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Positive Prescription of Landownership in Scots Law:  
The Requirement for the written deed, with particular  
reference to the concepts of *ex facie* validity and hability

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## Declaration

I confirm that this thesis has been composed by me, that the work contained in this thesis is my own and has not been submitted for any other degree or professional qualification.

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## Abstract

This thesis examines the doctrine of positive prescription of landownership in Scots law, with particular reference to the written deed that is required in order to commence the prescriptive period. The first part of the thesis sets out the historical context in which this doctrine has developed. Due to the civilian foundations of Scots law, the thesis begins with a brief examination of the Roman law of acquisitive prescription. This examination is both historical and comparative as it emphasises the unusual nature of the Scots law doctrine of positive prescription in comparison to Roman and later civilian formulations of acquisitive prescription. The fact that the Scots law of positive prescription has an apparent antipathy to good faith is also analysed in this context. The Roman law examination is then followed by a description of the development of the Early Scots law of acquisitive prescription. This again demonstrates the difference of Scots law from both civilian acquisitive prescription and common law adverse possession. The Early Scots law material is also significant in illuminating the context in which the Scots law doctrine of positive prescription emerged. The existence of limitation based on possession alone is a feature of Early Scots law which is highlighted in this section.

The second, and more extensive, part of the thesis focuses on doctrinal analysis of the written deed that is required in order to commence positive prescription in Scots law. This is in turn divided between an examination of the requirement of *ex facie* validity of the foundation writ and an examination of the requirement that the foundation writ must be habile to include the area in respect of which positive prescription is sought. The thesis demonstrates that the development of the doctrinal formulations of these concepts has not been free from some degree of confusion. However, it is shown that, in the case of *ex facie* validity, there is a solid principle of interpretation, grounded in consistent authority, which has only fallen from view in recent times. In the case of hability, the underlying principles are not so easily discerned. Nevertheless, it appears that particular principles may be present in respect of the interpretation of hability.

The thesis concludes with a discussion of the current and future state of the law of positive prescription of landownership, with particular reference to the impact of land registration.

## Lay Summary

Positive prescription of landownership is a mechanism which enables a party to acquire ownership of land by possessing it without the consent of the owner. The issue of whether such a mechanism should exist is controversial. However, many legal systems allow for landownership to be acquired by means of a party possessing land for a period of time without the consent of the owner. In jurisdictions which have been influenced by Roman law this mechanism is often known as positive or acquisitive prescription. In jurisdictions which have been influenced by English law the equivalent mechanism is often known as adverse possession.

Scotland is quite unusual as Scots law has traditionally made it very difficult to acquire landownership by possession alone. In Scots law a document must be recorded in the national property register before a party can attempt to acquire ownership of land by possession. This requirement for a recorded document has existed since 1617. This contrasts with many other legal systems, such as those of England and France, in which there was, and to a large extent still is, no requirement to record a document prior to possessing land for the purpose of gaining ownership. The requirement for a recorded document was therefore chosen as the focus of this thesis as it is a feature of Scots law which is unusual and distinctive.

The thesis examines the development of positive prescription in Scots law and focusses on the recorded document. There is particular analysis of the standard which the document must meet in order to be regarded as valid. This is accompanied by analysis of the standard of description which must be given in the document in order to link the document to an area of land. The analysis suggests that particular principles may exist for interpreting the document, but that these principles have not always been applied in individual cases. The thesis shows that these principles could be more clearly recognised as part of Scots law. The thesis then concludes with a discussion of the current and future role of positive prescription of landownership in Scots law.

## List of Abbreviations

### Statute

1594 Act	Prescription Act 1594 (APS c 24)
1617 Act	Prescription Act 1617 (APS c 12)
1973 Act	Prescription and Limitation (Scotland) Act 1973 (c 52)
1979 Act	Land Registration (Scotland) Act 1979 (c 33)
2012 Act	Land Registration etc. (Scotland) Act 2012 (asp 5)

### Books and Articles

Balfour, <i>Practicks</i>	Sir James Balfour of Pittendreich, <i>The Practicks of Sir James Balfour of Pittendreich</i> (1754; reprinted P.G.B. McNeill (ed.), Stair Society, Vols. 21-22, 1962-63)
Bankton	Andrew McDouall, Lord Bankton, <i>An Institute of the Law of Scotland in Civil Rights</i> (1751-53; reprinted Stair Society, Vols. 41-43, 1993-95)
Bell, <i>Principles</i>	George Joseph Bell, <i>Principles of the Law of Scotland</i> (4 <sup>th</sup> edn., 1839; reprinted in Old Studies in Scots Law, 2010)
Buckland, <i>Roman Law</i>	W.W. Buckland, <i>A Textbook of Roman Law</i> (3 <sup>rd</sup> edition, by P. Stein, 1963)
Burns, <i>Conveyancing</i>	J. Burns, <i>Conveyancing practice according to the law of Scotland</i> (4 <sup>th</sup> edition, by F MacRitchie, 1957)
Craig, <i>Jus Feudale</i>	Thomas Craig of Riccarton, <i>Jus Feudale</i> (1655; J.A. Clyde, Lord Clyde (trans.), 1934)
du Plessis, <i>Roman Law</i>	P. du Plessis, <i>Textbook on Roman Law</i> (4 <sup>th</sup> edn, 2010)
Erskine	John Erskine of Carnock, <i>An Institute of the Law of Scotland</i> (8 <sup>th</sup> edn., J.B. Nicholson (ed.) 1871; reprinted 1989)

Forbes, <i>Institutes</i>	William Forbes, <i>The Institutes of the Law of Scotland</i> (Printed by J Watson, J Mosman and Company and sold by W Brown, 1722-1730)
Gordon and Wortley, <i>Land Law</i>	W.M. Gordon and S. Wortley, <i>Scottish Land Law</i> , Vol.1 (3 <sup>rd</sup> edn., 2009)
Gretton and Reid, <i>Conveyancing</i>	G.L. Gretton and K.G.C. Reid, <i>Conveyancing</i> (4 <sup>th</sup> edn, 2011)
Halliday, <i>Conveyancing</i>	J.M. Halliday, <i>Conveyancing Law and Practice in Scotland</i> , (2 <sup>nd</sup> edition, by I J S Talman, Volume 1 (1996) and Volume 2 (1997))
Hope, <i>Major Practicks</i>	Sir Thomas Hope, <i>Hope's Major Practicks</i> (1608-1633; reprinted J.A. Clyde, Lord Clyde (ed.), Stair Society, Vols. 3-4, 1937-38)
Hope, <i>Minor Practicks</i>	Sir Thomas Hope, <i>Hope's Minor Practicks</i> (Printed and sold by A. Davidson, 1734)
Hume, <i>Lectures</i>	Baron David Hume, <i>Lectures</i> 1786-1822, Vols. I-VI (G.C.H. Paton (ed.), Stair Society, Vols. 5 (1939), 13 (1949), 15 (1952), 17 (1955), 18 (1957) and 19 (1958))
Johnston, <i>Prescription</i>	D. Johnston, <i>Prescription and Limitation</i> (2 <sup>nd</sup> edn., 2012)
Jolowicz and Nicholas, <i>Roman Law</i>	H.F. Holowicz and B. Nicholas, <i>Historical Introduction to the Study of Roman Law</i> (3 <sup>rd</sup> edn, 1972)
Kaser, <i>Das Romische Privatrecht</i>	M. Kaser, <i>Das Romische Privatrecht</i> (6 <sup>th</sup> edn, 1968) translated by R. Dannenbring as <i>Roman Private Law</i> (2 <sup>nd</sup> edn, 1968)
Mackenzie	Sir George Mackenzie of Rosehaugh, <i>The Institutions of the Law of Scotland</i> (2 <sup>nd</sup> edn., 1688)
Menzies, <i>Conveyancing</i>	A. Menzies, <i>Conveyancing according to the law of Scotland: being the lectures of the late Allan Menzies</i> (edited by J M Morison and J Hunter, 1856)
Metzger, <i>Justinian's Institutes</i>	E. Metzger (ed.), <i>A Companion to Justinian's Institutes</i> (1998)
Millar, <i>Prescription</i>	J.H. Millar, <i>A handbook of prescription according to the law of Scotland</i> (1893)

Montgomerie Bell, <i>Lectures</i>	A.M. Bell, <i>Lectures on Conveyancing</i> (3 <sup>rd</sup> edn, 1882)
Napier, <i>Commentaries</i>	M. Napier, <i>Commentaries on the Law of Prescription in Scotland</i> (Vol 1 (1839) and Vol 2 (1854))
Nicholas, <i>Roman Law</i>	B. Nicholas, <i>An Introduction to Roman Law</i> (1962)
Ockrent, <i>Land Rights</i>	L. Ockrent, <i>Land Rights: An Enquiry into the History of Registration for Publication in Scotland</i> (1942)
Rankine, <i>Land-ownership</i>	J. Rankine, <i>The law of land-ownership in Scotland</i> (4 <sup>th</sup> edn., 1909)
Reid, <i>Property</i>	K.G.C. Reid et al., <i>The Law of Property in Scotland</i> (1996)
Stair	James Dalrymple, Viscount Stair, <i>The Institutions of the Law of Scotland</i> (6 <sup>th</sup> edn., D.M. Walker (ed.), 1981)
<i>S.M.E.</i>	T.B. Smith et al. (eds.), <i>Stair Memorial Encyclopaedia of the Laws of Scotland</i> (25 Vols., 1987-96) with cumulative supplements and reissues
Thomas, <i>Roman Law</i>	J.A.C. Thomas, <i>A Textbook of Roman Law</i> (1976)
Wood, <i>Lectures</i>	J.P. Wood, <i>Lectures delivered to the class of conveyancing in the University of Edinburgh: session 1892-1893 to session 1899-1900</i> (1903)

### **Other Abbreviations**

Edin LR	Edinburgh Law Review
JLSS	Journal of the Law Society of Scotland
JR	Juridical Review
SLG	Scottish Law Gazette
SLPQ	Scottish Law and Practice Quarterly



# Chapter I - Introduction

## A. Definition

The doctrine of positive prescription of landownership is a means by which a party can acquire ownership of land. In its fundamental essence it may be understood as the process by which a party acquires ownership by possessing an area of land subject to certain conditions. The duration of the possessory period and the additional conditions required vary between jurisdictions but the essence of the doctrine remains the same. The name ‘positive prescription’ appears to simply mean ‘positive rule’ in the sense that it confers something, namely the real right of ownership, as opposed to ‘negative prescription’, which extinguishes rights after the elapse of a certain period of time. The ultimate derivation of the term seems to come from Roman law in which the formulation *longi temporis praescriptio* was used to identify the rule which allowed for the acquisition of ownership after the completion of a long period of possession.<sup>1</sup> In Roman law the term *praescriptio* seems to refer to the first written statement at the start of the court action to establish the acquisition or extinction of a right. It was thus the ‘first written’ statement of the relevant rule for the party bringing the action.<sup>2</sup>

In Scots law, the current definition of the doctrine is located in Section 1 of the Prescription and Limitation (Scotland) Act 1973. In summary, it can be said that Scots law requires a party to possess land, openly, peaceably and without judicial interruption and for a period of ten years on the basis of a properly written and recorded or registered deed. However, the details of how this doctrine has developed and operated have been subject to alteration and litigation. In particular, positive prescription has, in relatively recent times, been subject to change due to the advent of land registration. There is therefore a long doctrinal history, with contemporary relevance, which provides the subject matter for this thesis. In order to better understand the overall context in which the doctrine of positive prescription of

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<sup>1</sup> D.44.3.3 (Modestinus, *Distinctions*, book 6); C.7.33.1; Thomas, *Roman Law* 164; Nicholas, *Roman Law* 128; Jolowicz and Nicholas, *Roman Law* 506; Kaser, *Das Romische Privatrecht* 107-108; du Plessis, *Roman Law* 188.

<sup>2</sup> C P Sherman, “Acquisitive Prescription: Its Existing World-Wide Uniformity” (1911) 21 *Yale Law Journal* 147, 147-148.

landownership exists, it is necessary to say a few words about the existence of this doctrine in Scots law.

## **B. Context and Overview**

The ownership of land is a fundamental issue, possibly the most fundamental issue, for any legal system. A system may allow for private ownership of land or may elect to place all land in the hands of the state. However, no system may ignore the question of whether or not private individuals and entities may own land in their own right.

Scots law is a system which allows for the private ownership of land. This is something which one would expect to find in many legal systems both now and in the past. However, the means by which ownership of land is acquired and proven is something which has altered considerably over time and which varies considerably between jurisdictions. The question of whether the rules of any particular system are fair and appropriate to the present day is a continuing source of comment and controversy. Given the history of Scotland and the very large landholdings which are characteristic of so much of rural Scotland, it is unsurprising that Scots law is subject to criticism from social commentators with regard to land distribution and the legal mechanisms which are perceived to have facilitated and perpetuated the current state of affairs.<sup>3</sup> In particular, the doctrine of positive prescription of landownership has attracted criticism on the basis that it is alleged to have been central in enabling large scale acquisition of land by a privileged few at certain key points, most notably the Reformation of 1560, in Scotland's history.<sup>4</sup> This socio-cultural criticism of positive prescription dovetails with the recent case of *Pye v UK* in which it was argued that non-consensual acquisition by means of the English doctrine of adverse possession and limitation was contrary to the human rights of the party who lost ownership to the adverse possessor.<sup>5</sup> As the English law of adverse possession and limitation is the

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<sup>3</sup> A Wightman, *Who owns Scotland* (1996); A Wightman, *The Poor Had No Lawyers* (2010).

<sup>4</sup> Wightman, *Who owns Scotland*; Wightman, *The Poor Had No Lawyers*.

<sup>5</sup> *J. A. Pye (Oxford) Ltd v UK (44302/02)* (2006) 43 EHRR 3, re-heard 30 Aug 2007 *ECHR 700 (Grand Chamber)* (2008) 46 EHRR 45. The Chamber held that adverse possession and limitation were contrary to the human rights of the party who lost ownership to the adverse possessor. However, at the re-hearing the Grand Chamber held that adverse possession and limitation were not contrary to the human rights of the party who lost ownership to the adverse possessor. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 1.25-28; 16.12; 35.32-41.

approximate counterpart to the Scots law of positive prescription, it may be wondered if positive prescription will be subject to further criticism in Scots law. Even if apparent survival appears to be ensured under the Land Registration etc. (Scotland) Act 2012,<sup>6</sup> it may be argued that in reality the advent of land registration is also a factor which is serving to reduce the role of positive prescription.<sup>7</sup>

The purpose of this thesis is neither to praise nor to condemn the doctrine of positive prescription of landownership in Scots law. Rather, this thesis is concerned to analyse the operation of the doctrine in Scots law and to identify the underlying policy which justifies the existence of this aspect of the law.

With regard to existing research, the doctrines of negative and positive prescription are covered in the excellent work, *Prescription and Limitation*, by Professor David Johnston.<sup>8</sup> However, for reasons of space this book does not examine the doctrine of positive prescription to the depth and detail found in this thesis. Johnston notes that the topic of positive prescription is also covered in the overall examinations of property law provided by Professor Kenneth Reid<sup>9</sup> and by the late Professor Gordon.<sup>10</sup> These works are again of high quality, but again due to considerations of space do not have the scope to examine the detail of the doctrine of positive prescription in the same extent as this thesis. The same is also true of the coverage provided in the conveyancing textbooks of the nineteenth, twentieth and twenty first centuries.<sup>11</sup> Finally, mention must be made of the works of Napier and Millar on prescription.<sup>12</sup> Whilst these are again valuable contributions to the literature on this subject, the fact that these works are now more than one hundred years old and predate many of the key cases on positive prescription, means that it is now timeous for this topic to be revisited with a dedicated piece of research in the form of this thesis. Thus this thesis is directed at providing an analysis of the doctrine of positive prescription of

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<sup>6</sup> 2012 Act ss. 43-45.

<sup>7</sup> See discussion in chapter VIII below. See in particular R Rennie, "Land Registration and the decline of Property law" (2010) 14(1) Edin LR 62, 69-70.

<sup>8</sup> Johnston, *Prescription*.

<sup>9</sup> Reid, *Property*.

<sup>10</sup> Gordon and Wortley, *Land Law*.

<sup>11</sup> Hume, *Lectures*, Volume IV; Menzies, *Conveyancing*; Montgomerie Bell, *Lectures*; Wood, *Lectures*; Rankine, *Land-ownership*; Burns, *Conveyancing*; Halliday, *Conveyancing*; Gretton and Reid, *Conveyancing*.

<sup>12</sup> Napier, *Commentaries*; Millar, *Prescription*.

landownership in Scots law in a depth which has not been undertaken before. The thesis also aims to answer certain key questions regarding the operation of this doctrine in Scots law.

In order to address this topic systematically, the thesis is divided into a number of chapters, each containing various sub-divisions. The first chapter is concerned with the historical basis of the doctrine of positive prescription. As Scots property law is a civilian system, it is appropriate to begin with an examination of the Roman law of positive prescription. This is relevant both to the extent that Scots property law reflects Roman law and also to the extent that difference and divergence can be observed between Scots law and its Roman foundations. This comparison with Roman law leads naturally into an examination of Early Scots law and in particular, the circumstances which gave rise to the Prescription Act 1617. As this Act governed the fundamental operation of positive prescription in Scots law until 1973, the origins and context of the 1617 Act are obviously of great significance.

Having traced the historical development of the basis of positive prescription in Scots law, the thesis then moves into a doctrinal analysis of a particular aspect of positive prescription. It would of course be desirable to examine the entire modern development of Scots law in this area. However, for reasons of time and space, it is not possible to make such a comprehensive coverage of the modern form of the doctrine within the confines of a doctoral thesis. Therefore, in relation to the modern form of the doctrine, the thesis is focussed on an analysis of the written deed that is required in order to commence positive prescription of landownership in Scots law. This aspect of the doctrine has been selected as it highlights the distinctive nature of Scots law with regard to positive prescription of landownership. All jurisdictions which employ positive prescription as a means of acquiring landownership necessarily have a possessory requirement as part of the operation of positive prescription. However, Scotland is unusual in having required a written deed since at least 1617. Other jurisdictions have not followed this approach and even now, it is still usually

possible to positively prescribe landownership without a written deed.<sup>13</sup> These comparisons are examined as part of the overall analysis within this thesis.

Within the analysis of the requirement of the written deed, the thesis breaks down into three further chapters. Firstly, analysis is made of the requirement that the written deed be *ex facie* valid. This issue is one which gives rise to a certain amount of understandable conceptual confusion and this chapter seeks to provide a definitive statement of the underlying clarity which Scots law has held in this area, but which appears to have fallen from view in recent litigation.

Secondly, analysis is made of the requirement that the written deed contain a description which is habile to include the area in respect of which positive prescription is sought. This issue is again one which has witnessed a certain amount of conceptual confusion. In order to elucidate this confusion, the analysis is divided between an examination of hability in relation to the principal area under conveyance and an examination of hability in relation to areas which are pertinent to the principal area under conveyance.

Even with the division between principal area and pertinent areas, the concept of hability does not benefit from the consistency of judicial treatment which has historically characterised the concept of *ex facie* validity. Hence, the section on hability does not provide a definite statement of the underlying coherence of principle in the manner which might be desired. However, it is argued that certain underlying coherent principles may be discerned within the case law and that these might be emphasised more in future instances.

Lastly, the thesis concludes with a comparison of Scots law with the approaches adopted by other jurisdictions to the questions which have been analysed. This comparison is necessarily brief as Scots law is of a relatively unique character in its insistence on the requirement of the written deed. However, comparison may nonetheless be usefully made, particularly with regard to the fact that Scots law seems

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<sup>13</sup> However, in jurisdictions such as Germany, it is only possible to positively prescribe without a written deed in very limited circumstances. See section 927 *BGB*. See also W G Ringe 'Acquisition of land by Adverse Possession under German law' at 55-61 in *Report on Adverse Possession by the British Institute of International and Comparative Law for Her Majesty's Court Service* (British Institute of International and Comparative Law, 2006).

to dispense with the need for good faith on the basis that the written deed provides some degree of protection to parties affected by the operation of positive prescription. This balancing of third party protection as opposed to the desire to unite possession and ownership is the key point in the conclusion to this thesis.

## **C. Methodology**

### **1. Historical/Doctrinal**

As with other theses on Scots property law,<sup>14</sup> this thesis primarily follows an historical approach. This is necessary as it is only possible to understand the current state of the law by understanding the historical developments which occurred in order to produce the situation today.<sup>15</sup> The law of the present is only understood, in the context of, and, with reference to, the law of the past. In particular, as mentioned above, the Prescription Act 1617 governed the fundamental operation of positive prescription in Scots law until supplanted by the Prescription and Limitation (Scotland) Act 1973. Furthermore, the 1973 Act is essentially a statement of the law which had developed under the operation of the 1617 Act, hence the current law, as governed by the 1973 Act is essentially the law which had developed under the Prescription Act 1617. This has however been subject to further modification and alteration in relation to land registration by virtue of the 1979 Act and the 2012 Act.

As stated, and despite the occurrence of some relatively minor statutory modification of the 1617 Act in 1874, 1924 and 1970, the 1617 Act remained in force as the fundamental authority on positive prescription until 1973. It was therefore primarily through judicial interpretation of the 1617 Act that the law of positive prescription of landownership developed. This is very evident in the course of this thesis and again underlines the importance of the historical approach to the analysis of this doctrine.

Again, as with other theses on Scots property law, it is recognised that historical sources are always subject to the subjective interpretation of the interpreters own

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<sup>14</sup> See for instance J J Robbie, *Private Water Rights in Scots Law* (unpublished doctoral thesis, University of Edinburgh, 2012) at 5.

<sup>15</sup> See: K G C Reid and R Zimmermann, *A History of Private Law in Scotland* (2000) 10-12; Robbie, *Private Water Rights in Scots Law* at 5-6. See also D.1.2.1 (Gaius, *Twelve Tables*, book 1).

situation and context.<sup>16</sup> In order to attempt to counter the tendency to superimpose the present on the past, the historical material has been examined in chronological order and later interpretations of earlier material have not been accepted without consideration or challenge. This has not been particularly difficult to do, given the fact that there is often inconsistency between various sources of authority. Thus, the research lends itself to argument and counter argument.

With regard to the sources of authority, as noted, there is statutory material which is of fundamental importance. This includes Acts of the Old Scottish Parliament, the United Kingdom Parliament at Westminster and also, particularly with regard to land registration, the New Scottish Parliament at Holyrood. However, the great bulk of the research material exists in the form of Session Cases and other reports of cases before the Sheriff Courts, the Court of Session and the House of Lords. Some recourse has been necessary to House of Lords papers, but usually the published case reports seem to give a sufficient account of the case in question.

In addition to case reports and statute, the thesis has analysed material from sources such as the *Institutes of Gaius*, the *Corpus Iuris Civilis*, the Practick books kept by judges in the early days of the Court of Session, Institutional and academic writings. The research has attempted to be comprehensive and this is seen in the sources cited in the body of the text.

## **2. Comparative/Doctrinal**

As noted above, comparison of the Scots law of positive prescription of landownership is complicated as Scots law is unusual in having insisted, at least since 1617 on a written deed as a requirement in order to commence positive prescription of landownership. As will be seen, this longstanding requirement puts Scots law at variance with many other systems of positive prescription of landownership or adverse possession. Even in systems which now place a primacy on registered title, this is usually accompanied by a marginalisation of positive prescription or adverse possession with the effect that written documentation is not required for positive

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<sup>16</sup> See: Reid and Zimmermann, *A History of Private Law in Scotland* 10; Robbie, *Private Water Rights in Scots Law* at 5-6.

prescription or adverse possession as positive prescription or adverse possession are of reduced significance.<sup>17</sup>

However, comparison has been made and it is hoped that this, if nothing else, serves to highlight the interesting phenomenon of a small jurisdiction which has developed a relatively distinct form of a legal doctrine. This is made all the more interesting by the fact that the Scots law form of this doctrine appears to bear no obvious debt to any other legal system for its inspiration. It might be suggested that whilst Scots law is generally regarded as a mixed legal system, deriving its form from the civilian and common law legal families, it can on occasion function as its own unique entity. Just as a small language such as the Basque language of north east Spain and south west France is considered to bear no obvious relation to the Romance and Teutonic language families which dominate western Europe, so it can occur that a small European jurisdiction may develop a form of a particular legal doctrine which is largely distinct from the normal civilian and common law approaches. It appears that positive prescription of landownership in Scots law may in some important respects count as an example of such relative distinctiveness. However, this should not be overstated as other systems, such as that of Germany, have, in the context of land registration, an allowance for positive prescription that is similar to the current position of Scots law.<sup>18</sup>

In view of the relative uniqueness of positive prescription in Scots law, comparison has been made of the principal features of several jurisdictions rather than a detailed comparison of only one or two systems. As Scots law is so different from other systems of positive prescription, particularly with regard to the requirement of the written deed, which is the focus of this thesis, it is argued that there is little to be gained from rehearsing the extensive detail of approaches which are fundamentally different from Scots law and with which very little detailed comparison can be made. In particular, if a system allows positive prescription without requiring written documentation, there can be very little detailed comparison made as to the minimum quality of documentation required to allow positive prescription to take place. Yet, comparison

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<sup>17</sup> This is seen in the civilian law of Germany with regard to acquisitive prescription (*Ersitzung*) and in the common law of England with regard to adverse possession. See discussion in chapter VI, K, 3.

<sup>18</sup> With regard to Germany see discussion in chapter VI, K, 3.



of the fundamental differences, particularly noting the many jurisdictions which allow for positive prescription without written documentation, is valuable in demonstrating that alternatives to Scots law are possible and might indeed be contended to be in some ways preferable.

## Chapter II - Roman Law and Positive Prescription in a Comparative Context

### A. Introduction

The Roman doctrine of *usucapio*<sup>19</sup> is an appropriate starting point for the examination of positive prescription in Scots law as Roman law is the foundation for much of Scots property law<sup>20</sup> and the property law of the civilian tradition.<sup>21</sup> In particular, the Roman and civilian traditions are of claimed to be of relevance to the Scots law of prescription in the preamble to the Prescription Act 1617 and in the institutional writings of Stair<sup>22</sup> and Erskine.<sup>23</sup> However, a comprehensive study of *usucapio* will not be provided here as detailed accounts of this doctrine are already provided by eminent Romanists<sup>24</sup>.

The main point which will be observed here is that of the fact that the Scots law of positive prescription of landownership differs quite starkly from its Roman counterpart. This is particularly manifest in relation to the fact that Scots law does not require good faith on the part of the party attempting to positively prescribe. Furthermore, although the Scots law requirement for the written deed in respect of the land possessed may appear to bear some similarity to the Roman law requirement of *iusta causa*, the fact that the written deed can exist without any good faith has the effect of making Scots law radically different to Roman law with regard to any trace of *iusta causa* in this instance. These differences are particularly clear in classical Roman law which is now examined below.

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<sup>19</sup> Defined as “the acquisition of ownership by continued possession for a certain time” in Jolowicz and Nicholas, *Roman Law* at 151. The name of the institution is understood as meaning “taking by possession” as stated in Thomas, *Roman Law* at 158 n 62. The meaning of the term is also discussed in: Discussion Paper on Prescription and Title to Moveable Property (Scottish Law Commission Discussion Paper No 144 (2010)) para 6.20; Corporeal Moveables – Usucapion or Acquisitive Prescription (Scottish Law Commission Memorandum No 30 (1976)) para 2; Reform of the Law Relating to Prescription and Limitation of Actions (Scottish Law Commission Report No 15 (1970)) para 9, referring to “usucaption”.

<sup>20</sup> See Reid, *Property* para 2. See also *Burnett’s Tr v Grainger* 2004 SC (HL) 19 at para 53 per Lord Hobhouse of Woodborough.

<sup>21</sup> Nicholas, *Roman Law* 45-54; Reid, *Property* para 2.

<sup>22</sup> Stair II.12.1-11.

<sup>23</sup> Erskine III.7.1-2.

<sup>24</sup> See: Nicholas, *Roman Law* 120-130; Thomas, *Roman Law* 157 -165; Buckland, *Roman Law* 242 - 252; Jolowicz and Nicholas, *Roman Law* 151-155; D L Carey Miller, ‘Property’ 42 at 55-58 and E Metzger, ‘Actions’ 208 at 220-223 in Metzger, *Justinian’s Institutes*; Kaser, *Das Romische Privatrecht* 105-108; du Plessis, *Roman Law* 184-190.

## **B. Classical Roman law**

In order to understand the position in classical Roman law, particular attention is given here to the Institutes of Gaius.<sup>25</sup> The Institutes of Gaius are especially important as they are the only original work from the classical period to have come down to us independently of the revised material that is contained in the *Corpus Iuris Civilis*.<sup>26</sup> However, the material contained within the *Corpus Iuris Civilis*<sup>27</sup> is of course important both in respect of the classical and post-classical law.<sup>28</sup> The primary sources of the Institutes of Gaius,<sup>29</sup> the Digest of Justinian,<sup>30</sup> the Institutes of Justinian,<sup>31</sup> the Codex of Justinian<sup>32</sup> and the Novels of Justinian<sup>33</sup> are therefore all of relevance to understanding the development of Roman law from the classical period onwards.

For Gaius the basis of the law was the Twelve Tables.<sup>34</sup> Whilst it is impossible to be absolutely certain of the accuracy of any attempt at reproducing the content of this material it is still worth setting out at least one translation of this early public proclamation of the law of *usucapio*. This is thought to have been contained in Table VI which concerned ownership and possession. The particular law is believed to have been law IV<sup>35</sup> and to have read as follows:

Immovable property shall be acquired by usucaption after the lapse of two years;  
other property after the lapse of one year.<sup>36</sup>

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<sup>25</sup> G.2.40-65. The Institutes of Gaius are understood to have been written in the second century AD. See: Nicholas, *Roman Law* 36; Kaser, *Das Romische Privatrecht* 3. See also Jolowicz and Nicholas, *Roman Law* 151.

<sup>26</sup> Nicholas, *Roman Law* 35; *The Institutes of Gaius*, translated with an introduction by W M Gordon and O F Robinson (1988) 8.

<sup>27</sup> J.2.6; D.41.3-10; C.7.21-40.

<sup>28</sup> Nicholas, *Roman Law* 53-54.

<sup>29</sup> *The Institutes of Gaius*, translated with an introduction by W M Gordon and O F Robinson (1988).

<sup>30</sup> *The Digest of Justinian*, translated by T Mommsen, P Kruger and A Watson (1985).

<sup>31</sup> *Justinian's Institutes*, translated by P Birks and G McLeod (1976).

<sup>32</sup> *Annotated Justinian Code*, translated by Fred H Blume and edited by Timothy Kearley (2<sup>nd</sup> edn, 2009); *The Code of Justinian*, translated in S P Scott in *The Civil Law* (2001).

<sup>33</sup> *Justinian's Novels*, translated by Fred H Blume and edited by Timothy Kearley (2<sup>nd</sup> edn, 2009).

<sup>34</sup> Nicholas, *Roman Law* 15. These rules are regarded as having been set down in 451 and 450 BC on twelve bronze tablets posted up in the market place of Rome. The original tablets are thought to have been destroyed by the Gaulish invasion of Rome in 390 BC and today we only have a fragmentary knowledge of the content of the original Twelve Tables that has been built up by successive attempts at reconstructing the form of the originals by examining references and partial quotations in later material. See Jolowicz and Nicholas, *Roman Law* 108 -113; Nicholas, *Roman Law* 15.

<sup>35</sup> Although it stated as being Table VI, law III in Kaser, *Das Romische Privatrecht* at 105.

<sup>36</sup> The Twelve Tables, Table VI, Law IV, translated in S P Scott in *The Civil Law* (2001) Volume 1 at 68; Cicero, *Topica* 4.23 in Thomas, *Roman Law* at 157.

It thus appears that one could acquire property by *usucapio* of moveables for one year and immoveables for two years. However, in the classical law of *usucapio* there was no “free for all” with individuals surreptitiously taking the property of others, usucapting and thereafter claiming ownership of the item or area of land in question. This was due to the restrictive nature of the requirements that had to be fulfilled in order for an individual to successfully complete *usucapio*. These detailed restrictions will now be set out together with some comments on their relevance to Scots law.

### **C. Usucapio – The Requirements**

It has been argued that by the time of Gaius it was the case that five particular requirements had to be fulfilled in order for *usucapio* to be successfully applied in respect of an item of property or an area of land.<sup>37</sup> Each of these requirements are now examined.

#### **1. First Requirement – continuous possession for the relevant period**

Now, in the case of moveables, usucapion is completed in one year, in the case of land and houses on the other hand, in two years: and this is provided by the Twelve Tables.<sup>38</sup>

It has been stated that these time requirements contained the aspect that, in order to complete *usucapio*, the usucaptor would have to enjoy uninterrupted possession of the relevant item or area for the requisite period.<sup>39</sup> However, the requirement of uninterrupted possession does not seem to be definitely evidenced in the classical law as narrated by Gaius. It therefore seems that one has to look to the Digest<sup>40</sup> in order to find clearer references to the need for uninterrupted possession in classical law.

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<sup>37</sup>Nicholas, *Roman Law* 122.

<sup>38</sup>G.2.42.

<sup>39</sup>Nicholas, *Roman Law* 122-123; Carey Miller, ‘Property’ in Metzger, *Justinian’s Institutes* 42 at 56; Jolowicz and Nicholas, *Roman Law* 151-152; Thomas, *Roman Law* 159-160; Buckland, *Roman Law* 242-243; Kaser, *Das Romische Privatrecht* 105-107; du Plessis, *Roman Law* 184 -185.

<sup>40</sup>D.41.3.25 (Licinnius Rufinus, *Rules, book 1*); D.41.3.15.2 (Paul, *Plautius, book 15*); Thomas, *Roman Law* 159 -160. The Institutes of Justinian relate some exceptions to continuous possession which existed in post-classical law. See: J.2.6.12-13; Carey Miller, ‘Property’ in Metzger, *Justinian’s Institutes* 42 at 57. Furthermore, the principle of accession temporum, which allowed for usucapting parties to add their respective periods of holding together received little recognition until later classical law and was only fully developed by Justinian. See: J.2.6.12; Thomas, *Roman Law* 159; Kaser, *Das Romische Privatrecht* 107.

However, even with a requirement for continuous possession, the relative brevity of the applicable time periods would obviously raise concerns regarding how quickly it would be possible for a party to accomplish *usucapio*. In this respect, Scots law would appear to be far more restrictive than Roman law as Scots law has, at least since the Prescription Act 1617, required much longer periods of possession. A period of forty years was required under the 1617 Act, this was reduced to twenty years under the Conveyancing (Scotland) Act 1874<sup>41</sup> and the current period of ten years was introduced under the Conveyancing and Feudal Reform (Scotland) Act 1970.<sup>42</sup> Yet, it appears that the position under classical Roman law was complicated by the following additional requirements.

## **2. Second Requirement – There must be an *iusta causa*, a good cause for the commencement of possession<sup>43</sup>**

... those people are mistaken who hold that if a man takes possession of a thing in good faith, he can usucapt it as his own, and it is irrelevant whether he did or did not buy it, whether or not it was given to him, provided that he thinks he bought it or received it as a gift, because there is no effective usucapion unless there be, in truth, a legacy, a gift, or a dowry, although the recipient believes so.<sup>44</sup>

It can thus be observed from the above quotation, that classical Roman law required an *iusta causa* and that this *iusta causa* related closely to the requirement of initial good faith<sup>45</sup> on the part of the individual who was attempting to usucapt. However the *iusta causa* requirement was distinct from good faith in that *iusta causa* required that the possession must have commenced on a basis which would normally have allowed for, and justified, the transfer of ownership.<sup>46</sup> There could be no *iusta causa* if there was a mistaken belief that such a basis existed, even if the belief was held in good faith.<sup>47</sup> The *iusta causa* really had to be present in order to allow the *usucapio* to

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<sup>41</sup> Conveyancing (Scotland) Act 1874 s.34.

<sup>42</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s. 8

<sup>43</sup> Thomas, *Roman Law* 162; Kaser, *Das Romische Privatrecht* 106-107; du Plessis, *Roman Law* 186-187.

<sup>44</sup> D.41.3.27 (Ulpian, *Sabinus*, book 29). The requirement of *iusta causa* is also related in the Institutes of Justinian. See: J.2.6.pr; J.2.6.11

<sup>45</sup> G.2.43.

<sup>46</sup> Nicholas, *Roman Law* 122-123; Thomas, *Roman Law* 162-163; Carey Miller, 'Property' in Metzger, *Justinian's Institutes* 42 at 56; Jolowicz and Nicholas, *Roman Law* 151-152; du Plessis, *Roman Law* 186.

<sup>47</sup> Thomas, *Roman Law* 162-163.

commence.<sup>48</sup> Therefore the belief that ownership had transferred had to ‘be on some basis which was sustainable as a matter of objective fact’.<sup>49</sup> This was illustrated by the example of an heir selling an item which the heir believed to be part of the estate but which had actually only been lent to the deceased.<sup>50</sup> Thus *iusta causa* was distinct from subjective good faith as subjective good faith might be present if there was a genuine belief that the transfer of ownership had taken place, even if there was no basis for this in objective reality.<sup>51</sup> In contrast, *iusta causa* had to be demonstrated by objective evidence.

