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The Influence of the European *Ius Commune*
on the Scots law of Succession to Moveables:
1560-1700

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Ph.D thesis,
University of Edinburgh, 2017

I hereby declare that this thesis was written by me, is my own work, and has not been submitted in whole or in part for any other degree or professional qualification.

Abstract.

The purpose of this thesis is to identify the influence of the doctrines of the Medieval European *Ius Commune* on the Scots law of moveable succession in the crucial period of its development: from the Reformation to approximately 1700. To this purpose, this research is dealing with the Scottish writings, case law and archival materials, comparing them with the relevant Civilian and Canonistic texts and treatises of Medieval and Early Modern Continental authors.

This research specially concentrates on particular fields within the Scots law of succession. In some fields, such as the constitution and form of testamentary deeds and the destinations (tailzies), the *Ius Commune* influence was quite weak, but even there it is discernible in specific issues. The same can be said of the Scottish attitude to the agreements on future succession (*pacta successoria*); in this respect, as my thesis shows, Scots law used to have more in common with the Civil law than it has now.

On the other hand, the influence of the Continental doctrines was much more noticeable in the fields of the evidential force of last wills and the donations *mortis causa*. However, beginning from the 1660s, Scottish practice in these fields diverged from the Continental models. This was due to various practical reasons.

The regulation of the office of executor in Scotland in the 1500-1700, in many respects, seems to be heavily inspired by the *Ius Commune* regulation and by English practice of that time. In some respects, Scots practice on the office of executor followed the *Ius Commune* rules more closely than English practice.

In summary, the influence of the *Ius Commune* on the Scots law of succession in this period was real, due both to the retaining of tradition of ecclesiastical jurisdiction and to the knowledge of doctrine by the judges and litigants. However, this influence was often fragmentary and not properly expressed in the litigation and writings.

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Introduction.

1. Definition of terms.

A good way to start this thesis would be by defining some terms. The most important of them is “*Ius Commune*”.¹ The term *Ius Commune* is taken here in the meaning used by, e.g., M. Bellomo,² designating the system of doctrines based on the rules of the *Corpus juris civilis* and *Corpus juris canonici* and elaborated by Medieval and Early Modern legal authors. It may also be designated in this work as a “Learned law” or “Civil, Canon and Feudal laws”.³ The *Ius Commune* was the source of common legal discourse for lawyers all over the Continental Europe. National and local legislation, customs and practices in this conceptual system were designated “*Ius Proprium*”; their status could vary, but they were always supposed to be in some relationship *vis-à-vis* the *Ius Commune*.

Moveable⁴ succession is the focus of the present thesis. Moveable and heritable succession, until the enactment of the Succession (Scotland) Act 1964, constituted two separate systems of succession in Scotland. The former applied to moveable goods and rights and the latter to land and other heritable (immoveable) rights; however, in practice the distinction between heritable and moveable property could be a very complicated issue.⁵ Unlike succession to moveables, heritable succession was governed by feudal principles and was closely associated with the system of *brives* of the Medieval Era. However, the two systems of succession overlapped in many points and shared many common principles, as was evidenced by the classical Scottish legal writers.⁶ Because of this, some topics of this research could not be adequately elaborated without dealing with both heritable and moveable succession. This is why some chapters of the present thesis, particularly the chapters on *pacta successoria* and

¹ This thesis uses a modern Latin spelling, distinguishing between “i” and “j”; however, as the spelling “*Ius Commune*” is more widely accepted in the modern literature, it will be spelled in this way throughout this work.

² M. Bellomo, *The Common Legal Past of Europe: 1000-1800* (1995).

³ The “Feudal law” in this system was mainly inspired by the *Libri feudorum* (mid-12th century) and the learned commentaries to it.

⁴ This spelling is traditional and still widely accepted in the Scots legal literature.

⁵ *Infra*, s.5.4.

⁶ For example, Th. Craig’s *Jus Feudale* (c. 1600) contains title 17 of book II – “*Communia de successionibus*” – which deals with moveable as well as heritable succession.

on destinations and substitutions, effectually deal with both systems, which exercised influence on each other.⁷

2. *Modern scholarship on the Ius Commune and Scots law.*

The issue of the influence of the Civil law, the “Roman law”, the Canon law and Continental doctrine in general on the development of Scots law has traditionally been the object of significant scholarly interest. Among the classical scholars, dealing with this issue, one may mention here J. Dove Wilson,⁸ Henry Goudy,⁹ among the more modern ones, Thomas B. Smith,¹⁰ Peter G. Stein,¹¹ William M. Gordon,¹² James J. Robertson.¹³ Among contemporaries, this topic is pursued by John W. Cairns, Robin Evans-Jones, A. Mark Godfrey, Roderick R.M. Paisley, Kenneth G.C. Reid, W. David H. Sellar, J.D. Ford and many others.

This thesis follows the general trend in the scholarship of the recent three decades, aiming to look at the Scots law as a substantially “Civilian” legal system in historical context. Despite the almost universally accepted “mixed” character of the Scottish legal system, comprising the features of both the Continental Civil law and the English Common law, some scholars observed that a “neo-Civilian reaction” in the Scots legal science started in the 1990s, led by K.G.C. Reid, R. Evans-Jones and R. Zimmermann. As a result, the Scots law nowadays is predominantly looked upon as a Civilian system ruled by Civilian concepts.¹⁴

⁷ See *infra*, chapters IV, V.

⁸ J.D. Wilson, ‘Reception of the Roman Law in Scotland’, *JR*, vol 9 (1897), 361-394.

⁹ H. Goudy, *An inaugural lecture on the fate of the Roman law north and south of the Tweed* (1894).

¹⁰ T.B. Smith, ‘Scots Law and Roman-Dutch Law: a Shared Tradition’, *Studies Critical and Comparative* (1962), 46-61.

¹¹ P.G. Stein, ‘The Influence of Roman Law on the Law of Scotland’, *JR*, vol 8 (n.s.) (1963), 205-245; P.G. Stein, *Roman Law in Scotland // IRMA*, pars V 13b (1968); P.G. Stein, *The Character and Influence of the Roman Civil Law* (1988); P.G. Stein, *Roman Law in European History* (1999).

¹² W.M. Gordon, ‘Roman Law in Scotland’, *Civil Law Tradition in Scotland // SSP*, suppl vol I (1995), 13-40; W.M. Gordon, ‘The Civil Law in Scotland’, *ELR*, vol 5 (2001), 130-144; W.M. Gordon, *Roman Law, Scots Law and Legal History* (2007).

¹³ J.J. Robertson, ‘Scottish legal research in the Vatican Archives: a preliminary report’, *Renaissance Studies*, vol 2 no 2 (1988), 339-346; J.J. Robertson, ‘The Canon Law Vehicle of Civilian Influence with Particular Reference to Scotland’, *The Civilian Tradition and Scots Law* (1997), 117-133.

¹⁴ N.R. Whitty, ‘The Civilian Tradition and Debates on Scots Law’, *Tydskrif vir die Suid-Afrikaanse Reg* (1996), 237-239.

Within this paradigm, Scotland is seen as a part of the Medieval and Early Modern European tradition of the *Ius Commune*, albeit holding a peculiar place in that tradition.¹⁵ The law of property has received particular attention in that respect.¹⁶ A recent Ph.D. thesis by John MacLeod looks upon the Scots law on voidable transfers in the historical context of the *Ius Commune*.¹⁷ Professor Mark Godfrey revealed significant Civilian influences in the procedure adopted by the Scottish Lords of Council throughout the 16th century.¹⁸

Professor John W. Cairns has paid significant attention to the concept of the *Ius Commune* and the evolution of the attitude to it in Scottish legal treatises and other texts. In the mid-16th century, the term “common law” in the Scots texts designated precisely what we have defined above as the *Ius Commune*. Scots lawyers in this period considered both the Civil and the Canon law directly binding in Scotland, regulating all issues not directly covered by Acts of Parliament. The most popular *Ius Commune* authors in that period were Abbas (Panormitanus)¹⁹ and Bartolus²⁰ from the Middle Ages.²¹ Similar observations were made by Professor Gero Dolezalek.²² According to Dr. Andrew R.C. Simpson, the expert consensus of the members of the College of Justice, heavily inspired by the *Ius Commune* learning, enjoyed the force of law in Scotland of this period.²³ However, after c. 1600 a different approach started to prevail, when “common law” designated Civil law only, was no longer seen as of

¹⁵ W.D.H. Sellar. ‘Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions’, *ELR*, vol 4 (2000), 14-18; W.M. Gordon. ‘The Civil Law in Scotland’, 132-144.

¹⁶ E.g., G. MacLeod has been able to assess the “Romanization” of Scots law of property in the Scottish Institutional writers, based on the frequency of invocation of Civil law source to solve novel Scots problems. The law of moveable property had already been heavily “Romanized” at the time of Stair, but it was in Bankton’s time when this process reached its “high noon” (G. MacLeod, ‘The Romanization of Property Law’, *A History of Private Law in Scotland*, vol I (2000), 221-242).

¹⁷ J. MacLeod, *Fraud and Voidable Transfer: Scots Law in European Context*, PhD thesis (2013).

¹⁸ A.M. Godfrey, ‘Arbitration and Dispute Resolution in Sixteenth Century Scotland’, *TvR*, vol 70 (2002), 109-135; A.M. Godfrey, ‘*Ius Commune*, Practick and Civil Procedure in the Sixteenth-Century Court of Session’, *TvR*, vol 72, 283-295; A.M. Godfrey, *Civil justice in Renaissance Scotland* (2009).

¹⁹ Real name Nicolo de Tudeschi, lived 1386-1445.

²⁰ Bartolus de Saxoferrato, 1313-1357.

²¹ This was a characteristic of the pre-Reformation collection of the practice of the Court of Session – the *Sinclair’s Practicks* (1540s). Such legal philosophy was also expressed in the 1570s by John Lesly in his book *De origine moribus et rebus gestis Scotorum* (J.W. Cairns, ‘*Ius Civile* in Scotland, ca. 1600’, *Roman Legal Tradition*, vol 2 (2004), 139-140).

²² G. Dolezalek, *Scotland under Ius Commune // SSP*, vol 55 (2010), 1-12.

²³ A.R.C. Simpson, ‘Legislation and authority in early-modern Scotland’, *Law and Authority in British Legal History, 1200–1900* (2016), 85-89.

direct vigour in Scotland and was to be applied only in so far as it contained the principles of natural reason. This period saw the rising popularity of the more modern Humanist Civilian authors and of the collections of precedents of Continental law courts, while the Canon lawyers became less popular.²⁴

Research in a similar direction was provided in 2011 by Dr. Adelyn L.M. Wilson, who examined the influence of the Civilian literature on Viscount Stair's *Institutions*. It revealed that the most influential treatise on Scots law was inspired mainly by 17th century literature, lying within the Humanist and Natural law tradition: H. Grotius, A. Vinnius, P. Goudelin.²⁵ Cairns, in another article, traced the subsequent evolution of the attitude towards Civil law in Scots legal writings, showing that by the 18th century the Civil and Canon laws were seen as valid only in so far as "received" in Scotland.²⁶ Professor John D. Ford, in his book,²⁷ showed the current within the Scottish legal thought in the 17th century.

3. *Scholarship on the history of the Scots law of moveable succession.*

Despite this significant interest to the *Ius Commune* in the recent years, the law of succession remains a neglected topic. The 2000 *History of the Private Law in Scotland* (edited by K.G.C. Reid and R. Zimmermann) did not contain a chapter on the law of succession. The only work to elaborate on the Civilian influence on the development of this branch of Scots law was Prof. Peter G. Stein's 1963 article.²⁸ The article provided an overview of the most obvious examples of Civilian influence in this field, especially on the rules on interpretation of legacies. Some Civil law rules were expressly rejected by the case law, such as "pupillary substitution" and the identification of the "Bairn's part" with the *querela inofficiosi testamenti*. The main deficiency of Stein's account was that he used only the post-1660 printed precedents, not dealing with the earlier case law or with the archives of the Commissary Courts.

²⁴ This was a feature of Th. Craig's, J. Skene's and R. Spottiswoode's writings (J.W. Cairns, op cit, 150-167).

²⁵ A.L.M. Wilson, *The Sources and Method of the Institutions of the Law of Scotland by Sir James Dalrymple, 1st Viscount Stair, With Specific Reference to the Law of Obligations*, PhD thesis (2011).

²⁶ J.W. Cairns, 'The Civil Law Tradition in Scottish Legal Thought', *The Civilian Tradition and Scots Law* (1997), 200-219.

²⁷ J.D. Ford, *Law and Opinion in Scotland during the Seventeenth Century* (2007).

²⁸ P.G. Stein, 'The Influence of Roman Law...', 233-235.

The only exception to the general lack of interest in the law of succession is, perhaps, the narrow issue of *conditio si sine liberis decesserit* – two rules of the interpretation of wills in Scots law, which have been the subject of quite intensive scholarly attention in recent years. William M. Gordon published research on “*conditio...*” in 1969. He came to the conclusion that both “*conditio si testator...*” and “*conditio si institutus...*” were grounded in both the *Ius Commune* and the development of the *Ius Proprium*.²⁹ Recently, Roderick R.M. Paisley has elaborated on the origin and the mechanism of the “*conditio si testator...*” rule in much detail, noting the strong familiarity of the 17th century lawyers with the Civilian sources.³⁰ Other authors also made contributions on this topic.³¹

The influence of the *Ius Commune* on other fields of the Scots law of succession has attracted even less interest. Dr. John C. Gardner in 1928 defended a PhD thesis in Edinburgh on the origin of the rights of a surviving spouse and the children in the Scots law of succession.³² One of the author’s subjects was the origin of “tripartition” – the immemorial custom of dividing the defunct’s movable estate into three (in case of the widow and children surviving) or two (in case of either just the widow or just the children surviving). These are named the “Legitim” (“Bairn’s part”), the “*Jus relictæ*”, and the “Dead’s part”. This scheme has always been and in fact still is the foundation of the rules of moveable succession in Scotland. Gardner rejects the view that it was borrowed from Roman law and, instead, points to the medieval Norman origin of the custom. This view, however, was rejected by other scholars in favour of an Anglo-Saxon origin of the custom.³³

Further notable research into the early Scots law of movable succession was carried out by Professor Alexander E. Anton in his study of the Pre-Reformation

²⁹ W.M. Gordon, ‘Roman Law and Scot Law - the *conditiones si sine liberis decesserit*’, *JR*, vol 14 (n.s.) (1969), 108-127.

³⁰ R.R.M. Paisley, ‘Roman and Civilian Origins of the *Conditio si Testator Sine Liberis Decesserit* in Scots Law’, *ELR*, vol 11 (2015), 13-16.

³¹ D.R. MacDonald, ‘Lapse of Legacies in Scots Law’, *Modern Studies in Property Law*, vol I (2001), 275-287; A.R. Barr, ‘The *conditio si institutus sine liberis decesserit* in Scots and South African Law’, *ELS* (2007), 177-192.

³² J.C. Gardner, *The origin and nature of the legal rights of spouses and children in the Scottish law of succession*, Ph.D thesis (1928).

³³ A.E. Anton, ‘Parent and Child’, *ISLH*, 122-123.

ecclesiastical practice on the office of executor, summarized in his article from 1955.³⁴ Despite the scarcity of the pre-Reformation records, the research showed that that practice was largely consistent with the Canon law of the Decretals and with subsequent Scots practice.

Despite the abundance of textbooks on the Scots law of succession from the 19th to the 21st century, they tell little to nothing at all about the historical development of this field of Scots law, not to speak about the specific issue of the *Ius Commune* influence and comparison.³⁵ The rest of the literature is limited to occasional articles. It seems, a breakthrough happened in 2007, when *Exploring the Law of Succession* was published. W. David H. Sellar's article from that collection largely views the history of the Scots succession law as comparable to the contemporary English succession law.³⁶ George L. Gretton, in his article on fideicommissary substitutions, is more open for comparison with the Civil law, although he notes a peculiar blindness of the Scots authors to the Civil law.³⁷ Professor Kenneth Reid also provided helpful summaries of the Scots law as to testamentary formalities in the first two volumes of *Comparative Succession Law*.³⁸

The history of the English law of movable (personal) succession could provide some insights into its Scottish counterpart, taking into account the similarity of the two, especially the retaining of the institution of executor (administrator) as the main mechanism for the distribution of estate goods. Unfortunately, the history of the English law of personal succession, especially its early stages, is not researched much better than the Scots one. The research here has generally been concentrated on the practice of the secular courts, mentioning ecclesiastical practice only on matters of jurisdiction.³⁹ Michael M. Sheehan conducted some research into the Medieval last

³⁴ A.E. Anton, 'Medieval Scottish Executors and the Courts Spiritual', *JR*, vol 67 (1955), 129-154.

³⁵ David Robertson's treatise on the law of succession provided a very limited historical narrative, concentrated on statutory law (D. Robertson, *A treatise on the rules of the law of personal succession* (1836)).

³⁶ W.D.H. Sellar, 'Succession Law in Scotland - a Historical Perspective', *ELS* (2007), 49-66.

³⁷ G.L. Gretton, 'Fideicommissary Substitutions: Scots Law in historical and comparative perspective', *ELS* (2007), 156-176.

³⁸ K.G.C. Reid, 'Testamentary Formalities in Scotland', *CSL*, vol I (2011), 404-431; K.G.C. Reid, 'Intestate Succession in Scotland', *CSL*, vol II (2015), 371-399.

³⁹ See, e.g.: R.J.R. Goffin, *The Testamentary Executor in England and Elsewhere* (1981).

wills and the probate procedure in the Church courts.⁴⁰ In recent years, Professor Richard H. Helmholz provided much insight into the late Medieval and Early Modern practice of the Ecclesiastical courts, matters of succession included.⁴¹

4. *Significance of the topic.*

Why is moveable succession an important topic in this context? This is mainly because it is the field where we should expect to find at least some *Ius Commune* influence. The law of succession had been one of the most well-elaborated areas in Roman law, and this continued in the *Ius Commune*. 11 out of 50 books of the Digest of Justinian were dedicated to succession alone. The *Ius Commune* literature on the law of succession was enormous in volume. Moreover, in pre-Reformation Scotland the Church courts possessed an almost exclusive jurisdiction over moveable succession. Unlike England, where they were in constant competition with the royal courts and gradually lost much of their jurisdiction,⁴² in Scotland the business of the former Church courts, after a short confusion, was in a wholesale manner taken over by the Commissary courts, subordinate to the Court of Session.⁴³ It would be surprising not to find any *Ius Commune* doctrines whatsoever in the post-Reformation Scots succession practice.

The law of succession is also important because it gives us an opportunity to look into the practice of the Commissary courts, which has been a *terra incognita* of Scots legal history for a long time. The cases on matrimony and ecclesiastical benefices, from the Commissary records, have been investigated by John Riddell and Patrick Fraser⁴⁴ and, more recently, by Dr. Thomas Green.⁴⁵ In 1953, Anne Ashley published the results of a small survey of the last wills confirmed by the Commissary courts in the 16th century. The research revealed the absence of any visible restrictions

⁴⁰ M.M. Sheehan, *Will in Medieval England* (1963).

⁴¹ See the works of R.H. Helmholz in the bibliography section.

⁴² R.H. Helmholz, *Roman Canon Law in Reformation England* (1990), 79-89.

⁴³ D.B. Smith, 'The spiritual jurisdiction 1560-1564', *Records of the Scottish church history society*, vol 25 (1995), 1-18; Th. Green, *The Court of the Commissaries of Edinburgh: consistorial law and litigation, 1559-1576*, PhD thesis (2010).

⁴⁴ J. Riddell, *Inquiry into the Law and Practice in Scottish Peerages: Before, and After the Union...*, Thomas Clark, Edinburgh (1842); P. Fraser. *Treatise on Husband and Wife, According to the Law of Scotland*, T&T Clark, Edinburgh (1876-1878).

⁴⁵ Th. Green, op cit; Th. Green, 'Scottish Benefices and the Commissary Court of Edinburgh: The Example of McGibbon v Struthers', *Miscellany VI // SSP*, vol 54 (2009), 45-61.

for married women in making of the last wills (unlike neighbouring England) and provided evidence that the ‘community of goods’ concept was deeply rooted in the Scots law and practice already in that period.⁴⁶

5. *Subject matter and scope of the thesis.*

Even moveable succession alone would have been too wide a topic for a Ph.D. research to cover. This is why this thesis will concentrate on several specific topics within the law of succession. They were intentionally chosen as the fields where the *Ius Commune* influence has always been doubtful and unclear. For example, it is well known that the Scots rules on interpretation and vesting of legacies were strongly based on the Civil law, which was noted by P.G. Stein in his 1963 article. The Civil law was so influential in respect of interpretation and vesting of legacies that the Scottish 18th century judges sometimes had to apply the Civilian rules reluctantly.⁴⁷ The ‘*Conditio si institutus...*’ rule is already well researched in the literature (*supra*, pp.4-5). Instead of dealing with these obvious examples, this thesis concentrates on more obscure ones. There are six of them: constitution and form of last wills, evidential force of last wills, donations *mortis causa*, agreements on future succession (*pacta successoria*), substitutions and destinations, and the office of executor.

The historical period under investigation here was crucial for the development of the law of succession. Its starting point (1560) is determined by the Reformation, which brought a “takeover” of the testamentary jurisdiction from the former Catholic consistories, effectually incorporating it into the general law of the land. The ending point (1700) loosely signifies the time when the practice of moveable succession had already been well established. It does not mean that legal development in this field stopped after 1700 (in fact, numerous new developments occurred in the 18-19th centuries, as will be shown below) but that the collections of case law and the learned Institutional writings became an influential source of law on their own. Thus, any possible influences of the *Ius Commune* were conscious and explicit after then.

⁴⁶ A. Ashley, ‘Property in Relation to Marriage and Family’, *JR*, vol 65 (1953), 37-68, 150-181.

⁴⁷ As evidenced by this quotation from Lord Braxfield: “*I should be against the legacy, had I never heard of the civil law, and I own that the civil law speaks less sense in this case than in many others*” (Burnets v. Forbes, 1783, quotation by: P.G. Stein, ‘The Influence of Roman Law...’, 234).

The chief Scottish materials the present research is dealing with are: 1) the contemporary and subsequent legal writings and literature, 2) the published ‘practicks’ and case reports and 3) the archives of the Commissary courts. The last source has not been used in this research as extensively as was initially planned. This is because the Commissary courts’ practice turned out to be quite routine and homogeneous, while the substance of the litigants’ pleas and the reasoning of the judges was never made explicit in the records. For example, in the 1563-1564 Edinburgh Commissary court act book (CC8/2/1) the records refer to the “principal precepts” and other original documents, without disclosing the cause of the action or the exception. Those original documents might theoretically be found in the “Processes” section of the archival record; unfortunately, that section is extremely disorganized⁴⁸ and hard to read, which prevented their inclusion into research. Moreover, pure cases of succession were quite rare: e.g., in 1639 (CC8/2/62), there were only three claims for legacies and four claims for estate goods in the Edinburgh Commissary court. Nevertheless, the registers of Acts provided some useful insights into succession practice. The analysis of confirmed testaments – both their copies in the registers of testaments and the original testamentary deeds, designated as “Warrants of Testaments” in the archives – produced even more fruit, especially in respect of the will’s structure and form.

This present research has generally limited itself to use of the printed versions of the reports and ‘practicks’. Although G. Dolezalek has identified the use of citations of the *Ius Commune* in the diverse and differing manuscripts and also explored the variety and nature of the manuscripts themselves and their interrelationship,⁴⁹ research into the issue of sources is still at too early a stage to be practical for a thesis of this nature, which focuses on the juridical content of a specific area of law. Sensitive use of the printed material in fact allows the exploration of the law and its development sufficient to present a convincing argument and indeed a general picture.

Considerations of time also meant that the case law of the Scottish Interregnum (“Usurpation”, 1652-1660), when the Court of Session was disbanded and the Cromwell-appointed Commission acted as the supreme court of the land, had to be left

⁴⁸ E.g., in the Processes, allegedly from 1580 (CC8/4/587/1), documents from the 17th century were found.

⁴⁹ G. Dolezalek, op cit, vol 55-57.

out of the scope of this research. It is notable, however, that this case law was quite influential in subsequent practice and literature.⁵⁰

6. Methodology.

The main method employed by the present research is the doctrinal historical legal method.⁵¹ The assumption is taken that, at least, a substantial number of the Scots legal authors and practitioners were acquainted with the principles and doctrines of the *Ius Commune*. The task then is to take particular *Ius Commune* doctrines, principles and even simple rules and to see whether Scots practice employed them, in full or in part. This research, to an extent, is dealing more with the evolution and interrelations of legal ideas rather than of strict rules.

To a very limited extent, a method of quantitative analysis was also used in the course of this present research. It allowed identifying the changes in the proportion of a particular type of form of last will from the 16th into the 17th century. It also helped to interpret the effects of early 17th century legislation on the jurisdiction of the Commissary courts. The Act of the Commissariats and Jurisdiction Given to Archbishops and Bishops⁵² had ambiguous wording on whether the Edinburgh Commissary court lost its privileged right to confirm testaments for large estates.⁵³ The general number of testaments confirmed in the Edinburgh court dropped, around the year 1610, from c. 4000 testaments per year to c. 1500 testaments. This confirmed that Edinburgh's court was curtailed, as all the Commissaries were since then subordinate only to respective bishops and the Court of Session.

7. Selection of the literature of the *Ius Commune*.

The literature of *Ius Commune* on the law of succession is very extensive. There is a substantial volume of secondary literature in French and in German, dedicated to

⁵⁰ A.L.M. Wilson, 'Practicks in Scotland's Interregnum', *JR*, vol 57(n.s.)(2012), 319-352.

⁵¹ See the description of this method in: D. Ibbetson, 'Historical Research in Law', *The Oxford Handbook of Legal Studies* (2005), 872-874.

⁵² *RPS*, 1609/4/20.

⁵³ This right was granted to the Edinburgh court by the 1563 Charter of Constitution (*Balfour's Practicks*, 670-673) in respect of the estates where the "Dead's part" exceeded 50 pounds Scots.

the *Ius Commune* of succession, enumerated by H. Coing in his handbook on the history of European private law.⁵⁴ Giovanni Chiodi is one of the today's leading experts on the *Ius Commune* of succession; his works on the interpretation of testaments in both Continental and English doctrine were very helpful in preparation of the present research.⁵⁵ Nevertheless, the most efficient way to study the doctrine and principles of *Ius Commune* proved to be dealing with the primary sources: glosses, commentaries and treatises.

However, a selection had even to be made among the primary sources. Which authors, from what era and school, were to be given preference? The *Ius Commune* texts demonstrate a strong interconnection through mutual references. However, they lacked a uniformity of detail: every jurist provided his own interpretation on the extent of this or that particular rule and his own unique "tree" of distinctions arising out of that interpretation. This would make an attachment to one particular work or author counterproductive for this present research. However, some ideas or criteria for distinction, formulated by the more popular authors (e.g., Bartolus), were often taken by other authors and incorporated into their own classifications. This fits well to the subject matter of this research, which concentrates mainly on legal ideas, not on the details of legal regulation.

However, besides disagreements in detail, there are also much more significant differences among the learned authors, sometimes going to the core of the relevant

⁵⁴ H. Coing (*Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, vol II(1-2) (1977), 378-395) lists the following works on the European law of succession in 1500-1800: Ch. Lefevre, *Cours de doctorat sur l'histoire du droit civil français. L'Ancien droit des successions* (Paris, 1912); L. Fabre, *La succession testamentaire et ab intestat dans les pays de droit écrit*, thèse (Toulouse, 1930); G. Lepointe, *Les successions dans l'ancien droit* (Paris, 1945); H. Auffroy, *L'évolution du testament en France*, thèse (Paris, 1899); R. Caillemer, *L'exécution testamentaire dans l'ancien droit*, thèse (Lyon, 1900); F. Maury, *Etude historique sur l'institution contractuelle*, thèse (Caen, 1902); Navières du Treuil, *Etude historique & juridique sur la promesse d'égalité*, thèse (Paris, 1907); H. Fèrèol-Riviere, 'Essai historique sur les partages d'ascendants', *Rev. de législation*, vol 3 (1847), 406-422; G. Boissonade, *Histoire de la réserve héréditaire, et son influence morale et économique* (Paris, 1873); J. de Laplanche, *La réserve coutumière dans l'ancien droit français*, thèse (Paris, 1925); G. Boissonade, *Histoire de droits de l'époux survivant* (Paris, 1874); J. Simonnet, *Histoire et théorie de la saisine héréditaire dans les transmissions de biens par décès* (Dijon, 1851); H. Thiercelin, 'De la saisine héréditaire dans l'ancien droit français', *Rev. critique*, vol 37 (1870), 80 ss., *Rev. critique*, vol 1(n.s.) (1871/1872), 779-791.

⁵⁵ G. Chiodi, *L'interpretazione del testamento nel pensiero dei glossatori* (1996); G. Chiodi, 'Any Thing, Every Thing, Nothing. Note sull'interpretazione del testamento tra *ius commune* e *common law*', *Relations between the ius commune and English law* (2009), 203-221.

legal concepts. This is especially true in regards to the differences between the Commentators and the Humanists. With their critical approach to the text of the *Corpus juris civilis*, the Humanists were often able to understand the original meaning of the Roman law institutions and point out the mistakes of their Medieval predecessors. A good example here is the *jus accrescendi*.⁵⁶ The Medieval Commentators and the Early Modern Humanists held directly opposite views as to when *jus accrescendi* was applicable. In order to reconcile the various fragments of the Digest, the Commentators deduced a “*jus non decrescendi*” - an institution analogous to the *jus accrescendi*; the Humanists did not recognize the existence of “*jus non decrescendi*”.⁵⁷ Such disagreements are irreconcilable.

The authors of which school should be paid more attention in conducting this research? As was mentioned above, the preferences of Scots lawyers changed with time. In the 1500s, the Medieval *mos italicus* authors were still the primary texts of reference for the Scots. Th. Craig’s *Jus feudale*, one of the first treatises that incorporated together the *Ius Commune* and the Scots *Ius Proprium*, refers to Bartolus and Baldus quite extensively. In the 17th century, the Humanist *mos gallicus* literature, like that of F. Hotman, became the most popular in Scotland, together with collections of Continental judicial practice. In the late 17th – 18th centuries, the Dutch lawyer Johannes Voet (1647-1713), who belonged to the Humanist tradition, became the undisputable leader in the number of direct references in the Scots case law. Thus, in the historical period subject to the present research, both historical schools of the *Ius Commune* were relevant.

It is the opinion of the author of this thesis, that, all things being equal, the authors of the more conservative school of the Commentators should be given a somewhat bigger attention here. The main reason for that is that it is in the works of the Commentators that one should expect a systematic exposition of the legal doctrine on a particular subject. The treatises of the authors belonging to the *mos gallicus* tradition (Ch. DuMoulin, F. Hotman, A. Le Conte, J. Voet, etc.) are also employed in this research. However, by their nature, they contain much less strict and consistent

⁵⁶ *Infra*, n.847.

⁵⁷ Pau.Castr., C.6.51.10; J. Voet, *Commentarius ad Pandectas*, D.30.1, nu. LX-LXII.

doctrine, as they often concentrate on the discussions over the meaning of passages from the Digest and on the various diverging local practices. In this, they are less valuable as a source of the doctrine and principles of the *Ius Commune*.

Another reason why this research prefers the older Medieval *Ius Commune* authors is the assumption of a certain conservatism immanent for all lawyers. The cases of moveable succession were decided by the Commissary courts. Among the first judges of the Edinburgh Commissary court we find Edward Henryson and Clement Lital, both well-learned in the Civil law, as well as James Balfour, who was one of the last Officials of the Archbishop of St. Andrews.⁵⁸ Any potential input of the *Ius Commune* into Scots succession practice was most probably to start in the 16th century, when the old *mos italicus* was still more popular in Scotland. It is reasonable to presume that subsequent Commissaries tended to follow the practice of their predecessors, without introducing unnecessary changes.

A third reason is that it is only in the works of the Commentators that we are expected to find certain institutions elaborated and invented in the Middle Ages. The testamentary executor, absent from the Roman texts, was developed by the Medieval lawyers (*infra, s.6.1*); this institution persisted in the Continental practice until the 1500s, when it started to fade away there in favour of universal heirs.⁵⁹

In dealing with the *Ius Commune* sources, the author of this thesis has generally followed the recommendations of Harry Dondorp and Eltjo J.H. Schrage,⁶⁰ according to whom, the first step of research in the medieval *Ius Commune* texts is to identify the relevant *sedes materiae* – the focal fragments of the Digest or Code on particular topics. Then, the Ordinary Gloss to such fragments is studied, with attention paid to all references contained in it. Subsequently, the commentaries of the key Commentators to the fragment are studied, taking note of the citation of earlier authors and thus tracing the evolution of the legal doctrine. This is the approach adopted in the

⁵⁸ Notably, Henryson was the author of the commentary to the title of the Institutes on the constitution of of last wills, first published in 1752. See: A.R.C. Simpson, op cit, 117; Th. Green, *The Court of the Commissaries of Edinburgh...*, 25, 43-44.

⁵⁹ R. Zimmermann, 'Heres fiduciarius? Rise and Fall of the Testamentary Executor', *Itinera fiduciae* (1998), 270-286.

⁶⁰ H. Dondorp, E.J.H. Schrage, 'The Sources of Medieval Learned Law', *The Creation of the Ius Commune...*(2010), 52-56.

present work, although it was not always possible to use the editions that Dondorp and Schrage recommended.

The texts dedicated to the *Ius Proprium* of other countries and the implementation of *Ius Commune* in local practice (collections of decisions, customary law, etc.) are largely avoided in this thesis, in order not to complicate it with an unnecessary comparative element. The exception is the law of England, especially the works of English Civilians and Canonists (W. Lyndwood, H. Swinburne), which, because of their simultaneous similarity and difference from the Scottish circumstances, provided some extremely useful insights into the Scottish legal development.

8. Notes.

This thesis contains numerous quotations in English, Scots and Latin languages. All Latin quotations are given in italics; modern Latin spelling (with “j” and “u”) is given preference. Many English and Scots texts, especially those encountered in the archival records, contain unorthodox spelling. As the identification and reproduction of the original spelling in many instances would be problematic, the author of the present thesis took the liberty to correct (modernize) the spelling. The corrected quotations are given in plain font. The English and Scots quotations where the original spelling was reproduced are given in italics.

Chapter I. Constitution and Form of Last Wills.

1.1. *Fides instrumentorum in the Ius Commune.*

The *Ius Commune* regulations on the solemnities of last wills may not be understood outside of the general context of authentication and faith of documents. And this last topic was extremely controversial. Despite the obvious practical implications of this topic, the discussions mainly involved doctrinal arguments, with various mutually incoherent passages of the *Corpus juris* being given one or another interpretation.

The most important places in the *Corpus juris civilis* establishing the requirements for the authentication of instruments were C.4.2.17 (requiring subscriptions of three witnesses for private debt instruments to the amount exceeding 50 pounds of gold), C.4.19.5 (denying full faith to private instruments), C.4.21.17(16) (setting up the procedure for making contracts in writing), C.4.21.20(19) (setting up requirements for the writings used for *comparatio litterarum*) and C.8.17(18).11 (determining which instruments may prejudice third parties). But the biggest impact in execution of instruments was effected by Justinian's Nov.73 (A.D. 538). The unclear wording of that Novel has made trouble for several generations of jurists, while the multiplicity of its innovations helped to give birth to numerous *Authenticae* in the Code.⁶¹

Generally, neither Civil nor Canon law required a written proof in most day-to-day private deeds. One gloss to *Liber Sextus* (Sext.3.20.1, s.v. "*In scriptis*") enumerated 34 cases where the *Ius Commune* required an act to be in writing, most of such cases being quite narrow and specific.⁶² The more general and potentially widespread cases were the requirement to prove the payment on a written obligation by writ or five witnesses (C.4.20.18(14)), as well as the requirement to disprove *confessio* made in a written contract by another writing (C.4.30.13). Paradoxically, written contracts required stricter solemnities than oral ones, often requiring a larger

⁶¹ Here is the list of *Authenticae*, based on the Nov.73: C.4.2 Auth. *Sed Novo Jure*, C.4.21 Auth. *At Si Contractus*, C.8.17 Auth. *Si Quis Vult*.

⁶² For example, an oath by a minor about him being in reality an adult was to be in writing (C.2.42.3).

number of witnesses to be involved.⁶³ The usual justification for this was the distinction between “witnesses to the contract” and “witnesses to the writing”: the latter were not required to know the contract’s contents but were considered less reliable because of the “similarity of all writings”.⁶⁴

By the criterion of function performed, Baldus de Ubaldis (1327-1400) classified all instruments into three categories: 1) writings made as the substance of a particular act, 2) writings made as necessary (indispensable) proofs of some act, 3) writings made as facilitating proofs.⁶⁵ Into the first category fell, *inter alia*, written testaments (C.6.23.21) and the contracts intended by the parties not to be valid unless embodied in writing (“*contractus in scriptis*”, C.4.21.17(16)); these acts were one and the same thing with the respective writings, although their tenor might be proved by witnesses in case of loss.⁶⁶ In contrast, acts secured by the documents within the second category could be confessed to by the party to the litigation, taking away the necessity of their production. As an example of the second category, Baldus mentioned written *confessiones* defeating other written *confessiones* (C.4.30.13). Finally, writings within the third category were made voluntarily by the party or parties to a transaction. Unlike the first two categories, such writings were not strictly subject to any solemnities, falling under Emperor Leo’s constitution (C.8.17(18).11), which accepted (quite controversially) the probative value of private documents and “subscriptions”. However, the exact probative value of such documents varied greatly, depending on their form.

The basic distinction upheld in the *Corpus juris civilis* was that between public and private instruments.⁶⁷ The Canonist Panormitanus added a third category – “non-public authentic instruments” – which mainly included the letters of bishops and other public officials.⁶⁸

⁶³ For example, a contract made by an illiterate person in the city for the amount greater than one pound of gold could be made verbally before two witnesses. But if it was made in writing, it was to be subscribed by a notary and four witnesses (Nov.73.8).

⁶⁴ See, e.g., Bart., C.4.21 Auth. *At Si Contractus*.

⁶⁵ Bald., C.4.2 Auth. *Sed Novo Jure*.

⁶⁶ On proving the tenor see C.4.21.5, with Gloss and commentaries.

⁶⁷ See especially: C.4.19.5, C.8.17(18).11.

⁶⁸ Abb., X.2.22.1.

Public instruments were more or less the subject of consensus. They were instruments written by the hand of a notary public. They had the force of as many witnesses as were mentioned in them by name.⁶⁹ However, two witnesses were usually deemed enough to refute a public instrument, while one contradicting witness could turn the instrument into a “suspected” one, creating a necessity to prove its authenticity.⁷⁰ In the time of the Glossators it was an accepted point that a document could also become suspected if it contained erasures, vituperations (changes) and other defects in “suspected” parts.⁷¹ If suspicion was not cleared, the party producing the instrument was to be prosecuted as a forger.⁷² If the writer of the document was doubted, the doubt was to be settled by the notary-writer himself, and in case of his decease by his subordinates or by *comparatio litterarum* – comparison of the notary’s handwriting with that of undoubted specimens (*scripturae ex quis*).⁷³

The requirements of notarial instruments were extracted by the jurists from numerous passages of the *Corpus juris*. Undoubted requirements were an invocation of God’s name, mentioning the names of a ruling emperor or pope, the date and place of making, a subscription and a paraph of the notary.⁷⁴ The presence of witnesses, at least two, was also deemed necessary.⁷⁵ The notary was to be specially empowered by the parties to make the instrument - “invited” (*rogatus*) to make it. Whether the “inviting” of the notary was to be explicitly mentioned in the instrument or could be presumed, was controversial.⁷⁶ The majority opinion was that the witnesses in most public instruments (especially testaments) were also to be “*rogati*”, which was to be explicitly mentioned in the instrument.⁷⁷

Documents kept in public archives bore the same force as public instruments.⁷⁸

⁶⁹ A popular saying by Bartolus (Bart., D.28.1.21, C.4.21.15; see also: G.D. Durante, *De arte testandi*, II.1).

⁷⁰ Bart., D.29.3.1.2.

⁷¹ Tancred, *Ordo judicarius*, 5.5. The main authorities for the position were C.6.33.3 and X.2.22.3.

⁷² C.4.19.24, et ibi Bartolus.

⁷³ Nov.73.7; Bald., C.4.2 Auth. *Sed Novo Jure*.

⁷⁴ See, Bart., repetitio in D.2.13.6.6; see also C.10.71(69).3, s.v. “*Servituti*”.

⁷⁵ Bart., *ibid*.

⁷⁶ Bart., D.45.1.30; Bald., C.6.23.21pr.

⁷⁷ Bald., C.6.23.21pr; Alex., C.6.23.21.

⁷⁸ C.4.21 Auth. *Ad Haec*(=Nov.49.2.2).

Private instruments were a much more controversial topic. Every jurist made his own attempts at reconciling C.4.19.5, which rejected the probative force of private writings, and C.8.17(18).11, which assumed that private documents had a probative force. Much effort was also paid to interpreting Nov.73, to discern the exact formal requirements of private instruments and the ways to prove them, including *comparatio litterarum*.

The Glossators, it seems, came to admit that private writings provided a full proof, subject to the confession of the maker or the proof of his/her signature.⁷⁹ If the grantor denied the document and there was no proof by witnesses, the Gloss of Accursius seems to hold that the document provided a half-proof,⁸⁰ subject to potential corroboration (“adminiculation”) by other proofs of the underlying cause (receiving of money, etc.).

This position, however, was significantly qualified by Bartolus. His account of the authentication of private instruments, contained in his commentaries to D.12.2.31, D.39.5.26 and C.4.21 Auth. *At Si Contractus*,⁸¹ was often incoherent, as he obviously changed his mind with time. What lasted, however, was his influential classification of private writings into three: *apocha* (or *apodissa*, *chirographum*), a letter missive and a book of accounts.

An *apocha* was a document executed in favour of a party who was present. The rules of Nov.73 were fully applicable to it. The most solemn form in which an *apocha* could be executed contained the subscriptions of all parties to the act along with those of three witnesses. This requirement was deduced from several diverse passages of the *Corpus juris civilis*, mentioning three witnesses.⁸² Such a document, in Bartolus’ opinion, was “unlikely to be forged”.⁸³ In his earlier texts he opined such document to have “full faith”.⁸⁴ However, with time his views were becoming less “liberal”: he

⁷⁹ See Gloss to C.8.17(18).11.

⁸⁰ C.4.1.3, Gloss s.v. “Decidi oportet”; C.4.19.5, s.v. “Non aliis quoque”.

⁸¹ There is also Bartolus’ commentary to C.8.17(18).11, which, however, is very divergent from the rest of his writings and the writings of other jurists; that is why this commentary was not included into analysis.

⁸² C.4.2.17, C.4.21.20(19), C.8.17(18).11, Nov.73.1, Nov.73.7.1.

⁸³ Bart., C.4.21 Auth. *At Si Contractus*.

⁸⁴ This opinion was expressed in his commentary to D.12.2.31 and in the *antiqua lectura* (second commentary) to C.4.21 Auth. *At Si Contractus*. In fact, 1552 Lyon edition of Bartolus’ commentaries

began to consider it necessary for witnesses to come and recognize their subscriptions at trial. If all three witnesses were available, the instrument was proved; this opinion of Bartolus was widely accepted by the later scholarship.⁸⁵ If all three witnesses were dead or unavailable, some passages of Bartolus suggest that *comparatio litterarum* alone might decisively establish the document's authenticity;⁸⁶ however, subsequent writers, especially the Canonists, opposed that view.⁸⁷ If only one or two of the witnesses were available, both their testimony and *comparatio* were to approve the document; however, there was an opinion that the judge possessed discretion in assessment of the evidence in case the *comparatio* and witnesses contradicted each other.⁸⁸

An *apocha* that did not contain the subscriptions of all parties and of three witnesses was still valid; however, if the contract under dispute was entered into in a city and exceeded one pound of gold,⁸⁹ both the testimony of three witnesses (even unsubscribing) and a *comparatio* were necessary to establish the full faith of the writing.⁹⁰ Three witnesses alone or handwriting alone could only make "half-proof" in such cases. Thus, a private writing lacking the necessary number of instrumentary witnesses could only make a "half-proof" even after corroboration by *comparatio*; nevertheless, it could be fortified by additional proofs as to the subject-matter of the deed (like witnesses to the contract, as distinguished from instrumentary witnesses).⁹¹ A writing unconfirmed by comparison of hands created, in Bartolus' opinion,

to the Code titled the second commentaries to the laws as "*additiones novae*", assuming they were in fact the posterior ones. However, Panormitanus in dealing with the same topic confirms that this was the earlier commentary (Abb., X.2.22.2). Moreover, the second commentaries of Bartolus to the Code actually look like the older ones, usually being less definite and citing more contrary arguments.

⁸⁵ Bart., D.39.5.26; Abb., X.2.22.2; see also opinion of Giovanni da Imola, cited by Decio (Dec., X.2.22.2, nu. 13). However, Baldus and Decio disagreed with that opinion, deeming both witnesses and *comparatio* necessary in any case (Dec., *ibid.*; Bald., C.4.2 Auth. *Sed Novo Jure*).

⁸⁶ Bart., C.4.21 Auth. *At Si Contractus*, first commentary.

⁸⁷ See: Abb., X.2.22.2, - where Panormitanus criticises this opinion on the ground that Nov.73.2 did not allow *comparatio* alone as a proof, irrespective of the number of subscriptions. It is probable that Panormitanus (and F. Decio, who followed him, Dec., X.2.22.2) was also wary of potential conflict of this opinion with the law of Decretals (X.2.22.2), which held that death of instrumentary witnesses invalidated a private instrument, unless the latter contained a seal (*infra*, p.22).

⁸⁸ This was the way Panormitanus interpreted Bartolus's commentary to D.12.2.31 (Abb., X.2.22.2).

⁸⁹ These were the contracts to which Nov.73 applied (Nov.73.7.2, Nov.73.8).

⁹⁰ In his commentary to D.12.2.31, Bartolus accepted a possibility of judicial discretion in case *comparatio* alone or witnesses alone presented strong evidence; however, in the commentary to D.39.5.26 the author seems to have abandoned that view.

⁹¹ Abb., X.2.22.2.

“*aliquam praesumptionem*”, being of somewhat less value than “half-proof”. This “presumption” stemmed from “unlikelihood” that a party to litigation would produce a forged instrument to the court.⁹² However, this last position was considered illogical by many subsequent authors.⁹³

Letters missive, in Bartolus’ initial opinion, were not subject to the formalities of Nov.73. The reason provided by him was that a receiver could not be blamed for not securing the appropriate form of the letter, executed by the distant sender. Because of this, the “old law” of C.4.21.20(19) remained applicable to letters missive, with *comparatio litterarum* making full proof of the letter’s authenticity.⁹⁴ Moreover, obviously under the influence of Canon law (*infra*, p.22), Bartolus held that letters with an authentic seal of an official made full faith against the sender, irrespective of *comparatio*.⁹⁵ In a later commentary⁹⁶ Bartolus seems to back down on the privileged status of letters missive as regards authentication; however, the Canonist F. Decio (1454-1535) reports Bartolus’ original opinion as commonly accepted in Decio’s time.⁹⁷

Books of account (*libri rationum*) received an extremely favourable treatment from Bartolus and subsequent authors. The reasons given for that were that books of account were “hard to forge”; they also were, obviously, outside the scope of Nov.73.⁹⁸ Later authors also named the mercantile custom of using such books as another reason.⁹⁹ Bartolus considered *comparatio litterarum* sufficient to establish the authenticity of a book of account, if doubtful. In his view, the book of account prejudiced the maker only if it was written by the maker’s own hand;¹⁰⁰ this, however, was challenged by Baldus and other later authors, who held that any entry in one’s

⁹² Bart., D.12.2.31.

⁹³ Dec., X.2.22.2, nu. 14.

⁹⁴ Bart., D.12.2.31, D.39.5.26.

⁹⁵ Bart., D.39.5.26, C.4.21 Auth. *At Si Contractus*, first commentary. Influence of Canon law is obvious from Bartolus’ referring to C.1.3.22 as the ground for special importance of seals in letters. That law mentions the letters of bishops.

⁹⁶ Bart., C.4.21 Auth. *At Si Contractus*, first commentary, where he, contrary to the abovementioned commentaries, considers letters without a seal equal to *apochae* in their status.

⁹⁷ Dec., X.2.22.2, nu. 30-33.

⁹⁸ Bart., D.39.5.26; Abb., X.2.22.2, nu. 8; Bald., C.4.2 Auth. *Sed Novo Jure*.

⁹⁹ Bald., C.4.18 sub rubr.

¹⁰⁰ Bart., D.39.5.26.

book was presumed written with the owner's consent.¹⁰¹ There were sharp controversies on the necessary form of an account book, with Baldus deeming indispensable for a book to be single, bound and containing both debits and credits of the owner.¹⁰² The exact evidential force of the information contained in books of account will be dealt with in more detail later in this work.¹⁰³

Comparatio litterarum, for its employment, required the availability of acceptable specimens of the handwriting under question. The array of documents qualified to be specimens was limited: public instruments, instruments from public archives, writings submitted or recognized by the party to a litigation, private writings with subscriptions of three witnesses (who were either to come and confirm their subscriptions or *comparatio* could be used to confirm them).¹⁰⁴ There was a controversial question whether a defendant denying his or her own handwriting might be compelled to write down a specimen in the judge's presence, if there were no available specimens.¹⁰⁵ Comparison of handwriting was committed to "*scriptores periti*", who took an oath on making a faithful comparison.¹⁰⁶

Subscription, as an element of a document, was looked upon as performing two main functions. One function was providing the "sign of completion". A public document, as well as a contract made *in scriptis*, was deemed complete only after it was subscribed by the maker and the parties.¹⁰⁷

Another function of subscription was the expression of consent. A person subscribing a writing of another was deemed to be consenting to that writing.¹⁰⁸ In later law, the general rule was formulated that subscribing a document entails the same effect as writing it fully by hand.¹⁰⁹ This function received special importance in the context of the law against forgery. The *Lex Cornelia de falsis* (c. 81-79 B.C.) forbade

¹⁰¹ Bald., C.4.21 sub rubr.

¹⁰² Bald., C.4.18 sub rubr, C.4.21 sub rubr; Dec., X.2.22.2, nu. 44-46.

¹⁰³ See *infra*, chapter II.

¹⁰⁴ See Gloss and comments to C.4.21.20(19), C.4.21 Auth. *Ad Haec*; Abb., X.2.22.2, nu. 13; Alex., cons. 76, vol III.

¹⁰⁵ Bart., C.4.21 Auth. *At Si Contractus*; Abb., X.2.22.2, nu. 13; Dec., X.2.22.2, nu. 55-59.

¹⁰⁶ C.4.21.20(19), s.v. "*Ab his*".

¹⁰⁷ C.4.21.17(16).

¹⁰⁸ Bart., D.2.14.47(48).1, D.24.3.33.

¹⁰⁹ Dec., X.2.19.11, nu. 200-205

the scribe of another's document to write anything to the scribe's own benefit. An exception was made for a case when, after being written down, the document was subscribed by its granter, thus approving the suspect disposition. A "general subscription" was enough if the beneficiary-writer was a family member of the granter, whereas, in the case where the writer was an extraneous person, a "special subscription" was required, referring to the suspect parts of the text, such as "foresaid I have narrated and approved" (D.48.10.1.8). The medieval lawyers debated the exact meaning of "special subscription" and the scope of its application. Bartolus held that any mutual contract, where one of the parties was a writer, was to be subscribed "specially" by the other party to be valid.¹¹⁰ However, the common opinion of the later authors considered a "general" subscription sufficient for such contracts.¹¹¹ The consensus seems to have been that corrections and marginal additions to an instrument required approval by a "special subscription".¹¹²

The Canonists strongly contributed to the *Ius Commune* doctrine on the effect of seals. A decretal by Pope Alexander III (1159-1181) provided that a private writing would lose evidential faith when all the instrumentary witnesses had died, unless it contained a seal (X.2.22.2). The canonists, on the basis of this and other decretals, elaborated the concept of a "non-public authentic instrument". In their doctrine, the letters of bishops and other officials possessing authentic seals, although not public instruments, constituted full proof in matters pertaining to the granter's competence.¹¹³ Panormitanus went even further, holding that in private matters private seals ("rings") should also be held "authentic", irrespective of whether the instrument was a letter or an *apocha*.¹¹⁴ By the early 16th century, the opinion appeared that a document containing an authentic seal and subscribed by witnesses made full faith in all matters, being effectually equal to a public instrument.¹¹⁵

If a particular act, made or evidenced in writing, required in law specific formalities for validity, the question arose of whether compliance with such formalities

¹¹⁰ Bart., D.48.10.15.2.

¹¹¹ Bald., C.2.1 Auth. *Si quis in aliquo*; Dec., *ibid*.

¹¹² Bart., D.48.10.15.2.

¹¹³ Abb., X.2.19.7, nu. 5-9, X.2.22.1, nu. 2.

¹¹⁴ Abb., X.2.22.2, nu. 14-16, - where the author expounds the law of seals in much detail.

¹¹⁵ Dec., X.2.19.7, nu. 31, 36, 49.

was to be mentioned in the text? The jurists responded by distinguishing between intrinsic formalities (inseparable from the words used, such as offer and acceptance in a stipulation) and extrinsic formalities (such as witnesses). The former were usually presumed, while compliance with the latter was to be specially mentioned in the text.¹¹⁶

1.2. Solemnities and Proof of Last Wills in the Ius Commune.

The issue of the solemnities of last wills in the *Ius Commune* was extremely complicated and controversial. The standard Roman testament, made in writing and solemnized by seven witnesses, was largely disregarded by the learned authors, who instead preferred to deal with nuncupative notarial testaments, ‘parental testaments’, soldier’s wills and other forms that were marginal in the Roman world. This obviously reflected the practice the learned jurists were dealing with. Moreover, Papal legislation created new forms of wills, thus contributing to the “deformalization” of the law of wills in the learned doctrine.

The doctrine recognized two major ways in which an ordinary, unprivileged testament could be made: either in writing or nuncupatively. A nuncupative testament, in its turn, might either be reduced into writing (*redactum in scriptis*) or not reduced into writing. The forms of testament were separate from each other; the choice of form was determined by the testator’s own will. A testament could not be written and nuncupative at the same time, although, e.g., Paulus de Castro¹¹⁷ admitted that an incomplete written testament might be recognized as containing an “implicit nuncupation” (*infra, p.26*).¹¹⁸

A nuncupative testament reduced into writing was inspired by the form described in Justinian’s constitution of 521 A.D. (C.6.22.8) and originally prescribed for blind testators. The form involved participation of a notary and seven witnesses, or eight witnesses, if a notary was unavailable. The will was fully narrated by the testator to the notary and witnesses or written in advance and read aloud by the notary to the

¹¹⁶ Distinction was also made between formal (constituting the “substance” of the act) and material formalities, with the former more easily presumed from the text. See: Bart., D.45.1.30, C.4.32.1.

¹¹⁷ C. 1360 – c. 1441.

¹¹⁸ Pau.Castr., cons. 93, vol I.

testator before witnesses. The subscriptions of the notary and all of the witnesses were necessary. Such a will was not considered as made *in scriptis*, but as nuncupative, because the witnesses were expected to hear the contents of the will.¹¹⁹ This law was widely seen as an argument for the possibility of reducing the contents of a nuncupative testament before seven witnesses (described in C.6.23.21.4 and C.6.23.26) into a public instrument;¹²⁰ an exception was the subscriptions of witnesses, which were not generally required in a public instrument. The requirements of a public instrument, dealt with above (*supra*, p.17), were applicable to a notarial testament, as well.

A nuncupative testament, evidenced in notarial form, was obviously quite a convenient form, as it allowed illiterate people to make a last will in a secure way. Its advantage also lay in that the document proved itself – there was no need to “publish” such testaments (*infra*, p.31). The seven witnesses, enumerated in such testament by name,¹²¹ played quite a passive role – there was no need for them to be literate or to be called after the death of the defunct. At the same time, such witnesses could only be men and could not be among the instituted heirs.¹²² They were supposed to know the testator personally in case he was illiterate.¹²³ If, on the other hand, a nuncupative testament was not reduced into writing, all seven witnesses were to testify to every single statement by the testator.¹²⁴

The *Ius Commune* authors did not pay much attention to the solemn testament made by private writing (C.6.23.21, 28-29). Perhaps, it was, partially, due to the clarity and elaboration of this form in the text of the *Corpus juris*, and, partially, to the impracticality of making such a formal document, which was not considered a full proof of its own authenticity (*infra*, p.31-32). The law of Theodosius and Valentinian of 439 A.D. (C.6.23.21) provided that such a will was to be subscribed by the testator before seven witnesses, or by the eighth witness on the testator’s behalf. Alternatively,

¹¹⁹ Gloss to C.6.22.8, s.v. “*Per nuncupationem*”.

¹²⁰ C.6.23.21.4, s.v. “*Sine scriptura*”.

¹²¹ Initially there were discussions on whether a testament where only two witnesses were mentioned by name proved itself (D.28.1.21, s.v. “*Heredes palam*”).

¹²² Inst.Just.II.10.6, 10.

¹²³ Bart., C.6.30.22.2.

¹²⁴ Bart. and Pau.Castr., C.6.11.2.

the testator could show a closed and tied document to the witnesses. Then it was to be subscribed by the witnesses and then sealed by them. Every single action was to be made *uno contextu*¹²⁵ and without interruption, so that the witnesses and the testator could see each other. Subsequently, Justinian's constitution (C.6.23.28) dispensed with the requirement of subscription in a case where the will was fully written by the testator's own hand. Another constitution (C.6.23.29) provided that the names of the heirs were to be either written with the testator's hand or spoken with his own voice and confirmed by the witnesses in their subscription. However, this last constitution was completely abolished by Nov.119 (544 A.D.).¹²⁶

Papal legislation, notoriously, introduced a new form of testament. Alexander III issued a decretal *Quum esses* (X.3.26.10), referring to the law of Moses (*Deut* 19:15) and recognizing the validity of last wills made in the presence of a priest and two witnesses. Later Canonists quickly interpreted the decretal as not admitting any priest but only a parish priest, with a universal *cura animarum* over the parish where the will was made, so that his authority was based on a "jurisdiction" of a sort.¹²⁷ The priest's function in the solemnity was to "exclude fraud",¹²⁸ this meant that the jurists agreed that two additional witnesses might be substituted for him, raising the number to four.¹²⁹ The Canonical will, according to the prevalent opinion of Canonists, was supposed to be recognized in secular forums.¹³⁰

Commentators devised various additional, often "mixed" types of wills, obviously to address practical needs. Thus, Bartolus in his commentary to D.35.1.38 provides an example: a testator before seven witnesses declares his last will to be contained in a handwritten document he had made earlier and deposited in a monastery. Bartolus held such a will to be valid as "nuncupative", because the testator in this case implicitly "announced" the contents of the writing before witnesses. He

¹²⁵ Expression based on the text of C.6.23.9, where the term "*conspectum*" is used, however.

¹²⁶ Nov.119.9(=C.6.23. Auth. *Et Non Observato*). There was an opinion, however, that speaking the heirs' names with testator's own mouth was necessary for nuncupative wills, as distinguished from the written ones. See: D.28.1.21pr, C.6.23. Auth *Et Non Observato*, s.v. "*Scribat*"; see also Baldus' discussion, C.6.23.29.

¹²⁷ In this "jurisdictional" interpretation, the Canonical will was compared to the Civilian "testament submitted to the Prince" of C.6.23.19 (G.D. Durante, *De arte testandi*, II.2).

¹²⁸ Gu. Durantis, *Speculum judiciale*, II.2 *De instr edit*, rubr. *Compendiosae*, fo. CLXXXVI; Abb., X.3.26.10.

¹²⁹ G.D. Durante, *ibid*; Gu. Durantis, *ibid*.

¹³⁰ Abb., rep in X.3.26.10.

qualified this, however, with the condition, that there should be legitimate clues (*indicia*) to prove after his death that it was his writing: e.g., *comparatio litterarum*.¹³¹ Paulus de Castro christened this form of will a “nuncupative testament with implicit nuncupation”.¹³² By analogy to this form, the possibility of “secret notarial wills” was also allowed by the learned authors, where closed sheets of paper were inserted into a notarial protocol before witnesses, so as to acquire full proof after the testator’s death.¹³³

Bartolus also mentioned the possibility of a notary making an inscription on a written will, thus certifying the will’s compliance with formal requirements and bestowing the force of a public document upon it.¹³⁴ His idea was adopted by later authors.¹³⁵

Another kind of a last will, besides the testament, was a codicil. This was a document which did not appoint or disinherit heirs, but instead bestowed or cancelled legacies or fideicommisses. There were no formal requirements for codicils, besides the five witnesses to testify their making (C.6.36.8); there was no requirement of *unicus conspectus*, and at least some or all the witnesses could be female.¹³⁶ The jurists of the 16-17th century *usus modernus Pandectarum* would not even require the presence of witnesses for codicils which were referred to in a testament, because they were considered as constituent parts of the testament;¹³⁷ however, this position was not expressly stated by the medieval Commentators. Even “nuncupative codicils” were possible.¹³⁸

There also were other, special forms of last wills. Thus, Valentinian and Theodosius’ 439 A.D. constitution provided that a solemn testament could be cancelled by an informal writing, testified by five witnesses and appointing heirs *ab intestato* (C.6.23.21.5); this was considered a special kind of last will. An agreement

¹³¹ Bart., D.35.1.38.

¹³² Pau.Castr., cons. 93, vol I.

¹³³ G.D. Durante, op cit, II.3; C.4.21 Auth. *Ad Haec*=Nov.49.2.2.

¹³⁴ Bart., D.29.3.2.

¹³⁵ Pau.Castr., ibid; G.D. Durante, op cit, II.1.

¹³⁶ G.D. Durante, op. cit., II.2.

¹³⁷ Th. Rűfner, ‘Testamentary Formalities in Roman Law’, *CSL*, vol I, 24(n 184), 45.

¹³⁸ Fr. Mantica, *Tractatus de Coniecturis ultimarum voluntatum*, 17; C.6.26.8, C.6.49.5.

between two soldiers, that the survivor would succeed to the predeceasing one (C.2.3.19), was also considered a separate type of last will.¹³⁹

Besides the aforementioned forms of last wills, the *Ius Commune* sources provided for several types of “privileged” wills, which allowed significant departures from the normal solemnities, depending on the nature of the testator, the place of making, and the contents and the purpose of the will. The Code itself provided a minor softening of formalities for testaments made by *rustici* in the countryside.¹⁴⁰ However, the real relaxation of formal requirements was provided for soldiers’ wills, *testamenta inter liberos* (parental testaments), and wills *ad pias causas* (“for pious uses”).

Soldiers’ wills were deemed to be freed from the solemnities of the *jus civile* and to follow the *jus gentium* directly.¹⁴¹ Being free from solemnities of form, soldiers’ wills only required two witnesses for a full proof. The privilege extended to those employed in active military service; such wills were to remain valid only for one year after the service ended.¹⁴²

Parental testaments (*testamenta inter liberos*) were a more complex matter. Their history in Roman law was closely connected to *divisio inter liberos* - a similar legal device, allowing a father to divide his goods among the children in advance, thus excluding *actio familiae (h)erciscundae*.¹⁴³ A constitution by Constantine of 321 A.D. (C.3.36.26) provided that a father could provide for the distribution of his goods among children *post mortem* in any document, even in a letter missive. Nov.18.7,¹⁴⁴ from which the *Authentica “Si modo”* was extracted,¹⁴⁵ added the requirement of subscription: either of the testator alone or of all the children. The aforementioned constitution of Valentinian and Theodosius (*supra*, p.26) provided that an “imperfect” testament was to bear no force, except as concerned the children of the testator (C.6.23.21.3). Novel 107¹⁴⁶ (=C.6.23 Auth. *Quod Sine*) allowed the making of the

¹³⁹ D. Covarruvias, *De testamentis et ultimis voluntatibus tractatus // Tractatus selecti...* (1569), 154.

¹⁴⁰ C.6.23.31. If such testament was made by a private writing, the number of witnesses might be five instead of seven; the witnesses needed not be literate and could subscribe for each other.

¹⁴¹ Bart., D.29.1.13.1(29.1.14).

¹⁴² D.29.1.21; C.6.21.5.

¹⁴³ In more detail, see: Ma.L. Blanco Rodriguez, *Testamentum parentum inter liberos* (1991).

¹⁴⁴ Auth.Coll.3.5.

¹⁴⁵ C.3.36 Auth. *Si Modo*.

¹⁴⁶ Auth.Coll. 8.3.

testaments, in which only the testator's children were instituted heirs, by way of simple writing. Such writing, however, was to be written in the testator's own hand, without abbreviations in "parts of substance": the heirs' names, their shares and the date of the will's making. Such a will could also contain legacies in favour of third parties (i.e., not the children), but this was to be made in the presence of witnesses.¹⁴⁷

The approach of the Gloss to Nov.107 was quite cautious. The Glossators essentially recognized that a parental testament could be made by a holographic writing and did not require witnesses as a matter of formality, except as concerned legacies to extraneous persons, which, in their interpretation, required two witnesses.¹⁴⁸ However, undermining this, Accursius also held that the authenticity of such a will after the testator's death was to be either recognized by all the successors or proved by two witnesses!¹⁴⁹

Some of the later Commentators, such as Baldus¹⁵⁰ and Alessandro Tartagni (1424-1477),¹⁵¹ followed that opinion. Tartagni in one of his *consilia* explicitly rejects the possibility of proving a holographic parental testament by *comparatio litterarum* alone.¹⁵² Others, like Paulus de Castro, however, were ready to accept truly holographic parental wills. Paulus seems to have been the first jurist to take into account the origin of a holographic will for proving its authenticity. If a private writing ("*schedula*"), written by the father's own hand, was found among his papers, its authenticity could be fully established by *comparatio*;¹⁵³ in support of this position Paulus referred to Bartolus' "nuncupative will with implicit nuncupation" (*supra*, p.26). And this opinion seems to have been accepted more widely among late *mos italicus* Commentators, e.g., G.D. Durante and G. Claro.¹⁵⁴ Claro summarized the form of parental wills in the following way: they are either a) made before two witnesses, with or without writing, following C.6.23.21.3, or b) written by the testator's own hand without any witnesses, in accordance with Nov.107, and left by the testator in his own

¹⁴⁷ Nov.107.1.

¹⁴⁸ Nov.107, s.v. "*Inter filios*".

¹⁴⁹ Nov.107, s.v. "*Divisione*".

¹⁵⁰ Bald., C.6.23 Auth *Quod Sine*.

¹⁵¹ Alex., C.6.23 Auth *Quod Sine*.

¹⁵² Alex., cons. 76, vol III.

¹⁵³ Pau.Castr., C.6.23 Auth *Quod Sine*; cons. 93, vol I.

¹⁵⁴ G.D. Durante, *De arte testandi*, II.4; G. Claro, *Recept. Sent.*, § *Testamentum*, qu.14.

depository¹⁵⁵ or in a notarial archive, so as to make faith without witnesses, as long as they are undoubtedly in his handwriting.¹⁵⁶

Although a parental will was to be valid “without solemnities”, a holographic parental will, to qualify as such, was supposed to comply with particular “solemnities”. As was already mentioned, names of heirs, their shares and the date were to be written by the testator’s own hand. The date of making was, in effect, a necessity for a holographic will, which distinguished it from all other private instruments, which did not required the date as a matter of law.¹⁵⁷ The original meaning of Nov.107.1 was obviously to prevent testators from using any abbreviations, but the jurists allowed the generally accepted abbreviations.¹⁵⁸ Finally, even the requirement of writing the substantial parts with the testator’s own hand was dropped, with many jurists deeming a subscription sufficient! This was justified by reference to Nov.49.2.2,¹⁵⁹ as well as by the general rule that subscribing an instrument is the same thing as writing it in full (*supra*, p.21).¹⁶⁰ G. Claro opined that a subscription, to be fully authentic in a parental will, must be a “special” one,¹⁶¹ mentioning that the subscribed document is a will, in order to rule out potential misunderstandings of the testator.¹⁶²

The privileges of last wills made *ad pias causas* were based on Nov.131.11,¹⁶³ which provided that last wills in favour of the poor were to be enforced “*secundum testatoris voluntatem*”, and also on a decretal by pope Alexander III (X.3.26.11), which established two witnesses, even without a priest, as sufficient to prove a legacy in favour of the Church. The decretal resulted in “pious” wills receiving basically the same treatment as “soldiers’ wills”. They could even be made by a nod or another gesture.¹⁶⁴ Which cause could qualify as a “pious” one was a complicated question,

¹⁵⁵ “*Scrinium*” – a chest.

¹⁵⁶ G. Claro, *ibid*.

¹⁵⁷ Dec., X.2.22.2, nu. 24-28.

¹⁵⁸ Bald., C.6.23 Auth *Quod Sine*.

¹⁵⁹ See Pau.Castr., C.6.23 Auth “*Quod Sine*”; cons. 93, vol I.

¹⁶⁰ See: Bart., D.2.14.47(48).1; Dec., X.2.19.11, nu. 200-205.

¹⁶¹ See *supra*, p.29, on the matter of special and general subscriptions.

¹⁶² G. Claro, *ibid*.

¹⁶³ Auth.Coll. 9.6.

¹⁶⁴ See: G. Claro, *Recept. Sent.*, § *Testamentum*, qu. 8, - where Claro distinguishes a will *ad pias causas* from parental wills in this respect.

with many authors taking into account such issues as the financial position of the testator and the receiver of the disposition, their relation, etc.¹⁶⁵

Bartolus in his commentary on C.6.23.21.3 distinguished between testaments “imperfect” (i.e., incomplete) *ratione solemnitatis*, which could be valid in respect of children only, and *ratione voluntatis*, which bore no validity whatsoever.¹⁶⁶ Thence arose the controversy, at what exact moment could a last will be considered perfected as to will? There was a general consensus among the Commentators that ordinarily a nuncupative testament, reduced into a public instrument, became perfected *quoad voluntatem* only after the notary read the will aloud before the testator and witnesses. This was the way to ensure the testator’s definitive consent to the contents of the instrument.¹⁶⁷ Here the question arose: what if the testator narrated his last will before witnesses, or witnesses and a notary, but died before the text was formally recited to him by the notary? Could such a will be considered completed at least *quoad voluntatem*, if not *quoad solemnitatem*?

Bartolus was not explicit on this topic, but there are some indications that he was leaning towards accepting such wills.¹⁶⁸ Paulus de Castro, however, consistently rejected the validity of such incomplete wills even *quoad voluntatem*, so that they were invalid even in respect of children or *ad pias causas*.¹⁶⁹ Whereas, for ordinary wills, Paulus deemed it indispensable that the will be signed by the notary within the testator’s life.¹⁷⁰

However, among the later authors the more popular solution was to consider reading of the will before the testator as just a solemnity. In A. Tartagni’s opinion,¹⁷¹ if a testator reduced his will into writing, but died before the notary and witnesses could solemnize this writing into a public instrument, such will was valid in respect of children or *ad pias causas*, if it could be proved by at least two witnesses. F. Decio, in

¹⁶⁵ G.D. Durante, *De arte testandi*, II.2.

¹⁶⁶ Bart., C.6.23.21.3, D.28.1.25.

¹⁶⁷ Bald., C.4.21.17.

¹⁶⁸ Thus, Bartolus stresses that a notarial will not read before witnesses is incomplete and makes no faith, but he does not state that it must also be read to the testator (Bart., D.28.1.29, D.32.11.1).

¹⁶⁹ Pau.Castr., D.28.1.25. See also his *consilia*: cons. 75, vol I, and cols. 450, vol II, - where he does not extend his position to the situation where it is obvious that the testator’s intention is not to change.

¹⁷⁰ C.6.23.21

¹⁷¹ Alex., C.6.23.21.4.

his commentary to the Decretals,¹⁷² quite confidently considered reading the instrument aloud a mere solemnity, so that it was unnecessary for notarial wills made “among the children” or *ad pias causas*.

English Civilians, such as W. Lyndwood (c. 1375-1446) and H. Swinburne (1551–1624), held that two witnesses were a sufficient proof for any English will, irrespective of form. They justified this by reference to privileged forms: Lyndwood claims that any last will is “for pious uses”,¹⁷³ while according to Swinburne English testaments “followed military law”.¹⁷⁴ As to holographic wills without witnesses, Swinburne’s work displays eclecticism and some inconsistency;¹⁷⁵ ultimately, the author admits the possibility of proving such wills by *comparatio litterarum* together with other adminicles, such as finding the writing in the testator’s papers.¹⁷⁶ The research of R.H. Helmholz showed that English ecclesiastical courts in the mid-17th century used the procedure of *comparatio litterarum*, similar to that of the *Ius Commune*;¹⁷⁷ it is unclear, however, what exact probative value the *comparatio* bore.

A testament made no faith, unless it passed the procedure of “publication” before the local magistrate.¹⁷⁸ Bartolus made an exception for notarial wills, both nuncupative and written with notarial involvement, as they were deemed already “published” by the notary in his register.¹⁷⁹ Like other public instruments (*supra*, p.17), a notarial will was worth as many witnesses, as were mentioned in it by name.¹⁸⁰ This was the main advantage of notarial wills. However, practice could diverge:

¹⁷² Dec., X.2.22.1, nu. 42-43.

