v Sinclair* (1738) Kilkerran 192; Mor 4344 See e.g. the arguments in *Boswell v Arnott* (1759) Mor. 12578 at 12579. *Wauchope v Gibson* (1752) Mor 4404 suggests that a substitution can even be evacuated by a gratuitous assignation. Cf. the decision of the *Cour de Cassation*, Civ. 1st June 1853, D.P. 1853.I.191 where the advocate general made reference to the law of substitution in a case dealing with an apparent prohibition on cession. In French law, substitution – in the strict sense: restraint on voluntary alienation by the grantee during his lifetime – was prohibited following the revolution: see Art. 896 *Code Civil*. See also Arts. 900-1 ff. For a helpful, simple introduction to the idea of substitution in Scots law, see D.R. Macdonald, *Succession* (3rd ed. 2001) para 10.36. Cf. Erskine III.viii.44.

substitution, but to himself. And the known rule of simple substitutions, That the institute can defeat the substitution, even by a gratuitous deed, hath been applied to clauses of return... Where a bond is granted for an onerous cause, though it should contain a provision of return, the creditor is not barred from altering the destination, even gratuitously; because such clause is considered as proceeding from the will of the creditor alone, and so is of the nature of a special destination....¹⁵⁶⁴ But where the sum contained in the obligation flows from the granter, as in bonds of provision, donations, &c, or where there is any other good cause for the provision of return in his favour, the creditor's right of fee is limited, so that he cannot frustrate the return gratuitously¹⁵⁶⁵."

Admittedly, the cases are not consistent.¹⁵⁶⁶ It has been held that a clause 'secluding assignees' in a bond of provision does not apply to legal assignments.¹⁵⁶⁷ Some of the cases only go so far to hold that an assignment in breach of a 'clause of return' will be ineffectual if the assignment is gratuitous;¹⁵⁶⁸ but that an onerous assignment in breach of the clause will be valid.¹⁵⁶⁹ However, there are examples of a substitution being defeated by a gratuitous assignment.¹⁵⁷⁰ In *McKay v Campbell's Trs*, Lord Medwyn observed that the decisions were conflicting and could not be rationalized. Instead, he suggested, following Kames,¹⁵⁷¹ that the following principles should be applied:¹⁵⁷²

- (i) Where a grant or conveyance is onerous or necessary,¹⁵⁷³ the clause of return is considered gratuitous; consequently, it may be defeated gratuitously (*a fortiori*, one would imagine that it can be defeated onerously).
- (ii) If the grant or conveyance is gratuitous and voluntary,¹⁵⁷⁴ a clause of return cannot be defeated by a gratuitous grant of the donee (no mention is made, however, as to whether it can be defeated by an inconsistent onerous conveyance).

¹⁵⁶⁴ Referring to *Murray v Murray* (1680) Mor 4339; *Robertson v Mackenzie* (1737) Mor 9441.

¹⁵⁶⁵ Erskine III.viii.45, referring to *Drummond v Drummond* (1679) Mor 4338; *College of Edinburgh v Mortimer, Scot and Wilson* (1685) Mor 4342.

¹⁵⁶⁶ See e.g. *Lawrie v Borthwick* (1683) Mor 4339.

¹⁵⁶⁷ *Strachan v Dumbar* (1714) Mor 4312.

¹⁵⁶⁸ *Home v Lord Justice-Clerk* (1671) Mor 4377; *Grahame v Laird of Morphie* (1673) Mor 4305; 2 Stair 206; *Drummond v Drummond* (1679) Mor 4338; *Drummond v Drummond* (1683) Mor 4341; *Macreadie v Macfadden's Exrs* (1752) Mor 4402; *Stewart v Stewart* (1669) Mor 4337; *Lewis v Lawrie* (1736) 5 Br Sup 161; *Boswell v Arnott*, 7th February 1759 FC; Mor 12578; *Duke of Hamilton v Douglas* (1762) Mor 4358.

¹⁵⁶⁹ E.g. *Napier and Johnston v Johnston* (1740) Kilkerran 192; Mor 4344; *Nairns v Creditors of Nairn of Greenyards* (1749) Mor 4348; *Weir v Drummond* 28th November 1752 FC; (1752) Mor 4314. This is consistent with Huc's position quoted in n. 1553 above.

¹⁵⁷⁰ *Lewis v Lawrie* (1736) 5 Br Sup 161.

¹⁵⁷¹ Kames, *Elucidations*, Art. 12, at 81.