When coupled with the need for there to be good faith on the part of the acquirer, the *iusta causa* requirement is a significant limit on the scope of *usucapio*. This strict *iusta causa* rule is not necessarily easy to justify,<sup>52</sup> and this may explain why it appears that the transfer did not always necessarily involve a direct engagement between two active parties.<sup>53</sup> It seems possible to make this statement on the basis that an item of property which was a *res Mancipi* and which had been abandoned by one who was not the owner of the property was capable of being subject to *usucapio pro derelicto*.<sup>54</sup> This perhaps demonstrates a surprisingly wide definition of what constituted a valid *iusta causa* for the operation of *usucapio*. It is also perhaps slightly confusing given that abandoned property was usually treated as being subject to acquisition by virtue of *occupatio* rather than *usucapio*.<sup>55</sup> However, this does not seem to have prevented the compilers of the Digest including the provisions on *usucapio pro derelicto*. Indeed this situation has been used to illustrate the need for there to be a real *iusta causa*, rather than a putative or imagined *causa*, in order for *usucapio* to be initiated.<sup>56</sup> The real nature of

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<sup>48</sup> D.41.3.27 (Ulpian, *Sabinus*, book 29); J.2.6.11; Thomas, *Roman Law* 163; Nicholas, *Roman Law* 123.

<sup>49</sup> Carey Miller, ‘Property’ in Metzger, *Justinian’s Institutes* 42 at 56.

<sup>50</sup> See: G.2.50; Carey Miller, ‘Property’ in Metzger, *Justinian’s Institutes* 42 at 57; Thomas, *Roman Law* 162; du Plessis, *Roman Law* 184.

<sup>51</sup> Carey Miller, ‘Property’ in Metzger, *Justinian’s Institutes* 42 at 56.

<sup>52</sup> du Plessis, *Roman Law* 187.

<sup>53</sup> Buckland, *Roman Law* 247.

<sup>54</sup> D.41.7; Thomas, *Roman Law* 163 and 168. The fact that the abandonment was carried out by someone who was not the owner of the object prevented the doctrine of occupation from being applicable.

<sup>55</sup> Carey Miller, ‘Property’ in Metzger, *Justinian’s Institutes* 42 at 58-60; Thomas, *Roman Law* 158 n 67; Thomas, *Roman Law* 166-168.

<sup>56</sup> D.41.7.2pr (Paul, *Edict*, book 54); D.41.7.6 (Julian, *Urseius Ferox*, book 3); Thomas, *Roman Law* 163.

the *causa* is shown in that *usucapio pro derelicto* could not be commenced if someone took possession of an object which they merely thought to have been abandoned, when in fact it had not been abandoned.<sup>57</sup>

The complexities of the Roman law understanding of *iusta causa* suggest that Scots law has perhaps wisely avoided extensive reference to this concept in relation to positive prescription. However, it might be argued that the requirement for a written deed to commence positive prescription of landownership in Scots law is a replication of the Roman law requirement of *iusta causa*.<sup>58</sup> Yet, despite a degree of apparent similarity, the fact that the supposed Scots law concept of *iusta causa* has been completely decoupled from the concept of good faith seems to render Scots law *iusta causa* as being virtually unrecognisable and perhaps almost unintelligible to classical Roman law. As seen above, classical Roman law required that the party attempting to rely on *usucapio* genuinely believed that ownership had been transferred to them, and that the transfer had only been prevented by a latent defect which was unknown to the usucaptor at the time of the attempted transfer. Hence, in order to commence *usucapio*, the usucaptor had to believe that ownership had really been transferred. In essence, while it might be possible to have good faith without *iusta causa*, there could be no *iusta causa* without good faith. In contrast, Scots law requires only that a deed be recorded or registered in order to commence positive prescription.<sup>59</sup> Provided that the deed is not forged,<sup>60</sup> it is irrelevant that neither grantor nor grantee believes that ownership has really transferred.<sup>61</sup> Thus it appears, that even if it is arguable that Scots law preserves a form of *iusta causa* in the sense that the deed manifests an appearance of transfer, the fact that the deed is a valid foundation without good faith, would appear to render such a deed as an invalid *iusta causa* in classical Roman law. As mentioned above, it appears that in essence, Roman law held that there could be no *iusta causa* without good faith. This argument is further substantiated by the fact that modern

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<sup>57</sup> D.41.7.2pr (Paul, *Edict*, book 54); D.41.7.2.6 (Julian, *Urseius Ferox*, book 3); Thomas, *Roman Law* 163.

<sup>58</sup> See for instance the discussion of the concept of *justum titulum* in Bankton II.12.11. This was also suggested in the case of *Paton v Drysdale* (1725) Mor. 10709 at 10710.

<sup>59</sup> 1973 Act s.1.

<sup>60</sup> In addition to not being forged, deeds which are recorded in the Registers of Sasines must be *ex facie* valid under 1973 Act s.1.

<sup>61</sup> See for instance: Bankton II.12.49; *Duke of Buccleuch v Cunynghame* (1826) 5 S 53.

civilian jurisdictions which employ a requirement of *iusta causa* or ‘just title’ seem only to employ this requirement in tandem with a requirement of good faith.<sup>62</sup> Hence the requirement of *iusta causa* does not seem to be present without the requirement of good faith. Thus it appears that the Scots law of positive prescription of landownership either does not have a requirement of *iusta causa* or contains a form of *iusta causa* which is effectively incomprehensible to Roman or civilian law. Scots law may require *causa*, but this does not appear to truly be in the character of *iusta causa*.<sup>63</sup>

It might be wondered whether the civilian concept of *iusta causa* is in some sense reflected in the presence of the requirement that possession must be ‘adverse’ or exercised ‘as of right’ in order for positive prescription to be accomplished in Scotland. In the case of landownership this aspect of positive prescription is traditionally understood as meaning that the possession must be exercised as being referable to the foundation writ in question.<sup>64</sup> However, it would appear that the concept of possession being exercised ‘as of right’ is a fundamentally different concept to the civilian concept of *iusta causa*. There is a degree of similarity, in that both *iusta causa* and the exercise of possession ‘as of right’ are concepts which require possession to be exercised on a basis which is consistent with ownership. However, *iusta causa*, as discussed above, is essentially the objective evidence of the fulfilment of the requirement that the possession is being exercised on the basis that the possessor actually acquired the land in question in good faith regarding the transfer of ownership. In contrast, possession which is exercised ‘as of right’ is essentially the objective evidence that the possessor is exercising the possession as owner, but without regard as to whether the land in

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<sup>62</sup> See for instance: France under Art 2265 *Code civil*; Spain under Art 1957 *Codigo civil*. In the Netherlands, good faith may exist in the absence of *iusta causa*, but no mention is made of *iusta causa* existing in the absence of good faith. See Art 3:99 *Burgerlijk Wetboek*. In Germany, neither *iusta causa* nor good faith are required for positive prescription of landownership. See Sections 900 *BGB* and 927 *BGB*.

<sup>63</sup> This view also appears to be suggested in Napier *Commentaries* 51-57.

<sup>64</sup> *Grant v Grant* (1677) Mor. 10876; *Andersons v Lows* (1863) 2 M 100; *McCowan v Shields and Others* (1867) 4 SLR 179; *Edmonstone v Jeffray* (1886) 13 R 1038; *Johnston v Fairfowl* (1901) 8 SLT 480; *Houstoun v Barr* 1911 SC 134; *Duke of Argyll v Campbell* 1912 SC 458; *Hamilton v Ready Mix Concrete (Scotland) Ltd* 1998 GWD 35-1819; Gretton and Reid, *Conveyancing* 7.18-7.25; Millar, *Prescription* 40-41.



question was acquired in good faith. Hence there is a fundamental divergence between the concept of *iusta causa* and the concept of possession being exercised as of right.<sup>65</sup>

### **3. Third requirement – possession must be acquired in good faith (*bona fides*)**

But we can also usucapt things which have not been delivered to us by the owner, whether they are capable of mancipation or not, provided that we receive them in good faith, in the belief that the person who delivered them was owner.<sup>66</sup>

As noted above, good faith is closely linked with the requirement of *iusta causa*, although it is accepted that *iusta causa* and good faith are usually treated as two separate requirements.<sup>67</sup> Whilst there does not seem to be any single definition of good faith (*bona fides*) which can be applied to the Roman law of *usucapio*, a helpful example is suggested by Nicholas and Jolowicz in respect of the purchase of an item which did not belong to the selling party. In this instance the good faith that was required on the part of the purchaser ‘is the belief that the seller was qualified to transfer ownership in the thing’.<sup>68</sup> Thomas suggests that good faith ‘manifested the subjective honesty of the acquirer’<sup>69</sup> and du Plessis notes that the Digest<sup>70</sup> supports the view that good faith was present if even if the possessor was mistaken in believing that they owned the object, provided ‘that the mistake was one of fact, and reasonable in the circumstances’.<sup>71</sup> Given the variety of legal situations which may involve an element of good faith it is generally agreed that definition of this term is not easy.<sup>72</sup>

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<sup>65</sup> Whilst the presence of the concept of possession being exercised ‘as of right’ or on a basis which is ‘adverse’ may be seen as evidence of the influence of common law terminology in Scots property law, it should be noted that the Scots law understanding that the possession must be referable to the foundation writ in order for positive prescription to occur, appears to accord with the understanding of the nature of the possession required for *usucapio* as described by Gaius at G.2.60. See also D.41.4.6 (Pomponius, *Sabinus*, book 32); D.43.26. I am grateful to Professor Robert Rennie of the University of Glasgow and Professor George Gretton of the University of Edinburgh for highlighting the potential for comparison between the concept of possession being exercised ‘as of right’ or on a basis which is ‘adverse’ and the concept of *iusta causa*.

<sup>66</sup> G.2.43.

<sup>67</sup> Nicholas, *Roman Law* 122-124; Thomas, *Roman Law* 160 -163; Buckland, *Roman Law* 243-248; Jolowicz and Nicholas, *Roman Law* 152-155; Carey Miller, ‘Property’ 42 at 56-58 in Metzger, *Justinian’s Institutes*; Kaser, *Das Romische Privatrecht* 106-107; du Plessis, *Roman Law* 184-187.

<sup>68</sup> Jolowicz and Nicholas, *Roman Law* 152.

<sup>69</sup> Thomas, *Roman Law* 160.

<sup>70</sup> D.41.10.5.1 (Neratius, *Parchments*, book 5).

<sup>71</sup> du Plessis, *Roman Law* 186.

<sup>72</sup> Thomas, *Roman Law* 160; Nicholas, *Roman Law* 123; Kaser, *Das Romische Privatrecht* 107.

It was a very important feature of the law of *usucapio* that the party who was attempting to usucapt only needed to be in good faith at the moment at which the possession commenced.<sup>73</sup> Additionally, the Codex relates that good faith on the part of the acquirer was presumed unless it was proved not to exist.<sup>74</sup> Furthermore it seems that it was for the party who was challenging the *usucapio* to prove that the good faith was not present at the time of the initial acquisition.<sup>75</sup> It also appears that the existence of good faith could be inferred if the *iusta causa* requirement had been satisfied.<sup>76</sup>

The interplay of good faith and *iusta causa* is of great significance given the varying nature of good faith depending on the circumstances of the initial transaction and the difficulties involved in attempting to provide a definition of good faith and in proving its presence or absence.<sup>77</sup> Although the protection afforded to the usucaptor varied depending on the circumstances under which the *usucapio* was commenced,<sup>78</sup> the fact that the usucaptor did not have to prove the existence of the initial good faith would have been of considerable assistance in helping them to retain the object that they were attempting to usucapt.<sup>79</sup>

Gaius makes mention of some exceptions to the rule of good faith.<sup>80</sup> These exceptions included situations relating to succession and to certain purchases made without a guardian's authority.<sup>81</sup> These exceptions seem to be survivals from an earlier period of the law<sup>82</sup> and do not seem to be of a nature that prevents the assertion that the Roman law of *usucapio* normally required good faith on the part of the acquiring party at the commencement of the relevant period of possession.<sup>83</sup>

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<sup>73</sup> G.2.43; J.2.6.pr; see also J.2.6.4; Nicholas, *Roman Law* 123; Thomas, *Roman Law* 160; Buckland, *Roman Law* 244; Jolowicz and Nicholas, *Roman Law* 152; Carey Miller, 'Property' 42 at 56 n 34 in Metzger, *Justinian's Institutes*; du Plessis, *Roman Law* 186.

<sup>74</sup> C.8.44.30; Thomas, *Roman Law* 162.

<sup>75</sup> Nicholas, *Roman Law* 123; du Plessis, *Roman Law* 186.

<sup>76</sup> Thomas, *Roman Law* 162 n 98.

<sup>77</sup> Nicholas, *Roman Law* 123.

<sup>78</sup> D.6.2; G.4.36; Carey Miller, 'Property' 42 at 57-58 and Metzger, 'Actions' 208 at 220 in Metzger, *Justinian's Institutes*; du Plessis, *Roman Law* 188-190.

<sup>79</sup> Nicholas, *Roman Law* 123-124.

<sup>80</sup> G.2.52-2.61.

<sup>81</sup> Thomas, *Roman Law* 161-162.

<sup>82</sup> Jolowicz and Nicholas, *Roman Law* 153.

<sup>83</sup> Thomas, *Roman Law* 160; du Plessis, *Roman Law* 186.

The Digest states that in classical law good faith was necessary for the entire duration of the period of *usucapio* if possession was founded on a gift.<sup>84</sup> It was also the case that if possession was founded on a sale then good faith had to be present at both the time of the purchase and the time of the delivery.<sup>85</sup> Justinian abolished the rule in respect of gifts<sup>86</sup> but retained the rule in respect of sales.<sup>87</sup> These seem to be the only exceptions which required good faith to exist for a period longer than the moment at which possession commenced<sup>88</sup> and again do not seem to be of a nature to prevent the assertion that the Roman law of *usucapio* normally only required good faith on the part of the acquiring party at the commencement of the relevant period of possession.<sup>89</sup>

Given the great complexities of proof and definition that can arise with good faith it is arguable that Scots law is sensible in holding that good faith is irrelevant for the positive prescription of landownership. Although the institutional writers contain mixed views on this point,<sup>90</sup> it seems to be established that Scots law does not require good faith for the positive prescription of landownership.<sup>91</sup> Thus, Scots law is at complete variance with classical Roman law on this matter.

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<sup>84</sup> D.6.2.11.3 (Ulpian, *Edict, book 16*); Thomas, *Roman Law* 161; du Plessis, *Roman Law* 186.

<sup>85</sup> D.41.3.10pr (Ulpian, *Edict, book 16*); D.41.4.2pr (Paul, *Edict, book 54*); Thomas, *Roman Law* 161; du Plessis, *Roman Law* 186.

<sup>86</sup> C.7.31.1.3; Thomas, *Roman Law* 161; Carey Miller, 'Property' 42 at 56 in Metzger, *Justinian's Institutes*.

<sup>87</sup> Thomas, *Roman Law* 161.

<sup>88</sup> Thomas, *Roman Law* 161.

<sup>89</sup> Thomas, *Roman Law* 160.

<sup>90</sup> Stair and Mackenzie suggest that the lengthy period of possession functions as a replacement for good faith. See: Stair II.12.11; Mackenzie III.12.5. Erskine appears to hold that the written title combines with the long period of possession to give rise to a presumption of good faith. See Erskine III.7.15. This appears to have been argued by the party which was successful in *Grant v Grant* (1677) Mor. 10876. However, it is not clear if the Court held that this part of the argument was good law. In fact Bankton cites this case as authority for the view that good faith is not required as part of the Scots law of positive prescription. See Bankton II.12.49. Hume holds that written title alone gives rise to a presumption of good faith. See Hume, *Lectures* IV.531. Bell seems to hold that good faith is a definite requirement of the Scots law of positive prescription. See Bell, *Principles* §2004 and §2008.

<sup>91</sup> See for instance: Bankton II.12.49 and II.12.79; *Duke of Buccleuch v Cunynghame* (1826) 5 S 53; Gloag & Henderson, *The Law of Scotland* (13<sup>th</sup> edn, 2012) 34.33.

#### **4. Fourth requirement – the thing must be capable of being owned, a *res habilis*<sup>92</sup>**

Again, free persons and sacred and religious things obviously cannot be usucaped.<sup>93</sup>

This statement makes it clear that certain items of property were not susceptible to *usucapio*.<sup>94</sup> The most important features of this rule in classical law was that the *usucapio* did not apply in respect of provincial land<sup>95</sup> and was only available to Roman citizens.<sup>96</sup>

Again, with regard to landownership, this requirement of classical Roman law is not replicated in Scots law. The ownership of any land in Scotland could be positively prescribed.

#### **5. Fifth requirement – the thing must not at any time have been stolen or taken by force<sup>97</sup>**

This is the requirement which functioned as the greatest limiting factor in respect of the application of *usucapio* in Roman law.<sup>98</sup> It is summed up in the following passages of the Institutes of Gaius:

But sometimes usucapion will not work to the advantage of the possessor of another's thing, even although his possession is definitely in good faith. Examples are where he possesses something stolen or taken by force; the reason is that the Twelve Tables prohibit usucapion of a stolen thing and the Julian-Plautian Act does the same for a thing taken by force.<sup>99</sup>

Furthermore:

And so the point of the common saying that the Twelve Tables prohibited usucapion of things stolen and taken by force is not to exclude the thief or the violent taker himself from the right to usucapt. He is excluded anyhow for another reason: he possesses in bad faith. It is rather that a third party has no

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<sup>92</sup> Thomas, *Roman Law* 159-160; Kaser, *Das Romische Privatrecht* 106; du Plessis, *Roman Law* 187-188.

<sup>93</sup> G.2.48. See also J.2.6.1 in which it is stated that *usucapio* cannot be applied to runaway slaves.

<sup>94</sup> Carey Miller, 'Property' 42 at 56 in Metzger, *Justinian's Institutes*.

<sup>95</sup> G.2.46; Nicholas, *Roman Law* 128; Kaser, *Das Romische Privatrecht* 107-108; du Plessis, *Roman Law* 188.

<sup>96</sup> G.2.65; Nicholas, *Roman Law* 128.

<sup>97</sup> Nicholas, *Roman Law* 122; Kaser, *Das Romische Privatrecht* 106; du Plessis, *Roman Law* 187-188.

<sup>98</sup> Nicholas, *Roman Law* 123.

<sup>99</sup> G.2.45.

right to usucapt even after buying from him in good faith. And so with moveable things such a possessor cannot often rely on usucapion, because someone who sells and delivers another's property commits theft; the same applies even if the delivery is on some other basis.<sup>100</sup>

What is perhaps of greatest significance, by way of a partial exception, is the following passage:

A person can also acquire possession of another's land without using force, if it is lying unoccupied through the neglect of its owner or because the owner has died with no successor or has been away for a long time; if he transfers it to another who receives in good faith, the possessor can usucapt. Although the person who took possession of the unoccupied land knows that it belongs to someone else this does not prejudice the usucapion of the possessor in good faith at all, because the opinion of those who thought that land could be stolen has been discarded.<sup>101</sup>

The fact that land could be acquired through *usucapio* by a third party good faith acquirer, provided that it had not originally been taken by force is a significant difference from the *usucapio* in respect of moveables. This rule was repeated in Justinian's Institutes, but in conjunction with a longer requirement in respect of the period of time involved.<sup>102</sup> The fact that under the classical law it was possible for land to be successfully acquired by *usucapio* in a period of only two years by a good faith acquirer, provided that the seller had not taken the land by force, seems to be quite a generous allowance for *usucapio* in respect of immovable property. As further discussed below, the law was reformed in respect of the time periods required for *usucapio*. However, it may still seem surprising that the two year provision in respect of land was still operative at the time of Gaius, when the Roman Empire was already of a very considerable size and in which it would have been difficult for individuals who were residing in the outreaches of the empire to supervise the position of all their property in the areas which enjoyed the status of being Italic land.<sup>103</sup>

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<sup>100</sup>G.2.49-50. This passage emphasises a wide definition of theft. See Nicholas, *Roman Law* 123-124. However, there were exceptions to this rule. For instance, if the heir to an estate sold an item which the heir honestly believed to be part of the estate, then usucapio could be carried out in respect of this item even if the item had actually only been lent to the deceased. See: G.2.50; Carey Miller, 'Property' 42 at 57 in Metzger, *Justinian's Institutes*.

<sup>101</sup>G.2.51.

<sup>102</sup>J.2.6.7; Carey Miller, 'Property' 42 at 57 n 35 in Metzger, *Justinian's Institutes*.

<sup>103</sup>Buckland, *Roman Law* at 192 explains how even some areas of provincial land could be elevated to the status of being Italic land.

With regard to Scots law, the requirement that land be possessed peaceably is the nearest statement to the Roman law rule that the land not be taken by force. Furthermore, Scots law repeats the Roman view that land cannot be stolen.

In this context it is appropriate to note that it is sometimes stated that the Scots law of positive prescription contains a requirement that the possession be exercised '*nec vi, nec clam, nec precario*'.<sup>104</sup> This may be correct but attention should be drawn to the origin and history of this requirement as it is arguably not strictly part of the classical or later Roman law of *usucapio* or *praescriptio* in respect of land. It is dealt with in relation to interdicts to retain or regain possession<sup>105</sup> or else in the context of the imposition of a servitude by reason of prolonged custom.<sup>106</sup> The materials which have been examined on Roman law do not include this distinct tripartite requirement in respect of *usucapio* or *praescriptio* in relation to land and the primary sources seem to support this omission.

It does appear arguable that the possession required for *usucapio* would have had to satisfy the test of being *nec precario*, that is to say, not being held by virtue of tolerance.<sup>107</sup> Furthermore, as noted above, it is also possible to argue that the necessary possession could not involve force. This can be suggested on the basis of sections of the Digest which show that the possession would have had to be *nec vi* in order to allow for successful *usucapio* to occur.<sup>108</sup>

Yet, Roman law does not seem to contain a specific statement of the tripartite '*nec vi, nec clam, nec precario*' formula in relation to the possession that is requisite for the doctrine of *usucapio*. This seems to be most notable with regard to the concept of the possession being *nec clam*, as this part of the formula does not appear to be the subject of an unambiguous individual reference in the manner of the *nec vi* and *nec precario* requirements that have been discussed in the preceding paragraph. The references in the Digest to the possession being *nec clam* seem to be made in the context of

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<sup>104</sup> Gloag & Henderson, *The Law of Scotland* 34.34.

<sup>105</sup> G.4.1.50; D.41.3.31.4 (Paul, *Sabinus*, book 32); D.43.17.1.5 (Ulpian, *Edict*, book 69); J.4.15.4a.

<sup>106</sup> D.39.3.1.23 (Ulpian, *Edict*, book 53).

<sup>107</sup> G.2.60; D.41.4.6 (Pomponius, *Sabinus*, book 32); D.43.26.

<sup>108</sup> D.41.3.37 (Gaius, *Institutes*, book 2) - D.41.3.38 (Gaius, *Common Matters or Golden Things*, book 2).

prohibitions on the possession being in bad faith<sup>109</sup> or being based on dishonest acquisition.<sup>110</sup> It therefore seems to be arguable that there was no definite and distinct requirement that the possession must be commenced or exercised *nec vi, nec clam, nec precario* under the Roman law of *usucapio*.<sup>111</sup> The only basis for the inclusion of the tripartite requirement would be if the possession which was required for *usucapio* was that which was protected by interdict.<sup>112</sup> However, it may be suggested that the tripartite criterion was only relevant in the event of a dispute which involved application for interdict.<sup>113</sup> Therefore it may not have applied to situations in which possession was uncontested.<sup>114</sup>

Further research which has been carried out on this point suggests that the inclusion of the tripartite requirement in respect of land in Scots law may be an aspect of the Scots law of positive prescription in which the Roman-Dutch influence is clearly manifest.<sup>115</sup> However the situation is complicated by the fluidity of the terminology that has been used in respect of this requirement both in Roman-Dutch law<sup>116</sup> and in Scots law.<sup>117</sup>

#### **D. Conclusion regarding Classical Roman law in comparison to Scots law**

In summary the principal conclusion which can be drawn from the examination of the above material is that Scots law does very little to reflect the requirements of the classical Roman law of *usucapio*. The only clear reflections exist in the fact that a

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<sup>109</sup> D.41.10.4 (Pomponius, *Sabinus*, book 32). This passage prohibits ‘*clam*’ in relation to the possession that is required for *usucapio*. However, as noted, the context suggests that this may be more of a prohibition of bad faith rather than of ‘stealth’ on the part of the individual attempting to complete *usucapio*.

<sup>110</sup> D.41.3.38 (Gaius, *Common Matters or Golden Things*, book 2). This passage is translated as being a prohibition on ‘stealth’ in relation to the requisite possession for *usucapio*. However, the Latin word in this section is ‘*furtivum*’ which may relate more to the concept of dishonesty akin to ‘theft’ (*furtum*) rather than the concept of ‘stealth’ which is more usually expressed by the term ‘*clam*’.

<sup>111</sup> The provisions of D.43.24 ‘Against force or stealth’ seem to relate more to a general interdictal protection against the use of force or stealth in Roman law rather than stipulating that the possession for matters such as the *usucapio* should be exercised without the force or stealth.

<sup>112</sup> du Plessis, *Roman Law* 184.

<sup>113</sup> du Plessis, *Roman Law* 176.

<sup>114</sup> du Plessis, *Roman Law* 176.

<sup>115</sup> Lee, *An Introduction to Roman-Dutch Law* 142; The analysis given by the Honourable Mr Justice Jacob Wit in an appeal case from the mixed jurisdiction of Guyana has also been helpful in assisting understanding of this matter. The case referred to is that of *Lackram Bisnauth, deceased substituted by his executor Edward Jonathan v Ramanand Shewprashad and Rajwattie Bisnauth* [2009] CCG 8 (AJ).

<sup>116</sup> Voet, *Commentarius ad Pandectas* 44.3.9; Lee, *An Introduction to Roman-Dutch Law* 142.

<sup>117</sup> 1617 Act; Stair II.12; 1973 Act ss 1 and 3.

time period is required for possession and the possession may not be achieved by force. However, beyond these points it seems clear that Scots law does not incorporate a requirement of good faith or a Roman-civilian concept of *iusta causa*. Furthermore, Scots law does not observe any distinction regarding whether or not different types of land are susceptible to positive prescription.

### **E. The later reforms to *usucapio* and the introduction of *longi temporis praescriptio* and *longissimi temporis praescriptio***

Having observed the classical period of Roman law, it is appropriate to give a brief summary of the later reforms to the Roman law of *usucapio* and the introduction of *longi temporis praescriptio*.

As has already been noted *usucapio* was only available to Roman citizens<sup>118</sup> and in the case of immovables it did not apply to provincial land.<sup>119</sup> These issues were resolved by the introduction of *longi temporis praescriptio* which was available to individuals who were not Roman citizens and was available in respect of the parts of the empire which were held as provincial land rather than as Italic land.<sup>120</sup> This became necessary as the empire expanded and the number of people who were subject to Roman government, but who were not Roman citizens, increased in number. The rules which developed for the *longi temporis praescriptio* differed from *usucapio* in two major respects. Namely, that *accessio temporum* was permissible and the time period for acquisition was considerably longer.<sup>121</sup> It was therefore possible, by virtue of the *longi temporis praescriptio*, for moveables or immovables to be acquired by ten years possession if the parties were located in the same province or twenty years possession if the parties were in different provinces.<sup>122</sup> This allowance of *accessio temporum* in

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<sup>118</sup> G.2.65.

<sup>119</sup> G.2.46; Nicholas, *Roman Law* 128; Kaser, *Das Romische Privatrecht* 107-108; du Plessis, *Roman Law* 188.

<sup>120</sup> D.44.3.3 (Modestinus, *Distinctions*, book 6); C.7.33.1; Thomas, *Roman Law* 164; Nicholas, *Roman Law* 128; Jolowicz and Nicholas, *Roman Law* 506; Kaser, *Das Romische Privatrecht* 107-108; du Plessis, *Roman Law* 188.

<sup>121</sup> Thomas, *Roman Law* 164; du Plessis, *Roman Law* 188.

<sup>122</sup> C.7.33.9; C.7.33.9.12; Thomas, *Roman Law* 164 n 20; Kaser, *Das Romische Privatrecht* 107-108; du Plessis, *Roman Law* 188.



respect of *longi temporis praescriptio* eventually led to this principle also being allowed in respect of the *usucapio*.<sup>123</sup>

Both *usucapio* and *longi temporis praescriptio* seem to have ceased to be utilised after the time of Constantine.<sup>124</sup> Thereafter the simple prescription of thirty or forty years, which only required that the full time duration be observed, became the accepted means of dealing with situations to which parties would have previously applied the *usucapio* and the *longi temporis praescriptio* doctrines.<sup>125</sup>

Justinian reinstated the use of the *longi temporis praescriptio* so that it was again possible, by virtue of the *longi temporis praescriptio*, for immoveables to be acquired by ten years possession if the parties were domiciled in the same province or twenty years possession if the parties were domiciled in different provinces.<sup>126</sup> The reinstated *longi temporis praescriptio* was only applicable in respect of land.<sup>127</sup> However, Justinian rendered the *longi temporis praescriptio* as applying to all imperial land by virtue of abolishing the distinction of Italic and provincial land, which simultaneously involved the abolition of the old classical Roman law distinction of *res Mancipi* and *res nec Mancipi*.<sup>128</sup>

*Usucapio* was also reinstated and redefined by Justinian. In the reinstated form the *usucapio* only applied to moveables and required a period of possession of three years in order to be successfully completed.<sup>129</sup>

Subject to the abovementioned alterations, the *usucapio* and the *longi temporis praescriptio* still required the fulfilment of the requirements of the classical *usucapio*,<sup>130</sup> regarding *iusta causa*,<sup>131</sup> *bona fides*,<sup>132</sup> and *res habilis*.<sup>133</sup> The

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<sup>123</sup> J.2.6.12; Thomas, *Roman Law* 164 n 21.

<sup>124</sup> Jolowicz and Nicholas, *Roman Law* 506.

<sup>125</sup> Jolowicz and Nicholas, *Roman Law* 506.

<sup>126</sup> J.2.6pr; Thomas, *Roman Law* 164-165; Nicholas, *Roman Law* 128; Kaser, *Das Romische Privatrecht* 107-108; du Plessis, *Roman Law* 188.

<sup>127</sup> J.2.6pr; Thomas, *Roman Law* 165; Nicholas, *Roman Law* 128; Kaser, *Das Romische Privatrecht* 108; du Plessis, *Roman Law* 188.

<sup>128</sup> C.7.31.1; J.2.1.40; J.2.6pr; Jolowicz and Nicholas, *Roman Law* 506.

<sup>129</sup> J.2.6pr; Thomas, *Roman Law* 165; Kaser, *Das Romische Privatrecht* 108.

<sup>130</sup> C.7.31.1; J.2.6pr; Thomas, *Roman Law* 165.

<sup>131</sup> J.2.6.11.

<sup>132</sup> J.2.6.pr; see also J.2.6.4.

<sup>133</sup> J.2.6.1.

requirement that there had been no theft in respect of moveables or taking by force in respect of land also had to be observed.<sup>134</sup>

A further thirty year period of acquisition for moveables or immoveables was instituted by Justinian as the *longissimi temporis praescriptio*. Under the *longissimi temporis praescriptio* it did not matter if there was no *iusta causa* or if the object had been stolen at some point. Provided that there had been an initial acquisition in good faith and the thirty year possession had been completed then ownership would be acquired.<sup>135</sup> This enabled a new degree of certainty to prevail with regard to the ownership of moveables after the thirty year period had elapsed.<sup>136</sup>

## **F. Conclusion regarding later Roman law in comparison to Scots law**

By the time of the completion of the work of Justinian we can observe that Roman law, despite its preference for the inviolable nature of ownership had allowed for considerable encroachments to be made into this concept through the application of the *usucapio*, *longi temporis praescriptio* and *longissimi temporis praescriptio*.<sup>137</sup> Whilst it was no doubt a feature of the *usucapio* that it partly or wholly originally existed in order to cure defective conveyancing of items which were held to be *res mancipi*,<sup>138</sup> the lasting basis for the existence of the *usucapio* and subsequently the *longi temporis praescriptio* and the *longissimi temporis praescriptio* is perhaps most simply stated in the following passage:

And this appears to have been accepted to prevent too lengthy uncertainty over title, because the period of one or two years granted to the possessor for usucapion gave the owner long enough to discover his property.<sup>139</sup>

It is to this basis, the quest for legal certainty in respect of property, which prescription seems to ultimately spring from.<sup>140</sup> It is the balance of the utility<sup>141</sup> as against the

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<sup>134</sup>J.2.6.2-7.

<sup>135</sup> C.7.39.8; Novel 119.7; Thomas, *Roman Law* 165; Nicholas, *Roman Law* 128-129; Kaser, *Das Romische Privatrecht* 108; du Plessis, *Roman Law* 188.

<sup>136</sup> Nicholas, *Roman Law* 128-129.

<sup>137</sup> Nicholas, *Roman Law* 124-125 and 129-130.

<sup>138</sup> G.2.41; Thomas, *Roman Law* 158; Jolowicz and Nicholas, *Roman Law* 152 and 155.

<sup>139</sup> G.2.44.

<sup>140</sup> D.41.3.1 (Ulpian, *Edict, book 74*); du Plessis, *Roman Law* 184.

<sup>141</sup> Here meaning “usefulness”.

equity<sup>142</sup> of this doctrine which has caused most of the discussion and dispute with regard to this doctrine throughout the centuries since its inception.<sup>143</sup>

In distinction from the classical period of Roman law, later Roman law contains more features which appear to find reflection in the Scots law of positive prescription of landownership. Most immediately, the term ‘prescription’ appears to have first appeared in the *longi temporis praescriptio* of later Roman law. Additionally, the simple prescription of thirty or forty years which appeared after Constantine, and which only required that the full time duration be observed, appears more recognisable to the Scots lawyer as it involved neither good faith nor *iusta causa*, and was applicable to all land within the ambit of the Roman legal system. This form of simple prescription does not appear to have survived the reforms of Justinian in which the more restrictive *longi temporis praescriptio* and *usucapio* were reinstated. However, the simple prescription may have influenced Justinian’s creation of the thirty year *longissimi temporis praescriptio*. As mentioned above, under the *longissimi temporis praescriptio* it did not matter if there was no *iusta causa* or if the object had been stolen at some point. Provided that there had been an initial acquisition in good faith and the thirty year possession had been completed then ownership would be acquired.<sup>144</sup> Furthermore, there was no longer a restriction in respect of which parts of the empire were susceptible to prescription, as Justinian abolished the distinction of italic and provincial land.<sup>145</sup>

The longer time periods and the universal application of positive prescription to all land within the Roman legal system make aspects of the later Roman law appear more recognisable in relation to the Scots law of positive prescription of landownership. However, the persistence of good faith, even in relation to the *longissimi temporis praescriptio*, demonstrates that later Roman law was very different to Scots law with regard to positive prescription. This difference is emphasised further in the existence of the more restrictive *longi temporis praescriptio*, in which requirements of good faith and *iusta causa* were present and which maintained a temporal distinction based on

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<sup>142</sup> Here meaning “fairness”.

<sup>143</sup> Nicholas, *Roman Law* 129-130.

<sup>144</sup> C.7.39.8; Novel 119.7; Thomas, *Roman Law* 165; Nicholas, *Roman Law* 128-129; Kaser, *Das Romische Privatrecht* 108; du Plessis, *Roman Law* 188.

<sup>145</sup> C.7.31.1; J.2.1.40; J.2.6pr; Jolowicz and Nicholas, *Roman Law* 506.

the location of the domicile of the parties affected by the application of the *longi temporis praescriptio*.

As with the classical period of Roman law, the principal conclusion which can be drawn from the examination of the above material is that Scots law does very little to reflect the requirements of the Roman law of *praescriptio*. The only clear reflections exist in the fact that a time period is required for possession, the possession may not be achieved by force and, in contrast to the classical law of *usucapio*, the entirety of the jurisdiction is susceptible to *praescriptio*. However, beyond these points it seems clear that Scots law does not incorporate a requirement of good faith or a Roman-civilian concept of *iusta causa*. As *iusta causa* was not a part of the *longissimi temporis praescriptio*, it might be argued that this is an additional similarity with Scots law. However, the persistence of good faith as a part of the *longissimi temporis praescriptio* renders it as fundamentally dissimilar to the Scots law of positive prescription of landownership.

It might be suggested that, in relation to positive prescription of landownership, the Scots law rejection of both good faith and the Roman-civilian understanding of *iusta causa*, place it as closer to the common law doctrines of adverse possession and limitation, in which no requirements of good faith or *iusta causa* are to be found.<sup>146</sup> However, the fact that Scots law uses the term ‘prescription’ for the acquisition of landownership by possession, appears emblematic of the relationship, albeit distant, of Scots law to Roman law with regard to positive prescription of landownership. The term ‘prescription’ is found in the common law of England with regard to the acquisition of easements, but not with regard to the acquisition of landownership or its equivalents.<sup>147</sup> Furthermore, the fact that Scots law does not require good faith or a Roman law *iusta causa* as a part of the doctrine of positive prescription of landownership does not render it as being wholly outwith the Roman-civilian legal tradition. In particular, the Roman-Dutch legal tradition, as preserved in South Africa, exemplifies a civilian approach to positive prescription which elects to completely

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<sup>146</sup> The current English law is contained in: Section 15 of the Limitation Act 1980 for unregistered land; Schedule 6 of the Land Registration Act 2002 for registered land.