¹⁷³ W. Lyndwood, *Provinciale (seu Constitutiones Angliae)*, III.13, s.v. “Residuis”, 169, s.v. “Probatis”, 174.

¹⁷⁴ H. Swinburne, *A Briefe Treatise on Testaments and Last Wills*, I.10, p.19.

¹⁷⁵ For example, the author claims that, in case there are no doubts that the will was written by testator’s hand, comparison of letters alone would be sufficient (H. Swinburne, op cit, IV.25, pp.191-192). But what is the point of comparison, if there are no doubts about the testator’s hand?!

¹⁷⁶ Swinburne, *ibid*. The author also admitted a will found in the testator’s papers and sealed by his authentic seal.

¹⁷⁷ R.H. Helmholz, ‘The Transmission of Legal Institutions: English Law, Roman Law, and Handwritten Wills’, *SJILC*, vol 20 (1994), 156-158.

¹⁷⁸ C.6.23.2.

¹⁷⁹ Bart., D.29.3.2.

¹⁸⁰ Bart., D.29.3.1.2, C.4.21.15.

J. Sicchard mentions that in 16th-century Burgundy, even in notarial wills, the witnesses were to recognize their involvement.¹⁸¹

All other wills were to be “published”. The opinions about that procedure varied greatly. The consensus, however, was that it involved calling and interrogating testamentary witnesses *ad perpetuam rei memoriam*.¹⁸² In nuncupative wills all seven witnesses were necessary for a successful publication; death or disability of even one of them rendered the testament unprovable and thus unenforceable. Sharp controversy was created by the opinion of the 12th century Glossator Martin, that two out of seven witnesses were enough to prove the solemnity of the testament, as opposed to its contents;¹⁸³ but even this would make a difference only when the testament’s authenticity was recognized by the opponent (intestate heir, possessor of the estate goods, etc.).¹⁸⁴ In respect of testaments made by a private writing, the doctrine was unclear. It was obvious that a private instrument was unable to prove itself if all the witnesses died;¹⁸⁵ whether one or two surviving witnesses were enough for proving the testament was not directly addressed by the Commentators. Some passages of their works suggest that a private testamentary deed by itself had some probative force, but the impression remains that they mostly avoided determining the exact measure of that force.¹⁸⁶

Publication of testaments required summoning all the parties who might be affected by it (e.g., heirs on intestacy). The extent to which the testamentary witnesses were to be interrogated was a controversial topic: thus, Baldus held that the witnesses to a private written will were only to recognize their seals and subscriptions under oath, without formal interrogatories submitted by the parties.¹⁸⁷ As a result of publication,

¹⁸¹ Sicchard, *Dictata et praelectiones ad Codicem*, C.6.23.2.

¹⁸² This way of taking depositions of witnesses was prescribed by C.4.20 Auth *Sed Et Si Quis* (=Nov.90.5).

¹⁸³ C.6.11.2, s.v. “*Doceri potest*”.

¹⁸⁴ Bart. and Pau.Castr. to D.28.1.21 and C.6.11.2.

¹⁸⁵ Bart., D.29.3.2; G.D. Durante, *op cit*, II.1.

¹⁸⁶ Thus, Bartolus holds that if a witness doubts his seal on a testament, the seal is not deemed suspected by this fact only (Bart., D.29.3.1.2, nu.1). Baldus mentions that, if a testator’s handwriting is publicly known and easily recognizable, the witnesses need not prove the verity, but only the solemnity of a written testament (Bald., C.6.23.1). Panormitanus holds that if a witness to a testament is also a legatee, his testimony may be fortified by the testamentary document so as to avoid doubt of bias (Abb., X.2.19.9).

¹⁸⁷ Bald., C.6.23.2. Sicchard, however, held that witnesses even to private written wills were to give evidence about the will’s contents; but his opinion, as well as his classification of wills (he considered

an interlocutory sentence was issued and an inscription made by the judge on the testamentary deed.¹⁸⁸ The effects of publication and the possibility of challenging it in subsequent litigation were debated by the jurists; undoubted, however, was the right of interested parties to invalidate the published testament by providing strong proof of forgery.¹⁸⁹ The testator himself might publish the testament within his life, following the same procedures.¹⁹⁰

J. Siccard uses the term “confirmation” once while describing the procedure for publication of testaments.¹⁹¹ This was not standard *Ius Commune* terminology. However, “confirmation”, in a different meaning of the term, supposedly played an important role in the publication procedures used in England. H. Swinburne tells us about two forms of publication of testament, allegedly adopted in England in his time: a) the common form, which did not involve a citation of interested parties, but which was not definitive and could be challenged, and b) the special and solemn form, which involved a citation of the parties and was definitive.¹⁹²

Swinburne alleges that this distinction was developed in English practice by analogy to the distinction between the types of “confirmations”.¹⁹³ The “confirmation” he is talking about here was based on title 30 of book 2 of the *Liber Extra*. This Canon law institution was originally associated with Papal letters, which “confirmed” particular rights, possessed or enjoyed by individuals and corporations. If “letters of confirmation” were issued in common form, i.e. without enquiry into the case, they could not prejudice existing third parties' rights. They could prejudice third parties, however, if issued in special form, after enquiry into the case (*causae cognitio*) and making mention of third parties' rights.¹⁹⁴

This analogy between the publication of the testament and the “confirmation of rights”, if reported correctly by Swinburne, suggests that in late 16th-century

private written wills “nuncupative”), was obviously contrary to the prevalent views of the Commentators (Siccard, op cit, C.6.23.2).

¹⁸⁸ C.6.23.2, s.v. “*Publicati*”.

¹⁸⁹ This was based on on the Justinian’s law in C.4.21.21(20). See also: Bart., D.29.3.2.

¹⁹⁰ C.6.23.2, s.v. “*Publicati*”, additio; J. Siccard, ibid.

¹⁹¹ Siccard, ibid.

¹⁹² Swinburne, op cit, VI.14, pp.224-225.

¹⁹³ Swinburne, op cit, p.224, n.(c).

¹⁹⁴ X.2.30.3-4, 7.

England, unlike the Continent, the main perceived purpose of the relevant procedure was not to guarantee of the will's authenticity, but to endow formally the successor with powers. Consequently, the differentiation of two forms of such endowment looks logical, considering that in England, unlike the Continent, the universal successor was always the executor, a person nominally disinterested in the estate goods and accountable before the ordinary. It was expedient that someone in charge of the estate was to be appointed as soon as possible; hence the publication of a testament in "common form", leaving the will open to challenge by competing claimants, but providing administration for the defunct's property.

1.3. Authentication of Writs in Scotland: General Legal Background.

Scotland has demonstrated a unique development of the law of execution of writs and written evidence in the Early Modern era. It was different from both Continental and English models in the way private writings in Scotland, complying with formal requirements, were fully "probative", i.e., made full faith against the granters and third parties. However, despite practical dissimilarity, the Scots law on written documents does not look really devoid of roots in the *Ius Commune* doctrine.

In the 15-16th centuries the use of notaries and notarial instruments came to prominence in Scotland. However, there is a scholarly opinion that this process might be more of a regression than a positive development, with Scots notaries often being poorly qualified and their instruments easy to forge.¹⁹⁵ As Th. Craig famously wrote c. 1600, "*as their use was born out of abuse of private writings, thus because of the vices of notaries recourse should be had to private writings*".¹⁹⁶ Thus, Scottish legal practice took a restrictive approach to notarial instruments, so that by the late 17th century they were considered full proof only in respect of the legal acts which by custom required to be executed as notarial instruments as a matter of substance: transfers of seisin, resignations, requisitions, premonitions, consignations, intimations, protests of bills of exchange and similar documents.¹⁹⁷ For other acts, such as offers to

¹⁹⁵ J. Finlay, 'The History of the Notary in Scotland', *Handbuch zur Geschichte des Notariats...* (2009), 394 (with reference to G.W.S. Barrow).

¹⁹⁶ "...ut eorum usus ex privatarum scripturarum abusu natus est, sic ex notariorum sceleribus ad privatarum scripturarum fidem recurrendum est" (Craig, *Jus feudale*, II.7.7).

¹⁹⁷ Stair, *Inst.* IV.42.9; Bankton, *Inst.* IV.27.4. It should be noted that even instruments of seisin were not probative without also producing the relevant charters (Craig, *Jus feudale*, II.7.7).

perform an obligation, notarial instruments made a full proof of their own authenticity, but required calling instrumentary witnesses to prove the act itself.¹⁹⁸ In the 1611 case, *Anstruther v. Thomson* (M.12499), it was decided that acts and statements by a party, written down by the notary but not falling within established patterns, would make no faith.¹⁹⁹

The *Practicks*, traditionally attributed to James Balfour (c. 1580), tell us about the usual requirements for a private deed in the late 16th century: the seal and the subscription of the granter, *justa causa*, at least two instrumentary witnesses, the date and place of making.²⁰⁰ Although Balfour cites “Auld Lawes” in support, his list looks very similar to the *Ius Commune*’s requirements for public instruments. The same can be said of Balfour’s account of the procedure for “improbation” (disproval) of the charters: the defender bore the burden of calling the instrumentary witnesses or initiating the comparison of seals to prove forgery.²⁰¹ This makes Scottish sealed and witnessed deeds look quite similar to sealed and witnessed letters under Canon law (*supra*, p.22).

The form for Scottish written deeds was provided partially by statutes, partially by custom. Thus, the 1540 Act²⁰² required a subscription as necessary in addition to the seal for sealed writs. The 1555 Act,²⁰³ which concerned reversions only, required a sealed and subscribed document for the reversion’s validity. The 1579 Act²⁰⁴ had most lasting consequences. It provided that all “*contractis, obligationes... and generalie all writtis importing heritable title or utheris bandis and obligationes of greit importance*” were to make faith only if made in writing, subscribed by the granter or by two notaries before four witnesses. This Act was later supplemented by the 1593 Act, which required the documents to mention their writers.²⁰⁵

¹⁹⁸ Bankton, *Inst.* IV.27.5.

¹⁹⁹ See *infra*, p.54, for more detail on this case.

²⁰⁰ *Balfour’s Practicks, Of probatioun be writ*, c. 36.

²⁰¹ *Balfour’s Practicks, Of probatioun be writ*, c. 1. See also the 1557 Act (RPS, A1557/12/4), putting additional burdens on defenders wishing to improve the pursuers’ writs, and the Act of Sederunt of 26/05/1581, which effectually introduced a necessity to plead improbations in a criminal way, involving the Lord Advocate.

²⁰² RPS, 1540/12/92.

²⁰³ RPS, A1555/6/3.

²⁰⁴ RPS, 1579/10/33.

²⁰⁵ RPS, 1593/4/44.

Scots legal writers of the 17th century, namely R. Spottiswood²⁰⁶ and G. Mackenzie,²⁰⁷ claimed that this statute was “taken *verbatim*” from the French Ordinance on the reform of justice, enacted in Moulins in 1566. Indeed, this Ordinance contained an article 54, which provided that the contracts in which a single payment exceeded the value of 100 livres were to be made either in notarial form or by the contracting parties’ own hands.²⁰⁸ The obvious similarity between the Ordinance and the Scots 1579 Act is the value of the transaction as a criterion in determining the form.²⁰⁹ Indeed, the later Scottish legal practice established 100 pounds Scots as the mark of the “great importance” of the deed;²¹⁰ this mark was not contained in any statute, except for one Act of Sederunt from 1597, dealing with debt payments.²¹¹ The mentioning of notaries and holographic documents (*infra*, p.39) was another possible source of inspiration for Scots lawyers in the French Ordinance. However, the Scots 1579 Act was hardly taken “*verbatim*” from the French source.

The 1579 Act, strangely enough, did not mention the necessity of two instrumentary witnesses to deeds subscribed by the granter. Later Scottish authors, however, had no doubt about this requirement being “implied” in the Act.²¹² The Act also did not abolish the requirement of a seal on the document. It was later abolished for deeds submitted for registration.²¹³ Th. Craig circa 1600 mentioned the seal as still necessary for charters.²¹⁴ However, as pointed out by Erskine, during the 17th century private seals completely went out of use in Scotland as a matter of custom;²¹⁵ as noted by Mackenzie, comparison of seals gave way to comparison of subscriptions.²¹⁶

²⁰⁶ Spottiswoode’s *Practicks*, ‘Testaments’, 337.

²⁰⁷ G. Mackenzie, *Observations on the Acts of Parliament* (1687), 195.

²⁰⁸ The source of the text of the Ordinance: http://lecahiertoulousain.free.fr/Textes/ordonnance_1566_moulins.html. J. Bourhis courteously helped the author with translation from Middle French.

²⁰⁹ W.A. Wilson, ‘*In Modum Probationis*’, *JR*, vol 13(n.s.) (1968), 195-196; G. Lubbe, ‘Formation of contract’, *A History of Private Law in Scotland*, vol II, 1-46; W.D.H. Sellar, ‘Promise’, *A History of Private Law in Scotland*, vol II, 252-282.

²¹⁰ One of the earliest reported cases where 100 pounds rule was invoked was decided in 1605 (M.12354).

²¹¹ 8/06/1597, *Acts of Sederunt 1790*, 28.

²¹² Mackenzie, op cit, 193; Erskine, *Inst.* III.2.11; W.A. Wilson, op cit, 195.

²¹³ *RPS*, 1584/5/85.

²¹⁴ *Jus Feudale*, II.3.10.

²¹⁵ Erskine, *Inst.* III.2.7.

²¹⁶ Mackenzie, op cit, 146, 452.

The scope of applicability of the 100 pounds rule was controversial in Scots case law of 1579-1660. In an early case, *Auchinleck v. Gordon* (1580, M.12382), a point was made that a gratuitous promise might only be proved by a writ or an oath, irrespective of the amount. Colvil of Culross, reporting the case, disagreed with it on the ground of *Ius Commune* principles;²¹⁷ however, it is possible that the Lords in that case themselves followed the Civil law paradigm of *nudum pactum*.²¹⁸ Nevertheless, the subsequent practice was inconsistent: sometimes unilateral promises to pay a sum below 100 pounds were found provable by witnesses;²¹⁹ sometimes not.²²⁰ Finally, in *Deuchar v. Brown* (1672, M.12386) it was settled that a gratuitous promise, even one given by the surety to an obligation, may only be proved by a writ or an oath.

The extent of the influence of *Ius Commune* doctrine on Scots practice on private witnessed deeds in the 17th century is uncertain. Among 20th-century scholars there was a widely discussed topic on whether Scots law of that period distinguished between acts made substantially *in scriptis* and acts just evidenced by a written document. J.J. Gow in 1961 expressed doubt that Scots legal practitioners and writers really drew a difference between the two.²²¹ W.A. Wilson insisted that this distinction was clear and explicit from Stair's *Institutions* onwards: contracts in respect of heritable property and some other deeds required writing as a matter of substance, while obligations of "great importance" required writing (or, alternatively, an oath) as a matter of proof only.²²² References to the *Ius Commune* were not explicit in the controversy; it obviously has implications for the topic of the *Ius Commune* influence in Scotland, seeing that the distinction between acts *in scriptis* and acts evidenced in writing was present in the *Ius Commune* doctrine, at least since the time of Baldus (*supra*, p.16). The consensus in the controversy seems to be that, before 1660, Scots

²¹⁷ Namely, C.4.21.15, which established, as a general rule, that witnesses and writings have equal evidential force.

²¹⁸ The concept of "*nudum pactum*" as an informal agreement, not worthy of full legal protection, was obviously a part of the Scots legal discourse in 1579-1660 and was used in judicial practice. For example, in the case *Sharp v. Sharp* (1631, M.15562), as reported by Dury, the Lords took the trouble of explaining how the agreement under controversy was not a *nudum pactum*, because it had a just cause in creating mutually enforceable obligations of the parties.

²¹⁹ *Ernock v. Preston* (1636, M.12383).

²²⁰ *Russel v. Paterson* (1629, M.12383), where the promise was for 99 pounds.

²²¹ J.J. Gow, 'The constitution and proof of voluntary obligations', *JR*, vol 6(n.s.) (1961), 1-20.

²²² W.A. Wilson, *op cit*, 197-199.

practice did not consistently differentiate between the one and the other;²²³ G. Lubbe also seems to hold this opinion.²²⁴

W.A. Wilson called the money bond an “original *obligatio litterarum*” of Scots law, seemingly implying that even before 1660 it was looked upon as *contractus in scriptis* in the style of Civil law.²²⁵ However, all the early cases he cited in support of his claim dealt only with an issue of the oath that the document’s granter might be compelled to take;²²⁶ the earliest case expressly referring to the bond as *obligatio litterarum* was decided in 1749.²²⁷

Scottish deeds in 17th century practice often referred to a Civil law device – “*exception of not numerat money*”, – which Scots bonds for money usually renounced.²²⁸ However, this was only a clause of style, having no real legal effect.²²⁹

Subscription of illiterate or disabled persons’ deeds by a notary produced private, not public instruments in Scotland.²³⁰ There was at least one point of quite explicit influence of the *Ius Commune* doctrine on this type of document in Scotland: *unicus contextus*, requiring the subscription to take place in presence of all witnesses (*supra*, p.25). The term itself seems to have been used in a Scots case for the first time in 1633,²³¹ establishing that all notaries and witnesses were to be present at subscription; however, the Civil law fragment on stipulation was cited in that case²³² instead of the fragments on last wills. Another field where Scots deeds showed similarity to the *Ius Commune* was that of warrants of notaries: the deeds were required to mention the granter’s commission to the notary to subscribe for him, made before

²²³ E.g., in *Anstruther v. Thomson* (1611, M.12499), although the contract of sale concerned land, the judges allowed oath as a proof, which would contradict later law (see *infra*, p.54).

²²⁴ G. Lubbe, *op cit*.

²²⁵ Wilson, *op cit*, 205-206.

²²⁶ *Rankine v. Williamson* (1633, M.17017), *Cassimbro v. Irvine* (1634, M.17017), *Gordon v. Macpherson* (1686, M.17021).

²²⁷ *Coult v. Angus* (1749, M.17040).

²²⁸ See, e.g.: P. Goulesbrough, *Formulary of Old Scots Legal Documents // SP*, vol 36 (1985), 2-10.

²²⁹ Stair, *Inst.*I.10.11; Erskine, *Inst.*III.2.5.

²³⁰ Stair, *Inst.*IV.42.9.

²³¹ *Cow(Coll) v. Craig* (1633, M.16833). See also a later, 1666, anonymous case, reported in II B.S.426.

²³² Namely, D.45.1.137, providing that offer and acceptance in a stipulation were to take place in a continuous act.

witnesses, otherwise the deed was invalid.²³³ However, this last requirement might also be associated with the qualification in the 1579 Act about the granter's inability to subscribe, forcing him to invite notaries instead.

Many developments of 17th century practice were given a statutory basis by the 1681 Act.²³⁴ The Act established the conditions for probativity of witnessed deeds. The witnesses were now required to put their signatures on the document; they were held to know the granter and see him subscribe or give the warrant to the notary to subscribe for him. Non-compliance entailed nullity of the writ.

A mysterious problem in Scots legal history is the recognition of holographic writs. It is unclear how and when writs written fully or substantially by the granter's own hand started to be recognized as valid as an exception to the 1579 Act. Balfour, Craig and Hope are still silent on them. R. Spottiswood mentions them in his propositions to the Parliament under no. 6, claiming that holographs were accepted on a customary basis and suggesting to give them statutory grounding.²³⁵ The earliest reported cases to deal with holographic writings were decided in 1610-1611. The very first one, *Pursuer v. Titill* (1610, M.16959), concerned a testament. Several subsequent cases concerned letters missive, receipts and bonds. The law as to holographs established by them was as follows. Holographic documents, unlike witnessed deeds, could not prove the date of their making against the third parties.²³⁶ This rule was quite logical in view of the need to prevent possible fraud against creditors, heirs and *bonae fidei* purchasers of rights; it was reminiscent of the *Ius Commune* rules.²³⁷ As concerns the granter of the deed himself, the law, as it stood before 1635, also seems to have followed a pattern similar to the *Ius Commune*: if the granter (or his successor) denied

²³³ Littlejohn v. Hepburn (1608, M.16828), Veitch v. Horsburgh (1637, M.16834), Philip v. Cheap (1667, M.16835), Laird of Culterallers v. Chapman (1667, M.16803).

²³⁴ *RPS*, 1681/7/27.

²³⁵ *Spottiswoode's Practicks*, 363.

²³⁶ Lord Forbes v. Marquis of Huntly (1611, M.12603), Howieson v. Howieson (1611, M.12271). There were later divergent cases, like Lesly v. Boquhen & Pitcaple (1629, M.12604). However, since Dickie v. Montgomery (1662, M.12606), the non-probativity of the holographic date has been settled.

²³⁷ Which admitted private writings as proof against the third parties only if they were subscribed by three witnesses. See *infra*, p.64.

that the document was his/her holographic writing, the pursuer was to prove that fact, even if the document bore in the text that it was holograph.²³⁸

However, the case of *Earl of Rothes v. Leslie* (1635, M.12605) confused the law of holographs, as it apparently decreed that a holographic writing was probative if the text stated so, with a burden of proof on the defender to refute authenticity.²³⁹ Although the case law immediately following *Earl of Rothes* suggests that the Lords did not plan to establish a general rule to that extent,²⁴⁰ this was exactly the effect of *Earl of Rothes* in the long term. This is why Scots Institutional writers considered holographic writings probative;²⁴¹ Stair even put holographic writings in the first position in importance, being “*the least imitable*” of all writings (Stair, *Inst.IV.42.6*). One might draw parallels with the *Ius Commune* rule on the presumption of solemnities mentioned in an instrument.²⁴² Nevertheless, this presumption of authenticity of holographic writs was considered unreasonable by more modern authors²⁴³ and was finally abolished by the Requirements of Writing (Scotland) Act, 1995.

Comparatio litterarum – both the notion and the term itself - was well-known and employed in Scots practice. However, the procedure of *comparatio* in Scotland did not follow the *Ius Commune* pattern. There were no qualified experts (*periti*), specially called and sworn. Scottish judges allowed the parties to bring witnesses who “*knew the hand*” of the granter and give their personal opinions on authenticity of the text.²⁴⁴ Sometimes, it seems, the judges themselves performed the comparison.²⁴⁵ *Comparatio* in Scotland, similarly to the *Ius Commune*, usually provided a “half-

²³⁸ See: *Kirkwood v. Inglis* (1627, M.16926), *Inglis v. McCubine* (1631, M.16962).

²³⁹ W.A. Wilson, *op cit*, 196. It should be noted that the type of writing involved in *Earl of Rothes v. Leslie* was quite special: it was a holographic arbitral award, written at the back of the arbitral agreement.

²⁴⁰ In an anonymous 1638 case, as reported in I B.S.103, the defender, challenging a holographic bond on the ground of solemnity, lost the case, although he allegedly would have won if he had denied the bond’s authenticity. This is quite in line with the pre-1635 practice.

²⁴¹ Bankton, *Inst.I.11.33*; Erskine, *Inst.III.2.22*.

²⁴² Bart., D.45.1.30, C.4.32.1; *supra*, pp.22-23.

²⁴³ M’Laren, *Wills and Succession*, vol I (1868), pp.236-237; A.G. Walker, ‘Further notes on holograph wills’, *SLT(News)* (1933), 41-45.

²⁴⁴ *Vans v. Malloch* (1675, M.16885).

²⁴⁵ See: *Colvil v. Executors of Lord Colvil* (1664, I Stair, 215), - where the Lords assessed the similarity of the subscriptions of witnesses.

proof” and could be supplied by one witness to make full faith;²⁴⁶ in some cases, however, *comparatio* provided a presumption in favour of the document, subject to “stronger proofs” from the opposite party.²⁴⁷

Scottish judges showed a strong inclination to accept “not-so-solemn” writs as valid on the ground of custom, *lex mercatoria* or established practice of the parties.²⁴⁸ Much of the case law in this vein concerned letters missive used in commercial practice. In one of the early cases, *Pyromon v. Ramsay’s Executors* (1627, M.16960 = 1629, M.16963), it was established that for a letter between merchants a mere subscription was sufficient authentication. This rule persisted in practice,²⁴⁹ so that Lord Bankton in the mid-18th century would admit the validity of subscribed letters missive if they were the usual way of communication between the parties.²⁵⁰ Some commercial documents, like bills of exchange, began to be considered probative if they contained just a subscription.²⁵¹

However, similarly to the *Ius Commune*, probably the most privileged type of writing in Scotland was the book of account (*compt-book*). Not only was subscription enough for an account’s validity,²⁵² but even without subscription it made some faith. In *Brown’s Creditors v. Baillie* (1631, I B.S.319=M.2428=M.12617),²⁵³ the Court found that the accounts in the defunct’s “compt-book”, subscribed by the defunct though written by someone else, were enough proof for the debt to compete *pari passu* with other debts against an insolvent estate, while unsubscribed accounts were to be ‘adminicled’ by additional proofs.²⁵⁴ Despite some cases to the contrary,²⁵⁵ the

²⁴⁶ Vans v. Malloch (1675, M.16885).

²⁴⁷ Rentoun v. Earl of Leven and Alexander Kennedy (1662, M.12652).

²⁴⁸ Wilson, op cit, 197.

²⁴⁹ See Earl of Northesk v. Viscount of Stormont (1671, M.16967).

²⁵⁰ Bankton, *Inst.*I.11.33.

²⁵¹ Stair, *Inst.*IV.42.6.

²⁵² Rule v. Atton (1628, M.16961).

²⁵³ In the *Morison’s Dictionary* the case is also cited as “*Brown’s Creditors Competing*”. See: M.2428, M.12617.

²⁵⁴ This interpretation is apparent in the Spottiswoode’s report (*Spottiswoode’s Practicks*, ‘Creditors’, 77) and implicit in the Auchinleck’s report (I B.S.319), with the latter reporting that the accounts were written by the defunct’s servant. The report of Dury, however, claims that the accounts were written by the defunct’s own hand.

²⁵⁵ *Brown’s Creditors* seemingly contradicts another case from the same period - Ranken v. Watson, Mill et al. (1633, I B.S.340) – where an account, subscribed by the defender, was found not probative and not provable by the defender’s oath. However, the obvious difference between the two cases is that in *Ranken* the granter of the document was alive and contradicting it, while in *Brown’s Creditors*

probative force of the grantor's subscription of the account seems to have been settled as regards *res mercatoria* in *Stuart v. Agnew* (1680, M.12624).²⁵⁶ The 1696 Act²⁵⁷ dispensed with the necessity of the book pages being "battered" together, provided that every page be numbered and subscribed.

1.4. The Form of Last Wills in Post-Reformation Scotland: General Review.

In contrast to other kinds of documents, there is very little reported litigation on authentication of last wills in Scotland. However, this does not mean that last wills have never been an object of special regulation. The original *Instructions to the Commissaries of Edinburgh* of 1563²⁵⁸ provided that all testaments were to be made "in presence of a Minister... or in presence of an Notar... or subscrivit by the persoun, maker thair of...", while all that was to be "befor witnessis" (c. 24). However, the same article ends with the words: "or otherwayis as accordis the law". The openness of this list of accepted forms does not allow us to establish exactly its sources. However, the reference to clergy as officials eligible for writing testaments on par with notaries is an obvious reference to the Canon law "priest and two witnesses" last wills (*supra*, p.25). Absence of the requirement of sealing the wills and sufficiency of a simple subscription, long before the 1579 and 1584 Acts, are also notable.

The obvious and express change was introduced by the subsequent Instructions of the Lords of Session to the Commissaries of Edinburgh, from 26 March 1567. The very first article reads: "in all time cuming nomination of executouris be provin by writ allanerlie". This text implies that nuncupative testaments were lawful in Scotland before 1567. Whether they appeared in practice before and after 1567, will be dealt with below (*infra*, pp.48-49, s.1.7). However, this rule was well established in later Scots law. In fact, it was so well-established that in *Shaw v. Lewis* (1665, M.4494) even nuncupative testaments made abroad were deemed invalid as to nomination of

the executor did not challenge the accounts' authenticity – it was the third party rights that were at stake. Another difference between the two cases might be that in *Ranken* the "account" was not a part of the book of accounts.

²⁵⁶ In this last case the account was written by someone else and subscribed by the grantor, who was a merchant. The Court found that 1579 Act did not apply to books of account, so that mere subscription was sufficiently probative, although open to improbation by comparison of handwritings.
²⁵⁷ RPS, 1696/9/133.

²⁵⁸ We cannot be sure of their dating because January and February of 1564 in 16th century Scotland's calendar would be part of 1563.

executors for goods in Scotland: writing was considered not just a form but a “*constitution of the essentials of act*”! This “imperativity” of writing for Scottish wills was clearly contrary to the spirit of the 1567 Instructions, which required testaments only to be “proved” by writing, not “made” in that way. However, *Shaw* was cited with implicit approval by the Scottish learned authors²⁵⁹ and was still a part of Scots law in the late 19th century.²⁶⁰

In *Balfour’s Practicks*, written by about 1580, only the requirement of two witnesses is mentioned as necessary for a testament; they could not be women.²⁶¹ The legal writings we find after Balfour and before Stair’s *Institutions* (Th. Craig’s *Jus Feudale*, Th. Hope’s *Major and Minor Practicks*, R. Spottiswood’s *Practicks*) did not deal with the issue of testamentary formalities; neither did the subsequent Instructions to the Commissaries (1610, 1666).

However, the issue was not altogether ignored by legislation. The 1584 Act,²⁶² forbidding ministers of the Kirk to get involved with notarial activity, made an exception in favour of testaments. This Act was obviously intended to be of purely disciplinary significance;²⁶³ however, it was interpreted as actually confirming the ministers’ authority to write down last wills in their own right. Thus, when in *Hepburn v. Laird of Wauchton* (1606, M.16827) the authority of ministers to deal with testaments was challenged, the 1584 Act, not the 1563 Instructions, was mentioned as the basis of their authority. In reality, however, the source of the ministers’ power seems to have been Canon law. In Canon law (*supra*, p.25), a priest could draft testaments for his own parishioners only, his powers being area-restricted. The Scottish law on the matter was similar, as in the same *Hepburn* case the will was successfully challenged on the ground that the minister was from another parish.

²⁵⁹ Stair, *Inst.* III.8.35; J. Nisbet of Dirleton, ‘Testament’, *Some Doubts and Questions in the Law...* (1698), 205; Erskine, *Inst.* III.2.41.

²⁶⁰ M’Laren, *op cit*, vol I, pp.25-26.

²⁶¹ *Balfour’s Practicks*, ‘Anent testaments’, c. 11.

²⁶² *RPS*, 1584/5/12.

²⁶³ In *Hassington v. Bartilmo* (1631, M.16832) a contract subscribed by a minister, who was also a notary, was found valid, although the minister was punished for that misdeed. See also: J. Finlay, *op cit*, 409.

Litigation over authentication of proper testamentary deeds was extremely rare in 1560-1660. However, the few reported cases that we have are revealing as to Scots law's relation to the *Ius Commune* on this point. In *Lady Inverleith v. Bishop of Glasgow* (1613, M.16876) one of the witnesses to a testament was also the executor. The executor renounced his office before the action for reduction was initiated, and thus the testament was found void as regards his nomination but valid as to all other points. The report notes the point made by the Lords: had the executor-witness not promptly rejected the office of executry, the testament would have been invalidated entirely. This decision reveals that, in Scotland, appointing one of the witnesses as executor did not entail invalidity of the testament *ipso jure*, as it was with a witness appointed heir in Civil law.²⁶⁴ Such appointment in the early 17th century Scots law entailed voidability, “reducibility” of a testament, hence the importance of the moment of filing the action for reduction. The ground for reduction thus seems less that of the testament's informality and more that of the law of proof: a witness may not testify in litigation he has an interest in. Such a document cannot be fully proved, hence its invalidity. The solution of *Lady Inverleith* seems similar to that proposed by H. Swinburne in his treatise, although in Swinburne's situation the question was about legatees, not executors.²⁶⁵ We cannot be sure whether Swinburne exerted any actual influence on *Lady Inverleith*, but it should be pointed out that later Scots practice in similar situations followed a different way.²⁶⁶

It seems that gradually *Ius Commune* concepts had influence on the distinction between testaments and codicils in Scottish legal doctrine, where “testaments” contained a nomination of executor and “codicils” just contained legacies of the testator's free goods. The term “codicil” was still rare in Scots practice before 1660, with *Dundas v. His Father's Executors* (1639, M.2195=M.12501)²⁶⁷ being one of the few instances of its use in that period. In this case, among the grounds on which the party attempted to challenge the codicil was that “*there was a perfected principal*

²⁶⁴ Inst.Just.II.10.10.

²⁶⁵ Swinburne, *A Briefe Treatise...*, IV.22, 188. For a general discussion on legatee-witnesses in the *Ius Commune*, see: Abb., X.2.19.9.

²⁶⁶ See: *Forrest v. Veitch* (1676, M.16970), - where the contracting parties were allowed to be instrumentary witnesses to a contractual deed. See also Bankton's criticism of that decision (*Inst.I.11.32*).

²⁶⁷ See also this case *infra*, p.55.

testament bearing no such legacy". Although the report does not contain an express reference to the Civil law, the aforesaid objection is reminiscent of a peculiarly Civilian understanding: a formally defective codicil is to be referred to in the testament to be valid (*supra*, p.26). Anyway, the Lords rejected the plea, finding the codicil "*in substance and matter... good in itself*".

For Stair, the testament/codicil distinction was obviously an established part of doctrine.²⁶⁸ In his time, testaments were to be made in writing as a matter of substance,²⁶⁹ and the formalities of testamentary deeds were deemed the same as with "probative deeds" in general: a subscription before two witnesses or the testator's own handwriting in substantial parts.²⁷⁰

Codicils ("legacies"), on the other hand, could be made nuncupatively and proved by witnesses, if they did not exceed the amount of 100 pounds Scots.²⁷¹ This rule might sound identical to the rule for the "writs of importance" (*supra*, p.36), but, in reality, it was different. While *inter vivos* bonds and promises bigger than 100 pounds could never be proved by witnesses in any part, nuncupative legacies exceeding that amount were provable by witnesses to the extent of 100 pounds.²⁷² Moreover, by the time of Bankton and Erskine, the writing came to be considered not a simple proof but an essential solemnity for the constitution of legacies over 100 pounds,²⁷³ so they could not even be proved by oath of the defender as to such a big amount!²⁷⁴

This obviously had not always been the rule. Stair, for example, speaks of a legacy under 100 pounds as "provable by witnesses",²⁷⁵ possibly implying the rule to be that of proof, not of substantial solemnity. There is also earlier evidence, in the case *Russel v. Defender* (1609-10). This case was reported twice by Haddington, probably reflecting different stages of process. According to the 1610 report (M.12396), a debt

²⁶⁸ Stair, *Inst.* III.8.33-34.

²⁶⁹ Shaw v. Lewis, 1665, M.4494.

²⁷⁰ Stair, *Inst.* III.8.33-35; Mackenzie, *Inst.* III.9.2.

²⁷¹ Stair, *Inst.* III.8.36.

²⁷² Wallace v. Muir (1629, M.1350).

²⁷³ Bankton, *Inst.* III.8.6; Erskine, *Inst.* III.9.7.

²⁷⁴ See Mitchel v. Wright (1759, M.8082), where a distinction was drawn in that respect between the legacies and *donationes mortis causa* – the latter could be proved by an oath if exceeded 100 pounds.

²⁷⁵ Stair, *Inst.* III.8.36

of 200 merks,²⁷⁶ due to the executor, was fully set off by a nuncupative legacy for the “*like sum*”, proved by witnesses. If the facts were truly as reported here, a legacy in excess of 100 pounds in the early 17th century could apparently be claimed by way of exception for set-off (compensation). Civil law allowed to set-off enforceable debts with *obligationes naturales* (e.g., those from a *nudum pactum*).²⁷⁷ If *Russel* had any a connection to the Civil law, then it would mean that a legacy larger than 100 pounds in that time created a *naturalis obligatio*, unenforceable by a direct action but valid in other respects.

However, an earlier report of *Russel* (M.2546) from 1609 presents a different picture of the facts. In this report, the debt the executor was suing for arose from the defender’s intromission with the testator’s goods. And the defender here pleaded two exceptions: a nuncupative legacy for 50 merks and also a reciprocal debt against the defunct for goods supplied before the death, to the amount of 100 pounds. Together these two claims obviously make up the same 200 merks, but the legacy here is within the 100 pounds limit. This 1609 report creates an impression that the 1610 report might be a mistake or an oversimplification of facts. So, the possible interpretation of the legacy as a “natural” debt, proposed above, remains a conjecture only.

Thus, Scots legacies look more formal than *inter vivos* promises. The development of such an approach is hard to trace due to the scarcity of practice. Some insight into the doctrine might be provided by one decision from 1711,²⁷⁸ where one of the parties unsuccessfully tried to have several small legacies, contained in a testament, which was invalid due to the lack of formality, recognized as “nuncupative” legacies. The other party cited Civil law sources in support of the position that, if a testator makes a last will in writing, it may not qualify as nuncupative, and *vice versa* (*supra*, p.23). This argument prevailed. This case might suggest that the Scots doctrine of constitution of legacies and last wills in general at least by the early 18th century was similar to the Civil law doctrine. Unlike with contracts, last wills required solemnities for their constitution as a matter of substance: one could either make a legacy nuncupatively, so that it would be valid to the value of 100 pounds, or make it

²⁷⁶ 133 l. 6 s. 8 d.

²⁷⁷ See: C.4.31.2 and commentaries of Bartolus, Baldus and Paulus de Castro to that law.

²⁷⁸ *Moncrief v. Monypenny* (M.13307).

in writing, so that the legacy would be valid to the amount written. Later in the 18th century some influence of the *Ius Commune* rule on informal *fideicommissa* (C.6.42.32) also became visible, so that a nuncupative bestowal of the whole estate could be committed to the executor's faith.²⁷⁹

Unlike in the *Ius Commune*, there is no strong evidence to suggest existence of privileged testaments (soldier's will, parental will, will *ad pias causas*) in the Early Modern Scots law. The word "strong" here is used to point out some evidence that the judges at least were aware of such categories of wills and were considering their application in practice. In *Colonel Henderson's Children v. Murray* (1623, M.4481), as reported by Haddington, some Lords were of opinion that the testator's status as a soldier, *inter alia*, might allow him to dispose heritable property by will while being abroad. Haddington objected to that opinion, pointing out that soldiers' wills at Civil law only provided a privilege as to solemnities; his opinion prevailed in the narrow majority decision. In a much later case, *Ker v. Hay* (1708, M.16968), the concept of the soldier's will (litt., "among soldiers"), as well as that of a "lack of legal advise",²⁸⁰ were invoked (this time – successfully) to cure a testament made abroad, which lacked the names of the maker and of the writer.

Wills for "pious uses" were mentioned and bore some special status in Scots practice,²⁸¹ but not in respect of authentication. Parental testaments seem to have never been mentioned in Scottish case law. One fragment of Stair's *Institutions* (*Inst.* III.4.29) might create a false impression of the privileged status of such wills. In the fragment, Stair claims that holographic dispositions in favour of children are presumed to be made in *liege poustie*.²⁸² However, considering what other kinds of dispositions, according to Stair, bear this privilege,²⁸³ as well as the general illogicality of his

²⁷⁹ *Legatars of Hannah v. Guthrie* (1737, M.3836). In that case, a universal (residual) legacy was found provable by the executor's oath irrespective of the estate's value, because the duty of the executor to account was committed to his faith by the defunct. Civil law sources were cited in that case.

²⁸⁰ The latter being similar to the testaments of rustic persons, lacking knowledge and legal advice, for which Civil law somewhat relaxed the formalities (C.6.23.31).

²⁸¹ *Monro v. Scot's Executors* (1630, M.8048); *Commissioners of the Shire of Berwick v. Craw* (1678, M.6588).

²⁸² *Infra*, p.98.

²⁸³ He also mentions deeds reserving liferent to the granter and those expressly dispensing with delivery as privileged in this respect (*Inst.* III.4.29).

words,²⁸⁴ it seems that Stair is referring to the case law on delivery of deeds. Deeds in favour of “unforisfamiliarized” children did not require delivery, as the father-granter was at the same time the receiver of such deeds, being the children’s legal guardian.²⁸⁵ So, Stair’s claim here looks more like an ungrounded expansion of existing precedents to the law of ‘deathbed’.

1.5. Summary of Archival Evidence.

In the course of the present research, 163 testaments were surveyed: the entries from the register of the Glasgow Commissary (CC9/7/2) for 1563-1564 and of the Edinburgh Commissary (CC8/8/39-40) for 1605, the original testamentary deeds (“warrants of testaments”) of the Edinburgh Commissary for 1575 (CC8/10/1/1, an envelope with 26 deeds), 1586 (CC8/10/3/9, an envelope with 27 deeds) and 1625 (CC8/10/8, an envelope for November 1625 with 9 deeds).

In so far as legibility allows us to discern relevant information, the results on the formalities of wills are the following. The majority of wills were made with “professionals” involved: in at least 75, a notary public was involved, in at least 31 a clergyman (“minister”, “reader”, “exhortar”, “vicar”, “curate”, etc.). It is notable that clergymen practically disappear in the post-1600 records. In several instances, the status of the subscriber was not disclosed,²⁸⁶ although the appearance of the same person in several wills obviously implies a professional.²⁸⁷ 13 wills are identified as witnessed wills – bearing they are written or subscribed by the testator himself before witnesses.²⁸⁸ At least two wills are clearly holographic.²⁸⁹ Three instances of purely

²⁸⁴ If Stair were correct in the aforesaid fragment, the law of ‘deathbed’ would be totally undermined. Holographic dispositions, even made in favour of children, retained their main deficiency – they could not prove the time of their own making.

²⁸⁵ See *infra*, s.3.3, on the delivery of deeds.

²⁸⁶ CC9/7/2/47, “Thomas Pirry”.

²⁸⁷ “Robert Maxwell” in consecutive CC9/7/2/102 and CC9/7/2/103.

²⁸⁸ CC9/7/2/53, CC8/8/40/548; CC8/10/1/1/3, CC8/10/1/1/13, CC8/10/1/1/16 (this will is very interesting in that it was executed in France and written in French by Johne de Moncour – member of the French Garde Écossaise), CC8/10/3/9/3, CC8/10/3/9/6, CC8/10/3/9/25, CC8/10/3/9/26; CC8/10/8/nov1625, Sir Robert Deniston of Montjoy; CC8/10/8/nov1625, John Mitchelhill(?); CC8/10/8/nov1625, 23 February 1625 (Willaim McB...?).

²⁸⁹ CC8/10/3/9/18, CC8/10/3/9/22.

nuncupative wills are found.²⁹⁰ At least 12 of the entries in the Glasgow 1563-64 register and more than 16 in the Edinburgh 1605 register are on intestate succession.

The boundaries between the various forms of wills were quite lax. There are several instances where a notary or a minister, due to whatever reason, subscribed as one of the witnesses.²⁹¹ The will by William Browne from 1583²⁹² was subscribed by his own hand; however, for some reason, the testator thought it necessary to add “with my own mouth” in the beginning. In some wills, the text is composed in the first person of the testator, in others in the person of the notary, but sometimes the handwriting in the original will is inconsistent with the pretended authorship.²⁹³ Sometimes even the subscriptions of different persons, at least from a first glance, look as if made by the same hand.²⁹⁴

The internal structure of the wills was more or less uniform; the different forms of wills do not show much variation in that respect. A deed itself was usually entitled an “*inventar, testament and latter will...*” or a combination of these terms. It might be a distinctive feature of Scottish wills that almost all of them contained an inventory of the testator’s goods: corporeal goods first, then debits, followed by credits. These documents often leave an impression that the inventory was treated as the most important part of a will. The will of William Browne is even headed “*just inventar*”, despite also containing legacies. An inventory is usually followed by the legacies and the nomination of the “executor and universal intromitter”.

Practically all the wills (with the exception of the few holographs) report the presence of witnesses, and the lists of the witnesses they are providing are usually quite long: 5-6 witnesses on average, often ending the list with “*and uthers divers*”. Only in the minority of cases are the subscriptions of some or all of the witnesses mentioned present. An express mention of specially inviting the witnesses to testify to the will

²⁹⁰ CC9/7/2/55, CC9/7/2/68, CC9/7/2/83.

²⁹¹ CC8/10/1/1/13, CC8/10/3/9/25, CC8/10/3/9/27.

²⁹² CC8/10/3/9/26.

²⁹³ E.g., in a testament by “James Mow” (?), the body text is written in the person of the minister, while the subscription by the same minister below was obviously added afterwards by a different pen and, possibly, different hand (CC8/10/3/9/2).

²⁹⁴ E.g., Lady of Wedderburn from 1584, CC8/10/3/9/25.

(“*testes vocati*”, “*testes requisiti*”), akin to the *Ius Commune* practice,²⁹⁵ was found only in two wills, one from 1564²⁹⁶ and the other from 1574.²⁹⁷

Judging by the contents of the testaments, subscription seems to have been considered the most important formality. Subscriptions to notarial and holographic wills will be dealt with in more detail below (*infra*, s.1.6, 1.7). However, it can be generally pointed out here that there were no “special subscriptions” in the meaning attached to it by the *Ius Commune* writers.²⁹⁸ As already mentioned, a will might be seemingly written by one hand and subscribed by another;²⁹⁹ it might be expressly written by another person;³⁰⁰ sometimes the document seems cut in two, with the inventory glued in between afterwards,³⁰¹ but the subscriptions do not mention or refer to these doubtful manipulations. Even additions at the margins, adding new legacies to the testament, are not always separately subscribed!³⁰² Moreover, despite the importance of subscription, only the minority of wills expressly mention that the subscription actually took place before the witnesses devised in them;³⁰³ it seems that the witnesses were expected to witness the will as a whole, not just the subscription.

Only one of the attested wills found (Robert Monkray, CC8/10/1/1/1) contains the testator’s seal besides the subscription, and it is one of the earliest extant warrants of testaments.³⁰⁴ In all the wills confirmed afterwards, subscription, it seems, was deemed sufficient.

Perhaps, the striking feature of the Scottish registers of testaments is that they contain almost no data on the way confirmation of testaments took place. This is particularly striking in respect of the few nuncupative wills found (*infra*, s.1.7). The Edinburgh and Glasgow registers do not even contain any formal declaration by the

²⁹⁵ Bart., D.45.1.30.

²⁹⁶ TThomas Mwre, CC9/7/2/51.

²⁹⁷ Thomas Scott, CC8/10/1/1/14.

²⁹⁸ See *supra*, p.22.

²⁹⁹ James Mow, CC8/10/3/9/2.

³⁰⁰ Like in two wills subscribed by two professionals: CC8/10/3/9/17 and CC8/10/3/9/19.

³⁰¹ CC8/10/3/9/1, from 1585, name illegible.

³⁰² CC8/10/3/9/6; CC8/10/3/9/13, CC8/10/3/9/23.

³⁰³ Michael Bartilme, 1585 (CC8/10/3/9/11), where a writing on a margin is just followed by a word “legaty” below. Cp. Bart. D.48.1.15.2.

³⁰⁴ The year of this will’s original making cannot be known due to damaged text.

Commissary concerning the confirmation. Such declarations, quite long and generic, may be found in the register of Hamilton & Campsie Commissariat for 1574.³⁰⁵

The act books (1564, CC8/2/1; 1639, CC8/2/62) are also not particularly helpful in regard to the confirmation of testaments. Their short entries report executors-nominate producing inventories and giving ‘caution’ (*infra*, s.6.2) by sureties and sometimes mention the executor’s taking of instruments relevant to confirmation.³⁰⁶

It seems that looking through the inventories and calculating the “quots” was considered the most important element in the confirmation of testaments. On the reverse side of some of the original testamentary deeds, calculations of ‘quots’ may be found, with a few occasional notes on other issues. They are often hard to decipher; the ones which ultimately turned out to be legible mention the place of the will’s making or by whom the inventory was given,³⁰⁷ although in one instance the back of the will says that the original executor-nominate has died and an executor-dative was appointed instead.³⁰⁸

1.6. Notarial Wills: “own mouth” and “own hand”.

The first striking feature of the wills made by notaries and ministers is that some of them were only completed after the death of the defunct. At least 15 such wills were identified. Such wills either expressly mention the date of the death of the

³⁰⁵ Here is an excerpt of such declaration, in so far as it could be discerned: “*I, Andro Hay... Commissar of... constitut by our sovereign majesty for confirmation of all testaments of quhat ... persons deceissand with in my said Jurisdiction quhair of the deid's part extends not the soume of fifty lib money, Be the tenor hereof ratifies, approves and confirms this present testament and Inventor insofar as the samyn is dewlie and lachfully maid, and gevis and commits full power of intromission with the guds and geir above expremitt allandly to the saids ... executors forsaid, with power to claim, to call and pursew for the samyn and to ... debts to creditors ... and allways compt and reckoning to be maid of the intromission quhein and quhair the samyn sal be requirit as the law will. And the said executor has maid faith and to ... the effect of executry foursaid and has foundin andro ... in the quharin cautioner and surety with the guds and geir containit in the testament sal be to all parteis having interes thereto. In witness of the quhilk ... the seil of my commissariat with my subscription manuall is affixt heirto ...*”, CC10/5/1/124.

³⁰⁶ CC8/2/1, p. 20v, second entry.

³⁰⁷ On the back of one will, for example, the commissary pointed out that it was made in testator’s “own paroch in presence of Kirk” (CC8/10/3/9/2).

³⁰⁸ James Kaa, 1573, confirmed in 1575, CC8/10/1/1/23.

testator³⁰⁹ or report that the testament was “given up” by the executors on a later date and written by the notary. For example, in one register entry from 1563 the testament expressly bore that it was written by the notary “by relation” of the executor and the spouse of the defunct.³¹⁰

Usually, however, such testamentary deeds report only one structural part to be compiled after the decease – the inventory. The technical term “given up by the mouth of executor” is often used in notarial wills.³¹¹ The exact way the inventories were “given up” before notaries is usually not revealed. One testament³¹² narrates that the legacies (“*latter willis*”) were made before three witnesses, two of whom, two months later, also witnessed the writing down of the inventory; it is not revealed if they confirmed to the vicar the tenor of both the inventory and the legacies. In another testament, the inventory is reported as given up by the executor and then written down by the vicar in presence of just one witness - with the same first and last name, so it must have been the executor!³¹³ It might even seem that the presence of the notary, while the testator was making his will, was unnecessary, given that some wills reported the presence of the notary at the beginning, together with the witnesses, while in other wills the notary only mentions himself in the subscription at the end. However, such a conclusion cannot be securely deduced from the materials, especially taking into account that the presence of a notary or a priest was an element expressly required by the 1563 Instructions (c. 24).³¹⁴

It may be hypothesized that such deeds were drafted in two stages, with the nominations and legacies reduced into writing in the life of the testator, the inventories given up by the executors soon afterwards; and thus a finished document was produced after the testator’s death. However, even then such wills might seem to us quite worthy of suspicion, if not outright forgeries. Even in those wills where the inventory is

³⁰⁹ Sometimes a will states that someone died, e.g., “in the same month” (Beatrix Black, 1574, CC8/10/1/1/27), which might suggest an expectation of the imminent event. However, in other cases the exact date of death, subsequent to the date of the making of testament, is given (Christaine Reid, 1586, CC8/10/3/9/9).

³¹⁰ Agness Allyson, CC9/7/2/123.

³¹¹ E.g.: Jhone Aitoune, 1562, CC9/7/2/68; Williame Cochranne, 1564, CC9/7/2/91; Euphame Weir, 1564, CC9/7/2/65; William Lawson, 1575, CC8/10/1/1/19, etc.

³¹² Jhonne Craig, 1564, CC9/7/2/84.

³¹³ Euphame Weir, 1564, CC9/7/2/65.

³¹⁴ *Supra*, p.42.

expressly given up by the executors, the document as a whole is still often composed in the person of the testator.³¹⁵ Moreover, the person who gave up an inventory was legally significant. The 1567 Instructions to the Commissaries (c. 2) expressly forbade the inclusion of any debts (liabilities) owed by the defunct in the inventories, unless they were given by the defunct himself.³¹⁶ Yet, we find that practically all of such “posthumous” wills contained debts owed by the defunct, which does not seem to have prevented their successful confirmation!

Therefore, whatever might have been the real situation, the following interpretation of such wills seems probable. They might have been the instructions made by testators in their life to the executors, before witnesses, and afterwards reduced into writing by the notaries with the executors’ involvement. Such interpretation agrees with the wording of the wills, always containing a command to the executor to execute it and to hold account before God at the Last Judgement. The notary, probably, wrote down a draft of the will within the life of the testator, adding the perfected inventory after the decease. Witnesses in such a scheme play the passive role of guarantors of the verity of the testator’s words.

Such “posthumous” testaments do not seem to have had much prominence in the later law. There is only one later case, *Gray v. Ballegerno* (1678, II Stair 594), where the Lords of Session allowed proof of the testator’s warrant for the ministers to sign the bond after his death. This case did not concern a nuncupative act but a document made in writing, and, so, Bankton would later doubt the general implications of that decision.³¹⁷ On the other hand, such documents are compatible with the *Ius Commune* as expressed by later authors.³¹⁸ Reading a testamentary instrument aloud before witnesses has never been explicitly mentioned in Scots wills; neither was it necessary in the *Ius Commune* in respect of the wills *inter liberos* and *ad pias causas*. Therefore, the Scottish practice seems logical if the wills in Scotland were all

³¹⁵ William Lawson (CC8/10/1/1/19), *supra* n.307.

³¹⁶ See *infra*, s.6.2, for more detail.

³¹⁷ Bankton, *Inst.* l.11.40.

³¹⁸ See *supra*, pp.30-31, opinions of A. Tartagni and F. Decio.

considered *jus gentium* wills (*supra*, p.27), an approach similar to that expounded by English Civilians.³¹⁹

The second striking feature of the early Scots notarial wills follows from the first one and is quite simple – most of them were actually nuncupative wills, reduced into writing. There seems to be nothing surprising in this fact from the *Ius Commune* perspective, but it sharply disagrees with contemporary and later Scots law and practice of notarial instruments.

In Scotland, a person planning to make a contract, deed or another legally recognized transaction in writing (unless it was a special solemnized ritual: a transfer of seisin, a resignation of feu, etc.) but unable to write or subscribe it on his own, due to illiteracy or disability, was to have a notary subscribe the document for him, in presence of witnesses.³²⁰ Moreover, the act of subscribing on behalf of another person was customarily performed by “leading the pen” – the granter was holding the pen, while the notary was literally “leading” the granter’s hand through the document. This way of subscribing writs was provided by the 1555 Act in respect of reversions³²¹ and had been well established in respect of other writs by at least the 1570s.³²² It was only abolished by statute in 1876.³²³

Scottish writs, subscribed by a notary by “leading the pen”, were considered the deeds of the party, not of the notary. Unlike the *Ius Commune*, where a party might make a statement about some fact to the other party in presence of the notary who would embody that act in the public instrument,³²⁴ Scots law did not recognize such statements as probative writs. The most explicit case on this issue seems to have been *Anstruther v. Thomson* (1611, M.12499). In that case, two notaries reduced into writing and subscribed the statement of the parties about assigning a tack. The Lords refused to recognize this document as probative, pointing out that, while the two notaries could put their subscription on the party’s behalf, they, nevertheless, could

³¹⁹ Lyndwood, *Provinciale...*, III.13, s.v. “*Residuis*”, 169; Swinburne, *A Briefe Treatise...*, l.10, p.19.

³²⁰ In respect of ‘writs of importance’, the 1579 Act required two notaries and four witnesses (*supra*, p.35).

³²¹ RPS, A1555/6/3.

³²² Nairn v. Sutor (1579, M.12270) is the earliest case mentioning this custom.

³²³ J.G. Currie, *The Confirmation of Executors in Scotland* (1890), 38.

³²⁴ See Gloss and commentaries to C.4.30.3.

not “make a contract” for him. It should be clarified here that the involvement of land in this case did not bring anything special. At the end, the case report mentions that the contract was deemed “not of great importance”, so the judges assigned the oath as to the tenor of the instrument to the defender. Therefore, in this case the “notarial confession” was not only deemed insufficient to make up a substantially written document (“*obligatio litterarum*”),³²⁵ but was even unacceptable as a piece of written evidence! So restricted was the authentic force of notarial instruments in Scotland already in the early 17th century!

What does the archival evidence suggest on this issue? All of the surveyed wills from before 1579 were made as “nuncupative, reduced into writing”. Obviously, they were considered a sufficient “proof by writing”, required by the 1567 Instructions (c. 1). Only beginning with the 1585 collection (CC8/10/3/9) do we start to find the more or less standard Scottish instruments with “pen lead”: only 3 out of 14 notarial instruments from that collection were made in that way.³²⁶ Of these wills only one mentions expressly that the subscription with “touching the pen” took place in presence of the witnesses,³²⁷ which was deemed a necessary solemnity in the later law.³²⁸

Thus, the data suggests that only after enactment of the 1579 Act did the understanding start to arrive that a testamentary deed was supposed to be subscribed by the notary before witnesses, not just put by him into writing from the testator’s nuncupative statement. And in post-1600 archival records we find “leading the pen” as the main form, employed in the majority of notarial wills.³²⁹

However, the special treatment of last wills seems to have been recognized even in later case law. Nuncupative wills reduced into writing can be found even in

³²⁵ It is a doubtful question, to what extent the pre-1660 case law recognized the concept of *obligatio litterarum* (W.A. Wilson, op cit, 197, 205; *supra*, p.38).

³²⁶ CC8/10/3/9/7, CC8/10/3/9/12, CC8/10/3/9/13.

³²⁷ William Clarkstone, 1586, CC8/10/3/9/13.

³²⁸ Laird of Culterallers v. Chapman (1667, M.16803).

³²⁹ CC8/8/39/474; CC8/8/39/544; CC8/8/39/679; CC8/8/40/55; CC8/8/40/424; CC8/8/40/491; CC8/8/40/538; CC8/8/40/707; CC8/10/8/nov1625, John Thomson; CC8/10/8/nov1625, David Cowane; CC8/10/8/nov1625, Thomas Henrysoune.

the later records.³³⁰ In *Dundas v. His Father's Executors*,³³¹ a “certificate” written by the parish priest, although not subscribed by the testator or in his name, was sustained as a ground for the legacy of more than 100 pounds Scots.

The third feature of early Scottish notarial wills is that they were inconsistent in following the requirements of the 1579 Act. The Act prescribed that “obligations of importance” be subscribed by at least two notaries before four witnesses. It might be doubted, whether the criterion of “obligation of importance” had already been well defined in the 1580s the way it was interpreted in later law: i.e., 100 pounds Scots. It should be noted here that five wills found in the register have two professionals subscribing, obviously following the Act.³³² However, there are at least four more wills in the 1585 collection, where the ‘Dead’s part’ is obviously bigger than 100 pounds, but just one notary/minister was involved.³³³ This might suggest that some notaries took heed of the Act’s requirements, while others just continued with their old practice, deeming the statute inapplicable to last wills. This seems to be confirmed by the fact that the exception of last wills from the Act’s force was established quite early – no later than 1584, in *Buchanan v. McArtey* (M.16958).³³⁴ The point seems to have been finally settled in *Bog v. Hepburn* (1623, M.16960), where one notary was deemed enough for a legacy irrespective of the amount of the latter.³³⁵

As concerns other solemnities used in notarial wills, they demonstrate inconsistent and only partial compliance with the *Ius Commune* requisites for public instruments. As already mentioned above, Scottish notarial wills did not mention their being read before witnesses (*supra*, p.50). On the other hand, among the earlier deeds, the intention may be discerned at least to comply with as much of the *Ius Commune* formalities as possible. Thus, at least five wills from the 1563-64 Glasgow register and five wills among the 1575 Edinburgh warrants are fully or substantially written in

³³⁰ See, e.g., the testaments by Alesoun Bassendyne (20 July 1604, CC8/8/39/401), Williame Betay (17 December 1601, CC8/8/40/24); David Callendar (16 June 1605, CC8/8/40/382).

³³¹ 1639, M.12501=M.2195.

³³² CC8/10/3/9/17; CC8/10/3/9/19; CC8/8/39/527; CC8/8/40/89; CC8/10/8/nov1625, Thomas Watsoune.

³³³ CC8/10/3/9/2, CC8/10/3/9/20, CC8/10/3/9/21, CC8/10/3/9/23.

³³⁴ There is no date for this case, but as it was reported by Alexander Colvil of Culross and obviously addressed the effects of the 1579 Act, it should have been decided in 1579-1584.

³³⁵ See also *Wardlaw v. Earl Marshall* (1610, M.16959), where the losing party claimed that one notary was sufficient for an assignation, unsuccessfully trying to have it recognized as a “testament”.

Latin, although the inventory was usually given up in the vernacular. Among the same wills, at least seven mention a notary being “*requisit*”, which was the standard Scots term for giving warrant to a notary; however, at least one will uses the term “*notarius rogatus*”,³³⁶ which was the accepted *Ius Commune* term. Some wills begin with the invocation of God’s name, and they also mention the name and the year of reign of the ruling king.³³⁷ On the other hand, all Scottish wills, not only public, but also private ones, contain the date (sometimes together with an exact hour) and place of their making.

On the other hand, among the wills made after 1585, one no longer finds extensive inscriptions in Latin, invocations of God’s name in the beginning and the King’s name in the body of the text. The notarial and priestly subscriptions from this time look more or less uniform (“*notarius publicus requisitus... premissis testo manu propria*”); the term “*requisit*” becomes a routine technical term.

1.7. Nuncupative Wills.

As already mentioned, three cases of purely nuncupative wills were identified in the 1563-1564 Glasgow register. In two of them,³³⁸ the entire last will seems to have been nuncupative: it is reported as made before witnesses, given up and “*exprimit to be of veritie*” by the executor. In one case,³³⁹ after the notarial deed was copied into the register, the executors added one nuncupative legacy (“*left kindness of his maling...*”), allegedly made by the testator before the same (instrumentary) witnesses.

The surprising fact about nuncupative wills, already touched upon above (*supra*, pp.50-51), is the absence from the register of any sign of formal proof. There is no sign that the witnesses to the last will were interrogated, no sign of anything like the “common”/“special” forms, accepted in England (*supra*, p.33). The register only reports about executors relating such last wills, together with inventories.

Possibly, the words “*exprimit to be of veritie*”, present in the records, signify taking the oath by the executor, although the words “to make faith” would have been

³³⁶ Thomas Scott, 1574, CC8/10/1/1/14.

³³⁷ CC8/10/1/1/9, CC8/10/1/1/14, CC8/10/1/1/20.

³³⁸ James Guidwod, 1564, CC9/7/2/55; Gelis Greyneid, 1564, CC9/7/2/83.

³³⁹ Jhone Aitoune, 1564, CC9/7/2/68.

more likely in such case. However, if the executor's oath was really a proof sufficient for such a will, this would seem quite a dangerous practice, creating opportunities for abuse. A testamentary executor could be interested in the office; the undisposed residue of the 'Dead's part' belonged to him, prior to the 1617 Act.³⁴⁰ Obviously, he would not be a person to be given full faith in proving the authenticity of the last will!

It might be possible that this practical absence of checking the authenticity of nuncupative wills in Scotland meant that a confirmed will could be easily challenged by an interested party and put to a stricter proof. However, we do not have sufficient evidence to confirm this.

In any case, the mere existence of nuncupative wills in Scotland before 1567 is a significant discovery by itself. It shows that early Scots testamentary practice was not particularly divergent from the English practice and the Canon law. The reference in the 1563 Instructions (c. 24) to the testaments made "otherwise as accords the law" now seems to imply nuncupative wills, with the Canon law, possibly, being "the law" referred to here.

1.8. Holographic Wills.

Present research shows that holographic wills were being confirmed by the Commissary courts as early as 1584. Just two holographic wills have been identified so far.³⁴¹ One of them, made by David Crechton, expressly bears it was made "before no witnesses, but God only". Both of them contain no inventory, but commit its making to the executor.

Although holographic wills were not mentioned either in the 1563 Instructions (c. 24) or by Balfour,³⁴² there seems to have been no problem with their confirmation. As with most other wills, there is no data on whether any special procedures were employed to check their authenticity. Considering what has already been said about nuncupative wills (*supra*, s.1.7), there were, probably, no such procedures. The later practice of the Scottish Commissaries seems to confirm that: according to the Commissary practice of the 19th century, an express mention in the will's text, that the

³⁴⁰ RPS, 1617/5/28; *infra*, p.235.

³⁴¹ Robert Myller, 1584, CC8/10/3/9/18; David Crechton, 1585, CC8/10/3/9/22.

³⁴² Balfour's Practicks, 'Anent testaments', c. 11.

will was written by testator's own hand in its entirety or in substantial parts, was deemed sufficient; otherwise, an oath of the executor or affidavits of two witnesses were required.³⁴³ Only if the will was challenged by an interested party, would a full proof be required.

The two holographic wills found so far do not reveal whether an oath of the executor or any other proof was taken. However, these do not bear that they were holographic as it was accepted in later practice. They only purport to be subscribed by the testator's own hand. Again, as with most wills (*supra*, p.50), the subscription was obviously deemed the most important formality.

There was a type of document in Scots law, which was similar to the last will in remaining in the granter's hands until his death, for which a mere subscription without witnesses seems to have been sufficient, beginning from, at least, the early 17th century. This was a book of account. And, as it has already been established (*supra*, p.41), an account of a deceased person was considered valid due to the presence of the subscription alone. Could the last wills of that period share a similar "liberal" approach? In *Lady Inverleith v. Bishop of Glasgow*³⁴⁴ a testament, in which one of the witnesses was appointed executor, was found reducible, not null and void *ipso jure*. This means that, before the reduction, such a testament was considered valid *ex facie* and lawfully confirmed by the Commissaries. What if that testament had never had any witnesses at all, but only the testator's subscription? Presumably, it would have been confirmed by the Commissaries, but what if it had been challenged – would a mere subscription have constituted proof with *comparatio litterarum* or another 'adminicle'? Unfortunately, there is no clear answer to that question.

However, the similarity of authentication between last wills and accounts is more obvious in the situation opposite to the one already considered: where the body text of the document was written by the granter's hand but lacked subscription. Last wills made in such a way were recognized from quite an early period. In *Pursuer v. Tiill* (1610, M.16959), probably the earliest reported Court of Session case on holographic wills, the testament lacked a subscription, as well as the date, but it was,

³⁴³ Currie, op cit, 44-45.

³⁴⁴ 1613, M.16876.

nevertheless, sustained because it was written by the testator's hand.³⁴⁵ We do not have cases on books of account from the same decade, but in *Brown's Creditors v. Baillie* (*supra*, p.41) the absence of subscription in an account was not seen as a ground for invalidity; and since the 1660s the Court of Session followed that position even if the grantor's successors denied authenticity.³⁴⁶

For the sake of comparison, the *Ius Commune* position on holographs and the requirement of subscription should be recalled here. The late *Ius Commune* scholars equalized subscribing an instrument with writing it in full: initially for parental wills only³⁴⁷ and then for all other private instruments as well.³⁴⁸ And *vice versa*: writing a private instrument fully with one's hand took away the legal requirement of subscription.³⁴⁹ Such "alternative" solemnity, as we can see, was ultimately implemented in Scotland in respect of books of account. In respect of the Scottish last wills, only one part of the scheme is obvious: holographic wills did not need subscription, but it does not seem that a mere subscription in Scotland has ever been sufficient for anything more than a confirmation of the testament, which could always be subject to challenge. After all, in a situation where a literate testator subscribed a document written by someone else, specially called for that purpose, it is quite unlikely that the testator would not also call witnesses to the deed. Reflections of the *Ius Commune* scholars on such situation look largely theoretical.

The first conclusion for this chapter concerns the law of documents and written evidence in general. Clear influence of the *Ius Commune* on the Scots law of written documents is discernible. However, it existed largely on a theoretical level, in that Scots law adopted roughly the same classes of documents (contracts *in scriptis*, letters missive, books of account) as the *Ius Commune*.

³⁴⁵ The report does not tell whether any proof of the testament's authenticity was taken.

³⁴⁶ In the following cases the holographic account was found to prove against the maker without subscription: *Wardlaw v. Gray* (1662, M.12620), *Lawrie & Drummond v. Drummond* (1675, M.12622). However, the winning parties in both cases had to adminicle the proof by their oaths.

³⁴⁷ C.3.36. Auth. *Si Modo*; Pau.Castr., C.6.23. Auth. *Quod Sine*; see *supra*, p.29.

³⁴⁸ Bart., D.2.14.47(48).1; Pau.Castr., cons.93, vol I; Dec., X.2.19.11, nu.200-210; G. Claro, *Recept. Sent.*, §*Testamentum*, qu.14.

³⁴⁹ Pau.Castr., C.6.23.28.

On the other hand, little to no influence or inspiration took place in the field of testamentary writings. Two exceptions stand out here. The first one is the ‘nuncupative testaments reduced into writing’, used both in the *Ius Commune* and Scots law (*supra*, pp.23, 54). The second one is more theoretical and is expressed in the distinction between testaments and codicils and in the requirement of writing as a matter of substance for last wills (*supra*, pp.45-46).

Chapter II. Evidential Force of Statements in the Last Wills.

2.1. Summary on Evidential Force of Extra-Judicial *confessiones* in the *Ius Commune*.

In the *Ius Commune* texts, the issue of the evidential force of written *confessiones* separated slowly from the issue of authentication of writings. The expression “*fidem facere*” initially referred both to the issue if a document is true and to that if a statement contained in the document is to be believed. The Gloss reveals only an embryonic distinction between the two. Thus, the Accursian Gloss to the Emperor Leo’s constitution of 472 A.D., addressing the crucial question of whether private instruments make faith, came to an opinion that they made faith if the subscription was either confessed or proved.³⁵⁰ Another gloss, to the title on *exceptio non numeratae pecuniae*, pointed out that, while a public instrument fully proves itself, an receipt of payment contained in such an instrument does not exclude the *exceptio*.³⁵¹ However, a profound exposition of the law of written extra-judicial *confessiones* is only found in the writings of the Commentators.

Bartolus in his treatment of *confessiones*³⁵² deals with three types of documents, already enumerated above (*supra*, p.18): *apocha* (executed between present parties), a letter missive (sent to an absent party) and a book of accounts (made unilaterally). His general position on all three types of documents was that, if a party recognized his or her subscription of the document, the whole document made full faith against that party.³⁵³ Moreover, to make full faith, the private writings were always supposed to mention the *causa* of the transaction.³⁵⁴

A statement of fact contained in an *apocha* constituted full proof against the maker, whether it was about a debt, a discharge or another relevant fact.³⁵⁵ The other party, however, could attempt to prove the contrary by, at least, two witnesses. If the document was not just a recognition of some act but a contract made in writing

³⁵⁰ C.8.17(18).11, s.v. “*Suum robur*”.

³⁵¹ C.4.30.3, s.v. “*Probare*”.

³⁵² Bart., D.12.2.31, D.39.5.16, D.39.5.26, D.42.2.6.3, C.4.19.5, C.4.19.13, C.4.30.13.

³⁵³ Bart., C.4.19.5.

³⁵⁴ Bart., D.39.5.26, C.4.19.5.

³⁵⁵ Bart., D.39.5.16.

(‘*contractus in scriptis*’),³⁵⁶ the contrary proof could only be provided by another written evidence.³⁵⁷ An *apocha*, however, would not make faith against the third parties, unless it was made as a public instrument or contained subscriptions of three witnesses.³⁵⁸ In doubt, a document was presumed executed between present parties, and thus, being an *apocha*.³⁵⁹

Confessiones contained in letters missive could constitute full proof, in Bartolus’ eyes, depending on whether they concerned an obligation or a discharge, whether they were expressed directly or incidentally³⁶⁰ and whether the facts confessed were actions of the parties to the correspondence or someone else’s actions.³⁶¹ If the *confessio* in a letter was on some legal “status” or a situation, the letter might constitute a “quasi-possession” of such status: e.g., induce a particular person to be “considered as a kinsman” of the sender.³⁶² Baldus later systematized Bartolus’ classification of statements in the letters missive.³⁶³ However, both authors did not elaborate on the evidential force of such statements in respect of the third parties.

Confessiones in books of account were the most controversial. The reason for this was the fragment of Ulpian in the Digest (D.42.2.6.3), which clearly stated that a statement made in absence of the recipient made no proof. Bartolus in his commentary to this law expressed an opinion that this law was applicable irrespective of the facts recognized, whether those facts were to oblige or to relieve someone of an obligation. In another commentary he points out that, even if the unilateral statement were made before a notary public, it would not make faith.³⁶⁴ In the long commentary to D.12.2.31, expounding on the basics of the law of evidence, Bartolus also mentions

³⁵⁶ *Supra*, p.16.

³⁵⁷ Bart., C.4.30.13.

³⁵⁸ C.8.17(18).11.

³⁵⁹ Bart., C.8.37.1.

³⁶⁰ I.e., whether the statements of fact were used in the text for their own sake, leaving no doubt as to the intention to recognize, or were just mentioned in the text incidentally. Thus, statements in the letters missive, made incidentally as to obligation, were not to produce proof (Bart., D.2.14.52(53)pr, D.39.5.16).