¹⁵⁷² (1835) 13 S 246 at 250.

¹⁵⁷³ On the facts of the case, the conveyance was in pursuance of a marriage contract, which Lord Glenlee described as 'the most onerous of all contracts'.

¹⁵⁷⁴ These requirements seem to be cumulative.

- (iii) If the clause of return is not in favour of the granter himself, but a third party, 'it is held to be' gratuitous and defeasible by the grantee or substitute
- (iv) Even if the grant or conveyance is gratuitous, where there are intervening substitutes, any clause of return may be defeated gratuitously by the grantee.

This analysis, though not without its problems, does at least provide a starting point. To recapitulate, then, a *pactum de non cedendo* renders a purported assignation in breach invalid. A clause of return or substitution does not invalidate an inconsistent assignation invalid where the grant was onerous; where the grant was gratuitous, however, the clause of return is viewed as an intrinsic condition of the grant; as a result, an inconsistent assignation will be invalid.

B. International Developments.

In the *Principles of European Contract Law*, the general principle is that contractual prohibitions are effectual.¹⁵⁷⁵ However, this is subject to two important caveats. An assignee who did not know (and could not have known) of the prohibition is protected.¹⁵⁷⁶ Importantly, contractual prohibitions will not have effect if the prohibition relates to a future payment.¹⁵⁷⁷

Interestingly, however, the UNCITRAL convention,¹⁵⁷⁸ and the UNIDROIT *Principles of International Commercial Contracts*¹⁵⁷⁹ both deny effect to contractual prohibitions on assignation.¹⁵⁸⁰ The free movement of claims and their ready utilisation as collateral is seen as a preferable policy to that of freedom of contract. There is, however, some incongruency between the provisions in these instruments, which seek to render such a contractual prohibition ineffective, and the provisions which allow the debtor to raise all defences against an assignee which he could have raised against the cedent. Admittedly, the *pactum de non cedendo* is only triggered on a purported transfer in breach of it. But it could give rise to a defence against the cedent. Suppose the debtor becomes aware that the cedent

¹⁵⁷⁵ Art. 11:301(1).

¹⁵⁷⁶ Art. 11:301(1) (b).

¹⁵⁷⁷ Art. 11:301(1) (c).

¹⁵⁷⁸ Arts. 11, 19 and 20 (3).

¹⁵⁷⁹ Art. 9.1.9 (1), (2nd ed. 2004). See too the provisions of the American UCC to similar effect: § 9-318(4); §§ 9-406-408 UCC. Discussed in J.A. Stuckey, 'Louisiana's Non-Uniform Variations in UCC Chapter 9' (2002) 62 *Louisiana Law Review* 793 at 849

¹⁵⁸⁰ Compare the German position under § 161 *BGB*.

intends to assign in breach. The debtor would be able to call on the cedent to refrain from breaching this term of the contract; ultimately, an interdict could be obtained.

Moreover, the more fundamental policy of freedom and enforcement of contract can be offered to meet the economic arguments preferred by these international instruments. It is surprising that instruments which seek to expedite commercial transactions do so by subverting the most basic legal principle of a commercial society: that people are entitled to assume that contracts freely entered into will be honoured. Nonetheless, the law's failure to give effect to a contractual prohibition on assignation could, arguably, be circumvented. Instead of a prohibition on assignation, a resolutive condition could be inserted. This would be triggered on any attempted transfer of a claim. The assignation is valid, but empty: the underlying obligation is discharged by the purported assignation and the assignee obtains nothing. This argument is controversial.¹⁵⁸¹ However, the courts do give effect to resolutive conditions in Scots law, in the form of irritancy clauses in leases. There is one case where an irritancy for breach of a prohibition on assignation of a lease was upheld.¹⁵⁸² The combined effect of such a clause is to invalidate not only the purported assignation, but also the underlying right which was to be assigned.¹⁵⁸³ In the law of leases, there is no right to purge a