<sup>147</sup> This form of prescription allows for the acquisition of easements by common law, by lost modern grant or by the Prescription Act 1832.

omit good faith and *iusta causa*.<sup>148</sup> There are also other mixed or civilian jurisdictions which allow for positive prescription of landownership to be completed without good faith or *iusta causa*, provided that a longer period of possession is completed due to the absence of these requirements.<sup>149</sup> Thus Scots law is in company with other mixed or civilian jurisdictions which allow for positive prescription of landownership without good faith or *iusta causa*. This is not a preserve of the common law systems.

However, even allowing for the similarity between Scots law and other mixed or civilian systems with regard to the absence of good faith, it is clear that Scots law is considerably different from both the civilian and the common law approaches to the acquisition of land by possession. This difference is seen in the long established insistence of Scots law on the use of a written deed in order to commence positive prescription of landownership. This requirement has been fixed since the Prescription Act 1617 and places Scots law at considerable variance from both the civilian and common law approaches to this area of law.<sup>150</sup> Even in a system such as that of Germany, in which the Land Register is presumed to be correct,<sup>151</sup> the persistence of

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<sup>148</sup> The current South African law of acquisitive prescription is found principally in section 1 of Prescription Act 68 of 1969.

<sup>149</sup> An example of such a provision in a mixed jurisdiction is found in Article 3486 of the Louisiana Civil Code. Examples of such provisions in civilian jurisdictions include: France under Art 2262 *Code civil*; Spain under Art 1959 *Codigo civil*. The French provision appears to use terminology which is more akin to the limitation of actions rather than the acquisition of ownership. However, it appears that Art 2262 is understood to effectively function as a form of acquisitive ownership. See F Medjouba 'France' at 13-24 in *Report on Adverse Possession by the British Institute of International and Comparative Law for Her Majesty's Court Service* (British Institute of International and Comparative Law, 2006). In the Netherlands, *iusta causa* is not a requirement for either the shorter or the longer forms of acquisitive prescription. See Art 3:99 *Burgerlijk Wetboek*. Good faith is required for the shorter form, but is irrelevant for the longer form. See Art 3:105 *Burgerlijk Wetboek* (acquisitive prescription) read in conjunction with Art 3:306 *Burgerlijk Wetboek* (extinctive prescription).

<sup>150</sup> Examples of civilian jurisdictions which do not require written title to commence acquisitive prescription include: France under Art 2262 of *Code civil*; Spain under Art 1959 *Codigo civil*; The Netherlands under Art 3:99 *Burgerlijk Wetboek* and under Art 3:105 *Burgerlijk Wetboek* (acquisitive prescription) read in conjunction with Art 3:306 *Burgerlijk Wetboek* (extinctive prescription). Although, as mentioned in the preceding footnote, the French provision appears to use terminology which is more akin to the limitation of actions rather than the acquisition of ownership. Examples of mixed jurisdictions which do not require written title to commence acquisitive prescription include: South Africa under Section 1 of Prescription Act 68 of 1969; Louisiana under Article 3486 of the Louisiana Civil Code. In the case of the common law, the law of England does not require written title for the operation of adverse possession and limitation. See: Section 15 of the Limitation Act 1980 for unregistered land; Schedule 6 of the Land Registration Act 2002 for registered land.

<sup>151</sup> The *Bürgerliches Gesetzbuch* states that the *Grundbuch* is presumed to be correct. See *BGB* § 891 and § 892. See also E J Marais, *Acquisitive prescription in view of the property clause* (unpublished doctoral thesis, University of Stellenbosch, 2011) at 9.

positive prescription without the need for a written document is manifest, albeit only in relatively limited circumstances.<sup>152</sup>

As it is the longstanding requirement for the written deed which is so notable in the Scots law doctrine of positive prescription, this will be the focus of the largest part of this thesis. However, prior to moving on to the detailed analysis of the written deed, it is necessary to examine the early Scots law of positive prescription as this is the context from which the requirement for the written deed arose.

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<sup>152</sup> See section 927 *BGB*. See also W G Ringe 'Acquisition of land by Adverse Possession under German law' at 55-61 in *Report on Adverse Possession by the British Institute of International and Comparative Law for Her Majesty's Court Service* (British Institute of International and Comparative Law, 2006).

## Chapter III – Positive Prescription of Landownership in Early Scots Law

### A. Introduction

The early Scots law of the positive prescription of landownership is a complicated and sometimes contradictory collection of material that does not lend itself to systematization. As will be seen, it can occasionally appear that potentially important rules have been forgotten or overlooked without comment in earlier periods of history. However, it is possible to identify certain key points which may help to illuminate the subsequent development of this area of the law.

In the course of this chapter four particular arguments will be made. Firstly, there appears to have been a degree of partial statutory provision in respect of the positive prescription of landownership, or at least in respect of limitation with a similar effect, in Scots law prior to the Prescription Act 1594. Secondly, before the Prescription Act 1617, the law seems to have failed to observe a clear and settled temporal requirement in respect of the positive prescription of landownership. Thirdly, and confusingly, there appears to have been an application of both statutory and non-statutory customary law in relation to positive prescription of landownership in Scotland prior to the 1617 Act. Fourthly, and specifically with reference to the recent arguments of Andy Wightman in his work *The Poor Had No Lawyers*,<sup>153</sup> it appears that the combined effect of the Prescription Act 1617 and the Registration Act 1617 may have been to make the positive prescription of landownership more difficult to accomplish when viewed in comparison with the previous law. However, this does not completely negate the arguments put forward by Wightman.

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<sup>153</sup> Wightman, *The Poor Had No Lawyers* 23-29, 251-252 and 299.

## **B. The Law Prior to the 1594 Act**

### **1. *Leges Quatuor Burgorum***

The first reference<sup>154</sup> to a doctrine resembling positive prescription of landownership in Scots law appears in the *Leges Quatuor Burgorum*.<sup>155</sup> This collection of legal provisions seems to be best described as a formal recognition of customary practice rather than a true form of early statute.<sup>156</sup> They are therefore perhaps representative of an urban environment in which the desire for certainty in conveyancing gave rise to a customary rule with an effect similar to that which would later be achieved by positive prescription. This may be suggested as it seems to have been the four south eastern centres of commerce, namely, Berwick, Roxburgh, Edinburgh and Stirling<sup>157</sup>, which were the first places in which a provision similar to positive prescription was recognised or received into Scots law.

The provision reads as follows:

Of landis haldyn a twelf moneth and a day

Quha evir he be that has haldyn his lande a twelf-moneth and a day the quhilk he has boucht lelely thurch wytnes of twelf men of his nyctburis in pes and wythoutyn chalangyng quhafa it chalangys eftir the xii moneth and a day and he in the kynryk and of full elde and he na sterys na motis in the forsaide tyme he sall nevir mare be herde Bot gif he be wythin elde or ututh the kynryk he sall nocht tyne his rycht quhen he is cummyn to full elde or in the kynryk.

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<sup>154</sup> There are procedures and doctrines relating to disputes over the ownership or possession of land found in other sources such as *Regiam Majestatem* and *The Register of Brieves*. Examples of such material can be found in Lord Cooper (ed), *Regiam Majestatem* (Stair Society, volume 11, 1947) 182-183 on *purpresture* and Lord Cooper (ed) *The Register of Brieves* (Stair Society, volume 10, 1946) 15-16, 40-41, 62-63 on *novel dissasine*. However, these sources deal with procedures and doctrines without reference to any doctrine equivalent to that of positive prescription. They are therefore not the subject of this thesis and should be treated separately.

<sup>155</sup> *Leges Quatuor Burgorum*, Title 10, in T Thomson and C Innes (eds), *The Acts of the Parliament of Scotland* volume 1 (1844) at 334-335. The date of the *Leges Quatuor Burgorum* is uncertain. The collection was traditionally thought to have been compiled at the time of David I (1124-53), but it is now regarded as probably being a later work, possibly dating from as late as the 13<sup>th</sup> century. See H L MacQueen, *Common Law and Feudal Society* (1993) 87 and; H L MacQueen and W J Windram, 'Laws and Courts in the Burghs' 208 at 209-211 in M Lynch, M Spearman and G Stell (eds), *The Medieval Scottish Town* (1988).

<sup>156</sup> D M Walker, *A Legal History of Scotland*, volume 1 (1988) at 95 and 201-203.

<sup>157</sup> These are the four burghs which were the subject of the *Leges Quatuor Burgorum*. See Thomson and Innes (eds), *The Acts of the Parliament of Scotland* volume 1 at 333.



Translated<sup>158</sup> as:

Of lands held for twelve months and a day

If someone has held land for twelve months and a day which lands he has bought lawfully through the witness of twelve men of his neighbours in peace and without challenge; then if, after the twelve months and a day have elapsed, someone else is in the country and is of full age and has not started any action to reclaim the land in the foresaid time, then that other person shall never be heard: But if the other person is under age or outwith the country he shall not lose his right when he reaches full age or arrives in the country.

The provision thus generally prevents claims being raised in respect of land if a party has lawfully bought it and possessed it for one year and one day. As stated above, this seems to be reflective of customary law which developed in the east coast centres of trade in the early Middle Ages<sup>159</sup> and which was later applied in all the burghs of Scotland and approved by Parliament.<sup>160</sup> However, the provision in question seems to have retained some relevance as late as the sixteenth century, as it is recounted as being a part of Scots law in Balfour's *Practicks*.<sup>161</sup> The updated text reads as follows:

Gif ony lauchfullie buyis land, and bruikis and joisis the samin be the space of ane zeir and day peciablie, without challenge of ony man; and zeir and day being bypast, ony uther person, quha, befor the ische of the zeir and day, movit nor proponit nathing thairanent, he beand within the realme, and of perfeit age, and not in prisoun, cumis not and challengis the samin, he sall not be heard thairanent in ony time cuming: Bot gif he was within age, furth of the realme, or in prisoun, he sould be heard to persew his richt and titill, quhen he is cum to perfeit age, returnis hame, or is deliverit furth of prisoun.

Translated<sup>162</sup> as:

If anyone lawfully buys land and uses and enjoys the same for the space of a year and a day peaceably without challenge of any man: and after the year and

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<sup>158</sup> My own translation making use of: The Concise Scots Dictionary (2005); Glossary of Scottish and European Union Legal Terms and Latin Phrases (2<sup>nd</sup> edition, 2003) and; The Chambers Dictionary (11<sup>th</sup> edition, 2008).

<sup>159</sup> Walker, *A Legal History of Scotland*, volume 1 at 95 and 201-203. See also MacQueen and Windram, 'Laws and Courts in the Burghs' 208 at 209-211 in Lynch, Spearman and Stell (eds), *The Medieval Scottish Town*.

<sup>160</sup> Walker, *A Legal History of Scotland*, volume 1 at 201.

<sup>161</sup> *Leges Quatuor Burgorum*, Chapter 10 in Balfour, *Practicks* 159. The *Practicks* of Sir James Balfour are taken as representing Scots law in the mid-sixteenth century. However, it may represent aspects of the law as late as 1583 or 1610. See Balfour, *Practicks* xxxii-xxxiv and lxiv. See also D M Walker, *A Legal History of Scotland*, volume 3 (1995) at 10-14 and 369-372.

<sup>162</sup> My own translation making use of the sources mentioned at footnote 158 above. The terminology is discussed further below. Balfour's version of the provision appears slightly longer to reflect minor developments in the understanding of this provision. This is obvious from the text reproduced here.

the day have passed, if another person, who before the end of the year and the day did not initiate any action with regard to the land in question, and if that other person was within the realm and is an adult and was not in prison and did not raise the challenge within the year and the day, then he shall not be heard with regard to this matter in any time coming: But if the other person was under age, outwith the realm or in prison, he should be allowed to pursue his right and title at the time when reaches majority, returns to the realm or is released from prison.

With regard to possible influences involved in the creation of the *Leges Quatuor Burgorum* it is sometimes suggested that they were partly drawn from English sources,<sup>163</sup> and the fact that these provisions seem to deal with the limitation of actions rather than with acquisitive prescription would seem to accord with the position of medieval English law in relation to land.<sup>164</sup> However, the English influence in this area of the law should not be overstated as Scots law did not go on to replicate the English provisions for the equivalent of positive prescription<sup>165</sup> that were enacted in 1275 by virtue of the Statute of Westminster I, Edward I, chapter 39.<sup>166</sup>

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<sup>163</sup> Walker, *A Legal History of Scotland*, volume 1 at 201-203. However this is not mentioned in J W Cairns, 'Historical Introduction' 14 at 24 in Reid and Zimmermann, *A History of Private Law in Scotland*. The relationship between the *Leges Quatuor Burgorum* and the customs of Newcastle-upon-Tyne is particularly complicated. See MacQueen and Windram, 'Laws and Courts in the Burghs' 208 at 209-211 in Lynch, Spearman and Stell (eds), *The Medieval Scottish Town*.

<sup>164</sup> F Pollock and F W Maitland, *The History of English law before the time of Edward I* (2<sup>nd</sup> ed, 1982) 141; Sir William S Holdsworth, *A History of English Law*, volume 3 (7<sup>th</sup> edn, 1956) at 166-171. The position of medieval English law in respect of this matter is complicated. In particular, the time periods in English law were set on the basis that an action was limited if the right had come into existence prior to a certain event such as the coronation of Henry I. Thus the time period for limitation was not set by reference to a set number of years or days, but rather by reference to a specific event. See Pollock and Maitland, *The History of English law before the time of Edward I* at 51, 81 and 141. However, it seems clear that medieval English law allowed for the limitation of actions but did not allow for acquisitive prescription of land. See Pollock and Maitland, *The History of English law before the time of Edward I* at 51, 81 and 141.

<sup>165</sup> The current English terms are 'limitation' and 'adverse possession.' See Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (8<sup>th</sup> edition, 2012) 35.001-35.003. These concepts existed in medieval English law and continue to exist to the present time. See: Pollock and Maitland, *The History of English law before the time of Edward I* at 51, 81 and 141; Megarry and Wade, *The Law of Real Property* 35.001-35.003.

<sup>166</sup> Megarry and Wade, *The Law of Real Property* 35.001-35.003; Holdsworth, *A History of English Law* volume 2 at 300, volume 3 at 8-10, volume 4 at 484; T F T Plucknett, *A Concise History of the Common Law* (5<sup>th</sup> edn, 1956) 312. For instance, the Statute of Westminster I, Edward I, chapter 39 continued the tradition of setting the time period for limitation by reference to a specific event. In the Statute of Westminster, the specific event was that of the coronation of Richard I in 1189. See Pollock and Maitland, *The History of English law before the time of Edward I* at 81. There is thus really quite a stark difference between medieval English law and medieval Scots law with regard to the calculation of the time period for limitation.

In respect of the time period which is stipulated in this particular rule of the *Leges Quatuor Burgorum*, this may reflect a wider northern European legal tradition, as a provision with this time period is recorded as having existed in Dutch law from at least 1254<sup>167</sup> and as having been of Germanic origin.<sup>168</sup> The time period is one which is also important in other doctrines of Scots law such as that of the regulation of competition between adjudgers in adjudication.<sup>169</sup> Furthermore, there may also be a partial similarity observed with regard to an Act of the Old Scottish Parliament of 1450<sup>170</sup> which seems to reflect the medieval canon law<sup>171</sup> rule that if a defender was acting obstructively in relation to an action regarding land, the pursuer could be awarded interim possession of the area in question.<sup>172</sup> This possession became definitive after one year and the position could only be altered by the original defender raising an action in respect of the right which had originally been in dispute.<sup>173</sup>

With regard to terminology, the term ‘prescription’ is deployed in the annotation to the version of this provision of the *Leges Quatuor Burgorum* that is found in Balfour’s *Practicks*.<sup>174</sup> This may be suggestive of the existence of an emergent law of positive prescription, or at least an awareness of the civilian concept of positive prescription, in Scots law at a date preceding the passage of the statutes of 1594 or 1617.<sup>175</sup> However, it may be the case that the annotation was added by a later editor once the term ‘prescription’ was becoming more commonly used in relation to this type of

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<sup>167</sup> H Grotius, *Inleidinge tot de Hollandsche Rechtsgeleerdheid* (trans R W Lee in 2 vols, 1936-53) II.7.7. See also J Voet, *Commentarius ad Pandectas* (trans by P Gane, 1955-1958) 44.3.8.

<sup>168</sup> R W Lee, *An Introduction to Roman-Dutch Law* (5<sup>th</sup> edn, 1953) 141.

<sup>169</sup> Diligence Act 1661 and Adjudication Act 1672. See J G Stewart, *A Treatise on the Law of Diligence* (1898) 638; G L Gretton, ‘Diligence’ in *S.M.E.* vol 8 (1992) para 208.

<sup>170</sup> See T Thomson and C Innes (eds), *The Acts of the Parliament of Scotland* volume 2 (1870) at 37 (c.18). See also MacQueen, *Common Law and Feudal Society* 234.

<sup>171</sup> Canon law was the law of the western Church in the Middle Ages. See: J A Brundage, *Medieval Canon Law* (1995) 1-4 and 18-69; O F Robinson, T D Fergus and W M Gordon, *European Legal History* (3<sup>rd</sup> edn, 2000) 72-73. See also Robinson, Fergus and Gordon, *European Legal History* 228-232 on the particular importance of Canon Law in Scotland until fifteenth or sixteenth centuries.

<sup>172</sup> O J Reichel, *A Complete Manual of Canon Law*, volume 2 (1896) at 274 note 84; MacQueen, *Common Law and Feudal Society* 234.

<sup>173</sup> Reichel, *A Complete Manual of Canon Law*, volume 2 at 274 note 84; MacQueen, *Common Law and Feudal Society* 234.

<sup>174</sup> Balfour, *Practicks* 159. I am grateful to Professor George Gretton of the University of Edinburgh for drawing attention to the potential significance of the terminology used in this particular annotation.

<sup>175</sup> The *Practicks* of Sir James Balfour are taken as representing Scots customary law in the mid-sixteenth century. See Balfour, *Practicks* xxxii-xxxiv and lxiv.

material.<sup>176</sup> Yet, even if it is that is the correct explanation, it is interesting that the more English term ‘limitation’ was not utilised here, even though it might have been more appropriate. This is of significance as the annotation was probably not added after 1610 at the latest.<sup>177</sup>

It may be more of a question of importance for the law of limitation as to whether or not the abovementioned provision of the *Leges Quatuor Burgorum* has ever been specifically repealed. Irrespective of this, the doctrines of desuetude<sup>178</sup> or implied repeal<sup>179</sup> may be the best explanation of why the limitation period of one year and one day has not been mentioned by any authority subsequent to Balfour.<sup>180</sup> Alternatively, if the provision is regarded as merely customary<sup>181</sup> and not as actual legislation then it would appear that it would have been simply replaced by subsequent statutory authority on this matter.<sup>182</sup> In any case, it is significant that Scots law contained a provision in this area of law at a date that was well in advance of the Acts of 1594 and 1617. It is also important to consider the fact that no specific requirements are made with regard to the title required for the provision to operate, other than that the land should have been purchased lawfully. The quality of lawfulness would have been dependent on the conveyancing procedures of the time,<sup>183</sup> but it is arguable that written documentation may not originally have been essential. This may be suggested by the

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<sup>176</sup> On the composition and editing of Balfour’s *Practicks* see Balfour, *Practicks* xxxii-xxxiv and lxiv. See also H McKechnie, ‘Balfour’s *Practicks*’ (1931) 43 *JR* 179-192; Cairns, ‘Historical Introduction’ 14 at 96-97 in Reid and Zimmermann (eds), *A History of Private Law in Scotland*; D M Walker, *A Legal History of Scotland*, volume 3 (1995) at 10-14 and 369-372.

<sup>177</sup> On the composition and editing of Balfour’s *Practicks* see footnote 176 above.

<sup>178</sup> On the authority of the *Leges Quatuor Burgorum* see Walker, *A Legal History of Scotland* volume 3 at 10-14 and 369-372. On the authority of Balfour’s *Practicks* see Balfour, *Practicks* lxiv. On the doctrine of desuetude see: R B Ferguson ‘Legislation’ in *S.M.E.* vol 22 (1987) paras 129-133; G Maher and Sir T B Smith ‘Judicial Precedent’ in *S.M.E.* vol 22 para 256; W D Sellar ‘Custom’ in *S.M.E.* vol 22 paras 364, 376, 381; T D Fergus and G Maher ‘The Formal Sources of Scots Law’ in *S.M.E.* vol 22 para 526; H R M Macdonald, J C Mullin, Sir T B Smith and J F Wallace ‘Law Reform’ in *S.M.E.* vol 22 para 626.

<sup>179</sup> On the doctrine of implied repeal see: Ferguson ‘Legislation’ in *S.M.E.* vol 22 paras 156 and 158; J Fleming Wallace ‘Interpretation of Statutes’ in *S.M.E.* vol 12 (1992) para 1198.

<sup>180</sup> Although it might be possible to argue that the criteria for desuetude or implied repeal have not been fully satisfied. For these criteria see the works referred to under the two preceding footnotes.

<sup>181</sup> Walker, *A Legal History of Scotland* volume 1 at 95 and 201-203.

<sup>182</sup> See Ferguson and Maher ‘The Formal Sources of Scots Law’ in *S.M.E.* vol 22 para 531.

<sup>183</sup> It seems that the sale of land was permitted in the four burghs in certain circumstances. See Walker, *A Legal History of Scotland*, volume 1 at 367 and *Leges Quatuor Burgorum*, Titles 21, 42, 52, 89, 90, 91, 95 in Thomson and Innes (eds), *The Acts of the Parliament of Scotland* volume 1 at 336-352.

fact that under the original provision<sup>184</sup> sufficient title could be proved by the witness of twelve neighbours. However, the requirement for a lawful purchase does show that possession alone was not sufficient for this rule to be relied upon. That said, there is no stipulation that good faith should be present on the part of the purchaser who subsequently sought to rely upon the provision by virtue of completion of possession. It is an open question whether features such as the absence of good faith and the presence of terminology relating to lawfulness and peaceableness<sup>185</sup> are suggestive of a link between these provisions and the later Prescription Acts of 1594 and 1617. There does not seem to be any evidence to definitely indicate such a connection. However, it is not impossible that such issues influenced the mindset of the drafters of those later statutes.

It is perhaps surprising that this provision seems to have had authority from the thirteenth to the sixteenth century but then to have vanished without comment. The fact that doctrines may alter or disappear is not in itself remarkable, but the fact that such disuse should not provoke or require discussion within the legal system in question is strange. This can be seen in contrast to the law of the Netherlands which ceased to observe positive prescription of one year and one day in the seventeenth century but made clear recognition of this change in the writings of Voet.<sup>186</sup> That such a formula should have existed in Scotland but then fallen from use without comment is puzzling given the potential importance of this doctrine for the basis of landownership.

## **2. Sinclair's *Practicks***<sup>187</sup>

There does not seem to be any specific reference to positive prescription or *usucapio* contained in Sinclair's *Practicks*. This is not remarkable, although given some of the other material discussed in this chapter it would not be out of the question for a reference to positive prescription to occur in Sinclair's *Practicks* even though they cover a period from 1541 to 1549. It would have also been unsurprising to find civilian

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<sup>184</sup> As distinct from the version contained in Balfour's *Practicks*.

<sup>185</sup> These terms occur in the 1617 Act but not in the 1594 Act.

<sup>186</sup> Voet, *Commentarius ad Pandectas* 44.3.8.

<sup>187</sup> *Sinclair's Practicks*, edited by Gero Dolezalek (Leipzig: 1990). For further information on Sinclair's *Practicks* see A Murray, 'Sinclair's Practicks' in A Harding (ed) *Law Making and Law Makers in British History* (1980) 90.

concepts beginning to emerge in respect of positive prescription within this compilation.<sup>188</sup>

There is one reference to negative prescription.<sup>189</sup> There is also at least one case which perhaps gives an insight into some of the property disputes of that period. Such disputes may well have provided a motivation for the enactment of the statutes of 1594 and 1617. This case is simply entitled as '*proving of haldin of landis*' and involves the question of which documents are required in order to prove a good title to land.<sup>190</sup> This issue was therefore evidently something which came before the courts in early-mid sixteenth century Scotland.

The other interesting feature of Sinclair's *Practicks* is the considerable number of cases which involved the church prior to the Scottish Reformation.<sup>191</sup> One case in particular involves the '*wrangous and violent occupatione of the ane half of the kirk landis for the vicarage of Kirkcaldie and for the leiving of the uther pairt waist*'.<sup>192</sup> The significance of this observation will become apparent later in this chapter.

### **3. Balfour's *Practicks***<sup>193</sup>

The material contained in Balfour's *Practicks* is dealt with above in relation to the *Leges Quatuor Burgorum*.<sup>194</sup> Balfour's *Practicks* do contain a number of references to negative prescription<sup>195</sup> but the only material which appears to be of direct relevance to positive prescription is that which has already been discussed above.

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<sup>188</sup> See discussion in Robinson, Fergus and Gordon, *European Legal History* at 231-232.

<sup>189</sup> Dolezalek (ed), *Sinclair's Practicks* para 346.

<sup>190</sup> *Sinclair's Practicks* para 177.

<sup>191</sup> *Sinclair's Practicks* paras 98, 125, 126, 128, 213, 224, 434, 490, 511, 549 and 568. This is only a selection of such cases and is not an exhaustive list.

<sup>192</sup> *Sinclair's Practicks* para 549.

<sup>193</sup> The *Practicks* of Sir James Balfour are taken as representing Scots law in the mid-sixteenth century. See Balfour, *Practicks* xxxii-xxxiv and lxiv. See also McKechnie, 'Balfour's Practicks' (1931) 43 *JR* 179-192; Cairns, 'Historical Introduction' 14 at 96-97 in Reid and Zimmermann (eds), *A History of Private Law in Scotland*.

<sup>194</sup> *Leges Quatuor Burgorum*, Chapter 10 in Balfour, *Practicks* 159.

<sup>195</sup> Balfour, *Practicks* 146-148.

### **C. The law between the 1594 Act and the 1617 Act – with particular reference to the writings of Sir Thomas Hope**<sup>196</sup>

The period between the 1594 Act and the 1617 Act is not always easy to analyse as the main writer on this period, Sir Thomas Hope, covers the period between and after the Acts<sup>197</sup> and his work is not organised according to a straightforward chronological system. It is further complicated by the impression that the 1594 Act did not fully clarify the law and allowed for a degree of confusion to continue in this area. The confusion that existed in the period before and between the Acts will become apparent in the remainder of this paper. In order to illuminate this discussion we will begin with a brief examination of the Prescription Acts of 1594 and 1617. It is these two Acts, in particular the Act of 1617, which form the background to the modern law and, in the case of the 1617 Act, governed the essentials of the Scots law of positive prescription of landownership until the Prescription and Limitation (Scotland) Act of 1973.

#### **1. The Acts**

The following translation and analysis of the Acts involves the sub-division of the translated version of these statutes into sections in order to facilitate a clearer engagement with the material under discussion. The choice of where to divide the statutes has been made with consideration to the substance of each Act. There will thereafter follow further comparative analysis of the Acts and the particular exceptions that were allowed under this legislation.

##### **(a) The Prescription Act 1594**

24. That nane sall be compelled to produce procuratories or instruments of resignation, precepts of clare constat, or uther precepts of seasing of lands or annual-rents, possessed be them before before the space of fourty zeires.

OUR SOVERAIGNE LORD, And Estates of this present Parliament, understanding that sindrie of his Hienes Lieges, are heritably infeft in divers lands, and annualrents within this Realme, likeas their Predecessors and Authors, fra quhome their richts thereof proceeds, hes beene heritably infeft in the samine

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<sup>196</sup> Hope, *Major Practicks* VI.43. Hope's *Major Practicks* are understood to cover the period from 1608-1633. See Hope, *Major Practicks*, Introduction, page x. See also D M Walker, *A Legal History of Scotland*, volume 4 (1996) at 374. With regard to Hope's *Minor Practicks* these are understood to cover the period from 1620-1625. See Walker, *A Legal History of Scotland*, volume 4 at 374.

<sup>197</sup> See Hope, *Major Practicks*, Introduction, pages vii-xxviii.

Landes and annual-rentes: And be vertew of their several infeftments and liferents therein reserved, they and their Predecessors and Authors, hes bruiked the foirsaid lands and annual-rentes be the space of fourtie zeires togidder: Notwithstanding quhairof, the saids infeftments, made and granted to them and their Predecessours and Authors, are sundry times drawn in question, for laik and want of procuratories of resignation, instruments of resignation, precepts of clare constat, or uthers precepts of seasing, quhilks are not extant to be produced and used, in respect the samine are tynt and amitted, partly be iniquity of time, partly be perishing of protocolles and scrolles of notares: partly for non-delivering of the samine, be the persones sellares, and disponers thereof: partly because the evident of comprised Landes uses to be abstracted and with-halden upon malice of parties: and partly, as evident not thocht necessary to have bene kepted after sa lang time: Be reason that the Chartoures makes mention of the procuratories and instruments of resignations, and instruments of seasing makes mention of the precepts of seasing, quhair-upon the samine proceeds. For remeide quhairof, OUR said SOVERAIGNE LORD, with advise of his saids Estates, and hail body of this present Parliament, findes, decernes, and declares, that nane of his Hienes Lieges, may be compelled, after the space of fourty years, to produce procuratories or instruments of resignation, precepts of clare constat, or uthers precepts of seasing of lands, or annual-rentes, quhairof the present heretable possessours and their predecessours, and authoures, and uthers persons be vertew of life-rentes reserved in the saides infeftments, are, and was in possession be the space of fourty zeires togidder, and that the wanting and in-laik thereof, nor nane of them, sall be na cause of reduction of the infeftments granted to the proprietares, or their Predecessours or authors of the lands or annual-rents quhairof the charter or charters (makand mention of the resignation or resignations to have been made, and the instruments of seasing, makand mention of the precepts of seasing, be vertew quhairof the seasings were given) are extant. And wills, statutes, and ordainis, that this Act sall be extended to all procuratories, and instruments of resignation, precepts of clare constat, or uthers precepts of seasings, the wanting and in-laik quhairof, nor nane of them, sall be na cause of reduction, nor uther quarrel quhat-sum-ever, after the space of fourty zeires, quhair infeftments hes tane effect be possession, be the said space of fourty zeires, in manner abone rehearsed, and quhair the charters and Instrumentes of seasing are extant as said is.

Translated<sup>198</sup> as:

24. That nobody shall be compelled to produce procuratories or instruments of resignation, precepts of clare constat, or other precepts of sasine of lands or annual-rents, possessed by them for the space of forty years.

Analysis: the title makes it clear that this statute was being enacted to reduce the burden on possessors of land with regard to the written documentary evidence which was required in order to defend ownership. However, the language used was obviously

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<sup>198</sup> My own translation making use of the sources mentioned at footnote 158 above.



that of the procedures and problems of conveyancing under the feudal system.<sup>199</sup> The particular difficulty which was partially being addressed by this Act was that of the volume of documentation that was required to assert unchallengeable ownership of land in the feudal context.<sup>200</sup> This issue could be particularly manifest with regard to the evidence of the superior's consent to the transfer of the land in question to the current possessor.<sup>201</sup> The need to obtain the superior's consent was, as Walter Ross described it, an embarrassment to Scots law due to the potential for superiors to obstruct transactions without good reason.<sup>202</sup> Although this great difficulty was not dispensed with by this Act, it was at least the start of a process to reduce the volume of material that was required to hold an unchallengeable title to land.<sup>203</sup>

OUR SOVEREIGN LORD, And Estates of this present Parliament, understanding that various of his Highness' subjects, are heritably infeft in different lands, and annualrents within this Realm, like their Predecessors and Authors, from whom their rights were received, have been heritably infeft in these same Lands and annual-rents: And by virtue of their various infeftments and liferents therein reserved, they and their Predecessors and Authors, have enjoyed the foresaid lands and annual-rents for the space of forty years continually: Notwithstanding whereof, the said infeftments, made and granted to them and their Predecessours and Authors, are sometimes drawn into question, for lack and want of procuratories of resignation, instruments of resignation, precepts of clare constat, or other precepts of sasine, which are not extant to be produced and used, in respect the same are lost and omitted, partly by the passage of time, partly by the perishing of protocols and scrolls of notaries: partly due to the non-delivery of the same be the sellers and disponers thereof: partly because the evidence of the Lands comprised is removed and withheld due to the malice of parties: and partly, as it is not thought that it is necessary to keep the evidence

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<sup>199</sup> The feudal system was abolished on 28<sup>th</sup> November 2004 by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

<sup>200</sup> On the documentation required for feudal conveyancing see G L Gretton, 'The Feudal System' *S.M.E.* vol 18 (1993) paras 87-111.

<sup>201</sup> W Ross, *Lectures on the Practice of the Law of Scotland*, volume 2 (1792) at 268-269. See also Gretton, 'The Feudal System' in *S.M.E.* vol 18 para 59 on the potential difficulties and complexities of obtaining the consent of the superior prior to the enactment of the Conveyancing (Scotland) Act 1874 s.4.

<sup>202</sup> Ross, *Lectures on the Practice of the Law of Scotland*, volume 2 at 268-269. Fascinatingly, Ross commented that this problem would have been resolved by the Statute of Robert I which would have followed rules contained in the English enactment of *Quia Emptores*. However, the Scottish statute was counteracted and fell by desuetude. On *Quia Emptores* see Megarry and Wade, *The Law of Real Property* 2.014-2.018.

<sup>203</sup> Ockrent, *Land Rights* 47-48. Ockrent also provides a very useful account of the legal, social and economic developments surrounding the enactment of the Registration Act 1617. Ockrent comments on the fact that registration provides greater protection for purchasers and greater protection for lenders in relation to security rights. This is achieved as registration reduces the risk of fraud. See Ockrent, *Land Rights* 1-14 and 45-55.

after such a long time: By reason that the Charters make mention of the procuratories and instruments of resignations, and instruments of sasine make mention of the precepts of sasine, whereupon the same proceeds.

Analysis: the Act explains the need for legislative activity by detailing the concerns which were apparently affecting Scottish conveyancing at this time. The environment is described as being one in which parties were being lawfully infeft in the real right to their lands. However, such infeftments were sometimes being called into question. These issues were occurring even after the completion of forty years possession by the parties who had been infeft in the real right. A partial nascent solution to this problem is hinted at in the last line of the above section in that a view was being taken in some quarters that documents might not be required to be retained if they were mentioned within the body of other deeds that had been retained and which were necessary for future conveyancing and proof of ownership of land. This solution becomes overt in the next section of this Act. However, it should again be observed that some of these difficulties could surely have been circumvented through abolition, or at least restriction or modification, of the feudal system, such as had already been achieved in England and was to be achieved in much of Europe during the eighteenth century.<sup>204</sup>

It is possible that it was due to the desire to minimise the already cumbersome process of feudal conveyancing and attainment of unchallengeable title that the concept of good faith was deemed irrelevant by the framers of the statutes of 1594 and 1617. The fact that some Scottish legal thinkers of this time were prepared to assert a legal identity independent of continental civilian thinking may have provided a context in which the requirement of good faith, which was so central to the Roman law conception of positive prescription, could be dispensed with in the interests of simplicity.<sup>205</sup> The strongest evidence of such a particularly Scottish approach at this time is perhaps seen in Sir John Skene's preface to the *Auld Lawes*<sup>206</sup> in which he urges his readers to be concerned with Scotland's own unique legal heritage. This may have helped facilitate the writers of the 1594 and 1617 statutes in producing an inventive formulation of positive prescription which remained true to parts of the civilian

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<sup>204</sup> Gretton, 'The Feudal System' in *S.M.E.* vol 18 para 45.

<sup>205</sup> On the difficulties of defining and proving good faith see: Nicholas, *Roman Law* 123; Kaser, *Das Romische Privatrecht* 107; Jolowicz and Nicholas, *Roman Law* 155; Thomas, *Roman Law* 160.

<sup>206</sup> Sir John Skene, *Regiam Majestatem and The Auld Lawes and Constitutions of Scotland* (1609). See also Robinson, Fergus and Gordon, *European Legal History* 232.

doctrine but which radically departed from it in other respects, most notably those of good faith and *iusta causa*, in order to assist the particular needs of Scotland. This may also have allowed for the development of the requirement of written title in order to commence positive prescription of landownership in Scots law. As discussed in chapter II of this thesis, this requirement for a written deed has long placed Scots law at considerable variance to other civilian, mixed and common law jurisdictions.<sup>207</sup>

For remedy whereof, OUR said SOVEREIGN LORD, with advice of his said Estates, and whole body of this present Parliament, finds, discerns, and declares, that none of his Highness' Subjects, may be compelled, after the space of forty years, to produce procuratories or instruments of resignation, precepts of clare constat, or other precepts of sasine of lands, or annual-rents, whereof the present heritable possessors and their predecessors, and authors, and other persons be virtue of life-rents reserved in the said infeftments, are, and were in possession for the space of forty years continually, and that the wanting and lack thereof, of any of them, shall not be a cause of reduction of the infeftments granted to the proprietors, or their Predecessors or authors of the lands or annual-rents whereof the charter or charters (making mention of the resignation or resignations to have been made, and the instruments of sasine, making mention of the precepts of sasine, by virtue whereof the sasines were given) are extant. And wills, statutes, and ordains, that this Act shall be extended to all procuratories, and instruments of resignation, precepts of clare constat, or other precepts of sasine, the wanting and lack whereof, of any of them, shall not be a cause of reduction, nor other quarrel whatsoever, after the space of forty years, where infeftments have taken effect by possession, for the said space of forty years, in the manner above described, and where the charters and Instruments of seasing are extant as described above.