³⁶¹ Only statements as to what the parties might have done between themselves made full faith (Bart., C.4.19.13).

³⁶² Bart., C.4.19.13, D.39.5.16.

³⁶³ Bald., C.4.19.13.

³⁶⁴ Bart., D.39.5.26. Note, however, that it was not applicable if the notary accepted the statement as a representative (*negotiorum gestor*) of the beneficiary and had his deeds ratified by the latter, thus creating a *jus quaesitum tertio*. See: Bart., D.45.1.38.17, D.45.1.48.20.

that a document made by two parties, mentioning a payment from the third party, makes “half-proof” in regard of that payment; however, the author does not elaborate on this.

On the other hand, there was clear evidence in the *Corpus juris*, that accounts could be used as valuable evidence in proceedings.³⁶⁵ Bartolus, however, agrees with an opinion of Dynus, that *confessiones*, written in the books of account by the debtor’s own hand, make full proof against him. Writing the account by the debtor’s hand distinguished it, in Bartolus’ view, from a nuncupative and spontaneous *confessio*, dealt with in D.42.2.6.3. Bartolus claimed that “writing always speaks” (“*scriptura semper loquitur*”): whenever the creditor acquired possession of a written account, the *confessio* was perfected! Strangely enough, Bartolus compared the account with the letter missive on this point.³⁶⁶ A written *confessio* was, in his opinion, good enough for full proof against the maker, irrespective of the latter’s status. Obviously, this position was quite practical, seeing that books of account could in some cases be requested by the pursuer from the defendant in a litigation³⁶⁷ and that the comparison of handwritings was enough to establish the account’s authenticity (*supra*, p.20).

Unlike proving against the maker of the account, proving for the maker, in Bartolus’ opinion, was only possible if deeds recognized could be perfected by the mere will of the maker. Acceptance of the estate (*aditio hereditatis*) was a generic example.³⁶⁸ However, Bartolus admitted that the account could create “some presumption” in favour of the maker and his/her successors, if the maker was an “honest person”.³⁶⁹

In the case when the book of accounts proved neither for nor against the maker but in favour of a third party (e.g., in case of assignation of account held with a banker), in Bartolus’ opinion they could only constitute full faith if the maker held a public or “quasi-public” office. This *officium quasi publicum* was supposed to be similar to that held by *argentarii* and *nummularii* in the Roman times. Admitting that those “offices”

³⁶⁵ D.2.13.6, D.2.13.9.2.

³⁶⁶ Bart., D.39.5.26, D.12.2.31.

³⁶⁷ D.2.13.4-6. The general rule was that a pursuer could not request the defendant’s own written instruments to be used as proof against him (C.2.1 Auth. “Si quis in aliquo”=Nov.119.3).

³⁶⁸ Bart., D.12.2.31, D.39.5.26.

³⁶⁹ Bart., D.12.2.31, C.4.19.6.

were no longer extant in his time, Bartolus, nevertheless, deems merchants and other organized professions, contemporary to him, as taking place of the Roman “public officials”, because their accounts could provide a half-proof in respect of the third parties.³⁷⁰

Bartolus’ point of view was criticized, especially his maxim *scriptura semper loquitur*. Baldus and his brother, Angelo da Ubaldi, attacked Bartolus’ analogy between the account and the letter missive: a letter is intentionally sent to the recipient, while an account is a pure *confessio absentis*! In Baldus’ opinion, merchants’ books made faith only for the exact reason that they were made by merchants (holding “quasi-public” office) and were made in the form of a single formalized book, containing various debits and credits both in favour and against the maker. If the accounts, instead, were contained in separate unbound papers or were but copies (“*memorabilia*”) of the original book of accounts, they could not be considered reliable evidence, being just *confessiones absentis*.³⁷¹

The “liberal” position of Bartolus, however, found such influential supporters, as Panormitanus³⁷² and F. Decio,³⁷³ who held that even accounts not bound into uniform books and made by non-merchants could make full proof or half-proof. They fortified that position with Canon law references.³⁷⁴

Panormitanus’ original contribution to the doctrine of *confessiones* was the active use of the “half-proof” category. Thus, a half-proof, in his opinion, was constituted by the *confessiones* made incidentally in the letters missive and last wills.³⁷⁵ Moreover, he interpreted Bartolus’ statement in commentary to D.12.2.31 as a general rule, that the *confessio* to an absent party supplies a half-proof.³⁷⁶

³⁷⁰ C.4.1.3, Gloss s.v. “*Decidi oportet*”, Bart., D.12.2.31, D.39.5.26. In the commentary to C.4.21 Auth. *At si contractus* (=Nov.73.8-9), Bartolus, however, mentions that even accounts of private individuals make half-proof.

³⁷¹ Bald., C.4.18 sub rubr, C.4.21 sub rubr; see also Abb., X.2.22.2.

³⁷² Abb., *ibid*.

³⁷³ Dec., X.2.22.1, nu. 44-51.

³⁷⁴ Thus, the Clement V’s decretal of 1312 (Clem.5.5.1), which allowed using books of account of a usurer to prove his crime, was cited in support of that opinion (Abb., *ibid*, Dec., *ibid*).

³⁷⁵ Abb., X.3.27.3.

³⁷⁶ See more on this *infra*, p.70.

2.2. Effect of *confessiones* in Last Wills in the *Ius Commune*.

The issue of statements of fact in last wills is closely linked with an associated issue of the interpretation of the factual statements (“enunciative words”), contained in the last wills, as dispositions. A large mass of both the original *Corpus juris* texts and the commentaries to them were dedicated to the question of whether particular descriptions or implications of fact in the testaments might be interpreted as legacies.³⁷⁷ However, this is not an issue to deal with here. A legacy is only paid out of the free goods: it is liable for the Falcidian quarter, the natural portion of children, etc. On the other hand, a recognition of the obligation, made in the last will, can have a much stronger effect, having a force of *aes alienum*.

Moreover, seeing that a last will was a unilateral deed, depending on the sole will of the testator, revocable at his or her will and creating no consequences for the testator until death, statements contained in it might easily become an instrument of abuse, prejudging the successors of their legal rights and creditors of the debts due to them. So, it was natural that *confessiones* in last wills were given a weak effect by the *Ius Commune* scholars.

The main *sedes materiae* on the effect of *confessiones* in the last wills were C.4.19.6 (accounts and last wills of the defunct do not prejudice the heirs), C.4.19 Auth. *Quod obtinet*³⁷⁸ (an oath of the defunct may prejudice heirs), D.32.37.5-6 (a recognition of debt in the testament, joined with an oath, is a proof, except when made in fraud of law), D.34.3.8(9).4 (about a discharge by a last will). A canon from the *Liber Extra* (X.3.27.3 – a *confessio* made in the last will was accepted as a half-proof of the previously made donation) was also influential in shaping the doctrine on the issue.

It seems to have been the general consensus of the learned lawyers that statements contained in a last will could not be used in favour of the testator, lest they might prejudice creditors and the third parties.³⁷⁹ As to the *confessiones* the testator

³⁷⁷ The key passages on the interpretation “enunciative” words as legacies: D.31.34.3; D.34.2.18; D.39.5.16; C.6.23.6 and the whole title 44 of book 6 of the Code.

³⁷⁸ Based on Nov.48.

³⁷⁹ C.4.19.6, with Gloss.

made against himself and his successors, the Glossators, (e.g., Azo) were of the opinion that restrictive (“taxative”) words, used in the last wills as to the amount of debt due to the defunct (“just 100”, “only 200”, etc.), could prove the discharge of the debt, if the testator was in “*certa scientia*”; they would not, if he was in error.³⁸⁰ The Gloss to D.34.3.8(9).4³⁸¹ admitted that a direct recognition of the discharge of debt in the last will would provide an *exceptio doli* to the debtor.

Bartolus, however, was quite consistent in denying the evidential force of *confessiones* made in last wills. His main grounds for that were two: 1) were one to allow the last will an extensive evidential force, a regular legacy (in accordance with the title 44 of book 6 of the Code) could never be induced from such *confessio*; 2) a field for abuse would be opened, to defraud the heirs or even the creditors of their legal rights. He even denied that a last will might give rise to an *exceptio doli*.³⁸² The crucial difference of the last will from contracts, letters and other *inter vivos* documents dealt with above (*supra*, s.2.1) was, in Bartolus’ eyes, that the last will was not made in presence of the other party – the recipient of the *confessio*. This is why Bartolus allowed, e.g., the evidential force for a statement made in a will, if it was made in presence of the party or a notary public acting in the party’s name.³⁸³ It was even easier, in his view, to admit the discharge of a debt: a discharge could be made by a *nudum pactum*, and, thus, any person, not necessarily a notary, could accept such *confessio* on behalf of the debtor, subject to subsequent ratification.³⁸⁴ However, strictly speaking, such forms of *confessio* were not a part of the last will – they special kinds of document, annexed to the last will.

It might be noticed, however, that the books of account were similar to last wills in that they were made in the beneficiary’s absence; nevertheless, as clear from the survey above (*supra*, pp.64-66), the books of account, in most circumstances, were deemed a full proof of *confessiones* contained in them. Bartolus explained this on the basis of different functions of the two kinds of documents. A last will was made “mainly for disposition”, unlike a book of account, which served mainly an evidential

³⁸⁰ Ibid., s.v. “*Quantitatem*”

³⁸¹ S.v. “*Debitoris*”

³⁸² See Bart., D.32.37.5, D.34.3.8(9).4, C.4.30.13.

³⁸³ Bart., D.32.37.5.

³⁸⁴ Bart., D.34.3.8(9).4.

function.³⁸⁵ So, unlike letters and books of account, a last will made full faith as to the facts contained in it only if it: 1) concerned the facts which depended on the mere will of the defunct (an acceptance of estate, a ratification of the agent's deeds, etc.), 2) contained the oath of the testator; 3) the third possibility might be testator using 'taxative' (restrictive) adjectives as to the sums of debt or property due to him.

The (1) case, besides including purely unilateral acts, also allowed the testator to interpret *post factum* the transactions he made within his life, in so far as his intention was doubtful. E.g., the testator could interpret a prior act he had performed in favour of his wife as a donation, because a donation could be made by a 'nude pact'.³⁸⁶ In a situation like this, however, a preceding act, potentially creating *inter vivos* consequences, was to be established. Otherwise, the testator's *confessio* would only be a legacy at best, and not even a privileged legacy.³⁸⁷

The probative force of an oath was founded on the *Authentica "Quod Obtinet"* (C.4.19), itself excerpted from Nov.48. The text of the Novel's preamble justified the rule by the fiction that the heir is "one person" with the testator. The oath would prove (creating prejudice for the heirs) that the testator made an *inter vivos* act in his life or that the estate in succession extended to a particular amount and no further. Also, in Bartolus' opinion, a sworn statement was to be interpreted so as to give it the greatest validity legally possible.³⁸⁸ However, even with an oath, a last will could not be used *in fraudem legis*: e.g., to prove a debt in favour of the person restricted in succession (e.g., a second wife or a bastard).³⁸⁹ Moreover, although Bartolus held that the oath precluded the heirs from proving the contrary facts on the ground of an error of the testator,³⁹⁰ nothing in his or another Commentator's writings suggests that heirs were not allowed to prove that the oath defrauded them of *legitima* or other obligatory rights. And, of course, an oath could not create any prejudice to the defunct's creditors – this was expressly provided both in the Nov.48 body text and in Auth. "*Quod obtinet*".

³⁸⁵ Bart., D.32.37.5.

³⁸⁶ Bart., D.32.33.2. As to the 'nude pact' as a donation, see C.8.53(54).35, Gloss s.v. "*Detinuerit*".

³⁸⁷ Bart., D.34.2.18: if something is left to someone as the recipient's "debt" or his "own" thing, it is deemed a regular legacy, unless the debt or ownership is fully proved by separate proofs.

³⁸⁸ Bart., D.31.77.23, D.39.5.16.

³⁸⁹ Bart., D.32.37.6.

³⁹⁰ Bart., D.39.5.16, C.4.19.6.

Taxative words were, in theory, deemed to have a weaker force than the enunciative ones, as they did not infer a disposition by the testator, except when he was proved to act in certain knowledge. However, Bartolus, fusing the positions of Azo and Hugolinus on the matter, held that such words created a presumption against the heirs, so that the heirs were to prove that the amounts or quantities of debts and property were bigger in reality.³⁹¹ If the testator was proved to act *ex certa scientia*, the taxative words were interpreted as *legatum liberationis*.

Beyond the above exceptions, the last will would not infer a full proof of the acts and debts of the testator. Bartolus does not state expressly if a statement in the last will infers any kind of half-proof or presumption against the heirs or creditors. As was mentioned above (*supra*, p.64), in the commentary to D.12.2.31 he claims that a nuncupative *confessio* in favour of an absent third person induces the half-proof. He does not elaborate whether this is applicable to all *confessiones* in favour of absent persons or just to the specific situation he describes in the commentary.

Later medieval writers contributed to Bartolus' account on *confessiones* in the last wills. Thus, Baldus disagreed with him on a *confessio* of discharge, holding such a *confessio* would fully prove an *inter vivos* discharge, not just induce a *legatum liberationis*. Baldus also touched upon the question whether the oaths contained in the last wills were revocable. In his opinion, they were revocable, as they were just "supplements" to the wills they were contained in; however, they were not revocable as to spiritual forum.³⁹²

The Canonist Panormitanus elaborated on the topic of *confessiones* in last wills in his commentary to X.3.27.3, becoming the author of two alternative summaries to that decretal. In the *fabula* of the decretal,³⁹³ an archpriest donated all his goods to the monastery in presence of one witness; afterwards, lying on his deathbed ("*in extremis*"), he confirmed his previous donation in a nuncupative last will, made in presence of the recipient abbot and two witnesses. According to Panormitanus' interpretation of this canon, reconciling it with the Civil law authorities, the *confessio*

³⁹¹ Bart., D.4.19.6.

³⁹² Bald., C.4.19.6.

³⁹³ By Innocent III, dated 1198.

itself did not constitute a full proof in this case, because it was spoken “incidentally”, not “*principaliter et per se*”. So, *confessio* here constituted just a half-proof and required a corroboration by one witness to the original donation. More importantly, Panormitanus holds, although *obiter*, that, if the *confessio* had been made *principaliter* but in absence of recipient-abbot, the *confessio* would have also provided just a half-proof. Panormitanus ascribes this to the aforesaid commentary by Bartolus to D.12.2.31,³⁹⁴ which, in Panormitanus’ view, implied a general rule that a *confessio* to the absent party constitutes a half-proof.

2.3. *Statements of Fact in Last Wills and Books of Account in Scotland.*

In contrast with the *Ius Commune*, in Scotland, from the early times, debts given up (i.e., acknowledged) by the deceased in the testament seem to have been prejudicial as to successors. The overwhelming majority of testaments contain detailed inventories. They are never confirmed by an express oath of the defunct. In the notarial testaments the notary never accepts an acknowledgement of any debt on behalf of the third party.

Already in 1561³⁹⁵ we encounter a piece of evidence of the force of ‘taxative’ statements contained in last wills. In the case *Executors of Marjoribanks v. Wilson* (Maitland 102), the executors were pursuing for an estate debt of 800 pounds. However, as the testament of the defunct creditor stated the amount of the debt as 600 pounds, the remaining 200 pounds were deemed discharged.

The 1567 Instructions (C. 2) were the first document to restrict expressly the debts which could be voluntarily confirmed by the executors. The debts given up by the testator's "own mouth" were one of these. The restriction seems to have been mainly aimed at preventing the fraud as to ‘quots’ due to the Commissaries. However, it was ostensibly motivated by the protection of "*bairnis, and utheris havand interes*". The instruction does not tell us if a recognition by the testator is alone enough to

³⁹⁴ *Supra*, p.64.

³⁹⁵ The year is 1559 in some Mss, but 1561 seems to be the correct year (Maitland 102).

prejudice these interested parties. The restriction was later repeated in the Instructions of 1610³⁹⁶ and 1666.³⁹⁷

The practice embodied in the 1639 Edinburgh act book (CC8/2/62) suggests that a statement in the testament alone was a sufficient proof of the debt against the testator's executors. Most of the executry debt claims in that year were uncontested; some of them were won on the ground of executor's non-appearance at trial, which was a ground for a decret *pro confesso* against him. However, in some of the recorded cases the testament is expressly the decisive proof for the victorious creditor. For example, in the suit by James Broun against the executors of the umquihile Patrick Wood,³⁹⁸ the pursuer grounds two of his claims on assigned bonds and one of them on the testator's reognition in his testament, which was "well-known to the Commissary". And, although the defenders were absent, the court expressly accepted the confirmed testament as the only proof of the last claim ("*provin primo tempore*").

This is confirmed by the subsequent case law of the Court of Session, specifically by *Tutor of the Children of F.Ross v. A.Ross* (1668, I B.S.573). In this case, a tutor possessed a bond issued the deceased debtor, containing the debt for the goods purchased from the underage children. In his testament, however, the debtor described the bond as due to the tutor in his personal capacity. The tutor sued the executor on the ground of the acknowledgement in the testament. The suit was rejected by the Court, who found the testament insufficient proof of the debt as to the tutor personally; the pursuer was required to prove that there had been a second bond, given to the tutor personally. The wording of the report: "*The Lords would not sustain the testament to be a sufficient title, without production of the bond; because they found it was only an error in the defunct designing the bond to have been given to the tutor proprio nomine...*", - suggests, *a contrario sensu*, that the testament would have been sufficient title, if there had been no obvious error of the testator. So, a reognition of debt in the testament in Scotland bore pretty much the same effect against executors, as a *confessio* with an oath in the *Ius Commune* against heirs.

³⁹⁶ *Balfour's Practicks*, 666.

³⁹⁷ *Acts of Sederunt 1790*, 99.

³⁹⁸ CC8/2/62, 25 May 1639.

The law was different as regards the interest of third parties. Thus, in the case of *Executors of Edgar v. Edgar* (1628, M.12487), a debt recognized in the testament was paid by the executor without a judicial decree, but the original bond of the debt was not preserved. The executor was then sued by another creditor and pleaded exhaustion of the estate due to the payment of debts. The Lords found it relevant for the executor to verify the first debt by the oath of the creditor to whom he had paid without decree.³⁹⁹ Here, obviously, the recognition made in the testament does not make full faith as to the creditors of the defunct. Although the term is not used, it makes something akin to a half-proof. This position looks similar to that generalized by Panormitanus for the *Ius Commune*: a *confessio* in absence of the recipient makes a half-proof (*supra*, pp.65, 71).

The idea that the early 17th century Scots law on statements of fact in absence of the recipient might rely on the *Ius Commune* rules seems to receive verification not only from the practice on last wills, but also from the practice on statements made in books of account. In the already mentioned above case, *Brown's Creditors v. Baillie*,⁴⁰⁰ the accounts subscribed by the defunct's own hand were found to bear enough faith for the creditors in them to compete with others, while the accounts from the same book, which were written down by the defunct's servant and lacked subscription, were found only partial proofs: the respective creditors were required to 'adminicle' the accounts by proving the supply of goods and swearing an oath on their values. The solution provided by this case is similar to the solution of Bartolus: an account written by the granter's hand "always speaks" and thus makes full faith against the maker, while an account written by someone else is a nuncupative *confessio* in absence of the recipient, so it makes just a half-proof.⁴⁰¹ This "half-probativity" of the account in respect of the third parties persevered in later cases. Just as in the *Ius Commune*, the merchant status of the maker and the oath of the party could fortify the account in Scotland so as to make it fully probative.⁴⁰²

³⁹⁹ See also *Falconer v. Blair* (1629, M.12487), where the creditor was also requested to give an oath. That case, however, dealt with a heritable debt.

⁴⁰⁰ 1631, I B.S.319=M.2428=M.12617.

⁴⁰¹ Bart., D.12.2.31; *supra*, p.64.

⁴⁰² Thus, the book of account of a merchant found to prove the transaction's date against a third party, with 'adminicles' (*Skene v. Lumsden*, 1662, M.12618); the oath of the party was taken to support the

It is important to note here that the evidential force of last wills in the early 17th century Scots practice was facilitated by the non-application of the law of ‘deathbed’⁴⁰³ to the statements of fact. There is no direct evidence on this as to last wills, but there is a case on bonds - *Creditors of Byres v. Byres* (1628, I B.S.246) - where a bond of corroboration, recognizing a preceding debt, was granted on deathbed. After the debtor’s decease, the creditor on the bond obtained confirmation as the executor-creditor⁴⁰⁴ to him. Competing creditors sued him, claiming that he was not entitled to have the priority of payment by virtue of his confirmation, because the bond was granted on deathbed. However, the Court found in favour of the executor-creditor, thus giving a full evidential force to the bond issued on deathbed. The evidence provided by this case is not particularly strong. Stair in his *Institutions* interpreted this case as applicable to the confirmations of executor-creditors only, not to the debts in general.⁴⁰⁵ Nevertheless, as concerns the 1620s, *Creditors of Byres*, in combination with the above cases on last wills and accounts, suggests the possibility of prejudging of the testator’s successors by the acts executed on deathbed.

From the 1670s on, however, the view on the probative force of the last wills was clearly different. The last wills were no longer deemed fully probative against universal successors in respect of the law of ‘deathbed’. Instead, the case law in the late 17th century recognized the testaments and other statements made on deathbed as a half-proof of the respective debts against the heirs-at-law. Thus, a long term of marriage, taken together with the husband's recognition in his testament, was deemed a sufficient proof of payment of dowry by the wife, against the husband's heir-at-law.⁴⁰⁶ In another case⁴⁰⁷ the heir-at-law was sued for the moveable debt on a small loan (less than 100 pounds), unsecured by any written evidence but acknowledged nuncupatively by the testator on his deathbed. The defender pleaded the ‘law of deathbed’ to challenge the acknowledgement, but the Lords allowed the witnesses to the acknowledgement to be fortified by the witnesses to the intromission with the

account (*Wardlaw v. Gray*, 1662, M.12620, *Lawrie & Drummond v. Drummond*, 1675, M.12622), the maker’s status as a “sub-collector” supported the document (*Stuart v. Agnew*, 1680, M.12624).

⁴⁰³ *Infra*, p.97-98.

⁴⁰⁴ *Infra*, p.231.

⁴⁰⁵ Stair, *Inst.* III.8.63.

⁴⁰⁶ *Dods v. Scot* (1671, M.12584).

⁴⁰⁷ *Thallane v. Orrock* (1673, M.12585).

borrowed money by the defunct in his life. In later cases, declarations made on deathbed were allowed to “fortify” trusts created in the granter’s life.⁴⁰⁸ Nevertheless, all these cases showed that a statement made in the last will might be easily challenged on the ground of the law of ‘deathbed’. This development obviously undermined the evidential significance of last wills in Scots law.

This short research into the evidential force of the last wills reveals strong evidence that Scots practice might have experienced influence of the *Ius Commune*. However, this influence came not from the *Ius Commune* rules on the last wills, but rather from the *Ius Commune* rules on the books of account. Both Scottish books of account and last wills generally followed the principle that a statement of fact proves against the maker of the document and his general successors. The third parties could only be prejudiced if there were additional proofs, ‘adminicles’; the document would have a force of a half-proof against them. The similarity to the doctrines of the *Ius Commune* writers, like Bartolus and Panormitanus, is too strong to be a simple coincidence. It further proves that the Civilian and Canonistic teachings on the last wills were not particularly relevant for the Scots practitioners, who preferred to invoke the more general rules on the instruments and to treat Scots last wills accordingly.

⁴⁰⁸ Paton v. Stirling (1674, M.12586), Crawford v. Bell (1687, M.12591).

Chapter III. *Donatio mortis causa*

Donatio mortis causa (hereafter – “DMC”) was a term of Civil law that has been accepted by many legal systems. It did not bear the same meaning everywhere, with some countries more or less receiving the Civil law definition, and others receiving the term only. However, everywhere it meant a special device, standing at the boundary line between last wills and contracts, aimed at facilitating the inter-generational transfers of property. Such function was especially important in Scotland. The various tight restrictions and difficulties associated with testaments in Scotland provided for the popularity of various “will-like” devices in place of the testaments. This is why the Scots practice on DMCs and similar devices was relatively abundant, in comparison to practice on last wills.

3.1. *Donatio mortis causa in the Ius Commune.*

The best definition of DMC, which was very influential in Medieval and Early Modern texts for its convenience, was given in the beginning of the Digest’s title *De mortis causa donationibus et capionibus* by Marcian (D.39.6.1), who defined a DMC as a donation “in which one prefers himself to be owner over the donatary, but prefers the donatary over one’s own heir”. The definition reflects the function of such donation: to exclude some property from the usual process of succession in a situation when the donator is moved to do so by fear of death.

Whether the DMC was to be classified as a form of last will or as a form of contract was already a controversial topic in Classical Roman law, between Sabinians and Proculians.⁴⁰⁹ Justinian in his 530 A.D. constitution claimed to have resolved the controversy as concerns the formal requirements, defining the DMC as a last will (C.8.56.4); however, the controversy continued among the Medieval lawyers.⁴¹⁰ It seems that, by the Early Modern period, the opinion of Jason de Mayno (1435-1519) prevailed, which was that a DMC was more like a contract as to its constitution and more like a last will in its effect.⁴¹¹

⁴⁰⁹ Fr. Hotman, *Scholae ad titulos de donationibus*, C.8.56.4, pp.113-118.

⁴¹⁰ Cl. Aboucaya, ‘Les applications de la *donatio mortis causa* dans les pays de droit écrit et de coutumes’, *TvR*, vol 35 (1967), 1-9.

⁴¹¹ Aboucaya, *op cit*, 10; D. Covarruvias, *De testamentis...*, *Pars III // Tractatus selecti...*, 147-155.

The French Humanist legal scholar Fr. Hotman (1524-1590) provided one of the best lists of similarities and differences between a DMC, an *inter vivos* donation and a last will (legacy).⁴¹² Like a legacy and unlike *inter vivos* contracts, a DMC was always revocable by the donator. It was also always conditional on death, could burden the donatary by a *fideicommissum*, was subject to the Falcidian quarter,⁴¹³ required five witnesses for its validity and could bestow ownership *post obitum* upon the donatary without a transfer of possession.

On the other hand, like a contract and unlike a legacy, a DMC required the presence of the other party for its constitution. It was also not a constituent part of the donator's testament and could be made by a *filiusfamilias* with the father's consent. While legacies were supposed to be received by the legatees from the heir's hands and the heir could use the interdict *Quod legatorum* against legatees taking unauthorized possession, the heir could not use this interdict against a *mortis causa* donatary, who received possession from the testator himself.⁴¹⁴ The medieval learned lawyers added other differences. Thus, unlike legacies, a DMC came into force upon the death of the testator, without *aditio hereditatis*.⁴¹⁵ DMCs were also preferable to legacies in case of insolvency.⁴¹⁶

The abovementioned characteristics of a DMC may be essentially summarized into three peculiarities of this institution, making it different from both contracts and last wills. First, a DMC was subject to special requirements as to its constitution. Second, a DMC was revocable; special legal devices were developed to ensure its revocability. Third, a DMC had some unique properties in respect of the way the ownership might be transferred to the donatary.

⁴¹² Hotman, op cit, 119-120.

⁴¹³ And thus, as the Falcidian quarter included debts into its calculation, a DMC could not compete with the *inter vivos* obligations. See also Bart., D.39.5.15: a DMC, like any other last will, can never prejudice the fisc, so there is no need to prove the intentional fraud of the donator.

⁴¹⁴ D.43.3.1.5, et ibi Bart.

⁴¹⁵ For Bartolus it was still a debatable issue (Bart., D.39.6.21). For D. Covarruvias it was already a prevailing opinion (Covarruvias, op cit, 153).

⁴¹⁶ It clearly follows from D.43.3.1.5, which provided that an heir might use a *Quod legatorum* interdict against the *mortis causa* donatary only to the extent that the donation prejudiced the heir of the Falcidian portion (see the Gloss to that law).

In respect of the constitution, as was already said, a DMC was to be made in presence of five witnesses, irrespective of whether in writing or nuncupative (C.8.56.4). The Roman jurist Julian enumerated three specific ways of making a DMC: 1) a donation out of general “contemplation of mortality”; 2) a donation in the imminent danger of death, with either a) immediate effect or b) the postponed transfer of ownership (D.39.6.2). However, medieval scholars greatly widened the various forms of DMC. It could be made by a promise to bestow property at the moment of death (in the form of a stipulation or just a *nudum pactum*), or the donator could transmit possession of the property in his life, either providing for an immediate transfer of ownership or postponing it to the time of death.⁴¹⁷ The Roman sources also provided the possibility for a DMC in consideration of the death of another person (C.8.56.3; D.39.6.18), but, unfortunately, Medieval and Early Modern scholars did not pay enough attention to that possibility.

Whatever the form of a DMC, its essential requirement was “*consideratio mortis*”. Whatever the position of Classical Roman law, the late Roman legislation (C.4.11.1) allowed the creation of *inter vivos* obligations and contracts taking effect at death and *post mortem*. Thus, a simple mention of death could only be just one of the signs of a DMC, not the decisive criterion (*infra, p.81*). Nevertheless, the “consideration of death” was a relatively wide criterion, based on the subjective motives of the donator. Cl. Aboucaya showed how different was the DMC in French “*pays de droit écrit*”, which allowed a general “consideration of death”, from the DMC in the Paris region, which was valid only if made *in extremis*, in a situation of actual mortal danger.⁴¹⁸ English Common law also historically required an objective danger of death for a DMC.⁴¹⁹

Any DMC was deemed essentially a pact, an agreement, which is why it always required participation of the other party in its constitution. Like any other donation, a DMC could be made by a ‘nude pact’, so the donatory was not necessarily even to say or state anything, as his presence created a presumption of consent; however, his

⁴¹⁷ Gloss and Bart. to C.39.6.1.

⁴¹⁸ Aboucaya, *op cit*, 11.

⁴¹⁹ H. Richardson, ‘*Donatio mortis causa*’, *Central Law Journal*, vol 16 (1883), 482-485.

presence, either real or fictitious, was to be established.⁴²⁰ Early Modern jurists elaborated devices to overcome this requirement, so that a *stipulatio alteri*, sometimes together with a *constitutum possessionis*, could be made before a notary public, which created a *jus quaesitum tertio* in favour of the donatary. The latter was just to ratify such transaction *ex post facto*.⁴²¹

The revocability of a DMC was its substantial characteristic, so that a donation which included a clause or a promise not to revoke it could only be classified as an *inter vivos* donation (D.39.6.27). However, there was an opinion that the right of revocation could be restricted in some way in the contract.⁴²² There were four main modes of revocation: 1) the express declaration by the donator, either *inter vivos* or in a last will; 2) the predecease of the donatary (unless the donation included his successors); 3) the alienation of the donated goods by the donator (similar to *ademptio* of legacies); and 4) the recovery of the donator, stricken with mortal disease.⁴²³ If the donated thing was in the possession of the donatary or his heirs, after revocation the donator had *rei vindicatio* or *condictio* for the recovery of goods. If ownership of the thing had been previously transferred to the donatary, the donator could claim it by an *actio in rem utilis*.⁴²⁴ In fact, this created a peculiar institution, reminiscent of a special kind of real right.

A DMC displayed unique properties in respect of the way of transfer of ownership to the donatary. A passage from the Digest, dealing with the *actio Publiciana* (D.6.2.2), mentioned that the *actio Publiciana* could be acquired not only by *traditio* of possession, but also by a DMC, arguing that DMCs, similarly to legacies, do not require *traditio*. This passage was interpreted by the Medieval and Early Modern jurists in the way that DMCs do not need a transfer of possession for the change of ownership. Therefore, even if a DMC of a specified piece of property was made by way of promise, the donatary automatically acquired ownership on the death

⁴²⁰ Covarruvias, op cit, 151.

⁴²¹ Covarruvias, op cit, 150-151; G.D.Durante, *De arte testandi*, l.8.

⁴²² Thus, Covarruvias holds that a DMC made in a state of mortal danger may contain a clause of non-revocation, valid for the duration of such danger (Covarruvias, op cit, 153).

⁴²³ This last way of revocation was debated by the jurists, but Covarruvias claimed it was already a *communis opinio* in his time (Covarruvias, op cit, 153-154).

⁴²⁴ See Gloss to D.39.6.29-30.

of the donator.⁴²⁵ Unfortunately, there is not much elaboration on this issue in the works of the learned lawyers. D. Cobarrubias-y-Leyva (1512-1577) seems to imply in his work that the donatary in such case still cannot take possession of the donator's goods by himself and has to find a responsible successor to transfer physically the goods.⁴²⁶

A sharply debated subject was whether to presume a gift to be *inter vivos* or *mortis causa* in case of uncertainty. As already said above (*supra*, p.79), a simple mention of death was not the decisive criterion. Some jurists held that mentioning of death created a presumption of *mortis causa* disposition, unless another *causa* was mentioned;⁴²⁷ others held the contrary opinion.⁴²⁸ The prevailing opinion was that, if the death was not mentioned, even a donation made *in extremis* was presumed to be *inter vivos*, unless the danger was mentioned in the text.⁴²⁹ However, here as well a contrary opinion existed; Aboucaya described how it prevailed in the Parliament of Paris and was enshrined in the 1580 edition of *Coutume de Paris*, turning gifts made on deathbed into *mortis causa* gifts.⁴³⁰ A special question, arising from practice, was whether a donation of property with reservation of a usufruct for the donator's lifetime was to be qualified as a DMC or an *inter vivos* donation. The two most well-known and influential medieval Commentators – Bartolus⁴³¹ and Baldus⁴³² – both dealt with this question in their *consilia* and both deemed the reservation of usufruct a sign of an *inter vivos* donation.

⁴²⁵ Hotman, *Scholae ad titulos de donationibus*, C.8.56.4, pp.113-118; Bart., D.6.2.1.1.

⁴²⁶ Covarruvias, op cit, 153.

⁴²⁷ Bart., D.12.6.17; R. Passagerius, *De donatione causa mortis // Tractatus selecti...*, 381.

⁴²⁸ Covarruvias, op cit, 154.

⁴²⁹ Covarruvias, ibid.

⁴³⁰ Aboucaya, op cit, 43.

⁴³¹ Bart., cons. 76. In the case, a father bestowed all his goods, present and future, on his son, reserving usufruct and a right to dispose of property. Bartolus saw the usufruct as the evidence of the donator's thinking about his life and survival rather than death; mentioning the right of disposition would have been unnecessary if that had been a DMC. Thus, Bartolus deemed the transaction an *inter vivos* deed and thus invalid, as it infringed on testamentary freedom.

⁴³² Bald., cons. 107, vol II. In Baldus's case, a plot of land was granted to the monastery, usufruct reserved. Baldus deemed the usufruct an evidence of the irrevocable *inter vivos* donation, because one would only burden with a usufruct another's property, not one's own.

3.2. Evolution of the Concept of *donatio mortis causa* in Scots Law.

The outline of the classical law of *donatio mortis causa* in Scotland was provided in the case *Morris v. Riddick* (1867, 5 M 1036). Lord Inglis, giving the background of the DMC in Scotland, was quite explicit in that the Scots DMC was not received from Roman law and was very unlike its Civilian counterpart. While the Civil law DMC was characterized by the Court of Session as “a form of legacy”, the Scottish DMC was a “disposition with delivery, made in contemplation of death”, belonging largely to the law of contract. A DMC in Scotland involved a transfer of possession, either of the goods themselves or of bonds and other documents. In this respect, the classical DMC in Scotland is reminiscent of the DMC in English law, where the physical transfer of possession within the donator’s life was also required.⁴³³ Unlike English law, however, a Scots DMC may be revoked by a last will⁴³⁴ and is defined by the subjective criterion of “contemplation of death”; there also seems to have been no problems in Scotland as to DMCs made by a cheque or a promissory note.⁴³⁵ Similarly to the Civil law, the Scots DMCs were preferable to legacies but succumbed before *inter vivos* debts. They did not require writing and could be proved by witnesses or an oath irrespective of their amount. Finally, they could not concern heritable property;⁴³⁶ however, terms like “*mortis causa* disposition”, “*mortis causa* settlement” or “*mortis causa* trust” were widely used in respect of various lawful deeds of heritable property before the Succession (Scotland) Act 1964.⁴³⁷ The Succession (Scotland) Act 2016, s. 25, abolished the “customary mode” of DMC, effectually equalizing the DMC with all other conditional gifts.

If we move slightly back in time, to the 18th century, we find basically the same account of the law of DMC in the works of Lord Bankton and John Erskine. Bankton⁴³⁸

⁴³³ H. Richardson, op cit, 482-485.

⁴³⁴ Baron David Hume (1757–1838) held an opinion that a DMC of a thing cannot be canceled by leaving the same thing by way of legacy (*Lectures // SSP*, vol 18 (1957), 219). He refers to the case *Whitefoord v. Aiton* (1742, M.8072=12338) in support. However, in that case a nuncupative legacy was not allowed to cancel the DMC made in writing; so, this case was about form and did not forbid legacies from canceling DMCs. The Early Modern case law referred to in this chapter shows that *mortis causa* dispositions with a reserved power to revoke them on deathbed were quite widespread.

⁴³⁵ Cf. English law: W.L. Murfree, ‘*Donatio mortis causa*’, *Central Law Journal*, vol 19 (1884), 222-226.

⁴³⁶ M’Laren, *Wills and Succession*, vol I, pp.383-385.

⁴³⁷ M’Laren, op cit, vol I, pp.185, 454, 588.

⁴³⁸ Bankton, *Inst.* I.9.16-19.

deals with DMCs in largely Civilian terms, but the rules he expounds are already essentially those of *Morris v. Riddick*; a DMC for him is a bond, either delivered, but containing a right of revocation, or undelivered, but dispensing with delivery.⁴³⁹ Erskine, to the contrary, is sceptical about a possible relationship between the Scots DMCs and the Civilian DMCs, claiming that, unlike the DMCs of Civil law, the Scots bonds need an express, not a tacit, revocation clause to qualify as such.⁴⁴⁰ For both authors, the DMC is first and foremost a type of contract, which only becomes “effectual” at the moment of death, hence its inferiority in competition with *inter vivos* debts. Theoretically, such an approach excludes the possibility of making a DMC by a nuncupative promise.

However, if we plunge even further back in time, into 17th century court practice, we no longer find such a uniform definition of a DMC. The use of the term “*donatio mortis causa*” in the decisions of this period⁴⁴¹ is hard to analyze, because of the quality of the reports – there is no guarantee that the wording of the reports reflected the wording of the litigation precisely. Despite that, however, it seems possible to trace the evolution in the Scots understanding of the DMC in that period.

The first common feature all the “*donationes mortis causa*”, as they appear in the 17th century cases, share, is that a DMC is always a donation made in “contemplation of death”.⁴⁴² Stair in his *Institutions* obviously considers DMCs and donations in contemplation of death as the one and same thing.⁴⁴³ Deeds made on deathbed and *in extremis*, to the contrary, were not *eo ipso* considered *mortis causa*

⁴³⁹ See *infra*, s.3.3, on this type of bonds.

⁴⁴⁰ Erskine, *Inst.*III.3.91.

⁴⁴¹ Here are the 17th century cases where the term “DMC” is used explicitly: *Curriehill v. Executors of Currie* (1624, M.2937=M.3591), *Traquair & Robertson v. Blushiels* (1626, M.3591), *Sharp v. Sharp* (1631, M.15562), *Law(u)der v. Goodwife of Whitekirk* (1637, M.1692=M.3593), *Nasmith v. Jaffray* (1662, M.3593=M.5483), *Cruickshank v. Cruickshank* (1665, I Stair 282), *Henderson v. Henderson* (1667, M.11339, Dirl.103), *Hadden & Lawder v. Shorswood* (1668, M. 16997=I B.S.567), *Thomsons v. Creditors of Thin* (1675, M.3593), *Grant v. Grant* (1679, M.3596), *Johnston v. Johnston* (1697, M.8198), *Clerk’s Creditors v. Blackwood* (1686, M.8060), *Reid v. Daes* (1692, M.15000), *Straiton v. Wight* (1698, M.10326), *Lesly v. Lesly* (1699, M.3597).

⁴⁴² *Henderson v. Henderson* (1667, M.11339, Dirl.103), *Grant v. Grant* (1679, M.3596), *Irvine v. Skeen* (1707, M.6350).

⁴⁴³ Thus, in *Inst.*III.8.32 he enumerates testaments, legacies, deeds on deathbed and DMCs as the deeds which do not prejudice the legal shares of the wife and children. In *Inst.*III.8.39 he enumerates in the same list legacies, donations on deathbed and donations in contemplation of death.

deeds.⁴⁴⁴ Thus, Scots law already in this era firmly embraced the “subjective” criterion of a DMC. In this respect, it was different from English law and the law of the French *pays de coutumes* (*supra*, p.79) and followed the original Civil law approach.

Furthermore, in the vast majority of cases, the effect of recognizing or not recognizing a particular deed as a DMC was, respectively, the revocability or non-revocability of such deed. There are several exceptions, where the concept of DMC was invoked for other effects;⁴⁴⁵ they will be dealt with further in more detail. The rules on revocation of DMCs were pretty similar, if not identical, to those of the *Ius Commune*. Expressly or implicitly, the judges held that a DMC might be revoked by an express delivered document,⁴⁴⁶ by a last will made on deathbed,⁴⁴⁷ by predecease of the donatary,⁴⁴⁸ by the donator’s escaping the mortal danger⁴⁴⁹ and even by alienating the donated property.⁴⁵⁰

In no case do the judges explicitly use the term “DMC” in respect of a deed of land or other heritable property. However, there are several cases where one of the parties used the term in such a context.⁴⁵¹

There is one striking difference between the DMC in 17th century Scots law and the DMC as formulated in the 19th century. Lord Inglis in *Morris v. Riddick* referred to the Civil law DMC as “a form of legacy”, implying that it was something

⁴⁴⁴ See, e.g., *Aikman v. Boyd* (1679, M.3201), where the assignations made on deathbed were not assumed to be “testamentary deeds” in the strict sense, and *Sandilands v. Sandilands* (1683, M.3202=M.14384), with a similar outcome.

⁴⁴⁵ In *Nasmith v. Jaffray* (1662, M.3593=M.5483) and *Johnston v. Johnston* (1697, M.8198) the term “DMC” was used in the context of the legal shares (“legitim”) in the estate. In *Henderson v. Henderson* (1667, M.11339, Dirl.103) the question was that of validity of the disposition in respect of legal heirs. In *Hadden & Lawder v. Shorswood* (1668, M.16997=I B.S.567) and *Straiton v. Wight* (1698, M.10326) the term was used for a disposition which requires no delivery.

⁴⁴⁶ *Thomsons v. Creditors of Thin* (1675, M.3593), *McBride v. Bryson* (1680, M.17002).

⁴⁴⁷ *Curriehill v. Executors of Currie* (1624, M.2937=M.3591), *Traquair & Robertson v. Blushiels* (1626, M.3591) – in both follows *a contrario sensu*.

⁴⁴⁸ *Clerk’s Creditors v. Blackwood* (1686, M.8060), *Lesly v. Lesly* (1699, M.3597).

⁴⁴⁹ *Lesly v. Lesly* (1699, M.3597), *Irvine v. Skeen* (1707, M.6350). Note that, in the *Ius Commune*, whether ceasing of any or just some kinds of mortal danger brought the revocation of the DMC was a controversial question (Covarruvias, *De testamentis...*, Pars III // *Tractatus selecti...*, 153-154; see also D.39.6.29).

⁴⁵⁰ *Traquair & Robertson v. Blushiels* (1626, M.3591), *Thomsons v. Creditors of Thin* (1675, M.3593).

⁴⁵¹ *Sharp v. Sharp* (1631, M.15562), *Law(u)der v. Goodwife of Whitekirk* (1637, M.1692, in this case the debt assigned seems to have been heritable), *Henderson v. Henderson* (1667, M.11339, Dirl.103), *Lesly v. Lesly* (1699, M.3597).

alien to Scots law.⁴⁵² However, in the earliest Scots reports the terms “DMC” and “legacies” look pretty much interchangeable. In several cases they go side by side. In *Nasmith v. Jaffray* (1662, M.3593=M.5483) a husband, being on a long journey, sent a letter to his wife, bestowing on her the right to take all his goods in case he did not return; the Lords declared this deed “a legacy or a *donatio mortis causa*”. In *Hadden & Lawder v. Shorswood* (1668, M.16997=I B.S.567) one of the parties called an assignation, left undelivered by the defunct, a “DMC” which “must be valid without delivery, for a testament or legacy is valid without delivery”, while the other party, objecting to that claim, mentioned that “DMC is but a legacy”. There are other similar cases.⁴⁵³

Of course, using two words side by side does not imply an identical meaning but rather a similar meaning with subtle differences. There were also instances where the terms “legacy” and “DMC” were distinguished.⁴⁵⁴ Nevertheless, in some early cases, the term “DMC” is not used where it might have obviously been appropriate, with “legacy” or a different term used instead. Thus, in the case of *Houston v. Houston* (1631, M.8049=M.12307) a delivered bond to pay 500 merks after the debtor’s decease was found to be “just a legacy” for the purpose of the law of ‘legitim’. In another case, *Bells v. Parks* (1636, M.3593), a contract to pay 300 merks to a father from the daughter’s estate in return for the father’s renouncing all rights of succession to the daughter, was recognized as a “testamentary c(l)ause”, thus revocable by the daughter. In a late case *Nisbet v. Scot* (1709, M.3809), a disposition of all moveables *post mortem* in the form of a mutual contract was characterized as a “DMC” by the winning party and as a “universal legacy” by the Lords. Thus, a “legacy” in early Scots law could appear in quite surprising incarnations, often in a contractual form.

This is why it is obvious that, unlike the *Ius Commune*, there was no real difference in terms of constitution between a DMC and a legacy in 17th century Scots

⁴⁵² *Supra*, p.81.

⁴⁵³ For example, in *Thomsons v. Creditors of Thin* (1675, M.3593) the terms “legacy” and “DMC” are also used interchangeably. The two terms were also used interchangeably by the party in *Whitefoord v. Aiton* (1742, M.8072).

⁴⁵⁴ See *Cruickshank v. Cruickshank* (1665, I Stair 282), where the winning party, who was granted a provision in an assignation by the defunct, alleged that, although the said deed was “not in the express terms of a legacy, yet it is *donatio mortis causa*”, and so this provision was deemed a new donation and not a payment of the earlier debt.

law. Both DMCs and legacies in that period included promises and contract-like deeds. In fact, there could not be much formal difference between the two, considering that Scots contract law, as it was forming in that period, did not follow the strict principle of privity of contract and the doctrine of offer and acceptance. An enforceable contract could be made by a unilateral written promise (“bond”), without any acceptance of the other party required.⁴⁵⁵ The only practical guarantee of contractual privity was the requirement to deliver the writing. In further discussion we shall see how the rules on delivery were adapted so as to get rid of the delivery requirement for the deeds of “testamentary nature”, even if they were not, strictly speaking, DMCs (*infra*, s.3.3).

It also follows from the case law that the claims of the later Institutional writers, that a gift must explicitly mention its revocability in the text of the bond and that Scots law did not know “implied DMCs”,⁴⁵⁶ were incompatible with the early law. Cases like *Bells v. Parks* and *Nasmith v. Jaffray* obviously are examples of how deeds, which did not mention anything about revocability, could be recognized as “legacies” or “DMCs”. In fact, the case *Law(u)der v. Goodwife of Whitekirk* (1637, M.1692=M.3593), which Erskine cited in support of his claim, deals with a rather special situation. In that case, an assignation of the sum (debt) was granted in return for a back-bond to give “compt and reckoning” on the sum after the assignor’s return from a journey. The assignor made another assignation of the same sum whilst on the journey and died before his return. The Lords found that the first assignation was only revocable in case of the assignor’s return; they did not find that this deed was not a DMC simply because it did not mention it was a DMC. Thus, Erskine’s claim with reference to this case looks quite ungrounded.

That said, the approach of the Scots judges started to change in the late 17th century, probably from around the 1660s. The judges, seemingly, began to narrow

⁴⁵⁵ T.B. Smith, ‘*Jus quaesitum tertio*: remedies of the “*Tertius*” in Scottish law’, *JR*, vol 1(n.s.)(1956), 3-21; D.I.C. Ashton Cross, ‘Bare promise in Scots law’, *JR*, vol 2(n.s.)(1957), 138-150; J.T. Cameron, ‘*Jus quaesitum tertio*: true meaning of Stair I.x.5’, *JR*, vol 6(n.s.)(1961), 103-118; A. Rodger, ‘Molina, Stair and the *Jus quaesitum tertio*’, *JR*, vol 14(n.s.)(1969), 34-44, 128-144; D.N. MacCormick, ‘*Jus quaesitum tertio*: Stair v. Dunedin’, *JR*, vol 15(n.s.)(1970), 228-246; G. MacCormack, ‘A note on Stair’s use of the term *pollicitatio*’, *JR*, vol 21(n.s.)(1976), 121-126; W.W. McBryde, ‘*Jus Quaesitum Tertio*’, *JR*, vol 28(n.s.)(1983), 137-151; D. Smail, ‘The Requirements of Writing (Scotland) Act 1995: A Nail in the Coffin for Stair and Scots Promise?’, *ESLR*, vol 1(2)(2010), 15-41.

⁴⁵⁶ Bankton, *Inst.*I.9.19; Erskine, *Inst.*III.3.91.

down the definition of the DMC and became more reluctant to recognize particular transactions as DMCs. Perhaps, *Henderson v. Henderson* (1667, M.11339, Dirl.103) was one of the first such cases. In that case, the Court of Session refused to recognize as a “testament” or a “DMC” disposition of land that was worded like a testament and was revocable.⁴⁵⁷ In the case *Thomsons v. Creditors of Thin* (1675, M.3593), which concerned moveables, the donator granted a bond for a large amount of money (exceeding his free assets) to be paid after his death in case of his decease without heirs of his body. Afterwards the donator made a disposition of all his goods to his wife, reserving a liferent and a right to “affect” the goods in his life. The Court found that neither of the two dispositions was a legacy or a DMC: the first one was found to be just a debt suspended under a condition, while the second one was not a DMC because the right to “affect” the goods, allegedly, entailed only the power to dispose of particular property, not to revoke the whole disposition.

Subsequent practice continued restricting the application of the DMC concept. In *Grant v. Grant* (1679, M.3596) a man promised in future terms all his goods owned at the time of death. The judges did not find it a revocable DMC, as it was not made “in contemplation of death”. In *Lesly v. Lesly* (1699, M.3597) a tailzie of all one’s moveables and heritage, which reserved the power to “alter” the disposition, was found not to be a DMC and thus not revoked by the donatory’s predecease and the donator’s returning from the journey. Of course, there were also more successful invocations of the DMC concept. In a later case *Irvine v. Skeen* (1707, M.6350) a disposition of all one’s moveable goods was granted; a liferent and a power to revoke the disposition even “*in articulo mortis*” were reserved. Despite the losing party’s claims that this disposition was not made “in contemplation of death”, the Lords heeded to the winning party’s assertions that the deed contained all essential features of a DMC as defined in by the Civil law and was thus revocable by the granter’s surviving the donatory.

We see that the late 17th – 18th century judges tried to avoid DMCs as much as possible. To be a DMC, the bond was now supposed to expressly contain all the essential features of the DMC: absolute revocability even by a last will, “contemplation of death”, etc. The presumption was now clearly in favour of the *inter*

⁴⁵⁷ See the analysis of this case in some more detail *infra*, p.99.

vivos character of a deed. It is no surprise then that Bankton and Erskine had such a narrow understanding of the DMC – in their time, a valid DMC they might encounter would be either a bond, bearing in the most express terms that it was a DMC, or a physical transfer of goods, performed in a very clear situation of contemplation of death. It is not surprising either that a DMC by a nuncupative promise was not imagined – it was extremely unlikely that someone would make such a promise expressly providing for all the requirements for a DMC. 18th century and later lawyers could not think of a larger definition of DMC without contradicting contemporary court practice, which had been refusing this status to one or another transaction almost every time since the 1660s.

3.3. Evolution of the Requirement of Delivery of Deeds.

Survey of the evolution of the requirement of delivery for bonds and other deeds may help to answer the question of why the Scots courts started to narrow the definition of DMC in the 1660s. The general law, as presented by Erskine (*Inst.III.2.43*), considered delivery a necessary element for the constitution of a written deed, otherwise the deed would be considered incomplete. However, in the next paragraph (*Inst.III.2.44*), Erskine himself provides six exceptions to the rule, “deeds of a testamentary kind” being one of those. Moreover, even in the late 19th century, it was an accepted opinion of the Lords of Session that the “delivery” required of a *donatio mortis causa* was less than the delivery required of *inter vivos* documents.⁴⁵⁸ All that is traceable to the 17th century.

It is well known that a postponement of delivery was, since early times, one of the devices to avoid the rule forbidding the leaving of heritage by a last will and disposing of them on “deathbed”.⁴⁵⁹ The donator would create an *inter vivos* deed to transfer his land, which would oblige the heir-at-law to perfect the transaction after the donator’s death; but the deed was not delivered until the donator’s death, thus retaining its ambulatory character and remaining revocable by the granter. Was such practice lawful? Most, if not all, of the early 17th century cases on delivery, preserved to this

⁴⁵⁸ W.M. McBryde, op cit, 143; *Crosbie’s Trustees v. Wright* (1880, 7 R. 823).

⁴⁵⁹ J. Irvine Smith, ‘Succession’, *ISLH*, 214.

day, dealt with heritable deeds. They sometimes contradicted each other. Thus, in *Children of Wallace v. Their Eldest Brother* (1624, M.6344=M.16989) a bond by a father in favour of his younger sons, although made 25 years before his death and undelivered until then, was sustained as valid, with judges seeing the fact of the “evident” (i.e., the document) being in the younger son’s possession as creating a presumption of the bond’s valid execution. However, in this case the bond was not presumed to have been delivered at the moment of making, either.⁴⁶⁰

In another case, *Dickson v. Dickson* (1627, M.16990), unlike *Children of Wallace*, the judges considered the heir’s claim, that the deed in question had not been delivered in the donator’s lifetime, a defence serious enough to make the donatory swear an oath on this issue of fact. In *Lord Cardross v. Earl of Mar* (1639, M.11440=M.16993), a disposition of land was recognized as valid, although the heir of the original donee confessed that the disposition was purchased, after the donator’s death, from a third party, who himself obtained the document by unknown means. The common feature of the aforementioned cases was that the Lords did not make specific decisions on whether delivery was necessary or not. They just refused to investigate whether the delivery had taken place, creating a presumption of lawfulness of the ways that the written deed got into the party’s hands.

However, the approach changes from around the mid-17th century. Not only did the pleadings of the parties become more straightforward and open about the nature and purposes of undelivered deeds, but the judges also started to embrace such deeds as devices to overcome the law of ‘deathbed’. The Court of Session and parties started to treat such *mortis causa* dispositions as if there were a clear doctrine about them.

The possible beginnings of such doctrine might have been found in the now lost cases from about the early to middle 17th century. In *Aikenhead v. Aikenhead* (1663, M.16994=I Stair 186) the assignation of a bond, granted to bastard son and undelivered, was found valid, with the winning party claiming that the father being a

⁴⁶⁰ This follows from the decision on a different question, touched by the same case. The bond provided certain (obviously heritable) sums of money in favour of all sons, with a destination (substitution) clause that the sons’ portions will accrue to their brothers in case of death without children. Two sons predeceased their father. The Lords held that the destination clause did not apply to those two sons’ portions, as they died before the bond was delivered. Thus, there was obviously no presumption of the bond’s delivery at the moment of making.

legal guardian of the minor son made him a possessor of all the son's goods and documents, so there was no need for the document's delivery. Surprisingly, the winning party referred to this rule as if it were an established doctrine.⁴⁶¹ The rule that the bonds of fathers in favour of their minor children required no delivery, because their possession is undivided in law, was finally settled in 1677, in *Stevenson v. Stevenson* (M.17000). It was one of the exceptions to the requirement of delivery; but the judges were aware that it was a means to defeat the heir's rights and allowed it to perform this particular function. In *Laird of Glencorse v. His Brethren and Sisters* (1668, M.16995), the winner alleged (once again, as if it were a settled doctrine) that a written deed becomes "vested" in the donatary either at the moment of delivery or, if the deed so provided, at the moment of the donator's death without delivery. The Lords in that case found that an undelivered bond by the father to the son was freely revocable by the father and, thus, could be revoked by a subsequent marriage contract. Obviously, the Lords were treating such deeds as a matter of normal practice, not considering them a fraud against heirs.

Hadden & Lawder v. Shorswood (1668, M. 16997=I B.S.567) was probably one of the most remarkable cases on the issue of delivery. Unlike the previously mentioned cases, it dealt with moveables. The testator made an assignation to his cousin of a bond for 500 merks, which reserved a "liferent" to the testator and was not delivered in his life. After his death, the assignee sued the executor for the delivery of the bond. The executor alleged that undelivered bonds were valid only if made in favour of children. The assignee's reply was that the reservation of liferent was a sign that the deed was a *donatio mortis causa*, and thus, being similar to a legacy, did not require delivery in the testator's lifetime. The assignee prevailed in the case. This case shows that, in the 1660s, not only was DMC deemed equivalent in form to a legacy,⁴⁶² but even a deed in the form of an *inter vivos* disposition could be deemed a "DMC" in respect of the rules of delivery. Moreover, it is notable that Scots practice took a presumption opposite to the one taken by the *Ius Commune*. While Continental scholars usually considered the reservation of usufruct as a sign of an *inter vivos*

⁴⁶¹ Another surprising fact is that the father was not, strictly speaking, the legal guardian of the bastard, the latter having no rights of succession and "no legal relatives" by Scots law.

⁴⁶² This we have established *supra*, p.85.

transaction,⁴⁶³ in Scotland, as we see, the reservation of liferent (the Scottish analogue of the usufruct) was seen as the mark of a *mortis causa* deed.

Although the judges in *Hadden & Lawder v. Shorswood* made the decision taking into account the special circumstances of the case, such as the absence of a wife or any children of the testator⁴⁶⁴ and the fact that the assignee was the testator's cousin, further case law turned this decision into general law. *Stark v. Kincaid* (1679, M.17002) extended the *Hadden & Lawder* rule to dispositions of heritable property.

Finally, in addition to the abovementioned rules, a deed could just contain a clause that it was to be effectual although not delivered ('dispensing with delivery clause'). This was first explicitly stated in *Eleis v. Inglisoun* (1669, M.16999), where such a disposition was deemed "as if delivered" at the time of making. However, this did not restrict the revocability of such deed in the slightest. Even if the document was preserved intact until the granter's death, it might be revoked by a similar subsequent deed, because, as was expressly said in an anonymous case from 1683,⁴⁶⁵ the purpose of the clause dispensing with delivery was only to defeat the rights of the heir and the executor. Thus, the case law of the 17th century elaborated three main exceptions from the requirement of delivery, which were later embodied in Stair's *Institutions* and became classical: deeds in favour of children, deeds reserving liferent and deeds expressly dispensing with delivery.⁴⁶⁶ These exceptions obviously allowed making testament-like dispositions in prejudice of heirs and executors, avoiding the old prohibitions.

We can see that, beginning in the mid-17th century, the Lords of Session began to be quite honest about the purpose and substance of *mortis causa* dispositions, allowing them in quite a straightforward way. However, the term "DMC", with the exception of *Hadden & Lawder v. Shorswood*, was not usually applied to such transactions. Different, more amorphous terms were used: for example, "a disposition of testamentary nature". This last term was used, e.g., in *McBride v. Bryson* (1680,

⁴⁶³ See *supra*, p.81, the *consilia* of Bartolus and Baldus.

⁴⁶⁴ So that no one was prejudiced by the assignation, except for, possibly, the executor and the Commissaries (*infra*, s.3.4, 3.6).

⁴⁶⁵ M.17003, reported by Harcarse. It is unclear whether the case dealt with heritable or moveable property.

⁴⁶⁶ Stair, *Inst.* III.4.29.

M.17002). In that case, a tenement was disposed, reserving a right of revocation even *in articulo mortis*. The issue at stake was whether an undelivered written declaration by the granter revoked the disposition. The judges decided affirmatively, taking a wide interpretation of the revocation clause so as to include this declaration. The wide interpretation was taken on the grounds that the document in question was of a “testamentary nature” and thus was fitting to be interpreted widely, so as to find out the true will of the granter.

The Lords in this last case stopped short of accepting last wills of heritage. They could not expressly call them “last wills”. Neither could they, it seems, call such transactions “DMCs”, although such a term would sometimes be very convenient. What were the possible reasons to restrict the use of these concepts in regard to *mortis causa* dispositions in Scotland, we will see in subsequent sections.

3.4. Gifts *mortis causa* and the Rights of Executors. ‘Quots’ for Confirmation of Testament.

In this section we shall try to answer the question whether any special rules of transmission of ownership, like those accepted in the *Ius Commune* (*supra*, pp.80-81), were applied in Scotland to *mortis causa* deeds of moveable property. In the Scottish context of 1560-1660, this issue was not purely one of private law. As Scotland, similarly to England, continued to employ testamentary executors as the main mechanism of moveable succession, the traditional procedures and practices dictated restrictions on the testator’s ability to avoid “executorial” process by *mortis causa* dispositions. Before executing the testator’s last will, an executor was first to pay off the debts, as well as to pay the legal shares in the estate to spouses and children. Moreover, the executor, to be officially bestowed with relevant powers, was to “confirm” the testament in a Commissary court. The Commissary courts took tolls (“quots”) for the confirmation of testaments, which depended on the size of the moveable free goods.⁴⁶⁷ One of the main articles of income for the prelates of the

⁴⁶⁷ In the earliest preserved document on this matter, the ecclesiastical Provincial Council declaration of 1420, the amount of ‘quots’ was established at 12 pence per pound – 5% of the “Dead’s part” (*SES*,

Scottish Episcopal Church, these ‘quots’ were abolished (1641-1669) during the Civil War,⁴⁶⁸ but were restored afterwards and lasted until 1701.⁴⁶⁹ Thus, the interest of executors to ensure that all succession passed through their hands was “allied” with the interest of the Commissaries to receive the intact ‘quots’ and strengthened by the administrative powers of the Commissaries.

It is no surprise then that restrictions on *mortis causa* gifts of moveables in Scotland appeared quite early. The 1610 Injunctions to the Commissaries provided that, if anyone challenged the moveable estate of the defunct on the ground of an assignation made “before the death”, the assignation was to be “*estimatus simulat*”, i.e., deemed made in fraud of the executor and the ‘quots’. The assigned items were to be included in the inventory together with other goods; however, the assignee could make a protestation in the Commissary record, so that the confirmation would not prejudice his rights as a creditor.⁴⁷⁰ The same provision was repeated almost *verbatim* in the 1666 Instructions.⁴⁷¹

We should note here that this provision, despite being quite generally worded, obviously implies that the assignation in such situations was not yet perfected. The classical Scots law as to assignations provided that they were to be perfected by an intimation,⁴⁷² the latter being the equivalent of the transfer of possession for incorporeal rights. If the intimation had already been performed in the assignor’s lifetime, the assignee would not have to challenge the assignor’s estate – the debt would not have been a part of the assignor’s estate anymore. Another evidence of this is the term “*simulat*”, used in the text. It was a Civilian term. Among the *Ius Commune*

166). The same rates were set by the 1563 Instructions to the Commissaries of Edinburgh (c. 30) and the 1610 Injunctions (*Balfour’s Practicks*, 668).

⁴⁶⁸ The ‘quots’, due to the “great burden and prejudice” they were causing, were abolished by one of the Covenanted Parliaments on November, 16, 1641 (*APS*, vol V, 410). The “ordinary fees”, however, were preserved. At first, the abolition was confirmed at the Restoration (*RPS*, 1661/1/297); however, the 1666 Instructions to the Commissaries brought the ‘quots’ back intact (*Acts of Sederunt 1790*, 101). The 1669 Act of Parliament (*RPS*, 1669/10/56) legalized them once again, although with restrictions: the ‘quots’ were abolished for small estates, worth less than 40 pounds (fixed fees were to be paid to the court instead), for executor-creditors and widows; a limitation of 3 years from the death was established for their exaction, etc. See also, *infra*, pp.94-95, some cases in the period of abolition that still refer to “quots”.

⁴⁶⁹ They were finally abolished by the 1701 Act (*RPS*, 1700/10/243).

⁴⁷⁰ *Balfour’s Practicks*, 667.

⁴⁷¹ *Acts of Sederunt 1790*, 99.

⁴⁷² *Stair, Inst.* III.1.7.

jurists, simulated transactions and their use in fraud of the creditors and fisc were a rich topic of discussion. The retention of possession over alienated property by the disponent was the principal sign of simulation, bringing a presumption of fraud.⁴⁷³

Court practice followed this paradigm already in the very year when the 1610 Injunctions were published. In *Smeiton v. Hamilton* (1610, M.14385), the assignation of all his moveables by the defunct was found to avoid the confirmation only in so far as possession over the goods was transferred in the defunct's life.⁴⁷⁴ A particularly tight and informative series of cases on this issue followed in the 1660-1680s.⁴⁷⁵ In most of these cases, a demand, at the instance of the procurator fiscal, was made to the assignee, as an "intromitter" with the defunct's goods, to have the goods "confirmed" and to make an inventory. Such cases appeared even in the 1661-1666 period, when, technically, no 'quots' were due in law to the Commissaries;⁴⁷⁶ the procurators seem to have largely been motivated by their administrative duties to enforce the lawful procedure of succession.⁴⁷⁷

In the aforesaid cases, a rule was firmly established, that the disposed goods, unless possession was transferred in the defunct's lifetime, were *in bonis defuncti* and thus required confirmation.⁴⁷⁸ Moreover, confirmation was declared a matter of public law;⁴⁷⁹ the confirmation was to take place even if there were no estate goods to put in the inventory.⁴⁸⁰ However, the Lords still expressed uncertainty as to the criteria to distinguish deeds which diminished the defunct's moveable estate and deeds which did not. In the case *Procurator Fiscal of Edinburgh v. Fairholm* (1665, M.14386), as reported by Stair, the judges expressed doubts as to whether confirmation would still

⁴⁷³ Bart., D.39.5.15 (the third presumption of fraud); Bald., C.4.22.3, C.5.3.1.

⁴⁷⁴ The report, unfortunately, leaves uncertain, who precisely challenged the transaction.

⁴⁷⁵ *Procurator Fiscal of Edinburgh v. Fairholm* (1665, M.14386=I B.S.511), *Commissary of St. Andrews v. Balhousie* (1665, M.14387), *Govan v. Paip* (1666, M.14384), *Procurator Fiscal of Edinburgh v. Whyte* (1676, M.14388), *Kelhead v. Irving* (1674, Dirl.206), *Sandilands v. Sandilands* (1683, M.14384=M.3202).

⁴⁷⁶ See the note 464 *supra*.

⁴⁷⁷ However, in the case of *Commissary of St. Andrews v. Balhousie* (1665, M.14387), the pursuer mentioned that "quots" might be prejudiced if dispositions of all moveables were to be allowed. Possibly, by "quots", the ordinary court fees, allowed by the 1661 Act, were meant in this case.

⁴⁷⁸ *Govan v. Paip* (1666, M.14384).

⁴⁷⁹ *Procurator Fiscal of Edinburgh v. Fairholm* (1665, M.14386=I B.S.511).

⁴⁸⁰ See *Procurator Fiscal of Edinburgh v. Whyte* (1676, M.14388), where the husband was obliged to confirm himself as the executor to his wife, although the wife in her lifetime had discharged her share in the common goods and thus had no property at the time of her death.

be necessary if the disposition had been for an onerous cause, made in *liege poustie* (*infra*, s.3.5) or had been made in respect of specific goods instead of the moveable estate in general. In *Commissary of St.Andrews v. Balhousie* (1665, M.14387), the revocability of the transaction by the granter was also pointed to as the sign of “simulation”. Finally, in *Sandilands v. Sandilands* (1683, M.14384=M.3202) it was settled that an assignation granted on deathbed and fully intimated in the granter’s lifetime was valid and excluded the confirmation and ‘quots’, unless it was revocable.

All these criteria, when taken together, leave no doubt as to what Scots judges and practitioners had in mind while applying them. They took these criteria from the *Ius Commune*. As was already said, alienations where possession remained in the hands of the granter were considered simulated in the *Ius Commune* – hence the Scottish requirement of the transfer of possession within one’s lifetime. Dispositions of all goods were presumed fraudulent in the *Ius Commune*⁴⁸¹ – hence the doubts of Scots judges on whether there was any difference between universal and special dispositions. The thoughts about differing effects of lucrative and onerous transactions were obviously inspired by similar Civilian distinctions.⁴⁸² Finally, making a disposition on deathbed and the revocability of such disposition together tell us that it was a *donatio mortis causa* that the Scottish judges were wary of.⁴⁸³ *Sandilands v. Sandilands*, although not using the term “DMC” expressly, seems to deal with possible effects of a DMC: the DMC cannot prejudice the executor and the Commissaries, even if the transfer of possession (or the intimation) takes place while the donator is living.

There were signs in Scotland of attempts to use nominal transfers of possession, akin to the Civilian *constitutum possessionis*, to avoid confirmation. However, these attempts were unsuccessful, largely due to the general reluctance of Scots law to recognize any kind of possession of moveable property short of physical (“natural”)

⁴⁸¹ Bart., D.39.5.15 – where Bartolus provides this as the first presumption of fraud. The same he deems applicable to the sale of all goods, although some jurists disagreed (see *additiones* (c), (d) and (e) to D.39.5.15, Venice (1602) edition). See also: Bart., D.42.8.17.1.

⁴⁸² Bartolus in the same place (see *the note above*) makes a distinction for most of his six presumptions of fraud in that a buyer, unlike a donatary, needs to be *malae fidei* for the sale of goods to be revoked as fraudulent. See also C.7.75.5.

⁴⁸³ In the *Ius Commune*, a DMC, being a type of the last will, could never prejudice the creditors or the fisc and was always revocable by them in case of insolvency, irrespective whether the donator intended fraud or not (Bart., D.39.5.15).

possession. “Instruments of possession”, transferring “civil possession” over a pool of goods, by analogy to “instruments of seisin” in heritage, were usually disregarded by the courts.⁴⁸⁴ In *Brown v. Lawson* (1664, I Stair 209) the defunct made a disposition with an “instrument of possession” in favour of an extraneous person, who did not acquire the natural possession until after the defunct’s death. The Lords recognized this disposition as sufficient to cleanse the disponee of being a “vicious intromitter”, so that he was not liable *in solidum* for the defunct’s debts. However, the disponee was given a term to confirm himself as an executor,⁴⁸⁵ because the Lords deemed the disposition to be “more of a legacy than an *inter vivos* deed”.

Dramatic changes to the practice of confirmation and *mortis causa* dispositions were introduced by the 1690 Act.⁴⁸⁶ The biggest innovation of the Act was providing that “*where speciall assignations and dispositions are lawfully made by the defunct, tho neither intimate nor made publick in his lifetime, they shall be yet good and valid rights and titles to possess, bruike, enjoy, pursue or defend, albeit the soumes of money or goods therein contained be not confirmed*”. Another innovation, in line with the general disestablishment of the Episcopal Church, was the severe restriction of the power of the Commissaries to enforce confirmation of moveable estates, which they now could employ only at the request of a specific set of persons.

The Act made it much easier to exclude the goods of one’s estate from the general procedure of succession, by way of making a disposition enumerating specific goods and rights.⁴⁸⁷ Moreover, the Act was interpreted so as to abolish the rule that all the goods within the moveable estate of the defunct at the time of his death were only to be distributed through the executor. That is why, after this Act, even general disponees of one’s property were deemed eligible to possess the estate goods without confirmation, although not entitled to sue.⁴⁸⁸

⁴⁸⁴ See, e.g., *Corbet v. Stirling* (1666, M.10602), where a third party pursued for specified goods of the debtor as belonging to that third party by an “instrument of possession”. The creditor objected that the possession of the third party was never made public before the creditor applied his diligence and that the possession was “simulate”. The Lords allowed the creditor to “poind” those goods.

⁴⁸⁵ Possibly, as an “executor-legatar”.

⁴⁸⁶ *The Act anent the confirmatione of testaments (RPS, 1690/4/117)*.

⁴⁸⁷ *Gordon v. Campbell* (1729, M.14384).

⁴⁸⁸ *Dobie v. Oliphant & Robertson* (1707, M.14390); *Dickson v. Logan* (1711, M.14392).

The long-term consequence of the Act was a transformation of practice. Traditional testaments experienced a certain decline during the 18-19th centuries.⁴⁸⁹ Moveable estates in that period were often bequeathed by dispositions and trust settlements, similarly to heritage.⁴⁹⁰ Even testaments were worded in a way that was reminiscent of a *de presenti* disposition.⁴⁹¹

In such circumstances, the debates of the 17th century about the separation of *inter vivos* and *mortis causa* deeds as to the effect of confirmation were no longer relevant.