¹⁵⁸¹ R. Goode, 'Inalienable Rights' (1979) 42 *MLR* 553 at 557 pre-empts this argument. In his view, such a term would amount to an 'unconscionable forfeiture' (but see A.W.B. Simpson, 'Penal Bonds and Conditional Defeasance' (1968) 82 *LQR* 392). This is not part of Scots law. In any event, forfeiture clauses are apparently common in employee pension schemes, the forfeiture taking effect on the employee's bankruptcy: *In re Malcolm* [2005] ICR 611. Moreover, the balance of opinion is of the view that *as a matter of contract*, Scots law gives effect to resolutive conditions, unlike in Roman law (where certain *pacta legis commissoriae* were held to be *contra bonos mores*). They will be strictly construed. Admittedly, the sources are not consistent. At I.xiii.14 and I.xiv.4, Stair says that clauses irritant are allowed in pledges; at II.x.6 and IV.xviii.5 he says the opposite: irritant clauses are prohibited in pledges; but allowed in sales: II.x.6. As he rightly points out, however, in sales such a condition has no 'real' effect: Stair I.xiv.5. Erskine II.viii.14 allows them, but not where they are penal. See too Erskine, *Principles* (21st ed. 1911) II.vii.5. Bankton I, 417, 29 says that irritancy clauses are allowed in securities, although they are purgeable until declarator. Bell, *Commentaires* I, 260 (7th ed. 1870) follows Stair in so far as resolutive clauses have no real effect in sales; and at II, 270 says that such clauses 'have always been discountenanced in Scotland'. Like the institutional writers, W. Ross, *Lectures*, vol II, 341 refers to an Act of Sederunt of 1592 (see A.S. 27th November, 1592) requiring such conditions to be strictly construed. Writing in his retirement from the Lord Presidency, Sir Ilay Campbell said that this Act of Sederunt was an example of the 'various instances [in which] the Court made declaratory acts connected with the decision of particular causes, in order that the rule of decision might be better known, and followed as a precedent in time coming': Sir Ilay Campbell, *Remarks on the Acts of Sederunt* (1809), 9.

¹⁵⁸² *Lyons v Irvine* (1874) 1 R 512. See too *Blythswood Investments (Scotland) Ltd v Clydesdale Electrical Stories Ltd (in receivership)* 1995 SLT 150.

¹⁵⁸³ Cf. A. Mackenzie Stuart, 'Irritancies' in Lord Dunedin et al (eds) *Greens Encyclopaedia of the Laws of Scotland*, vol 8 (1929) para 985 states: 'A condition frequently fenced with an irritancy is the usual prohibition against assigning and sub-letting. The addition of the irritancy is designed to enable the landlord not only to avoid the assignation or sublet in virtue of the prohibition but also to cut down the assignee's right'. This is wrong on two counts. First, the assignation is void, so the assignee takes nothing; second, the effect of the irritancy is to cut down the cedent's right, not the assignee's (the assignee, as a result of the void assignation, has no right to cut down). A similar passage, but with these corrections, is in G.C.H. Paton and J.G.S. Cameron, *The Law of Landlord and Tenant in Scotland* (1967), 231: 'The exclusion [on assignation/subletting] may be fenced

conventional irritancy, and any performance already rendered by the cedent cannot be recovered by way of unjustified enrichment.¹⁵⁸⁴ Admittedly, the law is regarded as unsatisfactory; but this extends only to the consequences of irritancy in leases of land.¹⁵⁸⁵ There has been no suggestion that, as a matter of general principle, resolute conditions are repugnant.

C. Effect of a *Pactum de non cedendo* on Creditors.

The general principle is that what is transferable by assignation is arrestable; what is not assignable cannot be arrested. However, if a *pactum de non cedendo* is valid against creditors, the consequences would be serious: by virtue of a mere agreement with a third party, the bankrupt can ensure that the general body of creditors takes nothing.¹⁵⁸⁶ Unassignable claims cannot vest in a trustee in sequestration, it has been held,^{1586a} because vesting is the equivalent of an intimated assignation in security in favour of the trustee.¹⁵⁸⁷ Some deeds attempt to bring about the same effect by the insertion of a clause in the *assignation* that the claim is not attachable by creditors.¹⁵⁸⁸ This is clearly ineffectual. But what if such a clause is inserted in the underlying claim which a trustee in sequestration may wish to realise? It seems to this writer that it would be repugnant to the principles of Scottish bankruptcy law, not to say basic fairness, to allow the rights of creditors to be frustrated by such a simple device. Consequently, prohibitions on transfer in the original contract out of which the assigned claim arise, as well as purported prohibitions in the transfer agreement, cannot prejudice creditors: 'A man's property may be effected by diligence', says Lord Kames, 'whatever private obligation he is under'.¹⁵⁸⁹ In the same vein, Lord Deas has asserted that, 'No one is entitled so to protect his means against his own onerous obligations and the claims of his lawful creditors'.¹⁵⁹⁰ This would suggest that a *pactum de non cedendo*, even if

with an irritancy clause the object of which is not only to prevent the assignation or sublet but to cut down the right of the cedent'.