Analysis: as stated above, the latent remedy from the end of the last section flourishes into a full scheme for the prevention of landownership disputes in this section of the Act. The key to the curative effect of the statute is the allowance for the content of absent documents to be proved by their being referenced in a satisfactory fashion within other documents necessary for the proof of landownership. Specifically, the Act renders the crucial documents as being the charter and the instrument of sasine.<sup>208</sup> If these are extant and make reference to the absent documents then, if the land in question has been possessed continually for forty years, the absence of the other

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<sup>207</sup> See Chapter II, E.

<sup>208</sup> On the documentation required for feudal conveyancing see footnote 200 above.

documents is unproblematic for the possessor's claim to ownership of the land in question.<sup>209</sup>

The Act may be criticised for leaving certain matters as incomplete.<sup>210</sup> An example of this can be seen in the fact that the quality of possession is not defined as being peaceable. However, one should not lose sight of the potentially radical implications of the statute as effectively dispensing with the need for a complete set of all relevant documentation to be physically produced in order to enjoy unchallengeable ownership of land. Furthermore, it must be remembered that recording of the written title to land was not established until enactment of the Registration Act of 1617.<sup>211</sup> The 1594 Act may therefore stand as a bold measure to attempt to address the problem of how to prove title if documents of title were lost at a time when there was no public storehouse of such deeds.<sup>212</sup>

Lastly, it may be argued that the Act does not seem to provide a categorical statement that ownership is acquired after the forty year period has elapsed. It might be contended that this indicates that the Act only provided for a strong form of limitation

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<sup>209</sup> This development is discussed in Napier *Commentaries* 46-49.

<sup>210</sup> See for instance Napier's view that the 1594 Act was an imperfect remedy for the problems in question. See Napier *Commentaries* 49.

<sup>211</sup> There is an interesting parallel between the history of registration and the history of positive prescription in Scots law. As described by Ockrent, the Registration Act 1617 was preceded by earlier unsuccessful statutes which attempted to regulate registration in Scots law. Similarly, in relation to positive prescription, the 1594 Act was replaced after only twenty three years by the 1617 Act. It thus appears that this was a period during which Scots law was generally engaged in statutory enactment and reform and that both the Prescription Act 1617 and the Registration Act 1617 were the culmination of a process rather than a single instance in which the Parliament of Scotland happened to pass two statutes which proved to be successful and enduring. This is again a basis on which it may be appreciated that the 1594 Act contained flaws but that this was perhaps to be expected in the context a period of statutory innovation in which early statutes perhaps contained an element of experimentation on route to their more definite and successful statutory successors. It is perhaps for this reason that Napier describes the 1594 Act as preparing the ground for the 1617 Act. See Napier *Commentaries* 46. On the history of registration in Scots law see Ockrent, *Land Rights*. I am grateful to Professor George Gretton of the University of Edinburgh for emphasising the comparison between the history of registration and the history of positive prescription in Scots law.

<sup>212</sup> The Registration Act 1617 introduced the requirement that the instrument of sasine had to be registered in order for infestment in the real right of ownership to take place. See: Gretton, 'The Feudal System' in *S.M.E.* vol 18 para 99; Gordon and Wortley, *Land Law* 12.03. On registration in Scots law see Ockrent, *Land Rights*. This topic exists alongside positive prescription of landownership in Scots law due to the requirement for a written deed to be used in order to commence the operation of positive prescription of landownership. As registration is necessary in order to obtain the real right of landownership, a written document of title must be registered in order to gain the real right of landownership by positive prescription. However, it must again be emphasised that Scots law is unusual in having such a longstanding requirement for a written deed to be used in order to commence the positive prescription of landownership. See discussion in Chapter II, E.

of actions rather than for the acquisition of ownership. However, as the Act uses the terminology of heritable infeftment and proprietorship, it would appear that the Act is concerned with the assertion of ownership, albeit within the context of a feudal system of land tenure, rather than mere limitation of actions. This interpretation of the Act appears to accord with the civilian concept of ownership which is followed in Scots law and is compatible with the feudal system which was still in place at the time of the 1594 Act. Such an interpretation seems possible on the wording of the Act as it stands and, additionally, would be permissible in accordance with the liberal interpretation that is to be applied to Acts of the Parliaments of Scotland prior to the Union of 1707.<sup>213</sup>

## **(b) The Prescription Act 1617**

### 12. Anent prescription of heritable Rights

OUR SOVERAIGNE LORD considering the great prejudice which his Majesties Lieges sustaines in their Lands and Heritages, not only by the abstracting, corrupting and concealing of their true evident, in their minority and lesse age, and by the amission thereof, by the injury of time, through War, Plague, Fire, or such like occasions: but also by the counterfeiting and forging of false evident and writs, and concealing of the same to such a time, that all means of improving thereof is taken away: whereby his Majesties Lieges are constitute in a great uncertainty of their heritable Rights, and divers pleas and actions are moved against them, after the expiry of thirty or fourty years: which nevertheless by the civil Law, and by the Lawes of all Nations, are declared void and uneffectual: And his Majestie according to his fatherly care, which his Majesty hath, to ease and remove the griefs of his Subjects, being willing to cut off all occasion of pleas, and to put them in certainty of their heritage, in all time coming: Therefore his Majesty with advice and consent of the Estates of Parliament, by the tennour of this present Act, statutis, findes and declares, That whosoever his Majesties Leiges, their Predecessors and authors have brooked heretobefore, or shall happen to brook in time comming, by themselves, their tennents, and others having their Rights, their Lands, Barronies, Annuelrents, and other Heritages, by virtue of their heritable infeftments, made to them by his Majestie, or others their superiours and authors, for the space of fourty yeares, continually and together, following and issuing the date of their saids infeftments, and that peaceably, without any lawful interruption made to them therein, during the said space of fourty yeares, that such persons, their Heirs and Successours shall never be troubled, persued, nor inquieted, in the heritable right and property of their saids lands and heritages foresaids, by his Majesty, or others, their superiours and authors, their Heirs and Successours, nor by any other person,

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<sup>213</sup> See: Fergus and Maher 'The Formal Sources of Scots Law' in *S.M.E.* vol 22 para 526; Fleming Wallace 'Interpretation of Statutes' in *S.M.E.* vol 12 para 1200.

pretending right to the same, By vertue of Prior infeftments, publicke or private, nor upon no other ground, reason or argument, competent of Law, except for falsehood: Providing they be able to shew and produce a Charter of the saids lands, and others foresaids, granted to them, or their Predecessours, by their saids superiours and authors, preceeding the entry of the saids fourty yeares possession, with the instrument of seasing following thereupon: or where there is no Charter extant, that they shew and produce instruments of Seasing, one, or moe, continued, and standing together for the said space of fourty yeares, either proceeding upon retours, or upon precepts of clare constat. Which rights his Majesty, with advice and consent of the Estates foresaids, findes, and declares, to be good, valide, and sufficient rights, (being claid with the said peaceable, and continual possession of fourty yeares) without any lawful interruption, as said is: for brooking of the heritable Right of the same lands, and others foresaid. And sicklike his Majesty with advice foresaid, statutes and ordaines, that all actions competent of the law, upon heritable Bands, Reversions, Contracts, or others whatsoever, either already made, or to be made after the date hereof, shall be pursued, within the space of fourty years, after the date of the same: except the saids Reversions be incorporate within the body of the infeftments, used and produced by the possessour of the saids lands, for his title of the same, or registered in the Clerk of Register his Book: in the which case seeing all suspicion of falsehood ceases most justly, the actions upon the saids Reversion, ingrossed and Registrated, ought to be perpetual: excepting always from this present Act, all actions of warrandize, which shall not prescribe, from the date of the Band, or Infestment, whereupon the warrandize is sought: but only from the date of the distresse, which shall prescribe, it not being pursued within fourty years, as said is. And siklike it is declared, that in the course of the saids fourty years prescription, the years of minority, and lesse age, shall no ways be counted, but only the years during the which the parties against whom the prescription is used and objected were majors, and past xxi. yeares of age. And his Majesty, being careful, that no person, who hath any just claime, bee prejudged of their actions, by the prescription of fourty yeares, already run and expired, before the date of this present Act: Hath with advise foresaid, granted full liberty and power to them, to intent their saids actions, within the space of thirteen years, next following the date hereof, which shall be als effectual, as if the same had been intended within the said space of fourty years, prescribed by this present Act. After the expiry of the which thirteen yeares, this present Act shall have full force and effect, after the tennour thereof in all points. And nevertheless it is declared, that the persons, at whose instance the foresaids actions shall be moved, and intended within the said space of thirteen yeares, shall not be compelled to insist in the saids actions, at the desire of their parties, upon the first summonds and citation thereof only, except that the saids first summonds be called and continued, and the defenders of new summond thereby: in the which case, and no otherways, it is declared, that they may be compelled to insist at the instance of the party, having entresse.

Translated<sup>214</sup> as:

## 12. Concerning the prescription of heritable rights

Analysis: the title to this Act is short and direct. There is little detail provided and it appears that the educated reader is assumed to be familiar with the concept of prescription, both positive and negative. This would appear to be clear evidence of the reception of the civilian understanding of positive prescription into Scots legal culture at this time.<sup>215</sup>

OUR SOVEREIGN LORD considering the great prejudice which his Majesty's subjects sustain in their Lands and Heritages, not only by the abstracting, corrupting and concealing of their true evidence, in their minority and under age, and by the omission thereof, by the injury of time, through War, Plague, Fire, or such like occasions: but also by the counterfeiting and forging of false evidence and writs, and concealing of the same to such a time, that all means of proving thereof is taken away: whereby his Majesty's subjects are placed in a great uncertainty regarding their heritable rights, and various pleas and actions are moved against them, after the expiry of thirty or forty years: which nevertheless by the civil Law, and by the Laws of all Nations, are declared void and ineffectual:

Analysis: as with the 1594 Act we are presented with a brief summary of the problems which the statute is intended to remedy. The picture which is given is more troubled than that of the background to the 1594 Act which mentioned a wider variety of less sinister causes for difficulties and disputes relating to titles. In particular the 1594 Act seems slightly more concerned with the loss, absence or perishing of documentation rather than the active and lengthy schemes of fraud and forgery to obtain land by dishonest means which are described in the 1617 Act. However, this alteration in focus does not signal a radical change in the essential problem to which both Acts are directed, namely that of deciding which documents are indispensable for a party who wishes to obtain an unchallengeable title and how long a period of possession is required to support such a defence.

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<sup>214</sup> My own translation making use of the sources mentioned at footnote 158 above.

<sup>215</sup> On the reception of civilian Roman law into Scots law see: Walker, *A Legal History of Scotland* volume 4 at 861-865; Robinson, Fergus and Gordon, *European Legal History* 228-233; D Baird Smith 'Roman Law' in *The Sources and Literature of Scots Law* (Stair Society, volume 1, 1936-1939) 171-182; R Evans-Jones 'Civil law in the Scottish Legal Tradition' in R Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (Stair Society, supplementary volume 2, 1995) 3-12; W M Gordon 'Roman Law in Scotland' in Evans-Jones (ed.), *The Civil Law Tradition in Scotland* 13-40.

With regard to the reference to thirty or forty years which is contained in the above section, this apparent ambiguity seems to reflect a genuine uncertainty in Scots law at this time. This will be further elucidated and commented upon below.<sup>216</sup>

Furthermore we can again see some degree of influence of Roman law as evidenced in the reference to the civil law as support for the enactment of this statute. However, as mentioned above, the Scots law of positive prescription of landownership seems to be radically different to the Roman-civilian tradition, partly with regard to the omission of good faith and *iusta causa*, but more significantly in the longstanding inclusion of the requirement for the use of a written deed in order to commence the prescriptive period.<sup>217</sup>

And his Majesty according to his fatherly care, which his Majesty hath, to ease and remove the concerns of his Subjects, being willing to cut off all occasion of pleas, and to put them in certainty of their heritage, in all time coming: Therefore his Majesty with advice and consent of the Estates of Parliament, by the substance of this present Act, statutes, finds and declares, That whosoever of his Majesty's subjects, their predecessors and authors have enjoyed, or shall happen to enjoy in time coming, by themselves, their tenants, and others having their rights, their lands, baronies, annual rents, and other heritages, by virtue of their heritable infeftments, made to them by his Majesty, or others their superiors and authors, for the space of forty years, continually and together, following and issuing the date of their said infeftments, and that peaceably, without any lawful interruption made to them therein, during the said space of forty years, that such persons, their heirs and successours shall never be troubled, pursued, nor inquieted, in the heritable right and property of their said lands and heritages, by his Majesty, or others, their superiors and authors, their heirs and Successors, nor by any other person, pretending right to the same, by virtue of prior infeftments, public or private, nor upon any other ground, reason or argument, competent of Law, except for falsehood:

Analysis: this is the first part of the substantive section of the Act which serves to remedy the issue in hand. The second part of the substantive section deals with the details of the documentation that is required under the Act. In this first part we are simply and clearly told that in order to provide certainty of title, a period of forty years possession following on infeftment is required. Whereas the 1594 Act stated that if forty years possession was accomplished, then the absence of certain documentation would not necessarily be problematic, the 1617 Act is more categorical in stating and

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<sup>216</sup> See chapter III, C, 4, (b).

<sup>217</sup> See Chapter II, E.



that infeftment followed by forty years possession will specifically render a title as unchallengeable, unless a challenge is raised on grounds of falsehood.<sup>218</sup> This is of course followed by the details of what is required for proving satisfactory infeftment, as will be examined below. Additionally, as the Registration Act<sup>219</sup> was introduced simultaneously, infeftment implicitly requires that the instrument of sasine must be registered or else no real right can be obtained.<sup>220</sup>

Furthermore, the 1617 Act actually serves to make the standard of possession more exacting in that the quality of peaceableness and the absence of lawful interruption are now added to that of continuity. This is perhaps more of a clarification than a deliberate attempt to make positive prescription more difficult, but it would nevertheless impose an increased burden on a party wishing to prove the completion of the necessary possession.

Additionally, it may be observed, that, as with the 1594 Act, the 1617 Act does not seem to provide a categorical statement that ownership is acquired after the forty year period has elapsed. It might again be contended that this indicates that the Act only provided for a strong form of limitation of actions rather than for the acquisition of ownership. However, as the Act again uses the terminology of heritable infeftment and proprietorship, it would appear that the Act is concerned with the assertion of ownership, albeit within the context of a feudal system of land tenure, rather than mere limitation of actions. Again, this interpretation of the Act appears to accord with the civilian concept of ownership which is followed in Scots law and is compatible with the feudal system which was still in place at the time of the 1617 Act. Such an interpretation seems possible on the wording of the Act as it stands and, additionally,

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<sup>218</sup> This appears to be the precursor to the term ‘forgery’ which is deployed in the 1973 Act.

<sup>219</sup> Registration Act 1617. On registration in Scots law see Ockrent, *Land Rights*. There does not seem to be sufficient evidence available to make a definite statement regarding the stimuli for the enactment of the Prescription Act 1617 and the Registration Act 1617. However, as they were enacted on the same day by the same sitting of the Parliament of Scotland, it would appear that they formed an overall project to clarify the law and improve confidence in landownership and transactions. See Ockrent, *Land Rights* 1-14 and 45-55. Furthermore, as Ockrent also comments, they appear to be part of the response to the turbulence occasioned during the sixteenth century on account of changes in landownership and the land redistribution which followed the Scottish Reformation in 1560. See Ockrent, *Land Rights* 45-55.

<sup>220</sup> Gretton, ‘The Feudal System’ in *S.M.E.* vol 18 para 99.

would be permissible in accordance with the liberal interpretation that is to be applied to Acts of the Parliaments of Scotland prior to the Union of 1707.<sup>221</sup>

Providing they be able to show and produce a Charter of the said lands, and others foresaid, granted to them, or their Predecessors, by their said superiors and authors, preceding the entry of the said forty years possession, with the instrument of sasine following thereupon: or where there is no Charter extant, that they show and produce instruments of sasine, one, or more, continued, and standing together for the said space of forty years, either proceeding upon retours, or upon precepts of clare constat. Which rights his Majesty, with advice and consent of the Estates foresaid, finds, and declares, to be good, valid, and sufficient rights, (being clad with the said peaceable, and continual possession of forty years) without any lawful interruption, as said is: for the enjoyment of the heritable Right of the same lands, and others foresaid.

Analysis: the Act here states that in the normal case of land held by conquest, that is other than that which is gained by inheritance,<sup>222</sup> the party who wishes to rely on positive prescription must be able to exhibit both the charter and the instrument of sasine which were granted to the party or their predecessor by their superiors and authors, prior to the commencement of the forty year period. However, in respect of land held as heritage, that is gained through inheritance, a more lenient standard is allowed<sup>223</sup> in that a charter is not essential but only the instruments of sasine covering the forty year period, provided that they are based on retours or precepts of clare constat. The wording of the Act suggests that it is only the instruments of sasine which need be produced and not the actual retours or precepts of clare constat.<sup>224</sup>

Although the Act makes this distinction between property gained through inheritance and property gained otherwise, the effect of the Act is the same. Certain documents are required. Forty years peaceable possession without lawful interruption must follow. Then the possessor's title cannot be challenged provided that the requisite documents are extant.<sup>225</sup> The fact that there seems to have been a lighter evidential burden under the Act in relation to parties who gained land through inheritance may suggest that it

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<sup>221</sup> See footnote 213 above.

<sup>222</sup> See Gretton, 'The Feudal System' in *S.M.E.* vol 18, para 56 for definition of conquest and distinction of conquest from heritage.

<sup>223</sup> *Stair* II.12.20; *Erskine* III.7.4.

<sup>224</sup> *Erskine* III.7.4.

<sup>225</sup> With regard to exhibiting the documentation, the Instruments of Sasine would have been registered in order for infeftment to occur and a real right to be obtained following the Registration Act 1617. As such, proof of their terms and existence would have been made considerably easier.

was thought to be less likely that an executry based title would have been forged. On the other hand it may represent a latent favouritism for those whose capital was based on ancient inheritance rather than upon recent commercial acquisition.

And similarly his Majesty with advice foresaid, statutes and ordains, that all actions competent of the law, upon heritable bonds, reversions, contracts, or others whatsoever, either already made, or to be made after the date hereof, shall be pursued, within the space of forty years, after the date of the same: except if the said reversions be incorporated within the body of the infeftments, used and produced by the possessor of the said lands, for his title of the same, or registered in the Book of the Clerk of Register: in which case, as all suspicion of falsehood ceases most justly, the actions upon the said reversion, engrossed and registered, ought to be perpetual: excepting always from this present Act, all actions of warrandice, which shall not prescribe, from the date of the bond, or infeftment, whereupon the warrandice is sought: but only from the date of the distress, which shall prescribe, it not being pursued within forty years, as said.

Analysis: here the 1617 Act is deployed to cover various situations which belong to the law of negative prescription rather than the law of positive prescription. On the face of it the first rule seems straightforward in that it is imposing a negative prescription of forty years on heritable bonds, reversions and contracts. However, the terminology used does not seem to make it clear whether the relevant action prescribes from the date of the creation of the agreement in question or from the date at which the action can be raised. Furthermore it is puzzling that the Act states that if a reversion is incorporated within an infeftment and then registered, then it is perpetual rather than subject to prescription, as the authenticity of such a reversion cannot be doubted. This terminology would suggest that in other cases the bonds, reversions and contracts prescribed from the date of creation rather than the date that the action could be brought. This may have served as an early stimulus to register bonds and reversions. Such an interpretation is supported by the fact that a much more recognisable and understandable provision is then made in respect of warrandice which only prescribes if not actioned within forty years from the date at which the breach is made. However, negative prescription is not the subject of this thesis and so examination of the issues arising from this segment of the Act will have to be made elsewhere.<sup>226</sup>

And similarly it is declared, that in the course of the said forty years prescription, the years of minority, and under age, shall in no ways be counted, but only the

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<sup>226</sup> On negative prescription see Johnston, *Prescription* 2.01-9.73.

years during which the parties against whom the prescription is used and objected were majors, and past 21 years of age. And his Majesty, being careful, that no person, who hath any just claim, be prejudiced of their actions, by the prescription of forty years, already run and expired, before the date of this present Act: Hath with advice foresaid, granted full liberty and power to them, to raise their said actions, within the space of thirteen years, next following the date hereof, which shall be as effectual, as if the same had been raised within the said space of forty years, prescribed by this present Act. After the expiry of the thirteen years, this present Act shall have full force and effect, after the substance thereof in all points. And nevertheless it is declared, that the persons, at whose instance the foresaid actions shall be moved, and raised within the said space of thirteen years, shall not be compelled to proceed with the said actions, at the desire of their parties, upon the first summons and citation thereof only, except that the said first summons be called and continued, and the defenders of new summoned thereby: in which case, and in no other way, it is declared, that they may be compelled to proceed at the instance of the party who has interest.<sup>227</sup>

Analysis: this final section of the Act deals with two exceptions to the running of the forty year prescription.

Firstly, the period of minority is to be discounted from the running of prescription so that a party under the age of 21 is not to be prejudiced by the operation of the doctrine. This exception is not the subject of this thesis, however, it merits comment to the extent of noting that it may be a laudable attempt to protect individual rights, but that it must have created a great deal of uncertainty for so long as it existed in the law of Scotland.

Secondly, an allowance of an additional thirteen years, presumably a period chosen to tally neatly with a final cut off date of 1630, is made for parties who would otherwise suffer loss due to the operation of the provisions of this Act at a date prior to 1617. This allowance is accompanied by details of procedural matters which may be involved in attempts to invoke this exception.

It has already been noted that the Prescription and Registration Acts of 1617 appear to have arisen in the context of a project to clarify the law and bring stability to landownership following the turbulence of the sixteenth century.<sup>228</sup> However, it would appear that the objective of clarity was more important than that of stability. This

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<sup>227</sup> The final word is here translated as ‘interest.’ However the Scots word ‘entresse’ is capable of being translated as either ‘interest’ or ‘entry’. The term ‘interest’ has been selected here as it seems to be more in keeping with the surrounding context.

<sup>228</sup> See footnotes 203 and 219 above.

suggestion is made on the basis that a long period was required in order to positively prescribe landownership. Furthermore, even if the forty year period had been attained prior to the 1617 Act, the additional period of thirteen years was allowed in order for objections to be raised prior to 1630. Hence, the 1617 Act cannot be characterised as simply a swift measure to crystallise landownership as it existed in 1617. If such a measure had been desired, it would appear sensible for much shorter time periods to be selected for the Act.

## 2. Tabular Comparison of the Two Prescription Acts

Prior to examining Hope's treatment of the two statutes it may be useful to set out a brief comparison of the 1594 Act and the 1617 Act in tabular form.

	Prescription Act 1594	Prescription Act 1617
Provides for reduction in number of documents essential to holding unchallengeable title.	Yes.	Yes.
Provides for forty year prescriptive period in order to hold unchallengeable title.	Yes.	Yes.
Provides clear statement that holding particular documents and possession of land for forty years will provide unchallengeable title in all circumstances other than falsehood.	No	Yes.

Requires continuity of possession for the forty year period.	Yes	Yes.
Requires peaceable possession for the forty year period.	No.	Yes.
Requires that the possession has not been lawfully interrupted during the forty year period.	No.	Yes.
Requires that the possession has been overt, during the forty year period.	No	No.
Makes exception in favour of the Crown.	Possibly/Unclear	No.
Makes exception in favour of minors, that is those who are under the age of 21.	Yes.	Yes.

<p>Makes exception, in the form of a thirteen year additional period in which to raise the appropriate actions, in favour of those who would otherwise lose out due to operation of the prescription enacted within the statute.</p>	<p>No.</p>	<p>Yes.</p>
<p>Makes exception in favour of those who have been victims of the falsification of the relevant deeds.</p>	<p>No.</p>	<p>Yes.</p>
<p>Subsequently subjected to the exceptions created by the Act known as the Ratification of the Acts of Interruption 1633 which sought to return land to the Crown which was considered to have been wrongfully granted.</p>	<p>No.</p>	<p>Yes.</p>

### 3. The Exceptions<sup>229</sup>

In Part VI, Title 43 of his *Major Practicks*, Sir Thomas Hope provides an account of the law of prescription.<sup>230</sup> In respect of positive prescription, the central provisions of the 1594 Act<sup>231</sup> and the 1617 Act<sup>232</sup> are specified. As the provisions of these Acts have already been noted above, it is appropriate to focus on the exceptions which Hope recorded as being used in defence against these Acts. The exceptions to both of these Acts are best treated together as this makes it easier to appreciate the clarity of the 1617 Act in contrast to the relative ambiguity of the 1594 Act.

#### (a) Possible exception to the 1594 Act – The Crown

In relation to the Crown, Hope states that prescription does not run against the king in respect of the 1496 Act which was entitled '*Anent reduction of retoures within thrie yeirs*'.<sup>233</sup> However, it is not clear whether Hope is making a general statement, applicable to all forms of prescription, or a specific statement, that merely relates to the negative prescription governed by this particular Act of 1496, when he writes that '*there is no prescription can pase against the king*'.<sup>234</sup>

A passage from Balfour's *Practicks*<sup>235</sup> is adduced<sup>236</sup> which states that '*thair rins na prescription aganis the King*.'<sup>237</sup> This may be read as being limited to the abovementioned Act of 1496 which regulated a particular form of negative prescription. Alternatively it is possible that this passage indicates that the king cannot be prejudiced by prescription in any circumstance. This issue, in respect of positive

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<sup>229</sup> For the full statement of the exceptions contained within the Acts please see above within the body of the two Acts. The exceptions which are specifically commented upon by Hope are discussed in this section.

<sup>230</sup> Hope, *Major Practicks* VI.43.

<sup>231</sup> Hope, *Major Practicks* VI.43.14.

<sup>232</sup> Hope, *Major Practicks* VI.43.15.

<sup>233</sup> Hope, *Major Practicks* VI.43.1. It seems that the Act is '*Anent summondis of errour or Inordinat process*,' James IV, 13<sup>th</sup> June 1496, Chapter 6. The reference seems to be incorrect in Hope (Hope, *Major Practicks* VI.43.1) as 1494 c57 and in Balfour (Balfour, *Practicks* 146-147) as James IV fol 102 cap 90 13 June 1594.

<sup>234</sup> Hope, *Major Practicks* VI.43.1.

<sup>235</sup> Balfour, *Practicks* 146-147.

<sup>236</sup> Hope, *Major Practicks* VI.43.1.

<sup>237</sup> Balfour, *Practicks* 146-147. Balfour lists three cases in support of this passage: 10 julij, 1545 *Quene contra Laird of Drumlargall*; 25 Feb 1502, *the King contra Alexander Erle of Buchane*; 19 Decemb 1531, *The Laird of Innes contra L. Finlater*.



prescription, was not clearly covered by the 1594 Act. However, it was settled by the 1617 Act which specifically included the king as being a party against whom prescription may run. This development had the consequence that it was necessary for a statute to be enacted in 1633 in order to institute an exception to positive prescription, albeit in a very particular situation, in favour of the Crown.<sup>238</sup>

### **(b) Exception to 1594 Act and 1617 Act – Minors**

The next exception to be analysed is that which is made in respect of minors under the age of 21. This exception is clearly stated by Hope when describing the provisions of the 1617 Act.<sup>239</sup> It is notable that the exception does not seem to have been made in the 1594 Act, either in its text or in Hope's summary of the Act.<sup>240</sup> However Hope may suggest that the exception would have held good for the 1594 Act by virtue of the following statement:

Contra ignorantem, aut non valentem agere, nulla currit prescriptio;<sup>241</sup> and therfor it is a good repley against prescription that the partie obtained the knowledge of his right efter the outrunning of the prescriptione: [Balfour Pr. Tit. 'anent prescription,' c.6].<sup>242</sup>

The authority which is referenced from Balfour can be read narrowly as applying only to instances of negative prescription. However when read in conjunction with the *Leges Quatuor Burgorum*,<sup>243</sup> which is cited by Balfour<sup>244</sup> and which allows for the exception in respect of minors, it is possible that both Balfour and Hope may have taken it as being the case that the exception for minors would exist in all instances of prescription or limitation.

The passage from Hope relating to the exception for minors is one which may also be read as suggesting an exception for absentees. This would again be supported by the passage from Balfour which excepts both those who are outwith the realm and those

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<sup>238</sup> The Ratification of the Acts of Interruption 1633. See below at Chapter III, C, 3, (d).

<sup>239</sup> Hope, *Major Practicks* VI.43.15 and Hope, *Major Practicks* IV.9.28.

<sup>240</sup> Hope, *Major Practicks* VI.43.14.

<sup>241</sup> Translated as meaning that prescription does not run against those who are in a state of ignorance or who are unable to act. My own translation making use of The Oxford Latin Dictionary (1968).

<sup>242</sup> Hope, *Major Practicks* VI.43.3.

<sup>243</sup> *Leges Quatuor Burgorum*, Title 10, in Thomson and Innes (eds), *The Acts of the Parliament of Scotland* volume 1 at 334-335. See discussion above at Chapter III, B, 1 and 3.

<sup>244</sup> *Leges Quatuor Burgorum*, Chapter 10 in Balfour, *Practicks* 159. See discussion above at Chapter III, B, 1 and 3.

who are in prison.<sup>245</sup> However there does not seem to be any mention of such an exception for absenteeism, or for imprisonment, in either the 1594 Act or the 1617 Act. As the 1617 Act specifically allowed the exception for minors, together with another exception in the form of a thirteen year additional period in which claims could be raised by those who would have otherwise lost out due to the provisions of this Act, it can probably be argued that absenteeism was not a valid exception to the provisions of the 1594 or 1617 Acts at the time of Hope's writing.

### **(c) Exception to 1617 Act – Falsehood**

In another section, Hope makes the assertion that:

The action of exception of falsehood is never prescribed, bot is competent notwithstanding of whatsoever prescription of time; and reserved in the act anent prescription of heritable rights: 1617 c.12.<sup>246</sup>

This exception does not seem to be mentioned in the 1594 Act and is therefore only a matter for discussion with regard to the 1617 Act. This exception may be that which we would understand in the modern law under the heading of forgery.<sup>247</sup> However, it is possible that the term “falsehood” could be construed very widely as importing a definite and active requirement of good faith into the Act and this would perhaps go some way to explaining Bell's understanding of good faith in relation to positive prescription of landownership in Scotland.<sup>248</sup> However, Bell's view does not seem to accord with the general understanding of this point in Scots law.<sup>249</sup> Stair<sup>250</sup> and Erskine<sup>251</sup> do not seem to hold to the position which was later advanced by Bell, and it has never been argued that the 1973 Act abolished a requirement for good faith in the Scots law of positive prescription.

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<sup>245</sup> *Leges Quatuor Burgorum*, Chapter 10 in Balfour, *Practicks* 159. See discussion above at Chapter III, B, 1 and 3.

<sup>246</sup> Hope, *Major Practicks* VI.24.47.

<sup>247</sup> 1973 Act s 1.

<sup>248</sup> Bell *Principles* §2004, §2008 and §2010.

<sup>249</sup> See discussion above in Chapter II, C, 3 and Chapter II, E. See in particular: *Duke of Buccleuch v Cunynghame* (1826) 5 S. 53; Bankton II.12.49 and II.12.79; Gloag & Henderson, *The Law of Scotland* 34.33.

<sup>250</sup> Stair II.12.11 and 19.

<sup>251</sup> Erskine III.7.15.

#### **(d) Exception to the 1617 Act – The Ratification of the Acts of Interruption 1633**

A particular exception narrated is that of Act 12 of 1633 referred to as “The Ratification of the Acts of Interruption”<sup>252</sup>. Hope had particular involvement with the production of statute at this time<sup>253</sup> and the primary objective of this Act of 1633 seems to have been to interrupt the running of the 1617 Act in relation to a number of situations which were considered as being prejudicial to the interests of the Crown. This seems to have been part of a wider programme of legislation to return land to the Crown which had been granted, from the patrimony of the Kirk, by James VI.<sup>254</sup> This exception is very specific to the socio-religious transformations that characterised the sixteenth and seventeenth centuries in Scotland. Furthermore, apart from instances in which it may have been invoked by the Crown, this particular exception does not seem to have had much significance for the normal operation of the Prescription Act 1617. Yet, it might serve to provide circumstantial evidence for the argument, partially suggested by Ockrent,<sup>255</sup> but principally advanced by Wightman, that the 1617 Act was the fruit of aristocratic desire to consolidate landholdings appropriated from the church.<sup>256</sup>

#### **4. The Ambiguities between the 1594 and 1617 Acts**

It was seen above that,<sup>257</sup> under the provisions of the *Leges Quatuor Burgorum*, there appears to have been some partial customary provision in respect of limitation of actions regarding landownership in Scots law prior to the Prescription Act 1594. Although these provisions would appear to have been eliminated through desuetude<sup>258</sup> or implied repeal<sup>259</sup> the possible ambiguity surrounding their fate<sup>260</sup> is in some sense reflected in the general ambiguity which seems to have existed in respect of the early Scots law regarding the precursors to the positive prescription of landownership. In

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<sup>252</sup> T Thomson and C Innes (eds), *The Acts of the Parliament of Scotland* volume 5 (1870) at 28-31.

<sup>253</sup> See Hope, *Major Practicks*, Introduction pages x-xi.

<sup>254</sup> See Hope, *Major Practicks*, Introduction pages x-xi.

<sup>255</sup> See Ockrent, *Land Rights* 45-55. See discussion above at Chapter III, C, 1, (b).

<sup>256</sup> Wightman, *The Poor Had No Lawyers* 23-29. See discussion above at Chapter III, C, 1, (b).

<sup>257</sup> See discussion above at Chapter III, B, 1 and 3.

<sup>258</sup> See discussion above at Chapter III, B, 1 and 3.

<sup>259</sup> See discussion above at Chapter III, B, 1 and 3.

<sup>260</sup> See discussion above at Chapter III, B, 1 and 3.

particular, as will be seen in this section, early Scots law failed to observe a clear and settled temporal requirement in respect of the precursors to the positive prescription of landownership. Additionally, and confusingly, there was an application of both statutory and non-statutory customary law in respect of the law which foreshadowed positive prescription in Scotland prior both to the 1594 Act and the 1617 Act. These issues and other points of confusion are now discussed.

### **(a) Ambiguity – Which deeds were essential for conveyancing?**

The views of Craig are cited by Hope in relation to the argument that there was a good title to land even if the charter had been lost, provided that the precept of sasine and instrument of sasine were extant and the land in question had been possessed for a long time and it was proven that service had been continuously rendered or that the feuduty had been regularly paid.<sup>261</sup> This view may relate to the law prior to the 1594 Act but this is not explicit in the texts. This is of importance as the statement does not strictly comply with either the provisions of the 1594 or 1617 Acts.<sup>262</sup> The ambiguity of the time requirement is particularly manifest in the fact that possession must be for an unspecified period which must only meet the criterion of being ‘a long time.’

In more orthodox passages, the 1594 Act is quoted by Hope in support of the position that a precept of sasine need not be produced after 40 years possession on charter and sasine.<sup>263</sup> This is contrasted with a situation in which the 1594 Act could not apply, even though the 40 years had been fulfilled and an instrument of sasine was in existence.<sup>264</sup> This was presumably on the basis that the instrument existed but the charter was absent. Therefore the precept had to be produced.<sup>265</sup> The 1594 Act is also

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<sup>261</sup> Hope, *Major Practicks* III.6.2 and Craig, *Jus Feudale* 2.4.12.

<sup>262</sup> 1594 Act; 1617 Act. Craig’s *Jus Feudale* is examined below. It was written slightly prior to Hope’s *Practicks* but does not appear to have been published until after the time of Hope’s *Practicks*. The *Jus Feudale* was printed in 1655 but is thought to have been completed in 1605 or 1606. See: Walker, *A Legal History of Scotland*, volume 4 at 360-361; Gretton, ‘The Feudal System’ in *S.M.E.* vol 18, para 44. Hope’s *Practicks* are examined first in this thesis as this preserves the continuity of examination of the Practick books which began with Sinclair and Balfour above. See discussion above at Chapter III, B, 1, 2 and 3. This continuity is seen in the fact that Hope is focussed on the Scots law of his time, including actual caselaw, whereas Craig’s *Jus Feudale* is more of an abstract theoretical work, which is largely concerned with the wider European context of Feudal law rather than with Scots law.

<sup>263</sup> Hope, *Major Practicks* III.6.25.

<sup>264</sup> Hope, *Major Practicks* III.6.33.

<sup>265</sup> Hope, *Major Practicks* III.6.33 citing *Laird of Drumlanrig v Wemyss* (1615) Mor 10773.

referred to with regard to situations in which the absence of procuratory of resignation was unproblematic as the appropriate charter and instrument were both present and 40 years possession had been accomplished<sup>266</sup>

However, in a different passage it is related that the 1594 Act was interpreted in a way which allowed for it to be relied upon despite the fact that the relevant instrument of sasine which would normally have been essential, could not be produced. It was held that the Act could still be relied upon provided that the requisite charter was produced and, in place of the instrument of sasine, the defender proved a preceding contract along with other circumstances.<sup>267</sup> This case was dated at June 1611 and therefore obviously falls between the two Acts. This seems to be indicative of a situation in which the law was not being applied consistently and which was perhaps an environment in which the 1594 Act was insufficient to meet the needs of the time and which therefore necessitated the production of the Act of 1617. Unfortunately there is no case reference given by Hope in respect of his discussion of this particular issue so there does not seem to be much likelihood of ascertaining more information with regard to this instance.<sup>268</sup> This is therefore best viewed as simply being good supporting evidence for the climate of ambiguity which existed between the Acts and which allowed for such occasions of legal creativity. The more categorical approach of the 1617 Act may have helped to prevent such confusion although later issues of interpretation did occur and these will be examined in full during the course of this thesis.