3.5. Gifts *mortis causa* and the Rights of Heirs.

Unlike in the case of executors, the law on protection of the rights of heirs seems to have had a solid grounding in Scottish legal history and to have been quite well established from early times. The roots of both the non-disposability of heritable property by a last will and the law of ‘deathbed’ were already present in *Regiam Majestatem* (early 14th century).⁴⁹² Th. Craig circa 1600 presented an already fixed law of ‘deathbed’.⁴⁹³ No one, with several exceptions,⁴⁹⁴ could dispose (even for value) of one’s land or other heritage while being sick with a mortal disease, from which death would later follow. At the same time, a person could demonstrate recovery from the illness by walking unsupported to a public place;⁴⁹⁵ the 1696 Act also validated deathbed dispositions if the granter survived for 60 days after the deed.⁴⁹⁶ Dispositions made on “deathbed” (“*in lecto aegritudinis*”) were not null *ipso jure*, but were voidable

⁴⁸⁹ R. Bell, *A system of the forms of deeds used in Scotland*, Vol III (1813), 3-5.

⁴⁹⁰ Reid, ‘Testamentary Formalities in Scotland’, 410-411.

⁴⁹¹ See a testament in: Bell, *op cit*, 10.

⁴⁹² *Reg.Maj.*II.20.4 (only God, not a man, can create an heir), II.18.7-10 (donations of lands made *in extremis* are invalid, as they might easily be made out of a disturbance of the mind).

⁴⁹³ Craig, *Jus Feudale*, I.12.36.

⁴⁹⁴ These were: performance of an obligation contracted *in liege poustie* (in good health), sharp poverty of the granter (if the heir refused to help), provision of a liferent to the wife, consent of the heir (Craig, *ibid*; Anderson v. Anderson (1568, M.3208); Pollocks v. Fairholm (1632, M.3209); Jack v. Pollock&Rutherford (1665, M.3213)).

⁴⁹⁵ Craig, *ibid*.

⁴⁹⁶ *RPS*, 1696/9/56.

at the instance of the heir by an action of reduction.⁴⁹⁷ At some point, even moveable debts, created on deathbed, became reducible by the heir, because the heir might be held liable for them!⁴⁹⁸ The attempts of some litigants during the 17th century to exclude application of the ‘deathbed’ rule to some particular situations, by reference to the general principles and purpose of the institution, failed;⁴⁹⁹ the law of deathbed became a *jus strictum* of Scots law, inflexible and never mitigated by circumstances.

Being quite certain and unequivocal as to deeds made on deathbed, Scots law, however, was not always so certain as regards deeds which were made in *liege poustie* (i.e., in good health) but were to take effect upon death or were explicitly *mortis causa*. Judicial practice was clear in respect of testaments. If the document was explicitly a testament, it could never dispose of heritage, create heritable debts or otherwise create a burden for the heir.⁵⁰⁰ As was pointed out by the counsel for the winning party in *Colvil v. Colvil* (1664, M.15927), a testament, by definition, was equalized with a ‘deathbed’ transaction. The incompatibility of a testament and the *inter vivos* disposition of heritage was so strong in Scots law that they could not even be contained in one document,⁵⁰¹ unlike in the *Ius Commune*, where a testament could contain a contract.⁵⁰²

But what if a disposition was not explicitly called a “testament” but was very similar to a testament in its essentials, being suspended until death and(or) revocable? To qualify as an *inter vivos* disposition, the document was to be composed in present terms (*de praesenti*).⁵⁰³ To obtain a testamentary effect, such disposition, nevertheless, could be left undelivered until the granter’s death; we have seen how undelivered

⁴⁹⁷ Lord Craigie-Wallace v. Wallace (1626, M.3206), Seatoun & Laird of Touch v. Dundas (1666, M.2736). Deathbed deeds, however, could also be ‘reduced’ by the heir’s creditors, due to their interest in the heir’s solvency (G. Mackenzie, *Observations upon the Act against the dispositions in fraud*, 24-27).

⁴⁹⁸ *Infra*, p.234.

⁴⁹⁹ See, e.g., Richardson v. Sinclair (1635, I B.S.207=M.3210), where the ‘deathbed’ rule was applied despite the claims that the granter was in good memory and sound mind, and Cleiland & Boyde v. Cleiland (1672, II B.S.695), where the granter’s sickness in legs, preventing him from walking, was also deemed sufficient to constitute a ‘deathbed’ situation.

⁵⁰⁰ I am not dealing here with the rules on homologation, where an heir could be deemed to have voluntarily rejected the right to challenge the testamentary disposition by his own actions.

⁵⁰¹ Jack v. Gourlaw (1605, M.15923), The Daughters of Soutray v. The Eldest Daughter (1670, M.15927).

⁵⁰² Bart., D.28.1.21.3, D.32.37.5.

⁵⁰³ Gradually, the word “dispone” came to be considered essential for a disposition (J. Irvine Smith, ‘Succession’, 215-216).

deeds came to be recognized around the mid-17th century (*supra*, s.3.3) to the point of being expressly declared a lawful device to defeat the heir's rights.⁵⁰⁴

What if the disposition was delivered, but the right to revoke was expressly reserved by the grantor? *Henderson v. Henderson* (1667, M.11339=II B.S.437), already mentioned above,⁵⁰⁵ was one of the most significant cases in this respect. This case was reported in the greatest detail by John Nisbet of Dirleton (Dirlet.103), and the report is in Latin, which Dirleton explained by the heavy reliance on the "subtleties of Civil law" by both parties to the case. In this case, Henderson, who had no wife and children, before departing abroad made a strangely worded disposition in favour of his cousin, appointing the latter the "heir, executor and donatary" of all the grantor's heritage and moveables. The donation was called "irrevocable" in the document, but the grantor, nevertheless, reserved the right to "revoke" it after his return. Henderson eventually returned from his trip but died soon afterwards, without expressly revoking the gift.

The grantor's heir, his sister, challenged the deed on several grounds. She claimed it was a "testament" and thus was unlawful as to heritage. If not a testament, it was, in her opinion, a "*donatio mortis causa*". The latter, she claimed, entailed several possible consequences. It was either reducible in respect of heritage, just as a testament would be. Otherwise, in case it was valid as a "DMC", it was tacitly revoked by the fact of the grantor's returning from his dangerous trip alive. In support of the last position, it was claimed that the deed of donation was in the grantor's possession at some point of time after his return.

The donatary, in response to these claims, replied that the transaction was an *inter vivos* donation, as it used the word "donate" in the text. It was not a DMC, because DMCs are always revocable, while this particular donation was only revocable after Henderson's return, not before. Moreover, continued the donatary's side, even granted it were a DMC, DMCs of heritage were lawful in Scotland. The example of Scottish tailzies was provided, which were, in donatary's opinion, valid "DMCs", often reserving a right of revocation and made in contemplation of death. The donatary

⁵⁰⁴ See the anonymous 1683 case, published in M.17003.

⁵⁰⁵ *Supra*, p.86.

also pointed out that the DMCs of Civil law were not revoked by the mere ceasing of a mortal danger.⁵⁰⁶

The Lords in the case decided that this deed was not a “testament”, but a valid disposition. Only the fact of the granter possessing the document after his return raised their suspicion in respect that it might have been revoked, so they appointed additional investigation into that issue. Unfortunately, the Lords did not answer the question whether the disposition under scrutiny was a “DMC” or not, and thus the question whether DMCs of heritable property were possible in Scotland remained undecided.

This “permissiveness” of the Lords in allowing dispositions very similar to DMCs continued in subsequent cases. The Lords, however, just as in cases on delivery (*supra*, s.3.3), avoided using the term “DMC” directly. Thus, in *Pitillo v. Forrester* (1671, II Stair 6) lands were disposed with the granter reserving the power to revoke the disposition even *in articulo mortis* and to burden the disposition by legacies. The donator subsequently granted heritable bonds to a third party. The donatary challenged the bonds on several grounds, one of them being that they were made on deathbed. The Lords dismissed this claim, although the bonds were, nevertheless, voided on formal grounds. In the already cited case *McBride v. Bryson* (1680, M.17002=III B.S.317) a tenement was disposed with the same reservation – a right of revocation even *in articulo mortis*. The granter afterwards made a unilateral undelivered document, in which he declared the disposition “null and void” and restored the rights of the heirs of line. The Lords, once again, did not use the term “DMC”, but they characterized the disposition as a one of a “testamentary nature”. This “nature”, however, does not seem to have been the ground of invalidity of the disposition in this case – the judges based their decision solely on the revocation. This decision, nevertheless, did not entail that such a disposition could be revoked by a straightforward last will.⁵⁰⁷

⁵⁰⁶ This question was debatable at the *Ius Commune*, *supra*, p.80.

⁵⁰⁷ This follows from the Lords’ referring to the fact that the declaration was made in favour of the heirs of line, in respect of whom there was no need of delivery of a document. If the declaration had been a last will, there would have been no need whatsoever to discuss delivery.

In another case already cited, *Lesly v. Lesly* (1699, M.3597),⁵⁰⁸ where both heritage and moveables were disposed by a revocable tailzie, the substitute of the tailzie thought it reasonable to refer to *Henderson v. Henderson* in support of the position that such deeds were valid. The wording is ambivalent, however – it could also mean that this tailzie was “valid” in the sense of “not revoked” by the granter’s return from the journey, similarly to *Henderson*. In *Lesly*, the Lords found the tailzie to be *inter vivos* and thus not revoked by the granter’s return and the disponee’s predecease. Whether it would have been valid as to heritage if it had been a DMC once again remained unanswered. This is unsurprising, considering that, as was already shown above (*supra*, pp.86-88), the courts were very reluctant in this period to recognize particular transactions as DMCs.

It is possible that this uncertainty on whether a heritable estate could be left by a DMC was the exact reason why neither the parties nor the Lords were eager to put this issue to the test after *Henderson*. Particular ways to settle heritable property after one’s death were too well established in practice for the heirs to try challenging them on the grounds of a theoretical issue only (that they were DMCs). The Lords, on their part, might try to avoid using strict Civilian terminology and formulating general maxims, like “DMCs of land are (not) allowed”. Their conscious intention to allow the populace to overcome the strictness of the law of ‘deathbed’, which was so obvious in their treatment of the law of delivery (*supra*, s.3.3), might also have come into play here.

3.6. Gifts mortis causa and the Legal Shares of Wife and Children.

The custom of *tripartitio* in Scotland, where a wife and children had rights to a share of a man’s moveable estate, is extremely old, first mentioned in *Regiam Majestatem* (*Reg.Maj.II.37*) and then characterized by the 1420 Provincial Council (*SES*, 166) as being “beyond the memory of man”. This never ceased to be the law in Scotland, so that testamentary freedom, as a result, was seriously restricted.

⁵⁰⁸ *Supra*, p.87.

However, exactly how and when *tripartitio* became associated with the law of ‘deathbed’ is much less clear. Where did the rule that DMCs and gifts made on deathbed could only burden the “Dead’s part” of the estate come from? Among the Scottish legal writers, Stair was the first to mention it.⁵⁰⁹ Dirleton, circa 1680, was the first to provide a more or less comprehensive theory on this matter.⁵¹⁰ In the lifetime of a married man, family goods, in theory, were common, with the wife and children having their own shared interests in them. While the head of the family were alive and well, he had the full right of administration and ownership over the estate goods, able to dispose of them for value as well as for gratuitous causes. However, as soon as the head of the family fell into his *lectum aegritudinis*, the communion of goods comes into real force, so that the father is no longer able to prejudice the shares of the family members. This doctrine was largely rejected by the Scots courts in the 19th century,⁵¹¹ but it was dominant for a century after the Dirleton’s work.⁵¹² Some early cases seem to confirm Dirleton’s theory.⁵¹³

An alternative explanation on how the law of deathbed came to be applied to moveable estate might be an analogy from the rights of an heir. As was mentioned before (*supra*, pp.97-98), an heir could challenge a moveable debt created on deathbed, in so far as the heir could be held liable for such debt as the defunct’s representative. Seeing this, it would be quite logical that not only the heir but also the defunct’s family members should be allowed to challenge such a debt. The earliest decisions on wives and children successfully reducing deathbed transactions⁵¹⁴ come from the well-reported decade of the 1620s, when also appear the earliest cases of heirs reducing moveable debts.⁵¹⁵

⁵⁰⁹ *Inst.* III.8.32, 39.

⁵¹⁰ Dirleton, ‘*Legitima Liberorum*’, *Some Doubts and Questions...*, 112-113.

⁵¹¹ See: R.M., ‘The nature of *legitim* and *jus relictæ*’, *Journal of Jurisprudence*, vol 3 (1859), 72-75. The modern understanding of the “Bairns’ part” and *jus relictæ* is that they are debts burdening the testator’s estate, although succumbing before ordinary debts.

⁵¹² Thus, Erskine repeats Dirleton’s doctrine (*Inst.* III.9.16).

⁵¹³ In *Moncrieff’s Bairns v. Moncrieff* (1637, 1 B.S.371) the testator on his deathbed gave the keys of a chest with cash to one of his sons. The court found that the cash located in the chest at the moment of the gift belonged to the testator only in one third, the other thirds belonging to the wife and children.

⁵¹⁴ *Cant v. Edgar* (1628, M.3199), where a relict challenged the assignation granted on deathbed as being in prejudice of her third.

⁵¹⁵ *Shaw v. Gray* (1624, M.3208) might be the earliest one.

Whatever the origins of the anti-*mortis causa* and anti-deathbed rules in respect of the legal shares, these rules were much stronger than the similar rules in favour of heirs and executors. It should not be a big surprise, considering that there was a real social interest in guaranteeing to a wife and children a part of the testator's estate, which was explained by Stair as a "natural obligation" of the parents towards children,⁵¹⁶ similar to the *legitima pars bonorum* or *portio debita jure naturae* of the *Ius Commune*. In this, the right of wife and children were unlike the interest of heir, which ceased to be of social significance after the decline of feudalism, as well as the interest of the executor, which was primarily of procedural and fiscal significance (*supra*). Thus, the courts allowed the latter two interests to be avoided by legal means. They could not do the same with the legal shares.

Consequently, unlike the interest of executors, the interests of wife and children did not depend on whether possession of the goods was transferred in the testator's life.⁵¹⁷ In contrast to the position regarding the executor's and the heir's interest, the legal shares could not be prejudiced by a *donatio mortis causa*.⁵¹⁸ A deed which was an explicit and fully revocable DMC was thus equal to a legacy in that it could not burden the whole estate.

What if a bond by the testator remained undelivered, as was often done (*supra*, s.3.3)? This was one of the questions Dirleton discussed in his *Doubts and Questions*.⁵¹⁹ He adopted a subjective criterion to solve the issue: an undelivered bond would charge the whole estate if there was no intention of fraud on the granter's side (*infra*, p.104). Most of the subsequent Institutional writers, however, seem to have held that the bond must be fully delivered to be able to burden the entire moveable estate.⁵²⁰ It is not surprising that in *Hadden & Lawder v. Shorswood* (1668, *supra*, p.90), where an undelivered bond was recognized as valid, the Lords thought it necessary to mention

⁵¹⁶ Stair, *Inst.*I.5.6, III.8.44.

⁵¹⁷ *Cant v. Edgar* (1628, M.3199), *Moncrieff's Bairns v. Moncrieff* (1637, I B.S.371).

⁵¹⁸ Stair, *Inst.*III.8.32, 39, 43; Bankton, *Inst.*III.8.25. See also: *Nasmith v. Jaffray* (1662, M.3593=M.5483), where the deed was recognized as a DMC and thus charging only the "Dead's part"; *Johnston v. Johnston* (1697, M.8198), where a party claimed that the disposition was a DMC and thus could not charge the whole estate.

⁵¹⁹ Dirleton, 'Bond of Provision to children', *op cit*, 10.

⁵²⁰ Stair, *Inst.*I.5.6; Erskine, *Inst.*III.9.22; *Henderson & Campbell v. Henderson* (1728, M.8199).

the lack of a wife and children of the granter as a significant circumstance of the case. Only in later cases did the opposite opinion start to prevail.⁵²¹

What if a disposition of moveables for a lucrative cause was *inter vivos* and delivered - would it always charge the entire estate? There has never been a clear-cut answer to this question in Scots law. In Civil law, the “natural portion” of children was protected from both *mortis causa* and *inter vivos* donations by the *querela inofficiosae donationis*, usually irrespective of the father’s subjective intentions.⁵²² But the Scots law, as pointed out by Bankton,⁵²³ “did not receive” this institution. J. M’Laren in mid-19th century remarked that the doctrine on the issue of fraud against ‘legitim’ was underdeveloped even in his time,⁵²⁴ so the courts had to decide on a case-by-case basis, employing such discretionary terms as “reasonable provisions to children”, “trusts of testamentary nature”, etc.⁵²⁵

The case law of the 17th – early 18th centuries seems to reveal that the category of “fraud” was the most important criterion in determining whether a particular *inter vivos* donation could prejudice ‘legitim’ and *jus relictæ*. The abovementioned fragment from Dirleton on bonds of provision seems to confirm this. The law of fraud in Scotland in that period strongly relied upon Civil law. As G. Mackenzie testifies in his published commentary to the 1621 Act against fraudulent dispositions,⁵²⁶ the said Act just followed the *Ius Commune* rules on the *actio Pauliana*.⁵²⁷ The Act itself incorporated into Scots law only a fraction of the Civilian rules: it allowed creditors with preceding debts to revoke posterior gratuitous or inequivalent alienations of the insolvent debtor’s property, made in favour of “conjunct or confident persons”.⁵²⁸ As already mentioned (*supra*, p.95), at Civil law, alienations, if made in favour of relatives

⁵²¹ M’Laren, op cit, vol I, p.121. The first case where a bond of provision lying beside the dying testator was found charging the whole estate was McKay v. Fowler (1744, M.3948). Unfortunately, the case was reported by J. Fergusson of Kilkerran without any details.

⁵²² See, e.g., Bart., C.3.29.1.

⁵²³ *Inst.* III.8.27.

⁵²⁴ M’Laren, op cit, vol I, p.124.

⁵²⁵ M’Laren, op cit, vol I, pp.119-127.

⁵²⁶ *RPS*, 1621/6/30.

⁵²⁷ Together with the preceding 1620 Act of Sederunt (G. Mackenzie, *Observations upon the Act against the dispositions in fraud*, 9).

⁵²⁸ It should be noted, however, that the 1621 Act did not introduce the rules of fraud heretofore completely unknown in Scots law. J. MacLeod points out that Scots judicial practice was already developing the rules on fraud even before 1621 (J. MacLeod, *Fraud and Voidable Transfer*, 81, 95-97).

for a small price, were presumed fraudulent.⁵²⁹ Scots judges tended to establish fraud on more objective criteria than the *Ius Commune* authors did.⁵³⁰ Nevertheless, the Scots judges interpreted the 1621 Act through the lenses of the *Ius Commune* and expanded the anti-fraud rules accordingly. Thus, in *Henderson v. Anderson* (1669, M.888), a sale by the debtor of all his goods was deemed a fraudulent transaction,⁵³¹ while in *Street v. Mason* (1672, M.4917) an alienation of all one's heritage was considered a fraud to the future debt.⁵³² Both cases are full of express and implicit citations to Civil law authorities.⁵³³

Fraud to the legal shares of wife and children was identified along the lines of the presumptions of fraud, developed by the Civilian authors. Thus, where the testator disposed of his entire moveable estate, this was very likely to be 'reduced' or interpreted in such way as not to prejudice the legal shares. This happened in *Nasmith v. Jaffray* (1662, *supra*, p.84); this also happened in *Grant v. Grant* (1679, M.3596), where a disposition of one's all moveables after one's death, although not a DMC and not revocable, was deemed to concern the "Dead's part" only. Not all the cases were the same, though. In *Johnston v. Johnston* (1697, M.8198), the disposition of all father's goods to the younger son was deemed fully effectual. However, in this case the matter was complicated by the elder son being an heir-at-law to the defunct, getting the latter's entire heritage and, possibly, refusing to collate it. Bankton in his *Institutions* (Inst.III.8.26) suggested that dispositions of entire estates could prejudice 'legitim' but could not prejudice *jus relictæ*; however, his opinion does not seem to be confirmed by practice.⁵³⁴

As already mentioned above (*supra*, p.103), a DMC or a deed of "testamentary nature" was always subject to the legal shares and could only extend to the "Dead's

⁵²⁹ Bart., D.39.5.15; Jason de Mayno, *Lectura de actionibus*, Inst.Just.IV.6.6.

⁵³⁰ For example, in Scotland alienations were often 'reduced' because of the debtor's insolvency occurring afterwards, i.e., when the debtor subjectively did not intend any fraud (Mackenzie, *op cit*, 4-5).

⁵³¹ An alienation of one's all goods also created a presumption of fraud (*supra*, p.95; Jason de Mayno, *ibid.*). In the case, the buyer was explicitly charged with being a *particeps fraudis*, fully in line with the Civil law requirements (C.7.75.5).

⁵³² Cf., Bart., D.42.8(9).10.

⁵³³ On the extensive interpretation of the 1621 Act, see: MacLeod, *op cit*, 105-128.

⁵³⁴ *Henderson & Campbell v. Henderson* (1728, M.8199).

part”.⁵³⁵ In this, Scots law was similar to Civil law.⁵³⁶ There was no necessity for the deed to be a “DMC” in the strictest term possible, revocable by the donator’s survivance, etc. – one and the same deed could be not “testamentary” in respect of its revocability but “testamentary” in respect of the legal shares.⁵³⁷

Another sign of a fraudulent transaction, that is hard to identify with a particular Civilian presumption of fraud, was postponement of the obligation to the time of the debtor’s death.⁵³⁸ In the mid-19th century, this, although not being the sole reason to consider a transaction fraudulent or *mortis causa*, was a ground for suspicion in that respect.⁵³⁹ This seemingly contradicts the Civilian doctrine, which did not consider mentioning death a sufficient sign of a DMC and recognized the possibility of *inter vivos* contracts, even donations, becoming efficient at the moment of death or at the term or condition fulfilled after one’s death.⁵⁴⁰

The difference, however, was not that drastic. Already in the early 17th century, Scots case law recognized that promises and dispositions taking effect after death could be *inter vivos*.⁵⁴¹ In both the *Ius Commune* and Scots law, the wording of a contract was relevant in determining whether it was *inter vivos* or *mortis causa*. Bartolus, in one of his *consilia*, was dealing with the question whether an agreement between two men to succeed to each other was effectual.⁵⁴² His conclusion was that if such contract created an express obligation of the parties, albeit a conditional one, it was valid, but if it just bestowed the property after a party’s death, it was ineffectual as *pactum successorium*. Although the conclusion of this *consilium* is not directly applicable to Scots law, which has historically been quite welcoming to *pacta*

⁵³⁵ Nasmith v. Jaffray (1662, M.3593=M.5483); Johnston v. Johnston (1697, M.8198).

⁵³⁶ See Bartolus in his commentary to D.39.5.15 mentioning that DMCs are revocable by the fisc or the creditors, irrespective of intention to defraud.

⁵³⁷ Such was the deathbed assignation in Aikman v. Boyd (1679, M.3201).

⁵³⁸ Houston v. Houston (1631, M.8049=M.12307), Thomsons v. Creditors of Thin (1675, M.3593), Lady Balmain v. Graham (1721, M.8199), Henderson & Campbell v. Henderson (1728, M.8199).

⁵³⁹ M’Laren, op cit, vol I, p.123.

⁵⁴⁰ See C.4.11.1, et ibi Bald.

⁵⁴¹ See Traquair & Robertson v. Blushiels (1626, M.3591), where a disposition of certain goods to be delivered after the granter’s death was deemed an *inter vivos* donation. Moreover, obligations to bestow property on children of marriage were widespread in the marriage contracts since the early times, although not, technically, donations (Home v. French (1608, M.12886), McMath v. McCall (1619, M.12847), Finlayson v. Veitch (1622, M.12848)).

⁵⁴² Bart., cons. 212; *infra*, p.120.

successoria (*infra, chapter IV*), the logic used in solving this case was, intentionally or coincidentally, followed in Scotland; on the one hand, if a promise was made in the form of a command to the executors, it would be deemed a “legacy”.⁵⁴³ On the other hand, if the granter created an obligation and just “suspended payment” to the time of his death, it was an *inter vivos* deed.⁵⁴⁴

As regards the “suspension of payment”, *Thomsons v. Creditors of Thin* (1675, M.3593) should be mentioned again. In that case, a large bond, exceeding the granter’s free goods, was granted to be paid in case of the granter’s decease without heirs of his body. The granter’s wife tried to challenge the bond, claiming, *inter alia*, that the obligation on the bond did not become effectual until after the granter’s death, so it could not prejudice the wife’s share, which was due immediately after the granter’s death. The Court’s decision was complex. The Lords rejected the relict’s arguments, holding that the bond was *inter vivos* and just “suspended the payment” until the granter’s death. Thus, it could not be voided. However, the Court admitted that granting a lucrative obligation in such a way that a relict would receive nothing after the granter’s death would obviously be a “fraud”. Therefore, the bond was interpreted in such way that it could only charge the defunct’s “Dead’s part”. In the end, as the deed was not voided, the Lords found that the relict implicitly renounced her legal share by her own subsequent actions, thus becoming liable to the full extent of the goods she intromitted with.

Here we see both the establishment of the “suspension of payment” rule and the appearance of a completely new argument. Here a lucrative transaction, although undoubtedly *inter vivos* and within the husband’s marital competence, was nevertheless deemed “fraudulent” for the reason that the wife might be left with nothing at all. This does not look like a strict rule of law, reminiscent more of a general “good faith” principle. There might have been some similarity with the Civil law rule that at least something should be left to the heir, so that a gift of “all goods present and future” could not be valid, as it deprived the testator of anything to make a will about

⁵⁴³ *Houston v. Houston* (1631, M.8049=M.12307).

⁵⁴⁴ *J. M’Laren*, *ibid.*

and thus took away testamentary freedom.⁵⁴⁵ The analogy might be quite forced, nevertheless.

At the same time, it cannot be said that the law of fraud is the only key to the history of dispositions in prejudice of the legal shares of wife and children. A late case, *Henderson & Campbell v. Henderson* (1728, M.8199), is an example of that. In that case, the father disposed of all his moveable goods after his death to his son. His other children were provided with bonds of provision for particular sums. One of his daughters, however, challenged the disposition. On behalf of the son, it was alleged that, as all the children were provided, the disposition could not be fraudulent. However, the daughter's counsel claimed, even if this transaction was not fraudulent, it nevertheless could not prejudice the 'legitim', as the obligation here started at the moment of death. The pursuer admitted that a mere "suspension of payment" until death was not a sufficient ground for deeming a transaction a DMC, but this particular disposition was different. The Lords favoured the pursuer's case.

The last case shows that the Civil law of fraud might not be the only source of criteria for distinguishing between *inter vivos* and *mortis causa* dispositions. Scots law had its own more or less ingenious rules, which might be applied by analogy. Thus, there was a long and quite consistent line of case law on whether provisions to children in marriage contracts could or could not compete with creditors.⁵⁴⁶ The sheer abundance of cases suggests that most of the provisions to children were actually left in marriage contracts rather than in lucrative bonds. The texts of the marriage contracts usually followed feudal terminology and the principles of heritable succession, appointing children of the marriage as the "heirs of provision" to sums of money or the whole estate. In majority of such cases, the contracts of marriage only created obligations on the father to bestow property to the children after his death; in such case, the children had only a *spes successionis* and could not compete with the father's creditors. In cases where the children's rights were already exigible in the father's lifetime, they bore chances to be recognized as *jura crediti* and had an equal standing with other creditors (*infra*, s.4.5).

⁵⁴⁵ *Infra*, s.4.1.

⁵⁴⁶ See *infra*, s.4.5.

Practice on marriage contracts, having its basis in the Scots law of heritable succession, could thus provide another (besides the Civil law of fraud) mechanism of distinguishing between *inter vivos* and *mortis causa* deeds and explain why promises to be performed after death were often regarded with suspicion in Scotland. But all that is a mere speculation. As was already said, the Scottish practice on dispositions in prejudice of legal shares was quite controversial, and still underdeveloped even in the 19th century. What is clear, however, is that the Court of Session took seriously the task of defending the legal shares. The rights of surviving spouses and children did not share the fate of the rights of heirs-at-law, which since the 1660s turned into a formality, easily avoidable by carefully worded instruments (*supra*, s.3.5). The concept of a *mortis causa* gift remained conservatively wide in respect of the legal shares of wife and children.

It is time to summarize this chapter. Originally, the concept of *donatio mortis causa* in Scotland had a much wider definition than the one accepted by 19-20th century Scots law. Its original meaning was similar to that in the *Ius Commune*, encompassing both promises and dispositions, fully revocable and very similar to legacies, sometimes excluding the standard probate procedure by an executor. DMCs could not prejudice heirs and the legal shares of wife and children. However, from around the mid-17th century the judges started to avoid applying the term “DMC”. It seems that this turn in the courts’ attitude was intentional, calculated to allow devices specially designed to overcome the rights of the heirs. A new, intermediate group of dispositions emerged, which were deemed *mortis causa* in some aspects (delivery, interpretation, legal shares of wife and children) but *inter vivos* in other aspects (rights of heirs, revocability). This, together with the rule that possession was to be transferred in the testator’s lifetime to exclude the executor’s rights, had the side effect of narrowing down the definition of “DMC” proper by the 18th century, so that a DMC could be made only by delivery and only in respect of moveable property. However, the definition of a *mortis causa* disposition remained conservatively wide in respect of the legal shares of wife and children and (until the 1690 Act) in respect of the executor’s rights and “quotas” to the Commissaries. In these two last respects, the distinction between *inter*

vivos and *mortis causa* deeds was strengthened by the Civil law doctrines of fraud of creditors.

Chapter IV. Agreements on Future Succession (*Pacta successoria*)

At first sight, *pacta successoria* (agreements on succession) seems to be a topic where one should not expect to find much in common between Scots law and the Continental *Ius Commune*. Indeed, the Scots authors did not restrain themselves in stressing how different their law was from the Continental legal systems in its acceptance of contracts on succession. Stair contrasted Scots law with Civil law in that the former accepted *pacta de hereditate viventis* and admitted contracts to bestow legacies, thus being closer to “natural Equity” (*Inst.*, I.10.8; III.8.28). G. Mackenzie, at the end of his *Treatise on Tailies*, recommended that the “common law” (i.e., the *Ius Commune*) change its restrictive position on successory agreements.⁵⁴⁷ The counsel for the winning party in the case *Ragg v. Brown* (1708, M.5260=M.9492), talking about *pacta de hereditate viventis*, condescendingly noted: “*The Romans, a jealous people, much given to poisoning, did restrict such bargainings, but our law has repudiated these niceties...*”. Later legal writers followed suit.⁵⁴⁸

The real attitude of Scots legal practice towards *pacta successoria*, especially at the early stages, was, however, much more complicated. Yet even more complicated was the position of the *Ius Commune* itself, where such *pacta* always remained controversial. This chapter will contain a complex analysis of doctrinal and practical problems, posed by *pacta successoria* both in the *Ius Commune* and in Scotland.

4.1. *Pacta successoria* in the *Ius Commune*.

It will not be possible to provide here a full picture of all the nuanced opinions and subtle distinctions put forward by the Medieval and Early Modern Continental jurists on the topic. What will suffice are some basic premises and recurring ideas. There are common misconceptions about the *Ius Commune* position on *pacta successoria*. Thus, Dale Hutchison in his 2007 article on succession agreements in

⁵⁴⁷ Mackenzie, *A Treatise on Tailies // Mackenzie's Works*, vol II, 491.

⁵⁴⁸ ‘*Spes successionis*’, *Green's Encyclopaedia of the Law of Scotland* (1899), vol XI, 389; J. Trayner, ‘*Pactum corvinum de haereditate viventis*’, *Latin Phrases and Maxims: Collected from the Institutional and Other Writers on Scotch Law* (1861), 218; J.L. Wark, ‘*Spes successionis*’, *Encyclopaedia of the Laws of Scotland* (1933), vol XIV, 161-162.

Scots and South African law states that “*an agreement can only be a pactum successorium if it purports to bind to a disposition of an asset on or after one’s death*”.⁵⁴⁹ Nothing could be further from the truth as regards the *Ius Commune*.

In fact, this might to some extent be true in respect of Classical Roman law, which did not allow obligations becoming effectual in the person of a successor (*Gai.Inst.III.100*). However, Justinian’s 531 A.D. constitution (C.4.11.1) explicitly abolished this prohibition. Thus, the medieval learned lawyers considered it perfectly possible that an action or a contractual obligation became effectual at a term or a condition being fulfilled after the death of either the debtor or the creditor. There was no problem in promising that some property be given by your heir or to the creditor’s heirs.⁵⁵⁰

The problems started where one’s entire estate was to be disposed. The estate (“*hereditas*”) as a universal thing, containing both assets and liabilities, could only be disposed by a testament, so the common opinion of jurists did not admit promises to bestow either the whole or a portion of the promisor’s *hereditas*;⁵⁵¹ there was however, an opinion that a portion of the *hereditas* could be promised.⁵⁵² However, instead of the *hereditas* one might promise one’s own “goods” (*bona*). Unlike “*hereditas*”, this term meant “all property, debts excluded”.⁵⁵³ As a promise of the portion of the “goods” owned by the promiser at the moment of his life did not directly purport to make the creditor a universal successor, such promise was generally considered valid.⁵⁵⁴ One might even promise to donate “all goods present and future” after one’s death, except that in this case some portion of goods was to be reserved, so that the donator retained the property to leave by will and his heirs retained a theoretical incentive to accept succession.⁵⁵⁵ A sale of all one’s goods after one’s death was, on

⁵⁴⁹ D. Hutchison, ‘Succession Agreements in South African and Scots Law’, *ELS* (2007), 232.

⁵⁵⁰ Bart., D.45.1.61.

⁵⁵¹ Bart., D.45.1.61, C.2.3.30; Jason de Mayno, C.2.3.30; G.D. Durante, *De arte testandi*, II.10.

⁵⁵² Baldus reports this as an opinion of Pierre de Belleperche (c. 1230-1308). See Bald., C.2.3.30.

⁵⁵³ On the distinction between the terms “*bona*” and “*hereditas*”, see the Gloss to D.36.1.23(22).5, s.v. “*Retinebitur*”.

⁵⁵⁴ Bart., D.45.1.61; Durante, *De arte testandi*, II.10.

⁵⁵⁵ Bart., D.45.1.61, C.2.3.30, cons. 76; Bald., C.2.3.30.

the other hand, considered perfectly valid, as the testator retained the sale price to dispose by will.⁵⁵⁶

Addressing the issue of *pacta successoria* in general, we may find here two basic considerations, which stood in the way of those agreements' validity. One was a consideration of morality, which has already been slightly touched on here. The other consideration was about vesting of rights. In fact, one could not dispose of the share of succession to a living person not only because it was *contra bonos mores* but also because one did not have any true rights in the person's estate in the first place! The terms like "vesting" or "vested" were not used by the *Ius Commune* jurists themselves;⁵⁵⁷ however, they provide good generic terms to describe the extent to which a right or an interest at Civil law could be alienated, renounced, transmitted or otherwise disposed of.

A popular way among the learned lawyers to classify the interests depending on the degree of "vesting" was to divide them into: 1) fully vested rights *in re & spe*; 2) *spes de jure* (proper expectations), among which a) *spes obligationis* and b) *spes successionis* could be distinguished; 3) improper expectations, that is, rights existing neither *in re* nor *in spe*.⁵⁵⁸

Into the first (1) category fell rights which did not depend on unfulfilled future conditions and were either presently effectual or certain to become effectual: vested legacies, a right to accept the estate by the heir, unconditional promises, etc.⁵⁵⁹ Many kinds of rights from this category could be renounced by a unilateral declaration,⁵⁶⁰ as well as by a *pactum*. Moreover, such rights usually could be transmitted to successors and alienated (assigned). The general rule was that a right non-transmissible to

⁵⁵⁶ Ibid.

⁵⁵⁷ Various terms were used for this feature in respect for various kinds of rights: "*cessio*" for legacies, "*delatio*" for a right in the estate, obligations were "born" ("*nascuntur*"), etc.

⁵⁵⁸ For this classification see, esp., Bartolus' and Jason de Mayno's commentaries to C.2.3.1.

⁵⁵⁹ The moment when a right became fully vested varied greatly depending on the type of right in question. Thus, the death of a particular person, if attached to a legacy, was considered a condition (D.35.1.75; D.36.2.4), but was deemed a certain term if attached to *inter vivos* contracts (Bart., D.45.1.38.16). Thus, pending someone's decease, a legacy was not yet a vested right, while a contractual promise in such case was a vested right *in re&spe*.

⁵⁶⁰ Not all kinds of vested rights, however, could be renounced unilaterally. For example, a right of possession could be renounced, while a right of ownership could not (D.41.2.17.1; Bart., C.2.3.1).

successors was also not assignable;⁵⁶¹ there were, however, numerous cases when a right was transmissible but not assignable.⁵⁶²

Those titles of the *Corpus juris civilis*, that dealt with sales and assignments of *hereditas* (D.18.4; C.4.39), concerned only the sale of a fully vested right of succession, which arose after the testator was dead, all conditions fulfilled and succession accepted by the heir who was selling.⁵⁶³ A passage from the Digest, talking about a sale of “*quasi spes hereditatis*” (D.18.4.11),⁵⁶⁴ should not confuse readers: the situation it was dealing with was that of uncertainty whether the seller had rights as an heir or not, so that such contract was valid only in case there actually was a vested right in the seller’s person at the time of making.⁵⁶⁵

A disposition of the estate in the *Ius Commune*, however, could never entail an alienation of the title of heir itself.⁵⁶⁶ You could not entitle another person to accept the estate instead of you; in fact, *aditio hereditatis* could not even be performed through an agent (D.29.2.90). The same was true for a universal *fideicommissum*.⁵⁶⁷ A purchaser of the estate or a share in it could only receive it through the seller, who remained the heir or the fideicommissary. Thus, the seller remained liable for the debts of the testator. In case of a lucrative (gratuitous) disposition of the estate, however, some jurists admitted a possibility of estate creditors directly suing the donatory.⁵⁶⁸ However, a person entitled to a vested legacy of particular property could assign the

⁵⁶¹ Bart., D.26.7.42; Bald., C.4.39.9.

⁵⁶² M.A. Pellegrini (M.A.Pellegrini, *De fideicommissis praesertim universalibus tractatus* (1599), art XXXI, p.476) mentions that there were 39 such cases. A universal *fideicommissum*, before the restitution, was one of such cases (see n.721 *infra*).

⁵⁶³ However, it seems that, even if the estate had not yet been technically accepted before the making of a contract, making the contract by the heir would obviously qualify as an implicit *aditio hereditatis*.

⁵⁶⁴ Many Romanists hold that this passage is an interpolation (J.A.C. Thomas, ‘*Venditio Hereditatis* and *Emptio Spei*’, *Tulane Law Review*, vol 33 (1958), 541-550).

⁵⁶⁵ See Gloss to D.18.4.10.

⁵⁶⁶ Whether a transfer of the title of heir was possible in Classical Roman law is a debatable question (Thomas, *op cit*, 545-546).

⁵⁶⁷ It could not, however, be assigned or granted to a *procurator in rem suam* (D.23.3.59.1, s.v. “*Debet*”; Bart., D.30.1).

⁵⁶⁸ Baldus holds so in his commentary to C.4.39.2, with reference to D.39.5.28 (a donatory of the estate must secure the donator against claims of creditors). However, in his commentary to C.2.3.2 Baldus seems to take the contrary opinion – that the donatory of the estate may not be sued by the estate creditors directly, unless he voluntarily accepts the lawsuit.

action to a third party, so that the third party could sue for the legacy in his own name by *actio utilis*.⁵⁶⁹

Expectations (*spes*), the second category of interests mentioned above, were rights suspended on some certain condition, such as conditional obligations, legacies, hereditary shares, etc. The jurists drew a distinction between two definitions of the word *spes*: legitimate *spes* (*spes de jure*) and *spes* in an improper or vulgar meaning of the word. *Spes de jure* were expectations based on causes existing in the present time.⁵⁷⁰ If there was a legacy or a promise of something, suspended, for example, on the arrival of the ship or the fulfillment of some work by the creditor, this was a legitimate present cause to expect the realization of the condition and vesting of the right in the future. Only such expectations were considered legitimate and fell under the second (2) category.⁵⁷¹ Expectations which did not depend on a present cause or depended on someone's mere will were not considered legitimate and, although sometimes also improperly called "*spes*", fell under the third (3) category of interests.⁵⁷²

Unlike vested rights, *spes de jure* could not be renounced by a unilateral declaration.⁵⁷³ A commonly accepted exception was made for renunciations made in court during a trial (D.42.7.1). Jason de Mayno, under obvious influence of Canon law,⁵⁷⁴ held that a *spes* could also be renounced by an oath or by a declaration confirmed (*geminata*) subsequently.⁵⁷⁵ However, a *spes* could be renounced or, more precisely, bargained against by a *pactum* (agreement). A *pactum*, in order to be valid, required the participation or, at least, presence of the other party.⁵⁷⁶

⁵⁶⁹ C.4.39.5, 8-9.

⁵⁷⁰ Bart., D.34.3.6.1; Bald., C.2.3.30.

⁵⁷¹ Ibid.

⁵⁷² Bart., C.2.3.30, *in fine*.

⁵⁷³ D.31.45.1; Bart., C.2.3.1.

⁵⁷⁴ See *infra*, p.122, on the import of oaths from Canon law.

⁵⁷⁵ Jason de Mayno, C.2.3.1.

⁵⁷⁶ Bart., C.2.3.1. In obligations, the other party to the *pactum de non petendo* would be the debtor, in legacies and fideicommisses – the burdened heir or legatee or a conjunct legatee (C.6.51.1.11). In case of a conditional heir, the renunciation, it seems, was to be made to another heir (see, e.g., Bald., C.6.20.3).

Transmissibility and assignability of *spes de jure* was a much more complicated issue. Expectations arising from conditional *inter vivos* contracts and promises (*spes obligationis*) and expectations arising from conditional last wills (*spes successionis*) were different in this respect. A *spes obligationis* was fully transmissible to the creditor's successors.⁵⁷⁷ It could also be assigned freely, with the assignee immediately acquiring the right *in spe*, which could be further assigned by him and transmitted to successors (C.8.53.3, 33).

On the other hand, a *spes successionis* (e.g., a conditional legacy or a heirship) was not transmissible to the entitled person's successors until the fulfillment of the condition.⁵⁷⁸ The testator could provide in the last will that the legacy would pass to the legatee's heirs if the legatee predeceased the fulfillment of condition,⁵⁷⁹ but this would not be a 'transmission' in the strict meaning of the word: the legatee's heirs would receive the legacy not as a part of the legatee's estate but *quasi ex persona sua*.⁵⁸⁰ This was because the rights of succession were by their nature attached to a particular person; they were always divided when their payment was stretched in time. Thus, if a stipulation or another contract provided for annual payments to be made in future, this was all one contract; but, if a last will provided for annual payments, such payments were considered separate legacies.⁵⁸¹

Not being transmissible, a *spes successionis* could not be assigned with an immediate effect. It could, probably, be promised by future words, similarly to the interests of the third category (*infra, p.117*). It could also be given to someone as the assignor's procurator (agent), but it would not possess the features granted to a *procurator in rem suam* by C.8.53.33; thus, such mandate would be revocable and would perish if either party predeceased the vesting of the right.⁵⁸² The sale of the

⁵⁷⁷ D.50.17.18; Bart., D.45.1.115; Bald., C.4.11.1.

⁵⁷⁸ D.50.17.18; C.6.51.1.

⁵⁷⁹ This was the way some jurists interpreted D.35.1.56 (Bald., C.4.11.1).

⁵⁸⁰ Bald., C.4.11.1. The adverb "*quasi*" was added because the legatee's heir, nevertheless, received the legacy "in consideration of the person of the original legatee". So, in Baldus' opinion, the heir was to include such legacy in the inventory of the original legatee's estate.

⁵⁸¹ D.36.2.12; Bart., D.39.6.35.5, D.45.1.115.

⁵⁸² C.4.35.15; Sext.1.19.6.

estate by a conditional heir would not preclude further dispositions of the same estate.⁵⁸³

Finally, the interests of the third (3) category included the rights which did not exist either *in re* or *in spe*,⁵⁸⁴ or, in different words, expectations which could only be called “*spes*” improperly. Succession to a living person was a typical example.⁵⁸⁵ Taking into account the extensive testamentary freedom at Civil law, it is not surprising that a possibility to succeed to a specific person could not qualify as either a “right” or a “*spes*” – it was fully dependent on the will of that person. Other examples were also provided: thus, Baldus listed a catch in the net and a fortune won in gambling among the examples of a *spes* with no present cause.⁵⁸⁶

The interests of this category, as a general rule, could not be renounced either unilaterally or by a pact; they were not transmissible or assignable by present words.⁵⁸⁷ However, the jurists allowed renunciation and, generally, bargaining about such expectations in future terms: “I will renounce this in case the condition is fulfilled...”, etc.⁵⁸⁸ A future catch in the net or a future trophy won in a game could be sold in advance, although the seller would not be liable for inactivity or eviction.⁵⁸⁹ The object of the executory contract in such case, however, was to be certain enough. Baldus provides examples of a “*vana spes*”, an expectation too uncertain to be bargained about even in future terms: “all the fish I may capture in future”, “any castle I may be granted by the king”, etc.⁵⁹⁰

Whether conceived in present or in future terms, contracts and pacts were subject to the rules restricting disposability of some rights and interests. In this context, it is important to mention one of them, based on several fragments of the Digest

⁵⁸³ In case a vested right of heirship was sold and then sold again to another buyer by the seller, the second sale covered not the original goods, but the price from the first sale (D.18.4.21). This was a unique feature of dispositions of a *universitas*.

⁵⁸⁴ Bart., C.2.3.1.

⁵⁸⁵ Bart., D.29.2.18; D.34.3.6.1, C.2.3.30, *in fine*.

⁵⁸⁶ Bald., C.8.53.3. Of course, this classification might seem doubtful from a strictly philosophical point of view.

⁵⁸⁷ D.43.3.1.11; C.8.50.4.

⁵⁸⁸ D.45.1.31; Bart., C.2.3.1.

⁵⁸⁹ Bald., C.8.53.3.

⁵⁹⁰ *Ibid.*

(D.2.14.35; D.2.15.6, 12; D.45.1.122.6), which dealt with mutual settlements (*transactiones*) by successors in respect of the estate of a deceased person. Two principles the jurists deduced from these fragments were the following. Firstly, the right granted by a last will could be renounced, promised, bargained about or alienated only if the parties knew precisely the contents of the last will. Thus, no one could denude himself of the rights contained “in whatsoever testament there may be” or in similar terms – the heir or legatee was supposed to know what he was contracting about.⁵⁹¹ Another principle was that a general settlement or a renunciation could not prejudice the rights contained in a last will that was not expressly referred to.⁵⁹² Both these principles were justified by the need to avoid fraudulent concealing of last wills.

What about the succession to a living person, could it be bargained about in future, present or other kinds of words? Here is where the moral considerations came into play. The key passages from *Corpus juris civilis* on this issue were D.45.1.61 (which forbade stipulations compelling the debtor to appoint the creditor his heir, as *contra bonos mores*), C.8.38.4 (a similar provision), C.2.3.15 (a promise to the daughter that she would succeed in equal portions with her brother did not bind the testator), C.2.3.19 (an agreement between two brothers to succeed to each other was valid only if they were soldiers), C.2.3.30 (a pact about the succession to a living third person was valid only with the consent of that person), C.3.28.35.1 (an agreement between the father and the son, that the son would not claim his natural portion, did not bind the son), C.6.20.3 (a daughter cannot renounce her entire intestate share in exchange for a dowry). Another passage, C.2.4.11, allowed a settlement between two brothers to cancel mutual fideicommisses; it was important in that it mentioned the term crucial for the law on the matter: “*votum captandae mortis*” (“a motive to desire death”). This expression was taken by the medieval jurists as the general justification behind the prohibition of *pacta futurae successionis*: bestowing a guaranteed right of succession on someone was deemed likely to tempt the grantee to seek the grantor’s death. It was this position of Civil law that would later become the main object of ridicule by the Scots authors (*supra*, p.111), and not without reason. If guaranteeing succession to someone was likely to induce attempts at the testator’s life, why would

⁵⁹¹ Bart., D.2.15.6, D.45.1.122.6.

⁵⁹² Bart., D.2.14.35, D.45.1.122.6.

a perfectly lawful *inter vivos* contract, taking effect after the granter's death (*supra*, p.112), not induce the same attempts?! *Votum captandae mortis*, nevertheless, was an issue taken seriously by the jurists,⁵⁹³ although the extent of its applicability was controversial. Freedom of testamentary disposition was another argument often referred to.⁵⁹⁴

The Canon law texts, however, offered a different perspective. A decretal by Boniface VIII of 1298 (Sext.1.18.2) dealt with the situation where a daughter, in exchange for receiving a dowry from the father, took an oath not to seek her intestate share after the father's death. The Pope, though admitting that Civil law did not accept such renunciations, nevertheless, recognized it on the ground of the binding force of oaths. This oath, the argument went, did not cause prejudice to any third party, neither did its subject matter endanger the daughter's soul; so, it bound her. Subsequent Canonists were often inclined to extend the validity of oaths to other situations, even overcoming *votum captandae mortis*.⁵⁹⁵

The usual way of solving the issue of *pacta futurae successionis* was to divide them into four classes: 1) *pacta de successione adquirenda*, 2) *pacta de successione conservanda*, 3) *pacta de successione perdenda* and 4) *pacta de successione tertii viventis*.⁵⁹⁶

Pacta de successione adquirenda, when someone promised to make another person an heir or to succeed to the granter, were, generally, considered invalid. This category of pacts, as well as their distinction from *inter vivos* contracts, has largely been covered above (*supra*, p.112). Many authors, however, were ready to qualify such pacts as 'parental wills' (*supra*, pp.27-29), if they appointed only the testator's children heirs.⁵⁹⁷

⁵⁹³ A. Tartagni, for example, uses it as the main argument against a particular agreement in one of his *consilia* (Alex., cons. 28, vol III).

⁵⁹⁴ *Supra*, p.108.

⁵⁹⁵ Tartagni mentions an opinion by a Canonist that *votum captandae mortis* is a subjective matter, so it cannot be known for sure if the oath-taker had it in mind (Alex., cons. 28, vol III).

⁵⁹⁶ See Bart., D.45.1.61, C.2.3.30 (with more detail); Bald., C.2.3.30.

⁵⁹⁷ Jason de Mayno, C.2.3.30.

Much attention in this respect was paid to agreements on mutual succession. What if two men, especially two brothers, agreed that the surviving party would succeed to the predeceasing one? The presence of juristic *consilia* on this matter provides evidence that such agreements were popular in the Middle Ages and Renaissance.⁵⁹⁸ The Code (C.2.3.19) was nevertheless quite explicit in that such agreements were invalid, except when made between soldiers; and even in case of soldiers they were valid not as agreements but as military wills and thus were revocable. Bartolus in his *consilium* 212, mentioned above,⁵⁹⁹ deals with an agreement by which two men promised that one of them, in case of a predecease without children, would be succeeded to by another. In the facts of that *consilium*, one of the contracting parties died first, leaving children, then the other died without children. Bartolus makes the question of the validity of such contract dependent on its wording. If the contract used the language of obligation, making the parties conditionally obliged in respect of their goods, then it would have been valid.⁶⁰⁰ However, as the real contract in the facts of the case did not use the language of obligation, but just disposed of the parties' property after their death, Bartolus tended to consider it invalid. The *consilium* ends with a reservation that in case the contract were, nevertheless, valid, no right would pass to the first deceasing party's successors, as the contract created only a *spes successionis*.

Bartolus' solution was not without critics.⁶⁰¹ Many took a stricter approach to the pacts on mutual succession. Tartagni in one of his *consilia*⁶⁰² is dealing with an even more "innocent" case than Bartolus: two brothers agree to succeed to each other in case of a predecease without children or a testament. From a formal point of view, this agreement did not violate freedom of testation. Nevertheless, Tartagni held this agreement invalid, as inducing *votum captandae mortis* and being *contra bonos mores*.

⁵⁹⁸ Bart., cons. 212; Alex., cons. 28, vol III.

⁵⁹⁹ *Supra*, p.106.

⁶⁰⁰ It is not exactly clear how Bartolus dealt with the fact that such obligation would restrict the freedom of testation, which Bartolus defended so eagerly in other places (*supra*, pp.107, 119). It seems, his logic was that, as the obligation would be conditional, the party would not lose the freedom of testation in an absolute way.

⁶⁰¹ P. Peckius the Elder (1529-1589), for example, deemed it unreliable (P. Peckius, *De testamentis inter virum et uxorem*, l.7 // *Tractatus selecti...*, 268).

⁶⁰² Alex., cons. 28, vol III.

Unlike Bartolus, he did not draw any difference in respect of the pact's wording. Such pact, in Tartagni's opinion, would only be valid if it concerned specific goods, but here the entire estate was promised. This distinction between a promise of specific goods and a promise of the entire estate was popular among the jurists.⁶⁰³

Some *Ius Commune* authors, however, quite inconsistently with their general views on pacts of mutual succession, were ready to accept such agreements if made within marriage (*infra*, p.124).

Pacta de successione conservanda were looked upon much more benevolently by the Continental legal authors. On the one hand, the Code (C.2.3.15) provided that if a father, providing the dowry for his daughter, inserted into the contract a clause that the daughter would still be entitled to an equal portion in the father's estate together with her brother, such clause, nevertheless, did not restrain the father from providing differently in his testament. On the other hand, according to the Institutes (Inst.Just.III.2.8), a father emancipating his son retained the right to succeed to the son due to a "tacit agreement".

The prevailing opinion of the jurists who followed the *mos italicus* tradition was that pacts to conserve a share of intestate succession for the testator's relatives could not restrict the testator's testamentary freedom; however, such pacts could take off impediments, which deprived the relative of the right to succeed. Thus, a past delict, making the heir unworthy, could be forgiven by the testator. Also, in a case like the one described in C.2.3.15, the testator might exclude the collation of the dowry. A rule proposed by Bartolus was that a pact on preserving succession was valid if the testator could dispense in favour of that person by a last will.⁶⁰⁴ Much discussion of *pacta de successione conservanda* concentrated around real or hypothetical customs and statutes by local authorities, introducing new degrees of intestate succession and disinheriting Civil law heirs. Could the effect of such statutes be taken away by a *pactum*? In such a situation, Baldus advised examination of the purpose of the statute.

⁶⁰³ Pellegrini took it as the main distinguishing point between invalid *pacta successoria* and valid fideicommissary substitutions in contracts (Pellegrini, *De fideicommissis...*, art LI, 810-813). See *infra*, chapter V.

⁶⁰⁴ Bart., C.2.3.30.

Thus, a statute, which provided that a daughter who received dowry could not succeed together with brothers, was obviously enacted in favour of the brothers; so, Baldus held, the pact to conserve the right of succession of the daughter was only valid if the brothers also consented.⁶⁰⁵

Such a cautious approach was challenged by the legal authors of *mos gallicus*, such as A. Le Conte (1517-1586). In his short treatise trying to argue whether C.2.3.15 was a law worthy of application, after invoking arguments from legal authorities, practice and common sense, he finally concluded that the father's promise that the daughter would succeed in equal share with her brothers (called *Isomeria*) was obligatory even for the father himself. Among his main arguments were the subsequent abolition of that law by the Novels of Leo,⁶⁰⁶ the contrary practice of contemporary France, wide acceptance of renunciations of succession by oath in Canon law (*infra*) and, most importantly, the fact that such agreement did not create any *votum captandae mortis*, but, to the contrary, stimulated children to fulfill their duties towards their parents.⁶⁰⁷ Another important argument Le Conte added was that the father's testamentary freedom was not to restrict the freedom of marriage of the daughter, promoted by such *pactum*.

Pacta de successione perdenda seem to have been of the biggest practical importance. Writings of learned authors suggest that Canon law's sworn renunciations of succession by daughters in exchange for dowry were quite widespread and confirmed by custom.⁶⁰⁸ An argument in favour of such agreements was that they did not create *votum captandae mortis* but, to the contrary, extinguished such *votum* by extinguishing succession. Such agreements also did not restrict the testator's testamentary freedom,⁶⁰⁹ as their function was to exclude intestate succession and especially compulsory portions. It is no surprise that even authors within the *mos italicus* tradition accepted the validity of such pacts as a matter of custom and as a matter of sin for ecclesiastical courts. There were also instances where the jurists were

⁶⁰⁵ Bald., C.2.3.30.

⁶⁰⁶ They were late 9th century Greek constitutions of the Byzantine Emperor Leo VI.

⁶⁰⁷ A. Le Conte, *Tractatus de pactis futurae successionis... // Opera omnia* (1616), 240-243 (error in the numeration of pages).

⁶⁰⁸ Bart. and Bald. to C.2.3.30.

⁶⁰⁹ Baldus in his commentary to C.2.3.30 stresses this point.

ready to accept such agreements on the ground of pure Civil law: one in the rare situation when the pact was connected with the renouncer's immoral actions⁶¹⁰ and the other if the renouncer received an equivalent of his or her intestate share.⁶¹¹

Baldus elaborated on the way a daughter should renounce her succession. He suggested the oath to be conceived not in the words of "renouncing" inheritance but in the words of a *pactum*, which, furthermore, was to mention that the daughter took ("perceived") the dowry in exchange for her natural portion.⁶¹² In this way, the oath was not merely personal, but also extended to the woman's own successors.⁶¹³ If the dowry was provided not by the father but by the woman's brothers, the pact could be made by the woman with one of them being present, even in the father's absence. The woman's intention was to be taken into account in determining whether she renounced her future share in favour of one of her brothers, all of them or even in favour of all heirs whatsoever of her father, even his collaterals. Finally, Baldus even held that the tense of the oath – present or future – was irrelevant as to its effect.⁶¹⁴

The fourth category – *pacta de hereditate tertii viventis*, which were sometimes called *pacta corvina* ("ravens' agreements")⁶¹⁵ - occurred when a "right" to succeed to the living third person was disposed to another by the potential successor. It was the most complicated type of agreement. On the one hand, Justinian's 531 A.D. constitution (C.2.3.30) declared such pacts invalid, except when the testator, whose estate was the subject-matter of the pact, consented to it and persevered in that consent until his death. On the other hand, several fragments (D.2.14.21.4; D.17.2.3.2; D.18.4.2.2; D.19.1.23) seemed to allow such pacts. The jurists tended to admit the validity of *pacta de successione tertii* in special circumstances, which mitigated

⁶¹⁰ Such situation was taken from D.37.12.1.3, where a father emancipated his son in return for money. It was deemed *contra bonos mores* for the father to do, so the father was deemed to have renounced the right of intestate succession to the son (Bart. and Jason de Mayno to C.2.3.30).

⁶¹¹ Bart., C.2.3.30. The main fragment in favour of that was D.35.2.56.5, which allowed the testator to compensate the Falcidian quarter *inter vivos* to the future heir, so that the heir would no longer deduct it from the estate.

⁶¹² Bald., C.2.3.30, C.6.20.3.

⁶¹³ The exception was if the daughter predeceased her father, for in that case her own children, representing their mother, would accept their grandfather's estate in their own right, without necessity to accept the mother's estate and thus not bound by her acts (Bald., C.2.3.30, C.6.20.3).

⁶¹⁴ Bald., C.6.20.3.

⁶¹⁵ Unfortunately, the author of this present thesis was unable to identify the origin of this nickname.

potential *votum captandae mortis*. Thus, Bartolus, Baldus and Jason de Mayno deemed such agreements valid if they concerned the estate of an uncertain person (e.g.: “I oblige to restore everything I may receive in succession...”) or disposed the right to succeed to someone as a part of another estate. Moreover, the agreement was valid if it was aimed at discharging an obligation, as well as in the case where a future legatee promised not to pursue for the legacy in advance (D.2.14.21.4). Outside those special circumstances, C.2.3.30 was applicable.⁶¹⁶

Medieval and Renaissance learned lawyers did not ignore the systems of succession developed within the feudal structures of their time. The forms of *pacta successoria*, which were common in feudal relations, found their recognition in the juristic works. Thus, Bartolus put a case where an *emphyteusis* (to which the fiefs were often assimilated) was granted to a father and his sons. In such situation, after the father’s death, the sons would take the land by virtue of *mortis causa capio* from the landlord; the share of the son predeceasing the father would accrue to the other son.⁶¹⁷ This situation was different from the case where the disposition was made to two brothers directly, in which case the predeceasing brother’s share was to revert to the landlord.⁶¹⁸

The *Ius Commune* authors also tended to show leniency in applying the rules on *pacta successoria* to settlements between husband and wife. The *Libri Feudorum*, which was considered a part of *Corpus juris*, contained fragments (*Libr.Feud.II.29*) allowing spouses to change or exclude succession to fiefs by the children of marriage. Indeed, even the Code allowed bargaining about the fate of dowry after the death of one of the spouses.⁶¹⁹ Moreover, such jurists as Paulus de Castro and Jason de Mayno seem to have allowed pacts on mutual succession between the spouses,⁶²⁰ in what

⁶¹⁶ Bald. and Jason de Mayno, C.2.3.30; Bart., D.45.1.61.

⁶¹⁷ Bart., D.39.6.31. However, some jurists, such as Cobarrubias-y-Leyva, criticized that opinion, holding instead that the sons take as original disponees from the lord (D. Covarrubias, *De testamentis...* Pars III // *Tractatus selecti...*, 154-155).

⁶¹⁸ *Libr.Feud.II.12*; M. Ryan, ‘Succession to Fiefs: A *Ius Commune Feudorum*?’, *The Creation of the Ius Commune...* (2010), 153-154.

⁶¹⁹ C.2.33.1, et ibi Bald.

⁶²⁰ Cyno de Pistoia was the first to suggest that reciprocal donations between the spouses under condition of predecease were valid, but Paulus seems to have been the first to extend this possibility to the donations of all goods of husband and wife (Bald., Pau.Castr., las., C.3.28.12).

seems like a contradiction to the general rejection of such pacts (*supra*, pp.120-121). An opinion was even expressed that testamentary freedom may be restricted if it benefits marriage. The Dutch jurist, Peter Peckius the Elder (1529-1589), the author of the treatise *On the testaments between husband and wife*, nevertheless, rejected this opinion as being contrary to the established doctrine on *pacta successoria*. Instead, Peckius proposed achievement of the same results by mutual wills, where the husband and wife entitled each other to dispose of each other's property by will and contractually obliged each other not to rescind the settlement.⁶²¹

4.2. *Pacta successoria* in Scots Law: General Observations.

The starting point of the discussion of the Scots attitude to *pacta successoria* should be Th. Craig's *Jus feudale*. That book in general was quite strongly inspired by the Continental literature, and the rules on succession agreements and on similar issues were no exception. Thus, Craig explicitly "agrees" with Bartolus in holding that a *spes successionis* is not a right to be defended against the deeds of the defunct.⁶²² Craig mentions that a promise to bestow a portion of the "*hereditas*" is invalid in Scots law, being contrary to testamentary freedom and inducing *votum captandae mortis*;⁶²³ by *hereditas* he obviously means both moveable and heritable estate here.⁶²⁴ At the same time, Craig mentions that in Scotland marriage contracts, which bestowed the father's entire heritable estate upon the heirs of marriage, were valid despite seemingly creating a *votum captandae mortis* – Craig doubts that a child, who was born and raised in expectation of such provision, might be assumed to have *votum*! This practice of marriage-contracts he considers to be of a French origin.⁶²⁵ In his dealing with renunciation of rights, Craig is also heavily inspired by Civil law; he cites Bartolus a lot, although does not follow the latter's doctrine in all the details.⁶²⁶ He is faithful to

⁶²¹ P. Peckius, op cit, I.7, 13, 18 // *Tractatus selecti...*, 268, 273, 278; A. Braun, 'Revocability of Mutual Wills', *ELS* (2007), 211.

⁶²² "*Bartolo tamen assentior spem succedendi patri non esse in consideratione*" (*Jus feudale*, II.12.11).

⁶²³ *Jus feudale*, II.17.13.

⁶²⁴ Only moveable estate was subject to the testamentary freedom, which Craig mentions in the same fragment (*Ibid.*)

⁶²⁵ *Ibid.*

⁶²⁶ *Jus feudale*, III.1.20-23.

one of the abovementioned principles of Civil law: a future right, which does not have a present *causa*, cannot be renounced.⁶²⁷ Thus, no one may renounce succession until he becomes actually able to accept it.⁶²⁸

Craig's account did not stand the test of time in all its details. As was already mentioned above, in the account of *donationes mortis causa* (*supra*, p.94), contracts to dispose of one's whole estate, moveable or heritable, were practised and recognized from at least 1610 and were quite widespread from the 1660s. Most of such dispositions, it should be noted, were more like the Civil law dispositions of *bona* rather than its dispositions of *hereditas* (*supra*, p.112), in that the granter was not thereby obliged to make the donee his "heir" or "executor", liable to the estate creditors. However, a gift of heritable property could include a clause that the donee would be liable for the deceased donor's debts, which clause was effectual *ad valorem* of the gift.⁶²⁹ There were also numerous examples where the disponent promised to make the donee his "heir of provision".⁶³⁰ Dispositions which included appointment of an executor were also extremely widespread from the 18th century.⁶³¹ Craig's reservation about promises to bestow a portion of estate does not seem to have ever been raised in practice.

The most important 17th century cases on *pacta successoria* seem to have been *Sharp v. Sharp* (1631, M.4299=M.15562) and, especially, *Aikenhead v. Bothwell* (1630, M.9491). These cases will be analyzed in more detail later (*infra*, pp.145, 189). When expressly dealing with the issue of *pacta successoria*, Scots legal authors and practitioners since Stair's time would usually just claim that *pacta corvina de hereditate tertii viventis* (i.e., the fourth category of *pacta successoria*, *supra*, pp.123-124) were valid in Scotland, supporting this by a citation of *Aikenhead v. Bothwell*.⁶³²

⁶²⁷ Cf., the Civilian understanding of such future rights as not being a proper *spes* (*supra*, p.117).

⁶²⁸ *Jus feudale*, III.1.32.

⁶²⁹ *Mercer v. Scotland* (1745, M.9786=M.14015).

⁶³⁰ See *infra*, chapter V.

⁶³¹ See the forms of deed in: R. Bell, *A system of the forms of deeds used in Scotland*, Vol III (1813), 3-5.

⁶³² *Stair, Inst.*, I.10.8, III.9.28; *Nielson v. Bonnar's Heirs* (1682, III B.S.441; in this case, however, the issue was just mentioned and not decided); *Grey v. Udney & Maitland* (1694, IV B.S.142); *Ragg v. Brown* (1708, M.5260=M.9492).

There were other kinds of explicit succession pacts. Thus, Stair (*Inst.*III.8.28) ascribes unique features to the promise to grant a legacy: such promise, in his opinion, is valid and irrevocable, although may charge the testator's "Dead's part" only. Erskine in the 18th century would uphold Stair's opinion (*Erskine's Institutes*.III.9.6). In support of it, the case *Houston v. Houston* (1631, M.8049=12307) was cited.

It has already been noted by several scholars that Stair's and Erskine's interpretation of this case was obviously wrong. The case was already mentioned here.⁶³³ A bond for 500 merks was granted, commanding the granter's executors to pay the debt after his death. The Lords recognized this bond as a mere legacy, charging the "Dead's part" only. However, that legacy was found not to be cancelled by a subsequent nuncupative will. The last position is in full agreement with the Scottish non-recognition of nuncupative legacies larger than 100 pounds (*supra*, p.45). Thus, it seems quite obvious that the legacy in this case was found not revoked because of the informality of its revocation, not because of any inherent "irrevocability".⁶³⁴

In the later case of *Curdy v. Boyd* (1775, M.15946) the testator granted his entire moveable estate after his death, in return for the grantee's assistance to the testator in the last years of his life. After the testator's death, the grantee sued for his goods. The Lords dismissed the testator's relatives' claim that this disposition was a "fraud". More importantly, in what seems like an *obiter dictum*, the Lords referred to a principle not found explicitly in any preceding case: *pacta de hereditate viventis*, they held, were valid in Scots law, if given for an onerous cause. It is unlikely that they were speaking specifically about the dispositions of all goods *post mortem*: the long established case law was clear that such dispositions were valid even if given for a lucrative cause.⁶³⁵ There might be a tentative possibility that the Lords were influenced by the Civilian distinction between lucrative and onerous dispositions of "all goods present and future" (*supra*, pp.112-113). A more probable explanation, however, might be a distinction between lucrative and onerous tailzies (*infra*, p.189), which were

⁶³³ *Supra*, p.85.

⁶³⁴ As D. Hutchison points out (Hutchison, op cit, 239-240), Lord Ivory was probably the first to notice this inconsistency in his 1828 edition of Erskine's Institutes.

⁶³⁵ *Grant v. Grant* (1679, M.3596), *Irvine v. Skeen* (1707, M.6350).

among the valid forms of *pactum successorium* in Scotland but were not directly relevant to the facts of *Curdy*.

As to the issue of renunciation of future rights, which Craig solved in the spirit of the *Ius Commune*, Scots law has in the long term developed definitions different from those of the *Ius Commune*. Thus, the term “*spes successiois*” in the 19th century legal encyclopedias was defined as a “defeasible or contingent right to succeed to any property on the death of another”,⁶³⁶ under either testate or intestate succession, heritable or moveable. Unlike Civil law, modern Scots law considers the right to succeed to a living person a proper *spes*, a future right, although sometimes dependent on the will of another living person. In the modern Scots law, such right is considered assignable, although assignation becomes effectual only at the moment of vesting (such as the death of the testator).⁶³⁷ The Civil law distinction between a *spes* with a present cause and an improper *spes* without such cause is unknown to modern Scottish law.

However, historically, the *Ius Commune* doctrine on the disposability of future rights was not absolutely irrelevant in Scotland. It was not in vain that already in quite an early, 1554, case *Laird of Udney v. His Mother* (Maitland 66) an argument that a particular right was not yet *in rerum natura* was found sufficient to consider the right non-disposable.⁶³⁸ The clearest form in which the Civilian doctrine was present in Scots legal practice was the interpretation of general discharges and renunciations. A general renunciation was understood in Scotland to include only the vested rights the renouncer had at the moment of making it. In *Haliburton v. Hunter* (1633, M.5042), a general discharge made by a sister to her brother was found to cover the debt due to that sister directly but not to extend to a sum which the sister might claim in the future under condition of another sister dying before the term of payment. Similarly, in *Baillie v. Baillie* (1671, M.5044), a renunciation by the son of all rights in his father’s estate was found to extend only to his ‘legitim’ portion but not to his right as the

⁶³⁶ ‘*Spes successiois*’, *Green’s Encyclopaedia...*, vol XI, 389. A similar definition may be found in: Trayner, op cit, 325.

⁶³⁷ ‘*Spes successiois*’, *Green’s Encyclopaedia...*, ibid; J.L. Wark, op cit, 161-162.

⁶³⁸ In that case, a tailzie was made by the father, infesting his children of lands, with liferent reserved to the father and the mother. After the father’s decease, the Court held that, as the mother was never infeft of the lands in fee or in liferent, nothing could have technically been “reserved” to her.

substitute in a tailzie, which was deemed a “future right and hope of succession”. In the 1743 case of *Anderson v. Andersons* (M.5054), where a son renounced all “claims” to the father’s estate, his renunciation was found not to extend to his intestate portion in the father’s “Dead’s part”, as this portion was not a “claim” in the strict meaning of the term.⁶³⁹ Finally, in *E. Henderson v. J. Henderson & Others* (1782, M.8191), children agreed with their father to renounce all succession to him, having no knowledge about an undelivered settlement made by the father in their favour. The Court favoured their claim that, as the settlement was not yet effectual while the testator was living, the children’s renunciation of all claims they had did not prejudice the rights from that particular settlement.

The Scottish agreements to bestow succession, in the form of promising to make someone an “heir of provision” or “heir of tailzie”, will be dealt with in more detail in the chapter on tailzies and destinations (*infra, chapter V*). Here we are going to concentrate on the simpler forms: the renunciations and preservations of succession, as well as *pacta de hereditate viventis*.

4.3. *Pacta de successione perdenda and pacta de hereditate viventis in Scots Heritable Succession.*

It is important to deal with the question of renunciation and assignation of rights of heritable succession first, as this will provide an insight into the similar developments in the Scots moveable succession. The key concept of heritable succession in Scotland was the “heir”. Similarly to the *Ius Commune*, the title of heir itself could never be assigned to another person, neither within the defunct’s life nor after his death. The liability of the heir for the defunct’s debts could not be transferred to another person.

Moreover, this rule was, to a certain extent, even stronger in the Scots law of heritable succession, due to the feudal principles it was based upon. The heir in the feudal system succeeded not just to the abstract “*universitas*” of the defunct’s estate but to the property of which the defunct was “infert”. As the “infertment” was a public

⁶³⁹ See *infra, s.4.4*, for more consideration about the legal nature and disposability of the intestate share in moveable succession.

matter, so that the succession to such property passed to the heir only after the public and cumbersome procedure of ‘service of heir’. Unlike the *Ius Commune*, where the acceptance of estate (*aditio hereditatis*) was an informal procedure for which a unilateral declaration by the heir was enough,⁶⁴⁰ the Scottish ‘service of heir’ involved receiving a “*retourable brieve*” from the Chancery, as well as the participation of the defunct’s feudal superior.⁶⁴¹ Only after completing the ‘service’ did the heir acquire a vested and transmissible right to the heritable property. If the heir died before being ‘served’ as heir, no right was transmitted to his own heirs, and then the next heirs to the original defunct were to obtain ‘service’.⁶⁴² Thence arose the problem of invalidity of acts and deeds made by the ‘heir-apparent’ in respect of the estate property before getting ‘service’. In order to solve this problem, the 1695 statute was enacted,⁶⁴³ which made the debts created by the ‘heir-apparent’, who possessed the estate property without ‘service’ for three or more years, chargeable against the estate.