¹⁵⁸⁴ *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1992 SC (HL) 104 (where the outlays amounted to some £22 million). The decision on unjustified enrichment is reported at 1998 SC (HL) 90. Cf. *Steadman v Drinkle* [1916] 1 AC 275, where a resolute condition was treated as an illegal penalty clause.

¹⁵⁸⁵ Which were already ameliorated by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1986. See recommendations of the Scottish Law Commission, *Report on Irritancy in Leases of Land* (2003), No. 191.

¹⁵⁸⁶ Cf. § 851 ZPO and L. LoPucki, 'The Unsecured Creditor's Bargain' (1994) 80 *Virginia L. Rev.* 1887 at 1891.

^{1586a} *Mulvey v Secretary of State for Social Security* 1996 SC 8 aff'd 1997 SC (HL) 105.

¹⁵⁸⁷ Bankruptcy (Scotland) Act 1985, s. 31.

¹⁵⁸⁸ E.g. Juridical Society of Edinburgh, *Juridical Styles* (3rd ed. 1794) III, 247.

¹⁵⁸⁹ *Hastie & Jamieson v Arthur* (1770) Hailes 380 at 381.

¹⁵⁹⁰ *Ker's Tr. v Justice* (1866) 5 M 4 at 10.

it is effective to render an *inter vivos* assignation in breach of it invalid, cannot have any effect on involuntary assignations.¹⁵⁹¹ In other words, such debts remain arrestable by creditors;¹⁵⁹² further, they will fall into the sequestration of the cedent.¹⁵⁹³ Admittedly, it is common practice in leases to exclude not just voluntary assignees, but also legal assignees.¹⁵⁹⁴ This writer would doubt the efficacy of such a term. In any event, they can be distinguished. Leases are exceptional. They involve mutual rights and obligations. The landlord is wary of having a tenant forced upon him.¹⁵⁹⁵ But would a provision in an ordinary contract excluding legal, as well as conventional, assignees be effective to prevent the vesting of a *claim* in a trustee in sequestration?¹⁵⁹⁶ This writer is of the view that such a provision cannot be regarded as effective. It must be conceded, however, that there is considerable authority for the contrary view, particularly with regard to leases.¹⁵⁹⁷ But it must be remembered that, on bankruptcy, the debtor, by definition, cannot give effect to his obligations; that being so, it is hardly rational to provide that the one stipulation granted by him which can be given full effect, is the one that succeeds in depriving his creditors even further.

D. Some Interpretation Issues.

Does a *pactum de non cedendo* prohibit the purported creation of a trust in favour of the putative assignee? Two recent cases in England seem to have answered this in the negative,¹⁵⁹⁸ but they have been trenchantly criticised.¹⁵⁹⁹ In Scots law, where the cedent

¹⁵⁹¹ Cf. P.M. Nienaber, 'Cession' in W.A. Joubert et al (eds.) *The Law of South Africa*, 2nd edn, vol 2, Part 2, (2003) para 37. It should be remembered that contractual prohibitions in the contract out of which the claim arises is not always effective in South African law; but see *Durban County Council v Liquidators, Durban Ice-drones Ltd* 1965 (1) SA 600 (A) at 612.

¹⁵⁹² For example, Sir George Mackenzie, *Inst.* (2nd ed. 1688) II.viii at 165-166 observes that reversions could not be voluntarily assigned where they did not bear to assignees; irrespective of whether they bore to assignees, however, they could still be appraised (i.e. arrested) by creditors. Erskine II.viii.7 makes the same point.

¹⁵⁹³ Cf. *Krasner v Dennison* [2001] Ch 76 at 99C *per* Chadwick LJ: 'The starting point, as it seems to me, is the long established principle that it is contrary to the public interest to allow a party to contract out the operation of the bankruptcy code'. For an unsuccessful argument that vesting of annuity was a breach of the bankrupt's human rights, see *In re Malcolm* [2005] ICR 611 CA.

¹⁵⁹⁴ For example, *Dobie v Marquis of Lothian* (1864) 2 M 788.

¹⁵⁹⁵ Paradoxically, such a tenant would be particularly credit worthy: the trustee will be personally liable for any lease he adopts. This liability extends to arrears of rent: *Dundas v Morison* (1857) 20 D 225.

¹⁵⁹⁶ See e.g. Juridical Society of Edinburgh, *Juridical Styles* (5th ed. 1881) I, 638.