### **(b) Ambiguity - Common Law and Statutory Bases for Positive Prescription with varying temporal requirements?**

With regard to the importance of statute to the law of prescription Hope states that:

Found quod in regno Scotiae non currit praescriptio, nisi in obligationibus ex actu parliament...<sup>269</sup>

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<sup>266</sup> Hope, *Major Practicks* III.5.7.

<sup>267</sup> Hope, *Major Practicks* VI.43.21.

<sup>268</sup> Session papers do not exist for this early period of Scots legal history.

<sup>269</sup> Hope, *Major Practicks* VI.43.4.

Translated<sup>270</sup> as:

Prescription does not run in the Kingdom of Scotland, except for obligations, by Act of Parliament...

This may be true now. However, the law which foreshadowed the positive prescription of landownership in Scots law seems to have been more ambiguous.<sup>271</sup> In particular there is an interesting allowance for a strong form of limitation, or possibly even a form of positive prescription, to be accomplished by a period of continuous possession, without the need for any foundation writ, in respect of areas described as forming 'kirklands.' This possibility, which is not based on parliamentary statute, is suggested in the following quote:

The old possessors of kirklands should be preferred to all wthers in granting confirmations of ther fewes, they doing diligence in dew tyme: 1584 c.7.<sup>272</sup>

This possibility then becomes concrete under the heading '*Statutes of Session*' when Hope writes:

Possession of kirklands be the space of 30 or 40 yeirs continuallie, quher evidents ar not extant, to be equivalent to mortification: Stat. Sess., 16 November 1612...<sup>273</sup>

This is then given a more detailed treatment when Hope recounts:

The lords declaired that they wold decyde matters concerning kirklands, quher evidents wer not extant, be the parties' possession be the space of 30 or 40 yeirs continuallie, imediatlie preceeding the intending of their actions or proponing of their defences, to be proven be famous witnesses: 16 December 1612...<sup>274</sup>

In this instance the Court did not apply the 1594 Act. This may be an example of judicial ingenuity in the form of a statute of session<sup>275</sup> being created in order to deal with a case in which no deeds were present. However this would surely have produced

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<sup>270</sup> My own translation making use of The Oxford Latin Dictionary (1968). I am grateful to Professor George Gretton of the University of Edinburgh for improving my translation of this quotation.

<sup>271</sup> This does not seem to have been previously acknowledged. See for instance, Johnston, *Prescription* 1.24.

<sup>272</sup> Hope, *Major Practicks* III.21.17. However it seems that the statute should be 1584 c.8 entitled '*Act for confirmation of the fewis of kirklandis alsweill of auld as new*' which seems to be James VI 1584 20<sup>th</sup> August 1584.

<sup>273</sup> Hope, *Major Practicks* III.21.19. See also Hope, *Major Practicks* VI.43.20 mentioned below.

<sup>274</sup> Hope, *Major Practicks* VI.43.20.

<sup>275</sup> Hope, *Major Practicks* III.21.19. This would seem to be an Act of Sederunt. On Acts of Sederunt see: Fergus and Maher 'The Formal Sources of Scots Law' in *S.M.E.* vol 22 para 528.

a situation in which, despite the existence of the 1594 Act, there would have effectively been two systems of positive prescription or limitation in place at this time in Scots law. The principal system appears to have existed in the form of the 1594 Act governing most areas of land; whilst a secondary system covered the kirklands under the rules stipulated in the above case.

It is also interesting that the temporal requirement of the rules for the kirklands is unclear as between thirty or forty years. This variation in time limits may have its source in the Roman law of Justinian<sup>276</sup> in which time limits varied in accordance with the residence of the parties involved in a case.<sup>277</sup> Such a tradition of ambiguity and flexibility in respect of the time requirement is also suggested by what appears to be the only possible reference to positive prescription in Hope's *Minor Practicks* which states:

And of old the Sasines within Burgh, clade with Possession 40 or 50 Years, were counted irreduceable; and now the same have like Effect by Act of Prescription.<sup>278</sup>

Returning to the *Major Practicks*, the operation of the rules for the temporal requirements become particularly intriguing, under the heading of *Practicae Observationes*:

In ane matter moved betuixt the Earle of Home and the Lord Bacleugh concerning certaine lands in Liddisdail acclamed to pertain to the Abbey of Jedburgh, the lords fand that 30 yeirs' possession in ecclesiasticis should be ane sufficient tittle, in place of the old custome quhilk requyred 10 yeirs befor the reformation: 11 December 1612 [M.7972].<sup>279</sup>

These passages suggest that in respect of kirklands, the history of which is complicated,<sup>280</sup> there may have existed an allowance for a customary system<sup>281</sup> of

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<sup>276</sup> See discussion above in Chapter II, D. Such distinctions based in Roman law may have been mediated into the Scottish context through the influence of canon law in the Middle Ages. See Robinson, Fergus and Gordon, *European Legal History* 228-232.

<sup>277</sup> This allowance of intra system plurality is preserved in modern civilian systems such as those of France (Art 2265 *Code civil*) and Spain (Art 1957 *Codigo civil*).

<sup>278</sup> Hope, *Minor Practicks* para 238.

<sup>279</sup> Hope, *Major Practicks* III.21.27. The citation is for *Earl of Home v Lord Buccleugh* (1612) Mor 7972. The case report is brief but appears to confirm the statement made by Hope. This also appears to be confirmed by Stair II.3.37.

<sup>280</sup> Gretton, 'The Feudal System' in *S.M.E.* vol 18, para 66.

<sup>281</sup> Which was modified and statutorily recognised in an Act of Sederunt. See above at footnote 275.

positive prescription of land without any foundation writ. In particular, it seems that at the time of the Reformation in 1560 it may have been possible to acquire kirklands through possession alone. The significance of this may have been considerable as it is thought that as much as half of Scotland was held by the church prior to the Reformation.<sup>282</sup>

The rules which were described by Hope seem to have later received a partial explanation and justification within the Institutional writings of John Erskine of Carnock.<sup>283</sup> In particular, Erskine narrates that Scots law observed a rule of canon law through which churchmen gained a presumptive title to subjects which they possessed for thirteen years as part of their benefice.<sup>284</sup> However, as this presumption could be rebutted by contrary evidence, Erskine does not count this as a true form of positive prescription.<sup>285</sup> Following this narration, along with a discussion of related rules regarding benefices,<sup>286</sup> Erskine then states:

The rights of churchmen having been exposed to many accidents at the Reformation, the court of session, for some time subsequent to that period, when no title-deeds appeared, decided questions regarding church-lands, according to the possession at the time of the Reformation, and for ten years preceding it, and allowed a proof of the possession by witnesses. A proof of this kind having become impracticable, an act of sederunt was made, Dec. 16. 1612, whereby the Lords declared, that in time to come they would decide all questions with regard to church-lands, and livings pertaining to churchmen, by their possession for thirty years immediately preceding the suit concerning them...<sup>287</sup>

It therefore seems to be the case that the rule which is related in Hope's *Major Practicks*<sup>288</sup> is to some extent explicable as deriving from the special canon law rules regulating presumptions in favour of churchmen that are discussed by Erskine.<sup>289</sup> This background of separate rules for ecclesiastical property combined with the great shift in culture and in landownership in Scotland at the time of the Reformation to create a situation in which the Court of Session appears to have developed a rule that

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<sup>282</sup> Gretton, 'The Feudal System' in *S.M.E.* vol 18, para 66.

<sup>283</sup> Erskine III.7.33-34. This is also supported by Stair II.3.37.

<sup>284</sup> Erskine III.7.33. The term benefice is understood as meaning an ecclesiastical appointment for which property is provided in order to support the incumbent.

<sup>285</sup> Erskine III.7.33.

<sup>286</sup> Erskine III.7.33-34.

<sup>287</sup> Erskine III.7.34. This is supported by Stair II.3.37.

<sup>288</sup> Hope, *Major Practicks* III.21.27.

<sup>289</sup> Erskine III.7.33-34.



possession dating from ten years prior to the Reformation was sufficient to decide title to land in disputes regarding the kirklands. Erskine stated that the thirteen year presumption which originally existed in respect of benefices was a mere presumption and was therefore not a true form of positive prescription.<sup>290</sup> However, it would appear that the rule which was subsequently developed by the Court of Session in respect of kirklands was not narrated by Erskine as a mere presumption<sup>291</sup> and was not recounted by Hope<sup>292</sup> as functioning as a presumptive formula. Rather, it would seem that this judicially created regime may have been a form of positive prescription, which existed independently of any statute and was applicable specifically to the kirklands. The potential importance of this rule may be seen in the fact that the two litigants in the case of *Earl of Home v Lord Buccleugh* are two very significant landowning members of the aristocracy, who were engaged in a dispute over lands which had been held by a prosperous monastery prior to the Reformation.

## 5. Summary

The period between 1594 and 1617 seems to have been one in which there was no clear unitary system of positive prescription of landownership in Scots law. There appears to have been a fluidity regarding the temporal requirement for positive prescription. Furthermore, there appears to have been a persistence of customary law which was in turn modified and recognised by the Court of Session in an Act of Sederunt, but not by Parliament in an Act of Parliament. This appears to have reflected the state of the law prior to 1594 and to have continued until the Prescription and Registration Acts of 1617.

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<sup>290</sup> Erskine III.7.33.

<sup>291</sup> Erskine III.7.34.

<sup>292</sup> Hope, *Major Practicks* III.21.27.

## **D. The law between the 1594 Act and the 1617 Act - with particular reference to the writings of Sir Thomas Craig**<sup>293</sup>

Sir Thomas Craig's *Jus Feudale* is useful as a further illustration of the somewhat confused state of Scots law at this time. As will be seen below, Craig asserts that positive prescription had very little existence in Scots law prior to, and even following, the 1594 Act. This appears to be in some degree of contradiction to the material from Hope's *Major Practicks* which was examined above. However, despite Craig's perception that positive prescription was largely absent from Scots law during his time, he still provides a detailed account of how the doctrine should operate with regard to feudal law.

### **1. The justification for positive prescription in feudal law**

Craig makes specific mention of positive prescription as being:

a mode (in the general Feudal Law) of constituting as well as of acquiring a feu, which is inadequately recognised in the Law of Scotland.<sup>294</sup>

And also:

'In Scotland, however, prescription is but little recognised: which many people think a pity...'<sup>295</sup>

It can thus be seen that Craig is clearly an advocate for the benefits of the doctrine of positive prescription. His choice of language is indicative of his view that positive prescription should be a feature of Scots law and indeed of any sensible legal system.

Whilst noting the omission from Scots law, Craig states that positive prescription should be effective in the circumstance:

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<sup>293</sup> Craig, *Jus Feudale*. The *Jus Feudale* is understood to have been completed around 1605 or 1606 and published in 1655. See Walker, *A Legal History of Scotland*, volume 4 at 360-361; Gretton, 'The Feudal System' in *S.M.E.* vol 18, para 44. It is understood to be the case that Lord Clyde's translation of Craig, *Jus Feudale* is sometimes imperfect in its rendering of the Latin into English. An example of this is highlighted below at footnote 298. I am grateful to Professor George Gretton of the University of Edinburgh for drawing my attention to these translation issues.

<sup>294</sup> Craig, *Jus Feudale* 2.1.8-10 and 2.2.1.

<sup>295</sup> Craig, *Jus Feudale* 2.1.8.

‘that a right to the beneficial estate in lands can be prescribed by a possessor who actually performs the service of a vassal and acknowledges the owner as his superior in the lands - that is, provided he possesses as vassal’.<sup>296</sup>

This seems to be a statement of how the law should operate rather than a statement of how the law actually functioned in Scotland at that time. We see here the theoretical nature of much of Craig’s writing. He appears to be arguing that constructive work was needed in Scots law to bring positive prescription from the hypothetical to the actual.

However, in an acknowledgement that Scots law may be entitled to ignore prescription, Craig writes:

Prescription was never accepted in the fullest sense by the general Feudal law; and there is therefore room for the view that, in rejecting the doctrine of prescription, the Law of Scotland is not necessarily inconsistent either with the written Feudal Law or with general legal principle.<sup>297</sup>

This gives some leeway for the Scots law position within the overall *ius commune* approach to the relationship of feudalism and positive prescription. Nevertheless, Craig continues to press the case for the inclusion of the doctrine of positive prescription within Scots law in this area. He writes:

I shall therefore express my own opinion upon the matter which agrees both with the Book of the Feus and the commentators thereon. The question is, shortly, whether the property of the beneficial estate in land can, in conformity with the general Feudal Law, be prescriptively acquired by long possession. My answer is that it should be capable of being both acquired and constituted in that way, provided the superior knowingly suffers the possession to continue for thirty years in the case of a lay feu, or for forty years in the case of a feu of church lands, and provided also that the possessor has throughout those years either performed service, or been ready and willing to perform it, and that no failure in such performance has occurred through any fault of his. The law would rightly penalise the inaction of a superior who after so long a period of years maintained that the possession of the feu was contrary to his will; for he has chosen to remain silent in full knowledge of the facts when he might easily have challenged the possessor at any time. This opinion is not inconsistent with general legal principle; and, if it had been adopted as the law in Scotland, the cause of justice would not have suffered.<sup>298</sup>

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<sup>296</sup> Craig, *Jus Feudale* 2.1.9.

<sup>297</sup> Craig, *Jus Feudale* 2.1.8.

<sup>298</sup> Craig, *Jus Feudale* 2.1.9. As mentioned at footnote 293, it is understood to be the case that Lord Clyde’s translation of Craig, *Jus Feudale* is sometimes imperfect in its rendering of the Latin into

The writings of Craig on this topic are thus important both in relating the position of Scots law which he regards as not recognising positive prescription as a means of constituting and of acquiring a feu, and in relation to his understanding of the theoretical jurisprudential justifications for the existence of the doctrine in any given legal system. In particular, Craig identifies the proper application of positive prescription as either being consistent with principles of justice or at least not in conflict with them.<sup>299</sup>

With regard to the issue of the temporal aspect of the doctrine, the above quote is also significant in providing an additional set of possible time limits for positive prescription. These time limits appear to invert the rules examined above which Sir Thomas Hope described in relation to the positive prescription of kirklands. Such variation in the discussion of the mechanics of positive prescription again points to the fluctuating understanding of this doctrine in this period.

Furthermore, the above passage is also slightly curious in that the hypothetical scenario which is envisaged is rather hard to imagine existing as a practical reality. We are asked to visualise a situation in which a party is functioning as a vassal for thirty or forty years. The superior is supposedly aware of this phenomenon and does not make a formal grant of the feu or raise any objection to what is taking place. This scenario appears somewhat unlikely. However, it is nonetheless interesting as it is demonstrative of the fact that Craig was an advocate of allowing positive prescription to occur without foundation on a written document to which the possession is referable.

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English. An example of this is seen in the use of the terminology of 'beneficial estate' in this particular quotation and in the quotation given above at footnote 296. It is understood that this terminology does not reflect the original Latin. Whilst it appears that the translation inaccuracies may not obscure the essential meaning of the quotation, it is regrettable that the translation is not more accurate. I am grateful to Professor George Gretton of the University of Edinburgh for drawing my attention to these translation issues.

<sup>299</sup> This contrasts with Stair's view on the relation of prescription and principles of equity. See Stair II.12.9 and 14.

He is therefore representative of a path which Scots law did not elect to follow,<sup>300</sup> but which may once have been quite possible, even in the period of Craig's own writing.<sup>301</sup>

Returning to the justification for positive prescription, Craig makes the following observations with regard to the issue of good faith:

The general opinion of lawyers is that proof of good faith as the foundation of prescriptive possession is of little importance; for a presumption of good faith arises from the long endurance of the possession and the acquiescence of the superior, and if the possession be obtained in good faith that is enough.<sup>302</sup>

Here Craig seems to follow the Roman law formulation that the possession only requires to be commenced in good faith.<sup>303</sup> Although it appears rather contradictory that this is coupled with the presumption that if the prescriptive period is sufficiently long then the good faith is to be presumed from the length of the prescriptive period.

The argument regarding the implicit nature of the good faith as demonstrated by the length of the prescriptive period is one which appears to anticipate the position of Stair and Erskine and may have been deployed by them in an attempt to bridge the gap between the Scots law position and the Roman law emphasis on good faith. However, these views do not appear to accurately represent the Scots law understanding of positive prescription, at least since the Prescription Act of 1617.<sup>304</sup>

## 2. The necessities for the creation of a new feu by prescription

Elsewhere, Craig states the three conditions that were necessary to create a new feu by prescription under the General Feudal Law<sup>305</sup>. Firstly the possession had to be carried

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<sup>300</sup> *Grant v Grant* (1677) Mor. 10876; *Andersons v Lows* (1863) 2 M 100; *McCowan v Shields and Others* (1867) 4 SLR 179; *Edmonstone v Jeffray* (1886) 13 R 1038; *Johnston v Fairfowl* (1901) 8 SLT 480; *Houstoun v Barr* 1911 SC 134; *Duke of Argyll v Campbell* 1912 SC 458; *Hamilton v Ready Mix Concrete (Scotland) Ltd* 1998 GWD 35-1819; Gretton and Reid, *Conveyancing* 7.18-7.25; Millar, *Prescription* 40-41.

<sup>301</sup> See above at: Chapter III, B, 1 and 3; Chapter III, C, 4, (b).

<sup>302</sup> Craig, *Jus Feudale* 2.1.10.

<sup>303</sup> See above at Chapter II, C, 3 and Chapter II, D and E.

<sup>304</sup> See discussion above in Chapter II, C, 3 and Chapter II, E. See in particular: *Duke of Buccleuch v Cunynghame* (1826) 5 S. 53; Bankton II.12.49 and II.12.79.

<sup>305</sup> Craig, *Jus Feudale* 2.2.1. Bearing in mind the European outlook, scope and significance of Craig's work, it is understandable that he should treat feudalism so fully, even though he was a Scottish writer. Craig was writing a general treatment of feudalism in the *ius commune* with a particular interest in Scotland. See Gretton, 'The Feudal System' in *S.M.E.* vol 18, para 44. See also Robinson, Fergus and Gordon, *European Legal History* 234.

out by the possessor ‘*as being feudally entitled thereto.*’ The possession therefore had to be accomplished in the character of a vassal, not in the character of a tenant or security holder.

Secondly, the possession had to be for a continuous period of thirty years.<sup>306</sup> Craig states that:

No actual title was required as the foundation of such possession: at any rate the possessor for the prescriptive period was not bound to produce any, in as much as the law always presumed a title.<sup>307</sup>

Thirdly:

...there must have been at least one tender of feudal service during the prescriptive period...<sup>308</sup>

The fact that Craig holds that one offer would be sufficient might appear to be a lenient allowance for positive prescription based on a minimal level of contact between the vassal and superior. However, this might make sense in the context of the feudal system in which only one tender of feudal service might be required as *reddendo* by a vassal to a superior over a long period of time.<sup>309</sup> Yet, this should perhaps be treated with caution as it would seem that further evidence of possession would be required by the vassal in order to rely on positive prescription.<sup>310</sup> Whilst this issue may have been simplified with the abolition of the feudal system, with the result that concepts such as *reddendo* are no longer a part of Scots law, the standard of possession which must be satisfied in respect of positive prescription of landownership is something which remains a live issue in Scots law today.<sup>311</sup>

These are the three requirements which would have had to be satisfied in order for a novel feu to be constituted and acquired by prescription. However, as mentioned above, Craig is writing in his capacity as a commentator on the western European feudal tradition. He is writing in a theoretical capacity rather than as a narrator of the

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<sup>306</sup> Craig, *Jus Feudale* 2.2.1.

<sup>307</sup> Craig, *Jus Feudale* 2.2.1.

<sup>308</sup> Craig, *Jus Feudale* 2.2.1.

<sup>309</sup> On *reddendo* see Gretton, ‘The Feudal System’ in *S.M.E.* vol 18, para 63.

<sup>310</sup> See for instance Erskine III.7.3.

<sup>311</sup> *Hamilton v McIntosh Donald Ltd* 1994 SLT 793; R Rennie “Possession: nine tenths of the law” (1994) SLT (News) 261; Gretton and Reid, *Conveyancing* 7.22.

law of Scotland in this area. This is manifest in Craig's final statement in the paragraph on this point:

A feu so acquired would have to be regarded as conquest in Scotland, if we adopted the law of prescription.<sup>312</sup>

However, it should not be assumed that Craig's writing is irrelevant on this topic. In particular, as we have already observed, his treatment of the topic of good faith may be something which influenced later institutional writers such as Stair and Erskine in relation to positive prescription.

### **3. Craig's awareness of positive prescription in Scots law**

As mentioned above in relation to the works of Sir Thomas Hope,<sup>313</sup> Craig expresses the view that positive prescription can help to remedy a situation in which a charter has been lost, but in which the precept and instrument of sasine are still available.<sup>314</sup> However it is difficult to be certain of the application of this statement given Craig's abovementioned view that positive prescription is not actually recognised in Scots law. This is again demonstrative of the state of ambiguity that was manifest in the law of positive prescription in Scotland at this time. This ambiguity is further demonstrated by the fact that the view that is expressed by Craig and Hope does not appear to accord with the 1594 Act and it is therefore arguable that they are proposing a customary rule in addition to the statutory regime which was then in existence.

Lastly, as mentioned above, it is important to note that, although the *Jus Feudale* was printed in 1655, the fact that it was actually completed in 1605 or 1606<sup>315</sup> is manifest in the following statement:

It has recently been enacted by the estates that after forty years' possession the vassal need produce neither procuratory nor instrument of resignation, nor precept of sasine, provided he – being the person in whose favour these writs were made – has been in continuous possession, and that charters and sasines covering the said period are extant (1594, c.218).<sup>316</sup>

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<sup>312</sup> Craig, *Jus Feudale* 2.2.1. See footnote 222 above for definition of conquest and distinction of conquest from heritage.

<sup>313</sup> Hope, *Major Practicks* III.6.2.

<sup>314</sup> Craig, *Jus Feudale* 2.4.12.

<sup>315</sup> See footnote 293 above.

<sup>316</sup> Craig, *Jus Feudale* 2.4.12.

#### 4. Summary

Craig was aware that positive prescription did operate under some circumstances in Scots law, particularly following the enactment of the Prescription Act 1594. However, he seems to be unaware of the form of positive prescription which Hope recounted as existing from around the time of the Scottish Reformation. It might be argued that Hope's actual examples should be preferred to Craig's work which seems to be heavily focussed on the theoretical and the European rather than the practical situation of the Scots law of his time.

However, in addition to the possible influence which Craig may have had on future writers such as Stair and Erskine, it is worth examining the *Jus Feudale* as being further evidence of the ambiguity which existed at this time with regard to positive prescription in Scots law. Craig's writings underscore the fact that, prior to the 1617 Act, Scots law was in need of a clarified and definite doctrine of positive prescription.

#### **E. The law after the 1617 Act**

The Prescription Act 1617 clarified and simplified the law.<sup>317</sup> A forty year period was required and the prescription could only be initiated on the basis of a written and recorded deed.<sup>318</sup> It may be posited that the clarity and simplicity of the 1617 Act together with the clear list of exceptions facilitated a climate of greater certainty regarding the law of positive prescription in Scotland than had been achieved under the 1594 Act.<sup>319</sup>

The 1617 Act only allowed for certain specific exceptions<sup>320</sup> and Hope seems to have had no cause to comment on any case after the 1617 Act other than to note the application of the 40 year prescriptive period in relation to a case concerning salmon fishings in 1623.<sup>321</sup> As to the rules which appear to have existed in relation to a

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<sup>317</sup> This development is also discussed in Napier *Commentaries* 47-50.

<sup>318</sup> As noted above, the Registration Act 1617 introduced the requirement that the instrument of sasine had to be registered in order for infeftment in the real right of ownership to take place.

<sup>319</sup> With regard to the relationship of the 1594 Act to the 1617 Act it would appear that the provisions of the 1594 Act were supplemented by the provisions of the 1617 Act. To the extent of any conflict it would seem that the doctrine of implied repeal would apply in favour of the 1617 Act. On the doctrine of implied repeal see footnote 179 above.

<sup>320</sup> See above at Chapter III, C, 3.

<sup>321</sup> Hope, *Major Practicks* III.15.4 and III.15.7 citing *Forbes v Monymusk* (1623) Mor 10840.



possible form of customary prescription<sup>322</sup> based on the possession of the ‘kirklands’, these may well have fallen by virtue of desuetude<sup>323</sup> or implied repeal.<sup>324</sup> However, they still appear to be recognised as a part of the law of Scotland at the time of Erskine.<sup>325</sup> Furthermore, the fact that these customary rules appear to have existed seems to be quite contrary to the received understanding that Scots law has only recognised positive prescription by virtue of statute.<sup>326</sup>

It should not be overlooked that there has been some recognition that a customary form of positive prescription of landownership may have once existed in Scots law. The Scottish Law Commission Report on Prescription and Limitation of Actions makes mention of there being traces of such a doctrine with regard to special subjects such as church benefices.<sup>327</sup> This presumably relates to the rules which are discussed above in relation to the writings of Erskine.<sup>328</sup> However, as has been shown above, this customary form of the doctrine appears to have had a wider and more definite existence than that which is described by the Scottish Law Commission.<sup>329</sup> The writings of Hope and Erskine speak of a system which appears to have effectively operated a customary form of positive prescription in the period following the Scottish Reformation.<sup>330</sup> The fact that this appears to have persisted in some form until the time of Erskine suggests that a degree of confusion regarding the law of positive prescription of landownership in Scots law continued to exist for a period of time even after the reform and clarification of the law achieved by the Prescription Act 1617.

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<sup>322</sup> Which were modified and statutorily recognised in an Act of Sederunt. See above at Chapter III, C, 4, (b).

<sup>323</sup> See above at footnote 178. Although it might be possible to argue that the criteria for desuetude have not been fully satisfied.

<sup>324</sup> See above at footnote 179. Although it might be possible to argue that the criteria for implied repeal have not been fully satisfied.

<sup>325</sup> Erskine III.7.34.

<sup>326</sup> Hume, *Lectures* IV.510; Johnston, *Prescription* 1.24; C d’O Farran, *The Principles of Scots and English Land Law* (1958) 187; MacQueen, *Common Law and Feudal Society* 234.

<sup>327</sup> Reform of the Law Relating to Prescription and Limitation of Actions (Scottish Law Commission Report No 15 (1970)) para 10.

<sup>328</sup> See discussion above at Chapter III, C, 4, (b).

<sup>329</sup> See discussion above at Chapter III, C, 4, (b). There was also a suggestion by Lord Jeffrey that the 1617 Act was declaratory of the common law. This does not seem to be supported by evidence from the period prior to the 1617 Act. See *Craufurd v Menzies* (1849) 11 D 1127 at 1129-1130 per Lord Jeffrey. See also discussion in Rankine, *Land-ownership* 27.

<sup>330</sup> See discussion above at Chapter III, C, 4, (b).

## **F. Conclusion**

As mentioned in the introduction to this chapter, the creation of the Prescription Act 1617 has recently received attention in Andy Wightman's work *The Poor Had No Lawyers*.<sup>331</sup> It appears that the Prescription and Registration Acts of 1617 may have served to make positive prescription harder to accomplish when viewed in comparison with the previous law.

This is demonstrated by the fact that the Act stipulated a period of 40 years for positive prescription rather than opting for one of the shorter periods which appear to have had currency in Scots law at the time of this Act.<sup>332</sup> In addition to the lengthy time requirement, the fact that a written and recorded<sup>333</sup> deed was required in order to allow for positive prescription to be commenced under the Act was a further clarification which served to make positive prescription of landownership more cumbersome in Scots law. This is particularly clear in contrast to what appears to be the common law allowance of positive prescription by possession alone that is described above.<sup>334</sup>

It could be argued that the simultaneous introduction of the requirement for a written deed<sup>335</sup> together with the requirement for registration<sup>336</sup> of such deeds would have been beneficial to the landed classes who would be more able to utilise and access such a system than those further down the social system of the time. However, the high degree of literacy that was being achieved in Scotland following the Reformation may have worked as a check against this tendency.<sup>337</sup>

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<sup>331</sup> Wightman, *The Poor Had No Lawyers* 23-29, 251-252 and 299.

<sup>332</sup> See discussion above at Chapter III, C, 4, (b).

<sup>333</sup> Registration Act 1617. This Act required that recording of the deed take place in order to allow infestment in the real right of ownership to occur for the new proprietor.

<sup>334</sup> See discussion above at Chapter III, C, 4, (b).

<sup>335</sup> Prescription Act 1617.

<sup>336</sup> Registration Act 1617 and Prescription Act 1617 worked together as heritable infestment was required to start positive prescription and heritable infestment could only be achieved by registration of the deed.

<sup>337</sup> See C Lindberg, *The European Reformations* (2<sup>nd</sup> edition, 2010) 368. This may be central to explaining how Scotland was able to create the system of title registration which allowed the form of positive prescription based on written and registered title to function and flourish at such an early date in European history. This may also be suggested on the basis of the views expressed in Napier *Commentaries* 47-49. With regard to property registration, this is discussed further by Ockrent. See Ockrent, *Land Rights* 11-14 and 45-55.

In response to Wightman it might also be observed that the presence of the positive prescription of landownership or its equivalents in many other jurisdictions, both historically protestant and historically catholic,<sup>338</sup> suggests it has a function beyond that of consolidating landholdings following the Scottish Reformation.

However, Wightman may still have made a valid point with regard to the possibility that positive prescription or its equivalents were deployed to achieve appropriation of land belonging to the church in Scotland in the years following the Reformation. This argument may be supported by the abovementioned form of customary prescription which appears to have existed in the years following the Reformation.<sup>339</sup> The fact that this appears to have allowed for positive prescription based on possession alone is suggestive of a situation in which the 'kirklands' were being appropriated on a basis which might not have been acceptable for other lands. This issue is clearly one of social and political history and is largely beyond the scope of this thesis. However it does leave open the possibility that positive prescription in the sixteenth century was being used for possibly controversial purposes.

In view of the social upheaval which characterised the decades following the Reformation in 1560, it could be suggested that it is unsurprising that this appears to have been a time of ambiguity and confusion regarding ownership of land in Scotland. In this context it would appear that the 1617 Acts constituted a programme to clarify the law and eliminate uncertainty regarding the basis for landownership.<sup>340</sup> This may have had the consequence that land appropriations which satisfied the criteria for positive prescription were rendered unchallengeable. However, the fact that the 1617 Prescription Act imposed a lengthy time period, combined with the requirement for a written and recorded deed, appears to show that it was an Act which was focussed on clarifying the law rather than facilitating appropriation of land.

Having observed the context in which the 1617 Act came into existence, it is now appropriate to examine the operation of the Act in Scots law to the present day. As

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<sup>338</sup> For example: Germany in Sections 900 and 927 BGB; France in Arts 2262 and 2265 *Code civil* and; Spain in Arts 1957 and 1959 *Codigo civil*. Although the French Article 2262 appears to use terminology which is more akin to the limitation of actions rather than the acquisition of ownership. See discussion in Chapter II, E.

<sup>339</sup> See above at Chapter III, C, 4, (b).

<sup>340</sup> See Ockrent, *Land Rights* 11-14 and 45-55.

mentioned at the end of Chapter II, the requirement for a written deed to be utilised in order to commence the positive prescription of land ownership places Scots law at considerable variance from other jurisdictions in the common, civilian and mixed legal families.<sup>341</sup> There appears to be no evidence to explain why Scots law elected to impose this requirement for a written deed at such an early date and it is therefore taken that this is simply a particular innovation which Scots law chose to make of its own accord.<sup>342</sup> In view of distinctive nature of the requirement for a written deed, the rest of this thesis will be an examination of the two key doctrinal complexities of this requirement in Scots law.

The two key doctrinal issues examined are those of the *ex facie* validity of the foundation writ and the hability of the description contained within the foundation writ. The foundation writ is the term applied to the written deed which is required to commence positive prescription of landownership in Scots law. It is to the interpretation of this document that we now turn.

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<sup>341</sup> See: Chapter I, B and C; Chapter II, E.

<sup>342</sup> See: Chapter I, B and C; Chapter II, E.

## Chapter IV – *Ex Facie* Validity

### A. Introduction

There is no explicit statement of the requirement that the foundation writ must be *ex facie* valid under the Prescription Act 1617.<sup>343</sup> However, as the 1617 Act required that there had to be a foundation writ in every instance of positive prescription, it appears to be a logical necessity that the deed in question must meet a standard of validity or apparent validity in order to function as an effective document of title upon which positive prescription can be based. If there was no minimum quality of deed then any piece of paper with writing upon it could function as a foundation writ. This would clearly be absurd.

As the 1617 Act did not contain an overt stipulation of the minimum quality of deed required, it was left to the courts to define, or attempt to define, the standard which a deed would have to satisfy in order to constitute the foundation writ. In time it became established that the deed did not actually have to be valid in order to be effective as a document upon which positive prescription could be based. Rather, the deed merely had to be *ex facie* valid.<sup>344</sup> This standard received recognition in the Conveyancing (Scotland) Act of 1874<sup>345</sup> and was subsequently affirmed by further statutes in 1924<sup>346</sup> and 1973<sup>347</sup>. However, as will be seen in this chapter, the rule of *ex facie* validity had been developed by the judiciary in the centuries following the 1617 Act. This judicial activity seems to have been necessary in view of the issues which came before the courts regarding the interpretation of the 1617 Act and which seem to have been resolved by the courts in the context of the teleological approach to interpretation of

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<sup>343</sup> Or under the 1594 Act.

<sup>344</sup> This reflects the fact that *ex facie* validity is a question regarding formal rather than essential validity. A deed may be formally valid and therefore *ex facie* valid but simultaneously contain an essential defect which would render it essentially invalid if investigation was made of evidence outwith the deed. Such a distinction is found in sources such as: Stair II.12.25; Erskine III.7.4; W W McBryde, *The Law of Contract in Scotland* (3<sup>rd</sup> edn, 2007) paras 13-01 to 13-03. Therefore, in the context in which the words ‘*ex facie*’ are used in relation to the positive prescription of landownership, the concept of validity is adjusted to mean that a deed may not in fact be valid at the time of recording. However, provided that the deed appears to be valid at the time of recording, it will become valid at the completion of the prescriptive period.

<sup>345</sup> Conveyancing (Scotland) Act 1874 s.34.

<sup>346</sup> Conveyancing (Scotland) Act 1924 s.16.

<sup>347</sup> 1973 Act s.1.

Acts of the Parliament of Scotland<sup>348</sup>. This judicial application of the teleological approach can be seen in the creation of the test of *ex facie* validity and in other matters of statutory interpretation such as the definition of which deeds could function as foundation writs for positive prescription under the 1617 Act.<sup>349</sup>

Whilst it may be clear that the courts interpreted the 1617 Act on a teleological basis, it will be seen during the following examination of the concept of *ex facie* validity that there has not always been a consistent application of this concept in Scots law. Rather, it appears that an orthodox test for *ex facie* validity was developed in Scots law, but that in recent times this test has fallen from view.<sup>350</sup> This chapter will examine the development of this aspect of positive prescription and seek to present a clear statement of the Scots law test for *ex facie* validity. Furthermore, the chapter will conclude by examining the impact of land registration on the concept of *ex facie* validity. Land registration does not explicitly maintain a place for the concept of *ex facie* validity in relation to registered titles. However, it will be observed that the concept of *ex facie* validity is not irrelevant in relation to land registration.

## **B. Development of the concept and terminology of *ex facie* validity: prior to Bell's Principles**

### **1. Stair, Mackenzie and Forbes**

As noted above, the concept of *ex facie* validity can be seen as implicit in the 1617 Act itself. The fact that the Act required a heritable infefment consisting of written documents clearly gave rise to the question of what standard this documentation would have to meet in order to function as a valid foundation writ.

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<sup>348</sup> The liberal interpretation which is to be applied to Acts of the Parliaments of Scotland prior to the Union of 1707 is significant. See footnote 213 above.

<sup>349</sup> Scots law seems to have interpreted and understood the term "Charter" in relation to the 1617 Act with considerable latitude in order to include any deed which could be classified as a 'disposition'. See for example: Stair II.12.20; *Administrators of Heriot's Hospital v Hepburn of Bearford* (1697) Mor 10786; Erskine II.3.33-34; Napier, *Commentaries* 102-103 and 112 with the specific statement that the statutory word 'charter' is to be understood 'in a comprehensive sense'; Millar, *Prescription* 14-15.

<sup>350</sup> *Watson v Shields* 1994 SCLR 819; *Aberdeen College (Board of Management) v Youngson* [2005] CSOH 31; 2005 SC 355.