Unlike Civil law, however (*supra*, p.114), Scots legal practice allowed a person to obtain ‘service of heir’ through an agent, including a *procurator in rem suam*. In fact, this was the only way of service for foreigners, who were not sworn in allegiance to the King of Scotland and thus could not be infeft in Scottish lands. This happened in *Ragg v. Brown* (1708, M.5260=M.9492), where an Englishman granted to a stranger a procuratory *in rem suam* to get ‘service’ to his Scottish relative after her death. Such procuratory obviously would expire in case of either party’s death before the ‘service of heir’.⁶⁴⁴

Another alternative for one wishing to transfer rights before ‘service’ was mentioned in *Ragg v. Brown*: counsel for the winning party claimed that nothing was “more ordinary” than to make a resignation become effectual under a condition of the

⁶⁴⁰ See, e.g., C.6.30.17, Bald., cons. 224, vol II.

⁶⁴¹ Stair, *Inst.* III.5.25.

⁶⁴² Sometimes the absence of a timely ‘service of heir’ could change the line of heritable succession. Thus, if a son died before getting the ‘service’ to his mother, her estate would pass to her collateral relatives; but if the son died after the service, the property could only go to the son’s collaterals on the father’s side, as the maternal collaterals were excluded from heritable succession (Th. Hope, *Minor Practicks*, §114).

⁶⁴³ RPS, 1695/5/167.

⁶⁴⁴ Nevertheless, a counsel for the winning party in *Ragg*, to fortify his case, claimed that a mandate in Scotland may remain valid even after the mandator’s death, referring to the dubious case of *Gray v. Ballegerno* (1678, II Stair 594).

resigner's 'service' as heir. 'Resignation' was one of the main forms of conveyance in Scotland, where a feu owner resigned his feu in the hands of his feudal superior in favour of a third person, on whom the superior was to bestow the feu.⁶⁴⁵ Thus, the heir might resign his future heritable right, with effect after the predecessor was dead and the heir had obtained the 'service'. Such device could avoid the invalidity of a disposition by the disponee's predecease.⁶⁴⁶ Unfortunately, no cases explicitly dealing with this type of resignations were found in the course of the present research.

Seeing that it was possible in Scots law, in one or another way, to assign non-vested rights of succession in advance, a question, nevertheless, arises: were they in essence just promises to transfer the right in the future, or could such assignation have a present, immediate effect? In the *Ius Commune*, the assignation of a *spes successionis* could have the former but never the latter consequence: it could not bestow upon the assignee an *actio utilis* or any other immediate right, neither could it preclude a subsequent assignation to another assignee (*supra*, pp.116-117). In Scotland this seems to have been a doubtful question for some time. In an early case *Earl of Murray v. Defender* (1564, Maitland 135), the 'heir-apparent' was found eligible to assign an incorporeal right (a reversion) before getting 'service of heir', with subsequent service in this case being of "declaratory" importance. That case, however, was dealing with a simpler "general service", by which incorporeal heritable rights were transmitted, as distinguished from lands and annualrents, which could only be transmitted by a 'special service' with infektment.⁶⁴⁷ The 'special service' could hardly be called a mere "declaration", being essential to constitute a title in lands and annualrents.⁶⁴⁸

As late as 1696, in *Greig, Williamson & Dickson v. Knox* (IV B.S.323), it was debated whether a tailzied heir-substitute could assign her right before its vesting; in this case the question was not explicitly decided, as the right never became vested. A

⁶⁴⁵ Stair, *Inst.* III.2.8-13; Erskine, *Inst.* II.7.

⁶⁴⁶ It was a debatable topic in Scots law for some time, whether the *resignatio in favorem* perfected the disposition or a posterior 'seisin' by the feudal lord was necessary. However, Stair considers it "clear" that the lord is bound to convey the "seisin" to the acquirer by a personal obligation, which is transmissible to the acquirer's heirs (Stair, *Inst.* III.2.12)

⁶⁴⁷ See also *Dairsey v. Hay* (1663, M.4356), where the children's renunciation of their right as "heirs of provision" to a heritable bond in favour of the liferenter was found invalid until the children obtained 'service' as heirs.

⁶⁴⁸ Stair, *Inst.* III.5.25; Bankton, *Inst.* III.5.21.

more important case is *Grey v. Udney & Maitland* (1694, IV B.S.142). In this instance, a profligate son was found entitled to assign his right as the heir-apparent (“apparency of succession”) of his father while the father was still living. The wording of the report suggests that both the son himself and his assignee could rightfully demand an exhibition of the defunct’s dispositions even before the ‘service’.⁶⁴⁹ On the one hand, this case demonstrates that the assignee of the right in succession could enjoy some of its privileges even before the ‘service of heir’. On the other hand, the heir does not seem to be completely denuded before the ‘service’, being eligible to sue for the exhibition, together with the assignee. The assignation here looks like a procuratory, with the assignee’s right still dependable on the heir’s non-revocation of the procuratory. This is reminiscent of the position of assignments of *spes successionis* in the *Ius Commune*.

But even if Scots law might not originally allow assignments of *spes successionis* with immediate effect, this would become different in the 18th century, because of the influence of the “*jus superveniens auctori accrescit successori*” rule, which is called ‘accretion’ in modern Scots law.⁶⁵⁰ This rule traced its origin to a “warrantice” (warranty) by the disponent of heritable property to defend the purchaser from any competing claims. If the disponent acquired any right to the disposed property after the disposition, it was deemed to be a part of the original disposition and accrued to the purchaser *ipso jure*, without a need for additional disposition.⁶⁵¹ Such “supervenient” rights could not be redispensed to third parties, as they were by fiction included in the first disposition.⁶⁵² In 18th century cases – *Creditors of Gordon competing* (1738, M.7773), *Paterson v. Kelly* (1742, M.7775) – the ‘accretion’ rule was extended to situations where no right was initially transmitted in the disposition at all. So, if a debtor disposed one and the same piece of property to several disponees, himself not yet being infeft, the first of the disponees was preferable to the posterior ones after the debtor finally obtained infeftment. The cases, as far as their reports stand,

⁶⁴⁹ An ‘apparent heir’ had a right for such exhibition even before obtaining ‘service’ (Bankton, *Inst.*III.5.7).

⁶⁵⁰ K.G.C. Reid, *The Law of Property in Scotland* (1996), §677.

⁶⁵¹ Stair, *Inst.*III.2.1-2; Erskine, *Inst.*II.7.2-3.

⁶⁵² It is possible that G. Mackenzie had the ‘accretion’ in mind when saying that a disposition in Scots law creates a “*jus ad rem*”. The concept of *jus ad rem* was of Canonical origin (Mackenzie, *Treatise on Actions // Mackenzie’s Works*, vol II, 502).

do not seem to deal with *spes successionis*, but there is no reason why the same solution would not have been applied to rights of future succession as well.

The case law cited above is enough to answer the final question on assignments of heritable succession: did it matter whether the assignment was made within the defunct's life or after his death? *Ragg v. Brown* (1708, M.5260=M.9492) and *Grey v. Udney & Maitland* explicitly decided that it did not, despite the attempts to have *pacta corvina* recognized as immoral. This is not surprising, considering that *Aikenhead v. Bothwell* (1630, M.9491), mentioned above, had by the time of Stair become a standard authority for the claim that the Civil law on *pacta corvina* did not apply to Scotland (*supra*, p.111). However, the original meaning of *Aikenhead*, which dealt with moveable succession, was different, as will be shown below (*infra*, p.145).

We pass now to renunciations of heritable succession. As was shown above, in the *Ius Commune* both *pacta de successione perdenda*, made in the testator's lifetime, and renunciations of succession rights after the testator's death were distinguished from assignments and, under several conditions, were treated more favourably than the latter (*supra*, pp.122-123).

Th. Craig (*Jus feudale*, III.1.11), inspired by both Bartolus and Scots practice, distinguished between renunciation of rights based on infeftment and of other rights. The former (rights in lands and annualrents) could not be renounced by a simple renunciation. They required a resignation in the feudal superior's hands, becoming effectual only after the one, in whose favour the renunciation was made, himself became infeft. Alternatively, such rights could be renounced in the court during litigation, as was done with redemptions. On the other hand, a right not based on infeftment could be renounced by a simple renunciation, *ipso jure* becoming effectual for the person in whose favour they were made, even in his absence.

Craig does not speak here of rights of succession. Indeed, in another passage he actually says that no one may renounce succession until it becomes available for acceptance (*Jus feudale*, III.1.15). However, his account of renunciations was logically applicable to the rights of future heritable succession as well, because of the one fundamental difference of Scots heritable succession from the succession according to

the *Ius Commune*. In the *Ius Commune*, due to the wide freedom of testation and other circumstances, the principle “*testator vivus heredem non habet*”⁶⁵³ was strong – only after the testator’s death could his heir’s right be established. In Scots law, the same principle was also invoked from time to time.⁶⁵⁴ Despite this, in Scots heritable succession, where the making of a testament was forbidden, the heir’s name could be known long before the defunct’s death. For example, your elder son was your heir-of-line, with your grandson by him being your second heir in case of the son’s predecease, your second son being your third heir, etc. Such lines of succession could be drawn for any person at any stage of his life. One could dispose of his entire heritage in *liege poustie* (*supra*, pp.97-98), leaving nothing to the heir-of-line, but no one could “disinherit” his heir-of-line.

Because of this, a Scottish “hope” of future heritable succession was a *spes successionis* in the strict, proper meaning of that term in the *Ius Commune*. It did not depend on the defunct’s will, it had a present cause (in the blood relationship) and thus it was a conditional right, suspended on the heir surviving the defunct. From the Civilian perspective, Scots rights of heritable succession were something you could renounce and bargain against in present terms.

This was the understanding that Scots legal practice followed in the years after *Jus feudale*. One could not renounce the title of heir itself in the defunct’s lifetime. However, one could renounce particular rights attached to the heir, which were not based on infertment. Thus, the heir could renounce the right to challenge ‘deathbed’ dispositions.⁶⁵⁵ The right to “heirship moveables” could also be renounced. Extended to all feu-holders by the 1474 Act,⁶⁵⁶ this right entitled the heir-of-line to the “best of every kind” of moveables of the defunct, which were excluded from the executry.⁶⁵⁷ Indeed, there are several cases⁶⁵⁸ where the heir effectively renounced his right to the ‘heirship moveables’ in the defunct’s lifetime. In *Pollock v. Pollock* (1667, M.5402)

⁶⁵³ See, e.g., D.18.4.1.

⁶⁵⁴ See, e.g., *Chapman v. Gibson & Fingask* (1631, M.8163). That case, nevertheless, dealt with moveable succession.

⁶⁵⁵ *Supra*, s.3.5.

⁶⁵⁶ *RPS*, A1474/5/8.

⁶⁵⁷ *Stair*, *Inst.* III.5.9.

⁶⁵⁸ *Meidhope v. Sir Hepburn’s Son* (1636, M.9691), *Pollock v. Pollock* (1667, M.5402).

the effect of such renunciation was decided upon. In this case, Pollock provided his entire heritage to his oldest son of the second marriage, John, as the 'heir of provision'. His oldest son of the first marriage and the heir-of-line, Robert, in exchange for some provision, renounced all rights to his father's heritable and moveable estate in favour of his father's second wife and her heirs. After the father's decease both Robert and John were charged by the father's creditor. Robert, once again, renounced to enter as heir. John, in response to the charge, pleaded that the charge was to be directed first at the 'heirship moveables' renounced by Robert.⁶⁵⁹ It was replied that Robert had renounced his right to the 'heirship moveables' back in the father's lifetime, and thus 'heirship moveables' ceased to exist and became part of the executry.

A division arose among the Lords. Some of them held that a renunciation of the right to 'heirship moveables' was of the same effect as the renunciation of the right to succeed in lands: the defunct became able to dispose of them on deathbed, but, if he did not dispose of them expressly, the renunciation was incomplete and the right reverted back to the heir. Other judges held that 'heirship moveables' were different from rights in land, in that they could be renounced by a simple renunciation and thus ceased to exist absolutely, with the goods accruing to the executor (the position, in this case, held by the defunct's second wife).

The Court, eventually, leaned to the latter opinion. Dirleton's report of *Pollock* mentions that one of the decisive factors that pushed the Lords to that solution was that Robert's original renunciation was conceived in favour of the heirs of the second marriage, thus being "in effect an assignation". However, this passage should not be understood as talking about a literal "assignation". We have already seen above that an assignation of the right of the heir could only become effectual after the assignee's 'service of heir' (*supra*, pp.129-132), which did not happen in this case. What the judges seem to mean here is that the renunciation's conception in favour of particular persons and not in an abstract way suggested that Robert's intention was to denude himself of the 'heirship moveables' irreversibly. Such treatment of renunciations *in*

⁶⁵⁹ In that period, the widely accepted rule of Scots law was that the 'heirs of provision' were liable for the defunct's debts *in solidum* but only after the 'heirs of line' (Craig, *Jus feudale*, II.17.16, 19; Stair, *Inst.* III.5.17; *infra*, s.5.2, 5.3).

favorem seems similar to the treatment by Baldus, where the renouncer's mere intention was crucial in determining who the beneficiary of the renunciation was (*supra*, p.123). In this, some direct influence of the *Ius Commune* writings on the decision in *Pollock* seems possible, besides the obvious indirect influence through Craig. A similar approach we encounter in case of 'heirs of provision': in *Sandilands v. Sandilands* (1680, M.5498) a daughter, appointed as a substitute in the heritable bond due to her father, renounced the substitution in favour of the father's "heirs and executors" - a renunciation which was found to render the bond moveable.

While in the defunct's lifetime the heir could only renounce particular rights, after the defunct's decease he could renounce the title of heir as such. Moreover, one case suggests that a mere *spes successionis* could be renounced after the succession was opened. In *Wood v. Blair* (1632, M.13899), the younger son was charged by the defunct's creditors to enter as heir or to renounce the estate. The defender's plea that he had an elder brother, who was the true heir-apparent of the defunct and the appropriate defender, was rejected by the Court, obliging the younger brother to renounce the inheritance nevertheless. This case may be connected with Craig's privileged treatment of renunciations of rights made in court (*supra*, pp.133-134), which he himself took from the *Ius Commune* (*supra*, p.115).

So far, the last case seems to be the only one where the *Ius Commune* rules on the form and requirements of renunciations might have held any ground in Scotland. No cases have been found where the distinction between a unilateral renunciation and a mutual agreement, so important in the *Ius Commune*, was made; in fact, there was unlikely to be any difference considering the weakness of the doctrine of privity of contract in Scotland (*supra*, n.455). There are no cases to suggest that a renunciation of future succession was to be made by a religious oath at any point of Scottish history.

As to another criterion of the renunciation's validity at Civil law – receiving of the hereditary share's equivalent by the renouncing heir - there are two cases which suggest that the provision of an equivalent could only make things worse for the heir in Scotland. In *Meidhope v. Sir Hepburn's Son* (1636, M.9691), the heir renounced the right to 'heirship moveables' during the father's life in return for the provision of specific goods by the father. His father's creditor attempted to prove that the son's

acceptance of that equivalent to ‘heirship moveables’ constituted *gestio pro herede* for the son, making him liable for the father’s debts. The pursuer failed, but a similar argument was presented in *Scott v. The Heirs of Auchinleck* (1666, M.9693), except in that case the equivalent was provided by the heir-male, not by the defunct himself, and the female heirs avoided representing the defunct only by proving that the provision received by them was unrelated to the heirship they renounced. It seems these attempts by creditors were inspired by analogy to the *perceptio hereditatis* doctrine, by which a next heir in Scotland was made liable for the defunct’s debts if he received any heritable property from the defunct for a lucrative cause, without any proof of fraud being necessary.⁶⁶⁰

4.4. *Pacta de successione conservanda, pacta de successione perdenda and pacta de hereditate viventis in Scots Moveable Succession.*

In this section, the various forms of *pacta successoria* occurring in Scots practice will be analyzed in a different order from that of heritable succession. The judicial practice on this topic was relatively abundant, but its clarity varied depending on the type of the *pactum*. The Scots position on *pacta de successione conservanda* seemed quite clear since the early times. In its treatment of *pacta de successione perdenda*, it was somewhat ambiguous. The *pacta de hereditate viventis*, despite the seemingly clear position of the Institutional writers (*supra*, p.111), seldom appeared in case law and seem to have been a matter of some controversy.

Pacta de successione conservanda & perdenda were both usually dealt with by the courts in the context of ‘forisfiliation’ – a medieval concept, possibly of Norman origin, designating the separation of the child from the parent’s family, usually joined with receiving a material provision from the father.⁶⁶¹ The original effect of ‘forisfiliation’ was mainly the exclusion of the child from the “Bairn’s part” of the testator’s estate, the natural obligation of the father to support the child

⁶⁶⁰ Craig, *Jus feudale*, II.17.4.

⁶⁶¹ *Reg.Maj.*II.33; Anton, ‘Parent and Child’, 120-121.

becoming effectually extinguished.⁶⁶² Initially the bairns, especially the daughters, were deemed to be ‘forisfamiliaried’, with their ‘legitim’ discharged, when they contracted a marriage, after receiving a dowry or another marriage provision from their father.⁶⁶³ Gradually, the separation of the bairn from the family and the discharge of the “Bairn’s part” became distinguished in practice;⁶⁶⁴ from the time of Stair the standard opinion was that the discharge of ‘legitim’ was never presumed but was to be made expressly.⁶⁶⁵ Scottish agreements on preserving succession, especially in the first half of the 17th century, were usually attached to marriage contracts and bonds of provision to children, providing that the child remained “a bairn of the house” or promising a share equal to that of other siblings. The Scots agreements “*de perdenda successione*”, to the contrary, ensured that the bairn became fully forisfamiliaried.

However, from early times, agreements on preserving succession played a much wider role than that of exclusion of ‘forisfamiliaried’ and of collation.⁶⁶⁶ Such agreements in Scotland bound the testator. If the testator promised a daughter to bestow on her a share of succession equal to those of the other children, he could not prejudice this promise even by *inter vivos* provisions to her siblings, as was established in *McMath v. McCall* (1619, M.12847). *Finlayson v. Veitch* (1622, M.12848) settled that such a promise charged not only the “Bairn’s part” but also the “Dead’s part”, entitling the bairn to a particular share of the defunct’s moveable estate. The last case is also notable in that the daughter-creditor died before obtaining confirmation as the father’s executor – it was the daughter’s executors who claimed the relevant share on her behalf. Long before a similar rule was established for intestate moveable succession in general (*Bells v. Wilkie*, 1662, M.9250), *Finlayson* held that the promise

⁶⁶² Stair, *Inst.* III.8.44-45; Bankton, *Inst.* III.8.16.

⁶⁶³ *Hamilton v. Wallace of Cragie* (1561, M.8178).

⁶⁶⁴ See *Smith v. Elleis* (1622, Dury 14), where the court held that the defunct’s daughters receiving of equal provisions from their father, without any discharge clauses, did not constitute their ‘forisfamiliaried’, but allowed to treat them “as if forisfamiliaried” for other purposes.

⁶⁶⁵ Stair, however, mentions that the Commissaries in his time presumed the discharge of the “Bairn’s part” if all the testator’s children were endowed and married (Stair, *Inst.* III.8.44-45).

⁶⁶⁶ For the cases where the agreement on preserving succession had the effect of excluding the collation of the provision the bairn received with the testamentary share, see: *Ross v. Kelly* (1627, M.2366), *Corsan v. Corsans* (1631, M.2367=M.12849).

to a child to preserve succession created a vested right, transmissible to child's successors irrespective of the confirmation and execution of the testament.

Also notable as regards Scottish clauses to preserve succession is that, unlike similar clauses and pacts in the *Ius Commune* (*supra*, p.123), they were considered a matter between the testator and the contracting child only, in which other bairns had no interest and which they could not challenge. In *Corsan v. Corsans* (1631, M.2367=M.12849), the defending siblings of a 'forisfamiliaried' sister attempted to block the latter's right of succession on the ground that her agreement to have a share equal to her siblings could not concern the defenders. The agreement, allegedly, was made with other siblings of the pursuer in mind, who were long dead, while the defenders were not yet born at the time of its making. However, the Lords interpreted the agreement broadly, so that the provided daughter retained the right of succession together with all other competing siblings.

So much on agreements to preserve succession. The practice on *pacta de successione perdenda* in moveable succession was much more abundant. In most cases, as was mentioned above, it was about children renouncing their right in the "Bairn's part". The first case where the intestate share in the "Dead's part" was explicitly renounced comes from 1686.⁶⁶⁷ Although such renunciations were usually attached to the receiving of provisions by the children, there is no clear evidence that the giving of an equivalent was necessary at any historical point, which conforms with the case law on heritable succession (*supra*, p.137).

However, there was a substantial difference from the renunciation of heritable rights. While in heritable succession particular future rights, belonging to the heir, could be renounced in various ways, so they might revert back to the heir or accrue to other successors (*supra*, pp.134-136), a renounced share in the "Bairn's part" always accrued to other bairns. Until the late 18th century, the judges sought to follow strictly the rule that, at the moment of the testator's death, his goods were to be divided into two or three equal parts, even if some of the testator's children had discharged their 'legitim'. The judges usually rejected claims that the discharge of the bairn was meant

⁶⁶⁷ Inglis v. McMorran, M.9254.

to entitle the father to dispose of the share, not to enrich the renouncer's siblings.⁶⁶⁸ If all the children renounced their 'legitim', the "Bairn's part" ceased to exist and the testator obtained *libera facultas testandi*; however, if he died intestate, the same children could divide the estate among them with their shares undiminished.⁶⁶⁹ It was also debated whether the discharge of *jus relictæ* increased the children's third to the half of the estate (and *vice versa*), with dominant opinion obviously being positive.⁶⁷⁰ Thus, the right of 'legitim' was less "liquid" than heritable rights in this respect.

In *Hogg v. Hogg* (1791, M.8193), the Outer House judge, dealing with the case, attempted to change this attitude. In the interlocutory decision, it was held that the 'legitim' was a right assignable to anyone in the testator's lifetime. Therefore, the Lord Ordinary held that the renunciations by the testator's daughters were intended to be in favour of the testator's testamentary freedom, not in favour of the only non-renouncing daughter. However, the final decision of the Court of Session's Inner House overruled the interlocutor, holding that the entire "Bairn's part" accrued to that non-renouncing daughter. In this "illiquid" form 'legitim' was preserved in subsequent practice, although the law on 'approbate and reprobate' allowed some flexibility if 'legitim' was renounced after the testator's decease.⁶⁷¹

The discharge of the intestate share of the 'next-of-kin' in the testator's "Dead's part" appears more seldom in the reports and was, it seems, seen as something more extraordinary. As was mentioned above (*supra*, pp.128-129), in the later case law, the renunciation of the intestate share was not presumed included into a general discharge.⁶⁷² There was, however, a case where the renunciation of "everything she might crave" after the testator's death was found sufficient to discharge the right to be the executor-dative in competition with the brother.⁶⁷³

⁶⁶⁸ McGill v. Countess of Oxenford (1671, M.8179), The Nisbets v. Nisbet of Dirleton (1726, M.8181, this case concerned the renunciation of *jus relictæ* by the wife).

⁶⁶⁹ Chisholm v. Chisholm (1672, M. 5046=8180).

⁶⁷⁰ Stair, *Inst.*III.8.46; The Nisbets v. Nisbet of Dirleton (1726, M.8181).

⁶⁷¹ M'Laren, *Wills and Succession*, vol I, pp.481-482.

⁶⁷² Anderson v. Andersons (1743, M.5054).

⁶⁷³ Equibister v. Defender (1694, M.8181).

Unlike with 'legitim', not only children but also further descendants could be admitted to the intestate succession to the "Dead's part". This could only happen if all the testator's children were dead, so that the grandchildren were succeeding equally. There was no succession by representation in moveables, as the intestate successors were to be the testator's 'nearest-of-kin', being of equally close degree of proximity.⁶⁷⁴ Despite controversies among the judges, a renunciation by a bairn was found to exclude that bairn's descendants as well, barring them from competing with the testator's other children and their descendants.⁶⁷⁵ This solution was quite paradoxical. While the Civilian authors held that the renunciation of succession by a child did not inhibit succession by representation,⁶⁷⁶ here in Scotland the child's descendants, barred from succession, were not even considered his or her representatives. It followed that the testator's grandchildren ceased to be his 'nearest-of-kin' just because of their father's renunciation. In this, Scots intestate moveable succession was different from heritable succession, where an 'unserved' heir could not bar his own children from serving to the original defunct.

More understandable seems another rule, which presumed that a child's renunciation of the intestate succession was in favour of his or her siblings *in familia* and their descendants but not in favour of the testator's collaterals or the fisc.⁶⁷⁷ Similarly to Civil law, the "right" of future intestate succession was not a vested right, not even a *spes successionis*. Thus, the renunciation of future intestate succession was, essentially, a promise not to compete with fellow successors, which was not presumed to include remoter successors.

That the future intestate succession was not considered an abstract right or a 'spes' is confirmed by other observations. Firstly, in the early case *Bells v. Parks* (1636, M.3593), the renunciation of such succession was deemed not sufficient to constitute an onerous cause for a binding contract. In this case, the daughter made a contract with her father, promising to pay him 300 merks, the father in return

⁶⁷⁴ Stair, *Inst.* III.4.24.

⁶⁷⁵ *Campbell v. McLeod* (1731, M.9263, divided court is reported); *Campbells v. Lady Inverliver* (1738, M.8187=9265).

⁶⁷⁶ Bald., C.6.20.3.

⁶⁷⁷ *Campbells v. Lady Inverliver* (1738, M.9265) – see the court's final decision.

renouncing any kind of succession that might befall to him from her. However, the daughter, upon her deathbed, disposed of the same sum by way of a legacy. In the ensuing controversy between the testator's surviving father and the legatees, the Lords decided in favour of the legatees. They held that the daughter's promise to the father was not a binding contract but just a "testamentary clause", which was revocable by the granter; the father's claim to the contrary was dismissed as "unproven".

The reasons behind the Court's decision are not expressed in the report. Indeed, the decision seems to contradict earlier case law, which ruled that an onerous deed could not be a testament or a *donatio mortis causa*.⁶⁷⁸ The reasons, however, may be deduced from the circumstances of the case. The father renounced the future "right" of succeeding to his daughter. This "right" could become vested only if the daughter predeceased the father without a testament and without leaving any descendants and siblings.⁶⁷⁹ Such an opportunity was, apparently, quite slight, which might possibly be the reason why renouncing it was not seen as a thing real enough to qualify as an onerous cause. The father did not renounce anything from which his daughter could not have excluded him. The judges were thus aware of the idea that the future intestate succession could not be considered a "right" in the strict meaning.

Another instance where the effect of the renunciation of succession was tested was in *Inglis v. McMorran* (1686, M.9254) – perhaps, the most important case on the issue. This case is already interesting just because there the renunciation of succession was made by a sister to her brother, not to the mother to whom they were succeeding. Within the lifetime of their mentally disabled mother, Thomas Inglis provided his sister, Janet Inglis, with a dowry, in return for Janet's renouncing of her future intestate succession to the mother in favour of Thomas. After the mother's decease, Thomas confirmed as an executor-dative to her. However, he did not include the entire moveable estate in the inventory: he omitted a debt for a significant amount, owed to the mother by her brother and curator. Without confirming that particular debt, Thomas discharged the debtor of a large portion of it. Afterwards, Thomas himself died. As it turned out, Thomas died a 'rebel under the horn'. His sister, Janet, obtained from the

⁶⁷⁸ See, e.g.: *Curriehill v. Executors of Currie* (1624, M.2937=M.3591).

⁶⁷⁹ Craig, *Jus feudale*, II.13; Stair, *Inst.* III.4.35.

Chancery a 'gift' of his 'escheat',⁶⁸⁰ which entitled her to take as much from his estate as to "make up for the renunciation" she previously granted to him. Learning of the debt Thomas omitted as the executor of their mother, she confirmed herself as an executor *ad omissa* to the mother in respect of the debt. After she sued the debtor, he pleaded Thomas's discharge in defence.

Much of the debate in this case was devoted to whether the discharge by Thomas was effectual, which, in turn, depended on whether the executor had a vested right in the omitted property before it was "eiked" (included into inventory), whether a partial *aditio hereditatis* was possible in Scotland, etc. That question will be dealt with later in this work (*infra*, s.6.2, 6.4): in line with most of the case law of the time, the Court decided that the executor had no vested right in the omitted property and that partial *aditio hereditatis* was possible.⁶⁸¹ More important to us at this point is the debate on the effect of Janet's renunciation – did it preclude her from confirming *ad omissa* and challenging Thomas's discharge?

Surprisingly, the parties to the litigation showed essential agreement on the legal nature of the renunciation. Both parties agreed that the renunciation did not pass any "positive right" from Janet to Thomas. The renunciation, at best, had only a "*non repugnantia*" effect: the sister promised not to compete with the brother and not to challenge his right and actions in respect of the estate; she would not have been so obliged if there had been a third competitor for the executry.⁶⁸² The parties, nevertheless, drew different conclusions from that. The defender-debtor claimed that Janet obliged herself not to dispute any of Thomas's actions, even the ineffectual ones, such as his discharge. Janet, after her initial attempt to have her renunciation of the "*spes*" to the living testator completely invalidated,⁶⁸³ held that this obligation was ended with Thomas's death. Moreover, she sought to draw analogies with heritable

⁶⁸⁰ By virtue of 'single escheat', the Crown was entitled to confiscate all the goods of an uncooperating debtor (a "rebel"). This right of the Crown was usually sold to private persons in the form of the 'gifts of escheat'. In fact, it was a separate type of moveable succession (Stair, *Inst.* III.3.17-19).

⁶⁸¹ The case law, however, changed in the mid-18th century, when the 'next-of-kin' was deemed eligible to accept payments and the bonds of corroboration even before the confirmation (Spence v. Wilson (1751, M.14399=14418)).

⁶⁸² The defender admits this on page 9255 (report by Harcarse), the pursuer – on page 9255 (Harcarse) and 9259 (P. Home).

⁶⁸³ This plea by Janet, reported by Harcarse, was left unanswered and undecided upon.

succession and (in seeming contradiction with her own claim that no positive right was transferred!) compared her renunciation with an assignation of a *jus apparentiae* by an heir-at-law. Just as an heir-apparent could not complete the alienation before the ‘service of heir’, her renunciation was also not complete until Thomas acquired her renounced share.⁶⁸⁴ As he did not acquire the debt in question by including it in the inventory, it, allegedly, reverted back to Janet.

The Court’s decision was somewhat “Solomonic” in that it divided the omitted and discharged debt into halves. One half was a part of the share of succession that Janet renounced to Thomas. This half was deemed discharged, as Janet could not go against her renunciation in respect of it. The other half, corresponding to Thomas’s own share, was not covered by Janet’s renunciation and so, given that Thomas had never been vested of it and could not have validly discharged it, this half was still due and belonged to Janet as the ‘donatar’ of Thomas’s ‘escheat’.

Although the decision might look like a compromise, it definitely has logic in it. The most important detail in it is the implied consensus of the litigants on the legal nature of Janet’s renunciation of succession. The renunciation did not transfer any “positive right” to Thomas – otherwise this right would, probably, have fallen to Janet as Thomas’s ‘donatar of escheat’ and, thus, successor. Neither was it just a personal obligation of Janet to Thomas – because then it would possibly have had no effect as to third parties or even have been extinguished by Janet’s succeeding to Thomas. The renunciation here is somewhat akin to Baldus’ renunciation of succession (*supra*, p.123), being a “concession” of future succession to the particular “co-heir”. At the moment of renunciation, Janet’s future succession did not yet even qualify as a ‘*spes*’, but after the mother’s death the renunciation became the vested right of Thomas, remaining in force even after his own death. It is also logical that Thomas’s “own” half was deemed not included in the renunciation. For Janet it was just a vague future possibility, conditioned on her succeeding not only to the mother but also to Thomas as his ‘donatar of escheat’. While Thomas was alive, this possibility was neither a vested right nor a proper ‘*spes*’ for Janet. Janet’s renunciation could not be presumed

⁶⁸⁴ This “*jus apparentiae*” seems to be the same as the “apparency of succession”, mentioned in *Grey v. Udney & Maitland* (1694, IV B.S.142).

to include the obligation not to succeed to Thomas himself; this is why, after his death, Janet was free to confirm as executor *ad omissa* to the mother, in her capacity as Thomas's successor.

Enough is said so far on the renunciation of future moveable succession. What about *pacta de hereditate viventis*? We have already seen (*supra*, p.111), that the Institutional writers from the late 17th century were quite confident that such pacts were allowed and valid in Scots law. It is surprising that, no explicit cases were found on this topic that might be a clear example of the assignation of the future right of 'legitim' or of the intestate moveable succession and, at the same time, be clearly distinguishable from the renunciation of succession. Surprisingly enough, even what was considered a landmark case on the *pacta corvina* in Scots law does not really qualify as such.

That case is *Aikenhead v. Bothwell* (1630, M.9491). It is reported by Auchinleck and by Dury. Both reports stress the acceptability of *pacta de hereditate viventis* as the key issue at stake: the losing party claimed that the contract under controversy was such a *pactum*, invalid at Civil law. Dury's report makes an informed reservation on this question, noting that the regulations of Civil law on such *pacta* are more complicated, sometimes allowing them with the testator's consent. Nevertheless, the decision of the judges seems unambiguous: "*the civil law in this case has no place... as in tailzies and renunciations of the bairns' part of gear, and others...*"

However, the circumstances of the case are quite peculiar. The father, making a marriage contract for his daughter, inserted a clause providing that the daughter would remain "a bairn of the house", i.e., would succeed to the father in 'legitim' and as a 'next-of-kin'. Later on, while the father was still living, the daughter's husband (who was vested in all of his wife's moveable property *jure mariti*) assigned this "bairn of the house" provision to his wife's brother, his brother-in-law, in return for a money bond payable at the father's decease. The term of payment fulfilled, the brother-in-law refused to perform his bond, pleading that their contract was a *pactum de hereditate viventis*.

The obvious peculiarities of this case are the following. First, it was not just the intestate succession that was being assigned – it was a clause *de successione conservanda*, which, as was established above (*supra*, pp.138-139), was considered a regular contractual debt in Scots law. Second, the succession is not assigned to an extraneous person, but to the testator’s own son – the daughter’s co-successor. This makes this contract reminiscent more of a *pactum de hereditate perdenda*, a renunciation of succession in favour of another successor, rather than an “assignment”. Finally, it was the brother, the “assignee” in question, who was trying to invalidate the transaction in order not to pay the price.

This means that the Lords in the case were deciding on the validity of the contract in general, not on the question whether the future succession was “assignable” and “transmissible”. What Civil law writers might think of such a contract, is an interesting question: being a renunciation of succession for value, or, more like, a renunciation of the benefit of the pact on preserving succession, it might have “chances” at Civil law. Challenging it only on the ground that it was “immoral” at Civil law was, anyway, a wrong tactic for the defender. For better or for worse, the Lords’ rejection of the Civilian “moral” argument became the most conspicuous outcome of the case. This was the reason why it was seen by the later authors as “allowing *pacta corvina*” at Scots law (*supra*, pp.126).

No other cases from before 1800, found so far, decide explicitly enough in favour of assignments and other types of *pacta corvina* in moveable succession. In the absence of “morality” restrictions, the moveable succession obviously could (and still can) be bargained for by way of an executory contract, to be performed when the right of succession vests. It is unclear, however, whether the assignment of future succession could have an immediate effect, i.e., be intimated before the testator’s death. In *Hogg v. Hogg* (1791, M.8193), as was mentioned above,⁶⁸⁵ the interlocutory decision suggested that the right of ‘legitim’ was freely assignable in the testator’s life, but the final decision in that case overruled such approach. Further research in the post-1800 case law might shed more light on the modern position of Scots law on this matter.

⁶⁸⁵ *Supra*, p.140.

4.5. Marriage Contracts with Succession Impact.

In the strict meaning of the legal term, the “marriage-contract” in Scots law means an ante-nuptial agreement, establishing the regime of patrimonial relations in the marriage.⁶⁸⁶ They existed from “comparatively early times”⁶⁸⁷ in Scotland. Although marriage contracts in the 17th century mainly provided for mutual contributions of the spouses and their investment into heritable property and could not yet, for example, exclude the husband’s authority over the family property (*jus mariti* and *jus administrationis*),⁶⁸⁸ they were in this period expanding their scope, becoming the instrument to change the default legal regime of family property and the succession to it. In this, the Scots marriage contracts were perfectly in line with the *Ius Commune* and the Continental approach in general, allowing inter-spousal agreements, especially those in feudal context, to establish special orders of succession in a contractual way (*supra*, pp.124-125).

One of the most prominent functions of marriage contracts was to make provisions for the children of marriage, either before or after the dissolution of a marriage. In this respect, Scots marriage contracts held a unique middle ground between contracts and succession. It should be noted that the legal writers did not pay significant attention to this feature of marriage contracts. J.D. Wilson in his 1894 article⁶⁸⁹ criticized how rigid Scots law had become by his time, in its strict distinction between the “pactional” provisions for children (which were irrevocable even with the spouse’s consent) and the “testamentary” provisions for extraneous persons (which were freely revocable by the husband). Wilson proposed that a distinction between the “onerous” and the “lucrative” provisions might be a more appropriate one, but he stopped short of realizing that the most logical way of solving that problem was to recognize the marriage contract as a unique transaction, where the “onerous cause” of provisions was provided by the birth of children. Going further back in time, the

⁶⁸⁶ J. Burns, ‘Marriage Contract’, *Encyclopaedia of the Laws of Scotland (1933)*, vol IX, 432.

⁶⁸⁷ G.C.H. Paton, ‘Husband and Wife – Property Rights and Relationships’, *ISLH*, 114.

⁶⁸⁸ *Ibid.*

⁶⁸⁹ J.D. Wilson, ‘Successional Provisions in Marriage-Contracts’, *JR*, vol 6 (1894), 119-121.

Institutional writers also disregarded the special position of the marriage contract, often treating it, together with other forms of provision for children, in the rubrics on heritable succession.⁶⁹⁰ This excessively analytical approach of the legal authorities to the marriage contract brought some paradoxical outcomes (*infra*, p.152).

Debates over the effect of the provisions to children in marriage contracts existed as early as the late 16th century. As already noted, Th. Craig refers to marriage contracts as the exception from the *pacta successoria* prohibition, claiming that the Scots attitude to them followed French practice.⁶⁹¹ Elsewhere, Craig reports the case of *Lady Pitfirran v. Hepburn of Waucton* (*Jus feudale*, II.12.6, II.14.10, date unknown), where a marriage contract between the spouses and the wife's father contained a provision in favour of the children of the marriage. After the wife's decease the contract was rescinded by the surviving husband and his father-in-law. However, the only daughter of the said marriage subsequently sued the father's son of first marriage for the fulfillment of the contract, claiming that she had a vested *jus quaesitum* in the contract since the time of her birth, so that her right could not be prejudiced without her consent. This particular case ended with a compromise, with no decision on the substance given by the court. The daughter's argument, however, resonates strongly with another passage by Craig, where he contends that a marriage contract provision in favour of a future child is valid, as it can hardly create any *votum captandae mortis* in the child subsequently born in anticipation of the provision.⁶⁹²

The right of the child here also resonates, though in a remoter way, with the Civilian rules on dowry. Dowry at Civil law was mainly a matter of the relationship between the husband, the wife and the provider; but the children of marriage were considered the main beneficiaries of the dowry.⁶⁹³ The children did not have any *jus quaesitum* in the dowry while the parents were alive, except, in a few instances when

⁶⁹⁰ Stair, *Inst.*III.5.19; Mackenzie, *Inst.*III.7.21; Erskine, *Inst.*III.8.38-40. Bankton, however, is dealing with the marriage contracts in the context of marriage (*Inst.*I.5.15).

⁶⁹¹ *Jus feudale*, II.17.13.

⁶⁹² *Jus feudale*, *ibid.*

⁶⁹³ See Pomponius in D.24.3.1, who mentions the facilitation of procreation of children as the main function of the dowry.

they could sue their father for the dowry, they had an independent title to it, not merely by succession, and their title was considered onerous.⁶⁹⁴

However, the notable difference between the Civil law and the Scots law was that, in the absence of *patria potestas*, it was much easier in Scots law for children to sue their parents. We start to encounter such instances early. In *Hewtam v. Baillie* (1615, M.13897), an inhibition⁶⁹⁵ served on the marriage provision by the father to the son was mentioned. Moreover, in the same case the provision of the son from the marriage contract was characterized as a “*titulus singularis*”, so that the heir could rightfully renounce the inheritance while reserving the marriage contract provision. A marriage contract thus made the child a “creditor” in some respects, able to force the obliged parents into compliance. And the obligation of a parent to the child was considered onerous – this is why *Hewtam* lies in contrast to the contemporary case *Nair v. Nair* (1613, M.6943), where an inhibition served upon the gratuitous obligation to grant a tailzie was found null.⁶⁹⁶ Later cases⁶⁹⁷ left no doubt that a child could sue and impose diligence upon the obliged father in the father’s life, in order to secure his or her provision after the father’s death.

Despite this, marriage contracts were not “pure” contracts and retained their “testamentary” elements, remaining a type of *pacta successoria*. Thus, a general clause, “not to prejudice the heirs of marriage”, was found by the Lords not to impose any additional burdens besides leaving to the heirs what the defunct had at the moment of death, irrespective of the inhibition served.⁶⁹⁸ Even if there were burdens on the father within his life, they could never extend as far as to prevent the father from

⁶⁹⁴ See Bart., rep ad D.24.3.24pr, par. II qu. 10: if the father was prodigious and on the verge of insolvency, while the mother was excommunicated and thus unable to sue, the children could sue their father in their own name. Why their title was considered “onerous” is not revealed; it may be, similarly to the Craig’s account, that their birth was considered a “value” they “acquired” the dowry for. See also: Jason de Mayno, *Lectura de actionibus*, Inst.Just.IV.6.6.

⁶⁹⁵ The inhibition was a legal diligence, which affected the debtor’s heritable property and forbade the debtor to alienate it in so far as it might affect the payment of the debt (Stair, *Inst.*IV.50.1-23).

⁶⁹⁶ It is, possibly, the same case to the one reported as “*Maver v. Maver*” in Hope’ *Minor Practicks* (*infra*, p.189).

⁶⁹⁷ Frazer v. Frazer (1677, M.12859), Panton v. Irvine (1684, M.12860).

⁶⁹⁸ Home v. French (1608, M.12886).

making reasonable onerous dispositions.⁶⁹⁹ In 1631,⁷⁰⁰ it was decided, probably for the first time, that a marriage contract could abolish the regime of community of goods between the spouses; the 1669 Act legitimated this practice, empowering Commissaries to demand the production of marriage contracts from relicts (widows).⁷⁰¹

It seems that the most significant doctrinal development in the marriage contracts that happened in the 17th century came when courts and legal writers started to classify the provisions of marriage contracts as heritable succession⁷⁰² and apply its rules to them. This was probably facilitated by the development of the concept of “designative heir”. The term itself was, it seems, first mentioned in *Carnegy v. Blair* (1693, IV B.S.112), although the rule that the term “heirs of marriage” means “children of the marriage” and does not coincide with the strict definition of the “heir” seems to have developed earlier.⁷⁰³ In *Watt v. Forrest* (1702, M.2954) the identification of “heirs” with “children” was attributed to the influence of the Continental Feudal law; and this was not without reason.⁷⁰⁴ The identification entailed that a provision to the “heirs of marriage” in the marriage contract referred to the children of marriage, even if not truly served as heirs, but such entitled children were deemed analogical to “heirs” in some way. According to Dirleton, the “bairns of the marriage” were *ad instar heredum* and, effectually, were the same as the ‘heirs of provision’ in a wider sense.⁷⁰⁵

If the children of marriage were to be treated as ‘heirs of provision’, then the marriage contract provisions for them were the obligations to make the children ‘heirs of provision’, similar to the obligations of tailzie (*infra*, s.5.2, 5.3). Consequently, a provision in the marriage contract was supposed to be a strong and irrevocable *inter*

⁶⁹⁹ *Drummelziar v. Earl of Tweedall* (1677, I B.S.795) – a rather late case, but the Lords pointed out that the question was not raised before.

⁷⁰⁰ *Chapman v. Gibson & Fingask* (1631, M.8163).

⁷⁰¹ An Act concerning the confirmation and quots of testaments (*RPS*, 1669/10/56).

⁷⁰² See *supra*, pp.147-148.

⁷⁰³ See, e.g., *Turnbull v. Colmeslie* (1630, M.2938). This case, however, dealt with the definition of the word “children”, not “heirs”.

⁷⁰⁴ The learned *Ius Commune* authors largely followed the opinion of Accursius that the expression “*sine heredis*” in a feudal context actually meant “*sine liberis*” (D.36.1.18(17).8, et ibi Glossa, Bart. et al; M. Ryan, op cit, 152-153).

⁷⁰⁵ Dirleton even compares them with the Civil law *bonorum possessores*, although the comparison is superficial at best (Dirleton, ‘Heirs of Provision and substitute’, *Some Doubts...*, 87).

vivos contractual obligation, making the bairn a creditor (with a “*jus crediti*”) of his parent. The problems with such an approach were obvious. Unlike a bond of tailzie, a marriage contract provision was made in favour of children yet unborn – the circle of persons entitled to the provision could usually be ascertained only at the time of the dissolution of marriage by the parent’s death. This is why the Lords considered an obligation from the marriage contract as creating just a *spes successionis* in respect of the children. A child, peculiarly, could sue the father to secure or implement the provision, and this would turn the provision into a vested *jus crediti*; a provision would also be vested in the child’s person after the father granted a bond of provision to that specific child or if the child just survived the father.⁷⁰⁶ However, if the child predeceased his father before a bond or a legal diligence followed, no vested debt was created and nothing was transmitted to the child’s own successors.

We can see here that the provided children constituted strange kinds of “creditors”: before the provision was vested, they only had a non-transmissible *spes successionis*. But this does not tell the whole story – the *jus crediti* of the children would eventually evolve into not just two, but into three types! Initially the judges implied that, simultaneously with vesting, the obligation to provide became good as against the father’s creditors, with whom the children could compete after the father’s death. Thus, in *Creditors of A. Marjoribanks v. M. Marjoribanks* (1682, M.12891), the father promised to “employ” (invest) 20000 pounds Scots into heritable property in liferent for the father and in fee for the children. With the father dying before the fulfillment of the investment, the children attempted to compete with his creditors *pari passu*, going so far as claiming that they already owned a vested interest in the father’s estate, with the father being just a “fideicommissary fiar (owner)” of the money amount. The Lords rejected their claim, implying, nevertheless, that the decision would have been different if the children had had bonds of provision from the father or had served diligence on him. Similar implications may be found in other cases of the time.⁷⁰⁷

⁷⁰⁶ Clerk of Pennycuick v. His Sisters (1682, M.6330=M.12881); Creditors of A. Marjoribanks v. M. Marjoribanks (1682, M.12891).

⁷⁰⁷ See, e.g., Sibald v. Sibald (1677, M.12889).

However, considering that the purpose of the marriage contract was, essentially, to establish a succession regime and to make the children ‘heirs of provision’, a simple giving of the bond of provision was too easy a way to turn the children into full-blooded creditors. Thus, subsequent practice soon found (*Creditors of Marshall v. His Children*, 1709, M.12907) that the bond of provision was not sufficient to constitute a full *jus crediti*. The issue of whether the children of the marriage could compete with creditors remained hotly controversial throughout the 18th-century practice, with the parties debating the extent to which the children were “heirs” or “creditors”. By the 19th century the possibility of competition was limited to cases where the provision was payable in the parent’s lifetime or the child actually received a vested interest in his own name before the dissolution of marriage.⁷⁰⁸ There were, thus, three kinds of *jus crediti* the children might possess: a) a rudimentary one after birth; b) a vested one after a bond, a diligence or a dissolution of the marriage; and c) a full one, if the provision was fulfilled and the child became a “fiar” in the father’s lifetime.

However, the most paradoxical result of treating marriage contract provisions as “the obligation to make children heirs of provision” was a potential degradation of the child’s interest at the moment when the provision to invest money into heritable property was fulfilled. If an obligation of the parent was vested in the person of the child in the way described above but was not performed in the parent’s lifetime, it remained just a personal obligation, a *jus crediti* of the child. Thus, the child did not need to get either a ‘service of heir’ or a confirmation as executor to become fully entitled to sue, to assign and to transmit the obligation after the parent’s death.⁷⁰⁹ But what if the parent, as often happened, promised to invest an amount of money into a heritable asset, to which the children were to succeed afterwards? If he did not fulfill the obligation in his life, it remained a *jus crediti* and needed no ‘service’ or confirmation, as was already said. But if the primary obligation was performed and the asset was purchased, the child from that moment was only entitled to the asset as an

⁷⁰⁸ Erskine, *Inst.* III.8.40; M’Laren, op cit, vol I, p.416.

⁷⁰⁹ It seems to have first been established in *Wallace v. Wallace* (1665, M.9650=M.12857). A much earlier case *Hewtam v. Baillie* (1615, M.13897) features a son claiming a marriage provision promised to his father by his grandfather, but the manner of transmission in that case is unclear.

‘heir of provision’. So, he could only acquire a vested right in that asset after obtaining a ‘service of heir’! This was established in *Assignees of James Finlayson v. Jean Finlayson (aka Porterfield v. Gray, 1760, M.12874)*, although there were prior cases precipitating this outcome.⁷¹⁰ The paradox of this solution lies in that it becomes, to some extent, more profitable and convenient for the bairn that the provision is not fulfilled rather than fulfilled – the ‘service of heir’ entailed a liability for the defunct’s debts, administrative costs and other inconveniences. We see that while a marriage contract provision remained on the stage of personal obligation, it was progressing with time from the vaguer *spes successionis* to a more certain vested right. But when the personal obligation was converted into an item of heritable property, the direction of the development reversed, with the child’s right actually degrading!

This was, obviously, a result of the excessively analytical approach to the provisions in marriage contracts. The lawyers were eager to define their nature in the established categories of Civil and Scots law, trying to distinguish too strictly between the rights *in obligatione* and *in destinatione* and to apply contractual rules to the former and the rules of heritable succession to the latter. They were unable to see the marriage contract as a unique type of contract, blurring the lines between obligation and succession. This was, possibly, because the marriage contract, although known in the Continental learned literature (*supra, pp.124-125*), was, nevertheless, not developed well enough to provide a sufficient framework for the Scots lawyers to regulate it with.

That it was inappropriate to classify the marriage contract within heritable succession is further demonstrated by the fact that moveable property, disposed by it, did not follow the rules of heritable succession. In *Cumming v. Kennedy* (1697, M.6441=M.12881) a marriage contract appointed the children of the marriage the ‘heirs of conquest’ – i.e., entitled them to all new moveable property acquired during the marriage. With the father dead, his only daughter, surviving him but dying herself soon afterwards, was found to have acquired a vested right in the father’s *universitas*

⁷¹⁰ *Drummelziar v. Earl of Tweddall* (1677, I B.S.795); *Campbell v. Duncan* (1732, M.12885), *Anderson v. Heirs of Shiels* (1747, M.12868). Lord Bankton was mistaken in citing *Campbell v. Duncan* as an authority for holding that all provisions to children and heirs of marriage are vested automatically, without a ‘service of heir’ (Bankton, *Inst.III.5.22*). In *Campbell* the service was explicitly decided unnecessary only because the provision was not yet performed, while it would have been otherwise if it had been performed.

bonorum without either a ‘service’ as the ‘heir of provision’ or a confirmation as the executor. Vesting of her right entailed the acquisition of the dead father’s moveables by her husband via *jus mariti*. The husband eventually lost the lawsuit, nevertheless, due to an unrelated reason, but the judgment on the issue of vesting was clear. Bankton interpreted this case as dispensing with ‘service’ for all kinds of provisions (*Inst.III.5.22*), but, in fact, it was a special case about moveable property.⁷¹¹

Cumming could have been influenced by the 1690 Act,⁷¹² which took away the necessity of confirmation of testaments for some cases. However, there was an earlier precursor to the case - *Baird v. Robertson* (1681, M.3856). Unlike most of the cases so far discussed, it dealt with moveable succession proper. It featured a marriage contract that did not make a provision for future children. In this case, the father was a party to the daughter’s marriage contract, disposing to the daughter a half of all his moveable estate. After his death, the daughter intromitted with his estate. Later, she was sued by the father’s creditor as a “vicious intromitter”, having taken possession of the father’s goods without confirming as executor. In defence, she pleaded that she had already exhausted the value of the goods she intromitted with by paying another debt of her father. Despite the pursuer’s reply that she could not have lawfully paid that debt without a court decree, the Lords admitted the defence, as the defender paid the debt in “good faith”.

The reason behind the decision is not entirely clear. The case is notable in that it seems to go against the rules on “vicious intromission”, already established in the law of the time.⁷¹³ The case mentions that the daughter was eventually confirmed as the father’s executor after her intromission. It is not mentioned whether a year had passed after the defunct’s death.⁷¹⁴ Even more surprising is that the payment of the debt, unsecured by a decret, was admitted as a defence: Scots law was quite strict

⁷¹¹ The husband in *Cumming* distinguished the facts of the case from the earlier *Drummelziar v. Earl of Tweedall* (1677, I B.S.795) by pointing out that the latter dealt with heritable property, while *Cumming* was dealing with moveables.

⁷¹² *Supra*, p.96.

⁷¹³ Craig, *Jus feudale*, II.17.3; Stair, *Inst.III.9*.

⁷¹⁴ If it had not, her subsequent confirmation as executor might have purged her of the effects of “vicious intromission” according to the law (*infra*, p.238).

from early times in that only the debts recognized by the defunct or confirmed by a decret could be paid by the executor, not to speak of a “vicious intromitter”.⁷¹⁵

It seems that the marriage contract was the element that made *Baird* different. The marriage contract was a privileged type of *post mortem* disposition, which entitled the disponee to take the defunct’s goods without obtaining confirmation and becoming a “vicious intromitter”. Admission of the defence of paying out the debt in good faith is accordingly also understandable, as the disponee here is similar in status to a ‘donatar of escheat’, ‘donatar of bastardy’ or another Crown privilege holder:⁷¹⁶ they all were liable only *secundum vires* of their intromission not because of making an inventory but due to the fact of their intromission itself. The privileged character of the marriage contract is also proved by the case *Gallatly v. Scot* (1683, M.3857), where the debt from a marriage contract was recognized as “privileged” in the sense that it did not need a decret to be paid by the executor.⁷¹⁷

The several cases last cited prove that the marriage contract had special properties in the field of moveable succession. In fact, it is hard to classify the disponees from a marriage contract as anything more specific in status than just generic “intromitters”. The “intromitters”, without an adjective “vicious”, were prominent in Early Modern testaments, with testators often giving instructions to their “executors and intromitters” to pay the debts and legacies.⁷¹⁸ The executors were often also appointed “universal” or “special intromitters” by the testators.⁷¹⁹ Disponees and provided children in marriage contracts, it seems, together with “donatars of escheat”, were the separate types of such “intromitters”. It was the original, the simpler paradigm of the marriage contract. The Scots lawyers, however, were unable to articulate it, eventually classifying marriage contracts within heritable succession and the provided children as the ‘heirs of provision’ or “of conquest”. This complicated the law, creating an excessive differentiation between various effects of the marriage contract.

⁷¹⁵ Stair, *Inst.* III.8.66; *infra*, p.241.

⁷¹⁶ The Crown and the Crown’s assignees were liable for the debts of a *bona vacantia* defunct only *ad valorem* of the estate intromitted with (Mackenzie, *Inst.* III.10). This was almost identical to the similar *Ius Commune* rule concerning the imperial fisc (D.49.14.1.1, et ibi Bart).

⁷¹⁷ The case report, however, mentions a case to the opposite effect from 1688.

⁷¹⁸ See, e.g., CC8/2/62, 28 March 1639, case of Gilbert Sommerwil.

⁷¹⁹ E.g., CC8/10/3/9/7.

It is time for a short summary on the relevance of the discussion of *pacta successoria* in Scots law. On the one hand, the moral considerations of the *Ius Commune*, which brought a prohibition of bargains over a living person's estate, have never taken hold in Scotland. The fear of *votum captandae mortis*, despite its sympathetic treatment by Th. Craig, seems to have never been of any practical importance. The attempts of some litigants, referring the *Ius Commune* authorities on the "immorality" of such bargains, have never been successful.

On the other hand, the *Ius Commune* rules on vesting and the associated restrictions on disposability of unvested rights were influential in Scotland, both through Craig's exposition and directly. Thus, despite the certainty with which the Scottish authors were talking about the validity of *pacta corvina*, the available case law on heritable and moveable succession, until, at least, the late 18th century, does not provide sufficient support to the idea that a right of future succession could be assigned. It could be given to a procurator or promised in future terms, but that was possible in Civil law as well.

The renunciation of future succession in Scotland shows similarities with the *Ius Commune* in that it could have an immediate effect, but was to be made expressly, not implicitly. It is notable how the "more vested" rights, like those of heritable succession or of 'legitim' in moveable succession, could be renounced in a more abstract way, completely denuding the renouncer, while the future intestate moveable succession was not deemed a "positive" right, so it could only be renounced by promising not to compete with other successors.

Agreements to preserve intestate moveable succession in Scotland were not only valid but even could turn succession into a vested obligation. This essentially followed the spirit of the *Ius Commune* in its *mos gallicus* incarnation.

In its treatment of marriage contracts, Scots law was initially following the *Ius Commune* approach in treating them as privileged contracts, transcending the borders between obligation and succession. However, the poor development of the topic in the

Ius Commune possibly pushed Scots lawyers into dividing marriage contract provisions into “obligatory”, “testamentary” and various shades of intermediate types. This overcomplicated the law and brought some paradoxical results.

Chapter V. Destinations and Substitutions

5.1. Fideicommissary Substitutions in the *Ius Commune*.

This section explores the forms by which a “subsequent succession” could be achieved in Civil law. A ‘subsequent succession’ is any situation where the testator provides not only for the succession to him(her)self but also for the further succession to his own successors.⁷²⁰ The expression “fideicommissary substitution” in this chapter has a wide meaning, covering the main form of subsequent succession used in the Civil law. Strictly speaking, this term was used by the *Ius Commune* authors to designate the type of a textual clause in the last will: a particular clause, “substituting” one successor to another, could be interpreted as either a ‘vulgar’, a ‘pupillary’, an ‘exemplary’ or a fideicommissary substitution, or several of them together (“compendious substitution”).⁷²¹ The interpretation of a particular substitution depended heavily on its wording.⁷²² The term “fideicommissary substitution”, in strict meaning, did not designate the process of subsequent succession itself, which was usually called simply “*fideicommissum*”.

A simple ‘vulgar’ substitution at Civil law did not create a subsequent succession: the substitute did not succeed to the institute but only to the original testator. It was different in case of a pupillary substitution. If a testator appointed a substitute to the child under his *patria potestas*, then, if the child died before reaching “puberty”,⁷²³ the substitute became an heir to the child, not to the first testator (Inst.Just.II.16pr). This was logical, considering the child could not make his or her own testament before reaching puberty.⁷²⁴ This was one of the only two cases when

⁷²⁰ A. Dutta, ‘Succession, Subsequent’, MPEEPL, vol II, 1631-1634.

⁷²¹ There was also a reciprocal substitution, called *breviloqua*, when several people were substituted to each other; such substitution was deemed to contain other kinds of substitution in it (L. d’Alesme, *Tractatus in materiam substitutionum*, XV, CI, CVI, CXX). Other scholars also distinguished the “military” substitution, which was only available to soldiers and had the same effect as the fideicommissary one (J. Voet, *Commentarius ad Pandectas*, D.28.6, XXXVI).

⁷²² Thus, the words might be “direct” (directly entitling someone to succession) or “oblique” (obliging the institute to transfer the property to the institute. In doubt, the words were usually presumed direct (d’Alesme, op cit, XV).

⁷²³ 14 years for men and 12 years for women (D.28.1.5).

⁷²⁴ D.28.6.2pr.

one could appoint an heir to another person at Civil law, the other being to mentally incapable persons (Inst.Just.II.16.1).

The crucial difference between the effects of a ‘pupillary’ substitution and a fideicommissary substitution in Civil law was that fideicommissary substitution made the substitute a singular successor of the institute, not a universal successor. If the testator by his or her last will burdened the heir to give up to an appointed *fideicommissarius* the entire estate or a portion thereof (a universal fideicommiss) or a particular property or amount (a legacy),⁷²⁵ the *fideicommissarius* did not become the heir of the heir and was not liable for the heir’s personal debts and liabilities.⁷²⁶ In case of a universal fideicommiss,⁷²⁷ the *fideicommissarius* became liable for the debts of the original testator in proportion to the part of estate he received (C.6.49.1-2), but not for the debts of the heir or a previous fideicommissary (hereafter – “a fiduciary”) he or she received the property from. A fiduciary burdened by the universal fideicommiss, by a general rule, could proportionately decrease it if he were a creditor of the testator or if he paid off the testator’s debts in whole or in part.⁷²⁸ However, the testator could forbid this in the last will, expressly or implicitly, thus putting before his successor the choice of accepting the succession with the full burden or rejecting it.⁷²⁹

The testator could burden by a fideicommiss any person receiving a benefit from the last will: an heir, a universal *fideicommissarius*, a legatee, a legatee of the legatee, etc. The heir’s burden was usually restricted by his or her right to the Falcidian or the Trebellian portion⁷³⁰ or a “*legitima portio*”, although it also depended on

⁷²⁵ The *legata* and *fideicommissa* of the Classical Roman law were equalized as to the legal effect by Justinianic legislation (C.6.43.2) and became synonymous if a particular (special) amount or property was left. However, the universal fideicommisses remained unique; and thus the terms “*legatum*” and “*fideicommissum universale*”, as used in the works of the Civilian jurists, came to designate the two main species of the genus of “*fideicommissum*” (Bart., D.30.1).

⁷²⁶ The universal fideicommisses should not be confused with “general legacies”, where a portion of “all goods” (*omnium bonorum*) was left. The latter were considered particular legacies, because the term “*bona*” designated the goods remaining after the payment of debts, not the universal estate (Bart., D.30.1; *supra*, p.112).

⁷²⁷ Sometimes also called a “fideicommissary estate” (M.A. Pellegrini, *De fideicommissis ...*, art I, p.2).

⁷²⁸ D.18.4.2.18; D.36.1.65(63); Pellegrini, op cit, art XXXV, p.539.

⁷²⁹ Pellegrini, op cit, art XXXV, pp.539-540.

⁷³⁰ The Falcidian quarter was applicable to special legacies, the Trebellian quarter – to universal fideicommisses (Inst.Just.II.22-23).

whether an inventory was made, etc.⁷³¹ A *fideicommissarius* could be burdened up to the value of the benefit he received by the last will,⁷³² although there were also exceptions to this rule.⁷³³

A fideicommiss might become effectual immediately, on a certain or an uncertain term (like the death of the heir, *fideicommissarius*, etc.), on the fulfilment of a condition. The testator could create a continuous line of fideicommissary succession in respect of particular property, prohibiting, for example, its alienation outside of his or her family.⁷³⁴ Justinian's Novel 159 (555 A.D.), which was a judicial decision on a particular case, purported to restrict the effect of such fideicommisses to four generations after the testator's death. However, the prevailing opinion of the Medieval Commentators and the Early Modern jurists of the *mos italicus* was that this decree established a rule of interpretation only.⁷³⁵ Thus, the general consensus among the Civilians was that the testator could overcome this limit (as well as the limit of ten degrees of consanguinity for the collateral successors)⁷³⁶ by wording the last will in specific ways, like using "descendants" instead of "family" or explicitly commanding the succession to be *in perpetuum*.⁷³⁷

The procedures required to succeed to a fideicommiss depended on many factors. The legacies of particular property usually created a personal action for the entitled *fideicommissarius*. However, things *in specie*, under certain conditions, could

⁷³¹ See Nov.1 (=C.6.50(49) Auth. *Sed Cum Testator*).

⁷³² C.6.37.15pr; C.6.43.1.4.

⁷³³ Sometimes the *fideicommissarius* could decrease his burden (D.36.1.65.11-12). However, this could never be done against the express will of the testator.

⁷³⁴ According to David Johnston, in the Roman Empire the lines of fideicommissary succession never reached large lengths in practice, probably due to demographic reasons. The fideicommisses were usually used not to preserve particular estates or items of property from division but to perpetuate the testator's gentile name and ensure due care about his grave (D. Johnston, *The Roman Law of Trusts* (1988), 77-107). This explains why the Roman law was almost never preoccupied with the issue of perpetuities and restraints on alienation.

⁷³⁵ This was pointed out by other scholars before (T. Nadarajah, *The Roman-Dutch Law of fideicommissa...* (1949), 133; B. Beinhart, 'Trusts in Roman and Roman-Dutch Law', *JLH*, Vol 1(1)(1980), 28). One should always have this in mind when trying to compare Nov.159 with the Common law 'rule against perpetuities' (G.L. Gretton, 'Fideicommissary substitutions...', 172).

⁷³⁶ This "limit" was based on the assumption that a fideicommiss in favour of the family may only extend to potential intestate successors, which were restricted by the 10th degree in the collateral line (Inst.Just.III.5.5; Durante, *De arte testandi*, VIII.2).

⁷³⁷ See: Durante, *ibid.*; Pellegrini, *op cit*, art. XXX, pp.460-466 (providing an account of the debates on this issue).

be immediately acquired *in rem*;⁷³⁸ there was an opinion that the testator could entitle the *fideicommissarius* to take possession of the property by self-help.⁷³⁹ If an incorporeal right (e.g., an obligation) was left, the legatee acquired an *actio utilis* to pursue it.⁷⁴⁰

The law was different in respect of universal fideicommisses. In order for the estate or a portion of it to pass from the heir to a universal *fideicommissarius* with all the real and personal rights and liabilities, the heir was usually required to make a "restitution" of the estate. Before the restitution, the *fideicommissarius* only had a personal action against the heir, as well as an action to compel the heir to accept the estate.⁷⁴¹ The restitution itself could be performed by a simple declaration of the heir ("*restitutio verbo*"), which instantly transmitted all real rights in the estate to the *fideicommissarius* and created *actiones utiles* for him in respect of incorporeal rights.⁷⁴² The Justinianic legislation made exceptions from the requirement of restitution for some cases, e.g., if the heir contumaciously avoided the restitution, in which case the estate was transmitted to the *fideicommissarius* automatically, *ipso jure*.⁷⁴³ The medieval lawyers deemed restitution unnecessary for fideicommisses to the Church and *ad pias causas*.⁷⁴⁴ There was an opinion that restitution was generally not required in the ecclesiastical forum, being a formality contrary to *aequitas canonica*; but this was controversial.⁷⁴⁵

If, however, the fiduciary was not an heir but the first *fideicommissarius*, burdened in favour of the second one, etc., restitution was not needed and the estate passed *ipso jure* when the term or the condition was fulfilled (C.6.49.7.1b).⁷⁴⁶ It

⁷³⁸ This depended on whom the property belonged to, on the type of property itself, etc (Bart., D.30.1).

⁷³⁹ Bart., D.31.34.1; Durante, *De arte testandi*, II.3; Swinburne, *A Brief Treatise...*, IV.4.

⁷⁴⁰ C.6.37.18.

⁷⁴¹ D.36.1.4; Inst.Just.II.23.

⁷⁴² D.36.1.65(63); Pellegrini, op cit, art II, p.21.

⁷⁴³ C.6.49.7.1b, with Gloss and commentaries.

⁷⁴⁴ C.1.2.23; Pellegrini, op cit, art II, p.23.

⁷⁴⁵ D'Alesme, op cit, XIII (with reference to Baldus' commentary to X.2.19.8); Pellegrini, ibid.

⁷⁴⁶ The reasons provided by the scholars for the *ipso jure* transmission in this case were two: the absence of the right to deduct the quarter by the prior *fideicommissarius* and the easier transmissibility of *jura utilia* (Pellegrini, *De fideicommissis...*, art II, p.23). "Direct" actions remained in the hands of the heir unless he completed their *in jure cessio*, while the *actiones utiles*, acquired by the first *fideicommissarius* after the restitution of the estate, were transmitted more easily to the

remained, nevertheless, controversial, whether a delay of performance of the fideicommiss by the prior *fideicommissarius* was needed: some authors held that a judicial demand (“interpellation”) to perform the fideicommiss was necessary for transmission to occur.⁷⁴⁷ M.A. Pellegrini (1530-1616), with reference to contemporary practice, noted that the subsequent *fideicommissarius* was to make a unilateral declaration in court about accepting the fideicommiss, without summoning anyone.⁷⁴⁸

The issue of vesting (“*cessio*”) of fideicommisses and of their transmission to the heirs of the *fideicommissarius* was extremely complex and controversial; it cannot be elaborated in much detail here. It is enough to recall that, before becoming vested, a fideicommiss was just a *spes successionis* and was usually neither transmissible to heirs nor assignable.⁷⁴⁹ A pure (unconditional) particular legacy became vested at the moment of the original testator’s death, while a pure universal fideicommiss became vested at the moment of acceptance of the estate by the heir.⁷⁵⁰ Nevertheless, by the prevailing opinion of the late *Ius Commune* authors, a universal fideicommiss could be transmitted to the heirs even before the acceptance of the estate.⁷⁵¹ A conditional fideicommiss usually vested only at the moment of the fulfillment of the condition;⁷⁵² a moment of someone’s death and other “uncertain terms” were usually considered conditions.⁷⁵³

By the late 16th century, legal writers were distinguishing between several types of fideicommissary substitutions in favour of one’s family. One type was a *fideicommissum simplex et absolutum* (also called “*restitutorium*”), when the property was destined to descend by a strictly determined line and the fiduciary had no powers

subsequent *fideicommissarii* (Pau.Castr., C.6.49.7.1b; generally on the assignation of *actiones utiles* see C.4.39.5-6, et ibi Bald).

⁷⁴⁷ Bart., D.36.1.1.8, C. 6.49.7.1b; Pellegrini, op cit, art II, p.22.

⁷⁴⁸ Pellegrini, op cit, art II, p.24. He bases this on the principle that even an *ipso jure* acquisition cannot happen without the will of the acquirer (Pau.Castr., D.36.1.17.8).

⁷⁴⁹ D.50.17.18; C.6.51.1.

⁷⁵⁰ D.30.11 and D.36.1.26pr, with the Gloss and commentaries.

⁷⁵¹ The reason for this was that even before the acceptance the *fideicommissarius* had the action to compel the heir to accept, which action he could transmit to his own heirs (Bart., D.30.11; Pellegrini, op cit, art XXXI, p.467).

⁷⁵² In fact, this also depended on the type of condition (arbitrary or casual) and other factors (D.28.7.8; D.35.1.75; D.36.2.4; Swinburne, op cit, VII.23).

⁷⁵³ However, this was subject to the interpretation of a particular will (Bart., D.30.49.2; Swinburne, op cit, IV.8).

whatsoever to dispose of the property. Another type was a *fideicommissum in casu contrafactionis*, when there was only a ban to alienate the property beyond the family. In this case, the fiduciary retained some powers of disposal: e.g., he might donate the property to particular persons in the family, excluding others. Such fideicommiss became effectual only if the fiduciary broke its terms (“*contrafactio*”).⁷⁵⁴ If the first *fideicommissarius*, himself burdened by a “restitutory” fideicommiss, refused to accept it from the heir, the right to demand it from the heir passed to the second *fideicommissarius*.⁷⁵⁵ However, if this happened in a “contrafactual” fideicommiss, the condition of the subsequent fideicommisses was broken and the line of substitutions became extinguished. Some authors held that in a “contrafactual” fideicommiss the fiduciary could still sell the property beyond the family, if all the entitled family members refused to buy it;⁷⁵⁶ however, it could be prevented by making a clause that the “contrafaction” had the immediate real effect of transferring the ownership to the *fideicommissarius*.⁷⁵⁷

The Civil law texts provided exceptionally strong measures to protect the fideicommissary successors from any possible encroachments from the fiduciaries. The law forbade the fiduciary to alienate the burdened property in contravention of the terms of the fideicommiss. If the fideicommiss was *in diem* (i.e., due at a certain term) or contained a “contrafactual” clause, the alienation was invalid, even if the purchaser was *bona fide*; the ownership immediately passed to the *fideicommissarius*, without a need for restitution (C.6.43.3.2-3). However, if the fideicommiss was conditional and had no “contrafactual” clauses, the invalidation of alienation and the transfer of ownership were postponed to the time of the condition’s fulfillment (e.g., the fiduciary’s death); nevertheless, after the perfecting of the condition, the *fideicommissarius* could claim the alienated property by a real action from any third

⁷⁵⁴ Nadarajah, op cit, 17-18.

⁷⁵⁵ This included the right to compel the heir to accept the estate (D.36.1.57.2, with commentaries).