¹⁵⁹⁷ See J. Rankine, *The Law of Leases in Scotland* (3rd ed. 1916), 177 and authority there cited. The point does not seem to be settled in England: Cf. *In re Landau (A Bankrupt)* [1998] Ch 223 at 237B-C and *Krasner v Dennison* [2001] Ch 76 at 99H-100A.

¹⁵⁹⁸ *Don King Productions Inc v Warren* [2000] Ch 291; *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221.

¹⁵⁹⁹ See, above all, the commentaries by Professor A.M. Tettenborn, 'Trusts and Unassignable Agreements' [1998] LMCLQ 498; *idem.*, 'Trusts and Unassignable Agreements – Again' [1999] LMCLQ 353 (both on *Don King*); *idem.*, 'Prohibitions on Assignment – Again' [2001] LMCLQ 472 (*Foamcrete*).

becomes a trustee, this has the opposite effect from assignation. As trustee, the cedent remains creditor. The beneficiary has only a personal right against the trustees; he has no rights against trust debtors.¹⁶⁰⁰ As a strict matter of interpretation, therefore, a prohibition on assignation in Scots law will not cover a trust.¹⁶⁰¹

Does a prohibition on assignment of the *contract* prohibit assignation of the rights arising out of it without the debtor's consent?¹⁶⁰² In this writer's view it does not. Contracts cannot be assigned without the consent of the original parties to the contract. A clause prohibiting assignment without the consent of the debtor merely expresses what the law already implies. Indeed, because assignment of contract can only occur with the consent of the original parties, that consent can always supersede the original contract terms. Assignment of claims is different. Such an assignation is not covered by the prohibition: *expressio unius exclusio alterius*. Of course, such an issue is a question of interpretation. Questions of interpretation turn on the facts of the case. However, a *pactum de non cedendo* is a restraint on alienation. Freedom of alienation is one of the basic incidents of transactional autonomy. Consequently, any purported limitation on this freedom will be construed strictly. That the preferred interpretation empties a clause prohibiting assignment of the contract of all content is no answer: contracts and conveyances regularly contain superfluous or meaningless clauses.¹⁶⁰³

Scots law in this area can be summarised thus:

- (1) A *pactum de non cedendo* renders a voluntary assignation in breach of it invalid.
- (2) A *pactum de non cedendo* does not prevent the claim being attached by creditors or other involuntary assignation of it.¹⁶⁰⁴

¹⁶⁰⁰ Compare the position in English law. There the most common assignment is the equitable assignment. Claims like debts are 'legal' interests. To obviate the formalities of a legal assignment, the equitable assignment is usually relied upon. However, the rights of an equitable assignee cannot be understood without reference to the trust. The assignor becomes a trustee for the assignee. Only where there is a double assignment of the same debt is the trust basis rendered inadequate. As a result, first good faith notification to the debtor will effect a transfer. Equitable interests can be transferred in equity without notification and at law if the formalities of the Law of Property Act 1925, s. 136 are complied with.

¹⁶⁰¹ Which is not to say that a trustee-trustee trust over proceeds of a claim will always be valid; especially where the trust is used to frustrate the claims of lawful creditors. But this is a general issue and not particular to circumvention of prohibitions on assignation.

¹⁶⁰² See e.g. *Bawajan Ltd v M C Fabrications* [1999] 1 All ER (Comm) 377 CA where the clause ran: 'The contract is not transferable or assignable by either party without the written consent of the other party'.

¹⁶⁰³ Cf. Ross, *Lectures*, II, 165 quoted by Reid, *Property* para 641, n. 4 and reproduced in chapter 3 above, n. 548.

¹⁶⁰⁴ *Forbes v Forbes* (1740) Mor 10404; Kilkerran 396.

- (3) Alimentary provisions are neither arrestable nor assignable in so far as they are genuinely alimentary,¹⁶⁰⁵ even if they are expressly granted to assignees.¹⁶⁰⁶
- (4) Where a grant includes a 'return' clause, this should be interpreted as a substitution. As a result, it can be evacuated by a voluntary disposition for good consideration; but not if the assignation is gratuitous.
- (5) Prohibitions on alienation will be strictly construed.