This question was addressed by Stair, who stated that positive prescription is effective against ‘any nullity in the titles of prescription, except it be in the essentials thereof’.<sup>351</sup> This was a more explicit statement of the nascent doctrine of *ex facie* validity than any which was made by Mackenzie<sup>352</sup> or Forbes.<sup>353</sup>

## 2. Early cases

The early to mid-seventeen hundreds witnessed the first litigation in which it appears that the concept of *ex facie* validity began to be developed by the courts. In *Ainslie v Watson*<sup>354</sup> the Court heard a case regarding prescription in relation to adjudication.<sup>355</sup> The report of this case is not particularly clear and the discussion of positive prescription appears to be somewhat intermixed with negative prescription. However, the decision may indicate that nullities which were not intrinsic could only be pled within the forty year prescriptive period. In particular, *Ainslie v Watson*<sup>356</sup> appears to contain the first mention of a distinction between intrinsic nullities and extrinsic objections. This distinction may have been the basis which allowed for a finding that negative prescription could not extinguish a claim based on intrinsic nullity, although the report does not state the specific basis on which the Court repelled the plea of negative prescription.<sup>357</sup>

The case of *Ged v Baker*<sup>358</sup> seems to indicate that extrinsic nullities could no longer be pled against an adjudication after the forty year prescriptive period had elapsed.<sup>359</sup> The

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<sup>351</sup> Stair II.12.25.

<sup>352</sup> Mackenzie III.7.1-20.

<sup>353</sup> Forbes, *Institutes* Part III, Book I at 63-65.

<sup>354</sup> *Ainslie v Watson* (1738) Mor. 10736.

<sup>355</sup> On adjudication generally see: Stewart, *A Treatise on the Law of Diligence* 576-669; Gloag & Henderson, *The Law of Scotland* (13<sup>th</sup> edn, 2012) para 48.33.

<sup>356</sup> *Ainslie* at 10736.

<sup>357</sup> In *Ainslie v Watson* it was held that the action for reduction of the adjudication was competent even though the subjects had been possessed (albeit with interruptions to the possession and without infertment taking place) for forty years on the basis of the adjudication. The defence of negative prescription was repelled. It is not totally clear from the case report whether this was because the adjudication contained intrinsic nullities. However the case is significant as the issue of intrinsic nullity is discussed. *Paton v Drysdale* (1725) Mor. 10709 was an earlier case regarding adjudication. The report of this case is not particularly clear. However, it is reported that the Court held that an adjudication could be reduced on the basis of certain nullities even though a period in excess of forty years had elapsed since the adjudication had been granted. This decision may have been reached on the basis that the nullities were intrinsic rather than extrinsic.

<sup>358</sup> *Ged v Baker* (1740) Mor. 10789.

<sup>359</sup> The report on *Ged v Baker* is very brief but is clear in stating that forty years possession following infertment upon a charter of adjudication would result in the exclusion of all objections of nullities

case report is brief; however it was regarded as sufficiently important for Erskine to cite it as his main authority in relation to the issue of apparent validity.<sup>360</sup> This view is also supported by Napier who cites this case, alongside the corresponding passage from Erskine,<sup>361</sup> as his earliest authority on the issue of apparent validity.<sup>362</sup> The case of *Miller v Dickson*<sup>363</sup> is cited by Napier<sup>364</sup> as additional authority on this point and may actually deserve to be counted as the most significant of the early cases given that it was cited as authority for the party which prevailed in the extremely important case of Duke of *Buccleuch v Cunynghame*.<sup>365</sup> These cases will be analysed further during the course of this chapter.

### 3. Bankton

Regarding defects in title, Bankton writes:

“But no essential defect in the title can be supplied by prescription. Thus, a seisin, or its warrant, that is null for want of essential solemnities, cannot become good by prescription; for the positive prescription, as Usucapion, requires *Justum titulum*, a title valid in law, without which it cannot proceed.”<sup>366</sup>

Bankton seems to be reflecting the general development of the law in drawing a distinction between essential and non-essential defects in relation to the basis for a claim of ownership. However, as discussed in Chapter II above, he may not be correct in directly relating the Scots law requirement of title to the Roman requirement of *iusta causa*.<sup>367</sup> It appears that the Roman and civilian concept of *iusta causa* cannot fully

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against the adjudication or against the grounds of the adjudication. However, although this principle was held to be correct by the Court it is not clear if these requirements had been successfully fulfilled by the party relying on positive prescription in this case.

<sup>360</sup> Erskine III.7.4.

<sup>361</sup> Erskine III.7.4.

<sup>362</sup> Napier, *Commentaries* 154.

<sup>363</sup> *Miller v Dickson* (1766) Mor. 10937.

<sup>364</sup> Napier, *Commentaries* 154.

<sup>365</sup> *Duke of Buccleuch v Cunynghame* (1826) 5 S. 53.

<sup>366</sup> Bankton II.12.11. This quote again reflects the fact that *ex facie* validity is a question regarding formal rather than essential validity. A deed may be formally valid and therefore *ex facie* valid but simultaneously contain an essential defect which would render it essentially invalid if investigation was made of evidence outwith the deed. Such a distinction is found in sources such as Stair II.12.25; Erskine III.7.4; McBryde, *The Law of Contract in Scotland* paras 13-01 to 13-03.

<sup>367</sup> See discussion in Chapter II, C, 2 above.



exist alongside the Scots law doctrine that good faith is irrelevant for positive prescription of landownership.<sup>368</sup>

Returning to the issue of extrinsic and intrinsic nullities, Bankton observes that negative prescription will extinguish grounds for reducing deeds. However, this will not apply in relation to intrinsic nullities which are evident from the face of the deed itself.<sup>369</sup> This appears to be demonstrative of a context in which the distinction between defects which are intrinsic and extrinsic was becoming ever more present in Scots law. This would appear to be further evidenced in the following case of *Miller v Dickson*.

#### **4. *Miller v Dickson***

In *Miller v Dickson* a charter had been granted by a party, the Earl of Wigton, who was not actually the superior and had thus had no right to grant such a deed. The provisions of the Prescription Act 1617 were applied and thus the deed was held to be fortified as the forty year prescriptive period was complete and the foundation writ was held to have been ‘*proper*’.<sup>370</sup> The fact that an Act of the Parliament of Scotland had vested the superiority in the Crown<sup>371</sup> and thus meant that the Earl did not own the superiority did not prevent the foundation writ from being a ‘*proper*’ deed upon which positive prescription could be completed. The Act which vested the superiority in the Crown was a document which existed externally to the charter and there was thus no intrinsic nullity in the foundation writ.

This holding would appear to be a relatively uncontroversial statement and application of the rule on *ex facie* validity in which it is simply understood as meaning that there is an apparently good foundation writ which contains nothing to prove its invalid nature.<sup>372</sup> However, this case is followed by three cases of such significance in the

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<sup>368</sup> See discussion in Chapter II, C, 2 and 3 above. The irrelevance of good faith is noted by Bankton himself at Bankton II.12.49.

<sup>369</sup> Bankton II.12.21.

<sup>370</sup> *Miller v Dickson* (1766) Mor. 10937 at 10939 – 10942.

<sup>371</sup> 23<sup>rd</sup> Act of 1690.

<sup>372</sup> The case of *Miller v Dickson* is cited in Hume, *Lectures* IV.552. The topic of validity is covered in Hume, *Lectures* IV.550-553. It is in this section that Hume acknowledges the possibility that foundation writs which are *a non domino* may stand as good foundation writs for positive prescription.

development of this principle that they merit individual analysis. This will be made after an examination of the writings of Erskine on this topic.

## 5. Erskine

Erskine seems to acknowledge the concept of *ex facie* validity in relation to his discussion of *a non domino* foundation writs:

“And as prescription cuts off all grounds of preference, which, if insisted in before the expiration of the forty years, would have excluded the prescriber; a charter, though granted a non domino, by one who himself had no right, is a good title of prescription: so that if the title be a fair genuine writing, and proper for the transmission of property, the possessor is, after the years of prescription, secure by the statute; which admits no ground of challenge except falsehood, the length of time standing in place of all other requisites, 1741, Ged.”<sup>373</sup>

Thus Erskine notes that the foundation writ must be proper for the transmission of property, but that it need not be granted by the true owner in order to be an effective foundation writ. It must therefore have the appearance of validity, if not the substance.<sup>374</sup>

## 6. *Scott v Bruce Stewart*

This was a relatively simple dispute over the ownership of land in which a very important statement of the character of the principle of *ex facie* validity was provided.<sup>375</sup> In particular, it was held that an extrinsic nullity was an objection which could be resolved by the production of collateral evidence. In contrast, an intrinsic nullity was held to be one which no external production could remedy. This rule was applied with the effect that the defender did not need to produce any antecedent deeds to explain the basis for a granter being able to grant sasine at a particular place.

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<sup>373</sup> Erskine III.7.4. This is also reflected in Erskine’s *Principles* III.7.3. See J Erskine, *The Principles of the law of Scotland* (3<sup>rd</sup> edition, 1764) III.7.3.

<sup>374</sup> Erskine also mentions intrinsic and extrinsic nullities in relation negative prescription. See Erskine III.7.9. In this connection Erskine also mentions the case of *Ainslie v Watson* (1738) Mor. 10736 which was examined above.

<sup>375</sup> *Scott v Bruce Stewart* (1779) Mor. 13519 concerned a disposition of the lands of Blosta and others in Zetland. The pursuer argued that sasine had not been taken on the lands in question and that there was no proper authority allowing for the sasine to be taken elsewhere. However, it was held that the disposition and sasine had been followed by forty years possession and that therefore the disposition was fortified by positive prescription and could not be reduced on the grounds argued by the pursuer. It was possible that extrinsic evidence could have provided authority for the granting of the sasine outwith the lands in question and this evidence could not now be required after the forty year period had elapsed.

Although this ruling might appear straightforward, the definition that was being developed here should be read very carefully.

The fact that an extrinsic nullity was held to be one which could be resolved by the production of external evidence shows that a strict interpretation of *ex facie* validity was now being applied. In effect, it would appear that if any defect could be remedied by external evidence and was therefore not entirely self-proving from within the body of the deed, it would be held to be extrinsic.<sup>376</sup> This rule is seen even more clearly in the following case of *Paterson v Purves*.

### **7. *Paterson v Purves*<sup>377</sup>**

In this case the House of Lords ruled that a charter which included details of an entail and its provisions for the purposes of describing the subjects<sup>378</sup> was a valid foundation writ for positive prescription. This was held despite the fact that the provisions of the entail stated that the granter of the charter did not have the right to grant such deeds. The Court held that the charter was *ex facie* valid as the entail was only referred to for the purpose of describing the subjects.<sup>379</sup> This case thus seems to accord with, and possibly extend, the *ratio decidendi* of *Scott v Bruce Stewart*. This may be suggested as it would seem that the deed in question was held to be *ex facie* valid as it did not contain absolute self-proving evidence of its invalidity and was therefore sufficient as a foundation writ for positive prescription. The fact that the charter was held to be *ex facie* valid despite actually containing the contradictory wording of the deed of entail would seem to indicate that, as the entail itself would have to be consulted in order to check that the charter accurately reflected the terms of the entail, examination of the entail was therefore required to demonstrate the invalidity of the charter and thus the charter was *ex facie* valid until the entail was examined. As the entail was therefore a piece of extrinsic evidence the charter was an *ex facie* valid foundation writ.

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<sup>376</sup> The case of *Scott v Bruce-Stewart* and the rule which it represents are cited in Hume, *Lectures* IV.552. The case of *Scott v Bruce-Stewart* and the rule which it represents are also cited by Napier as being authoritative on the issue of *ex facie* validity. See Napier, *Commentaries* 152-162.

<sup>377</sup> *Paterson v Purves* (1823) 1 Sh. App. 401.

<sup>378</sup> The estates of Polwarth, Redbraes, Greenlaw and others situated in Berwickshire.

<sup>379</sup> The House of Lords affirmed the judgments of the Outer House and the Inner House of the Court of Session. See: *Paterson v Purves* (1823) 1 Sh. App. 401 at 412.

This case might be regarded as representing an overstatement of the principle found in *Scott v Bruce-Stewart*. However it might rather be considered to represent a logical consequence of the principle that a deed is only invalid if no external evidence is required to prove its invalidity. This is supported by the fact that it is cited in later cases such as *Cooper Scott v Gill Scott*<sup>380</sup> and *Abbey v Atholl Properties Limited*.<sup>381</sup> Thus, as will become clear in the course of this chapter, it would seem that *Paterson v Purves* may represent a statement of the logical consequences of the traditional test for *ex facie* validity in Scots law.

### **8. Duke of Buccleuch v Cunynghame**<sup>382</sup>

This case is one of the most important within the Scots law of positive prescription. It is perhaps most often cited as authority for the statement that good faith is not required for positive prescription in Scotland.<sup>383</sup> It may therefore be unsurprising that an issue such as *ex facie* validity, which has strong potential to overlap with the issue of good faith, is also significant with regard to this case.

In this case the Court held that a foundation writ, by which the Crown had granted particular lands to Cunynghame, could be successfully fortified by positive prescription even though the foundation writ referred to an Act which had expressly prevented the Crown from obtaining ownership of the lands in question.<sup>384</sup> The Court seems to have affirmed the abovementioned authorities of *Miller v Dickson*<sup>385</sup> and

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<sup>380</sup> *Cooper Scott v Gill Scott* 1924 SC 309 at 320 and 327.

<sup>381</sup> *Abbey v Atholl Properties Limited* 1936 SN 97.

<sup>382</sup> *Duke of Buccleuch v Cunynghame* (1826) 5 S. 53.

<sup>383</sup> See for instance, Johnston, *Prescription* 18.04. However, Menzies only cites this case as authority for the view that insufficiency of title is cured by positive prescription. Menzies, *Conveyancing* 829. Menzies does not appear to offer any further commentary regarding material relating to *ex facie* validity.

<sup>384</sup> The Crown was prevented from obtaining ownership of lands which had been granted to the church by particular patrons prior to the Reformation and which had reverted to those patrons at the time of the Reformation. The fact that the Crown was prevented from obtaining ownership of these lands was statutorily enacted in the annexation statute 1587, c.29 which was affirmed by subsequent statutes (1592, c.158 and 1661, c.54). However, the Crown ignored the provisions of the annexation statute when it granted the foundation writ which was relied upon by the defender in this case. In fact the foundation writ which was granted by the Crown made specific reference to the annexation statute as the basis on which the Crown had right to the lands in question.

It may be the case that annexation statute 1587, c.29 should actually be referenced as 1587, c.28. However, even if this error was present in the foundation writ this would have had no bearing on the outcome of this case as the statute was in all events a piece of extrinsic evidence.

<sup>385</sup> *Miller v Dickson* (1766) Mor. 10937.

Erskine<sup>386</sup> with the result that the objection was held to be extrinsic to the foundation writ in question.

However, there should perhaps be more caution with regard to the *ratio decidendi* of this case. Of the four judges, Lord Balgray presents the most definite holding. He goes so far as to say that there is normally some degree of falsehood involved in cases such as these, there is no place for good faith in positive prescription and the forty year period will thus cure an *a non domino* deed in which the objection is extrinsic.

Lord President Hope seems to agree with Lord Balgray but adds a note of qualification by stating that Crown is the ultimate superior of all Scotland. Therefore the party relying on a deed granted by the Crown is in some sense in good faith even if there is statutory authority to the contrary in specific instances. Thus the Lord President does not present as an emphatic statement of the irrelevance of good faith as that which was advanced by Lord Balgray.

Lord Gillies' is not categorical, however he appears to hold that positive prescription has been successfully completed in this instance as the objection was extrinsic to the deed. However, Lord Craigie states that the normal rule might not be appropriate for this particular case or in any situation in which there was manifest falsehood evident from the deed itself.

In sum it would appear that *Buccleuch v Cunynghame* is not totally solid authority for the proposition that an objection which is suggested by the deed itself, but which can only be proven by reference to external authority, is to be regarded as extrinsic to the deed and not as an impediment to the deed being regarded as an *ex facie* valid foundation writ for the purpose of positive prescription.<sup>387</sup> However, this case does not stand against that principle and thus the understanding of *ex facie* validity found in the judgments in *Miller v Dickson* and *Scott v Bruce Stewart* would appear to be established as law by the time of the fourth edition of Bell's *Principles* in 1839.

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<sup>386</sup> Erskine III.7.4.

<sup>387</sup> It might also be argued that this case is not totally solid authority for the proposition that good faith is not required for positive prescription in Scots law. However, this principle appears to be an accepted part of the doctrine of positive prescription of landownership in Scots law. This is evidenced in the fact that the absence of good faith is never argued as an objection to positive prescription. See for instance Gloag & Henderson, *The Law of Scotland* 34.33.

Therefore, as will be examined below, Bell was prepared to cite *Scott v Bruce Stewart* and *Buccleuch v Cunynghame* as authority for his statements on the treatment of nullities.<sup>388</sup>

It is notable that the Court in *Buccleuch v Cunynghame* did not accept that the provisions of all statute are automatically incorporated into all deeds on the basis that everyone is taken to know the law. This is despite the fact that the essence of this argument appears to have been made before the Court.<sup>389</sup> This aspect of the judgment might be regarded as potentially controversial, but it appears that by taking this view, the Court preserved the consistency of the principle of *ex facie* validity; in particular, the strict rule that extrinsic evidence cannot be adduced to show a deed is invalid after the prescriptive period has been completed.

### 9. Case law from 1827 to 1837

In addition to *Paterson v Purves* and *Buccleuch v Cunynghame*, a number of other cases occurred during the early part of the nineteenth century with regard to the issue of *ex facie* validity.

The cases of *Forbes v Livingstone*<sup>390</sup> and *Hope Vere v Hope*<sup>391</sup> were both decided in accordance with the principle that objections which required extrinsic proof were cured by the forty year period of positive prescription.

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<sup>388</sup> Bell, *Principles* § 2010.

<sup>389</sup> *Duke of Buccleuch v Cunynghame* at 56.

<sup>390</sup> *Forbes v Livingstone* (1827) 6 S 167. In this case a vassal had held a foundation writ in respect of a particular area of land under reservation of coal in favour of a superior. The superior subsequently had his rights forfeited due to involvement in the 1715 rebellion. The Crown later granted, by virtue of an Act which the Court referred to as the Clan Act (1 Geo I, Stat.2, c.20), but which is often also referred to as the Treason in Scotland Act 1714, a new foundation writ in favour of the vassal without any reservation of the coal. This grant was made despite the fact that the Clan Act did not allow for the Crown to grant better rights than those which had been held by vassals prior to the forfeiture. The Inner House held that the new foundation writ was valid despite the fact that the new foundation writ which had been granted by the Crown specifically narrated that it was being granted by virtue of the Clan Act. However the claim of positive prescription failed due to insufficient possession.

<sup>391</sup> *Hope Vere v Hope* (1828) 6 S 517. Here the foundation writ stated that it conformed to the provisions of a deed of entail. However the foundation writ actually contradicted the provisions of the deed of entail. Despite this statement the Inner House held that the foundation writ did not have to be construed so as to conform to the entail. The provisions of the foundation writ, including the extent to which they did not conform to the deed of entail, were thus successfully fortified by forty years possession.

In *Cubbison v Hyslop*<sup>392</sup> the Inner House held that rights of reduction in respect of a decree of adjudication and a decree of sale were extinguished by virtue of negative prescription, provided that these decrees did not contain any *ex facie* nullities. This case was therefore concerned with negative, rather than positive prescription. However, it again demonstrates that the principle of the distinction between extrinsic and intrinsic nullities was now established in Scots law. The establishment of this principle is further reflected in the following examination of Bell's *Principles*.

### **C. Development of the concept and terminology of *ex facie* validity: Bell's *Principles***

Bell's treatment of this issue is found in the following section:

“An infeftment with its warrant (a charter, disposition, or procuratory of resignation), is a perfect title of prescription, although proceeding a non domino, and although the title be subject to a latent nullity; nay, it has been held good even where the title bore evidence in graemio of the objection, but the ground of that charge was to be collected extraneously.”<sup>393</sup>

Bell supports these assertions by citing the cases of *Scott v Bruce Stewart* and *Duke of Buccleuch v Cunynghame*. These cases, taken along with *Paterson v Purves*, *Forbes v Livingstone*, *Hope Vere v Hope* and the quote from Bell given above, serve to demonstrate the strength which the concept of *ex facie* validity had acquired by the early part of the nineteenth century.<sup>394</sup> By virtue of the case law of the previous hundred years, Bell was able to make an emphatic statement of the fact that a deed would only be invalid as a foundation writ if its invalidity could be demonstrated without reference to external evidence. This was placed as a logical precursor to the discussion of the precise requirements as to the form of deed required under the 1617 Act<sup>395</sup> and was followed by additional emphasis of the fact that successful positive prescription served to fortify foundation writs against objections based on grounds other than those of intrinsic nullities.<sup>396</sup>

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<sup>392</sup> *Cubbison v Hyslop* (1837) 16 S 112.

<sup>393</sup> Bell, *Principles* § 2010 (4<sup>th</sup> edn, 1839). The wording in this edition is almost identical to that found in all the editions of Bell's *Principles* from the 1st edition in 1829 to the 10<sup>th</sup> edition in 1899.

<sup>394</sup> *Scott v Bruce Stewart*, *Paterson v Purves*, *Duke of Buccleuch v Cunynghame*, *Forbes v Livingstone* and *Hope Vere v Hope* are analysed above. See Chapter IV, B, 6, 7, 8 and 9.

<sup>395</sup> Bell, *Principles* § 2010-2015.

<sup>396</sup> Bell, *Principles* § 2016.

The fact that Bell emphasised that the evidence of the objection could occur *in gremio*, that is to say, within the body of the deed, demonstrates how rigorous the principle had become. If the deed suggested its own invalidity, but the invalidity could only be proved by means of extraneous evidence, then the deed was to be held as a sufficient foundation writ upon which to ground positive prescription. Thus the concept of *ex facie* validity was to be understood in a strong sense and this would influence case law of the future. The adherence or non-adherence to the strictness of this principle in later case law is the subject of the next part of this chapter.

#### **D. Development of the concept and terminology of *ex facie* validity: after Bell's Principles**

##### **1. Case law from 1842 to 1868**

The cases of *Macdonald v Lockhart*<sup>397</sup> and *Her Majesty's Advocate v Graham*<sup>398</sup> were decided in accordance with the orthodox principles found in *Forbes v Livingstone* and *Hope Vere v Hope*. The case of *HMA v Graham* was similar to *Forbes v Livingstone* as a foundation writ had been granted in relation to a specific Act of Parliament.

In *HMA v Graham* it was argued that an Act of Parliament<sup>399</sup> had given the Crown the right to grant a patronage in Berwickshire to Sir George Home of Eccles.<sup>400</sup> However, it was objected that there was no evidence that the Crown had ever actually granted this right. In spite of this objection, positive prescription fortified a grant of the patronage which was ultimately traceable to what appeared to be an *a non domino* grant by Sir George Home. This fortification occurred as the possession had been accomplished on the basis of an '*adequate*' deed.<sup>401</sup>

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<sup>397</sup> *Macdonald v Lockhart* (1842) 5 D 372. In this case the Inner House held that an entail which stated that it was implementing a marriage contract but which in fact contradicted part of the marriage contract was a valid foundation writ and was fortified by positive prescription.

<sup>398</sup> *H M Advocate v Graham* (1844) 7 D 183. Here it was held by the Inner House that a right of patronage was fortified by positive prescription based on an *ex facie* valid deed.

<sup>399</sup> An Act of the Parliament of Scotland of June 1609. The case report relates that no copy of this Act was to be found within any record but that its title was found in a list of Acts of the reign of James VI. See *H M Advocate v Graham* (1844) 7 D 183 at 184.

<sup>400</sup> These patronages had been part of the property of the Church which had been annexed to the Crown following the Reformation.

<sup>401</sup> The pleadings which are recorded in the case report appear to be the first instance in which the term '*ex facie*' is deployed in Scots law with regard to positive prescription. The term may have



It can therefore be appreciated that during this period an orthodox interpretation of the minimum quality of the foundation writ was being regularly applied. It would appear that if any extrinsic evidence was required to support an objection, the objection was regarded as being extrinsic and the deed was considered to be *ex facie* valid and sufficient to ground positive prescription. It might therefore be stated that by 1844 a deed would have to conclusively prove its invalidity without the use of extrinsic evidence in order to be *ex facie* invalid.

The existence of this orthodox interpretation did not of course mean that it was impossible to find a deed to be *ex facie* invalid. This was demonstrated in the case of *Shepherd v Grant's Trustees*.<sup>402</sup> Here it was held that an entail was *ex facie* invalid due to the designation of the first substitute being written upon an erasure throughout the deed. This was a vitiation which positive prescription could not remedy and therefore the deed could be reduced. Therefore, by virtue of the law of the execution of deeds, the deed was held to be self-proving of its invalidity and therefore *ex facie* invalid in the same fashion as if it had not been signed by the granter.<sup>403</sup>

The Inner House case of *Fleeming v Howden*<sup>404</sup> is sometimes regarded as relating to *ex facie* validity.<sup>405</sup> However, this case seems to turn on the question of whether minerals are excluded from the conveyance of a superiority unless the conveyance makes express reference to the minerals as being included. Such an express reference appears to be necessary as otherwise it will be presumed that the minerals were separated from the superiority at the time of the grant of the *dominium utile*.<sup>406</sup> The decision in *Fleeming v Howden* thus appears to depend on whether the disposition of

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begun to receive currency at this time and would subsequently be statutorily enacted in the Conveyancing (Scotland) Act 1874.

<sup>402</sup> *Shepherd v Grant's Trustees* (1844) 6 D 464. The Inner House held that the entail in question could be reduced and that it was not fortified by positive prescription.

<sup>403</sup> This is a case in which the requirements of formal validity were not satisfied and the deed was therefore *ex facie* invalid. This again reflects the fact that *ex facie* validity is a question regarding formal rather than essential validity. A deed may be formally valid and therefore *ex facie* valid but simultaneously contain an essential defect which would render it essentially invalid if investigation was made of evidence outwith the deed. Such a distinction is found in sources such as Stair II.12.25; Erskine III.7.4; McBryde, *The Law of Contract in Scotland* paras 13-01 to 13-03.

<sup>404</sup> *Fleeming v Howden* (1868) 6 M 782.

<sup>405</sup> Johnston, *Prescription* 17.31. This case seems also to relate to the issue of the sufficiency of the foundation writ. See Johnston, *Prescription* 17.42. This will be discussed further below. See Chapter IV, D, 7, (c), (i).

<sup>406</sup> See R Rennie, *Minerals and the Law of Scotland* (2001) 1.1-2.10.

the superiority contained wording which also included the *dominium utile*, and hence the minerals. Therefore, this case essentially relates to the concept of hability rather than to the concept of *ex facie* validity.<sup>407</sup> Hence, this case is not analysed any further in this thesis.<sup>408</sup>

## 2. Case law from 1868 to 1900

The case of *Chancellor v Mosman*<sup>409</sup> was relevant to the development of the test for *ex facie* validity as it affirmed the governing character of the dispositive clause in a disposition. In this case there was a *mortis causa* disposition in which the narrative clause conflicted with the dispositive clause. The Inner House held that the dispositive clause would be decisive against all other parts of the deed unless the dispositive clause was unclear or ambiguous. This decision would be of particular importance in relation to the case of *Cooper Scott v Gill Scott*<sup>410</sup> in the following century.

In the case of *Glen v Scales' Trustees*<sup>411</sup> the Inner House held that a disposition was invalid due to the fact that it had not been signed by all the grantors. As with *Shepherd v Grant's Trustees*,<sup>412</sup> this case demonstrates that a deed which conclusively proves its own invalidity cannot be *ex facie* valid. The issue in this case was therefore relatively straightforward as an unsigned deed is clearly *ex facie* invalid. However this case contains a comment from Lord Craighill which may be read as casting doubt on the orthodox test for *ex facie* validity. The comment reads as follows:

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<sup>407</sup> In particular it relates to the issue of the hability of minerals. The case of *Fleeming v Howden* is discussed by Professor Rennie with regard to whether minerals are included when a disposition of a superiority is made. See Rennie, *Minerals and the Law of Scotland* 1.3. It is not totally clear from the case report if the disposition of the superiority in *Fleeming v Howden* did contain wording which excluded the *dominium utile* from the conveyance of the superiority. However, it appears that the Court held that the wording of the disposition was exclusive of the *dominium utile* and hence exclusive of the minerals in question.

<sup>408</sup> The hability of minerals is not analysed in this thesis. See explanation in Chapter V, A.

<sup>409</sup> *Chancellor v Mosman* (1872) 10 M 995. The narrative or inductive clause of the disposition stated that the granters desired that a house in Edinburgh was to be made over in fee to two sisters and in liferent to their cousin. However the dispositive clause stated that the house was to be disposed to all three parties or the survivors or survivor of them.

<sup>410</sup> *Cooper Scott v Gill Scott* 1924 SC 309.

<sup>411</sup> *Glen v Scales' Trustees* (1881) 9 R 317. This case involved an invalid disposition of land in Glasgow. Positive prescription did not fortify the disposition in question. However the defender, who had been attempting to rely on positive prescription, was protected by virtue of a ratification of the disposition. It was held that the pursuer was bound by the ratification as the pursuer was a descendant of the party who had ratified the disposition.

<sup>412</sup> See above at Chapter IV, D, 1.

“Prescription does not cure *ex facie* nullities, but only excludes grounds of challenge not disclosed on the face of the title.”<sup>413</sup>

The above quote is interesting in that the suggestion that a deed may be *ex facie* invalid if it merely discloses, rather than conclusively proves its invalidity, suggests a potential for a looser interpretation of the concept of *ex facie* invalidity than that which seems to have prevailed earlier in the nineteenth century. This point was not decisive in this case but it may indicate that the orthodox test for *ex facie* validity was not fully recognised by all members of the judiciary at this time. The comment by Lord Craighill is suggestive of a view that it might be possible for deeds to be held to be *ex facie* invalid, even if extrinsic evidence was required in order to conclusively prove their invalidity. As will be seen, this view does not appear to reflect the orthodox understanding of *ex facie* validity in Scots law. However, for reasons discussed later in this chapter, the unorthodox view espoused by Lord Craighill seems to have reappeared in Scots law in recent times.

The House of Lords case of *Duke of Sutherland’s Trustees v Countess of Cromartie*<sup>414</sup> dealt with the construction of a deed of trust<sup>415</sup> but was relevant for the concept of *ex facie* validity as it was held that the operative words of the deed were unambiguous and must therefore be given effect despite a preliminary statement which conflicted with the operative section. This clearly had parallels with the earlier case of *Chancellor v Mosman* and would again be of importance in the decision in the case of *Cooper Scott v Gill Scott* in the twentieth century.

The final two cases of this period were both marked by orthodox reasoning which supported the view that positive prescription cured foundation writs which did not conclusively prove their own invalidity. This was seen in *Fraser v Lord Lovat*<sup>416</sup> and in *Simpson v Marshall*.<sup>417</sup>

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<sup>413</sup> *Glen v Scales’ Trustees* at 325. This quote is also noted in Johnston, *Prescription* 17.31.

<sup>414</sup> *Duke of Sutherland’s Trustees v Countess of Cromartie* (1896) 23 R (HL) 32.

<sup>415</sup> The deed of trust made certain provision for various members of the Duke of Sutherland’s family.

<sup>416</sup> *Fraser v Lord Lovat* (1898) 25 R 603.

<sup>417</sup> *Simpson v Marshall* (1900) 2 F 447.

In *Fraser v Lord Lovat* the Inner House held that a deed restoring forfeited lands<sup>418</sup> to a party who was not the most immediate heir to the lands in question became valid after the forty year period of positive prescription as the invalidity of the deed<sup>419</sup> was not present *ex facie* the deed.

In *Simpson v Marshall* it was opined by Lord Trayner<sup>420</sup> that, whilst positive prescription could not validate the disputed deed due to insufficient possession, the foundation writ could have grounded positive prescription as it was not *ex facie* invalid.<sup>421</sup> Specifically, the fact that the testator's direction was incorrectly represented by the subsequent infestment was not apparent *ex facie* the deed. This again seems to be an uncontroversial opinion within the orthodox understanding of *ex facie* validity and provides the background to the important case of *Cooper Scott v Gill Scott* in 1924.<sup>422</sup>

### **3. Cooper Scott v Gill Scott**

In *Cooper Scott v Gill Scott*<sup>423</sup> the Inner House was asked to rule on an instance of erroneous conveyancing. An error had, not wholly surprisingly, arisen in the context of a convoluted testamentary instruction being replicated in a deed of entail. The error arose through the deed of entail being framed in such a fashion as to convey the estate to a branch of the testator's family which had, according to the testamentary instruction, only been intended to inherit if a preferred branch of the family had died out. The branch of the family which were preferred under the testamentary instruction had not died out but were erroneously relegated to a secondary position in the deed of entail,

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<sup>418</sup> The lands had been forfeited due to the Fraser family's involvement in rebellion against the government.

<sup>419</sup> The foundation writ was argued to be invalid as the lands should have been restored to the most immediate heir. However, extrinsic evidence would have been required to establish this invalidity. Therefore the deed was held to have been *ex facie* valid.

<sup>420</sup> In the Inner House.

<sup>421</sup> *Simpson v Marshall* at 457-459.

<sup>422</sup> The established test for validity is reflected in the academic literature of this period. See: Montgomerie Bell, *Lectures* 702-704; W Bell, *Dictionary and Digest* (7th edition, edited by George Watson, 1890) 834-836; Millar, *Prescription* 17-20 and 106; Wood, *Lectures* 550-552; Rankine, *Land-ownership* 31-37.

<sup>423</sup> *Cooper Scott v Gill Scott* 1924 SC 309. See also the commentary on this case in: A J McDonald, *Professor McDonald's Conveyancing Manual* (6<sup>th</sup> edition by A J McDonald, S Brymer, D Cusine, R Rennie, 1997) para 14.7. See also K Swinton, 'Self granted a non domino dispositions' (2005) 73 SLG 52.

whilst the other branch of the family were promoted, without any justification, to the preferential position.<sup>424</sup>

The error in *Cooper Scott* was evident but only when examination was made of the testamentary instruction. Without this piece of ‘extrinsic’ evidence there was nothing to indicate, from the face of the deed, that the deed was invalid. Thus the Court was faced with an opportunity to provide a definitive ruling as to what would or would not constitute *ex facie* invalidity. Although two of the seven judges dissented,<sup>425</sup> it was held<sup>426</sup> that, as the invalidity could only be determined by reference to an extrinsic document, the dispositive deed was not intrinsically invalid and was thus *ex facie* valid and good as a foundation writ for positive prescription.

The case of *Cooper Scott* provides an extensive survey of the history of Scots law in relation to this matter.<sup>427</sup> Although counsel for the pursuer attempted to interpret the authority in a fashion which was favourable for the pursuer, this approach did not prevail and *Cooper Scott* thus represents a categorical statement of the rule that a deed will be satisfactory as a foundation writ for positive prescription unless it contains definite proof of its own invalidity. If nothing within the deed demonstrates that it is definitely invalid, then it is good for the purposes of positive prescription, even if, prior to the expiration of the prescriptive period the deed could be exposed as invalid by reference to external evidence.

The rigour of the test established in *Cooper Scott* can be appreciated by reference to the following quotation from Lord Justice Clerk Alness:

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<sup>424</sup> The family history and lineage in this case was complicated and was rendered even more complicated by the testator’s instruction that the party who inherited the estate had to change their surname to that of ‘Scott’ in order to preserve historical continuity.

<sup>425</sup> Lord Ormidale (George Lewis Macfarlane) and Lord Hunter.

<sup>426</sup> By Lord President Clyde, Lord Justice-Clerk Alness, Lord Skerrington, Lord Anderson and Lord Blackburn.

<sup>427</sup> Reference is made to: Stair II. xii. 25; Ersk *Inst.* III.vii.4 and 9; Bell, *Principles* § 2010; *Paton v Drysdale* (1725) M 10,709; *Ainslie v Watson* (1738) M 10,736; *Scott v. Bruce Stewart* (1779) M 13,519; *Paterson v Purves* (1823) 1 Sh. App. 401; *Duke of Buccleuch v Cunynghame* (1826) 5 S 53; *Forbes v Livingstone* (1827) 6 S 167; *Hope Vere v Hope* (1828) 6 S 517; *Cubbison v Hyslop* (1837) 16 S 112; *Macdonald v Lockhart* (1842) 5 D 372; *H M Advocate v Graham* (1844) 7 D 183; *Shepherd v Grant’s Trustees* (1844) 6 D 464; *Chancellor v Mosman* (1872) 10 Macph 995; *Duke of Sutherland’s Trustees v Countess of Cromartie* (1896) 23 R (HL) 32; *Fraser v Lord Lovat* (1898) 25 R 603; *Simpson v Marshall* (1900) 2 F 447; Napier, *Commentaries* 152-162; Montgomerie Bell, *Lectures* 702-707; Wood, *Lectures* 254.

“The question accordingly comes to be, within which category does this deed fall? Is the nullity with which we are here concerned extrinsic or intrinsic?”