⁷⁵⁶ Bart., D.45.1.122.3.

⁷⁵⁷ Bart. et alii to D.30.114.14; Pellegrini, op cit, art XIV, pp.213, 223, art XL, p.606. This is why R. Burgess was wrong, when comparing the fideicommiss with the Scots tailzie, by saying that “*fideicommissum* lacked the resolutive clause...” (R. Burgess, *Perpetuities in Scots Law* // SSP, vol 31 (1979), 64). Of course, a particular fideicommiss might lack a resolutive clause, but there was no reason why it could not be inserted. The resolutive clause was well-known to the learned *Ius Commune* jurists, although it is not prominent in the texts of *Corpus juris civilis*.

party whatsoever.⁷⁵⁸ The *fideicommissarius* also had a hypothec over the estate goods as a security for non-payment.⁷⁵⁹ Moreover, a *fideicommissarius* could compel the fiduciary to provide an additional security (*cautio*) with “worthy sureties”.⁷⁶⁰

There were, however, exceptions to the rule against alienation. As was already mentioned (*supra*, p.160), the fiduciary, unless forbidden by the testator, could use the burdened property to pay off the estate debts or to compensate for his or her own claims against the testator. Sometimes, however, he could also use the burdened goods to pay off his own debts, because paying off one’s debts was considered an alienation “out of necessary cause”, as opposed to a “voluntary” alienation (D.31.69(71).1). However, this type of alienation was only of temporary effect – it lasted until the debtor’s death, to which the fulfillment of a term (or condition) of the fideicommiss was effectually postponed.⁷⁶¹ As soon as the debtor died, the *fideicommissarius* became entitled to pursue the alienated goods in the hands of the creditors or whoever held them!⁷⁶² Moreover, such “necessary” alienation was only valid if the debtor had no other goods; immovable property could only be sold in the absence of moveable goods.⁷⁶³

There were also instances when an alienation with a permanent liberation from the fideicommissary burden was allowed. For example, it was possible for perishable goods.⁷⁶⁴ The alienation of burdened goods was allowed by Nov.39 if the testator’s children had no other goods to constitute a dowry or a donation *propter nuptias* for themselves.⁷⁶⁵ The testator could expressly allow the fiduciary to alienate the goods; the effect of such permission and whether it permitted alienation for a voluntary cause or by a last will were controversial questions.⁷⁶⁶ Finally, the testator could make a

⁷⁵⁸ Pellegrini, op cit, art XL, p.606.

⁷⁵⁹ See Gloss to C.6.43.1.

⁷⁶⁰ See, in general, D.36.3.

⁷⁶¹ Pellegrini, *De fideicommissis...*, art XL, p.608.

⁷⁶² Bart., D. 30.114.14.

⁷⁶³ Pellegrini, op cit, art XXXV, pp.540-541, art XL, pp.609-610.

⁷⁶⁴ Pellegrini, op cit, art XL, p.612.

⁷⁶⁵ Nov.39.1=C.6.43 Auth. *Res Quae*.

⁷⁶⁶ Another problematic question was whether the rules on the fideicommiss *de residuo (infra)* were to be used in interpreting such permissions (Pellegrini, op cit, art XL, pp.615-620).

fideicommiss de residuo (*infra*, p.167). Whether the burdened property fell under the confiscation for a fiduciary's crimes was yet another subject of discussion.⁷⁶⁷

What if the *fideicommissarius* became the heir of the fiduciary, which may have been a widespread situation for fideicommisses in favour of a family? According to Pellegrini's work, the final *communis opinio* of scholars was that the *fideicommissarius* in this case could not challenge or question the fiduciary's actions, including the alienation of the goods subject to the fideicommiss.⁷⁶⁸ This was justified by the heir's being *una et eadem persona* with the defunct, by the defunct's power to burden the heir's property and, most importantly, by the idea that the heir, accepting the estate, made a "quasi-contract" with the defunct's creditors, legatees and disponees.⁷⁶⁹ Thus, a *fideicommissarius* had to choose: either to claim the fideicommiss, revoking all unauthorized alienations, or to become the heir of the fiduciary, losing the fideicommiss in part or in full.

What if the *fideicommissarius* became the fiduciary's heir but made an inventory of the estate, limiting his liability for the fiduciary's debts? The outcome depended on the type of property subject to the fideicommiss. If the property was of an "allodial" (regular) kind, the consensus held that the *fideicommissarius*, after making the inventory, could revoke the fiduciary's dispositions only if there were no sufficient free goods in the estate to compensate for the lost fideicommiss.⁷⁷⁰ The opinion was different, however, in respect of feudal property granted to the vassal and his children and descendants.⁷⁷¹ According to the *Libri feudorum* (*Libr.Feud.II.45*), the descendants of a vassal, in order to receive the fief by succession from him, were required to become heirs to him, taking upon them a share in the general estate of the defunct, with debts.⁷⁷² In such circumstances, preventing the feudal successor from revoking the defunct's alienations might result in the destruction of the system of

⁷⁶⁷ Pellegrini responded affirmatively to this question (Pellegrini, op cit, art XL, p.604).

⁷⁶⁸ Pellegrini, op cit, art XXXIII, pp.496-498.

⁷⁶⁹ See, e.g., C.7.16.7.

⁷⁷⁰ Bart., C.6.30.22.9; Pellegrini, op cit, art XXXIII, p.498.

⁷⁷¹ Which was different from a simple fief and was reminiscent of the fideicommissary substitution in many respects (*infra*, p.171).

⁷⁷² This was different in case when the fief was succeeded to by collaterals, who did not need to be the defunct's heirs and incur liability for his debts, as they took the fief in their own right (*Libr.Feud.II.45*).

feudal succession and the restrictions on alienation associated with it.⁷⁷³ Therefore, some of the jurists admitted a revocation of alienation by the vassal's heir with *beneficium inventarii*.⁷⁷⁴

If a fideicommiss in favour of a family was *in casum contrafactionis* (*supra*, pp. 163-164), the *fideicommissarius* was precluded from revoking the alienations not only if he himself became the heir to the fiduciary, but also even if any other person in whose favour the fideicommissary succession was established became the fiduciary's heir. Let us say, there was specific land, forbidden from alienation beyond one's descendants. The current owner of the land, nevertheless, sold it for a "necessary cause". In this case, the owner's son A could not revoke the sale in the life of his father (*supra*, p.165), but, more than that, he forever lost the right to revoke it if his brother B became the only heir to the father after the father's death. B was not liable before A for paying off the fideicommiss because B himself was one of the class of persons to whom the burdened property was to descend, as well as because B, as his father's heir, enjoyed the same privileges as his father. In this way, the line of fideicommissary succession became extinct.⁷⁷⁵

There was also a different type of fideicommiss – *de residuo* or *residui*, – which allowed much more freedom to the fiduciary in disposing of the burdened goods.⁷⁷⁶ Such fideicommiss obliged the fiduciary to transfer to the *fideicommissarius* the goods remaining in the fiduciary's hands ("*residuum*", "*quod supererit*") at the moment of the fideicommiss becoming effectual (which might be the fiduciary's death). What powers did the fiduciary hold in respect of the goods subject to such fideicommiss? The Digest, reflecting the Classical Roman law, provided that the fiduciary could dispose of such goods in good faith, but not fraudulently, with the intention to subvert ("*intervertere*") the fideicommiss (D.36.1.56). The fiduciary was supposed to exercise the "*arbitrium boni viri*", not preferring his own goods to the burdened goods. If the burdened goods were sold, their prices were considered to take their place (D.31.70.3).

⁷⁷³ See *infra*, p.171.

⁷⁷⁴ Bald., C.6.14.3; Pellegrini, *ibid*.

⁷⁷⁵ D.31.69(71).1, s.v. "*Exterus heres*"; Bart., D.31.69(71).1; Pellegrini, *op cit*, art XL, p.608.

⁷⁷⁶ Gretton, *op cit*, 161.

However, the Classical law was changed by Nov.108 (541 A.D.), which provided that the fiduciary in a fideicommiss *residui* could dispose of the goods and decrease the fideicommiss to the extent of three fourths of the initial value, with only the remaining quarter being due unconditionally. This quarter could only be diminished to constitute a dowry or a donation *propter nuptias* and to ransom captives. In case of an illegal decrease to less than one quarter of the initial value, the *fideicommissarius* was to sue the fiduciary (or his heirs) and, the fiduciary's estate being insufficient, use real actions against the purchasers of the burdened goods.⁷⁷⁷

Nov.108 was the source of confusion and debate among medieval jurists. Its effect upon the law of the Digest, with the requirement of *bona fides* and *arbitrium boni viri*, was controversial. Although the generally shared assumption seems to have been that the *arbitrium boni viri* criterion was no longer required, some authors contended that *bona fides* was still a valid requirement and that an obvious intention to subvert the fideicommiss invalidated a disposition even within the three quarters limit.⁷⁷⁸ Others held that the fiduciary was absolutely free in disposing of the three fourths of the goods, being able to donate them.⁷⁷⁹ A related debate was whether the three fourths of the estate could only be disposed *inter vivos* or might be left by the fiduciary's last will, as well. Some held that *mortis causa* dispositions, becoming effectual only after the death, could not affect what was *residuum* at the moment of death; others allowed this, with further disagreement over whether an express disposition was needed or a tacit one (e.g., an appointment of heir) was sufficient.⁷⁸⁰ A Dutch jurist, J. Voet, pointed out that, in the practice of contemporary Holland, a fideicommiss *de residuo* could be diminished by both *inter vivos* and *mortis causa* deeds; however, good faith was required of the fiduciary, while fraudulent dispositions could be challenged.⁷⁸¹

⁷⁷⁷ Nov.108.1-2=C.6.49(48) Auth. *Contra Cum Rogatus*.

⁷⁷⁸ Pau.Castr., D.36.1.56(54).

⁷⁷⁹ Bart., D.31.70.3.

⁷⁸⁰ Bald., C.6.49(48) Auth. *Contra Rogatus*; Pellegrini, op cit, art XL, pp.614-615.

⁷⁸¹ Voet's position is open to interpretation. On the one hand, he mentions (J. Voet, *Commentarius ad Pandectas*, D.36.1, V) that in Holland a fideicommiss could be "simple" (allowing alienation by the fiduciary, even by a last will) or "double" (not allowing alienation). In another fragment, he deals with *fideicommissa de residuo*, without specifying whether they are a sub-species of "simple" fideicommisses or make up a separate kind (ibid., LIV). T. Nadarajah, in his book, holds that the practice

Everything previously mentioned mainly concerns fideicommissary substitutions made in last wills. Such substitutions could also be made in donations *mortis causa*.⁷⁸² But could a fideicommiss or a line of fideicommisses be created by an *inter vivos* contract? There was no easy answer to this question. Ultimately, the *Ius Commune* jurists were able to develop substitution-like devices for *inter vivos* contracts, whence they travelled into some of the modern legal systems;⁷⁸³ however, this required extensive work of doctrinal elaboration.

The *Corpus juris civilis* was contradictory as regards the possibility of contractual substitutions. On the one hand, a fragment of the Digest (D.45.1.137.8) held that it was not possible for a stipulation *de dando* (i.e., to give something) to contain a substitution in favour of one of the creditor's heirs, ignoring other heirs, for promises of pecuniary character. This was only possible in respect of a stipulation *de faciendo* (to perform work). The Gloss contrasted this fragment with D.2.14.33 and deduced that this law applied to obligations and actions only, while an exception-producing *pactum de non petendo*, barring the creditors from suing, could be licitly contracted in favour of one of the heirs.⁷⁸⁴

Pierre de Belleperche (c. 1230-1308) was of the opinion that this restriction could be avoided by creating separate obligations in one contract: one to the original creditor, by whose death it was extinguished, and a new obligation in favour of the heir. The rule against *stipulatio alteri*, allegedly, did not apply, as the heir was "one person" with the original creditor.⁷⁸⁵ However, Bartolus strictly opposed that. He pointed out that the heir was "one person" with the testator only to the extent of his hereditary share (one third, fourth, etc.), while in respect of other shares he was a "third party". Moreover, even an obligation created *post mortem* still was an estate obligation.⁷⁸⁶ Thus, a pecuniary obligation would always transmit to all the creditor's

of the Roman-Dutch legal system distinguished between the "simple" fideicommiss of the Dutch law (which was defeasible by a last will) and the fideicommiss *residui* of the Civil law (which was not defeasible by any lucrative or fraudulent disposition). See: Nadarajah, op cit, 18-19, 188-193.

⁷⁸² Fr. Hotman, *Scholae ad titulos de donationibus...*, pp. 119-120; M.A. Pellegrini, op. cit., art. I, p. 4.

⁷⁸³ G.L. Gretton, 'Quaedam Meditationes Caledoniae: The Property/Succession Borderland', *EPLJ*, vol 3, issue 2 (2014), 125.

⁷⁸⁴ D.45.1.137.8, s.v. "Acquiri".

⁷⁸⁵ Pau.Castr., D.45.1.38.14, D.45.1.137.8.

⁷⁸⁶ D.42.5.7 was cited to this point.

heirs in their respective portions, although an express or a tacit legacy by the creditor could provide otherwise in respect of the relations among the heirs. Obligations to do something, in Bartolus' opinion, were different only in so far as they were indivisible, so they would transmit only to the heir having an interest in their performance.⁷⁸⁷ However, Bartolus, following the common opinion of authors, admitted *pacta de non petendo* in favour of one of the creditor's heirs.⁷⁸⁸

On the other hand, there were fragments in the Digest that seemed to allow "substitution"-like devices in contracts. For example, D.32.37.3 describes a case where a father donated all his goods to his son, in return receiving the son's stipulation that the goods would be restored to the father or a person the father might name, as soon as the father revoked the donation or died. Later on, the father appointed beneficiaries of his revocation by a letter. After the father's death, the son was found directly liable before the beneficiaries. This fragment is not an example of a *jus quaesitum tertio*: the son's debt was considered here "left by legacy", which created an *utilis actio* for the beneficiaries (*supra*, p.162).⁷⁸⁹

Furthermore, the Code contained a 290 A.D. constitution by Diocletian (C.8.54.3), which allowed the making of donations with a clause that the gift would pass to a third person at a later date, with the third person acquiring an *utilis actio* against the first donatary. Medieval lawyers saw it as one of the instances of *jus quaesitum tertio*, which arose only in a fully performed contract of donation, where the donor gave away the ownership of the property.⁷⁹⁰ Although the exact interpretation of this law was debatable,⁷⁹¹ it obviously allowed the creation of a line of singular succession.

Feudal practice was another source of contractual substitutions. It was already mentioned above (*supra*, p.124) that Medieval learned lawyers analyzed the situation

⁷⁸⁷ For example, an obligation to repair a house would be profitable only for an heir who got that house from the testator (D.45.1.137.8, s.v. "Unius").

⁷⁸⁸ Bart., D.45.1.137.8.

⁷⁸⁹ D.32.37.3, s.v. "Quasi debitorem".

⁷⁹⁰ Bart., D.45.1.48.20.

⁷⁹¹ See *infra*, p.173.

where an *emphyteusis* or a fief was granted to the father and his sons.⁷⁹² The sons in such case acquired the fief not as the father's heirs but as the disponees in the original grant; however, Bartolus held that the fief was, nevertheless, to be considered *paternum*,⁷⁹³ and thus the sons were obliged to become heirs to the father after his death and to be liable for his debts.⁷⁹⁴ A similar situation occurred if a fief was granted to "the vassal and his children", which created a *jus quaesitum* for the vassal's children and further descendants.⁷⁹⁵ Early jurists sometimes went as far as to contend that the grandson of the original vassal in such a fief could not be prejudiced by the confiscation of the fief that his father (the original vassal's son) might incur for crimes committed by him. The grandson, it was alleged, could take the fief "in the right of his grandfather and his own" (*ex persona avi et sua*), not "in the father's right" (*ex persona patris*).⁷⁹⁶ Later Commentators qualified this position with many conditions,⁷⁹⁷ but the underlying principle remained the same: if the heir of the disponee acquired the right in the fief not as the "heir", but as the "child" or the "descendant", then he might be protected against the actions of the member of the line of succession standing between him and the original disponee.

Such "entailed"⁷⁹⁸ feudal succession in the *Ius Commune* created a peculiar situation. The descendant of the original vassal acquired the fief not by way of succession but by way of *jus quaesitum*, created by the original disposition. However, this descendant was still required to become the heir of the previous holder of the fief and be liable for his debts (*supra*, p.166). Such heirship was not essential to the acquisition of the fief but was more like a collateral duty, required to complete the passing of the fief. This is why such feudal heir could challenge the renunciations and other dispositions by his predecessors, if they prejudiced his *jus quaesitum*. Baldus admitted that the holder of the fief, "entailed" in this way, could make his alienations

⁷⁹² Bart., D.39.6.31; D. Covarruvias, *De testamentis...*, 154-155.

⁷⁹³ Bart., cons. 58.

⁷⁹⁴ *Libr. Feud.* II.45; see *supra*, p.166.

⁷⁹⁵ Pellegrini, *De fideicommissis...*, art II, pp.820-821.

⁷⁹⁶ D.1.9.7.1, s.v. "*Patris*".

⁷⁹⁷ Bartolus distinguished between a crime committed against the feudal superior, which led to the outright loss of the fief, and any other grave crime, where such "entailed" fief went to the perpetrator's descendants (Bart., D.48.22.3).

⁷⁹⁸ It seems, there was no special term for this type of succession in the *Ius Commune*.

secure by obliging himself and his heirs to warrant the alienation against any challenges or revocations.⁷⁹⁹ However, given what has already been established here about the rights of a feudal heir, it seems that such warranties could only oblige the heir to the pecuniary compensation up to the limit of *beneficium inventarii* and could not disturb his right to the fief.

Seeing the extent to which devices similar to fideicommissary substitution could be created in donations and in a feudal context, it is not surprising that the Early Modern jurists were eager to generalize substitutions in contracts and give them an equal standing with substitutions in last wills. Pellegrini admitted that “fideicommisses”, in the strict meaning of the term, could not be made in *inter vivos* contracts, but he held that contracts which contained substitutions “by way” (*per modum*) of a fideicommiss were governed by the same rules as true fideicommisses.⁸⁰⁰ He also clarified that such a fideicommiss might only concern particular property, so that it would not be characterised as a *pactum successorium* (*supra*, p.121).⁸⁰¹ Voet was less subtle and straightforwardly claimed that a fideicommiss could be made by a contract, although governed by rules slightly different from those of a testamentary fideicommiss.⁸⁰²

One of the problems the jurists had to deal with, in order to accommodate contractual fideicommissary substitutions, was the *jus quaesitum tertio*. A fully executed donation (C.8.54.3) was a special case when the law expressly allowed the creation of a third party’s right, but what about a different type of contract: a loan, a stipulation, a sale, etc? One of the solutions was to involve a notary public.⁸⁰³ Another option was making the contract as a *negotiorum gestor* for an absent third party – in this case, the third party’s right became *quaesitum* after ratification.⁸⁰⁴ Most importantly, a *jus quaesitum* could be created by a father in favour of his children and descendants, both those belonging to his *potestas* and the emancipated ones.⁸⁰⁵

⁷⁹⁹ Bald., C.6.14.3.

⁸⁰⁰ Pellegrini, op cit, art LI, p.805.

⁸⁰¹ Pellegrini, ibid., pp.810-817.

⁸⁰² J. Voet, *Commentarius ad Pandectas*, D.36.1, IX.

⁸⁰³ *Supra*, p.80.

⁸⁰⁴ Pellegrini, op cit, art LI, p.806.

⁸⁰⁵ D.2.14.21.2; D.45.1.45.2; Bart., D.45.1.130; Pellegrini, ibid.

One of the important and, at the same time, controversial differences between contractual and testamentary fideicommissary substitutions was the real effect of the ban on alienation of the burdened property. While in last wills the real effect of such ban was provided by legislation,⁸⁰⁶ whether an agreement, prohibiting an alienation of an asset, could have not only a personal but also a real consequence was a hotly debated topic. There were disagreements even on the issue of whether an *actio utilis*, provided by law to a third-party beneficiary of donation (C.8.54.3), was a real or a personal action. Voet, from his perspective of a late Humanist lawyer, was quite confident that this law created only a personal action of the beneficiary against the burdened donatory and his heirs and not a real action against the purchasers of the thing.⁸⁰⁷ Many of the earlier *mos italicus* lawyers, like Ph. Decius and M.A. Pellegrini, stuck to the contrary opinion.⁸⁰⁸

Even then, C.8.54.3, requiring a fully executed donation, covered just a portion of the possible contracts with a fideicommissary substitution. What if the contract was a sale, a loan, a stipulation to pay, etc? The early Commentators held that, by the general rule, such a contract could not prevent an alienation in so far as to preclude the change of property owner.⁸⁰⁹ However, the same jurists developed various tricks, enhancing non-alienation clauses in order to achieve the desired real effect. For example, a non-alienation clause had a real effect if the person who granted the property reserved some real right over it: it could be a hypothec (security)⁸¹⁰ or a *dominium directum* (applicable to fiefs and similar rights).⁸¹¹ The alienation was *ipso jure* invalid if a relevant judicial decree was issued against the burdened party⁸¹² or if

⁸⁰⁶ C.6.43.3.2-3.

⁸⁰⁷ J. Voet, *Commentarius ad Pandectas*, D.36.1, IX.

⁸⁰⁸ They justified it by the privileged position of donations and dowries - the "favour of generosity" (*favor liberalitatis*) (Dec., cons. 239; Pellegrini, op cit, art LI, p.808).

⁸⁰⁹ An exception was made for absolutely irrevocable alienations, such as a manumission of a slave or a consecration of the land for religious use (Bart., D.30.114.14; Pellegrini, op cit, art LI, p.825).

⁸¹⁰ There was a discussion whether a general hypothec over the receiver's entire estate was sufficient or a special mention of the burdened property was required (Bart., *ibid*; Alex., D.41.2.38.1).

⁸¹¹ Pellegrini, op cit, art LI, pp.824-825.

⁸¹² D.18.1.26 (a procedural decree of *bonis interdictio* mentioned); Pellegrini, op cit, art LI, p.825.

the contract allowed the third party to take possession of the burdened property by self-help.⁸¹³

Most importantly, there was an opinion that a device similar to the *lex commissoria*⁸¹⁴ could be used to prevent alienations. It was called a “resolutive clause” and provided that the burdened property, in case of alienation, reverted back to the grantor and immediately passed to the beneficiary.⁸¹⁵ Not everyone recognized this possibility: e.g., Bartolus continued to insist on “reserving” a real right in the hands of the grantor;⁸¹⁶ other legal writers (Baldus, Tartagni) were more enthusiastic. They provided slightly different examples of wording for a “resolutive clause”: e.g., Baldus’ and Tartagni’s version declared the original contract to be considered “not made” (“*infecta*”),⁸¹⁷ while Pellegrini’s version directly declared the deed of alienation itself to be “null, invalid and not made”.⁸¹⁸ The problem of the real effect of a contractual substitution was, in this way, essentially solved.

Another question troubling the learned lawyers was whether substitution clauses in contracts were revocable by the original parties to the contract. The dominant opinion seems to have been that a *jus quaesitum* of the third party could be revoked by the original parties until this right became vested and enforceable: i.e., a future conditional right (e.g., becoming effectual after one’s death) and even a right *a die* could be revoked.⁸¹⁹ One of the exceptions was the case of a solemn stipulation by one of the parties in the name of the beneficiary,⁸²⁰ but some authors believed that this was restricted only to stipulations made exclusively in a beneficiary’s favour and was inapplicable when the stipulation benefited both the stipulator and the beneficiary.⁸²¹

⁸¹³ Such pact was interpreted as creating a power of *manus injectio* in the creditor (D.18.1.56; Pellegrini, *ibid*).

⁸¹⁴ *Lex commissoria* was a type of contractual clause in Civil law, by which the ownership of the transferred property reverted back to the grantor, in case a particular condition occurred (usually, if the purchase price was not paid on time). See D.18.3.

⁸¹⁵ D.39.5.1, s.v. “*Mortis causa donatio*”; C.4.54.4; Bald., C.4.6.3.

⁸¹⁶ Bart., D.30.114.14, C.4.6.3. He seems, however, surprisingly accepting of “*lex commissoria*”-like devices in another fragment, D.41.2.38.1.

⁸¹⁷ Bald., C.4.6.3, C.4.51.7; Alex., D.41.2.38.1.

⁸¹⁸ Pellegrini, *op cit*, art LI, pp.825-826.

⁸¹⁹ Bart., D.45.1.122.2; Bald., C.5.12.7; Pellegrini, *op cit*, art LI, pp.818-819.

⁸²⁰ Bald., C.5.12.7.

⁸²¹ Pellegrini, *op cit*, art LI, p.819.

Whether the revocation could be made by one of the contracting parties or required the consent of both, depended on the type of contract and on who was primarily interested in adding the substitution clause.⁸²² If the substitution was contained in an obligation (“obliged to pay to A, whom failing by death to B”), the substitution was considered a “mandate” of the creditor and thus could be revoked or altered by him in his life.⁸²³

What if one of the contracting parties was dead? By what seems the universal opinion of the scholars, the heir of the grantor or the receiver could not revoke the substitution – this clearly followed from the *Corpus juris civilis* fragments.⁸²⁴ The same logic applied in feudal matters, where a renunciation of the fief in prejudice of the children was generally allowed if it was a *feudum novum* (newly granted), but not allowed in subsequent generations.⁸²⁵

In most other aspects, contractual substitutions followed the rules similar to testamentary substitutions. Just as in last wills, conditional substitutes possessed only a *spes successionis* and there was no transmission until the respective rights became vested.⁸²⁶

5.2. Fideicommissary Substitutions and Scottish Destinations: a Conceptual Difference.

The first issue to settle here is that of terminology. The term “fideicommissary substitution” was not used in Scots legal practice, although it was mentioned in some legal treatises.⁸²⁷ The term “*fideicommiss*” in the Scots context designated either a legacy⁸²⁸ or a trust.⁸²⁹ Notably, Th. Craig in his treatise used the term with a meaning

⁸²² Pellegrini, op cit, art LI, pp.817-819.

⁸²³ Pellegrini, when dealing with substitutions in obligations, refers to D.39.5.19.3 – a fragment dealing with a mandate by the creditor to the debtor to pay to another person. It should be noted, however, that the analogy of the substitution with the mandate is not perfect, as the substitution created a *jus quaesitum*, while the mandate expired after the principal’s death (Pellegrini, op cit, art LI, pp.819-820).

⁸²⁴ D.18.7.3; C.8.55.1; Bart., D.45.122.2; Pellegrini, op cit, art.LI, p 820.

⁸²⁵ Bald., C.6.14.3; Pellegrini, op cit, art LI, pp.820-821.

⁸²⁶ Pellegrini, op cit, art LI, pp.808-809.

⁸²⁷ Dirleton, ‘Substitution in Legacies’, *Some Doubts ...*, 185.

⁸²⁸ Stair, *Inst.*III.8.30; G.L. Gretton, ‘Fideicommissary substitutions...’, 169.

⁸²⁹ *Fotheringham v. Mauld* (1671, M.16179); *Seton v. Pidmedden* (1717, M.4425).

close to that of “fideicommissary substitution”: he calls a feu given under a condition to transfer it to the third person a “fideicommiss” (*Jus feudale*, II.5.9), mentioning that in England a contravention of such condition entails the loss of the feu. He points out that in Scotland the practice on such conditions is absent but thinks that the same rule should apply as in England.

The term “substitution” was often used in Scotland to denote the process when one successor succeeded to another successor, in distinction to the “conditional institution”, which roughly corresponded to the Civilian ‘vulgar substitution’.⁸³⁰

The term “destination”, on the one hand, is used as early as the time of Craig in the meaning of “directing the use of some property for a third person”.⁸³¹ However, the earliest cases from the printed collections use this term in a different meaning of “directing some property to be converted into a different kind of property”: for example, promising to invest money into heritable property (*infra*, p.197). Either way, this Scots term seems to have little to do with the *Ius Commune* “*destinatio*”.⁸³²

The term “tailzie” in Scots law originally designated a *feudum talliatum* – a feu in which a regular line of succession (especially a collateral one) was “cut off” and which descended to the heirs determined in advance by the terms of the infeftment.⁸³³ G. Mackenzie in his *Treatise on Tailies* (c. 1687) notes that the term “tailzie” is proper for heritable property, while substitutions in moveable obligations are properly called “destinations”.⁸³⁴

In this chapter, “destination” will be the general term for a fideicommiss-like device, providing for a ‘subsequent succession’.

⁸³⁰ This terminology of Scots law looks even more peculiar when we see the Civilians say: “every substitution is a conditional institution” (Bart., C.6.30.20; Pellegrini, op cit, art XV, p.224). Perhaps, the Scots lawyers at some point took the more generic Civilian term “conditional institution” and started using it in a narrower meaning (Gretton, op cit, 158).

⁸³¹ “*In tertium... destinatum transferre*” (*Jus feudale*, II.5.9).

⁸³² In the *Ius Commune* the term “*destinatio*” usually meant a subordination of one asset to another (e.g., an appurtenance to the principal thing), which mattered in the field of interpretation of legacies (J. Del Castillo Sotomayor, *Quotidianae controversiae juris*, tomus V (1726), 1-22).

⁸³³ *Jus feudale*, II.16.2.

⁸³⁴ Mackenzie, *A Treatise on Tailies*, 484.

Similarly to the *Ius Commune*, Scottish destinations could be found both in last wills and in *inter vivos* contracts.⁸³⁵ Destinations in last wills became the subject of decisions of the Court of Session only in the late 17th century, despite appearing quite early in the wills themselves. The archival registers of wills reveal a practice of leaving a right of tack (lease) of a land or a house to “A, and after his death to B”.⁸³⁶ It is notable in that it contradicts the 17th century law, when tacks were considered heritable property⁸³⁷ and, thus, could not be disposed by a last will.⁸³⁸ There were also more explicit examples of fideicommiss-like arrangements in respect of tacks. Thus, in a will by Alan Mortoun⁸³⁹ the testator left one half of the “*kyndness of his steding*” to his elder son Walter and the other half to the testator’s wife Margaret for the duration of her life (both being executors to him); after his mother’s death, Walter was to dispose of her half “*to quhasome... Margaret thinkis expedir*”. The will’s text does not allow us to make any conclusions as to the nature of this destination or to guess whether Margaret could dispose of her share in her life. A similar substitution of a tack may be found in the will of James Corras.⁸⁴⁰ Sometimes, a liferent was used to achieve the same effect: e.g., in the testament of a famous diplomat Sir Robert Deniston of Montjoy a sum of 500 merks was left to Helen Deniston for her lifetime, to be divided equally among her children after her death.⁸⁴¹

It seems it was in the 1660s that the first court decisions on destinations in last wills appeared. *Hill v. Maxwells* (1665, M.14355) is notable in this respect. John Maxwell left by testament a general legacy of his moveable goods in equal parts to his two daughters, Janet and Bessie, substituting them to each other in case of “failing by

⁸³⁵ The designation of destinations in the last wills as “destinations over” and destinations in the *inter vivos* dispositions as “special destinations” (M. Morton, ‘Special Destinations as Testamentary Instructions’, *SLT(News)*(1984), 133-134) is of recent origin and is not found in the pre-1800 literature and case law.

⁸³⁶ Thus, in a testament by William Cochranne (CC9/7/2/91; 7 January 1564(65)) the testator left the “kindness of (his) steding” to the elder son, whom failing – to the younger one.

⁸³⁷ Stair, *Inst.* II.1.4, III.5.6; Rule v. Hume (1635, M.14374), Boyd v. Sinclair (1671, M.14375). The actual bequests of tacks were still being made as late as 1604 (Archibald Bordland, 27/06/1604, CC8/8/39/544).

⁸³⁸ It should be noted, nevertheless, that the tacks were not included into the testamentary inventories of the wills that disposed them. See, e.g., a testament of Alan Mortoun (note below).

⁸³⁹ CC9/7/2/94; 14 February 1564(65).

⁸⁴⁰ CC8/10/3/9/8; 6/03/1583(84).

⁸⁴¹ CC8/10/8/nov1625; 4/11/1625.

decease”. Their mother was appointed tutor to them. After John’s death, his daughters also died, Janet first, before achieving 12 years of age, and then Bessie, after achieving the same age and making her own will, nominating her mother as the general legatee.⁸⁴² Thereafter a controversy arose between the mother and John’s brothers, who claimed that Bessie’s death without confirming as executrix to her sister meant that Janet’s part of estate was not established in Bessie’s person and thus was to belong to Janet’s ‘next-of-kin’ –John’s brothers. The Lords decided in favour of the mother, holding that Janet’s half of the legacy accrued to her sister without confirmation; this half, however, was to be subject to any debts Janet might have incurred in her life.

This case, on the one hand, might be easily used to demonstrate a variety of Civilian doctrines as applied in Scots practice; on the other hand, to do so would be a mere speculation. Thus, the substitution used by the testator might be compared to the reciprocal substitution of the Civil law (*supra*, n.721). This case could be about a “fideicommiss” from Janet to Bessie and then the question would be whether such “fideicommiss” was vested or not. In Civil law, as was said above, special legacies were considered vested at the testator’s death and universal fideicommisses at the acceptance of estate (*supra*, p.163). General legacies in Scotland did not, by themselves, transmit a liability for the testator’s debts, which was the exclusive duty of the executor.⁸⁴³ However, the terminology of the Scots lawyers of the time was often confusing, with general legacies often called “universal”;⁸⁴⁴ the Maxwell brothers could possibly have relied on this confusion to argue that the legacy was not vested before the confirmation, which was often considered the Scots equivalent of *aditio hereditatis*.⁸⁴⁵

⁸⁴² Newbyth’s report of the case contradicts itself, saying at the end that Bessie died first. However, it is obviously a mistake, as in the same sentence the report confirms that the mother was Bessie’s legatee (M.14356).

⁸⁴³ It is unclear who the executor of John was – the daughters, the mother, someone else or no confirmation followed at all. The last possibility, however, is implausible, as then John’s brothers would have taken an opportunity to bring this point in their favour. If the daughters were executors, their mother would exercise their office, being their tutor.

⁸⁴⁴ Stair, for instance, uses the words “general” and “universal” as synonyms in respect of legacies (Stair, *Inst.*III.8.38; Mackenzie, *Inst.*III.9.20). Cf. with the ‘general legacies’ of Civil law, *supra*, n.726.

⁸⁴⁵ Stair, *Inst.*III.8.51.

The defenders' claim that Bessie was to become executrix to Janet might also be associated with Civilian 'pupillary substitution', where the substitute became the heir of the institute (*supra*, pp.159-160). This last conjecture seems to reflect the actual way in which the Lords interpreted the substitution: Stair's report of the case stresses the fact that Janet died as a pupil, still being under-12 and unable to make a will.⁸⁴⁶

Finally, the Lords might, to some extent, have had the Civilian *jus accrescendi* in mind, which might explain their position that no confirmation was needed and that Janet's portion was subject to Janet's debts.⁸⁴⁷

However, all of the above remains a speculation. Neither report of *Hill* includes any references to the *Ius Commune*. Moreover, the winning party's argument, as reported by Stair, was based on considerations drastically different from those set out above. The mother claimed that the substitution made the sisters "heirs of provision" to each other, drawing analogy from the case of a bond granted to a father, whom failing to his son *nominatim*. Without referring to a particular precedent, the mother's counsel pointed out that neither 'service of heir' nor confirmation were necessary for the son in case of such bond, so it should also be unnecessary for Bessie to be Janet's substitute. The notable thing in this argument is that the terminology of heritable succession – "heir of provision" – was used in quite an unusual setting of the last will, executry and moveable legacies!

This mixing of the terminologies of heritable and moveable succession may also be found in subsequent, albeit scarce, case law involving last will destinations. In

⁸⁴⁶ The age of pupillarity in Scots law in that period was identical to that of Civil law: 14 for men and 12 for women (Stair, *Inst.*1.6.24).

⁸⁴⁷ By virtue of the *jus accrescendi* at Civil law, as understood in the medieval *Ius Commune*, the portion of an heir or a legatee proportionately accrued to other heirs or conjunct legatees, if he died without the heirs of his own. No new *aditio hereditatis* was required. The burdens attached to the vacant portion also accrued (see, e.g., Pau.Castr., C.6.51.1.10-11). However, the Humanist scholars provided a different interpretation of *jus accrescendi* and its consequences (see: Voet, *Commentarius ad Pandectas*, D.30.1, LX-LXII). Irrespective of the interpretation taken, the Civilian *jus accrescendi* was only applicable before the legacy was vested, while in *Hill v. Maxwells* the original general legacy of John Maxwell to his daughters was already vested. However, like with many other *Ius Commune* institutions, Scots lawyers could have taken a wider interpretation of *jus accrescendi*: see, e.g., Dirleton applying the '*jus accrescendi*' concept to a situation when a bond was given to the mother in liferent and to her children in fee and one of the children predeceased the mother (Dirleton, '*Jus accrescendi*', *Some Doubts...*, 104).

Nicolson v. Nicolsons (1677, M.8944) the Court of Session was, without any objections, dealing with a deed which appointed the granter's son "heir and executor" of the granter and substituted the son's siblings as "heirs and executors" to him. It seems that these siblings were confirmed by the Commissary as the deceased son's executors, which implies that substituting an executor to an executor (at least, an underaged one) was an acceptable practice in that period.

In another case, *Christie v. Christie* (1681, M.8197=14849),⁸⁴⁸ a father appointed his daughter Jean his executor and general legatee, substituting another person for the occasion of her decease. Jean survived the father and was confirmed as executor to him but, soon afterwards, died herself. Jean's posthumous brother was confirmed as executor-dative to her but was sued by the substitute. The substitute claimed that he was a "tailzied heir-substitute *in mobilibus*" of Jean, entitled to the general legacy despite Jean's surviving her father. His action was granted by the Lords, who held that Jean (or her tutors) could have defeated the "moveable tailzie", but, as she had not, the "tailzie" was still in force. The Lords however, found that the "tailzie" did not extend to the "Bairn's part" of Jean, which her father could not substitute;⁸⁴⁹ the substitute's claim that he was *substitutus pupillariter* to Jean was met with a pronouncement that the 'pupillary substitution' did not exist in Scots law. This confirms that the doctrine behind this decision was not Civilian – it was more of an analogy with heritable succession. Moveable substitutes were considered "heirs" similarly to the heritable substitutes – the 'heirs of tailzie' (*infra*, s.5.3).

Campbell v. Campbell & MacMillan (1740, M.14855) is considered the main Scottish case on destinations in last wills.⁸⁵⁰ Daniel Campbell appointed his father, John Campbell, his executor and general legatee, substituting his sister, Margaret, for the occasion of the father's decease. John survived his son, but not for long, never confirming as executor to him. The dispute arose between Margaret, as substitute, and John's elder son, William, who was John's general legatee. William claimed that,

⁸⁴⁸ This case was previously analyzed by George L. Gretton (Gretton, op cit, 169).

⁸⁴⁹ At Civil law, the father could freely make a 'pupillary substitution' of the child's 'legitim'. Whether the same could be done by a fideicommiss, was a controversial question. There was an opinion that it was possible if it did not restrict the son's freedom to dispose of the 'legitim' (Bart., D.28.6.1.2-3).

⁸⁵⁰ Gretton, op cit, 170.

according to Civil law, a substitution was to be presumed a *substitutio vulgaris*,⁸⁵¹ and so John's surviving Daniel excluded Margaret's hope of succession. In return, Margaret argued that Civil law did not know any other type of substitution besides a 'vulgar' one⁸⁵² and that Civil law had "*this subtlety, that... (one) could not name an heir to his heir...*" The latter statement was not exactly true, as the Civilian 'pupillary' and 'exemplary' substitutions were doing exactly that – appointing "an heir to the heir" (*supra*, pp.159-160). However, this statement by the party reflects the dominant approach of Scots lawyers to destinations in last wills. They always tended to draw an analogy between them and heritable destinations, which were dominated by the concept of "heirship".

Margaret prevailed in that case, as the Lords found that she was a "proper" substitute and not a conditional institute, as well as that John's disposing of his estate to William could not be interpreted as defeating the substitution. Defeatance itself, in theory, was recognized as perfectly possible, even by a last will. The one question that caused hot debates among the Lords was how Margaret was supposed to establish her title in the legacy. Some claimed that, as the legacy was vested in John's person without confirmation, it was to transmit to Margaret *ipso jure*, similarly to a substitute *nominatim* in a heritable bond.⁸⁵³ Others, however, held that Margaret was to confirm as executor-dative to Daniel, the original testator, in order to establish the title.

Campbell was confirmed in subsequent cases: *Robertson v. Ker* (1742, M.8202=15942)⁸⁵⁴ and *Brown v. Coventry* (1793, M.14863). The last case established that substitutionary clauses in legacies, in doubt, were presumed to create "conditional institutions", not proper substitutions. This rule was afterwards widened and extended to all moveable property.⁸⁵⁵ However, George L. Gretton's claim that "*a mortis causa*

⁸⁵¹ This is partially true, as in doubt the words of a substitution were deemed "direct" and not "oblique" at Civil law. The exact interpretation of the substitution depended on the wording and other factors (d'Alesme, *Tractatus in materiam substitutionum*, XV; *supra*, n.722).

⁸⁵² This was untrue (*supra*, s.5.1).

⁸⁵³ *Infra*, p.201.

⁸⁵⁴ This case dealt with the question whether the 'legitim' of the son could be subject to a substitution, previously raised in *Christie v. Christie* (1681, M.8197). The answer was negative, in so far as the substitution restricted the son's right of disposal; the question remained undecided in respect of a simple destination *de residuo*.

⁸⁵⁵ M'Laren, *op cit*, vol I, p.299.

substitution becomes indistinguishable from an *inter vivos* one”⁸⁵⁶ is not exactly true for the pre-1800 legal context. It will be demonstrated further⁸⁵⁷ that the same clauses that created a moveable substitution in a last will also created a heritable substitution in an *inter vivos* disposition.

The conclusion that we are to draw from Scottish testamentary destinations, besides the scarcity of case law, is that such destinations were not seen as a separate legal device until the late 18th century. They were heavily influenced by *inter vivos* destinations, called “special destinations” in modern law, which at the time were governed by the rules of heritable succession.

The *inter vivos* destinations, called “special destinations” in later law,⁸⁵⁸ were the main form of destinations in Scots law in the 17-18th centuries. How similar or dissimilar were they from the Civil law fideicommisses? This is a very complex question. Scottish legal writers were themselves divided on this point. Lord Bankton considered the Scottish tailzies to descend from the Civil law fideicommisses (*Inst.II.3.135*), although the law as described by Bankton does not reveal a significant Civilian influence.⁸⁵⁹ G. Mackenzie pointed out that the Scots tailzies and destinations were very similar to fideicommisses, but he, nevertheless, followed Craig in ascribing them mainly to the Anglo-Norman ‘entails’.⁸⁶⁰ Stair thought them to be of French origin (*Inst.III.4.33*). J. Erskine famously stressed the uniqueness of Scottish substitutions (destinations), stating that “*Romans had the name of substitution without the thing*” and pointed out that it was not possible to appoint “an heir of the heir” in Civil law, except for a case of the ‘pupillary substitution’ (*Inst.III.8.44*). The 18th century case law usually followed the same line, evidenced, e.g., by *Campbell v. Campbell & MacMillan* (1740, *supra p.180*).

Some authors, for example, George L. Gretton, were troubled by what looks like the ignoring of Civilian fideicommissary substitutions by the majority of Scots authors and practitioners. Further, Gretton points out how Dirleton completely ignores

⁸⁵⁶ G.L. Gretton, *op cit*, 170.

⁸⁵⁷ *Infra*, pp.188, 198.

⁸⁵⁸ See, e.g., M’Laren, *op cit*, vol II, pp.592-593.

⁸⁵⁹ See *infra*, n.901.

⁸⁶⁰ Mackenzie, *A Treatise on Tailzies*, 484; *Jus feudale*, II.16.1.

it when dealing with tailzies, creating an impression that only ‘vulgar’ and ‘pupillary’ substitutions were comparable with tailzies. In that fragment, Dirleton (in Latin) opines that a tailzie of lands worded “to Titius and the heirs of his body, whom failing to his heirs-male” creates both a ‘vulgar’ and a ‘pupillary’ substitution at Scots law.⁸⁶¹ And this despite Dirleton’s using an excerpt from the text by the Civilian jurist A. Perez (1583-1673), which in the original context expressly referred to the *substitutio fideicommissaria*.⁸⁶²

In the opinion of the author of the present thesis, there is no inconsistency in Dirleton’s work. When Dirleton mentions “pupillary substitution” in this fragment, he does not mean that the substitution is only effectual while Titius is under 14 years old. He means that such tailzie appoints the substitutes as heirs to Titius, similar to the way the Civil law ‘pupillary substitution’ operated. In this, Dirleton’s fragment stands in line with all other instances when “an heir to an heir” paradigm was mentioned. Nor is there inconsistency in this paradigm in general. It was perfectly true that Scottish destinations and tailzies, at least since the 1660s, did exactly that – they appointed the substitute an heir of the institute.

The substitutes in tailzies and destinations in Scotland were considered “heirs of provision” and were subject to the rules of heritable succession. This did not depend on whether the property subject to the destination was originally heritable or moveable. *Hill v. Maxwells* (*supra*, pp.177-180) showed how the terminology of heritable succession was applied to a moveable sum in a legacy. Subsequent cases concerning substitutions in bonds used the same language.⁸⁶³ The 18th century Institutional writers explicitly held that a bond conceived in favour of the creditor and the substitutes *nominatim* was heritable.⁸⁶⁴ The substitutes in destinations were called “heirs of provision”, “heirs-substitutes”, etc. and, by a general rule, were required to obtain ‘service of heir’ to the previous member of the destination in order to vest the right in their person (Bankton, *Inst.III.5.22*).

⁸⁶¹ J. Nisbet of Dirleton, ‘*Substitutio*’, *Some Doubts...*, 183.

⁸⁶² Gretton, *op cit*, 171-172.

⁸⁶³ *Fleming v. Fleming* (1666, M.13999=14848); *Laird of Lamington v. Muir(Moor)* (1675, M.4252=14357); *Robertson v. Preston* (1680, M.14357).

⁸⁶⁴ Bankton, *Inst.II.1.36*; Erskine, *Inst.II.2.19*; *infra*, p.202.

The most important consequence of this approach, which was the most crucial difference of Scots destinations from the Civil law fideicommisses, was the fact that Scots destinations created a universal succession. Being an “heir” of the previous holder of the tailzied property, the substitute was liable for the debts created by the predecessor. Sometimes this liability was absolute, sometimes limited (*infra*, p.193-194). An ‘heir of tailzie and provision’ usually enjoyed a ‘privilege of discussion’, so that the general heir of the defunct was to be “discussed” before the creditors could use diligence against the ‘heir of tailzie’.⁸⁶⁵ Nevertheless, the ‘heir of tailzie’ was liable for the debts of all his predecessors.

Moreover, if the heir was obliged to retain the tailzied estate for a further heir-substitute, the payment of the predecessor’s debts did not take away the burden of the tailzie. This was found in the case of *Callendar v. Hamilton* (1686, M.15476), where the heir of tailzie⁸⁶⁶ paid off the debts of the granter of the tailzie and afterwards burdened the tailzied estate with a new debt, in consideration of the money he had paid. After his death, the next heir of tailzie challenged the new debt on the basis of the 1621 Act on fraudulent dispositions,⁸⁶⁷ arguing that the transaction violated the clause not to “disinherit” him. The pursuer succeeded in his petition, which, as evidenced by G. Mackenzie’s report of the case,⁸⁶⁸ was supported by a large amount of Civil law citations: to the Digest, An. Robertus, M.A. Pellegrini. The pursuer was able to persuade the judges that any claims the contravening heir might have against the tailzied estate were extinguished by confusion. The Civil law citations seem to have helped him to prove that the “not to disinherit” clause was sufficient to prevent the heir from decreasing the tailzied estate. However, the unique feature of this case, distinguishing it from the Civil law, is the use of the anti-fraud legislation by the next heir of tailzie to relieve himself of the debts created by his predecessor. This might imply a possible creation of the long tailzied succession, where each member was to pay the debts of the preceding members from his or her own estate, while the tailzied

⁸⁶⁵ Craig, *Jus feudale*, II.17.19; Stair, *Inst.* III.5.17.

⁸⁶⁶ Strictly speaking, the defender in this case was not an ‘heir’ in the proper meaning, because he was not ‘served’ as an heir to his predecessor. Instead, he received the tailzied estate from the hands of the granter, in return for an obligation to pay off some of the granter’s debts. However, he is called an “heir” in the case and is treated as such, which further proves the prevalence of this concept.

⁸⁶⁷ *Supra*, p.104.

⁸⁶⁸ Mackenzie was the winning counsel in that case (*Mackenzie’s Works*, vol I, 154-160, vol II, 488).

estate was changing hands intact. Not all the lawyers agreed with such a possibility,⁸⁶⁹ but the case is very telling indeed. This shows that the Scots authors were absolutely right when they stressed the specialty of the Scottish destinations, which allowed to make “an heir for the heir”.

The other outstanding feature of the Scots law of destinations that *Callendar* and similar cases demonstrated concerned the extent to which a substitute was protected against the predecessor’s deeds. It was mentioned above that in Civil law, by a general rule, a *fideicommissarius* could not dispute the fiduciary’s deeds if he became the latter’s heir (*supra*, p.166). In contrast, in Scots law, under some circumstances, the ‘heir of provision’ could challenge the acts of his predecessor.

This was related to the assumption that the ‘heir of provision’, in Craig’s words, was an “extraneous” person to the defunct and was not a “true” heir.⁸⁷⁰ The procedure of ‘service of heir’ was performed in a different way for the ‘heir of provision’. As was mentioned above, the ‘service of heir’ could be either “general” or “special”, depending on the type of property the heir was succeeding to.⁸⁷¹ At the same time, both a ‘general’ and a ‘special service’ could often be performed by one and the same person either as an heir of a particular provision or as a general heir. An heir of line or an heir of conquest was always a general heir; an ‘heir of provision’ *nominatim* or an ‘heir of marriage’ were supposed to obtain ‘service’ to the particular provision, while an ‘heir-male’ could serve as both the general heir and the heir to the particular provision.⁸⁷²

The difference was crucial. An heir obtaining ‘service’ only in respect of the property that was due to him by provision was entitled to defend his provision from the actions of the defunct and sue the general heirs to implement the provision.⁸⁷³ However, as soon as the heir became ‘served’ to the estate in general, he lost his right to challenge the defunct’s deeds, as the creditor and the debtor became confused in his

⁸⁶⁹ Thus, Bankton, in what looks to be a contradiction to *Callendar*, holds that an heir of strict tailzie can get a compensation for the debts of the tailzie paid by him (*Inst.*II.3.159).

⁸⁷⁰ *Jus feudale*, II.17.19.

⁸⁷¹ *Supra*, p.131.

⁸⁷² Craig, *Jus feudale*, II.16.22; Stair, *Inst.*III.4.33; Bankton, *Inst.*III.5.14-16.

⁸⁷³ Stair, III.5.12.

person, in a way not dissimilar to the *fideicommissarius* losing his right to challenge by becoming the heir of the defunct in Civil law (*supra*, p.166). Mistakes in the form of ‘service of heir’ were common and costly.⁸⁷⁴ This is why most of the ‘heirs of provision’ preferred to dispute the defunct’s deeds without obtaining ‘service of heir’, often using alternative methods to establish their title. In *Callendar v. Hamilton* the pursuer, in order to prove he was the ‘heir of provision’, granted a simulate bond to his brother, was charged by the brother to enter as heir, renounced the succession, and his brother afterwards raised an adjudication of the tailzied estate; this practice was probably invented by Th. Hope.⁸⁷⁵

These two special features make Scottish destinations very different from Civil law fideicommisses. They explain why Scots lawyers did not see many similarities between the two legal systems on this point. However, in spite of all this, the Scottish model of the destination is not completely alien and unprecedented to the Continental doctrine. In fact, Scottish destinations are somewhat reminiscent of the feudal substitutions of the *Ius Commune* (*supra*, p.171). The similarity is already on the surface just because the Scots destinations followed the rules of heritable succession: heritable succession in Scotland, as is well known, was based on feudal principles.⁸⁷⁶ However, there is more to it than that. Th. Craig drew an analogy between the Scots ‘heirs of provision’ and collaterals succeeding to fiefs according to the *Ius Commune feudorum*.⁸⁷⁷ Collaterals, according to the *Ius Commune*, could succeed to the fief without becoming heirs to the defunct fiar and accepting the liability for his debts, as they were entitled to the fief in their own right (*supra*, n.772). In a similar way, the Scots ‘heirs of provision’ had a safeguard against the debt liability in the form of the “privilege of discussion”.

⁸⁷⁴ Home v. Home (1708, M.12900=14010), where the son’s serving as heir-male general prevented him from disputing his father’s dispositions of the property which was due to the son by the contract of marriage. Nevertheless, in this case the son prevailed by proving that the opposite party bore special responsibilities. See also: Laird of Ayton v. Colvil (1710, M.14010).

⁸⁷⁵ George J. Bell refers to this practice as invented by Hope, without, however, making a specific reference or citation to Hope’s writings (G.J. Bell, *Principles of the Law of Scotland* (1830), §835).

⁸⁷⁶ J. Irvine Smith, ‘Succession’, ISLH (1958), 208-210.

⁸⁷⁷ *Jus feudale*, II.17.19; *Libr. Feud.* II.45.

Craig admitted that the analogy was quite forced.⁸⁷⁸ However, his analogy looks stronger if we modify it, comparing ‘heirs of provision’ not to collateral feudal succession but to substitutions in fiefs, which were absent from the text of the *Libri feudorum* but prominent in the writings of the learned jurists (*supra*, p.171). When a fief was granted to “the vassal and his children”, the children, under the *Ius Commune*, received such a fief not as the heirs of their father, but in their own right, although they were also required to become heirs to him, as a secondary requirement. In the opinion of many Civilian authors, the child in such a situation was entitled to dispute his father’s deeds in prejudice of the fief, despite being the heir of his father.⁸⁷⁹

This is exactly what we can see in Scots tailzies and destinations. The substitute was entitled to the property in his own right, flowing from the provision made by a distant predecessor; and, although the substitute was required to be an “heir” of his immediate predecessor, this “heirship” was of a privileged kind and did not prevent from challenging the predecessor’s deeds or holding the general heir responsible for them.

The subsequent sections will be dedicated to looking through the various types of destinations in Scots law and their further similarities and differences from their Civilian counterparts.

5.3. Tailzies of Heritable Property.

Th. Craig’s *Jus feudale* (book II, title 16) was the first text to deal with tailzies systematically. The tailzie of circa 1600, as presented in this treatise, was a purely feudal institution. There is no talk whatsoever about any vested rights of the ‘heir of tailzie’, as the tailzie is created exclusively by an agreement between the granter of the tailzie, his feudal superior and the grantee (who could coincide with the granter). The tailzie was most often given to “A and the heirs-male of his body, whom failing to B

⁸⁷⁸ Craig, *ibid.*

⁸⁷⁹ Baldus, C.6.14.3; Pellegrini, *De fideicommissis...*, art XXXIII, p.498.

and...”, but the ‘heirs of tailzie’ could be designated in any convenient way. The heir who was substituted by the words “whom failing” was called an “heir of provision” in the proper meaning of the term, with “provision”, allegedly, meaning “substitution”.⁸⁸⁰ However, in the later Scots law the terminology was less strict and the term “heir of tailzie and provision” acquired the widest meaning of anyone succeeding to a certain property by the defunct’s appointment.⁸⁸¹ A feu was only considered a “tailzied feu” if there was still a pending substitution: thus, a feu simply “to him and his heirs-male” or “to him and the heirs of his body”, with no provision for the further destiny of the feu, was not a tailzied feu and descended to heirs whatsoever of the vassal.⁸⁸² A cancellation of the tailzie was achieved in the same way as its constitution – by the consent of the fiar with the superior.⁸⁸³ Without the superior’s consent, the fiar was forbidden not only to alienate the feu but also to make the ‘heirs of tailzie’ the primary representatives of the fiar’s debts: the “privilege of discussion” in Craig’s treatise is presented as a strict rule, with the general heir of the fiar always being the first person to be sued.⁸⁸⁴

However, already in the time of Craig, there was a method to compel a non-cooperating feudal superior to consent to the making of the tailzie – namely, the creation of a real or a fictitious debt in favour of the disponee and heirs of tailzie;⁸⁸⁵ in the time of Stair this was the usual procedure.⁸⁸⁶ The same came to be applied in respect of breaking the tailzie; this, however, took a more complicated evolution. In *Bruce v. Buckie* (1619, M.10415), it was decided that a right of reversion, granted to the person and his heirs, excluding assignees, could be subject to diligence by the person’s creditors. This case was dealing with an incorporeal right, so there was no “superior” to ask consent of, unlike in the case of corporeal (physical) land. With time,

⁸⁸⁰ *Jus feudale*, II.16.19.

⁸⁸¹ Stair, *Inst.* III.4.33; Erskine, *Inst.* III.3.38.

⁸⁸² *Jus feudale*, II.16.19; Stair, *Inst.* III.4.33.

⁸⁸³ *Jus feudale*, II.16.21-22.

⁸⁸⁴ Craig illustrated this by an undated case of Henry Stewart succeeding to Robert Stewart (*Jus feudale*, II.17.19).

⁸⁸⁵ *Jus feudale*, III.1.13.

⁸⁸⁶ Stair, *Inst.* II.3.43; Gretton, ‘Fideicommissary substitutions...’, 165.

it was established, contrary to Craig, that the fiar could put a burden of debts upon heirs of provision, irrespective of the superior's consent.⁸⁸⁷

A distinction soon arose between "tailzies by infetment" and "tailzies by contract". In *Sharp v. Sharp* (1631, M.15562) the Lords called them "charters of tailzie" and "bonds of tailzie" respectively. The former, made between the fiar and the superior, were revocable, while the latter were valid contracts, obliging the fiar to grant the tailzie. Their revocability varied. In the case of *Nair v. Nair* (1613, M.6943),⁸⁸⁸ one brother granted a lucrative bond of tailzie in favour of the other brother, appointing him his heir-substitute. The heir pursued his brother to set up an inhibition against this obligation in order to secure the debt. The Court of Session, however, refused to grant such diligence on the ground of this bond, holding that the granter could revoke the bond freely. This case shows that a contract to grant a tailzie in this period was not yet considered a purely contractual obligation but retained elements of succession.

Nair was interpreted as applying to lucrative promises only.⁸⁸⁹ At some point, the opinion emerged that the granter of a lucrative tailzie was obliged to perform the infetment in accordance with it just once but was not obliged to keep the tailzie unchanged after that; opinion was different, however, in respect of the granter's general heirs, who could not go against the tailzie.⁸⁹⁰ Th. Hope called this the dominant opinion of the lawyers of his time, which he, nevertheless, did not agree with, holding that a lucrative tailzie did not put any restrictions on either the granter or his heirs.⁸⁹¹ However, it seems that the dominant opinion remained such and persevered. Mackenzie confirms that a lucrative promise to grant a tailzie obliged the promisor to perform the infetment just once but did not forbid going against it.⁸⁹² In *Scot v. Scot*

⁸⁸⁷ *Fairly v. Heirs of Blair* (1611, M.2746=3575), *Calderwood v. Pringle* (1664, M.3036).

⁸⁸⁸ There are several reports, obviously dealing with this same case but each using a different name citation. Th. Hope in his *Major Practicks* (II.15.9) refers to substantially the same case from the 1613, but the party's name he provides is "Thomas Movat". The same Hope, in the *Minor Practicks* (§§360-361), deals with the case in much detail, but does not provide the date and the parties' names this time are "Thomas Maver and Walter Maver".

⁸⁸⁹ Hope, *Minor Practicks*, §§358-359.

⁸⁹⁰ Cf. the *Ius Commune* rule that the original parties to the contract (but not their heirs) could defeat the substitution in favour of a third party until the substitution became a vested right (*supra*, pp.174-175).

⁸⁹¹ Hope, *Minor Practicks*, §§358-361, 364.

⁸⁹² Mackenzie, *Treatise on Tailzies*, 485.

(1713, M.15569), the mutual consent of the debtor and creditor was found necessary to defeat a gratuitous promise to grant a tailzie.⁸⁹³

However, if the tailzie was promised for an onerous cause, it could not be defeated either by the granter or his heirs general or ‘of provision’.⁸⁹⁴ Moreover, a mutual tailzie, in which two persons agreed to be each other’s ‘heirs of tailzie’, was also indefeasible. This was established in *Sharp v. Sharp* (1631, M.4299=15562), where two brothers, at the urging of their father, made a contract appointing them each other’s ‘heirs of tailzie’, failing the heirs of their body. The general heir of the predeceasing brother presented numerous objections against this contract’s validity on the ground of Civil law. The heir described this contract as a *nudum pactum* or a *contractus innominatus*, unenforceable if not executed within the party’s life, and a *pactum futurae successionis*, as it promised heirship. The Lords rejected these arguments. It was held that *contractus innominati* were unknown in Scotland, and thus neither party could refuse to perform the tailzie. The contract was found to be grounded on a valid cause, being neither a *nudum pactum* nor a *pactum successorium*. Thus, agreements on mutual succession, which were such a controversial topic in Civil law (*supra*, p.120), were held acceptable in Scots law. The Lords also noted that, if either party alienated the lands with obvious signs of fraud (namely, for a lucrative cause in favour of a “conjunct or confident person”), the other party might potentially use the 1621 Act (*supra*, p.104) to ‘reduce’ the alienation.

As well as the tailzies for onerous causes, tailzies containing “non-alienation clauses” were also considered indefeasible.⁸⁹⁵ “Non-alienation clauses” could be worded in various ways: as promises “not to do anything in prejudice of the heir of tailzie”, “not to alter the tailzie”, “not to contract debts in prejudice”, etc. The problem with such clauses, however, was enforceability. They had no real effect and left the aggrieved ‘heir of provision’ limited to a personal action against the defunct’s heirs. In the *Earl of Hume Case* (1634, M.15563=I B.S.202), one party to a mutual tailzie overburdened the estate and sold lands, in violation of the “non-alienation clause”.

⁸⁹³ Note that W.M. Morison seems to have misinterpreted this case in his summary at M.15569.

⁸⁹⁴ Hope, *Minor Practicks*, §§362-363.

⁸⁹⁵ Hope, *Minor Practicks*, §357; Mackenzie, *Treatise on Tailies*, 485.

However, it was not found a sufficient ground to rescind the contract by the other party, who was found entitled to pursue the heirs of the other party for damages (“*interest*”) only.

Moreover, there were situations when even damages could not be demanded. *Drummond v. Drummond* (1636, M.4302) was, probably, the first case where the Civilian distinction between “necessary” and “voluntary” alienations was influential.⁸⁹⁶ In the case, an onerous obligation to tailzie an estate was granted, containing no ‘non-alienation clauses’, with an actual infeftment on the tailzie following. The tailzied lands were sold by the granter afterwards. The Court of Session rejected the pursuit by the creditor against the granter. The Lords held that the obligation to grant the tailzie was already performed, while the subsequent sale of lands was made for an “urgent and just cause”. The pursuer could not even demand the return of the price he bought the tailzie for, because all he bought was “like a hope and a catch of the net” (“*quasi spes et factum retis*”), being constrained by the debts created by the granter in his “urgent affairs”. This alienation, the Court held, might have been held fraudulent if it had been done to “frustrate the tailzie directly”, but this was not proved in the case.

“Urgent and just cause” is pretty much the same as the “necessary” cause of the Civil law. There is, however, an obvious difference between the two. While in Civil law a “necessary” alienation of the burdened property did not extinguish the fideicommiss but only postponed it until the fiduciary’s death (*supra*, p.165), in Scotland the ‘necessary cause’ for alienation completely evacuated the tailzie in respect of the disposed property. Neither was any trace found in Scotland of the Civilian rule that the price of the sold property was subject to restitution (*supra*, pp.167-168).⁸⁹⁷ A tailzie or a destination only extended to the property originally subject to it. Probably, it was connected with the nature of the Scots institution of

⁸⁹⁶ At least, if we do not take *Bruce v. Buckie* (1619, M.10415) into account; in that case there was no obligation on the alienating party.

⁸⁹⁷ In *Kilburny v. The Heirs of Tailzie of Kilburny* (1669, M.15347) there was a non-alienation clause with a corollary that the tailzied land could be sold to pay the debts of the granter of the tailzie. The Court held that this corollary was applicable even if the sale was for the price larger than the sum of debt. The question of the restitution of the surplus price was not even raised.

‘heirship of provision’ – the ‘heir of provision’, unlike the general heir, only succeeded to the specific assets, which were “provided” by the defunct.

Other instances of Civilian influence on tailzies may be found. As already mentioned (*supra*, p.165), at Civil law goods burdened by a fideicommiss could be converted into a dowry or a donation *propter nuptias*, if there was no other property available for that purpose. As concerns Scotland, already in 1668 (*Binny v. Binny*, M.4304) we encounter a claim that a contract of marriage was “privileged” and could freely convey tailzied lands to the spouse; in this case, however, the claim was not successful.⁸⁹⁸ There were later cases, on the other hand, where giving lands in a marriage-contract was found sufficient ground to defeat a tailzie.⁸⁹⁹ However, it should be made clear that neither of those cases referred to the Civil law. The discussion in these cases, as reported, developed mainly around the question of whether a particular marriage contract was “lucrative” or “onerous”; if it were found lucrative in respect of the beneficiary of the marriage contract, the contract would not defeat the tailzie.⁹⁰⁰

The lack of specific references to the Civil law in Scots practice on breaking of tailzies produced a confusion in later Scots law. The “necessary/voluntary” causes dichotomy seems to have been replaced by the “onerous/lucrative” cause distinction.⁹⁰¹ The outcome was that, in order to break a tailzie, a disposition needed not to be “necessary” but just onerous. This confusion might possibly have arisen due to the influence of the law on fraud as established by the 1621 Act, which created a presumption of fraud only for the lucrative deeds.⁹⁰² It might also have been associated with the influence of marriage contract provisions to children, which could be defeated by “reasonable onerous dispositions” (*supra*, p.149-150) and required no “necessity”. Most of the destinations we encounter in the case law, in fact, were contained in

⁸⁹⁸ Disagreement among the Lords in this case are reported. Possibly, the final decision was due to the fact that an inhibition was served on the defender before the marriage contract was made.

⁸⁹⁹ *Strachan v. Dunbar* (1714, M.4312); *Weir v. Drummond* (1752, M.4314).

⁹⁰⁰ This was found in *Craik v. Craik* (1735, M.4313), where the fiduciary’s ‘heir of marriage’ was found a lucrative beneficiary of the marriage contract, liable to implement the prior tailzie broken by the marriage contract.

⁹⁰¹ See: Bankton, *Inst.* II.3.137-139, - where the word “necessary” is mentioned only once, when talking about “just, necessary and onerous causes”; otherwise, only ‘onerous’ and “voluntary” (in the meaning of “lucrative”) causes are distinguished.

⁹⁰² J. MacLeod, *Fraud and Voidable Transfer*, 105-113.

marriage contracts, so it is not surprising that the rules on provisions to children were influential on the law of tailzies.⁹⁰³ Finally, the enactment of the 1685 Act on tailzies⁹⁰⁴ might have contributed to the idea that tailzies unprotected by ‘clauses irritant and resolute’ (*infra*, s.5.5) could not have vigour against non-fraudulent onerous dispositions.⁹⁰⁵

The protection of the ‘heirs of provision’ in tailzies was gradually strengthened by various devices. Similarly to the *Ius Commune*, where a judicial *bonis interdictio* could be used to prevent the alienation of goods burdened by a fideicommiss (*supra*, p.178), Scots law, initially at least, allowed an inhibition to be used by the ‘heir of provision’ for the same purpose. *Nair v. Nair* (1613, *supra*, p.189) established that an inhibition was to no avail in a purely lucrative tailzie, but the 17th century lawyers held to the contrary if the inhibition was served not on the promise to bestow tailzie itself but on the “non-alienation” clause, which was considered “extraneous” to the tailzie.⁹⁰⁶ 18th century lawyers, however, were doubtful of the inhibition’s effect in respect of tailzies.⁹⁰⁷

Another important development in the protection of heirs of provision during the 17th century was the restriction of their liability for the predecessor’s debts. As was already mentioned, 17th-century legal practice rejected the position of Craig’s *Ius feudale*, according to which an ‘heir of provision’ was always protected by the ‘privilege of discussion’ and could only be sued after the general heir’s estate was exhausted (*supra*, p.184). It was eventually found that the defunct could make his or her ‘heirs of provision’ primarily liable for a particular debt, especially for the obligation of tailzie which obliged the ‘heirs of tailzie’ before the subsequent ‘heirs of tailzie’, etc.⁹⁰⁸ However, in the 1660s it was established that substitutes in bonds could

⁹⁰³ Erskine, dealing with tailzies and their “non-alienation clauses”, deals almost exclusively with marriage-contract tailzies as the main form (*Inst.*III.8.38-40).

⁹⁰⁴ *RPS*, 1685/4/49.

⁹⁰⁵ This was Bankton’s interpretation of the Act (*Inst.*II.3.139).

⁹⁰⁶ Hope, *Minor Practicks*, §357; Mackenzie, *Treatise on Tailzies*, 490; Binny v. Binny (1668, M.4304). See also Dirleton, who distinguishes the tailzie itself and the obligation not to break it, as well (Dirleton, ‘*Quo casu Heirs of Tailzie may be considered as Creditors?*’, *Some Doubts...*, 88).

⁹⁰⁷ Bankton, *Inst.*II.3.140; J. Dalrymple, *An essay towards a general history of feudal property in Great Britain* (1758), 172.

⁹⁰⁸ Stair, *Inst.*III.5.17; Fairly v. Heirs of Blair (1611, M.2746=3575), Calderwood v. Pringle (1664, M.3036).

only be liable for the debts of the institute *ad valorem* – to the extent of the value of the right they received from their predecessor.⁹⁰⁹ The opinion arose that ‘heirs of tailzie’ of lands should also bear a limited liability, by analogy to bonds. Although most of the authors still held that the liability of the ‘heir of tailzie’ was *in solidum*,⁹¹⁰ voices in favour of the limitation appeared.

For example, Dirleton addresses this question explicitly in several places and finally holds that an ‘heir of provision’ in lands should only be liable *ad valorem*, in so far as he is an heir *in certa re*⁹¹¹ and obtains the ‘service of heir’ only in respect of the particular provision, not generally.⁹¹² Bankton expressed a similar opinion, making an exception for ‘heirs of provision’ who were the defunct’s children.⁹¹³ The matter was only definitely decided in *Baird v. Neil* (1766, M.14019), where *ad valorem* liability was established as a rule for all ‘heirs of provision’. This was one of the instances when the law on substitutions in bonds influenced the law on tailzies, not *vice versa*.

5.4. Destinations in Bonds.

Destinations contained in personal obligations (mainly, in Scottish context, bonds) will be dealt with separately from the tailzies of heritable property. The reason for this is that, as will be shown further, destinations in bonds were initially conceived as an institution separate from that of tailzies. With time, however, they were assimilated, with destinations in bonds taking many features from tailzies, but the reverse influence was also true.

⁹⁰⁹ Fleming v. Fleming (1666, M.13999=14848).

⁹¹⁰ Stair, *Inst.* III.5.16; Mackenzie, *Inst.* III.8.26. Erskine also held this opinion (*Inst.* III.8.51).

⁹¹¹ Dirleton here is obviously referring to *heres ex re certa* of the *Ius Commune*, where an heir appointed as such in the certain item of property possessed combined features of an heir and a legatee. Like an heir, he participated in the division of the estate property, but, like a legatee, he was not directly liable for the debts of the defunct and did not need *aditio hereditatis*. The details of such heir’s legal status were, nevertheless, a subject of controversy. See: D.28.5.35 (with the Gloss and commentaries); Sext.3.11.1, s.v. “*In re certa*” (a good summary on the subject).

⁹¹² Dirleton, ‘Heirs of Provision and Substitute’, ‘Heirs of Tailzie’, *Some Doubts...*, 87-88.

⁹¹³ Bankton, *Inst.* III.5.62-63.

The evolution of the status of destinations in bonds to a very large extent concerned a question, whether to consider them a form of heritable or moveable succession. In classical Scots law, obligations were either heritable or moveable. To put it simply, moveable obligations made part of the deceased creditor's moveable estate on his death and could be left by his last will. Heritable obligations descended to the creditor's heirs, either general or 'of provision', and could not be disposed by a last will.⁹¹⁴ The same distinction, usually, held in respect of the debtor, but it was less significant here. The debtor's executor and heir could be sued for both the moveable and the heritable debts of the defunct; afterwards they had recourse against each other.⁹¹⁵ Heritable and moveable obligations also had different 'diligences' (procedural forms) to enforce them, but this does not concern the present research.

Which obligation was heritable and which moveable? This was one of the most controversial topics of Scots law. In principle, a bond was considered heritable if it contained an obligation to infeft the creditor in land or annualrents from land. However, even if there was no obligation to infeft, a bond creating an annualrent (interest) on a principal sum⁹¹⁶ or any other right of periodical character (*tractum futuri temporis*) was usually considered heritable.⁹¹⁷ This was due to the medieval Canon law prohibition of usury: the obligation to pay annualrent, being theoretically attached to the profits of the debtor's heritable property, was not considered usurious.⁹¹⁸ However, the bonds could often be very confusing as to their nature; the pre-1641 case law was also often confusing and contradictory on what to consider a heritable and a moveable bond. The same bond could be deemed moveable before the coming of the

⁹¹⁴ Established as early as *Dickson v. John* (1581, M.3205).