VI. Accretion.

Where there has been a purported transfer by one who is not entitled, but that transferor subsequently becomes entitled, the doctrine of accretion can operate. The asset is transferred without the need for a new conveyance. The law implies what the granter is bound to do by the warrandice in the *a non domino* transfer.¹⁶⁰⁷ It has, however, been doubted whether the doctrine of accretion applies to moveables.¹⁶⁰⁸ There is little discussion of the application of the doctrine to the assignation of a money claim. On the authority of Stair himself, however, it seems that, in principle, accretion is equally applicable to the assignation of personal rights as it is to transfers of other assets:

“In both dispositions and assignations, the disponent or cedent is called author, and the acquirer is called singular successor, and in both, this common brocard takes place, *jus superveniens auctori accrescit successori*, that is, whatever right befalleth to the author after his disposition **or assignation**, it accresceth to his successor, to whom he had before disposed, as if it has been in his person when he disposed, and as if it has been expressly disposed by him...”¹⁶⁰⁹

The First Division has also confirmed that the doctrine of accretion is applicable to assignation,¹⁶¹⁰ and the applicability of the doctrine to assignation has also been accepted by

¹⁶⁰⁵ See authority cited in n. 1383. Cf. *Irvine v Crawford* (1705) Mor 10397 and *Calder v Relict and Children of Kenneth Mackenzie* (1776) Mor, 'Personal and Transmissible' App. No. 1; Kames Sel Dec 187.

¹⁶⁰⁶ *Urquhart v Douglas* (1738) Mor 10403.

¹⁶⁰⁷ See Bell, *Principles* (10th ed. W. Guthrie, 1899) § 881: 'the law doing what the granter is bound to do', quoted in Reid *Property* para 677.

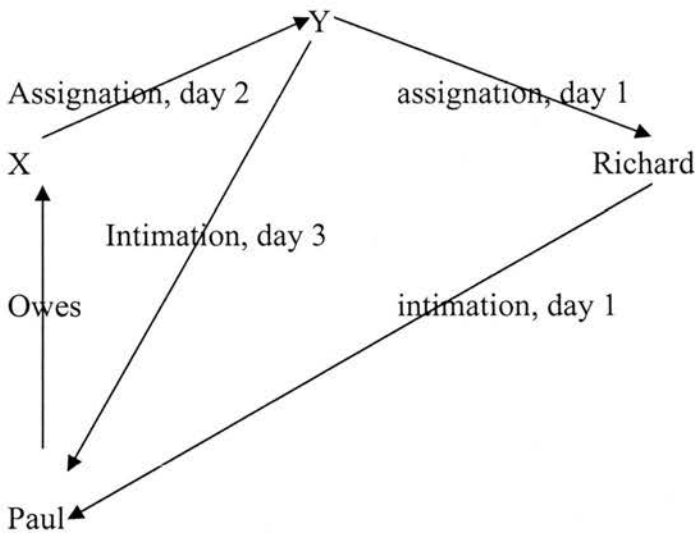
¹⁶⁰⁸ Reid, *Property* para 678; G.L. Gretton, 'The Assignation of Contingent Rights' 1993 *JR* 23. See also the dictum of Lord Low in *Burnett's Trs v Burnett* 1909 SC 223 at 226: '...a right cannot be assigned unless the assignor had that right vested in him'.

¹⁶⁰⁹ Stair III.ii.1 (emphasis added). See also Erskine II.vii.3.

¹⁶¹⁰ *Smith v Wallace* (1869) 8 M 204 at 211 *per* Lord Kinloch: 'I cannot accede to the doctrine that the principle of accretion only operates to support an infestment. I think it equally operates to support a mere personal right'. See also *per* Lord Ardmillan at 216: 'I give the pursuer the benefit of the accretion; for I retain the opinion which I expressed in the case of *Swan [v Western Bank]* (1866) 4 M 663], that accretion is not so much a rule of conveyancing, or a principle of feudal law, as a principle of equity introduced as a remedy against a wrong, and a

the House of Lords in the context of an assignation of a patent.¹⁶¹¹ The classic case of accretion by title is well known. A purports to transfer to B property which is in fact owned by C. B records his disposition.¹⁶¹² Thereafter, C transfers the property to A. By virtue of the doctrine of accretion, B becomes owner *ipso iure*. It is probably the case that accretion in this classic sense can apply to the assignation of claims. However, matters are more problematic due to the presence of the debtor. Assignation must be completed by intimation to the debtor. If the debtor receives intimation of an assignation which was granted by someone who was never the debtor's creditor, the debtor will – and ought to – refuse to pay.

Suppose Paul is indebted to X. On day 1, Y purports to assign X's claim against Paul to Richard. Richard intimates to Paul on day 1. On day 2 X assigns to Y. On day 3, Y intimates to Paul.



manuiment to the title arising out of the warrandice.' Lord President Inglis also concurred in this opinion at 217. Compare the report of Inglis' opinion at (1869) 7 SLR 122 at 127.