In order to answer that question, it is obviously imperative to ascertain, with as much precision as may be, what is an intrinsic and what is an extrinsic nullity. How are they to be defined? It is difficult to furnish an exhaustive definition; but one can at least say, on a survey of the examples given in the authorities, that a deed which is intrinsically null may be described as a deed which suffers, on the face of it, from an incurable defect in its essentials. The deed must per se afford complete and exclusive proof of its nullity. It must be, in short, a self-destructive title. Such a deed is one which, while the older law applied, omitted the word “dispone,” a deed which is witnessed by only one witness, or a deed in which essential words are written on an erasure. Such a deed has no effect whatever upon the lands which it purports to convey, and cannot be buttressed by extrinsic evidence. On the other hand, any deed which, though defective, may be made good by separate documentary evidence does not suffer from an intrinsic nullity.”<sup>428</sup>

Furthermore, Lord Anderson stated:

“On the authorities, the test as to whether a nullity is intrinsic or extrinsic would seem to be this – if the nullity can be conclusively established from an examination of the deed itself, it is intrinsic; if on the other hand, it is necessary to go de hors the deed to ascertain whether or not there is a fundamental nullity, the flaw is extrinsic.”<sup>429</sup>

It seems significant that Lord Anderson’s judgment<sup>430</sup> made reference to the case of *Thomson v Stewart*<sup>431</sup> regarding a bill of exchange. In *Thomson v Stewart* the Inner House held that when a bill of exchange was *ex facie* granted by a married woman it

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<sup>428</sup> *Cooper Scott* at 323 per Lord Justice Clerk Alness. This quote again reflects the fact that *ex facie* validity is a question regarding formal rather than essential validity. A deed may be formally valid and therefore *ex facie* valid but simultaneously contain an essential defect which would render it essentially invalid if investigation was made of evidence outwith the deed. Such a distinction is found in sources such as Stair II.12.25; Erskine III.7.4; McBryde, *The Law of Contract in Scotland* paras 13-01 to 13-03.

<sup>429</sup> *Cooper Scott* at 344 per Lord Anderson.

<sup>430</sup> *Cooper Scott* at 344 per Lord Anderson.

<sup>431</sup> *Thomson v Stewart* (1840) 2 D 564. The Bills of Exchange Act 1882 seems to incorporate a concept of *ex facie* validity with regard to the validity of bills of exchange. However the Act does not seem to employ the specific phrase ‘*ex facie*’ at any point with regard to validity. The leading nineteenth century textbook on bills of exchange also does not employ the phrase ‘*ex facie*’ with regard to the validity of bills of exchange. Furthermore, this textbook does not mention the case of *Thomson v Stewart*, even in the section which deals with the capacity of married women in relation to bills of exchange. See Sir M D E S Chalmers, *A Digest of the Law of Bills of Exchange, Promissory Notes and Cheques* (3<sup>rd</sup> edition, 1887) 54-56. However, there is nothing to indicate that *Thomson v Stewart* exists at variance with any other authority in relation to bills of exchange. In fact it may be read as being in essential agreement with the English law on the capacity of married women in relation to bills of exchange. However, the English law should be treated with caution, partly in view of its reliance on equity. See Chalmers, *A Digest of the Law of Bills of Exchange, Promissory Notes and Cheques* 54-56.

would nevertheless be held as valid as such a situation did not always give rise to a nullity. In particular, Lord Gillies held that such a bill was not in every instance an ‘*absolute*’ nullity.<sup>432</sup> His lordship stated that if there were ‘*any*’ grounds on which the bill could be valid, then it must be presumed that such grounds did exist, and therefore, once the period of negative prescription had elapsed, any claim that the bill was invalid would be cut off.<sup>433</sup> Lord Mackenzie also held that the objection was not a ‘*sufficient nullity*’ as such a bill was not ‘*necessarily or absolutely*’ null.<sup>434</sup> This reasoning was also supported by the Lord President<sup>435</sup> and Lord Fullerton.<sup>436</sup>

The reference to *Thomson v Stewart* would seem to form significant background to the *ratio decidendi* in *Cooper Scott*. The emphasis applied in *Thomson* to the principle that a bill will be valid if there are ‘*any*’ grounds on which it may be valid<sup>437</sup> seems to be reflected in the terminology deployed in *Cooper Scott*. This seems to be encapsulated in Lord Justice Clerk Alness’ statement that in order for a deed to be held as *ex facie* invalid it must provide ‘*complete and exclusive proof of its nullity*’.<sup>438</sup> This is further emphasised in his lordship’s statement that ‘*any deed which, though defective, may be made good by separate documentary evidence*’ is not to be treated as *ex facie* invalid.<sup>439</sup> Lord Anderson’s statement that a deed is *ex facie* valid unless the nullity can be ‘*conclusively*’ established by examining the ‘*deed itself*’ reiterates this point.<sup>440</sup>

Thus it can be appreciated that *Cooper Scott* appears to have provided a definitive statement of the strict test for *ex facie* validity which seems to accord with the orthodox test developed in the earlier authority on this point.<sup>441</sup> This test seems to hold that a deed is *ex facie* valid unless it provides absolute and conclusive evidence of its own invalidity. If there are any grounds on which a deed may be held to be valid then it is

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<sup>432</sup> *Thomson v Stewart* at 570 per Lord Gillies.

<sup>433</sup> *Thomson v Stewart* at 570 per Lord Gillies.

<sup>434</sup> *Thomson v Stewart* at 571 per Lord Mackenzie.

<sup>435</sup> *Thomson v Stewart* at 571 per Lord President Hope.

<sup>436</sup> *Thomson v Stewart* at 571-573 per Lord Fullerton.

<sup>437</sup> *Thomson v Stewart* at 570 per Lord Gillies.

<sup>438</sup> *Cooper Scott* at 323 per Lord Justice Clerk Alness.

<sup>439</sup> *Cooper Scott* at 323 per Lord Justice Clerk Alness. This particular statement seems to emphasise the rule that a deed which does not absolutely and conclusively prove its own invalidity, without call for any extrinsic evidence, is to be held as *ex facie* valid.

<sup>440</sup> *Cooper Scott* at 344 per Lord Anderson.

<sup>441</sup> However, the abovementioned comment by Lord Craighill in *Glen v Scales’ Trustees* does not appear to fit with the orthodox understanding of *ex facie* validity. See above at Chapter IV, D, 2.

not *ex facie* invalid. This appears to present a distinction between deeds which are merely suggestive of their own invalidity and which are nevertheless to be treated as *ex facie* valid, and deeds which are conclusive of their own invalidity and which are therefore *ex facie* invalid.

It appears that *Cooper Scott* provided a clear statement of the test for *ex facie* validity in Scots law.<sup>442</sup> This can be posited on the basis that between 1924 and 1994 there appears to have been only one case in which it was necessary to invoke the *Cooper Scott* test for *ex facie* validity. Thus it may be suggested that the *Cooper Scott* test was so clear that there was rarely any dispute regarding its application.<sup>443</sup> Furthermore, the only case which did occur regarding *ex facie* validity was decided on the basis of an emphatic application of the strict test which had been deployed in *Cooper Scott*. This is the case of *Abbey v Atholl Properties Limited*.

#### **4. *Abbey v Atholl Properties Limited*<sup>444</sup>**

In *Abbey v Atholl Properties* the Outer House held that if any extrinsic evidence was required to show that a deed was invalid then the deed was not invalid. In this strong application of the strict test which had been used in *Cooper Scott* the Court held that even if a deed stated that a granter did not have the power to grant the deed in question, due to the provisions of an entail, this would not impede positive prescription from commencing and being completed on the basis of this deed.<sup>445</sup> The deed was *ex facie* valid as the entail existed externally to the deed and the entail would have to be examined in order to verify that it did in fact contain the information which was reported in the foundation writ.<sup>446</sup>

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<sup>442</sup> See for instance, Johnston, *Prescription* 17.31.

<sup>443</sup> The leading conveyancing textbook of the mid-twentieth century reflects the established test for *ex facie* validity. See Burns, *Conveyancing* 201-202.

<sup>444</sup> *Abbey v Atholl Properties Limited* 1936 SN 97.

<sup>445</sup> The foundation writ under which Atholl Properties Limited held the estate stated that the disponent was heir of entail. Despite this statement the disponent granted the disposition in fee simple, which was argued to be clearly outwith the powers of such an heir as it violated the provisions of the Entail Acts.

<sup>446</sup> *Abbey v Atholl Properties Limited* 1936 SN 97 connects with the case law of the early nineteenth century in that *Paterson v Purves* (1823) 1 Sh. App. 401 is applied. See discussion above of *Paterson v Purves* at Chapter IV, B, 7.



It can thus be seen that the strict test which was employed in *Cooper Scott* test was again applied with rigour in *Abbey v Atholl Properties* and it would appear that this test continued unchallenged until 1994. The test might be summarised as meaning that if a deed might possibly be valid then it was to be treated as *ex facie* valid.

### **5. Non-application of the strict test for *ex facie* validity**

The case of *Cooper Scott* was cited in 1927,<sup>447</sup> 1950,<sup>448</sup> 1951,<sup>449</sup> 1971,<sup>450</sup> 2008<sup>451</sup> and most recently in 2012.<sup>452</sup> However, the cases in 1927, 1950 and 1951 did not relate to positive prescription, and the cases in 1971 and 2008 only involved *Cooper Scott* as authority for the principle that the dispositive clause prevails over any other part of the deed in which it is found. The 2008 case simply recognised that a deed does not require to be essentially valid in order to allow for positive prescription, rather it only requires to be *ex facie* valid. The 2008 case did not involve any substantial consideration or application of the *Cooper Scott* test for *ex facie* validity.

It can therefore be observed that the strict test for *ex facie* validity does not appear to have been applied by a court since 1936. As noted above, the scarcity of dispute regarding the test may be indicative of its clarity.<sup>453</sup> However, the rarity of dispute may have allowed the test to slip from view. This suggestion is made on the basis that there have been two relatively recent cases in which specific citations of the *Cooper Scott* test would appear to have been appropriate and yet were markedly absent. Such absence of citation is particularly noticeable as *Cooper Scott* was an Inner House case decided by a bench of seven. Yet, the *Cooper Scott* test does not seem to have been

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<sup>447</sup> In order to explain the history of a related petition. See *Scott's Trustees, Petitioners* 1927 SLT 16; Bill Chamber.

<sup>448</sup> As authority for the rule that a beneficiary's right to trust property never prescribes. See *United Collieries Ltd v United Collieries Ltd* 1950 SC 458; Inner House.

<sup>449</sup> As authority for the rule that a beneficiary's right to trust property never prescribes. See *Hastie's Judicial Factor v Morham's Executors* 1951 SC 668; Inner House.

<sup>450</sup> As authority for the principle that the dispositive clause is the critical clause in a deed. See *Territorial Auxiliary and Volunteer Reserve Association for the Highlands of Scotland, Petitioners* 1971 SC 125; Inner House.

<sup>451</sup> As authority for the principle of *ex facie* validity in relation to positive prescription and a servitude right. See *Romano v Standard Commercial Property Securities Ltd* [2008] CSOH 105.

<sup>452</sup> As authority for the principle of the dispositive clause prevailing over any other part of the deed. See *Trustees of Calthorpe's 1959 Discretionary Settlement v G Hamilton (Tullochgribban Mains) Ltd* [2012] CSOH 138.

<sup>453</sup> See Chapter IV, D, 3.

pled directly before the courts in either of these two recent instances.<sup>454</sup> It is to the examination of these two recent and controversial decisions that this chapter now turns.

## 6. *Watson v Shields*<sup>455</sup>

In 1994 Airdrie Sheriff Court heard a case which involved a disposition of an area of land<sup>456</sup> with a specific statement being made within the deed to declare that the granter did not have a title to the area in question. The deed stated that the granter had occupied the land since 1955 but ‘*without a title thereto*’.<sup>457</sup> This deed was therefore held to be *ex facie* invalid under section 1(2) of the Prescription and Limitation (Scotland) Act 1973 as it appeared to show that the granter did not have title to that which they disposed.<sup>458</sup>

However, it is arguable that the fact of the granter lacking title could only have been definitely ascertained if external evidence had been led in respect of the ownership of the land in question.<sup>459</sup> It is thus submitted that a deed could contain a declaration of non-ownership, but that the declaration itself could actually be inaccurate. Therefore the declaration would fail to prevent the transfer of land from taking place. This, albeit improbable, scenario is envisaged in the instance of a particularly timorous granter who was unconvinced by the protection afforded to their position by virtue of the qualification of the warrandice clause. Such a granter might insist that the deed itself contained a declaration of non-ownership as an additional protection for their position as against any future action by the grantee. The declaration might thus only represent

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<sup>454</sup> Although textbooks containing reference to *Cooper Scott* were at least referred to in *Aberdeen College (Board of Management) v Youngson* [2005] CSOH 31. See further discussion of this case below at chapter IV, D, 7.

<sup>455</sup> *Watson v Shields* 1994 SCLR 819. This was a Sheriff Court decision. The case was later heard at the Inner House of the Court of Session in *Watson v Shields* 1996 SCLR 81. At the Inner House no argument was raised regarding the validity of the *a non domino* deed. Therefore the Inner House did not rule on the point being analysed here. It is only the Sheriff Court decision that is being analysed in this paper.

<sup>456</sup> The area of land is in Chapelhall in Lanarkshire.

<sup>457</sup> See Disposition by John Stewart Watson and Agnes Watson in favour of themselves and the survivor recorded GRS Lanark 4<sup>th</sup> October 1990.

<sup>458</sup> Sheriff Simpson’s judgment affirms the view of the law expressed in Sheriff Principal Mowat’s note on this case issued on 21<sup>st</sup> September 1993. See *Watson v Shields* 1994 SCLR 819 at 820 per Sheriff Principal Mowat and at 823 per Sheriff Simpson.

<sup>459</sup> This would appear to accord with the orthodox test for *ex facie* validity which existed prior to *Watson v Shields* and which has been examined as the central subject of this chapter. See for instance: Bell, *Principles* § 2010; *Cooper Scott v Gill Scott* 1924 SC 309; McDonald, *Professor McDonald’s Conveyancing Manual* (6<sup>th</sup> edition by McDonald, Brymer, Cusine and Rennie) para 14.7.

uncertainty rather than a definite statement of non-existence of title.<sup>460</sup> As the true position with regard to title could only be determined by reference to extrinsic evidence it is submitted that such a deed would not be *ex facie* invalid under the test established in *Cooper Scott*. The question of whether any disposable interest did actually exist could only be settled by reference to external evidence which would thus mean that the deed would not be truly *ex facie* invalid.<sup>461</sup> It would therefore seem that *Watson v Shields* was incorrectly decided in terms of the strict test for *ex facie* validity which was established in *Cooper Scott* and which was also applied in *Abbey v Atholl Properties*.<sup>462</sup>

Aside from *ex facie* validity, the decision in *Watson v Shields* also contains a passing reference to the deed being insufficient in respect of its terms. This point is not developed but it seems that this may be a separate criterion from that of *ex facie* invalidity.<sup>463</sup> This criterion appears to be further developed in the case of *Aberdeen College v Youngson* and will be discussed in relation to that case below.<sup>464</sup> However, as it is not developed in *Watson v Shields* it is simply noted here that there may be a criterion which is distinct from *ex facie* validity, namely sufficiency of terms, which might prevent the deed in *Watson* from being used as a foundation for positive prescription. However, this is not developed in this case and is not the subject of this chapter. Furthermore, it appears that the reference to insufficiency of terms in *Watson* may simply be a restatement of the Sheriff's view that the deed was *ex facie* invalid. Yet, for completeness further discussion will be made below of the criterion of sufficiency of terms in relation to the case of *Aberdeen College*.

Returning to *ex facie* validity, it might be argued that, whilst *Cooper Scott* and *Abbey* are representative of the general understanding of *ex facie* validity in Scots law, there may be some degree of alternative judicial interpretation on this point. Specifically, it

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<sup>460</sup> This would appear similar to a declaration by the granter that they are only disposing 'so far as the granter has right thereto.' An example of such a declaration can be seen in the case of *Landward Securities (Edinburgh) Ltd v Inhouse (Edinburgh) Ltd* 1996 GWD 16-962.

<sup>461</sup> 1973 Act s. 1(2)(a).

<sup>462</sup> This accords with: *Paterson v Purves* (1823) 1 Sh. App. 401; Bell, *Principles* § 2010; *Cooper Scott v Gill Scott* 1924 SC 309; *Abbey v Atholl Properties Limited* 1936 SN 97; McDonald, *Professor McDonald's Conveyancing Manual* (6<sup>th</sup> edition by McDonald, Brymer, Cusine, Rennie) para 14.7.

<sup>463</sup> In relation to sufficiency of terms, see 1973 Act s.1(1)(a). In relation to *ex facie* validity see 1973 Act s.1(2)(a).

<sup>464</sup> See Chapter IV, D, 7.

was noted above that it was suggested by Lord Craighill that a deed may be *ex facie* invalid if it merely indicates its own invalidity without containing absolute proof of said invalidity within the four corners of the deed.<sup>465</sup> However, it appears that this was only a minor departure from the orthodox text for *ex facie* validity. It has been shown in this chapter that the orthodox test had been clearly recognised by the courts prior to the case of *Cooper Scott*, and was then definitely enunciated, and rigorously applied, in *Cooper Scott* and *Abbey*.

In the present time the essential issue seems to be the interpretation of the word ‘*is*’ in section 1(2)(a) of the 1973 Act. If the *Cooper Scott* test is applied in relation to this word then it would seem that the words ‘*is invalid ex facie*’ should be interpreted as meaning a deed which is definitely and indisputably invalid *ex facie*. On this interpretation the deed in *Watson* is not invalid *ex facie* and the case is therefore incorrectly decided with regard to *ex facie* validity. Alternatively, following Lord Craighill’s opinion in *Glen v Scales’ Trustees* the words ‘*is invalid ex facie*’ may be interpreted as meaning a deed which merely discloses or suggests possible grounds of challenge against the said deed.<sup>466</sup>

It is submitted that the *Cooper Scott* test appears preferable on the grounds that it promotes certainty and serves to reduce potential costs and delays in conveyancing transactions.<sup>467</sup> This is achieved by observing a criterion which only allows for *ex facie* invalidity in very limited circumstances. This view would appear to concur with the orthodox test for *ex facie* validity found within the authorities reviewed in the course of this chapter. Furthermore, and specifically with regard to *Watson*, it may be suggested that with regard to the disclosure that the grantor is not the owner of the land in question, an application to register the deed in this case would, in theory, be quite compliant with the provisions of the new Land Registration Act in relation to prescriptive claimants.<sup>468</sup> These provisions envisage it being clear to all parties

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<sup>465</sup> See *Glen v Scales’ Trustees* (1881) 9 R 317 at 325 per the opinion of Lord Craighill. See discussion above at Chapter IV, D, 2.

<sup>466</sup> *Glen v Scales’ Trustees* at 325 per the opinion of Lord Craighill.

<sup>467</sup> Positive prescription is an important means of limiting transactional costs and delays. See Johnston, *Prescription* 17.29.

<sup>468</sup> 2012 Act s.43 and s.44. This is discussed further below at chapter IV, F, 2, (a).

concerned that the prescriptive claimant has no title to the land in question, yet this will not prevent positive prescription from being commenced.

Having observed the case of *Watson* in 1994 it is now appropriate to consider the case of *Aberdeen College* in 2005.<sup>469</sup> This is the other major case in which specific citation of the *Cooper Scott* test would appear to have been appropriate and yet was markedly absent. However, in this case the deed was held to be problematic on contractual grounds in addition to being *ex facie* invalid. These issues are now discussed below.

## **7. Aberdeen College (Board of Management) v Youngson**

### **(a) Introduction**

In the case of *Aberdeen College (Board of Management) v Youngson*<sup>470</sup> Lord Menzies held that a valid disposition cannot be granted by a party in his or her own favour as such a deed is not sufficient in respect of its terms to constitute a conveyance of land. Furthermore, it was held that such a disposition is *ex facie* invalid. Such a deed thereby fails two tests in respect of the Prescription and Limitation (Scotland) Act 1973<sup>471</sup>. The ruling in this case is, as will be seen below, controversial. It also suggests that it may be necessary to consider the secondary question of whether a party may validly grant a disposition in his or her own favour if they are granting the right along with other parties.<sup>472</sup> All of these issues are important for conveyancing. However, for reasons of space, the issues relating to sufficiency of the deed, are only discussed briefly in this chapter. The focus of this chapter is that of *ex facie* validity.

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<sup>469</sup> Despite the ruling of the Court in *Watson v Shields* it would appear that important textbooks continued to largely reflect the traditional orthodox test for *ex facie* validity as found in *Cooper Scott*. See for instance Halliday, *Conveyancing* 31.69 and 36.08. However, at 33.94 Halliday states that a disposition must contain nothing which indicates that it is defective with regard to ownership. This seems to be a departure from the traditional test for *ex facie* validity. Johnston appears to state the essence of the traditional test. See Johnston, *Prescription* 17.30-17.32. Although it is surprising that *Watson v Shields* is cited as authority on this point alongside *Cooper Scott* at Johnston, *Prescription* 17.31. The reference to *Watson v Shields* should perhaps be regarded as misplaced in light of the analysis provided above.

<sup>470</sup> *Aberdeen College (Board of Management) v Youngson* [2005] CSOH 31; 2005 SC 355.

<sup>471</sup> 1973 Act s.1. The requirement that the deed must be sufficient in respect of its terms to constitute a in favour of the disponee a real right in the land in question is contained in section 1(1)(a). The requirement that the deed must not be *ex facie* invalid is contained in section 1(2)(a).

<sup>472</sup> This additional issue was partially discussed in *Kenneil v Kenneil* 2006 SLT 449.

## **(b) The facts of the case**

In *Aberdeen College*, the Youngson family granted a disposition of an area of land in Aberdeenshire in favour of themselves. The deed was explicit in stating the following words in the dispositive clause:

Do Hereby Dispone to and in favour of ourselves the said...<sup>473</sup>

Thus there was no doubt, according to the deed, that the parties on both sides of the transaction were identical. In light of this information Lord Menzies stated that the pursuer was correct both in the law of contract and in the law of conveyancing:

“A person cannot contract with himself. It appears to me that this is the essence of the argument in conveyancing terms as well as in contractual terms. Transfer of property is essential for an effective conveyance of land. A person cannot dispone a piece of land from himself to himself in exactly the same status or category, because no transfer will have resulted.”<sup>474</sup>

This is the principal doctrinal argument upon which the entire decision turns. In order to understand why the decision may be questionable it is necessary to analyse further the bases on which it was reached.

## **(c) The two part failure of the deed in *Aberdeen College***

### **(i) The failure of the deed as a contract which resulted in the deed being held to be insufficient in respect of its terms to constitute in favour of the disponee a real right of landownership**

At paragraph 11<sup>475</sup> Lord Menzies cited various passages as authority for the proposition that there must be two distinct parties to a contract under Scots law.<sup>476</sup> This argument, in relation to the law of contract, is not disputed here. However, the automatic extension of this argument to the law of conveyancing of immoveable property in Scotland may be questionable. The extension is made explicit in paragraph 12 of the judgment in the following statement:

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<sup>473</sup> Disposition by William Philip Youngson, Mrs Gladys Watt or Youngson, Stewart Watt Youngson and John Charles Youngson in favour of themselves recorded GRS Aberdeen 23<sup>rd</sup> July 1993.

<sup>474</sup> *Aberdeen College (Board of Management) v Youngson* [2005] CSOH 31 at para 10.

<sup>475</sup> *Aberdeen College* at para 11.

<sup>476</sup> *Kildrummy (Jersey) Ltd v Inland Revenue Commissioners* 1991 SC 1 at 5-6 per the Lord President; *Clydesdale Bank Plc v Davidson* 1998 SC (H.L.) 51 at 58 per Lord Clyde.

“Essentially the same point arises when viewed through the prism of conveyancing theory and practice. Although sec 15 of the Titles to Land Consolidation Act 1868 removed the necessity to expedite and record an instrument of sasine and provided that the recording of the conveyance or deed itself should have the same legal force and effect as if the conveyance or deed so recorded had been followed by an instrument of sasine, this merely simplified and modernised the procedures or mechanisms required – it did not alter the underlying theory. That underlying theory required transfer or delivery of the land by the disponer to the disponee. This theory is set out in Prof Gretton’s chapter on the feudal system in the Stair Memorial Encyclopedia (vol 18, paras 87-93), which were referred to with approval by the Lord President in *Sharp v Thomson*. A deed or conveyance whereby a person purports to sell to himself does not involve any transfer nor any delivery. Without some independent third party or separate persona, it is no transaction at all.”<sup>477</sup>

This argument is further advanced in the next paragraph of the decision<sup>478</sup> in which the view of Professors Gretton and Reid is specifically endorsed in relation to the contention that a disposition by an individual in favour of that same individual cannot form a valid foundation writ for the purpose of positive prescription in Scots law.<sup>479</sup>

As noted above, for reasons of space, the issues relating to sufficiency of the deed, are only discussed relatively briefly in this chapter. The focus of this chapter is that of *ex facie* validity. Furthermore, as the issue of the sufficiency of the deed involves an overlap between property law and the law of contract, this thesis is not the appropriate location for a full examination of the issue of sufficiency of terms. This is a property law thesis and it is not appropriate or possible for a contractual topic to be examined fully within the confines of this work. However, it is noted here that it may be possible to argue that the principles of contract law should not automatically apply in the context of property law, specifically in the context of the conveyancing of immoveable property.<sup>480</sup> This point is noted in Lord Menzies judgment,<sup>481</sup> yet it might be suggested

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<sup>477</sup> *Aberdeen College* at para 12.

<sup>478</sup> *Aberdeen College* at para 13.

<sup>479</sup> G L Gretton and K G C Reid, *Conveyancing* (3<sup>rd</sup> edn, 2004) 7.25. This view is also expressed in the 4<sup>th</sup> edition. See Gretton and Reid, *Conveyancing* 7.25.

<sup>480</sup> See for instance the evacuation of survivorship destinations by means of parties conveying property to themselves. See further discussion in A J McDonald, *Professor McDonald’s Conveyancing Manual* (7<sup>th</sup> edition by D A Brand, A J M Steven and S Wortley, 2004) para 12.7. It may also be observed that cases exist in which A to A dispositions have been involved but in which no criticism has been ventured in respect of their validity. See: *Zetland v Glover Incorporation of Perth* (1870) 8 M (HL) 144; *Porteous’s Executors v Ferguson* 1995 SLT 649. See again the discussion in McDonald, *Professor McDonald’s Conveyancing Manual* (7<sup>th</sup> edition by D A Brand, A J M Steven and S Wortley, 2004) para 12.7.

<sup>481</sup> *Aberdeen College* at para 13.

that this point is not fully explored by his lordship. However, as stated, this issue involves such a degree of overlap with the law of contract that it is beyond the scope of this thesis.<sup>482</sup>

**(ii) The deed being invalid *ex facie* due to disclosing the fact of non-ownership on the part of the granter**

In addition to the insufficiency of the terms of the deed, Lord Menzies held that the disclosure of the identical character of the parties on both sides of the transaction rendered the disposition as being invalid *ex facie*.<sup>483</sup> This argument was successful on the basis that the deed was held to be revelatory of the fact that the disponer was not the owner and was thus unable to transfer any real right.<sup>484</sup> The views of Professors Gretton and Reid were again approved on this point<sup>485</sup> and there is, with both the lines of attack in this case, a great deal of logical and conceptual appeal to commend these positions.

However, with regard to the issue of *ex facie* validity it seems surprising that the *Cooper Scott* test was not cited in *Aberdeen College*. Even if *Aberdeen College* was correctly decided it would appear arguable that the decision should be interpreted in a very limited fashion due to the existence of the *Cooper Scott* test which holds that a deed is *ex facie* invalid only if it definitely proves its invalidity without reference to extrinsic evidence.

It is not disputed that the identical nature of the disponer and the disponee was conclusively shown from within the four corners of the deed in the *Aberdeen College* case.<sup>486</sup> However, this does not seem to be absolutely demonstrative of *ex facie* invalidity as it does not indisputably demonstrate non-ownership on the part of the granter. Although it is strongly suggestive of non-ownership, this is not categorical as

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<sup>482</sup> It is noted that the decision in *Aberdeen College* has recently been considered in the Outer House case of *Povey v Povey's Executor Nominat* [2014] CSOH 68; 2014 SLT 643. The *ratio* of *Aberdeen College* does not appear to have been applied in *Povey*, however the Outer House appears to have considered the decision of *Aberdeen College* to be unproblematic.

<sup>483</sup> *Aberdeen College* at para 14.

<sup>484</sup> *Aberdeen College* at para 14.

<sup>485</sup> *Aberdeen College* at para 14 approving Gretton and Reid, *Conveyancing* (3<sup>rd</sup> edn, 2004) 7.25. This view is also expressed in the 4<sup>th</sup> edition. See Gretton and Reid, *Conveyancing* 7.25.

<sup>486</sup> As it contained the wording 'ourselves the said' to show absolute identification.



it would not be impossible for a granter to grant a deed covering land in respect of which the granter's ownership was doubtful rather than definitely non-existent.<sup>487</sup>

It is argued here that unless *ex facie* invalidity can be absolutely verified from the body of the deed itself then the deed should not be treated as *ex facie* invalid. This view would appear to concur with the orthodox test for *ex facie* validity which was developed by the authorities reviewed in the course of this chapter. This is seen most clearly in the test for *ex facie* validity which was applied in *Cooper Scott*.<sup>488</sup> Thus, in *Aberdeen College* it would seem that the deed should not have been held to be *ex facie* invalid under section 1(2) as it did not categorically prove that the disponer did not own the land in question. The identical character of the parties did not necessitate a finding of *ex facie* invalidity under section 1(2) as it did not definitely demonstrate that the disponer did not own the land in question.

The fact that *Watson v Shields*<sup>489</sup> was cited in *Aberdeen College* may explain why the decision was reached without reference to *Cooper Scott*. As noted above, *Watson v Shields* appears to have been decided on the basis that a deed may be *ex facie* invalid if it merely indicates, but does not absolutely prove, its invalidity from within its own four corners. This seems also to be the basis of the decision in *Aberdeen College*.

As argued above,<sup>490</sup> it is submitted that the *Cooper Scott* test appears preferable on the grounds that it promotes certainty and serves to reduce potential costs and delays in conveyancing transactions.<sup>491</sup> This view would appear to concur with the orthodox

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<sup>487</sup> As noted at Chapter IV, D, 6 the case of *Landward Securities (Edinburgh) Ltd v Inhouse (Edinburgh) Ltd* may be an example of a situation in which the granter's ownership of the subjects in question was doubtful rather than definitely non-existent.

<sup>488</sup> This orthodox position was supported by Professor McDonald in McDonald, *Professor McDonald's Conveyancing Manual* (6<sup>th</sup> edition by McDonald, Brymer, Cusine, Rennie) para 14.7. The 6<sup>th</sup> edition of *Professor McDonald's Conveyancing Manual* is specifically referred to here as it contains a longer discussion of this issue than that which is found in the 7<sup>th</sup> edition. However, it is also useful to examine the discussion in the 7<sup>th</sup> edition. See *Professor McDonald's Conveyancing Manual* (7<sup>th</sup> edition by D A Brand, A J M Steven and S Wortley, 2004) para 12.7. See also Swinton, 'Self granted a non domino dispositions' (2005) 73 SLG 52.

<sup>489</sup> *Watson v Shields* 1994 SCLR 819. This was a Sheriff Court decision. The case was later heard at the Inner House of the Court of Session in *Watson v Shields* 1996 SCLR 81. At the Inner House no argument was raised regarding the validity of the *a non domino* deed. Therefore the Inner House did not rule on the point being analysed here. It is only the Sheriff Court decision that is being analysed in this paper.

<sup>490</sup> Chapter IV, D, 6.

<sup>491</sup> See footnote 467 above.

test for *ex facie* validity found within the authorities reviewed in the course of this chapter. Therefore a disposition should not be read as *ex facie* invalid unless the invalidity is absolutely proven from within the four corners of the deed itself. If the deed is *ex facie* valid, then prescription may be commenced and at the end of the prescriptive period the latent invalidity will be cured.

It may also be suggested that a distinction should be observed between dispositions which are *ex facie* valid and those which are effective.<sup>492</sup> This argument posits that a deed may be recorded which is ineffective as a transfer, but which is *ex facie* valid due to the fact that the ineffectiveness could only be proven if extrinsic evidence was adduced. Hence, unless the extrinsic evidence is provided, positive prescription may be commenced on the basis of the deed as it is *ex facie* valid. Thus, at the end of the prescriptive period, the latent invalidity will be cured and the *ex facie* valid deed will become a deed which is both valid and effective. This argument is again in agreement with the orthodox test for *ex facie* validity which holds that a deed is *ex facie* invalid only if it definitely proves its invalidity without reference to extrinsic evidence.<sup>493</sup>

#### **8. *Burgess-Lumsden v Aberdeenshire Council*<sup>494</sup>**

Despite the holdings in *Watson* and *Aberdeen College, 2009* witnessed a more orthodox judgment on the issue of *ex facie* validity. In this case Sheriff Cusine held that a reversionary right could not be enforced in respect of a property feued under the School Sites Act 1841. The property had not been used as a school for many years and the reversionary right had negatively prescribed.<sup>495</sup> The fact that a 1979 deed which conveyed the land to a third party purchaser referred to an 1855 feu charter (which contained a condition that the site must always be used for a school) for a description and burdens did not make it *ex facie* invalid within the meaning section 1(2)(a) of the 1973 Act. Therefore, unless the deed was a forgery, any latent defect in the third party purchaser's foundation writ would have been cured in 1989 by the

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<sup>492</sup> See Swinton, 'Self granted a non domino dispositions' (2005) 73 SLG 52.

<sup>493</sup> See *Cooper Scott v Gill Scott* 1924 SC 309. See also: Reform of the Law Relating to Prescription and Limitation of Actions (Scottish Law Commission Report No 15 (1970)) paras 11 and 13.

<sup>494</sup> *Burgess-Lumsden v Aberdeenshire Council* 2009 SLT (Sheriff Court) 117.

<sup>495</sup> The Inner House case of *Houldsworth v Cambusnethan School Board* (1904) 7 F 291 was considered but Sheriff Cusine held that a reversion was not automatic under section 86 of the Title Conditions (Scotland) Act 2003.

operation of positive prescription. 1989 had therefore been the last date on which the superior had held a right to demand a reconveyance. The Sheriff also opined that while the party who sold the land in 1979 would have been under an obligation to account to the superior in respect of the money realised from the sale, this liability had also prescribed.

The case report does not contain a reference to *Cooper Scott*. However, it does seem to accord with the orthodox interpretation of the concept of *ex facie* validity as established in *Cooper Scott*. Specifically, the 1979 deed was held to be *ex facie* valid as it did not contain conclusive evidence of its invalidity. Thus, *Burgess-Lumsden v Aberdeenshire Council* seems to show that the orthodox understanding of *ex facie* validity has not been totally forgotten.

### **E. Conclusion regarding ex facie validity under the Sasine system**

It is argued here that the orthodox test for *ex facie* validity as articulated by Bell<sup>496</sup> and as refined and developed through the case law which culminated in *Cooper Scott* and *Abbey* is to be preferred to the approach seen in *Watson* and *Aberdeen College*.<sup>497</sup> As mentioned above,<sup>498</sup> this view is taken on the grounds that it promotes certainty and serves to reduce potential costs and delays in conveyancing transactions. It is therefore argued that, in accordance with the orthodox test for *ex facie* validity, a disposition should not be read as *ex facie* invalid unless the invalidity is absolutely proven from within the four corners of the deed itself.

It is also suggested here that if extrinsic evidence is not completely excluded then it will become an open question as to when it is admissible. This would appear to undermine the consistency of the principle of *ex facie* validity.

Furthermore, it appears that the orthodox test for *ex facie* validity is particularly appropriate to the Scots law of positive prescription. This is posited on the basis that the requirement for a deed to found positive prescription is in itself onerous. To demand a higher standard than that of the orthodox test for invalidity would place an

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<sup>496</sup> Bell, *Principles* § 2010.

<sup>497</sup> See also *Glen v Scales' Trustees* (1881) 9 R 317 at 325 per the opinion of Lord Craighill.

<sup>498</sup> Chapter IV, D, 6 and Chapter IV, D, 7, (c), (ii).

even greater burden on the party relying on positive prescription and thus on any party attempting to rely on a deed recorded in the Register of Sasines for proof of ownership. In this context, it is worth remembering that Scots law is unusual in imposing such a longstanding requirement for a written deed to be deployed in order to commence positive prescription.<sup>499</sup> Thus the orthodox test for *ex facie* validity is a sensible measure to prevent the requirement of the written deed becoming an excessive restriction on positive prescription of landownership.

It is also important to recognise that the orthodox test for *ex facie* validity is appropriate to Scots law due to the fact that good faith is not required in order to commence positive prescription.<sup>500</sup> Therefore, by holding that a deed is only *ex facie* invalid if that can be proved conclusively from within the four corners of the deed, the orthodox test for *ex facie* validity is clear in showing that good faith is not required by the party who is relying on positive prescription. This again appears appropriate for Scots law due to the fact that the requirement for a deed to found positive prescription is in itself onerous. To demand good faith would again place an even greater burden on the party relying on positive prescription. In this context it is again worth remembering that Scots law is unusual in imposing such a longstanding requirement for a written deed to be deployed in order to commence positive prescription.<sup>501</sup> Thus the orthodox test for *ex facie* validity is a sensible measure to prevent the requirement of the written deed becoming an excessive restriction on positive prescription of landownership. If good faith was incorporated this would destroy the orthodox test as it would be impossible for positive prescription to occur if the party attempting to rely on positive prescription was aware that the deed was actually invalid, even if it was *ex facie* valid.<sup>502</sup> This in turn would lead to complex evidential questions regarding whether or not individuals had been aware of invalidity which was not absolutely proven *ex facie* the deed in question. To allow such questions to arise could greatly complicate conveyancing transactions. Thus Scots law appears sensible in avoiding these problems by treating the question of good faith as irrelevant. The existence of the

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<sup>499</sup> See Chapter II, E.