⁹¹⁵ G. Mackenzie expounded the classical law on this issue in his commentary on the 1503 Act (*RPS*, A1504/3/121), in the *Observations upon the Acts of Parliament* (113-114). The heir could not be sued by the moveable creditors of the defunct within one year of the defunct's death. After the year expired, both the heir and the executor could be sued for moveable and heritable debts. The heir had recourse against the executor in respect of the moveable debts paid, but always within the *vires inventarii* of the executor. The judicial practice introduced a mirror remedy for the executor, who could have recourse against the heir in respect of the heritable debts he had to pay.

⁹¹⁶ The term "annualrent" in Scots law denoted two closely related but still separate rights. An "annualrent by infeftment" was a real right, due from a particular piece of land (*Stair, Inst. II.5.2-3*). An "annualrent" could also be a purely personal obligation to pay interest on borrowed money (*Stair, Inst. I.15.7*).

⁹¹⁷ W. Alexander, *The practice of the Commissary Courts in Scotland* (1859), 7-12.

⁹¹⁸ *Stair, Inst. II.5.2*; A.J. Mackenzie Stuart, 'Moveable Rights', *ISLH* (1958), 204-206.

term of payment but turn into heritable after the annualrent became due and then turn moveable again after the creditor formally demanded that the debtor pay the principal sum.⁹¹⁹ If, for example, the creditor died before the term of payment and the debtor died after the term, the bond would be moveable as to the creditor and his executors and heritable as to the debtor and his heirs.

In 1641, the Covenanted Parliament issued an “*Act in favours of orphans, fatherlesse and others*”.⁹²⁰ This Act was confirmed at the Restoration in 1661, as the *Act concerning heretable and moveable bands*.⁹²¹ This legislation aimed at widening the definition of a moveable bond but only ended up in complicating the issue further. The Act provided that “*contracts and obligations for souns of money*”, even containing annualrents, were to be considered moveable. Two exceptions from this rule were provided: a) bonds providing for infetment remained heritable, b) bonds conceived in favour of the creditor’s heirs and assignees, “*secluding executors*”, also remained heritable. Finally, the Act did not extend to the rights of spouses and of the Crown.⁹²² So, the bonds that were heritable by the old rules but moveable by virtue of the Act could not increase or decrease the wife’s *jus relictæ* or the husband’s *jus mariti*; nor could they fall to the Crown by virtue of ‘single escheat’.⁹²³

Despite this legislation, even after 1661 new categories of heritable obligations continued to develop. Specifically, bonds “*heritable by destination*” were actively being developed by the case law exactly in this period. The term “*destination*” originally meant not a “*destination to the named persons*” but a “*destination for particular purposes*”. In the first printed cases where we encounter this term it was used

⁹¹⁹ Hope, *Minor Practicks*, §§99-104.

⁹²⁰ APS, vol V, 414-415. The Act purported to solve the problem of the children who were defrauded of their ‘Bairn’s parts’ by their fathers by way of heritable bonds. The Act also mentioned the concealment of heritable bonds from their “*owners*” (possibly meaning heirs of line) and the opportunity of their fraudulent defeasance as other motives for its enactment. It should be noted that this Act did not use the terminology of “*heritable*” and “*moveable*” and its language was legally crude and not well refined.

⁹²¹ RPS, 1661/1/300. The legal terminology of the new Act was much more refined.

⁹²² The motivation provided by the 1641 Act was preventing the Crown or the relict from taking away or diminishing the children’s share in the bonds.

⁹²³ Which extended only to moveables, *supra*, n.678.

in the context of moveable debt “destinated” to be converted into heritable property.⁹²⁴ The most widespread example of such “destination” were “employment clauses” in marriage contracts (*supra*, s.4.5), where the bride’s father promised a sum of money to the future husband in dowry, which the husband, in turn, promised to invest into annualrents or other kinds of heritable property to the benefit of the heirs of marriage.

There were two cases in the 1630s where an issue was discussed whether an obligation to pay money to a husband, who was to employ the money on heritage afterwards, was heritable or moveable. In the first of them, *Ayton v. Watson* (1635, M.5489=I B.S.205, 356), the husband assigned this sum, still unpaid, on his deathbed, an assignation challenged by his heir on the ground of “deathbed” law. The Court, in what seems to have been an interlocutory judgment, initially refused to ‘reduce’ the assignation, holding that the obligation, until it was actually converted into annualrent, remained moveable and disposable by will. However, a month later the Lords issued the definitive sentence, deciding that the heir of the defunct could not have been prejudiced by the deathbed assignation. It is unclear whether the obligation was finally held moveable or heritable; it was mentioned that the defunct’s executor, who included the obligation in the inventory, would be obliged to assign it to the heir or to employ the sum in the way originally intended. This suggests the sum was still moveable, albeit not assignable on deathbed.⁹²⁵

The other case was *Robertson v. Seton* (1637, M.5489), the circumstances of which were almost the same, except that here the dispute was directly between the heir and the executor of the deceased husband. Unlike in *Ayton*, here the Lords made it clear that the obligation to pay dowry was “heritable by destination” in respect of the husband-creditor, whose heir could sue the dowry-provider by a direct action. At the same time, it was mentioned that the obligation remained moveable *quoad debitorem*, implying that the debtor, or his executor, could also validly pay the dowry to the

⁹²⁴ See: *Drumkilbo (Tyrie) v. Stormonth* (1629, M.4254=I B.S.282), where a moveable debt, which after the term of payment was to be converted into an annualrent by infertment, was called a “destination”.

⁹²⁵ The report of *Ayton v. Watson* by Dury (Dury 753), which was used by Morison in his *Dictionary* (M.5489), reports only the first stage of the case (which was decided on the 6 February 1635) and is misleading as to the final outcome of the case. The two stages of the case were reported by Spottiswoode (I B.S.205), while Auchinleck reports only the final decision (I B.S.356).

creditor's executor, although the latter would be obliged to repay the money to the heir instantly.

These two cases were taken as a ground for the existence of a separate category of bonds –bonds “heritable by destination”, not abolished by the 1641 Act. They were heritable only in respect of the creditor, while remaining moveable for the debtor. They contained an obligation to employ the money into heritage; the obliged person's executor was to perform this task.⁹²⁶

In the time of Stair, bonds “heritable by destination” were still understood in the abovementioned way. What about bonds that just contained a substitution: “to A, whom failing by decease to B and the heirs of his body, whom failing...”? The attitude of the case law to them in the 1660-70s was still ambivalent. In *Hill v. Maxwells* (1665, M.14355), it was established that a substitute by name was the ‘heir of provision’ of the institute. The same was confirmed shortly afterwards in *Fleming v. Fleming* (1666, M.13999=M.14848), where the substituted sum was found not to belong to the institute's moveable estate and to pass to the ‘heir of provision’ without any ‘service’ or confirmation; subsequent case law confirmed this position.⁹²⁷ On the other hand, in the report of *Fleming*, the reporter Newbyth, while pointing out how different that case was from those of the tailzies of heritable property, called the bond in *Fleming* “moveable”.⁹²⁸ Strangely enough, a “moveable” bond turns out to descend to the ‘heirs of provision’ and not to be included into the defunct's executry!

Another sign of the ambivalence of substitutions in bonds in this period is the case of *Scrimzeour v. Murrays* (1663, M.464=M.6446). In *Scrimzeour*, a bond was granted to a husband and wife and the survivor of them in liferent and, afterwards, to their ‘heirs of marriage’ in fee. After the husband's decease, it was found that the wife could not claim both the liferent of the bond and a half of the bond's value as her *jus relictii* – she was to choose one of the options. This decision seems to imply that the

⁹²⁶ Stair, *Inst.* II.1.3; Mackenzie, *Inst.* II.2.6-10; Nasmith v. Jaffray (1662, M.5483).

⁹²⁷ Laird of Lamington v. Muir(Moor) (1675, M.4252=14357; in this case, however, the bond was heritable by its nature); Robertson v. Preston (1680, M.14357).

⁹²⁸ M.14000.

defunct's widow could decide whether to treat the bond as heritable (and thus take the liferent) or moveable (and claim *jus relictii*)!⁹²⁹

So, substitutions in bonds in this period were seen as creating a line of heritable succession, although the bonds themselves were not yet considered "heritable" just because they contained a substitution. Nevertheless, this was enough for multiple rules applied in heritable tailzies to be applied to bonds as well, both in theory and in practice. Dirleton expressed a particular interest in comparing the substitutes in bonds and the 'heirs of tailzies'. In two fragments, he straightforwardly held that substitutes in bonds should be treated as 'heirs of tailzie'.⁹³⁰ In other fragments, however, he is still speculating, whether the substitute might be something else: e.g. a donatory *mortis causa* or *inter vivos*?⁹³¹

This last speculation by Dirleton - that the substitution in a bond might, in fact, be a donation *mortis causa*, - is very interesting and is not, strictly speaking, entirely implausible. As was already said, there was no strict requirement of "privity of contract" in Scotland, especially in relation to the DMCs (*supra*, p.86). A substitution in favour of a third party was understood as a completed (albeit still revocable) assignation.⁹³² Newbyth's report of *Fleming v. Fleming* also reflects this "DMC" interpretation of substitutions, noting that in bonds "*the substitution is rather like a condition than a substitution*" (M.14000). James Stewart, the author of the "*Responses*" to the "*Dirleton's Doubts*", was quite confident and enthusiastic in qualifying substitutions in bonds as "donations *mortis causa*".⁹³³ This approach disappeared in later writings, when the interpretation of substitutions in bonds as 'heirship of provision' prevailed (*infra*, p.201-202). However, the "DMC" approach prevailed in respect of documents which were ineligible to create a destination.⁹³⁴

⁹²⁹ Cf., with the later law: M'Laren, *Wills and Succession*, vol I, pp.134, 136.

⁹³⁰ Dirleton, 'Heirs of Provision and Substitute', 'Substitutes', *Some Doubts...*, 87, 183.

⁹³¹ Dirleton, 'Substitutes', 'Substitution in bonds', *Some Doubts...*, 183, 185.

⁹³² In *Robertson v. Preston* (1680, M.14357) it was pointed out that the debtor already knew the substitute from the tenor of the bond and so there was no need for any formal intimation to complete the bond's transfer to the substitute.

⁹³³ J. Stewart, 'Substitutes', 'Substitution in Bonds', *Dirleton's Doubts and Questions in the Law of Scotland, Resolved and Answered* (1715), 280-283.

⁹³⁴ Thus, in the post-1800 Scots law, a deposit receipt is not a document eligible to create a special destination, because it does not by itself constitute a right (M. Morton, *op cit*, 134). Nevertheless, a

Moreover, this approach might be helpful in interpreting the pre-1660 law of destinations (*infra*, p.202).

In practice, not only were substitutions in bonds often governed by the same rules as heritable tailzies, but, it seems, they led in the development of such rules. If the bond contained a clause of reversion to the granter/debtor, this reversion was considered an ‘heirship of provision’ and could be defeated by a ‘necessary cause’. It was found that, if a bond was granted to the children under a condition of reverting back to the debtor in case children died before getting married, the children could still pursue for the principal sum before getting married, if it was “necessary for their upbringing”.⁹³⁵ It was also found that a bond with a clause of nullity in case the creditor died without children could still be assigned for a “necessary and onerous cause” and pursued by the assignees, even though the creditor died without children.⁹³⁶ It was in respect of bonds, not in respect of land, that the law of fraud was first applied to protect the rights of the substitute.⁹³⁷

Another instance where the substitutions in bonds followed feudal principles and notably diverged from the Civil law was the transmission of non-vested rights by the substitutes. In *Innes v. Innes* (1670, M.4272), a heritable bond was granted to Robert, whom failing by decease, to William and Janet in equal shares. Janet predeceased Robert, and, after Robert’s death, a controversy arose between William and the heirs of Janet. Did Janet’s share, which was just a *spes successionis* when she died, accrue to William or transmit to Janet’s heirs? According to the Civil law rules on legacies and fideicommisses, Janet’s share was to accrue to William, unless the bond specially provided for its transmission (*supra*, p.117). However, the Lords, while admitting that the Civil law prevailed in the case of legacies, nevertheless, held that the last substitute in a bond – which Janet was – was entitled to succession with all her

deposit receipt taken by A, conceived “to A, B, C or the survivor of them”, could be interpreted as a “donation *mortis causa*” by A in favour of “B” and “C” (*Crosbie’s Trustees v. Wright*, 1880, 7 R. 823).

⁹³⁵ *Grahame v. Laird of Morphie* (1673, M.4305).

⁹³⁶ *Strachan v. Barclay* (1683, M.4310).

⁹³⁷ In *Drummond v. Drummond* (1677, M.4338), the father granted bonds to his daughters and the heirs of their bodies, whom failing, to return to the granter. The daughters assigned their respective bonds to each other. The Lords found their assignments “neither onerous nor necessary deeds”, fraudulent to the substitution.

heirs whatsoever. As soon as Janet died, her own heirs took her place as the heirs-substitute of Robert. This stemmed from the same principle as the one which governed the tailzies: the line of substitutions was always supposed to end with the general heirs of the last substitute.⁹³⁸

Nevertheless, despite these strong similarities, bonds were not governed by exactly the same law as heritable tailzies. As was mentioned above, substitutes in bonds were liable for the predecessor's debts *ad valorem*,⁹³⁹ while other 'heirs of tailzie' were still liable universally (*supra*, p.193). Furthermore, if the substitute was appointed *nominatim* in a bond, he did not require 'service as heir' and was vested in the provision as soon as the institute died.⁹⁴⁰ A special concern was the interpretation of destinations in bonds, as it was often unclear whether the particular member of the destination was a "fiar" (and thus could accept and dispoise the principal sum) or a "liferenter" (and thus could not defeat the bond and burden the substitutes by any debts). The principle of interpretation, as elaborated by practice, was that, in a bond granted to a husband, wife and children (or to a father and his children), the husband/father was usually considered the "fiar".⁹⁴¹ The same held for the maker of the destination: for example, a money lender receiving a bond to himself and the heirs of his body was presumed to retain the right to change and break the destination freely.⁹⁴²

The ambivalent approach to destinations in bonds of the mid-17th century gradually changed by the mid-18th century, when such bonds were finally recognized as heritable. This might seem strange, taking into account that 18th-century judges generally tended to see bonds and obligations as moveable, having the "interests of

⁹³⁸ *Supra*, p.188.

⁹³⁹ Hill v. Maxwells (1665, M.14355); Fleming v. Fleming (1666, M.13999).

⁹⁴⁰ Fleming v. Fleming (1666, M.13999); Laird of Lamington v. Muir(Moor) (1675, M.4252=14357). It was, however, not applicable if there were other conditions to be fulfilled, besides the predecessor's death: for example, to acquire the bond "to A and the heirs of his body, whom failing – to B", B was to 'serve' as an 'heir of provision' to A, thus ensuring that there were no living heirs of A's body (Bankton, *Inst.* II.3.151).

⁹⁴¹ Tulliallan v. Clackmanan (1626, M.4253); Drumkilbo (Tyrie) v. Stormonth (1629, M.4254=I B.S.282); Laird of Lamington v. Muir(Moor) (1675, M.4252); Mackenzie, *Treatise on Tailies*, 486.

⁹⁴² Murray v. Murray (1680, M.4339).

trade” in mind.⁹⁴³ Indeed, if the bond was granted “to A and his heirs”, 18th century authors interpreted it as fully moveable and descending to the executor, who was “the heir in moveables”.⁹⁴⁴ However, if the bond was conceived to substitutes *nominatim* (“to A, and then to B, etc.”), it was now considered ‘heritable by destination’;⁹⁴⁵ the category of bonds ‘heritable by destination’ was thus effectively expanded. This development was quite logical, considering the ambivalent approach of the earlier lawyers to such bonds. Thus, irrespective of whether the obligation itself was heritable or moveable by its nature, the destination of such obligation was governed by the rules of heritable succession. One of the few distinctive features of the moveable character that such bonds retained was that, in the opinion of some lawyers, they could be left by the creditor’s last will, disregarding the destination.⁹⁴⁶ This opinion, however, was not sufficiently resolved by practice before 1800; the question remained and is still debated in the Scots law.⁹⁴⁷

The present account, so far, shows that destinations in bonds, in the developed Scots law, largely followed the same feudal principles as tailzies of heritable property. However, this account would be incomplete without an observation on the destinations found in pre-1660 practice, which showed substantial differences from the later practice.

The first observation is that, in the available pre-1660 cases, a substitute in the bond is never expressly called an “heir”, “heir-substitute” or an “heir of provision”. Furthermore, it seems, the difference between destinations in moveable and heritable bonds was much more pronounced in this period. In this time, unlike heritable bonds, moveable bonds, or, at least, a particular type of them, passed to the substitute through the hands of an executor and the procedure of confirmation. Such, at least, was the

⁹⁴³ According to Erskine, the judges of his time were prone not to consider a bond heritable when the creditor did not intend it to be heritable (Erskine, *Inst.* II.2.9).

⁹⁴⁴ Bankton, *Inst.* II.1.36; Erskine, *Inst.* II.2.11-12.

⁹⁴⁵ Bankton, *Inst.* II.1.36; Erskine, *Inst.* II.2.14, 19.

⁹⁴⁶ Dirleton doubted whether a destination could be defeated by the last will, while James Stewart, in his “Responses” to the “*Dirleton’s Doubts*”, was positive about that, on the ground that a destination in a bond was just a “donation *mortis causa*”, referring to a decided case on this issue, but providing no citation (J. Stewart, ‘Substitutes’, *Dirleton’s Doubts...*, 280-281).

⁹⁴⁷ Erskine, *Inst.* II.2.19. See also *Porterfield v. Cant* (1672, M.3179), where the substitutes in bonds were found protected against the deathbed assignments. For modern law, see: *Perrett’s Trs. v. Perrett* (1909, SC 522); *Morton*, *op cit*, 134-135.

usual practice, evident from the case law. In *Ayton v. Watson* (1635, M.5489=I B.S.205, 356), a moveable sum, “destinated” to be employed in favour of the creditor’s heirs, was subject to confirmation and was to be employed by the executor.⁹⁴⁸ There are other cases to the same effect.⁹⁴⁹ Now these cases will be analyzed in more detail.

The earliest preserved cases that we have on destinations in moveable bonds are notable in that the bonds there did not actually create a “substitution” in the Scottish meaning of this term⁹⁵⁰ – they created a ‘conditional institution’. If the creditor of the bond survived the term of the debt’s payment, the ‘conditional institution’ was considered extinguished. After the creditor’s death, the sum fell to his executor and was subject to his testament.⁹⁵¹ This seems clear for a situation where the creditor died testate. It is unclear whether the outcome would be the same if he made no will, as the ‘conditional institution’ in a bond could be interpreted as a form of legacy or as a donation *mortis causa*.

This last point may be indirectly supported by the case of *Laird of Wauchton v. Hamilton* (1627, M.14355). In that case, a bond was taken by the lender to be paid to himself or to his son, William. After the father died (unclear, whether before or after the term of payment),⁹⁵² the cautioner (surety) of the bond paid the debt to William, who was not confirmed as the executor to his father. In exchange, William “assigned” the action against the principal debtor to the cautioner. When the cautioner sued the debtor, the latter objected to the action, pleading lack of title. William, the debtor claimed, could not have “assigned” the debt before having obtained confirmation. The Lords rejected the objection, holding that the “assignment” was in reality a discharge of the debt paid, which the son could make without confirming as executor.⁹⁵³

⁹⁴⁸ And this is unlike *Robertson v. Seton* (1637, M.5489), where the heir was found to have a title to the sum without the confirmation of executor.

⁹⁴⁹ *Cousland v. Laing* (1609, M.14845); *Leitch v. Balnamoon* (1623, M.3844=M.14845); *Laird of Wauchton v. Hamilton* (1627, M.14355); *Graham v. Symes* (1628, I B.S.254); *Nisbet v. Crawford* (1629, I B.S.171=Dury 361).

⁹⁵⁰ *Supra*, p.176.

⁹⁵¹ *Cousland v. Laing* (1609, M.14845); *Leitch v. Balnamoon* (1623, M.14845).

⁹⁵² It seems most probable that the father survived the term of payment. If he had not, then, taking into account *Thomson v. Merkland* (1630, M.5774), there would have been no need for the Lords to motivate their decision by drawing the distinction between an assignation and a discharge.

⁹⁵³ This case implied that the debtor could safely pay to the defunct creditor’s ‘next-of-kin’ before confirmation. This was finally confirmed in *Spence v. Wilson* (1751, M.14399, n.677 *supra*).

Although the Lords avoided answering this question directly, the case implies that, in order to make a real assignation, the confirmation would have been necessary. The substitution in the bond, then, had an effect similar to that of a legacy.

This approach was soon controverted by two later decisions. In *Watt v. Dobie* (1625, M.14846) and *Keith v. Innes* (1634, M.14846), the argument that the first creditor's death after the term of payment excluded the substitute did not prevail, and the bond was found to pass to the substitute, without need for confirmation. Later lawyers, e.g., Erskine (*Inst.*III.8.44), interpreted these two cases as the sign of a legal change that occurred in that period, fitting well into the post-1660s doctrine of destinations. However, upon closer examination, *Watt* and *Keith* did not really change anything, as, it seems, they were dealing with a different type of bond. Both cases mention that annualrent was due on the bonds after their term of payment. This means that the bonds, most probably, were heritable by their nature - at least, after the term of payment came (*supra*, pp.195-196). If this assumption is correct, it was quite logical that there should be no need for the bonds to pass through the process of confirmation. In *Keith*, the judges also supported the decision by the fact that neither executors nor heirs of the defunct challenged the substitute's claim against the bond debtor. Thus, although the case reports are quite short and do not allow us to be 100% sure about the nature of the bonds, these two cases should probably be not taken into account when dealing with moveable destinations.

Thus, we see that purely moveable obligations in the early 17th century, if they contained a substitution, did not pass by way of 'heirship of provision'. At least in a situation when the first creditor survived the term of payment on the bond, the substitute was to acquire it by way of confirmation of the moveable estate.⁹⁵⁴ Moreover, the substitute was liable for the defunct's debts only in case he was confirmed as his executor, not otherwise.⁹⁵⁵ So, what about a situation when the

⁹⁵⁴ Another case, which speaks in favour of this position, is *Nisbet v. Crawford* (1629, I B.S.171), where a wife, having confirmed herself as the executor to her husband, was pursuing the debtor on the bond, which was granted to the husband, the wife and the longest liver of them.

⁹⁵⁵ In *Graham v. Symes* (1628, I B.S.254=Dury 361), the husband, in contravention of the marriage-contract, lent the family funds on bonds payable to himself and his sons *nominatim*. After his death, his wife sued the sons for the marriage-contract debt. However, the Lords found that she could only sue those sons who were confirmed as executors to the father, as well as his general heir.

creditor died before the term of payment came – how and in what capacity did the substitute acquire the bond?

The only pre-1660 case found dealing precisely with this situation is *Thomson v. Merkland* (1630, M.5774), and it is very interesting. In this case, a bond was granted to a father and his son *nominatim*. The father dying before the term of payment,⁹⁵⁶ the bond was confirmed by the executor and the relict claimed a third of its value as *jus relictæ*. However, the Lords held that the sum did not make part of the defunct's moveable estate and that neither the relict nor the executors had any right to it. Moreover, it was mentioned that the outcome would have been different if the defunct father, by his testament or any other means, had changed the substitution or otherwise had disposed of the sum – in this case, the sum would have been considered a part of the executry.

The legal status of a moveable destination before the coming of the term of payment turns out to be quite peculiar: the obligation is not part of the creditor's moveable estate, but the creditor can defeat it at any moment, returning the obligation back into his moveable estate! Such a construction is quite hard to classify. One might hold that it was not a type of succession and that such bonds were just conditional obligations. This would mean, both the first creditor and the substitutes had *jura quaesita*; upon the first creditor's death, his right was extinguished and the right of the substitute became effectual. However, such an interpretation cannot explain the right of the first creditor to defeat the substitution, even by a last will. One also might compare such substitutions to 'donations *mortis causa*' – something the later lawyers would often do (*supra*, p.199). However, as we have already seen in the chapter on DMCs (*supra*, s.3.4, 3.6), such dispositions in Scotland could not defeat the rights of the executor, children and relict – which is exactly what substitutions in bonds did, as evidenced by *Thomson*.

⁹⁵⁶ Dury's report of the case stresses the fact that the father died before the term – possibly, to distinguish this case from all the previous ones, where the defunct survived the term. The short report by Kerse, to the contrary, reads that this outcome happened "albeit" the father died *ante terminum*. What could this "albeit" imply? It is possible that this bond, like many other bonds in that period, contained a clause of annualrent to be due after the term of payment. In that case, the outcome would have been the same if the father had survived the term of payment, as the bond then would have been heritable, excluding any claims by the executor and the relict.

It would be purely speculative to try to fit these moveable substitutions into any theory. Nevertheless, it should be noted that they look more logical if one compares them with the Civilian contractual fideicommisses. If we look at the creditor in the bond with substitution as the “fiduciary” of the fideicommiss, obliged to assign the moveable sum to the substitute under condition, it becomes logical that the sum was not considered a part of his estate – he was both the creditor and the debtor of this sum. Unlike Civil law, in Scots law an assignation did not require judicial action: it was sufficient that the debtor knew of the change of creditor. Thus, the obligation of the first creditor to assign the bond to the substitute was, technically, “performed” from the very beginning,⁹⁵⁷ albeit the condition for the assignation (the creditor’s death) had not yet come. Thus, there was no need for any additional assignation, confirmation or any other procedure to transfer the sum to the substitute. Finally, it was mentioned above that a contractual fideicommiss in Civil law was usually considered revocable by the first creditor until the condition and term for the substitution came.⁹⁵⁸ This might explain the revocability of moveable substitutions in Scots law.

This analogy between Civilian contractual fideicommisses and the early Scots substitutions in moveable bonds remains largely a speculation. We lack much of the information that could facilitate the comparison. For example, in every pre-1660 case available, the substitution the court was dealing with was a “one-generation” substitution; we cannot know if longer lines of substitutions were possible. We also cannot know what the rules of vesting of bonds were in this period: were they similar to those established by *Innes v. Innes*⁹⁵⁹ or did they follow the rules of the *Ius Commune*?⁹⁶⁰ The scarcity of Scottish cases, the shortness of the reports and the absence of surviving citations do not allow a clear answer. It is possible that the post-Restoration generation of judges was unable to discern the law from the pre-Restoration cases, which might be the reason why they simply extended the rules of heritable succession into the destinations of moveable bonds.

⁹⁵⁷ *Supra*, n.932.

⁹⁵⁸ *Supra*, p.174-175.

⁹⁵⁹ 1670, M.4272.

⁹⁶⁰ *Supra*, p.163.

5.5. Clauses Irritant and Resolutive.

‘Clauses irritant and resolutive’ were one of the devices designed to strengthen Scots destinations with a real effect, making them enforceable against third parties. A theory about their origin was provided by John Vans Agnew in his 1826 work.⁹⁶¹ According to Agnew, these clauses were “borrowed” from the ‘voluntary interdictions’ of Scots law. The ‘voluntary interdictions’ were primarily an institution of the law of persons, designed to protect minors, incapacitated, drunken or simply inexperienced persons. By a ‘bond of interdiction’, such person obliged himself not to commit any alienation of his heritable property without the consent of certain persons (“interdictors”), otherwise the deeds of alienation or debts created by him were voidable.⁹⁶² In order to be effectual against third party purchasers, interdictions were to be published and registered by the sheriff.⁹⁶³ Agnew considered the ‘irritant’ element to be the more important in a ‘clause irritant and resolutive’, because it was very similar to the wording of a ‘bond of interdiction’, declaring “null and void” the deeds contrary to the clause.⁹⁶⁴ Agnew supported his opinion with the *Viscount of Stormonth Case* (1662, p.210).

Agnew’s opinion is not completely ungrounded, seeing that ‘interdictions’ were referred to in the *Viscount of Stormonth Case*. We shall deal with this case later. Nevertheless, this is just one side of the coin. Let us look at the way ‘clauses irritant and resolutive’ were first mentioned in the Scottish texts.

The first description of such clauses was provided by Th. Hope in his *Minor Practicks*: “...there is a new Form (of tailzies) found out, which has these two Branches, viz. either to make the Party Contracter of the Debt to incur the Loss and Tinsel of his Right, in Favour of the next in Tailzie, or to declare all Deeds done in

⁹⁶¹ J. Vans Agnew, *Some important questions in Scots entail law* (1826), 8.

⁹⁶² Craig, *Jus feudale*, l.15.24; Stair, *Inst.* IV.20.30-32.

⁹⁶³ 1581 Act anent registratioun of inhibitionis and interdictionis (RPS, 1581/10/43).

⁹⁶⁴ For an example of a bond of interdiction, see: *The Juridical Styles*, vol III (1794), 33.

Prejudice of the Tailzie, by Bond, Contract, Infefment or Comprising, to be null of the Law".⁹⁶⁵ The first variant that Hope mentions here describes a 'clause resolutive', when the tailzied property is to pass to the next member of the tailzie upon contravention, while the second part describes a 'clause irritant', simply declaring all deeds in contravention null and void. Hope then proceeds to argue that both clauses stand firm against *bona fide* third party purchasers and creditors, despite the maxim "*pacta privatorum non derogant juri publico*": he points out that the rights of third parties are private, not public.⁹⁶⁶ We can see that both versions of clauses were given equal weight by Hope. This contradicts Agnew's opinion that the 'irritant' clause was the main variant.

Subsequent tradition regarded Hope as the inventor of 'clauses irritant and resolutive'. Fountainhall, in his report of *Earl of Ross v. Lord Melville* (1677, III B.S.170),⁹⁶⁷ says so, calling the tailzie of the Laird of Calderwood, drafted with Hope's assistance, to have been the first 'clause irritant' in Scotland. Modern authors share this view.⁹⁶⁸ Whether this is true or not, we are unlikely to know for sure. It should be pointed out that the wording of the Hope's text – "*there was a new form found out*" – does not seem to support the version of his authorship of 'clauses irritant and resolutive', although it might have been just an expression of modesty. The more important question here is whether Hope or another inventor of the clauses was inspired by Civil law.

As we have seen, 'clauses resolutive' were known to the Civilian authors. Moreover, quite similarly to Hope's account, the Civilian authors provided two different forms of wording, with some authors offering the 'resolutive' variant and

⁹⁶⁵ Hope, *Minor Practicks*, §367.

⁹⁶⁶ *Ibid.*, §368-369.

⁹⁶⁷ That case is very interesting by itself, with the issue at stake being whether a remoter heir of tailzie may succeed while there is still a possibility of the closer heir. The case contains numerous references to the *Ius Commune* texts and authors, none of which, however, directly concerns 'clauses irritant and resolutive'. This case is unique and outstanding, which is why it will not be analyzed in detail in this thesis. See other reports of this case are in M.14880 and in *Mackenzie's Works*, vol I, 131-137.

⁹⁶⁸ G.L. Gretton, *op cit*, 165-166.

others preferring the ‘irritant’ version.⁹⁶⁹ In Civil law, such clauses were associated with the *leges commissoriae* of the law of contract.

The text of the *Minor Practicks* reveals little use of the Civilian doctrines on substitutions by Hope. He does not refer to the subtle distinctions in the wording of an ‘irritant’ clause.⁹⁷⁰ He is dealing with the effects of confiscation and forfeiture of feus on the rights of substitutes – the exact question the *Ius Commune* scholars dedicated significant attention to.⁹⁷¹ However, he does not make use of the Civilian criteria of solving this question, employing instead his own improvised logic: the substitute’s rights are defeated if the feu is lost for a public law crime, like treason or rebellion, but substitutes are protected against private delicts of the fiar against the superior.⁹⁷²

However, other evidence that we have shows that at least some of the Scots lawyers were aware of the Civilian ‘clauses resolutive’ and their association with *leges commissoriae*. ‘Clauses irritant and resolutive’ in Scotland were not restricted to tailzies and succession. Similar clauses were employed in “wadsets” (the Scottish version of the mortgage), where they provided that the debtor, not paying the debt at the prescribed term, forfeited his right (“reversion”) to the pledged property. Stair, in the second edition of his *Institutions*, contrasts Civil law, which forbade such “*leges commissoriae in pignoribus*”,⁹⁷³ with Scots law, which allowed them, except when they were exorbitant (*Inst.IV.18.3-5*).⁹⁷⁴ Here, Stair expressly uses the term “*lex commissoria*” in respect of ‘clauses irritant’ in wadsets. Right in the next paragraph (*Inst.IV.18.6*), Stair is dealing with ‘clauses irritant’ in tailzies; he does not use the term *lex commissoria* then, but the proximity is quite telling.

⁹⁶⁹ *Supra*, p.174.

⁹⁷⁰ The predominant opinion of the Civilian authors distinguished between the clause “if alienates” and “if proceeds with alienation”: the former had no effect against the third parties, while the latter invalidated the alienation (Bart., D.30.114.14, D.41.2.38.1, C.4.6.3; Bald., C.4.6.3, C.4.51.7).

⁹⁷¹ See discussions on this by Dynus, Cynus, Bartolus, Pellegrini: Bart., D.48.22.3; Pellegrini, *De fideicommissis...*, art XL, p.604.

⁹⁷² Hope seems to refer here to the loss of fief by ‘recognition’, which in Scotland mainly applied to alienations of the fief without superior’s consent (*Jus feudale*, III.3.7-36).

⁹⁷³ Such clauses were truly forbidden in the Civil law pledges and hypothecs; however, some jurists argued that the pledge parties could agree on the retention of the pledge by the creditor for a term not exceeding 30 years (C.8.34(35).3, Gloss s.v. “*Amissa*”).

⁹⁷⁴ The book IV of the *Institutions*, absent from the first, 1681, edition, first appeared in the 1693 edition.

Even more telling are the citations of Civil law in two cases, *Viscount of Stormonth v. Creditors of Annandale* (1662) and *Callendar v. Hamilton* (1686), as reported by George Mackenzie, who was the winning counsel in both of them. Debating whether ‘clauses irritant and resolutive’ had a real effect both in Scots law and the Civil law, both Mackenzie and his opponents referred to the fragments of the *Corpus juris* which were dealing with *lex commissoria* and other clauses with real effect.⁹⁷⁵ Mackenzie never expressly calls or compares ‘clauses irritant and resolutive’ with *leges commissoriae*, but the logic of his arguments is pretty much the same as that of the Civilian authors.

Viscount of Stormonth v. Creditors of Annandale (1662, M.13994) was, in fact, the first and the most important case to test effect of the ‘clauses irritant and resolutive’. A tailzie under discussion was conceived in favour of consecutive substitutes and their heirs-male, protected by a clause, which was, it seems, worded as either purely ‘resolutive’ or both ‘irritant’ and ‘resolutive’. The clause forbade not just an alienation of the tailzied lands, but also any deed which might cause their alienation. The Earl of Annandale, the heir of tailzie, while being a fiar, created debts, for which the tailzied land was “comprised” from him by the creditors. The representatives of the next substitute named in the tailzie brought a declarator against the creditors.

The defenders adopted a smart defence strategy. They referred to the uncertain status of ‘clauses irritant and resolutive’, as well as their “private” status, which could not defeat the right of a *bona fide* third party. The defenders also referred to Civil law to argue that the payment of a legal debt constituted a “necessary” cause of alienation and that an irritant clause could only be effectual against the third party if a real right had been reserved by the granter or if inhibition had been served upon the tailzie (*supra*, p.173-174). In response, the pursuers argued that the clause in this tailzie could be qualified as an ‘interdiction’ (*supra*, p.207). As the clause was contained in the Earl of Annandale’s *retourable brieve*, which constituted the Earl’s title, it was known to the creditors, constituting them in “bad faith”. While the pursuers conceded that the

⁹⁷⁵ D.20.5.7.2 (a pact between the debtor and the creditor, forbidding the alienation of the pledged property by the debtor, invalidates alienations by him), C.4.6.3 (about prohibitions of alienation, cited by the opposing party), Baldus to C.4.51.7 (about prohibitions of alienation and their effect), C.4.54.6 (a law from the title dealing with *leges commissoriae*).

alienation might have been valid if made for a truly “necessary” cause, e.g., to ransom the Earl from enemies, in the facts of the case the debt itself was created in contravention of the clause. It was also stated that the granter of the tailzie, in fact, “reserved” a real right to himself and his heirs of tailzie, bestowing only a “limited” ownership on the fiars of the tailzied estate.

The Court decided in favour of the pursuers. It held that the pursuers could establish title to the tailzied estate by ‘serving as heir’ either to the Earl of Annadale himself, but without becoming liable for his debt before the defenders, or directly to the member of the tailzie who immediately preceded the Earl. Thus, it was recognized that the ‘clause irritant and resolute’, in case of contravention, turned the contravener’s title void, excluded the heirs of his own body and allowed the next ‘heir of tailzie’ to take the contravener’s place. This effect is similar to that of the *lex commissoria*, which could turn a contract of sale or donation “not made”.⁹⁷⁶ Nevertheless, the term “*lex commissoria*” itself was not used.

J. Vans Agnew saw *Viscount of Stormonth* as a decision based on the law of ‘interdictions’, extending that law to the situation when the third party could know about the ‘interdiction’ from the title of the estate which was purchased or burdened. However, Agnew himself recognized that this case was not a perfect example of identity between interdictions and tailzies, in that there was no ‘clause irritant’ in *Viscount of Stormonth*, only a ‘clause resolute’.⁹⁷⁷ It hard to discern from the reports whether there was really no ‘clause irritant’ in *Viscount of Stormonth*.⁹⁷⁸ Later case law interpreted *Stormonth* as involving both forms of clauses.⁹⁷⁹ In any case, *Stormonth* cannot be seen as an example of the ‘clause irritant’ taken “*ipsisimis verbis*” from the formula of interdiction, which is the claim of Agnew.⁹⁸⁰

⁹⁷⁶ D.39.5.1, s.v. “*Mortis causa donatio*”; Bart., D.39.5.1; Bald., C.4.6.3; *supra*, p.174.

⁹⁷⁷ J. Vans Agnew, op cit, 12, 14-15.

⁹⁷⁸ According to Stair’s report of the case (M.13996), the clause was purely ‘resolute’, while the report by Gilmour (M.13994) contains the words ‘*and the said charter and infeftment... should be null and expire...*’. It is unclear whether these last words referred to the contravention deed or to the tailzie itself.

⁹⁷⁹ Reidheugh v. Bruce (1707, M.15489).

⁹⁸⁰ J. Vans Agnew, op cit, 12.

Moreover, the effects of interdictions and of ‘clauses irritant and resolute’ were substantially different. Interdictions were created for the benefit of the interdicted person, so that they did not invalidate onerous alienations,⁹⁸¹ while ‘clauses irritant’, at the time of *Viscount of Stormonth*, could be defeated only by “necessary” deeds (*supra*, p.191-192, 210). A deed in contravention of the interdiction was valid, but voidable, requiring an action of ‘reduction’ for its invalidation;⁹⁸² a ‘clause irritant and resolute’, if contravened, immediately invalidated the contravener’s title with a retrospective effect: it is not by chance that the action used in *Stormonth* was not a ‘reduction’, but a ‘declarator’. All this, together with other abovementioned evidence, speaks against Agnew’s opinion on the origin of ‘clauses irritant and resolute’. The reference to interdictions in *Stormonth* was a case of remote analogy, not identity between the two institutions.

Viscount of Stormonth was the only major pre-1685 case involving a non-statutory clause irritant and resolute. It is not surprising, then, that it was criticized by many later legal scholars, considering it a mistaken decision. It was the opinion of Lord Kames that an operation of the ‘clause resolute’ could not, technically, reverse a performed deed of alienation.⁹⁸³ Despite the doubts and criticism, the approach set by *Viscount of Stormonth* was eventually enshrined in the 1685 *Act concerning tailzies*.⁹⁸⁴ The Act provided for exactly the same basic scheme: the wording of the clause was to be both ‘irritant’ and ‘resolute’;⁹⁸⁵ in case of contravention the ‘heir of tailzie’ could “dismiss” the contravener and ‘serve as heir’ to the previous member of the tailzie. The innovation of the Act was the creation of the register of tailzies, kept by the Court of Session. Much of the subsequent practice concerned registered tailzies.

It was unclear if the Act stripped non-registered tailzies of all real effect. The predominant opinion was that it did.⁹⁸⁶ Agnew’s opinion was that the Act concerned

⁹⁸¹ See: Earl of Athol Case (1607, M.7147); Collington v. Faw (1624, M.7148).

⁹⁸² J. MacLeod, *op cit*, 8, 28.

⁹⁸³ H.H. Kames, *Historical Law-Tracts*, vol I (1758), pp.205-212; cf. the Civilian attention to the wording of ‘clauses resolute’, *supra*, p.174.

⁹⁸⁴ *RPS*, 1685/4/49.

⁹⁸⁵ See: Reidheugh v. Bruce (1707, M.15489).

⁹⁸⁶ Bankton, *Inst.*, II.3.141; Willison v. Dorator & His Creditors (1724, M.15369, 15371); Dickson v. Dickson (1786, M.15534).

the heirs of the granter of tailzie, but not the party to the original tailzied disposition, to which situation the “common law” still applied.⁹⁸⁷ Professor George L. Gretton’s seems to be of the view that the Act did not touch “one-generation” tailzies (“to A, then to B”, “to A, B and the survivor of them”, etc.), so that even after the abolition of registered tailzies by the Abolition of Feudal Tenure Etc. Act, 2000, one-generation “common law tailzies” with ‘clauses irritant’ can be created.⁹⁸⁸ Gretton’s opinion does not seem to be shared by some of the classical authors.⁹⁸⁹ 17th-century practice does not provide the ground for any special treatment of the one-generation tailzies. It was mentioned that the destinations in bonds were usually limited to one generation (*supra*, p.206), but it was not so with tailzies in lands, where the lines of substitutes could often be quite long.

We have seen now that in Scots law, unlike the *Ius Commune*, the devices of ‘subsequent succession’ were predominantly used in *inter vivos* contracts and dispositions, not in last wills. Destinations contained in bonds of obligation, as demonstrated by *Thomson v. Merkland* ((1630, M.5774) were initially governed by the rules similar to the Civilian *fideicommissa*, but, beginning from the 1660s, even they were assimilated to heritable tailzies. Scots heritable tailzies themselves demonstrate significant differences from Civilian *fideicommissa*, creating a universal, not a singular succession. Some similarities may be found between Scots tailzies and the *Ius Commune* substitutions in fiefs, but they are not strong enough to make any conclusions.

Nevertheless, there were instances where the *Ius Commune* influence on Scots tailzies and other destinations looks quite plausible. One such instance is the distinction between “voluntary” and “necessary” alienations. Although the consequences of the distinction were different in Scots law, there does not seem to be any other possible source of this distinction. It is not surprising, then, that this

⁹⁸⁷ Agnew, op cit, 8-10.

⁹⁸⁸ G.L. Gretton, op cit, 167.

⁹⁸⁹ M’Laren, op cit, vol I, 513-514.

distinction was gradually washed away and was substituted by the “onerous”-“lucrative” juxtaposition, which was more familiar in Scots practice.

The same can be said of Scottish ‘clauses irritant and resolutive’, which seem to have been inspired by Civilian ‘clauses resolutive’ and *leges commissoriae*. The analogy was drawn between the Scottish ‘clauses’ and Scottish ‘interdictions’, but it looks more like a convenient argument from *jus proprium*, provided by litigants. The machinery of the ‘clauses irritant and resolutive’ looks so similar to its Civilian counterpart that it is hardly imaginable that the learned Scots judges drew no analogy between them.

Chapter VI. Office of Executor.

6.1. Office of Executor in the *Ius Commune*.

The “executors” in succession were not expressly mentioned in the Roman law texts. However, Roman law, in fact, had this institution. A legacy could be left to a person “as a minister”, so that he was obliged to transfer it immediately to a third party, without receiving any profit even if the third party could not receive the bequest (D.31.17pr). The Roman texts provided that such persons did not, by a general rule, have actionable rights to the bequeathed property in their own name.⁹⁹⁰ In the Digest, such “ministers” (which did not yet have a special term) were most prominent in the field of aliments. Aliments left to minors and pupils required regular payments, control and safeguarding – the functions performed by the persons specially authorized by the testament.⁹⁹¹ If the testator appointed no executor for the distribution of the aliments, the public judges could appoint one (D.34.1.3).

However, the most influential passages to shape the law of executorship were contained in the late Imperial legislation on ecclesiastical matters. A constitution by Emperor Leo of 468 A.D. (C.1.3.28) provided that testamentary dispositions for the redemption of captives were valid despite their obscurity and were to be executed by a person appointed by the testator. If the testator appointed no one, this function was to be taken by the local bishop, who was to perform the task within a year and give an account of its results. A later constitution by Justinian of 531 A.D. (C.1.3.48) extended this to bequests in favour of the “poor” and all other dispositions *ad pias causas*. This constitution provided that a testament might contain no institution of an heir but instead dispose of the entire estate for charity, in which case it was taken over by the bishop or the bishop’s *oeconomus*; no “Falcidian quarter” or other profit was to be deducted by anyone from such an estate. Justinian’s 545 A.D. constitution (Nov.131.11-12)⁹⁹² empowered bishops to issue monitions to the heirs on performing charitable legacies.

⁹⁹⁰ D.36.1.80.1.

⁹⁹¹ See, e.g., D.34.1.9pr; D.34.1.15pr.

⁹⁹² A.C. 9.6; extracted into Auth. *Licet Testator* (C.1.3(6).28).

The Church in the High Middle Ages used the above legislation to secure ecclesiastical jurisdiction over charitable bequests. It is, therefore, no surprise that the main contribution in the development of the executor was made by the Canon law. The Canon law of executors was mainly developed through practice and doctrine, not through Papal legislation. Even the Papal legislation dedicated to this issue was mainly restricted to decretals deciding particular cases. Several decretals issued by Gregory IX (1227-1241) developed the Imperial legislation and fortified the principle of Church supervision over the execution of charitable bequests (X.3.26.17). The testator's precept was to be executed within one year, after which the execution devolved to the bishop (X.3.26.3), while the executor could be compelled to fulfill his mandate by the bishop acting *ex officio* (X.3.26.19). The only general constitution on executors was issued by Pope Boniface VIII in 1298 (Sext.3.11.2).⁹⁹³ It was, however, the glosses and commentaries of the learned Canonists that were the most influential in shaping the law of executor.

Gu. Durandus (Durantis, c. 1230-1296) was probably the most important scholar for the early development of this issue. His *Speculum judiciale*⁹⁹⁴ provided a list of questions which were to become standard questions for any writer on the subject of executors to answer: 1) what were the types and classes of executors? 2) did the executors have an actionable right to pursue heirs and third parties, and, *vice versa*, could an executor be sued by third parties? 3) could an executor appoint procurators (agents)? 4) was an executor obliged to provide cautions or securities and give oaths? 5) could an executor sell or otherwise alienate the estate property? 6) could he discharge the estate debts? 7) was an executor always obliged to make an inventory and give an account and what were the terms established for that? 8) could an executor be compelled to fulfil the task? 9) in case of several executors appointed, could one of them act without the others? 10) what happened to the office of executor after his death? 11) who could be an executor? We are going to deal with the majority of these questions below.

⁹⁹³ See *infra*, p.227, for more detail on this constitution.

⁹⁹⁴ Last version dated c. 1291.

The Civil law texts suggested that a *nudus (merus) minister* was a separate type of executor, distinguished by the lack of any material profit received from the office.⁹⁹⁵ Correspondingly, the learned lawyers used the term “*executor mixtus*” for an executor who was the testator’s heir or had a legacy bestowed on him.⁹⁹⁶ The exact way to distinguish them was debated. Some authors held that a “mixed executor” was an executor in respect of the part of estate left for further distribution and a legatee in respect of the part left to him personally.⁹⁹⁷ In the opinion of other authors, the executor was to be considered “mixed” even if he was simply entitled to possess the estate property for a period of time.⁹⁹⁸ Unlike a “mixed executor”, a *merus minister* was not entitled to the residue of the legacy in case its beneficiaries or conditions failed.⁹⁹⁹ Quite an original version of this classification was provided by the English Canonist John Ayton (d. 1349): a *nudus executor*, in his interpretation, was the one with just a “naked” power of custody over the estate goods, while a *non nudus executor* had the power of discretionary administration.¹⁰⁰⁰

Another classification was that of *testamentarii, legitimi* and *dativi executores*. Testamentary executors were appointed by the testator. The *executor legitimus* of a last will made for pious uses was the local bishop, although this power could be delegated to any private person, even an unwilling one.¹⁰⁰¹ The term ‘*executor dativus*’ was initially reserved for the court-appointed distributors of aliments (D.34.1.3),¹⁰⁰² but in later times it was used for the bishop’s delegates.¹⁰⁰³

A distinction was also made between “universal” and “special” executors. A universal executor was one appointed to the entire estate to distribute it all for charity,

⁹⁹⁵ D.31.17pr; D.34.1.9pr; D.36.1.80.1.

⁹⁹⁶ Gu. Durantis, *Speculum judiciale*, II.2 *De instr edit*, rubr. *Nunc vero*, fo. CXCIV; Bart., D.31.17pr; see also: D.32.8pr, D.34.1.15pr.

⁹⁹⁷ Durantis, *ibid.*, fo. CXCVI; J. Oldendorp, *De executoribus ultimarum voluntatum*, tit. III // *Tractatus selecti...*, 410.

⁹⁹⁸ Bart., D.31.17pr.

⁹⁹⁹ D.32.8pr.

¹⁰⁰⁰ See: Constitution of Ottobuono, 1268, tit. 14 // *Constitutiones Legatinae sive Legitimae regionis Anglicanae D. Othonis et D. Othoboni Cardinalium...*, 108.

¹⁰⁰¹ Bart., D.31.1.

¹⁰⁰² Durantis, *ibid.*, fo. CXCIII.

¹⁰⁰³ H. Swinburne uses this term for the English intestate administrators (Swinburne, *A briefe treatise...*, VI.1, pp.206-207).

so that there were no heirs instituted by the testator. From the 1200s, there was an opinion that a universal executor was *loco heredis* and enjoyed the same rights and duties as the heir;¹⁰⁰⁴ and, although Durantis in his *Speculum* expressed doubts on this issue, the identification of the universal executor with the heir seems to have been approved by the common opinion of the doctors by the 16th century.¹⁰⁰⁵ Having the same rights as the heir, the universal executor was always a “mixed executor”.¹⁰⁰⁶ A ‘special’ executor was one entitled to keep and/or distribute a part of the estate; much of the learned discourse was dedicated to the relationship of such executor with the heir. In some countries, e.g., in England, the normal way to distribute the moveable estate after one’s death came to be through a universal executor with no role whatsoever given to the feudal heir. This is why it became customary for English testamentary executors to be the beneficiaries of the undisposed remnant (*residuum*) of the estate. The English Canonist, W. Lyndwood, with reference to the rules on ‘soldier’s wills’ (C.6.21.3), held that the *residuum* was presumed left to the executor, unless the testator’s will to die “intestate” in respect of the *residuum* was apparent.¹⁰⁰⁷ Nevertheless, English practice also allowed appointment of ‘particular’ executors, in which case the testator could be deemed to have died *partim testatus, partim intestatus*.¹⁰⁰⁸

Whether the executor had actionable rights was problematic, as the executor was not considered an independent subject of legal rights and liabilities – he acted in favour of someone else. The prevailing understanding among scholars, especially the early ones, was that the executor was not the owner of the goods he was dealing with, but just the administrator, similarly to tutors, curators and procurators.¹⁰⁰⁹ Eventually, it seems that the jurists reached a frail consensus. The *executor mixtus* had the same actions for the estate goods and debts against both the heir and third parties as if he

¹⁰⁰⁴ Durantis attributes this opinion to Roffredus Beneventanus (c. 1170-1244). See: Gu. Durantis, *ibid.*, fo. CXCVII.

¹⁰⁰⁵ Thus, J. Oldendorp (c. 1486-1567) stated that the universal executor bears the name of the heir and is considered the heir (Gu. Durantis, *ibid.*; J. Oldendorp, *op. cit.*, p. 410).

¹⁰⁰⁶ This is implied by J. Oldendorp, who effectually divides only the particular executors into “mere” and “mixed” (J. Oldendorp, *ibid.*)

¹⁰⁰⁷ W. Lyndwood, *Provinciale (seu Constitutiones Angliae)...*, tit. 13, s.v. “Effectum”, 175; Swinburne, *op cit*, IV.4, p.115.

¹⁰⁰⁸ Swinburne, *op cit*, IV.18, p.176.

¹⁰⁰⁹ See: D.32.8pr, s.v. “Petierit”; Gu. Durantis, *ibid.*, fo. CXCVII.

had been an heir or a legatee. The *executor merus* could not sue the heir, with three exceptions: a) when the bequest was charitable (*ad pias causas*), b) when the bequest was about aliments, and c) when the testator expressly granted this right to the executor. The *executor merus* could sue third parties and estate debtors only if the heir was negligent in ensuring the execution of the legacy.¹⁰¹⁰ It also came to be accepted that the executor could be sued by legatees and estate debtors in the same instances when he could sue.¹⁰¹¹ But even when the executor could not sue, he could enforce the execution of the testament by invoking the *officium iudicis* of the bishop;¹⁰¹² thus, the aforementioned subtle distinctions retained practical significance only for the issue of transmission of the executor's office (*infra*, p.228). The English Canonists initially followed the same logic¹⁰¹³ but eventually abandoned this classification, entitling all executors to sue and be sued.¹⁰¹⁴

As the executor was not the owner, but just the administrator of the goods and rights he was managing, it could be doubted whether he was entitled to commit litigation or administration to agents. At Civil law, a procurator, by a general rule, could not reassign his power to pursue an action to another procurator before he filed the action and the *litis contestatio* followed (C.2.12.8). Similarly, tutors and curators could not appoint a procurator before the *litis contestatio* (C.2.12.11). Were executors subject to the same restriction, seeing they were often assimilated to tutors in many respects? For a *merus executor* it seemed to be so, seeing he performed a mere office and was personally selected by the testator for this purpose. *Executor mixtus*, however, was assimilated by some scholars to a *procurator in rem suam* – an agent appointed in his own interest. A *procurator in rem suam*, according to the Code (C.8.53.33), could appoint procurators and otherwise dispose of the right assigned to him from the moment of mandate, even before the *litis contestatio*. It followed that the same should

¹⁰¹⁰ D.31.17pr, s.v. "*Ut ministrum*"; D.36.1.80(78).1, s.v. "*Non posse*"; Durantis, *ibid.*, fo. CXCv-CXCvIII; Bart., D.30.96.3, D.31.17pr; G.D. Durante, *De arte testandi*, VII.9.

¹⁰¹¹ Bart., D.30.107(110); D.36.2.26.2.

¹⁰¹² Gu. Durantis, *ibid.*, fo. CXCvIII; Bart., D.31.17pr.

¹⁰¹³ For example, John Ayton held that a *nudus executor* could not sue for acquisition of possession over the estate goods but only for the recovery of possession lost by him (Constitution of Ottobuono, 1268, tit. 14 // *Constitutiones Legatinae...*, 108).

¹⁰¹⁴ This problem is not raised at all by Lyndwood in his *Provinciale* or by Swinburne in his *Briefve treatise*.

apply to the *executor mixtus*.¹⁰¹⁵ The disagreements, nevertheless, continued into the 16th century.¹⁰¹⁶

The question whether the executor was obliged to provide caution, or even a security, or swear an oath on the faithful performance of his duties, was very controversial. Some authors made this contingent on whether the executor was *merus* or *mixtus* and whether he was testamentary or dative: an *executor merus*, especially if he was appointed by the testator himself, was not required to provide any obligations or securities.¹⁰¹⁷ Others allowed some discretion for the judge to decide whether the executor was a solvent and trustworthy person or, otherwise, suspect and perfidious.¹⁰¹⁸ The latter approach eventually prevailed in English practice.¹⁰¹⁹

On the issue of the executor's powers to sell the estate property, the jurists held that a universal executor, who was *loco heredis* and possessed discretion over the distribution of estate, was always entitled to sell. The executor appointed to particular goods, on the other hand, could do that either for a just cause or by direct authorization of the testator. Much of the juristic discourse was devoted to the relationship between the executor to particular goods and the heir, whose interests were to be taken into account during the sale of the goods.¹⁰²⁰ One of the questions to which, it seems, no definite answer was found, was whether the executor could discharge the debts of the defunct: on the one hand, it was a lucrative transaction, on the other, as he could pursue those debts, he was by implication entitled to make out-of-court settlements. In England, where the universal executor was the rule rather than exception, the executor's right of sale and disposal was largely undisputed; the lawyers dedicated much of their attention to the prohibition of unauthorized appropriations by the executor from the estate goods.¹⁰²¹

¹⁰¹⁵ Gu. Durantis, *ibid.*, fo. CXC VII; Bald., C.8.53(54).33.

¹⁰¹⁶ Thus, G.D. Durante still held that the executors could not appoint procurators before the *litis contestatio* (G.D. Durante, *De arte testandi*, VII.9).

¹⁰¹⁷ Bart., D.35.3.7.

¹⁰¹⁸ Gu. Durantis, *Speculum iudiciale*, II.2 *De instr edit*, rubr. *Nunc vero*, fo. CXC VI-CXC VII.

¹⁰¹⁹ Swinburne, *op cit*, VI.14, p. 225.

¹⁰²⁰ Gu. Durantis, *ibid.*, fo. CXC VIII; Bart., D.34.1.9; G.D. Durante, *De arte testandi*, VII.10.

¹⁰²¹ Namely, much discussed possibility was buying something from the estate by the executor. See: J. Ayton, *ibid.*, 110; W. Lyndwood, *Constitution of J. Stratford*, c. 1343 // *Provinciale...*, tit. 13, s.v. "*Titulo emptionis*", 178.

Both the Civil and the Canon law texts agreed that the executor had one year for the execution of the testament and six months if the bequest was *ad pias causas*.¹⁰²² By coincidence, the same term was prescribed as the standard one for the performance of a particular legacy.¹⁰²³ The moment from which the year ran differed in the *Ius Commune* depending on various circumstances, but, in practice, as noted by Panormitanus, the bishops often enacted local statutes, providing that the year for execution ran from the moment of death of the testator.¹⁰²⁴ At the expiration of the year for execution, if the executor was *mixtus*, all the profit he was entitled to was, after a monition by the judge or the bishop, to pass to the legatees, while the office of executor devolved to the bishop.¹⁰²⁵ The legatees, however, could sue the executor even before the expiration of the year, if there were free goods or money available in the estate; the term for performance of such legacies was up to judicial discretion.¹⁰²⁶ If the executor did not accept the office in the first place, so that the estate was intact (“*res integra*”), then, if he was an *executor mixtus*, he could be obliged to accept and perform it by a private action; an *executor merus* could be forced into performing the office by the public authority *ex officio*.¹⁰²⁷

A universal executor was to make an inventory of the goods under his administration (C.1.3.48). There was an opinion that the executor appointed for particular goods was not held to make an inventory.¹⁰²⁸ In England, the legateine constitution of Cardinal Ottobuono in 1268 forbade all executors to take possession of the estate before the inventory was made. The commentators on the constitution, however, were ready to make an exception when the goods required quick disposal,¹⁰²⁹ this is confirmed by the actual English practice, where probate powers were often granted before the inventory was actually made.¹⁰³⁰

¹⁰²² C.1.3.28; Nov.131.12.1; X.3.26.3, 6.

¹⁰²³ Nov.1.1.1=C.6.43 Auth. *Hoc Amplius*.

¹⁰²⁴ See: Abb., X.3.26.3. Swinburne pointed out that in England even the term itself was at the discretion of the bishop but usually was no less than a year (Swinburne, op cit, VI.19, pp.234-235).

¹⁰²⁵ X.3.26.17, 19; Durantis, *Speculum judiciale*, II.2 *De instr edit*, rubr. *Nunc vero*, fo. CXCIX, CCV.

¹⁰²⁶ Abb., X.3.26.6; Oldendorp, *De executoribus ...*, tit. VII // *Tractatus selecti...*, 412.

¹⁰²⁷ Bart., D.31.1.

¹⁰²⁸ Gu. Durantis, *ibid.*, fo. CC.

¹⁰²⁹ J. Ayton, *ibid.*, s.v. “*Inventarium*”, 107.

¹⁰³⁰ B.E. Ferme, ‘The testamentary executor in Lyndwood’s *Provinciale*’, *The Jurist*, vol 49 (1989), 649-655.

The form and effect of the executor's inventory posed a problem. There were two main types of inventory in the Civil law: the tutor's inventory (D.26.7.7, 57) and the heir's inventory (C.6.30.22). The function of the tutor's inventory was to be a safeguard against maladministration. This is why the tutor's inventory was to be submitted to the judicial authority and could even be made before the judge. However, the making of the tutor's inventory allowed for some laxities. For example, the tutor's inventory was to include all corporeal goods and instruments of debts found in the pupil's estate; however, there was no requirement to include obligations unsecured by any writing, as they were not considered "found" (*inventa, reperta*) in the estate.¹⁰³¹ There was also no requirement to include the liabilities and debts due by the defunct.¹⁰³² Non-compliance with the making of the inventory could result in the tutor's removal from the office.¹⁰³³

The heir's inventory served a different function. It was mainly aimed at protecting the heir's own interest, which is why it was voluntary. The heir without inventory was liable *ultra vires hereditatis* before the creditors and the legatees of the testator.¹⁰³⁴ The contents of the heir's inventory required much greater precision, and thus by necessity included all incorporeal rights of the defunct, as well as the debts due by him.¹⁰³⁵ An omission of goods by the heir from the inventory in fraud of the creditors might result in the duplication of his liability before the creditors or in the inventory's invalidity;¹⁰³⁶ goods omitted by accident were to be included with retroactive effect.¹⁰³⁷ The heir's inventory was to be prepared within a particular term: up to 90 days if the testator's goods were concentrated in one region, up to one year if they were spread over a large territory (C.6.30.22.2-3). It was to be composed in a special notarial form.¹⁰³⁸

¹⁰³¹ C.5.37.24; Bart., D.26.7.7, 57.

¹⁰³² Bart., D.26.7.7; Fr. Porcellini, *De confectione inventarii...*, c. 3 // *Tractatus selecti...*, 523.

¹⁰³³ Porcellini, *ibid.*, 524.

¹⁰³⁴ C.6.30.22.5-6; Nov.1.2.2.

¹⁰³⁵ Porcellini, *ibid.*, 524.

¹⁰³⁶ Porcellini, *ibid.*, 523.

¹⁰³⁷ Bald., C.6.30.22.1a.

¹⁰³⁸ The form of the heir's inventory, elaborated and almost universally accepted by the Commentators, involved one notary and two witnesses, while all the creditors, legatees and other persons who could be prejudiced by the confection of the inventory were to be invited. A second additional notary public was required if the heir was illiterate. Three additional witnesses were to be present of any one of the

These two types of inventory were substantially different both in function performed and in formal requirements; there was, nonetheless, a tendency among the jurists to bring these two types together and find shared features in them. For example, Baldus pointed out that, in his day, the inventories of both tutors and heirs were often made before a judge, dispensing with many of the Civilian formalities.¹⁰³⁹ Both types of inventories, especially if made before a judge, were presumed to contain correct information, unless proven otherwise; therefore, written bonds held by the defunct, after being fully transcribed into the inventory, made full proof against their respective debtors.¹⁰⁴⁰

The universal executor combined the features of heir and tutor. Like an heir, the executor was tasked with purging the defunct's estate of debts and distributing it among the legatees and beneficiaries. On the other hand, like a tutor, the executor was acting mainly in someone else's interest and was subject to the supervision of public authority. This dual nature was to be taken into account when dealing with the executor's inventory. There is very little material dedicated specifically to the executor's inventory in the *Ius Commune*. The English Canonists, with reference to the obligatory nature of the inventory for the executor, held that the executor's inventory was more similar to that of a tutor rather than to that of an heir.¹⁰⁴¹ Moreover, they extended to English inventories the rule that only debts secured by writing could be included, although Swinburne opined that "some sort of commemoration" of such debts (outside of inventory) was needed.¹⁰⁴² The debts due by the testator could be included only after their ascertainment by the bishop's official, as a false debt might be used as an instrument of fraud.¹⁰⁴³ From the formal point of view, the inventory was made by the executor before two witnesses and submitted under oath to the bishop.¹⁰⁴⁴

interested persons, invited for the procedure, was absent. The text of the inventory was to begin with the Sign of the Cross ("*In nomine Patris...*") and end with a subscription. See: Bart., C.6.22.30pr; Porcellini, *De confectione inventarii...*, c. 2 // *Tractatus selecti...*, 521; Angelus de Ubaldi (Perusinus), *Tractatus inventarii // Tractatus selecti...*, 513-516; J. Coras, *Tractatus inventarii // Tractatus selecti...*, 538-543.

¹⁰³⁹ Bald., C.6.30.22pr.

¹⁰⁴⁰ Bart., D.26.7.57; Bald., C.6.3.22.10.

¹⁰⁴¹ W. Lyndwood, *Provinciale...*, tit. 13, s.v. "*Prius*", 176.

¹⁰⁴² W. Lyndwood, *Provinciale...*, tit. 13, s.v. "*Dictis bonis*", 176; Swinburne, *A briefe treatise...*, VI.7, p.219.

¹⁰⁴³ Swinburne, *ibid.*

¹⁰⁴⁴ Swinburne, *op cit*, VI.9, p.220.

With a reference to Baldus,¹⁰⁴⁵ Swinburne holds that a complete inventory is presumed true unless proven otherwise, so that all the goods mentioned in it are presumed to belong to and be in possession of the executor.¹⁰⁴⁶

J. Siccard (1499-1552) held that an heir who accepted the estate without inventory was liable *ultra vires*, because he was presumed to be acting fraudulently.¹⁰⁴⁷ This was the doctrinal ground for Swinburne to justify an English practice, according to which any person who intermeddled with the defunct's estate without an inventory or a prior authorization was considered an *executor de son tort* ("in his own wrong"), liable before the estate creditors *ultra vires*, irrespective of the extent of the estate he intermeddled with.¹⁰⁴⁸ This liability arose in case the perpetrator performed actions of an executorial nature (paying the testator's debts, receiving the profits, etc.). However, Swinburne stressed that a person who meddled with the estate goods as a "mere trespasser" did not qualify as an *executor de son tort*.¹⁰⁴⁹ This changed in the later English law, where even a trespasser could be considered the *executor de son tort*, while the extent of his liability depended on whether he had "devastated" the estate and on the technicalities of pleading.¹⁰⁵⁰ This change was probably due to the fact that jurisdiction over the defunct's debts in England was shared between the ecclesiastical and the secular courts, so that Swinburne's doctrine reflected only the attitude of the former.¹⁰⁵¹

The Civil law procedure for paying off the estate debts and legacies by the heir or the executor followed the principle *prior tempore potior jure*. The first creditor or legatee to present his claim to the executor received his debt in full. An exception was made for creditors with hypothecs over estate goods, as well for legacies *ad pias causas*. Moreover, if the executor knew about insolvency and the existence of other debts, he was obliged to obtain a caution (*cautio cessantium partes reddi*) or even a security (*satisfactio*) from the payee about proportionate repayment; otherwise, he was

¹⁰⁴⁵ Bald., C.6.3.22.10.

¹⁰⁴⁶ Swinburne, op cit, VI.10, p.221.

¹⁰⁴⁷ Siccard., C.6.30.22.4.

¹⁰⁴⁸ Swinburne, op cit, VI.3, p.214, VI.10, p.221.

¹⁰⁴⁹ Swinburne, op cit, VI.22, p.237.

¹⁰⁵⁰ 'Legal Position of an *Executor de Son Tort*', *Monthly Law Magazine*, vol 9, issue 35 (1841), 184-194.

¹⁰⁵¹ R.H. Helmholz, *Roman Canon Law in Reformation England*, 85-86.

in *mala fide*.¹⁰⁵² If a legacy was paid unbeknownst of a creditor's existence, the creditor had recourse against the legatee by means of *condictio indebiti* (C.6.30.22.5). The making of the inventory prevented a confusion of the executor's actions against the testator, and thus the executor could deduct debts owed to him on par with other creditors.¹⁰⁵³ During the making of the inventory, the heir could not be sued for the estate debts and legacies.¹⁰⁵⁴

However, in England this system for the payment of debts had little to no application. According to Swinburne, contemporary practice established the order in which the debts were to be paid by the executor: debts to the Crown, then debts on statutes merchant,¹⁰⁵⁵ then debts secured by judgements, then debts upon deeds of obligation, then debts upon books and "simple bills and specialties". Within each particular category the executor was free to pay to whatever creditor he preferred; an exception was made for debts on which a lawsuit was already initiated and outstanding debts, which were to be preferred. Debts unsecured by writing, in the times of Swinburne's writing of his treatise (1580-91), were not exactable from the executor, as the defunct himself could have purged them by a "wager of law". Swinburne, however, admitted the possibility of the executor claiming a debt due to him by the testator from the estate. Even if the executor broke the aforesaid rules, the aggrieved creditor could only sue the executor, not the payee, be he creditor or legatee.¹⁰⁵⁶ This divergence of the English practice from the *Ius Commune* can, probably, be explained by the influence of the secular courts.

At the end of the term given for the execution of the testament, the executor was expected to give an account before the bishop or his official.¹⁰⁵⁷ The expenses the executor incurred while in office were to be proved by witnesses or documents, except

¹⁰⁵² D.35.2.41; Bart., D.35.3.7, C.6.30.22.4; Sichard, C.6.30.22.4.

¹⁰⁵³ Baldus, however, held that, in case the executor had no written instruments evidencing his debt, he was to establish it by a special judicial procedure (Bald., C.6.30.22.9; Porcellini, *De confectioe inventarii...*, c. 4 // *Tractatus selecti...*, 525-526).

¹⁰⁵⁴ Porcellini, *ibid.*, 526.

¹⁰⁵⁵ A statute merchant was a type of security, entered into before the civic officials and having a force of judgment.

¹⁰⁵⁶ Swinburne, *op cit*, III.17, pp.108-109, VI.16, pp.229-230.

¹⁰⁵⁷ Clem.3.5.1; Gu. Durantis, *Speculum judiciale*, II.2 *De instr edit*, rubr. *Nunc vero*, fo. CC; Oldendorp, *De executoribus ...*, tit. VIII // *Tractatus selecti...*, pp.413-414.

for small expenses, for which an oath was sufficient.¹⁰⁵⁸ After giving account, the executor was officially exonerated of the office and any further lawsuits and obligations.¹⁰⁵⁹

What if several executors were appointed by the testator or the bishop: how were they to exercise their powers? This question was very controversial, especially at the early stages of the doctrinal development of executorship. The Civil and Canon law texts provided three possible models of multiple co-administrators: those of procurators (agents), of tutors and curators and of judges and arbiters. In respect of procurators, the Civil law texts provided that out of several procurators appointed for one case, the one who was the first to take control of the case (namely, to achieve a *litis contestatio* stage in the lawsuit) became the only one entitled, excluding all others (D.3.3.32), unless the contrary was provided by the mandate. Unlike that, every single tutor out of several could act alone in the interest of the pupil, unless there was a protest from the others (D.21.2.55; D.26.7.3, 24). Finally, if judges or arbiters were appointed to decide a case, the decision was to be taken by the majority, but all the judges or arbiters were to be present (D.4.8.17.2, 7); the mandate could provide for a smaller *quorum*, but all the arbiters were to be called, unless their participation was obstructed by distance (X.1.29.21, 30; X.1.43.1); in case of an equal vote on any issue, the public authority could appoint an additional arbiter (D.4.8.17.6).

All three models were referred to by the jurists dealing with the executor. Which model was to be used for executors, if the testament did not provide for exact rules? Durantis in his *Speculum* provided the best synthesis available for the pre-1298 period. He classified the commissions of executors according to the tasks set by the testator.¹⁰⁶⁰ Firstly (1), a group of executors could be assigned with distributing certain property to certain beneficiaries. Such task could be performed by every executor individually in respect of a particular portion of property. Here he seems to have largely adopted the procuratorial model: the business and property the executor personally intermeddled with was to be sorted out by himself; Durantis, however,

¹⁰⁵⁸ C.6.30.22.9, et ibi Bart. et Bald.

¹⁰⁵⁹ Swinburne, op cit, VI.20-21, pp.235-236.

¹⁰⁶⁰ Durantis, ibid., fo. CXCIV.

would allow the co-executors to fulfill the office of their colleague who was impeded in any way.¹⁰⁶¹ Secondly (2), a college of executors might be set up to sell the estate of the defunct and distribute the proceeds for the poor at their discretion. To this situation Durantis applied the principle of co-judges and co-arbiters: decisions were to be taken by all the executors together, with majority prevailing over minority. Finally (3), a college of executors might be tasked with performing together a pious task (e.g., building a monastery) – in this case, the executors were to do everything together, unanimously. In the last case, if a disagreement obstructed the performance of the task, the bishop by his authority could force the dissenters to comply with the best solution.