¹⁶¹¹ *Buchanan v Alba Diagnostics Ltd* 2004 SC (HL) 9 at para 19 *per* Lord Hoffmann. For criticism see R.G. Anderson (2005) 9 *Edin LR* 457.

¹⁶¹² In the case of land registered in the Land Register, the position is different: B will become owner if he is registered as the Land Register is a register of title.

On general principles, Richard's intimation on day 1 will be ineffectual: X had nothing to assign. Moreover, the debtor, Paul, will not only not know the putative assignee, Richard (which is normal), but he will never have heard of the cedent. According to the doctrine of accretion, on day 3, the law implies a transfer from X-Y-Richard. The legal effect is achieved on the transfer from the true creditor, X, to Y. As a result, Paul ought to pay Richard, not Y; though on day three the intimation that Paul receives will be from Y, not the true creditor, Richard. And Y's intimation is likely to say nothing about Richard. The issue of debtor protection is somewhat separate from the question of whether accretion can operate in principle in an assignation. However, since it is likely to give rise to the greatest problems, we will deal with it first.

Is there good faith protection for Paul if he pays:

- (a) Richard on day 1?
- (b) X on day 1?
- (c) Y on day 1?
- (d) Richard on day 2?
- (e) X on day 2?
- (f) Y on day 2?

While the debtor should be protected from having to make onerous enquiries, he will not be protected for paying someone he knows is not his creditor. The debtor should not, therefore, be protected in case (a): the debtor has no defence if he pays someone waving an assignation in his face that patently bears to have been granted by someone who is not his creditor. On day 1, X is still Paul's creditor. So in (b) there is no issue of good faith payment. Paul is simply paying his creditor. Similarly, in case (c), Y is a complete stranger to the debtor, so there should be no good faith protection here. On day two, however, the debtor has received a second intimation. Where there are competing intimations, the first is preferred.¹⁶¹³ But this presupposes that the intimations are good. While lawyers can work out who ought to have been paid in this situation (by virtue of the doctrine of accretion) the question for debtor protection is

¹⁶¹³ The complexities of the offside-goals rule will be ignored here.

whether, in the confusion, the debtor should be protected; even if, from a lawyer's perspective, his actions are irrational. In case (d) there is no issue of good faith protection: Richard is the creditor by virtue of the doctrine of accretion. However, since the matter has become complex, arguably the debtor should be protected providing he can show that whomsoever he paid, he did so in good faith. The test must be subjective. If the debtor has taken legal advice, then it seems unlikely that the good faith defence can be relevant. The lawyer, one would hope, would properly identify the true creditor. But it would be a brave lawyer who advised that, in our example, Richard should be paid because of the operation of accretion. The obvious advice is to raise a multiplepinding.

As was suggested above, there seems no reason to hold that accretion cannot apply, in principle, to assignments. The above has demonstrated, however, that there will be considerable problems in ensuring that the debtor pays the correct person. Moreover, even if there can be an application of the doctrine of accretion, there remains the question of the intervening insolvency of the first cedent. It is clear that the accretion is merely 'the law doing what the grantor is bound to do'.¹⁶¹⁴ It is based on the personal obligation in the warrandice. As a result, where the cedent, through whose patrimony the claim must pass, becomes insolvent, the doctrine of accretion cannot operate. In *Buchanan v Alba Diagnostics Ltd*,¹⁶¹⁵ there are dicta from Lord Hoffmann which suggested a contrary result. But these dicta are unintelligible and cannot be correct.

Accretion and Future Rights.

Accretion is of further importance to the law of assignation. It has long been suggested that accretion can be applied analogously to the assignation of future rights. The idea seems to be based on dicta of Lord Rutherford Clark in *Reid v Morrison*:

"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

¹⁶¹⁴ Bell, *Principles* (10th ed. 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 M 663; *Smith v Wallace* (1869) 8 M 204.

¹⁶¹⁵ 2004 SC (HL) 9; 2004 SLT 455.

by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest.”¹⁶¹⁶

This dictum is unhelpful. On the one hand, ‘an expectant cannot sell’; on the other, the effect is that there is ‘nothing but a mere agreement’. Although not all agreements are sales, all sales are certainly agreements. There is therefore considerable overlap in what Lord Rutherford Clark says is permitted and what is prohibited. Moreover, Lord Rutherford Clark 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 is simply wrong. After all, if there were no more than a personal obligation to grant a disposition then the doctrine of accretion could not apply. It is a principle of property law. For accretion to operate there must be a purported disposition or assignation followed by either registration or intimation. The disadvantages are two-fold: first, the chances of the debtor actually paying the person who is the true assignee are slim; second, there will be no protection for an assignee if there is an intervening insolvency of one of the cedents. The operation of accretion in assignation is therefore uncertain and, for the intended assignee, insecure. As a basis for the large scale transfer of book debts, or indeed other commercial transactions, it will therefore be very much a doctrine of last resort.¹⁶¹⁷

¹⁶¹⁶ *Reid v Morison* (1893) 20 R 510 at 514 *per* Lord Rutherford Clerk.

¹⁶¹⁷ It is of some interest that the accretion argument was largely ignored in two recent Sheriff Court decisions: *Bank of Scotland Cashflow Finance v Heritage International Transport Ltd* 2003 SLT (Sh Ct) 107 and *Nigel Lowe Holdings Ltd v Intercon Construction (Pty) Ltd* 2004 GWD 40-816. Cf. *Tayplan Ltd v D & A Contracts Ltd* 2005 SLT 195 OH.

Conclusion

Despite its everyday importance, the Scottish law of assignation has, hitherto, been the subject of little analysis. Nevertheless, much of Scots law is clear. The principles have evolved over many centuries. The greatest problems have arisen comparatively recently, in particular, with the failure to properly distinguish an assignation from other legal institutions. Some of these difficulties no doubt emerged from the confused picture that has been drawn of the history of assignation in Scots law (and perhaps the law of cession throughout Europe). Shed of a misleading picture of the history of the law on the transfer of claims, practically important institutions, such as the transfer of entire contracts, may now be ripe for more detailed development.

Although this thesis has been primarily concerned with the transfer of the paradigm money claim, Scots law has had a remarkably liberal attitude to assignability. Yet always has focus remained – even if that focus has not always been as sharp as would have been desirable – on two important related issues: (1) the position of the debtor who is a passive party to the operation; and (2) the effect of a purported assignation on creditors.

Scots law has sought to strike a balance: the need encourage the free transfer of claims on the one hand; and the need to protect creditors and the debtor on the other. The result has been formal rules on intimation. Many will feel that these intimation requirements go too far, that there is an imbalanced conservatism. There is no doubt that the intimation requirements are, compared to some other legal systems, relatively onerous. But it is for this reason that the Scottish rules avoid many of the problems which must arise in other legal systems. The law of assignation/assignment/cession cannot ignore the fact that there is a debtor who exists and who must be protected. Intimation is not, of course, the only way to do so. But if Scots law is to be reformed in this regard,¹⁶¹⁸ alternative methods must be found to address the same issues. Many legal systems, as well as the most modern international instruments, concede that communication with the debtor is, on occasion,

¹⁶¹⁸ As seems likely: see Scottish Law Commission, *Seventh Programme of Law Reform* (SLC No. 198, 2005) para 2.31.

unavoidable; yet provide no rules or simplified form in which such communication ought to occur.

The effect of the contractual prohibition on assignation has proved as controversial as the constitutive role accorded to intimation. Again, however, it is difficult to see why parties should not be free to enter into contractual prohibitions. After all, commercial people have a simple and time-honoured way of ensuring that claims are 'clean' and free from *any* of the debtor's defences: the negotiable instrument. The apparent decline in this instrument is unexplained.

Finally, questions of validity are complex. Many of the issues raised are not peculiar to the law of assignation. They raise questions for the law of transfer in general. In some aspects, Scots law has been found to be comparatively underdeveloped. While traces of doctrines of *inopposabilité*, or *relative Unwirksamkeit* can be detected, they are meagre.

One scholar has written of the feeling of standing on the shore of an ocean in his research on Scottish history;¹⁶¹⁹ a metaphor that is apposite to much of the study of Scottish private law and certainly to the law of assignation. No mention, for example, has been made here of the assignation of future claims to payment, of global assignments or securitizations; the transfer of incorporeal heritable rights such as leases, liferents or writs; not to mention intellectual property rights or the ever increasing thickets of *ad hoc* statutory licences. The list goes on. But it is only with an understanding of the principles applicable to the assignation of the paradigm money claim that these more sophisticated topics can be addressed.

¹⁶¹⁹ M. Fry, *The Scottish Empire* (2001) vii.

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