It is only for this last situation (3) that Durantis provided a specific outcome on the death of one of the executors: his office was to accrue to other co-executors, as such a task, although requiring consensus of all active executors, could still be performed if some of them were dead. The co-executors in such a situation, effectively, made up one “person” or “body”, which could decrease but was still to act in unison. It seems that Durantis admitted such an outcome in case (2) as well: depending on whether the executors were appointed by the testator “conjunctly” or “separately”, either the office of the dead executor accrued to other executors or the bishop substituted a new executor in place of the old one.¹⁰⁶² Irrespective of the form of appointment, however, if one executor was not dead, but was prevented from performing his duties due to being away or other temporary causes, Durantis held that, “out of equity”, other executors could take the decision without him, similarly to arbiters appointed with a *quorum*.¹⁰⁶³

However, many conclusions of Durantis and other 13th century lawyers were set aside by the legislation of Pope Boniface VIII in the *Liber Sextus* of 1298. The pope issued two constitutions which marked a shift towards the principle of unanimity in making collective decisions. One constitution, concerning procurators (Sext.1.19.6), established that several procurators, appointed for one lawsuit, could only pursue the action together, unless the mandate provided otherwise. Another constitution, which

¹⁰⁶¹ Durantis, *ibid.*, fo. CCl.

¹⁰⁶² The distinction between “separate” and “conjunct” appointments was an analogy from legacies and *jus accrescendi* (Durantis, *ibid.*, fo. CC).

¹⁰⁶³ Durantis, *ibid.*, fo. CCl.

directly concerned testamentary executors (Sext.3.11.2), provided that, if one of several executors died or was away, unavailable or unwilling to act, his office accrued to the other co-executors, unless the testament provided otherwise.

Sext.3.11.2 introduced a profound change into the doctrine of co-executorship.¹⁰⁶⁴ For the first time, it set the same consequence for the death of an executor, his temporary unavailability and his inactivity. In that, the constitution assumed that the co-executors, taken together, were akin to “one person”. This was a sign that out of the three paradigms of an executorial task, provided by Durantis (*supra*, pp.226-227), the constitution selected paradigm (3) to be the main one; the co-executors were not to be treated like co-arbiters, but like an indivisible “body”. Taken together with the new constitution on procurators (Sext.1.19.6), this implied that, without testamentary instructions to the contrary, the executors were to make their decisions together, unanimously. Subsequent authors, like G.D. Durante (1490-1565), confidently held that one executor could not act without others, unless the testator allowed them to act *in solidum*; a reference was made both to Sext.3.11.2 and to the constitution on procurators, Sext.1.19.6.¹⁰⁶⁵

The problem of co-executors was closely connected with another problem – the transmission of the executor’s office to his heirs. On the one hand, the executor was an administrator, personally selected for the position, akin to a tutor, which implied that the office was not supposed to be transmissible. On the other hand, in many cases the executor had personal actions – what happened to them after his death? The eventual consensus was to apply to the executor the same principle as was applied to procurators and judges-delegate. An *executor mixtus* transmitted to his heirs all the rights and actions that he had, together with the obligation to assign them to the beneficiaries; thus, the *executor mixtus* was effectually equalized with a *procurator in rem suam*, who was able to transmit and assign the right at any moment.¹⁰⁶⁶ If the executor was *merus*, receiving no profit out of the estate, then, if he died without having intermeddled with the estate goods, leaving them intact (“*res integra*”), no

¹⁰⁶⁴ Bartolus points out the change brought by *Liber Sextus* in his commentary to D.26.7.3.

¹⁰⁶⁵ G.D. Durante, *De arte testandi*, VII.8.

¹⁰⁶⁶ Bart., D.34.1.15pr, 16pr; Bald., C.8.53(54).33.

transmission took place, just as no transmission could take place in case of a regular procurator (C.4.35.15; X.1.29.21); a new executor was to be appointed in his stead. If the executor actually intermeddled with the estate goods, then, after his death, the fund (“*bursa*”) he took possession of was transmitted to his own heirs, together with the obligation to employ the fund in favour of the beneficiaries; the heir, however, was not obliged to take upon himself any other unfinished business of the deceased executor.¹⁰⁶⁷

The writings of the English Canonists are a good demonstration of how flexible the above-expressed principles were and how they could be reinterpreted and adapted to justify local practice. J. Ayton, having presented the prevalent opinion on the necessity of unanimity among the executors, eventually leant in favour of the opinion that every executor can both sue and be sued *in solidum*, which Ayton called the practice of contemporary England. The doctrinal justification Ayton provided for this is that the unanimity rule was devised for procurators, who were appointed mainly for judicial matters; on the other hand, most of the functions of executors were “extrajudicial”, as with tutors, where the *in solidum* rule was more convenient. Ayton, nevertheless, admitted that the consideration of the lawsuits of several executors together is desirable, “*favore testamenti*”.¹⁰⁶⁸ By the time of H. Swinburne, English practice was to allow the co-executors to sue and be sued individually, unless a party to the litigation objected to this.¹⁰⁶⁹ One executor could also discharge the debts due to the testator, without consent of the other executors.¹⁰⁷⁰ Nevertheless, even in England the co-executors were seen as “one person” in that they could not sue each other over possession of the estate; if one of them died or rejected the office, the office accrued to the others.¹⁰⁷¹

In sharp contrast to the *Ius Commune*, in England the executor never transmitted the office to his own representatives, even in respect of property he actually possessed. If there were no co-executors, a testamentary executor could appoint a

¹⁰⁶⁷ Durantis, *ibid.*, fo. CCVII; Bart., D.31.1, D.34.1.15pr.

¹⁰⁶⁸ Constitution of Ottobuono, 1268, tit. 14 // *Constitutiones Legatinae...*, 108.

¹⁰⁶⁹ Swinburne, *op cit*, IV.20, pp.183-184.

¹⁰⁷⁰ Swinburne, *op cit*, VI.3, pp.215-216.

¹⁰⁷¹ Swinburne, *op cit*, IV.20, pp.183-184.

substitute to complete the executorial tasks after his death; however, this was not a transmission, because the substitute was considered the executor of the original testator, not the executor of the executor.¹⁰⁷²

As to the qualifications to be an executor, the early jurists dedicated a lot of attention to whether various types of consecrated persons and clergy were eligible to take the office.¹⁰⁷³ Besides that, an executor was supposed to be over 25 years old, so that he possessed a *persona standi in judicio*. In England, however, this last requirement did not apply: in practice, children were often appointed executors, in which case, if they were underage, the office was performed by their tutors or curators.¹⁰⁷⁴ For women to hold this post was initially doubtful,¹⁰⁷⁵ but it afterwards became accepted practice.¹⁰⁷⁶

6.2. Duties and Mechanism of Executorship in Scotland.

The long-term development of the office of executor in Scotland was very similar to that in England. In pre-Reformation Scotland, executors and the lawsuits involving them were dealt with predominantly by the Ecclesiastical Courts, and, in contrast to England, there seems to have been no strict control and pressure from the secular courts over jurisdictional encroachments. A.E. Anton in his research into the rudimentary Scottish pre-Reformation Church court records showed how their practice was heavily based on Canon law.¹⁰⁷⁷ Similarly to England, the ordinary way to administer a moveable estate was through the universal executor, who was often characterized as “*heres in mobilibus*” in subsequent writings and case law.¹⁰⁷⁸ In the same vein, the Church courts’ procedure of ‘confirmation of testament’,¹⁰⁷⁹ by which

¹⁰⁷² An intestate executor, which was called an “administrator” in England, could not appoint a substitute (Swinburne, op cit, II.9, pp.49-50, VI.3, pp.213-214).

¹⁰⁷³ Durantis, ibid., fo. CCVI.

¹⁰⁷⁴ Swinburne, op cit, V.1, pp.196-197.

¹⁰⁷⁵ Durantis, ibid., fo. CCVII.

¹⁰⁷⁶ Oldendorp, *De executoribus ...*, tit. V // *Tractatus selecti...*, p.411; Swinburne, op cit, II.9, pp.49-50.

¹⁰⁷⁷ A.E. Anton, ‘Medieval Scottish Executors and the Courts Spiritual’, 129-154.

¹⁰⁷⁸ The earliest writing in which I have found this expression is Th. Craig’s “Jus Feudale” (II.17.1).

¹⁰⁷⁹ In Lyndwood’s *Provinciale* similar procedure was called “insinuation” (Lyndwood, *Provinciale (seu Constitutiones Angliae)...*, tit. 13, s.v. “*Insinuationem*”, 170).

the executors were bestowed with powers, was compared to the Civilian *aditio hereditatis* by the Scots authors.¹⁰⁸⁰

Executors in Scotland were either *executors-testamentar (-nominate)* or *executors-dative*. The latter were appointed by the bishop before the Reformation; after the Reformation they were to be appointed by the Commissary, although various instructions directed to the Commissaries from time to time reserved the right to deal with some estates to the bishops of the Scottish Episcopal Church.¹⁰⁸¹ In this case, the functions of the executor were performed by the procurator-fiscal. While initially the appointment of an executor-dative was at the discretion of the Commissary (*infra*, p.249), the 1666 Instruction to the Commissaries provided for a strict order of priority in confirmation as such: the defunct's 'nearest-of-kin' first, then his creditors, then legatees and, finally, the procurator-fiscal.¹⁰⁸² The definition of the 'nearest-of-kin', provided by Th. Hope and by Stair, suggests that this category of Scots intestate moveable succession was taken by analogy from heritable succession, except: 1) there was no primogeniture, 2) there was no preference of males,¹⁰⁸³ and 3) there was no succession by representation, i.e., the defunct's children excluded the grandchildren from a predeceasing child.¹⁰⁸⁴ The last rule was probably caused by the literal interpretation of the term "nearest-of-kin", meaning the closest extant relatives of the defunct, to the exclusion of the remoter ones.

The terminology of "mere" and "mixed", "universal" and "particular" executors was not part of the usual Scots legal discourse. However, Scots law made use of several special types of executors. One of them was an 'executor-creditor'. An executor-creditor was a creditor of the defunct who was confirmed as an executor-dative to his debtor, who died intestate. In fact, the machinery of executor-creditor was used as a type of diligence (execution) against the debtor. The special feature of such

¹⁰⁸⁰ Stair *Inst.*III.8.51.

¹⁰⁸¹ The 1610 Injunctions to the Commissaries (*Balfour's Practicks*, 667) reserved to the bishops the privilege to be executors-dative where no other claimant existed. Unlike that, the 1567 Instructions (c. 4) reserved this right, in respect of large estates, for the Lords of Session.

¹⁰⁸² *Acts of Sederunt 1790*, 99-100. Stair in his *Institutions* also mentioned the surviving spouse as entitled, on par with legatees (*Inst.*III.8.54).

¹⁰⁸³ But there was still an exclusion of the uterine lines in the succession of collaterals. See note below.

¹⁰⁸⁴ Hope, *Minor Practicks*, §76; Stair, *Inst.*III.8.31-32.

executor's position was that he was not obliged to obtain a confirmation for the entire estate of the defunct – he might include in the inventory just as much as would pay his debt;¹⁰⁸⁵ it seems that initially an executor-creditor was not even obliged to repay the surplus estate to the defunct's next-of-kin, but this was changed by the 1679 Act of Sederunt.¹⁰⁸⁶ There were also other special types of executors: executors *ad omissa*, *ad male appreciata* and *ad non executata* (or *ad extra*); these were appointed for the goods which the principal executor, respectively, omitted, undervalued or was unable to collect. These types are traceable to pre-Reformation practice.¹⁰⁸⁷

In compliance with Canon law, the executor in Scotland had one year to execute the testament. Later legal writers¹⁰⁸⁸ ascribed this term to statute – to the provision in the 1503 Act,¹⁰⁸⁹ which concerned the payment of the defunct's debts. However, the Act was not the real source of this term. The Act was dedicated to a different purpose: it established that the heir-at-law could not be sued by the moveable creditors of the defunct before the expiration of one year after the defunct's death; the reason for this was that during the first year after the death the defunct's executor was responsible for paying off the defunct's debts. Thus, the 1503 Act just referred to this yearly term, which was established by pre-existing law and practice, conform to the Canon law. Indeed, subsequent Scottish practice often confused this term of one year and a different term of “one year and one day”, during which the heir could decide whether to accept or to reject the heritable estate.¹⁰⁹⁰ There are decisions which imply that the executor had “one year and one day” to execute the testament, not just one year.¹⁰⁹¹ However, the source of this confusion is quite obvious, as the two terms performed a similar function; the Canonical origin of the “one year” term should not be put into doubt.

The year given for the execution of a testament was particularly important in the period before roughly the mid-17th century, because the moveable property,

¹⁰⁸⁵ *Spottiswoode's Practicks*, 352.

¹⁰⁸⁶ 14/11/1679, *Acts of Sederunt 1790*, 143.

¹⁰⁸⁷ Anton, *Op cit*, 139; 1563 Instructions, c. 31; *Spottiswoode's Practicks*, 110-113.

¹⁰⁸⁸ Erskine, *Inst.* III.9.41.

¹⁰⁸⁹ *RPS*, A1504/3/121.

¹⁰⁹⁰ This term was established by the later 1540 Act (*RPS*, 1540/12/78).

¹⁰⁹¹ *Collington v. Johnston* (1557, M.5201).

especially incorporeal rights, omitted by the executor from the inventory and not intromitted with by him, were to pass to the heir-at-law. The judges considered this logical, as the heir could be pursued for the moveable debts of the defunct on the expiration of the year.¹⁰⁹² Craig¹⁰⁹³ and Spottiswood¹⁰⁹⁴ still mention this possibility, which seems to have been a relic of the medieval practice, when the distribution of the defunct's goods for the payment of debts was primarily the function of the heir.¹⁰⁹⁵ However, this practice disappeared from later writings and case law, which may imply that it went out of use.

Scots judicial practice demonstrates uncertainty as to when the executor was to pay a specific legacy or a share due by law. On the one hand, the executor was found not liable for an annualrent on the legacy until a court decree was obtained against him;¹⁰⁹⁶ on the other hand, he was found liable for the annualrent on a 'legitim' share for the defunct's children, who were minors and thus unable to sue.¹⁰⁹⁷ Later authors, such as Erskine, held that that an executor could be sued for the legacy when there were available goods but was fully liable after one year expired.¹⁰⁹⁸

Akin to the English practice of the same period, Early Modern Scots practice did not limit the procedural capacity of executors: they could sue and be sued in the defunct's name.¹⁰⁹⁹ More than that, the executor was supposed to sue the debtors and be sued by the creditors in order to be able to dispose of the respective sums. Even if the testator had a court decree upon a debt awarded for him or against him in his life, the decree was not automatically valid in respect of his executors in Scots law: until 1693, an 'action of transference' had to be filed by the executor or against him in order to formally change the party to the obligation.¹¹⁰⁰ Thus, all the defunct's creditors, who did not start the execution of diligence in the defunct's lifetime, were to file new

¹⁰⁹² Collington v. Johnston (1557, M.5201=Maitland 84).

¹⁰⁹³ *Jus feudale*, II.17.16.

¹⁰⁹⁴ *Spottiswoode's Practicks*, 113.

¹⁰⁹⁵ *Reg. Maj.* II.36.

¹⁰⁹⁶ Mackmichael v. Makfegie (1628, I B.S.252).

¹⁰⁹⁷ Hendersons v. Sanders (1634, M.8164).

¹⁰⁹⁸ Erskine, *Inst.* III.9.41; cf. the *Ius Commune* position, *supra*, p.221.

¹⁰⁹⁹ See *infra*, p.239, however, on the importance of the title of "universal intromitter" in the early case law.

¹¹⁰⁰ Stair, *Inst.* IV.34.1-3. Note that the active transference was abolished by the 1693 Act (*infra*, p.247).

lawsuits with the executor (*infra*, p.241). In a similar way, the executor was deemed to have “executed” (i.e., meddled with) the testator’s debt only after he obtained a court decree on that debt in his own name, although receiving a bond of corroboration from the debtor was also considered sufficient.¹¹⁰¹ The debts unsecured by the executor in the aforesaid fashion, by a general rule, could not be transmitted to the executor’s executor (*infra*, s.6.4).

Moreover, Scots law demonstrated strictness in respect of the executor’s title to pursue. The executor could only file a lawsuit upon a debt that he included in the inventory of the defunct’s estate.¹¹⁰² By way of exception, the Commissaries could grant a “licence to pursue” a debt before the completion of the inventory, in case of urgency or when it was uncertain if the debt existed.¹¹⁰³ Because of the last reason, as the archival evidence demonstrates, executors sometimes confirmed the inventories under a protestation that the debts which were not real and “responsal” were not to be counted into the general estate value.¹¹⁰⁴

As regards the liability of the executor for the defunct’s debts, the focus of attention for the early legal authors was the executor’s position *vis-à-vis* the heir. Both heir and executor could be pursued for either heritable or moveable debts.¹¹⁰⁵ The 1503 Act (*supra*, p.232) provided the heirs with a recourse against the executor in respect of moveable debts, but the executor could not be held liable *ultra vires*.¹¹⁰⁶ The reverse recourse – of the executor against the heir – was not expressly provided by the statutory law. However, such recourse was often given by the courts in practice¹¹⁰⁷ and gradually became the established law.¹¹⁰⁸

Scots law showed a striking similarity to the Civil law in the question of appointing agents and assigning debts by the executor. The executor at Scots law could

¹¹⁰¹ Stair, *Inst.* III.8.71; Erskine, *Inst.* III.9.38.

¹¹⁰² Pool v. Morison (1628, M.3493=3846); Brown & Duff v. Bizet (1666, M.4498).

¹¹⁰³ 1610 Injunctions (*Balfour’s Practicks*, 667); 1679 Act of Sederunt (14/11/1679, *Acts of Sederunt* 1790, 143).

¹¹⁰⁴ CC8/2/62, 19/11/1639, second entry (David Wilson).

¹¹⁰⁵ Crawford v. Mathisone (1628, I B.S.273).

¹¹⁰⁶ Laird of Elphinston v. Lord Glamis (1561, M.5204).

¹¹⁰⁷ Falconer v. Blair (1629, M.12487); Carnousie v. Meldrum (1630, M. 5204).

¹¹⁰⁸ Stair, *Inst.* III.8.65.

not appoint a procurator to sue upon a debt in his own name before the debt was secured by a court decree in the executor's name.¹¹⁰⁹ Similarly to Civil law, this rule was mitigated in respect of the executor having interest in the estate (*infra, s.6.4*).

The 1617 Act¹¹¹⁰ is evidence that the practice preceding the Act was to leave the residue of the "Dead's part" of the estate to the executor-nominate. It was exactly this practice that the 1617 Act aimed to abolish, calling it a practice of "ignorant" testators, contrary to "law, conscience and equity". The Act provided that, from then on, the executors-nominate could only claim a third of the "Dead's part" as a reward for their services and were obliged to give up the rest to the defunct's nearest-of-kin. The case law that immediately followed the Act found this right of the executor subject to contrary dispositions by the testator.¹¹¹¹

Early cases provided that the executor could not gift or assign anything from the estate for a lucrative cause.¹¹¹² In the later case law, under the influence of the 1617 Act, most of the executors were recognized as trustees of the legatees and other parties interested in the estate;¹¹¹³ this entailed that they had no *plenum dominium* over estate goods and could not voluntarily assign them to the detriment of the beneficiaries (*infra, p.248*).

The making of an inventory and the probate procedure were the fields where the Scots law and practice demonstrated significant robustness and bureaucracy, when compared to the *Ius Commune* and the English law. The making of an inventory in Scotland was indispensable, and, aside from the narrow instance of a "licence to pursue" (*supra, p.234*), in theory the executor could not intermeddle with the goods before the inventory was made and confirmed, which was different from English practice.¹¹¹⁴ Moreover, as was already mentioned in the survey of the Scottish wills (*supra, s.1.5*), in the majority of cases the inventory was made by the testator himself

¹¹⁰⁹ Millar v. Lindsay (1633, I B.S.339); Ramsay v. Demperstoun (1633, I B.S.344). In the last case, the appointment of a procurator was actually allowed under condition that the lawsuit was in the executor's name and the executor personally concurred at the process.

¹¹¹⁰ RPS, 1617/5/28.

¹¹¹¹ Forsyth v. Forsyth (1626, M.3923).

¹¹¹² Anonymous case, 1546, *Sinclair's Practicks*, §396; anonymous case, 1558, Maitland 90.

¹¹¹³ Gordon v. Laird of Drum & Irving (1671, M.3894).

¹¹¹⁴ A.E. Anton, *op cit*, 138; *supra, p.221*.

– the practice that many *Ius Commune* authors straightforwardly rejected as unacceptable.¹¹¹⁵ Scottish inventories routinely contained corporeal goods, debts due to the testator and debts due by him; no visible distinction was made between the debts secured and unsecured by writing.

The archival evidence shows that the probate procedure for both testate and intestate executors usually started with an “edict of executry”, published at the instance of the procurator fiscal, which edict commanded all executors, intromitters and other interested parties to provide an inventory of the defunct’s goods, under pain of appointing executors-dative at the commissary’s discretion. The executors-nominate then usually appeared with a complete inventory, although sometimes they asked for additional time.¹¹¹⁶ In case of intestacy, the executor-dative was first to be granted powers by a “decree-dative”, which provided an additional term for completing the inventory.¹¹¹⁷ The various instructions addressed to the Commissaries established various terms for making an inventory: six months from the testator’s death were provided by the 1567 Instructions,¹¹¹⁸ three months by the 1610 Injunctions and 1666 Instructions.¹¹¹⁹ However, in practice these terms were often not complied with; the extant materials reveal no sanctions imposed for this upon the executors. One undated pre-Reformation monition by the Archbishop of St. Andrews¹¹²⁰ provided for an extremely short term for making the inventory – nine days, - which, surprisingly enough, became the usual term set by the individual decrees-dative and was even mentioned as such by Erskine.¹¹²¹

Both pre- and post-Reformation documents required the executor to take an oath on the faithful administration of the estate.¹¹²² A 1559 constitution by the St. Andrews Provincial Council¹¹²³ commanded executors-dative to give “sufficient caution” for the same purpose, by “caution” here meaning a security. In practice,

¹¹¹⁵ Bald., C.6.30.22.1a; Porcellini, *De confectione inventarii...*, c. 2 // *Tractatus selecti...*, 520.

¹¹¹⁶ CC8/2/1, pp. 13v, 15v.

¹¹¹⁷ CC8/2/62, 22/11/1639.

¹¹¹⁸ C. 9, *Balfour’s Practicks*, 664.

¹¹¹⁹ *Balfour’s Practicks*, 667; *Acts of Sederunt 1790*, 100.

¹¹²⁰ *St. Andrews Formulare*, §53 (f. 51).

¹¹²¹ Erskine, *Inst.* III.9.31.

¹¹²² *SES*, 212; *Balfour’s Practicks*, 667.

¹¹²³ *SES*, 280.

however, in the same robust spirit as with other issues, both executors-nominate and datives had to provide “caution”, which was given in the form of surety for the value of the entire estate.¹¹²⁴ This was only changed by the 1823 Act.¹¹²⁵

Originally, the form of inventory in Scotland¹¹²⁶ involved giving up the goods by the executor under oath before the judges, but the oath lost its legal significance at some point,¹¹²⁷ and thus the practice faded away by mid-18th century.¹¹²⁸ The 1690 Act¹¹²⁹ had the effect that the inclusion of all the goods in the inventory was no longer required and all types of executors could obtain partial confirmations.¹¹³⁰ This possibility was abolished by the 1823 Act.

However, the effect of compiling an inventory in Scotland was quite similar to that of England and the *Ius Commune*. Besides limiting the executor’s liability, it prevented a confusion of the executor’s debts against the testator: the executor was entitled to claim his debt against the estate, having effectual priority before all other creditors.¹¹³¹ The inventory also created a presumption about the contents and value of the estate, which could be used both for and against the executor. Thus, it came to be accepted in practice that the goods possessed by the defunct at the time of his decease and included in the inventory belonged to him, putting the burden on all intromitters to prove their title;¹¹³² this differed from the ordinary Scots requirement for real actions that the pursuer was to prove *quo modo desiit possidere*.¹¹³³ And, unless the contrary was proven, the inventoried goods were presumed to be in the executor’s possession and to be of the value designated by him.¹¹³⁴

¹¹²⁴ Bankton, *Inst.* III.8.62.

¹¹²⁵ 4 Geo. IV, c. 98.

¹¹²⁶ Here we are talking about the inventories given up by executors, not the inventories contained in the testamentary deeds, which we have reviewed previously (*supra*, s.1.5-1.6).

¹¹²⁷ In *Ker v. Ker* (1667, M.3874) the oath was recognized a mere formality, unable to entail perjury.

¹¹²⁸ Erskine, *Inst.* III.9.33.

¹¹²⁹ *Supra*, p.96.

¹¹³⁰ *Brodies v. Stephen* (1753, M.3911).

¹¹³¹ *Smith v. Gray* (1628, M.9660=I B.S.182=243).

¹¹³² *Inglis v. Inglis* (1670, M.12727); *Semple v. Givan* (1672, II Stair 78).

¹¹³³ *Stair, Inst.* III.2.7.

¹¹³⁴ *Hamilton v. Laird of Kinbrachmont* (1628, I B.S.158); *Ludquharn v. Haddo* (1632, M.3872).

Similarly to the *Ius Commune*, an executor in Scots law could reject the office before intermeddling with the goods: the *Ius Commune* expression “*res integra*” (*supra*, pp.221, 229) was used as a technical term in Scots practice.¹¹³⁵ In case of misconduct, the executor could be removed by the Commissaries,¹¹³⁶ although the case law on this issue is extremely scarce, which possibly implies that removals occurred very seldom. Should the executor fraudulently omit some goods from the inventory, the instructions provided for their forfeiture in favour of the bishop.¹¹³⁷ However, in practice the two main remedies for the aggrieved party in such a situation were either to sue the executor as the “vitious intromitter” (*infra*) or to confirm him- or herself as an executor *ad omissa*; the case law was contradictory on whether these two alternatives were for the pursuer’s choice or one of the two had priority over the other.¹¹³⁸ If the execution of a testament was not completed within one year after confirmation, the executor could not use the lack of funds as a defence against claims from creditors and legatees.¹¹³⁹ Finally, the 1695 Act¹¹⁴⁰ entitled the creditors of the defunct to charge the ‘next-of-kin’ to confirm as executor and empowered the creditors of the ‘next-of-kin’ to confirm as executors-dative to the defunct.

Unauthorized meddling with the defunct’s moveable estate was dubbed “vitious intromission” in Scots law. This issue in the Scots law was, probably, first dealt with by Th. Craig, where it was designated as “universal intromission”.¹¹⁴¹ Subsequently, the law of vitious intromission did not change significantly. Any person, irrespective of whether executor or not, taking possession of the defunct’s property before such property was confirmed and inventoried, was considered to be a ‘vitious intromitter’. How substantial was the amount of the intromitted property to be? This depended significantly on the discretion of the judges.¹¹⁴² The main consequence of ‘vitious intromission’ was that the intromitter was liable to the defunct’s creditors

¹¹³⁵ See: Learmont v. Holme (1561, M.3829); CC8/2/62, 11/07/1639, entries 3, 4.

¹¹³⁶ Wood v. Bonnington (1609, M.5201); Young v. Murray (1629, M.3880).

¹¹³⁷ 1610 Injunctions, *Balfour’s Practicks*, 667; 1666 Instructions, *Acts of Sederunt 1790*, 99.

¹¹³⁸ Johnston v. Ker (1616, M.9848); Schaw v. Auchinleck (1623, M.14411); Peebles v. Knight (1629, M.3494); Inglis v. Bell (1639, M.14414); Irving v. Forbes (1676, M. 7722).

¹¹³⁹ Craig, *Jus feudale*, II.17.16.

¹¹⁴⁰ RPS, 1695/5/207.

¹¹⁴¹ *Jus feudale*, II.17.3, 16.

¹¹⁴² Johnston v. Ker (1616, M.9848); Bad v. Haddington (1622, M.9865); Stark & Tam v. Jolly (1713, M.9830); Bankton, *Inst.* III.9.1, 14.

irrespective of the value of his intromission, *ultra vires*. The intromitter was, nevertheless, not liable to the creditors if he became the executor and confirmed the disputed goods before the defunct's creditor brought an action against him.¹¹⁴³ The same followed if someone else became the executor – in this case, the intromitter was liable to account before the executor for the possessed goods. If the intromitter was the defunct's executor-nominate, relict, child, legatee or another person entitled to some benefit by way of succession, there was a period of privilege – one year and one day after the death – during which no lawsuit by the defunct's creditors could be initiated, while confirmation and inventory were being prepared. The same period of privilege applied to the disponees of the defunct's goods in his life, if the possession was not transferred until death.¹¹⁴⁴ However, the 1690 Act (*supra*, p.96) freed the disponees of particular goods from the need of confirmation, unless the dispositions were in fraud of creditors.

The Scots Institutional writers considered 'vicious intromission' a unique legal device. Bankton called the unlimited liability of an intromitter a "singularity of our law" (*Inst.*III.9.1), obviously comparing it with the *executor de son tort* of English law (*supra*, p.224), who in Bankton's time was liable *ultra vires* only in special circumstances.¹¹⁴⁵ Erskine, in his turn, saw similarities between the 'vicious intromission' and the *actio expilatae hereditatis* of the Civil law.¹¹⁴⁶ Both authors, however, were quite far away from the truth. As was mentioned above, the English law on the *executor de son tort* evolved in time; in the 16th century, the English *executor de son tort* was liable *ultra vires*, just like a 'vicious intromitter'. The comparison of vicious intromission with the *actio expilatae hereditatis* is also inadequate. That *actio* was a purely criminal action, given against one who spoiled the estate goods before the estate was accepted (D.47.19.2). The *actio expilatae hereditatis*

¹¹⁴³ However, there were some cases where the action against the intromitter was sustained despite the existence of the executor (Schaw v. Auchinleck (1623, M.14411); Carnousie v. Meldrum (1630, M.5204)).

¹¹⁴⁴ *Spottiswoode's Practicks*, 350-352; Th. Hope, *Minor Practicks*, §§77, 92-94; Stair, *Inst.*III.9; Bankton, *Inst.*III.9; Erskine, *Inst.*III.9.49-56.

¹¹⁴⁵ Bankton, *Inst.*III.9, *Observations on the Law of England...*, §§4-5.

¹¹⁴⁶ *Inst.*III.9.49.

entailed a criminal punishment upon the perpetrator, not any additional liability in favour of the estate creditors.¹¹⁴⁷

In fact, ‘vicious intromission’ seems to be very similar to the early English *executor de son tort* and based upon the same principle: the meddling with the estate without inventory creates a presumption of sufficiency of goods and(or) of fraud (*supra*, pp.223-224). “Intromitter” in Scots law had a wide meaning, not restricted to that of an unlawful perpetrator (*supra*, p.155). In almost all testaments, an executor was routinely appointed a “universal intromitter”. This was not just a form, in the early law at least, as there was a case where out of several executors only the one who was also appointed a “universal intromitter” was found entitled to sue and be sued in the testator’s name.¹¹⁴⁸ Moreover, there is evidence suggesting that, in early law, not all intromitters could be sued by creditors: in one case from the Edinburgh Commissary Court the defunct’s relict successfully defended herself against the creditor by claiming that she was not an executor and that her “intromission” extended only to what was owed to her by the deceased husband.¹¹⁴⁹ It seems that, originally, only those intromitters who acted under disguise of an executor incurred liability; the fact that they were not really entitled to the office and did not make an inventory could not, obviously, be pleaded in their defence.

This is confirmed by the early writings, which spoke about a “universal intromission” and stressed that a “vicious” intromission must be to the *universitas* of the estate.¹¹⁵⁰ Stair insisted on the necessity that the intromitter takes possession of a “universal thing”, like the estate in general or the flock of sheep; taking possession of individual goods was not to be qualified as an intromission;¹¹⁵¹ Erskine, in the 18th century, no longer saw the need for such a distinction.¹¹⁵² This is reminiscent of the way “mere trespassers” were not considered executors *de son tort* in the early English

¹¹⁴⁷ D.47.18.1; D.47.19.1; C.9.32.1, 6.

¹¹⁴⁸ Pursuer v. Hamilton (1565, M.14686).

¹¹⁴⁹ CC8/2/1, p.2, 1564, lawsuit by John Hepburn. In the case, the defender held that she only intromitted with her relict’s third due from the first husband, which was later possessed by her second husband, now also defunct. The court assigned her to prove her case, which is a sign that her arguments were deemed acceptable.

¹¹⁵⁰ Craig, *Jus feudale*, II.17.3, 16; *Spottiswoode’s Practicks*, 350-352.

¹¹⁵¹ Stair, *Inst.* III.9.7.

¹¹⁵² Erskine, *Inst.* III.9.50.

law (*supra*, p.224). Moreover, the “one year and one day” period, during which the defunct’s successor could not be sued for intromission, might be of Civilian origin. Stair explained this rule on the ground that “*there being no competent time to confirm, neither any time limited in law other than year and day*” (*Inst.III.9.10*). Stair seems to be unaware of the shorter terms for confirmation, set by the various instructions to the Commissaries.¹¹⁵³ Further in the text, Stair associates the “year and day” term with the similar term, established by law for the execution of a testament.¹¹⁵⁴ Nevertheless, the underlying principle itself – that during the making of an inventory the successor could not be sued by the defunct’s creditors – is quite recognizable as Civilian (*supra*, p.225). It was only the later authors who started to explain the “year and day” rule from the necessity of “custody” over the defunct’s goods by his relatives and potential successors.¹¹⁵⁵

In respect of procedure for the payment of debts, Scottish law once again demonstrated a certain strictness and inflexibility. On the one hand, the 1567 and subsequent Instructions forbade the inclusion of debts due by the defunct into the inventory, unless the inventory was given up by the defunct himself, in line with the testator’s statement having the force of, at least, a ‘half-proof’ (*supra*, s.2.3).¹¹⁵⁶ The debt, however, could also be proved by the creditor and established by a court decree against the executor. The chief motivation behind these rules was to ensure a fair calculation of ‘quots’ due to the Commissaries (*supra*, s.3.4); but they also served to protect the estate against embezzlement by the executor. In this, Scots law was not much different from English practice, where all debts were to be established by the bishop’s official before their inclusion in the inventory (*supra*, p.223). However, unlike English law, Scots law did not allow the executor to pay whichever debt he preferred, adopting instead a “first come – first served” principle.¹¹⁵⁷ A 1662 Act of Sederunt, to prevent fraud, forbade the executor from distributing the estate within six

¹¹⁵³ This is especially striking, seeing that the 1666 Instructions to the Commissaries were registered as an Act of Sederunt by the Court of Session, of which Stair was a member.

¹¹⁵⁴ *Supra*, pp.221, 233. This opinion of Stair does not seem logical, because, as was already shown above, a confirmed executor was not free from lawsuits during the year given for execution, but, to the contrary, was to sue and be sued.

¹¹⁵⁵ Mackenzie, *Inst.III.9.23*; Bankton, *Inst.III.9.2*; Erskine, *Inst.III.9.53*.

¹¹⁵⁶ 1567 Instructions, c. 2; 1610 Injunctions (*Balfour’s Practicks*, 666).

¹¹⁵⁷ It was, probably, first formulated by Craig (*Jus feudale*, II.17.15).

months after the testator's death and provided that all creditors, presenting their claims within that term, had equal standing, *pari passu*.¹¹⁵⁸ However, at the expiration of the six months, the "first come" principle prevailed. In this, Scots law followed the *Ius Commune* more closely, with the exception, that the priority of creditors here was established not by the order of demand but by the order of obtaining court decrees.

Moreover, sometimes even a court decree was not sufficient for a secure payment. The executor could not simply pay upon a decree which was based solely on the executor's oath,¹¹⁵⁹ confession or inactivity during the litigation.¹¹⁶⁰ In such a case, the executor was supposed to receive caution from the creditor to return the paid debt in so far as a posterior creditor was prejudiced. The Civilian principle of *bona fides* in paying off debts (*supra*, p.225) was also referred to and applied in Scotland, although to a limited extent: the executor was held to be in "bad faith" if he paid the debt while knowing of another debt, recognized in a last will; but this did not extend to a debt unrecognized and unsecured by court decree.¹¹⁶¹

There were attempts to introduce into Scots law the privilege of legacies *ad pias causas*, following the *Ius Commune*. However, these were unsuccessful. Curiously enough, this failure seems to have been due to a peculiar interpretation of Civil law by the judges. In *Monro v. Scot's Executors* (1630, M.8048), the Lords refused to grant priority to a legacy in favour of the Kirk. According to Dury's report of the case, the Lords referred to the 'Falcidian quarter' of Civil law, which, allegedly, was not deductible from a legacy *ad pias causas* if the estate was sufficient to pay all the legacies; it was, however, deductible from all kinds of legacies if the estate was insolvent. Consequently, a legacy *ad pias causas* had no privilege before other legacies.

The problem with this statement by the Lords (of course, if it was reported correctly) is that it is outright wrong. At Civil law, a legacy *ad pias causas* was free

¹¹⁵⁸ 28/02/1662, *Acts of Sederunt 1790*, 82.

¹¹⁵⁹ Unlike England (*supra*, p.242), in Scotland the executor could take an oath in the lawsuit upon the defunct's debt (*Relict of Hamilton Case* (1630, I B.S.300)).

¹¹⁶⁰ *Kerr v. Lady Collington* (1627, I B.S.235); *Nesbet v. Hume* (1629, 1 B.S.277); *Relict of Hamilton Case* (1630, I B.S.300).

¹¹⁶¹ *Scougall v. Horseburgh* (1621, M.3863).

from the ‘Falcidian quarter’ in case of both solvency and insolvency (C.1.3.48; Nov.131.12pr.). In fact, the body text of Nov.131.12pr quite explicitly states that the insolvency of the estate is no ground for the deduction of the ‘Falcidian’: to the contrary, it says that the entire insolvent estate should be directed to the payment of the “pious” legacy! This interpretation was accepted both by the Commentators¹¹⁶² and by the Humanist jurists.¹¹⁶³ Some scholars held to the opinion that Nov.131 was only applicable to situations where the heir/executor was at fault in not paying the legacy, but even they did not distinguish between solvent and insolvent estates.¹¹⁶⁴ Thus, the interpretation expressed in *Monro* looks extremely peculiar; nevertheless, it is to blame for the absence of the privilege of charitable legacies in Scots law.

There was one more instance where Scots probate procedure was strikingly similar to the *Ius Commune*, although the connection between the two was problematic. It was mentioned above that the Civilian executor, after paying off the debts and legacies, was free from further liability, while the creditors who came late could have recourse against the legatees who received their legacies (*supra*, p.225). An essentially similar rule was accepted in Scotland by the time of Stair.

The Scots rule, however, underwent a peculiar evolution. Spottiswood in the 1630s held that a Scottish executor was not liberated from the debts by paying off the legacies, but the creditor could pursue either the executor or the legatee at his choice.¹¹⁶⁵ He mentioned that it was a Scottish practice for executors to get cautions from the legatees in case forgotten creditors emerged. Such caution in Scots practice was called “*cautio mutiana (muciana)*”, which was a complete misnomer, as *cautio Muciana* in Civil law served a different function.¹¹⁶⁶ Indeed, there was little case law involving *cautio mutiana* in Scotland, and what there was was indecisive on whether this caution was necessary.¹¹⁶⁷ Stair in his *Institutions* gives a different account of the

¹¹⁶² Bart., D.35.2.52; Pau.Castr., D.30.79.

¹¹⁶³ Voet, *Commentarius ad Pandectas*, D.35.2, XVI.

¹¹⁶⁴ J. Voet, *ibid*.

¹¹⁶⁵ *Spottiswoode’s Practicks*, ‘Legacies’, 195.

¹¹⁶⁶ In Civil law, *cautio Muciana* was applicable to legacies under a resolutive condition; this caution was provided by the legatee to repay the legacy back in case the condition was fulfilled and the legacy failed (D.35.1.7).

¹¹⁶⁷ *Craufurd v. Matheson* (1634, M.15925); *Binning v. Hamilton* (1675, M.3853).

law: the executor, according to him, was liberated by paying off the legacies, while the creditor had direct relief against the legatees; the *cautio mutiana*, surprisingly, Stair called “not accustomed” in Scots law.¹¹⁶⁸ This was the approach taken by subsequent practice and writings.¹¹⁶⁹ The new direction taken by Stair and subsequent authors possibly implies conscious imitation of the Civilian doctrine, which, nevertheless, was not very well understood.

Originally, with the office finished, the executor was required to give an account of it, all the creditors being called, and receive a “decree of exoneration”.¹¹⁷⁰ However, this practice went out of use, as a simple procedural exception was found eligible to defend the executor from further lawsuits.¹¹⁷¹

As to the person of the executor, Scots law largely followed the English approach (*supra*, p.230). The executor could be a minor, and then his or her functions were performed by the tutor or curator. Both men and women were routinely appointed executors; however, a married woman, as the executor, participated in litigation only together with her husband, “for his interest”.

6.3. *Plurality of Executors in Scotland.*

The earliest Scottish cases available to us demonstrate quite a faithful following of the *Ius Commune* rules on co-executorship. As early as 1548 it was decided that the office of a dead executor accrued to the remaining co-executors;¹¹⁷² in 1557 it was established that one co-executor could not be pursued without the others.¹¹⁷³ Correspondingly, in 1566 it was decided that one co-executor could not pursue the estate debtors without other co-executors joining in the lawsuit.¹¹⁷⁴ It is notable that all these cases are from the Court of Session, which shows that the Scots royal courts, in contrast to those of England (*supra*, p.230), did not contradict the practice of the

¹¹⁶⁸ *Inst.* III.8.70.

¹¹⁶⁹ Erskine, *Inst.* III.9.46; *Executors of Maccomie v. Isabel & Rachel Strachans* (1760, M.8087).

¹¹⁷⁰ *Jus feudale*, II.17.15.

¹¹⁷¹ *Lord Brughton v. Aikman* (c. 1570s, M.2737); *Tailzifer v. Wilson* (1629, M.2190); *Inglis v. Bell* (1639, M.14414).

¹¹⁷² *Culross v. Balvaird* (1548, M.3877).

¹¹⁷³ *Earl of Morton v. Duke* (1557, M.14685). See also: *Lovat v. Frasers* (1567, M.2189=3878).

¹¹⁷⁴ *Borthwick v. Douglas* (1566, M.14686).

Ecclesiastical and then Commissary courts. In this way, the Scottish solution of this issue remained closer to the *Ius Commune* rules than the English solution.

The Canonical origin of Scots law in this respect is further proved by the difference in the way executors were regulated from that of similar institutions. Tutors in Scots law were liable *in solidum* for their administration.¹¹⁷⁵ The rules on the liability of heirs-portioners were also different: the early cases on heirs-portioners allowed creditors to sue them separately to the extent of their hereditary shares.¹¹⁷⁶ In later cases, it was established that all heirs-portioners were to be summoned in a lawsuit by the estate creditors.¹¹⁷⁷ However, this was a matter of form and procedure; unlike with executors, who held their office *pro indiviso*, the renunciation of one heir-portioner did not make his share of liability accrue to the other, while the insolvency of one co-heir could make the other liable *in solidum*.

Nevertheless, even in Scotland some deviations from the *Ius Commune* standard appear in later practice, in the 1620s. To some extent, they all are connected to the development in the field of transmission of the executor's rights. First of all, it was found that, with one co-executor of the several dying, the remaining co-executors could not be pursued by the creditors and legatees for the property intromitted with (goods taken possession of, decrees awarded, etc.) by the deceased executor;¹¹⁷⁸ the executor of the deceased executor was to be pursued for those goods if the residue was insufficient.¹¹⁷⁹ The transmission of the goods in possession, as will be shown further (*infra*, s.6.4), was also inspired by *Ius Commune* doctrine; so, in this respect, Scots law was reconciling the two Civilian rules rather than deviating from them.

Another peculiar rule that Scots practice developed was that an executor who possessed as much property as could pay the entire debt or legacy, could be sued

¹¹⁷⁵ Stair, *Inst.* I.6.23.

¹¹⁷⁶ Home v. Home (1632, M.14678); anonymous (1633, M.14680); Duncan v. Ogilvie (1635, M.14680).

¹¹⁷⁷ Lawers v. Dunbar (1637, I B.S.368); Burnet v. Leper (1665, M.14682); Salton v. Salton & Forbes (1670, M.5360); Oswald v. Somervell (1685, M.14682).

¹¹⁷⁸ Aitkin v. Hewart (1625, M.3878); Peacock v. Peacocks (1628, I B.S.265=M.2189).

¹¹⁷⁹ This is why the claim by Th. Hope in his *Minor Practicks* (§90), that the surviving executors were to be sued for the share of the deceased one and have recourse against the latter's representatives, was imprecise. Aitkin v. Hewart (1625, M.3878) made a clear point that the surviving executor could not be sued for the property in the hands of the dead one. The recourse could only be possible to restore the *pro rata* distribution of liability among the executors.

without summoning other executors;¹¹⁸⁰ the aggrieved executor had recourse against his colleagues. This rule seems to correlate with the previous one. To an extent, these two rules look like “mirror images” of each other: the executor cannot be sued for the goods in possession of the dead co-executor but can be sued for the goods in his own possession. It seems that the judges at some point overlooked the important detail that one of the co-executors was dead in the former case but alive in the latter case.

Furthermore, in 1630 the judges deduced by analogy an even more peculiar rule: one of the co-executors could pursue, discharge and receive payment of the debt, if the other co-executor intromitted with as much more property above his own share as equaled the amount of the discharged debt.¹¹⁸¹

In addition to the above, other details of the legal regulation of the plurality of executors may be found in Scots practice. Thus, a case from 1629 suggests that, just like the pre-Reformation bishops, the Commissaries could force one of the executors into compliance if he prevented his colleagues from effective performance of their duties.¹¹⁸² The decision in the *Lag’s Case* (1634, M.14689) implied that executors could be appointed by the testator either “conjunctly” or separately to several parts of the estate, in which latter case they could act or sue individually.¹¹⁸³ G. Mackenzie tells us that one executor could discharge a debt of an estate debtor to the proportion of his share in the estate, which suggests that co-executors could individually perform extra-judicial acts in respect of their proportional shares.¹¹⁸⁴

With time, however, the approach of the Scots law changed. In the 18th¹¹⁸⁵ and especially 19th century,¹¹⁸⁶ instead of the unanimity principle, the majority principle started to be applied to executors-nominate: the majority of co-executors was entitled

¹¹⁸⁰ *Mc’Mitchell v. Mc’Quharrc* (1625, M.14687); *Turnbull v. Mathison* (1626, M.7574); *Salmon v. Orr* (1630, M.14688).

¹¹⁸¹ *Semple v. Dobie* (1630, M.14688).

¹¹⁸² *Young v. Murray* (1630, M.3880).

¹¹⁸³ Possibly, this was what an option that Th. Hope was talking about when he reported witnessing a case where the Lords allowed one co-executor to pursue for his share (*Minor Practicks*, §91). However, without a more specific citation we cannot confirm this.

¹¹⁸⁴ Mackenzie, *Inst.* III.9.19.

¹¹⁸⁵ *Grant & Gregory v. Representatives of Campbell* (1764, M.14690).

¹¹⁸⁶ *Mackenzies v. Mackenzie* (1886, 13 R 507); W.A. Wilson, A.G.M. Duncan, *Trusts, Trustees and Executors* (1975), 414.

to make decisions on both judicial and extrajudicial matters. The change was obviously inspired by the influence of the law of trusts. A large proportion of moveable estates in this period was administered through *inter vivos* settlements and trustees rather than traditional testaments and executors;¹¹⁸⁷ the powers of trustees did not depend on the Canon law tradition, but on the interpretation of dispositions and various statutes.¹¹⁸⁸ 19th century doctrine interpreted the 1617 Act (*supra*, p.235) as making the executor-nominate a trustee, which further facilitated the analogy.¹¹⁸⁹ Executors-dative *qua* 'next-of-kin' (*infra*, p.249), in their turn, were found eligible to sue and act individually in respect of their own shares, as they held the office *in rem suam*.¹¹⁹⁰ Eventually, the Executors (Scotland) Act, 1900,¹¹⁹¹ confirmed the majority principle in respect of all types of executors, effectually dispensing with the *Ius Commune* regime.

6.4. Transmissibility of the Office of Executor in Scotland.

The early Scottish practice and writings demonstrated an absence of the category of *executor mixtus* and of the special treatment of executors who had a personal interest in the estate. The early case law seems to imply that, originally, a dying executor's share accrued to the co-executors;¹¹⁹² if the only executor died, an executor *ad non executum* was appointed in his stead.

After the 1620s, if not earlier, as was shown above (*supra*, p.245), goods intruded with by the executor were treated differently: such goods were transmitted to the executor's executors, and, with them, the liability for the estate debts and legacies to the extent of the goods' value was also transmitted. There was a controversy for some time over what constituted "intrusion" and "execution" for incorporeal rights: the filing of an action, a court decree or a letter of horning?¹¹⁹³ This question

¹¹⁸⁷ See *supra*, pp.96-97.

¹¹⁸⁸ M'Laren, *Wills and Succession*, vol II, 185-187.

¹¹⁸⁹ M'Laren, *op cit*, vol II, 143.

¹¹⁹⁰ M'Laren, *op cit*, vol II, 187.

¹¹⁹¹ 63&64 Vict, c. 55.

¹¹⁹² *Culross v. Balvaird* (1548, M.3877).

¹¹⁹³ "Letters of horning", in the 17-18th centuries, was the main type of executorial diligence in Scotland. The letters, read publicly at the market-cross with the blow of the horn, commanded the debtor to pay the debt, under the threat of becoming a "rebel to the King" (*Stair, Inst.IV.47.1-22*).

was eventually answered by the 1693 Act, which abolished the active ‘action of transference’; a lawsuit, initiated by an executor, was now automatically transmitted to the pursuer’s representatives.¹¹⁹⁴

In respect of the “not executed” part of estate, the pre-1660 case law was quite clear: such goods could not be transmitted; they either accrued to co-executors or passed to an executor *ad non executam*.¹¹⁹⁵ Even if the dead executor was the only son of his defunct mother, the mother’s ‘nearest-of-kin’, confirmed as *executor ad non executam* to her, excluded the son’s executors; the claim that the son was the mother’s successor “*ex asse*”¹¹⁹⁶ was to no avail.¹¹⁹⁷

However, this gradually changed through the 17th century, with Scots law eventually coming to apply the same logic as the *Ius Commune* applied to “mixed” executors, although the term “mixed” was never used in Scots practice. The exact way it happened was different for the executors-nominate and executors-dative.

As was mentioned above, before the 1617 Act executors-nominate in Scotland were presumed to receive the undisposed part of the estate (*supra*, p.235). However, the Act restricted their interest in favour of that of the ‘next-of-kin’ and legatees. Subsequent practice, most crucially, *Gordon v. Laird of Drum & Irving* (1671, M.3894), interpreted the Act in the way that an extraneous executor-nominate, appointed by the defunct, only possessed a *nudum officium*, or, simply, a trust over the goods he was administering. In the case, the defunct’s relict and son were appointed executors by him; together they obtained a decree for the debt due to him, and then the relict died being a “rebel under horn”. A dispute arose between the surviving co-executor and the ‘donatar’ of the relict’s ‘escheat’ as to whom the recovered but yet unpaid debt belonged. The Court eventually decided that the executor-nominate did not have a *plenum dominium* over the estate goods. Thus, even though the relict would have transmitted the debt she intromitted with to her successors (had she not died

¹¹⁹⁴ RPS, 1693/4/65.

¹¹⁹⁵ Duke of Lenox v. Cleland (1627, M.3879).

¹¹⁹⁶ I.e., to the entire estate; it was a technical term of the Civil law (Inst.Just.II.14.5-8).

¹¹⁹⁷ Wilson v. Nicolson (1633, M.9249).

“under the horn”), yet she could not assign it and it could not fall under her escheat; thus, the debt was found to accrue to the son.

However, in *Spreul v. Miller* (1665, M.8052) it was decided that, if the executor-nominate was also appointed a universal legatee by the testator, such executor transmitted to his own executors both the rights to the entire estate and the liability for the debts and legacies, excluding the executors *ad non executi*. The decision did not use the term *executor mixtus*. However, the argumentation for the winning party in this case involved using the term “*heres heredis*” for the executor of the deceased executor, implying that the universal legacy left to him turned the “naked executor” into the main beneficiary of the estate, akin to an “heir”. The logic of the decision was that the executor, who was to take the main benefit out of estate, was not a “trustee” and thus could transmit the entire office, irrespective whether the estate property was collected (“executed”) or not.

The office of executors-dative experienced a different evolution, although it eventually reached the same result as with testamentary executors. This evolution was closely connected to the question of who was the beneficiary of intestate moveable succession. As was already shown above (*supra*, p.231), the 1666 Instruction was the first official document to set up directly the categories of people entitled to be appointed executors-dative. What was the situation before then?

It seems that we should, in general, agree with Lord Kames’s short discourse on executors-dative,¹¹⁹⁸ in which he shows that the appointment of an executor-dative, similarly to English practice, used to be largely at the discretion of the public authority: a bishop before the Reformation, a Commissary after. The most well known pre-Reformation document aimed at restricting the bishop’s discretion was the 1526 Act.¹¹⁹⁹ This Act provided for the preferential appointment of the ‘next-of-kin’ as the executors-dative of deceased pupils, unable to make a will; the Act was limited to the estates of people under 14 years old. Besides that, in Kames’ opinion, the executor-dative could be anyone the bishop or the Commissary might appoint, who, after paying

¹¹⁹⁸ H.H. Kames, *Remarkable decisions of the Court of Session* (1766), p.89. The same discourse was published in *Morrison’s Decisions* (M.3902-3907).

¹¹⁹⁹ *RPS*, 1526/6/40; later re-enacted in 1541 (*RPS*, 1540/12/95).

off the debts and leaving a part of the estate for charity, could essentially appropriate the residue to himself. This, Kames held, changed only in 1654, by an Order of the Cromwellian Commission, which Order was, allegedly, the first document to specifically command the executors-dative to restore the relevant free goods to the defunct's wife and next-of-kin.¹²⁰⁰

The picture provided by Kames is incomplete. It omits the ecclesiastical legislation. The constitution of the 1559 St. Andrews Provincial Council, already mentioned above,¹²⁰¹ instructed the Commissaries to appoint "specially well-qualified" kinsmen of a deceased person as executors-dative, to distribute the goods among other kinsmen. This document shows that, even before the Reformation, neither were the Church officials free to appoint whoever they wished as executors-dative, nor were the executors free in disposing of the estate. As early as that, executors-dative managed the estate in favour of the defunct's next-of-kin, in a "trust"-like fashion. However, it is clear that, before the confirmation of executors, the defunct's kinsmen did not have any strict actionable right to the estate. In this respect, Kames is right.

In practice, however, the ordinary way in which the defunct's 'next-of-kin' obtained an interest in the estate was by getting personally confirmed as the executor-dative, together with all other next-of-kin within the same degree of proximity. A.E. Anton explained this on the basis of simple expediency: the kinsmen, being the most trustworthy people to commit the administration to, were also the main beneficiaries of the estate; the undisposed residue of the estate was simply appropriated by them.¹²⁰² However, in theory the office of executor-dative remained separate from the right of the 'next-of-kin' to a share in the defunct's "Dead's part". Perhaps, this is why, before 1660, the 'next-of-kin' could not transmit the right to "unexecuted" goods (*supra*, p.245). Moreover, if the defunct's kinsman died before the confirmation of estate (by anyone), he or she did not transmit any right whatsoever!¹²⁰³

¹²⁰⁰ This order is dated 14 January 1654, c. 15. See: M.3906.

¹²⁰¹ *SES*, 280; *supra*, p.236.

¹²⁰² Anton, 'Medieval Scottish Executors and the Courts Spiritual', 148-149.

¹²⁰³ *Hamilton v. Hamilton* (1662, M.9252); *Duke & Duchess of Buccleugh v. Earl of Tweeddale* (1677, M.2369).

The discernible changes started with *Bells v. Wilkie* (1662, M.9250). In the case, three sisters were confirmed executors-dative to their brother. One of them died before the testament was executed. Her own son and executor sued his aunts for a third of his uncle's "Dead's part". The defenders alleged that the executors-dative had no right to the estate separate from their offices, and so the dead sister's share in the estate was extinguished and accrued to the co-executors. In response, the pursuer, with a reference to the 1617 Act, claimed that, besides the office which accrued to the defenders, his dead mother also possessed a separate "right of relation" ("*jus agnationis*"), which she acquired simply by surviving her brother and which was transmissible to her successors. The Court decided in favour of the pursuer. The *jus agnationis* of the 'next-of-kin', mentioned by the pursuer, began to be designated in practice as the "right of blood".¹²⁰⁴

Nevertheless, contemporary authors did not accept the far-reaching claim that a mere survivance vested the "right of blood" in the 'next-of-kin'. Stair insisted that the right of the 'next-of-kin' was extinguished by his death before the confirmation extinguished his right, although he considered such a situation an "extraordinary contingency".¹²⁰⁵ Dirleton called the right of the executor a "*jus anomalum*", because it combined both the office of executor and the right of moveable succession; however, even Dirleton held that the title of the 'next-of-kin' was an empty name, useless without a confirmation of the executor-dative.¹²⁰⁶ Both authors, it seems, saw the "right of blood" as providing the 'next-of-kin' with only a personal action against the executors.

Eventually, however, even this began to change, along the lines of *Ius Commune* rules. The important case in this respect was the *Graeme of Claverhouse Case* (1686, M. 3899). In this case, the issue was whether the 'executor *qua* next-of-kin' could validly assign a debt due to the defunct, for which a decree was not obtained. Ordinarily, an executor did not have a title to the goods he did not intromit with. However, in this case the assignee argued that the assignor, being a 'next-of-kin', had

¹²⁰⁴ Stair, *Inst.* III.8.51; *Inglis v. McMorran* (1686, M.9254).

¹²⁰⁵ Stair, *ibid.* This was only changed by statute in 1823 (4 Geo. IV, c. 98).

¹²⁰⁶ Dirleton, 'Executor', *Some Doubts...*, 50-51.

a real interest in the action from the moment of confirmation. This is probably the first Scots case where an executor with a *nudum officium* was directly contrasted with an executor *qua* next-of-kin, who had a personal interest in the estate. The claim was successful, although its *ratio decidendi* was not exactly clear.

Finally, the question was expressly decided in *Mitchel v. Mitchel* (1737, M.3900). In this case, an executor-creditor assigned a debt, unsecured by a decree, and died afterwards. An executor-dative, confirmed later, denied the validity of the assignation, because the unexecuted debt remained *in bonis defuncti* and belonged to the defunct's executors. However, the Court decided that the executor-creditor was, essentially, a *procurator in rem suam*, acting in his own interest. Thus, following the *Ius Commune*, he had no need for a decree, being able to transmit and assign the estate property from the moment of confirmation. The Court extended the same principle to 'executors *qua* next-of-kin', as well. In the words of Erskine, it applied to all executors who administered the estate "chiefly for themselves", so that there had been "few or no" executors *ad non executata* appointed by the Erskine's time.¹²⁰⁷

The improvement of the rights of the next-of-kin did not stop there. In *McWhirter v. Miller* (1744, M.14395) it was decided that the defunct's 'next-of-kin' could acquire a title to the defunct's goods by taking physical possession of them, even before the confirmation as an executor. An even further step was taken in *Murray's Executors v. Murray* (Falconer 52, 1745),¹²⁰⁸ where it was decided that the confirmation of a part of estate by the defunct's 'next-of-kin' bestowed on him the title to the entire estate. These last two decisions were probably inspired by the Civilian privileges of the *suus heres*;¹²⁰⁹ in yet another case, Scots 'next-of-kin' were expressly compared with the Civil law *sui heredes*.¹²¹⁰ However, this was the highest point for

¹²⁰⁷ Erskine, *Inst.* III.9.38. See also: Bankton, *Inst.* III.8.72.

¹²⁰⁸ In *Morison's Dictionary* (M.3902) this case was cited as *Sommervil v. Creditors of Murray*.

¹²⁰⁹ A *suus heres* in Civil law was a person under parental authority of the defunct. Unlike other heirs, a *suus heres* was, by fiction, considered a "co-owner" of the defunct's goods in the latter's life, and this ownership became real immediately after the testator's death, even before the acceptance of the estate. The title of the *suus heres* excluded any title of any other potential claimant to the estate (C.6.51.1.5; C.7.29.2; Bart., D.28.2.11).

¹²¹⁰ *Ogilvie v. HM Advocate* (M.3916).

the rights of ‘next-of-kin’ in Scotland: in a line of cases, *Murray* was effectually overruled.¹²¹¹

In general, Early Modern Scots practice on the office of executor demonstrates significant conservatism and preservation of the pre-Reformation, Canon law-inspired practice. In most respects, Scots practice was very similar to English practice, as described by the English Canonists. In some respects, e.g., in the making of inventory, Scots judges were stricter than their English counterparts. In other respects, namely, in respect of ‘vicious intromission’, plurality of executors and transmissibility of the executor’s office, they followed the *Ius Commune* principles more closely than English practice. The last observation could be explained by the absence of competing jurisdictional forums in Scotland, where the ecclesiastical jurisdiction was accepted pretty much intact into the secular legal system. The evolution of the approach to the transmission of the executor’s office in the 17th century seems to show that these *Ius Commune* principles were not just retained from the pre-Reformation period but continued to exert, at least, a hidden influence on Scots practice.

¹²¹¹ Sloan-Laurie v. Spalding-Gordon (1779, M.3918); Fraser v. Gibb (1784, M.3921); Alison v. Scollay’s Creditors (1802, M.3922).

Conclusion.

This thesis has produced few definitive results. A large number of the discovered *Ius Commune* influences are not explicit but conjectural; alternative interpretations are possible. Nevertheless, we can draw some conclusions from this research when we compare the different ways in which various fields of the law of succession developed.

Thus, in the field of constitution and form of last wills, Scots law revealed very little evidence of *Ius Commune* influence. The Scots rules on the form of last wills were, with a few exceptions, the same as the rules on contracts and all other documents; the relation of the latter to the *Ius Commune* rules is ambiguous. The same can be said of the Scots destinations and tailzies, which largely followed the logic of feudalism rather than the principles of the *Ius Commune* fideicommisses. An additional result of the research into Scots destinations is that, while originally there were different rules for destinations of heritable and moveable property, by the mid-18th century the peculiarity of moveable destinations all but disappeared and the destinations of both types of property came to be considered heritable destinations, governed by the the same rules.

As regards agreements on future succession (*pacta successoria*), the case law reveals a largely theoretical influence of such Civilian concepts as '*spes successionis*'. This influence, however, was significant enough to make a difference. The position of the Institutional writers, who juxtaposed Civil law and Scots law on this issue, turns out to be unsupported by the case law.

However, the influence of Continental doctrines was much more noticeable in the field of the evidential force of the last wills. Nevertheless, it was not the influence of the Civilian rules on last wills but rather of the Civilian rules on books of account that played the most obvious role in the development of Scots law in this field. The research into the concept of a '*donation mortis causa*' demonstrates the prevalence of the Civilian understanding of this concept at the early stages. In both fields, the law seems to have experienced change in second half of the 17th century, when last wills

lost full evidential force, while ‘donations *mortis causa*’ were redefined more narrowly.

The regulation of the office of executor in Scotland displays the strongest inspiration of *Ius Commune* rules. To a large extent, this was due to the preservation of the Canon law-related tradition of ecclesiastical court practice. This tradition, in its turn, seems to be largely inspired by English ecclesiastical practice. However, in some respects, the Scots practice in this field followed the *Ius Commune* rules more closely than English practice. This may possibly be explained by the absence in Scotland of the jurisdictional competition between secular and ecclesiastical courts. Instead, at the Reformation in the 1560s, the ecclesiastical jurisdiction, transferred to the Commissary courts, was incorporated into the system of the royal courts in a wholesale manner, without attempts to create a competing system of rules within secular courts. Indeed, a divergence between the practice of the Commissaries and the Court of Session did exist in the early 17th century;¹²¹² but this only concerned minor issues.

In summary, the influence of the *Ius Commune* on the Scots law of succession in this period was real, due both to the retaining of the tradition of ecclesiastical jurisdiction and to the knowledge of doctrine by the judges and litigants. However, this influence was often fragmentary and not properly articulated in the litigation and writings. Even then, we can hardly say that the *Ius Commune* influence was negligible. This thesis concentrated on the fields of the law of succession where one was least expecting any Civilian or Canonist analogies. The research results demonstrate that, even in such unlikely areas, Scots law was not isolated from Continental learning.

Among the interesting observations this research provides are the noticeable changes in legal practice in the mid-17th century. This is when the judges started to narrow down the definition of ‘donation *mortis causa*’, to assimilate all types of destinations to heritable ‘tailzies’ and to change the preceding practice of succession in other ways. It is no coincidence that it was exactly the time of the Restoration, when the Court of Session was reestablished after the period of “Cromwellian Usurpation”, when new judges were appointed and when case reporting became much more

¹²¹² Hope, *Minor Practicks*, §93 (on the issue of ‘vicious intromission’).

systematic. This possibly implies that the post-Restoration judges, encountering the scarcity of pre-Restoration practice and lacking the experience of their older colleagues, had to systematise the old case law within their own conceptual framework. This could also imply that further research into the succession practice of the “Usurpation” is needed, in order to fully evaluate the possible influence of this period on the subsequent legal development.

Another area where further research could be useful is the citations of the *Ius Commune* texts in the original Mss. of the Scottish reports and ‘practicks’. In numerous cases, we encountered the legal actors following principles similar to those of the *Ius Commune*, without direct reference to such. It is possible that in some of such cases the citations were present in the original Mss., but were dropped when the ‘practicks’ were published. This opens a potentially wide and exciting field of study.

Appendix A. Abbreviations.

1. General.

APS – *The Acts of the Parliaments of Scotland*, ed by Th. Thomson, C. Innes, vol I-XI (1814-1872).

CSL – *Comparative Succession Law* (2011, 2015)

ELR – *Edinburgh Law Review*

ELS – *Exploring the Law of Succession* (2007)

EPLJ – *European Property Law Journal*

ESLR – *Edinburgh Student Law Review*

EUP – Edinburgh University Press

IRMA – *Ius Romanum Medii Aevi*

ISLH – *Introduction to Scottish Legal History* // Stair Society Publications, vol 20 (1958).

JLH – *The Journal of Legal History*

JR – *Juridical Review*

MPEEPL – *Max Plank Encyclopedia of European Private Law*, ed by J. Basedow, K. Hopt and R. Zimmermann, vol I-II (2012).

RPS – *Records of the Parliaments of Scotland*

SES – *Concilia Scotiae: Ecclesiae Scoticae statuta tam provincialia quam synodalia quae supersunt*, Tom I-II (1866) (*Statutes of the Scottish Church 1225-1559... (1907)*).

SJILC – *Syracuse Journal of International Law and Commerce*

SLT(News) – *Scots Law Times (News)*

SSP – Stair Society Publications

TvR - *Tijdschrift voor Rechtsgeschiedenis*

2. Scottish legal literature.

Acts of Sederunt 1790 – The Acts of Sederunt of the Lords of Council and Session, from the 15th of January 1553 to the 11th of July 1790 (1790).

B.S. – M.P. Brown, *Supplement to the Dictionary of the Decisions of the Court of Session* (1826).

Balfour's Practicks – The Practicks of Sir James Balfour of Pittendreich (1754, repr 1962-1963).

Bankton, *Inst.III.8.6* - Andrew McDouall, Lord Bankton, *An Institute of the Laws of Scotland in Civil Rights*, vol I-III (1751-1753, repr 1993-1995), book III, title 8, §6.

Dirl.103 – John Nisbet of Dirleton, *The Decisions of the Lords of Council and Session, in Most Cases of Importance* (1698), decision no 103.

Dury 14 - Alexander Gibson of Dury, *Decisions of the Lords of Council and Session in most Cases of Importance* (1690), page 14.

Erskine, *Inst.III.9.7* – John Erskine, *An Institute of the Law of Scotland*, vol I-II (1773), book III, title 9, §7.

Falconer 52 – David Falconer, *The decisions of the Court of Session: from the month of November 1744 -December 1751*, vol I-II (1746-1753), page 52.

Hope, *Minor Practicks* – Sir Thomas Hope of Craighall, *Minor Practicks, or, a Treatise of the Scottish Law* (1726).

Juridical Styles – A collection of styles, or a complete system of conveyancing (1st ed, Vol I-III, 1787-1794; 4th edition, Vol I-II, 1852-1865).

M'Laren, *Wills and Succession*, vol I, 186 – J. M'Laren, *The law of Scotland in relation to wills and succession: including the subjects of intestate succession, and the construction of wills, entails, and trust-settlements* (1st ed, 1868), volume I, page 186.

Mackenzie, *Inst.III.9.2* – Sir George Mackenzie of Rosehaugh, *The Institutions of the Law of Scotland* (7th ed, 1730), book three, title nine, §2.

Mackenzie, *Observations upon the Act against the dispositions in fraud* - Sir George Mackenzie of Rosehaugh, *Observations upon the 18. Act 23. Parl. K. James VI, against Dispositions made in Defraud of Creditors & c.* (1698).

Mackenzie's Works - The works of that eminent and learned lawyer, Sir George Mackenzie of Rosehaugh, vol I-II (1716-1722).

Maitland 102 - Sir Richard Maitland of Lethington, *The practiques* (2007), page 102.

Morison's Dictionary – W.M. Morison, *Decisions of the Court of Session, from Its Institution until the Separation of the Court into Two Divisions in the Year 1808* (1811).

Reg.Maj.II.20.4 – Regiam Majestatem, ed by Lord Cooper // Stair Society Publications, vol 11 (1947), book II, chapter 20, §4.

Spottiswood's Practicks - Robert Spottiswoode of Pentland, *Practicks of the Laws of Scotland* (1706).

St. Andrews Formulare – Stair Society Publications, vol 7 (1942), 9 (1944).

Stair, *Inst.III.8.32* – James Dalrymple, Viscount of Stair, *The Institutions of the Law of Scotland* (2nd ed, 1693, unless a different edition stated), book III, title 8, §32.

II Stair 594 – James Dalrymple, Viscount of Stair, *The Decisions of the Lords of Council & Session in the most Important Cases Debate before them*, Parts I-II (1683), part II, page 594.

3. Literature of the *Ius Commune*.

A.C. 9.6 – *Authentica Constitutio 6, collatio 9* (medieval (*Littera Bononiensis*) citation of the Nov.131).

Abb., X.2.19.9 – Abbas Panormitanus, *Commentaria, secundae partis in Secundum Decretalium librum* (1591).

Abb., X.3.27.3 – Abbas Panormitanus, *Commentaria in Tertium Decretalium Librum* (1571).

Alex., C.6.23 Auth *Quod Sine* - Alessandro Tartagni, *In Codicem Iustinianum Commentaria*, tom I-II (1567).

Alex., cons. 76, vol III – Alessandro Tartagni, *Consilia, vel Responsa, Libri I-VII* (1610).

Bald., C.4.22.3 – Baldus de Ubaldis, *Opera omnia* (1599, see bibliography)

Bald., cons. 107, vol II – Baldus de Ubaldis, *Consilia, sive Responsa*, vol I-V (1589).

Bart., C.6.30.22.2 – Bartolus a Saxoferrato, *Commentaria* (1590, unless otherwise stated; see bibliography).

Bart., cons. 76 – Bartoli a Saxoferrato *Consilia, Questiones et Tractatus // Opera omnia*, tom X (Venice, 1590).

C.8.53(54).35 – Code of Justinian, book 8, title 53 (54 in the medieval versions (*Littera Boniniensis*, see Venice 1560 edition), law 35.

Dec., cons. 239 – Filippo Decio, *Consilia, sive Responsa* (1570).

Dec., X.2.22.2 – Filippo Decio, *In Decretales Commentaria, necnon in tit. De Privilegiis* (1581).

G. Claro, *Recept. Sent.* – J. Clarus, *Receptatum Sententiarum Opera Omnia* (1625).

Jason de Mayno, C.2.3.1 – *Iasonis Mayni Mediolanensis in primam Codicis partem Commentaria* (1581).

Nov.1 (=C.6.50(49) Auth. *Sed Cum Testator*) – Novel 1, in the medieval Mss. (*Littera Bononiensis*) extracted into the *Authentica “Sed cum testator”*, located in the Code, book 6, title 50.

Pau.Castr., C.6.49.7.1b – Paulus de Castro, *In Secundam Codicis partem Commentaria* (1585).

Pau.Castr., cons. 93, vol I – Paulus de Castro, *Consilia*, vol I-II (1582).

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- [An Act making an heir immune against the moveable debts within one year after the death], 1503(04), *RPS*, A1504/3/121.
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- Of testaments; and that executors shall render count and reckoning, Provincial Council holden by the Prelates and Clergy of the realm of Scotland, Edinburgh, 1549 (*SES*, 212).
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- *Carta constitutionis Commissariorum Edinburgi (Balfour's Practicks, 670-673).*
- Instructions given to the Commissaries of Edinburgh, Subscribed by our sovereign Lady, on 12 March 1563(64) (*Balfour's Practicks, 655-662).*
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