<sup>500</sup> Scots law is not particularly unusual in containing an allowance for positive prescription of landownership without the need for good faith. See Chapter II, E.

<sup>501</sup> See Chapter II, E.

<sup>502</sup> See Chapter II, B, 3 and Chapter II, D and E.

orthodox test for *ex facie* validity is thus a logical consequence of a system which requires a deed but which does not require good faith.

Whilst there may have been an orthodox test for *ex facie* validity under the Sasine system, it must be emphasised that the Register of Sasines is about to be closed and the Sasine system will only retain relevance with regard to examination of title for property disputes relating to deeds recorded in the Register of Sasines and for examination of title for first registrations in the Land Register of Scotland. Accordingly it is necessary to turn to the question of whether there is a continued role for *ex facie* validity under land registration.

## **F. Ex facie validity and land registration**

The relationship of land registration to the concept of *ex facie* validity is complicated. In order to trace the ways in which *ex facie* validity has continued to have relevance in the context of land registration, it is necessary to distinguish between the situation under the 1979 Act and the situation under the 2012 Act.

### **1. The 1979 Act**

#### **(a) No requirement for *ex facie* validity of registered titles with or without indemnity**

Under the 1979 Act, positive prescription only ran on titles which were registered in the Land Register but which were not indemnified.<sup>503</sup> Hence, positive prescription appeared only to be relevant in limited circumstances. Furthermore, the concept of *ex facie* validity was not required in relation to positive prescription in the Land Register as positive prescription was running on the registration of the title in the Land Register, rather than on the recorded deed in the Register of Sasines.<sup>504</sup>

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<sup>503</sup> 1979 Act s.10 and 1973 Act s.1.

<sup>504</sup> 1973 Act s.1.

## **(b) *Ex facie* validity of foundation writs for first registrations in the Land Register**

It might be suggested that the concept of *ex facie* validity was in some sense relevant in relation to all first registrations of title in the Land Register. This was due to the fact that the Keeper had to examine title in order to allow first registration to take place.<sup>505</sup> As this appeared to mean that the Keeper had to verify title on the same basis that would have been used to verify title under the Sasine system, the concept of the *ex facie* validity was in a sense incorporated into all first registrations as the foundation writ for the prescriptive progress of any title would only have to meet the standard of being *ex facie* valid rather than essentially valid. This suggestion appears to be supported by the Registration of Title Practice Book which states that the documentation which must be submitted for proof of title during first registration is, in practical terms, the ‘prescriptive progress’.<sup>506</sup> This information is also reflected in the Registers of Scotland Legal Manual.<sup>507</sup> Thus it appears that the standard of validity, namely *ex facie* validity, which was required under the Sasine system for proof of title, was the standard of validity which should have been required of foundation writs during first registration of title in the Land Register. This use of the term ‘prescriptive progress’ is suggestive of the method of proving title that existed under the Sasine system.<sup>508</sup>

However, given the decision in *Watson v Shields*, it may well have been the case that the Keeper would have interpreted *ex facie* validity as meaning that that a foundation writ must not contain anything to suggest its invalidity, rather than as meaning that it was valid unless its invalidity could be established without recourse to extrinsic evidence. This would appear to have accorded with the Keeper’s practice of rejecting applications which did not appear to be valid.<sup>509</sup> Given the fact that the Keeper was providing a monetary guarantee for all indemnified titles it may have been

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<sup>505</sup> 1979 Act s.4.

<sup>506</sup> Registers of Scotland Registration of Title Practice Book para 5.11.

<sup>507</sup> Registers of Scotland Legal Manual para 2.13.

<sup>508</sup> See discussion of examination of title in: Halliday, *Conveyancing* 36.01-36.104; Gretton and Reid, *Conveyancing* 7.01-7.31.

<sup>509</sup> See Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 12.42-12.51.

understandable for the Keeper to be reluctant to accept an application in which the prescriptive progress was based on a foundation writ in the form of the deed found in *Watson v Shields*. The explicit indication of potential invalidity contained in such a deed might have caused the Keeper to reject such an application. Thus it may have been the case that the Keeper actually required foundation writs for first registrations to contain nothing which could be read as indicating that they might not be essentially valid. This would of course be different from the orthodox test for *ex facie* validity which held that a deed was *ex facie* valid unless invalidity could be conclusively proved without recourse to extrinsic evidence.

Irrespective of whether or not the Keeper would reject an application which used a foundation writ in the form of the deed found in *Watson v Shields*, it is suggested that, following the advent of land registration, practitioners may well have opted to avoid direct applications which involved the use of foundation writs which contained anything to indicate potential invalidity. If a foundation writ contained an indication of potential invalidity it may well have been the case that recourse would have been made to the courts in order to allow for registration to proceed rather than attempting a direct application to the Keeper.<sup>510</sup> This would seem likely as it would avoid delay and expense consequent on any potential dispute with the Keeper. Thus, whilst it might be theoretically argued that the standard of the foundation writ required to support an application for registration under the 1979 Act should technically have been the same as that which was described in the orthodox test for *ex facie* validity under the Sasine system, it may well have been the case that, following land registration and the decision in *Watson v Shields*, the foundation writ had, in reality, to meet the standard of containing nothing which could be read as indicating that it might not be essentially valid. If there was an indication of essential invalidity, it would seem likely that recourse would have been made to the courts in order to allow for registration to proceed, rather than engaging in a direct attempt at registration which would in all likelihood have ended in failure or a prolonged dispute with the Keeper. Thus there

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<sup>510</sup> I am grateful to Professor George Gretton of the University of Edinburgh and Professor Robert Rennie of the University of Glasgow for their guidance in developing my understanding of this issue.

may have been a tension between the theoretical understanding of *ex facie* validity and the practical application of *ex facie* validity under the 1979 Act.

## 2. The 2012 Act

### (a) Deeds which do not appear to be valid due to the granter lacking title

Under the 2012 Act positive prescription can run on the basis of any deed which is registered in the Land Register.<sup>511</sup> This is a substantial change from the position under the 1979 Act which, as discussed above, only allowed for positive prescription to run on titles which had been registered in the Land Register but which had not been indemnified. However, the 2012 Act does not make express allowance for deeds to be *ex facie* valid in order to enter the Land Register. Rather it simply appears to require deeds to be valid.<sup>512</sup> The content of this requirement is now examined below.

The 2012 Act defines a valid deed as including a deed which would result in the acquisition of a right if the deed is registered.<sup>513</sup> It may be suggested that this should therefore include deeds which are *ex facie* valid if they have been perfected by positive prescription under the 1973 Act. Hence an *ex facie* valid deed, which has been supported by ten years of prescriptive possession, is sufficient to allow for the acquisition of a right in Scots law. However, prior to the completion of the prescriptive period, an *ex facie* valid deed may not actually be valid and may therefore be insufficient to allow for the acquisition of a right on registration. This would appear to make it impossible to register such a deed.<sup>514</sup> However, it is possible for a deed to

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<sup>511</sup> 1973 Act s.1 as amended by 2012 Act s.119 and Schedule 5 para 18. This change appears to raise possible issues regarding the reliance on the accuracy of the Land Register. The question of whether the deed which gave rise to registration should be able to take precedence over the content of the information held on the Land Register is an issue which may create questions regarding the certainty of land registration. However, this is an issue which belongs to a separate discussion on the future of land registration. I am grateful to Professor George Gretton of the University of Edinburgh and Professor Robert Rennie of the University of Glasgow for drawing my attention to the potential significance of this point.

<sup>512</sup> 2012 Act s.23 and s.26.

<sup>513</sup> The term 'valid' is defined in section 113(2) of the 2012 Act. However, this definition does not specifically mention the relationship between the concept of validity under the 2012 Act and the concept of *ex facie* validity under the 1973 Act. This relationship is therefore analysed in this section of this thesis. The issue of validity is discussed by the Scottish Law Commission but not with regard to the relationship of validity and *ex facie* validity. See the Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 12.42-12.55.

<sup>514</sup> 2012 Act s.23 and s.26



be registered even if it appears to be invalid due to the granter lacking title. This is possible even though the deed does not allow for the acquisition of a right if it is registered. This point is addressed in sections 43 and 44 of the 2012 Act.

The 2012 Act is very clear in stating that a disposition which appears to be invalid due to the granter lacking title may nonetheless be registered, provided that certain specific criteria, primarily relating to notification of affected parties, are complied with by the applicant.<sup>515</sup> Once the deed is registered, the invalidity will be cured if positive prescription is completed in respect of the disposition in question.<sup>516</sup> As stated, the 2012 Act is clear in stating that these provisions apply to dispositions which do not appear to be valid at the time of registration.<sup>517</sup> As noted earlier, this would appear to suggest that a deed which contained an express declaration of the granter's doubtful ownership, such as that found in *Watson v Shields*, would be entirely compliant with the provisions of the 2012 Act relating to the allowance for registration of invalid dispositions.<sup>518</sup> Yet in this situation, it appears that the concept of validity refers to essential validity rather than *ex facie* validity.<sup>519</sup> This is suggested as, under section 43 of the 2012 Act, the test for the validity of a disposition is that of whether or not the disposition appears to be valid when examined by the Keeper.<sup>520</sup> Specifically, the question is that of whether it appears to the Keeper that the disposition is not valid due to the granter lacking title.

In view of the test described in section 43, it seems that if the granter appears to lack title then the disposition will be invalid. This seems to mean that if a deed appears to

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<sup>515</sup> 2012 Act s.43 and s.44.

<sup>516</sup> 2012 Act s.43 and s.44.

<sup>517</sup> 2012 Act s.43 and s.44.

<sup>518</sup> See Chapter IV, D, 6.

<sup>519</sup> The term 'valid' is defined in section 113(2) of the 2012 Act. However, this definition does not specifically mention the relationship between the concept of validity under the 2012 Act and the concept of *ex facie* validity under the 1973 Act. This relationship is therefore analysed in this section of this thesis. The issue of validity is discussed by the Scottish Law Commission but not with regard to the relationship of validity and *ex facie* validity. See the Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 12.42-12.55.

<sup>520</sup> However, it is understood that, under the regime which is now operating under the 2012 Act, the Keeper is no longer checking the prescriptive progress for each application. Rather, the Keeper is relying on the certification of the applicant in respect of each application. Yet, it is anticipated that this may not actually alter the understanding of the concept of validity in relation to land registration from that which appears to have developed under the 1979 Act regime. This issue is discussed further below at chapter IV, F, 2, (c).

be essentially invalid due to lack of ownership on the part of the granter, then it will be treated as being essentially invalid. Therefore, a deed such as that found in *Watson v Shields* might not be described as *ex facie* valid under the 2012 Act, rather it might be described as invalid as it appears to show non-ownership on the part of the granter. This view would be further evidenced if there was no documentation which could be led to support any claim that the granter had title.<sup>521</sup> However, despite being invalid, it would still be possible for such a deed to benefit from the provisions of the 2012 Act which allow for such deeds to be registered and subsequently rendered valid by positive prescription.<sup>522</sup>

With regard to the difference between the concept of *ex facie* validity under the 1973 Act and the concept of validity under the 2012 Act, it would seem possible to read the term 'valid' in the 2012 Act as meaning that a deed such as that found in *Watson v Shields* would not appear to be essentially valid and therefore would be regarded as essentially invalid under the 2012 Act. Yet it would still seem to be possible to read such a deed as being formally valid and hence as being '*ex facie* valid' on the basis that, unless extrinsic evidence were to be produced, the invalidity of the deed could not be conclusively proved. Thus the difference between the concept of validity in the 1973 Act and the concept of validity in the 2012 Act maybe resolved on the basis that a disposition is *ex facie* valid unless it can be conclusively proven to be invalid without reference to extrinsic evidence. Hence, even if a disposition appears to be essentially invalid, it is nonetheless *ex facie* valid unless it is formally invalid.<sup>523</sup>

In summary, it should be emphasised that there is no need for a disposition to be *ex facie* valid to benefit from positive prescription under sections 43 and 44 of the 2012 Act. Yet, it should be recognised that deeds which may be regarded as invalid in relation to land registration under the 2012 Act might have been regarded as *ex facie* valid in relation to recording in the Register of Sasines under the 1973 Act. This point

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<sup>521</sup> This would presumably hold true for any *a non domino* deed as there would be no prescriptive progress to support the title.

<sup>522</sup> 1973 Act s.1; 2012 Act s.43 and s.44 and 1973 Act s.1 as amended by 2012 Act s.119 and Schedule 5 para 18.

<sup>523</sup> This can again be read as relating to the distinction between a disposition which is ineffective as a transfer but which is *ex facie* valid as the ineffectiveness is only proven if extrinsic evidence is led. See Swinton, 'Self granted a non domino dispositions' (2005) 73 SLG 52.

may not affect dispositions which benefit from positive prescription under sections 43 and 44 of the 2012 Act. However, it may be of wider relevance for understanding the concept of validity in relation to land registration applications under the 2012 Act. This is now examined under the two following headings.

### **(b) Apparent validity of all deeds registered in the Land Register**

The concept of validity is also important in relation to section 23 of the 2012 Act. Section 23<sup>524</sup> requires that, apart from the allowance for invalid dispositions under section 43 of the 2012 Act, the Keeper is only to accept deeds which are valid.<sup>525</sup> However, the 2012 Act also amends the 1973 Act to allow for positive prescription to run on all deeds in the Land Register.<sup>526</sup> Hence, if a deed is accepted and registered as valid, but is in fact invalid, the invalidity may be cured if positive prescription is completed on the basis of that deed. Therefore, a tension might exist as the term ‘valid’ in the 2012 Act should perhaps be read in some instances as meaning ‘apparently essentially’ valid rather than ‘essentially’ valid. Whilst this is not identical to the concept of *ex facie* validity in relation to the Register of Sasines, it might be argued that there is a hint of continuity between the Register of Sasines and the land registration regime under the 2012 Act, given the possibility that positive prescription can cure deeds which appear to be valid but which are in fact invalid. This may be further facilitated as, it is understood to be the case that, the Keeper is no longer checking the prescriptive progress for each application. Rather, the Keeper is relying on the certification of the applicant in respect of each application. Yet, it is anticipated that this may not actually alter the understanding of the concept of validity in relation to land registration from that which appears to have developed under the 1979 Act regime.<sup>527</sup> Hence, it may be the case that the land registration regime under the 2012 Act will continue to demand the same level of proof of a deed’s validity as that which

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<sup>524</sup> Section 23 covers first registrations. Section 26 covers registration of registered plots.

<sup>525</sup> 2012 Act s.23 and s.43. The term ‘valid’ is defined in section 113(2) of the 2012 Act. However, this definition does not specifically mention the relationship between the concept of validity under the 2012 Act and the concept of *ex facie* validity under the 1973 Act. This relationship is therefore analysed in this section of this thesis. The issue of validity is discussed by the Scottish Law Commission but not with regard to the relationship of validity and *ex facie* validity. See the Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 12.42-12.55.

<sup>526</sup> 2012 Act s.119 and Schedule 5 para 18.

<sup>527</sup> This issue is discussed further below at chapter IV, F, 2, (c).

was required under the 1979 Act regime. Therefore, the land registration system may continue to require far more proof of a deed's validity than that which was required in the test for *ex facie* validity under the Sasine system. In relation to first registrations, it may thus be the case that a deed can only be regarded as valid if it appears to be essentially valid on the basis of the prescriptive progress.<sup>528</sup> The role of *ex facie* validity in relation to proof of title for first registrations under the 2012 Act is therefore examined next.

### **(c) *Ex facie* validity of foundation writs for first registrations in the Land Register**

As with the 1979 Act the concept of *ex facie* validity may continue to be relevant for the 2012 Act with regard to the foundation writ for a first registration in the Land Register. This is again due to the fact that, as discussed above,<sup>529</sup> a deed must be valid in order to be registered in the Land Register.<sup>530</sup> As this appears to mean that an application must consist of a title which can be verified on the same basis that would have been used to verify title under the Sasine system,<sup>531</sup> the concept of *ex facie* validity is in a sense incorporated into all first registrations as the foundation writ for the prescriptive progress of any title would seem only to have to meet the standard of being *ex facie* valid rather than that of being essentially valid.

However, as with the 1979 Act, given the decision in *Watson v Shields*, it may well be the case that the Keeper will interpret *ex facie* validity to mean that a foundation writ must not contain anything to suggest its invalidity, rather than as meaning that a foundation writ is valid unless its invalidity can be established without recourse to extrinsic evidence. This would appear to accord with Keeper's practice, under the

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<sup>528</sup> This would be a continuation of the practice which was established by the Keeper of the Land Register under the 1979 Act regime. See Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 12.42-12.51.

<sup>529</sup> See chapter IV, F, 2, (a).

<sup>530</sup> 2012 Act s.23 and s.26.

<sup>531</sup> This would appear to be supported by the definition of 'validity' provided in section 113(2) of the 2012 Act. See discussion of validity under the 2012 Act at chapter IV, F, 2, (a).

regime which operated under the 1979 Act, of rejecting applications which did not appear to be valid.<sup>532</sup>

Yet, as mentioned above,<sup>533</sup> the 1979 Act regime may be in the process of alteration as, it is understood, that the Keeper is, under the regime which is now operating under the 2012 Act, no longer normally checking the prescriptive progress. Rather, the Keeper is now relying on the certification of the applicant in respect of the prescriptive progress. This may allow for applications to be registered which are based on foundation writs which do not appear to be valid. However, it may be the case that applications under the 2012 Act will continue to be made only on the basis that the foundation writs which ground the applications appear to be valid. This might seem likely in view of the introduction of the statutory duty of care which is owed to the Keeper under s.111 of the 2012 Act and the new criminal offence in relation to information provided in relation to applications under s.112 of the 2012 Act. Whilst an application in relation to a foundation writ which does not appear to be valid under the 2012 Act might not breach s.111 or s.112 of the 2012 Act, practitioners may nonetheless feel it is appropriate not to attempt to register an application which is based on a foundation writ which does not appear to be valid in case this is treated as breaching the duty of care owed to the Keeper, as knowingly misleading the Keeper, or as a failure to disclose material information to the Keeper. Hence the regime which operated under the 1979 Act, and which prevented applications which did not appear to be valid, may essentially continue under the 2012 Act. Thus it may be the case that the foundation writs required for first registrations will have to contain nothing which can be read as indicating that they may not be essentially valid. This is of course different from the orthodox test for *ex facie* validity under the Sasine system which held that a deed was *ex facie* valid unless invalidity could be conclusively proved without recourse to extrinsic evidence. Therefore, if the orthodox test for invalidity is not followed, the Keeper may mark an entry in the title sheet as provisional<sup>534</sup> if it is based on a foundation writ such as that found in *Watson v Shields*. The explicit declaration of non-ownership contained in such a foundation writ might cause the

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<sup>532</sup> See Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 12.42-12.51.

<sup>533</sup> See chapter IV, F, 2, (a) and (b).

<sup>534</sup> 2012 Act s.43 and s.44.

Keeper to take the view that a disposition which is reliant upon such a foundation writ for proof of title is invalid and that a disposition based on such a foundation writ will have to be perfected by positive prescription under sections 43 and 44 of the 2012 Act.

As with the 1979 Act, irrespective of the Keeper's response to an application which used a foundation writ in the form of the deed found in *Watson v Shields*, it is suggested that, practitioners may well opt to avoid direct applications which involve the use of foundation writs which contain anything to indicate potential invalidity. If a foundation writ contains an indication of potential invalidity it may well be the case that recourse will be made to the courts in order to allow for registration to proceed rather than attempting a direct application to the Keeper. This would seem likely as it would avoid delay and expense consequent on any potential dispute with the Keeper. Thus, whilst it might be theoretically argued that the standard of the foundation writ required to support an application for registration under the 2012 Act may well be that which was described in the orthodox text for *ex facie* validity under the Sasine system, it may well be the case that, as a consequence of land registration and the decision in *Watson v Shields*, a foundation writ must, in practical terms, meet the standard of containing nothing which could be read as indicating that it might not be essentially valid.<sup>535</sup> If this standard is not met then it would seem likely that recourse will be made to the courts in order to allow for registration to proceed, rather than engaging in a direct attempt at registration which may result in failure or a prolonged dispute with the Keeper. Furthermore, even if such court action were successful, and the resultant application to the Land Register was supported by a judicial declarator, the registration might well be marked as provisional and positive prescription would therefore be required to validate the disposition under sections 43 and 44 of the 2012 Act. Thus it may be seen that there may continue to be a fundamental divide between the theoretical understanding of *ex facie* validity of foundation writs and the practical application of *ex facie* validity in relation to foundation writs under land registration.

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<sup>535</sup> This again would be a continuation of the practice which was established by the Keeper of the Land Register under the 1979 Act regime. See again Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 12.42-12.51.

### 3. Conclusion regarding land registration and the concept of *ex facie* validity

As can be seen from the above analysis, it appears that the concept of *ex facie* validity is not totally irrelevant to land registration in Scots law. However, the emphasis in the land registration system appears to be on the actual transfer of rights rather than on the apparent transfer of rights. Therefore, in order to understand the role of *ex facie* validity in the Scots law of positive prescription of landownership, this thesis has set out the orthodox principle, which was developed under the Sasine system, that a deed is only *ex facie* invalid if the invalidity is conclusively proven without reference to extrinsic evidence. However, it seems important to recognise that, in practical terms, it may well be necessary for practitioners to now work on the basis that a foundation writ is only *ex facie* valid if it contains nothing which indicates that it might not be essentially valid. As discussed above, this appears to be a consequence of the decision in the case of *Watson v Shields* and also the approach which was developed by the Keeper of the Land Register in relation to the acceptance of applications for land registration under the 1979 Act regime.<sup>536</sup> As also discussed above, it is anticipated that this will continue to influence the understanding of validity under the 2012 Act.<sup>537</sup>

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<sup>536</sup> See chapter IV, F, 1 and 2.

<sup>537</sup> See chapter IV, F, 2.

## Chapter V – Hability of Principal Area

### A. Introduction

As with the requirement of *ex facie* validity, the Prescription Act 1617<sup>538</sup> does not provide an explicit statement of the requirement that the foundation writ<sup>539</sup> must contain a description of the land, or a description habile to include the land, in respect of which positive prescription may be pled. However it does stipulate that it protects heritable infestment of '*Lands*', that the foundation writ exists in respect '*of the saids lands*' and that a purpose of the Act is to allow for the enjoyment of the heritable property '*of the same lands*'. It can thus be seen that the 1617 Act was written on the basis that the foundation writ would always relate to the area of land in respect of which positive prescription was being sought.

Furthermore, as the 1617 Act requires that there must be a foundation writ in every instance of positive prescription, it appears to be a logical necessity that the deeds in question must relate to the areas of land in question in order to function as effective foundation documents for proof of title.<sup>540</sup> If there was no minimum standard of correlation between the deed and the land in question then any conveyance could function as a foundation writ in respect of any area of land in Scotland. This would clearly be absurd. However, as the 1617 does not contain an overt statement of the minimum standard of description, it has been necessary for the courts, with guidance from institutional writings, to attempt to define the standard of description which is required for a deed to function as a valid foundation writ.

This process has been complicated by the fact that hability of description is a concept which is intertwined with the concept of bounding descriptions<sup>541</sup> and the concept of

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<sup>538</sup> Or the 1594 Act.

<sup>539</sup> The foundation writ is understood in the broad sense of any deed with dispositive effect. See footnote 349 above.

<sup>540</sup> This is a similarity with the doctrine of *ex facie* validity examined in chapter IV above.

<sup>541</sup> A bounding description is understood here as being a description which provides a verifiable description of particular boundaries in respect of the property in question. This is achieved by means of a written description or a plan or both. It is understood that a written description which includes measurements may be qualified by use of the term 'thereby' to allow for some latitude in respect of the said measurements. However, whilst affording some measure of freedom from the precise measurements provided, this is not understood as allowing for the measurements to be ignored. In this thesis, if the use of the term 'thereby' is relevant to the analysis of any particular case, this will be explicitly mentioned. If it is not mentioned then it is not of any significance with regard to the



pertinents.<sup>542</sup> Whilst the concept of *ex facie* validity exists in the context of the distinction of formal and essential validity,<sup>543</sup> it is nonetheless easier to identify it as a distinct concept within Scots property law. Therefore, in order to provide a clear analysis of hability this thesis contains separate treatment of this concept in relation to principal areas and in relation to pertinents. This chapter is devoted to analysis of the description which is required in respect of the principal area in a conveyance.<sup>544</sup> It should also be emphasised that this thesis only analyses the concept of hability in relation to ownership of land at surface level. The hability of minerals is a complex area which, for considerations of space, cannot be covered adequately in the course of this thesis. Furthermore, it has already been very well analysed by Professor Rennie.<sup>545</sup>

Additionally, it must of course be emphasised that the principles governing hability under the Sasine system continue to be relevant for determining the extent of subjects at the time of first registration in the Land Register. However, once a property is included in the Land Register, hability is simply determined by a plan based description.<sup>546</sup>

## **B. Comparison with the concept of *ex facie* validity under the Sasine system**

In contrast to the concept of *ex facie* validity, the concept of hability did not receive recognition in the statutory reforms to positive prescription which occurred in 1874<sup>547</sup> and 1924<sup>548</sup>. It was only in the 1973 Act that this concept was placed on a statutory footing. However, as mentioned, this principle had been developed at a much earlier date by the judiciary.<sup>549</sup> As with the development of the concept of *ex facie* validity,

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particular case in question. On bounding descriptions generally see: Halliday, *Conveyancing* 33.09-33.10; Gordon and Wortley, *Land Law* 3.04-3.07; Gretton and Reid, *Conveyancing* 12.16; Johnston, *Prescription* 17.45. The term ‘particular description’ will not be used in this chapter due to the potential difficulties identified in Gordon and Wortley, *Land Law* 3.04.

<sup>542</sup> Pertinents are defined and discussed in Chapter VI of this thesis.

<sup>543</sup> This reflects the fact that *ex facie* validity is a question regarding formal rather than essential validity. See Chapter IV, A.

<sup>544</sup> The principal area is understood to consist of the area of land which is the principal object of the conveyance. See: Reid, *Property* paras 196 to 198.

<sup>545</sup> Rennie, *Minerals and the Law of Scotland* 1.1-2.15.

<sup>546</sup> See discussion of land registration and hability at chapter VI, K.

<sup>547</sup> Conveyancing (Scotland) Act 1874 s.34.

<sup>548</sup> Conveyancing (Scotland) Act 1924 s.16.

<sup>549</sup> The chronological development of this concept will be examined at length in this chapter.

this judicial activity is particularly understandable when viewed as part of the teleological approach to interpretation of Acts of the Parliament of Scotland.<sup>550</sup>

The most significant issue regarding the comparison of validity and hability is that of whether or not hability is determined *ex facie* the deed. As seen in chapter IV, the orthodox test for *ex facie* validity stipulates that a deed is only *ex facie* invalid if the invalidity is absolutely proven from the face of the deed itself. A similar rule is found with regard to hability in that deeds earlier than the foundation writ may not be examined in order to determine whether or not the foundation writ is habile to include the subjects in question.<sup>551</sup> However, this rule is qualified in that it is competent to examine earlier deeds if they are incorporated by reference into the foundation writ for the purpose of describing the subjects.<sup>552</sup> Furthermore, it appears that it is competent to examine extrinsic evidence, aside from earlier deeds, in order to ascertain whether or not a description is habile.<sup>553</sup> Such other evidence may include surveyors' reports,<sup>554</sup> proceedings from other court actions<sup>555</sup> or details of the measurements of physical boundaries of the area in question.<sup>556</sup> Thus hability bears some similarity, but also some dissimilarity to the concept of *ex facie* validity with regard to the admissibility of evidence extrinsic to the foundation writ in question. This degree of dissimilarity would appear to accord with the fact that validity is statutorily defined in the 1973 Act as an *ex facie* concept whilst hability is not subject to this characterisation.

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<sup>550</sup> See Chapter IV, A.

<sup>551</sup> *Auld v Hay* (1880) 7 R 663; *Troup v Aberdeen Heritable Securities Company* 1916 SC 918.

<sup>552</sup> *North British Railway Company v Hutton* (1896) 23 R 522.

<sup>553</sup> *Houstoun v Barr* 1911 SC 134; *Smith v Crombie* [2012] CSOH 52.

<sup>554</sup> *Smith v Crombie* [2012] CSOH 52.

<sup>555</sup> *Houstoun v Barr* 1911 SC 134.

<sup>556</sup> *Houstoun v Barr* 1911 SC 134.

## **C. Hability and the law of bounding descriptions under the Sasine system**

### **1. Fundamental agreement between concept of hability and the rules for interpretation of bounding descriptions under the Sasine system**

As the concept of hability is closely connected to the law of boundary descriptions, it is argued here that the interpretation of boundary descriptions must accord with the concept of hability. If this suggestion is not followed then there would be an inconsistency within the law. It would be odd to state that the rules for interpreting bounding descriptions might exclude an area from the ambit of a foundation writ and yet to simultaneously argue that the foundation writ could be habile to include the disputed area in question.<sup>557</sup> It is of course recognised that in a boundary dispute in which the prescriptive period has elapsed, it is not possible to examine deeds earlier than the foundation writ in order to determine hability. However, aside from this distinction, there would appear to be no basis for holding that boundary disputes and hability issues should involve different approaches to the interpretation of bounding descriptions. It is therefore appropriate, in order to understand the concept of hability, to provide a brief summary of what appear to be five main forms or elements of description which are used in Scots law to identify boundaries. This categorisation has been partially manifest in academic writing but does not appear to have been developed in detail.<sup>558</sup> As will now be seen, each of these five different elements of boundary description has a distinct form and character. These five elements existed under the Sasine system and continue to be relevant for determining the extent of subjects at the time of first registration in the Land Register. However, once a property is included in the Land Register, the five elements of description are reduced to the single element of plan based description.<sup>559</sup>

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<sup>557</sup> Halliday writes on the basis that the concept of hability and the concept of bounding descriptions should not exist in contradiction. See Halliday, *Conveyancing* 33.09.

<sup>558</sup> Halliday, *Conveyancing* 33.13; Gordon and Wortley, *Land Law* 3.08; R Rennie, "Boundary disputes revisited" (2013) SLT (News) 189 at 190.

<sup>559</sup> See discussion of land registration and hability at chapter VI, K.

## **2. The five elements of boundary description in Scots law under the Sasine system**

### **(a) Verbal description by reference to physical features**

The first element of description is that which defines a boundary by virtue of physical features such as a river or a road. This is the verbal description by reference to physical features. It is accepted that in order to constitute a bounding description, a deed must refer to obvious and indubitable features.<sup>560</sup> However, such unalterable features appear to be of a very rare character given the possibility that even roads and rivers may alter their course and thus alter the boundaries of a property. As this is the case with regard to the first, and arguably the most obvious, form of boundary description, it is unsurprising that there seem to be few instances in which a boundary description can be regarded as indisputable.

### **(b) Verbal description by reference to neighbouring property but without reference to physical features**

The second element of description is similar to the first; however the boundaries are identified by means of identifying the neighbouring property by stating information such as the address, the owner, or details of a deed which contains a description of the neighbouring property. This of course again allows for the possibility that a boundary may shift if the area encompassed in the neighbouring property happens to be adjusted.

### **(c) Verbal description by written measurements specifying the length of each boundary**

Thirdly, there is the description by written measurements specifying the length of each boundary of the property in question. This form of description will exist in addition to any of the first, second or fifth forms of boundary description listed here as it has to be tied to identifiable points on the ground in order to be intelligible as a form of description. However, if measurements are described as existing in relation to boundaries which are defined by reference to neighbouring properties but without

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<sup>560</sup> *Troup v Aberdeen Heritable Securities Company* 1916 SC 918 at 927 per Lord Salvesen citing Erskine II.6.2 and Erskine II.6.3 as authority.

reference to physical features, it may be difficult to identify the precise location of the boundary lines on the ground. This again relates to the fact that boundaries between neighbouring properties are not necessarily permanently fixed to any definite point.<sup>561</sup>

#### **(d) Verbal description by written statement of acreage**

Fourthly, there is the statement of acreage of the property in question. It is arguable that this is not a form of boundary description as it does not specify the details or the location of the boundaries in question. Yet, this does appear to function as an effective limit on the size of the area which the party relying on the description in question may claim. Hence, it is really a distinct element of description which is used to elucidate the identity, and hence the boundaries of, the area in question. This form of description is clearly distinct from a statement of boundary measurements as a particular statement of acreage can exist in relation to many different boundary configurations.

#### **(e) Description by means of a plan**

Fifthly, the boundaries of a property may be identified by means of a plan. However, plans, under the Sasine system, vary in quality and it is possible for measurements stated on a plan to fail to correspond with the scale given on the plan in question.<sup>562</sup>

### **3. The rules for determining which form of description will prevail in the event of a conflict between forms of boundary description under the Sasine system**

It appears that a written description of boundaries by reference to physical features is usually expected to prevail over any other form of boundary description.<sup>563</sup> However, it is acknowledged that this rule may not always be applied.<sup>564</sup> Furthermore, with regard to other conflicts between different elements of boundary description, it seems difficult to deduce any definite rules of construction.<sup>565</sup> However, with regard to

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<sup>561</sup> See for instance *Royal & Sun Alliance v Wyman-Gordon* 2001 SLT 1305.

<sup>562</sup> Such variance in quality does not occur under Land Registration. Furthermore, once a property is included in the Land Register, the only form of boundary description is that which is plan based. See discussion of land registration and habitation at chapter VI, K.

<sup>563</sup> Halliday, *Conveyancing* 33.13; Gordon and Wortley, *Land Law* 3.08; Rennie, "Boundary disputes revisited" (2013) SLT (News) 189 at 190.

<sup>564</sup> Halliday, *Conveyancing* 33.13; Gordon and Wortley, *Land Law* 3.08.

<sup>565</sup> Halliday, *Conveyancing* 33.13; Gordon and Wortley, *Land Law* 3.08.

instances of conflict between elements of description which belong to the same category there have been two recent cases which may provide a basis for identifying a consistent approach which can be used to resolve future conflicts.<sup>566</sup>

The issue of conflict will be seen to be important both for boundary descriptions and for the concept of hability. The examination of hability in this chapter will frequently relate to issues of conflict between forms of boundary description and it will be in this context that the key principles of hability will become apparent.

#### **D. Summary of principles which will be observed in relation to hability under the Sasine system**

It is suggested here that three particular principles can be discerned in relation to the determination of the hability of the principal area in the Scots law of positive prescription of landownership under the Sasine system.

##### **1. Hability of ambiguous descriptions**

A deed will be habile to include subjects if the description is ambiguous in respect of those subjects. This is the key principle of hability in Scots law.

##### **2. Descriptions which are contradictory are not automatically habile**

If a deed contains elements of description which are contradictory, the deed will not automatically be habile to the extent of the element of description which covers the larger area. In such an instance of contradiction, the deed is only habile to the extent that one form of description prevails over another. It does not matter whether the description which covers the larger area has been supported by possession.

##### **3. Descriptions which are of equal status and which contradict each other are not habile**

If a deed contains elements of description which are contradictory, one element of description will only prevail over another element of description if there is a difference

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<sup>566</sup> *Royal & Sun Alliance v Wyman-Gordon* 2001 SLT 1305; *Sir Charles Christian Nicholson and Others (The Trustees of Niall Calthorpe's 1959 Discretionary Settlement) v (First) G. Hamilton (Tullochgribban Mains) Limited and (Second) The Keeper of the Registers of Scotland* [2012] CSOH 138.

in status between the two elements of description. Therefore, if two elements contradict each other within the same deed, but neither is of greater status than the other, it must follow that the attempt to include the area which is subject to the contradiction must fail. Again, it does not matter whether the description which includes the larger area has been supported by possession.

### **E. Emergence of the concept of hability under the Sasine system with regard to the conveyance of the principal area: The Institutional Writers**

It will be seen during the course of this chapter that it has taken a long time for the abovementioned principles to emerge in Scots law, and that their very existence may be subject to dispute. However, it is contended that these principles can be observed and that their development can be traced through the case law of the preceding centuries.

Prior to examining the case law on hability, an analysis of the Institutional Writers' contribution to the concept of hability is now offered. This is offered prior to the case law analysis as key cases on hability are almost all decided subsequent to the time of the Institutional Writers.

#### **1. Stair, Mackenzie and Forbes**

The account which Stair gives of the law in relation to conveyancing descriptions is heavily focussed on the question of conveyance of pertinents.<sup>567</sup> This is evident in the fact that he repeatedly cites the case of *Young v Carmichael*<sup>568</sup> as the principal authority in this area. However, whilst concentrating on pertinents, Stair appears to be recognising the development of the principle that a deed must contain a description which can be read as including the area in respect of which positive prescription is sought. Therefore, if a deed contains a description which specifically narrates the boundaries of the land to which it relates, it will not be possible to positively prescribe in respect of land which is outwith those specific boundaries.<sup>569</sup> This view, that a

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<sup>567</sup> Stair II.3.26 and II.3.73.

<sup>568</sup> *Young v Carmichael* (1671) Mor. 9636; 2 Stair 3. This is a case which relates to the hability of description in relation to pertinents rather than in relation to the principal area under conveyance. It is therefore analysed in Chapter VI of this thesis and is only mentioned here as it is referred to by the institutional writers.

<sup>569</sup> Stair II.3.26.

bounding description strictly limits the area which can be positively prescribed as part of the principal area seems uncontroversial and seems to continue to accurately represent the law today. However, as will be seen in chapter VI, the application of this view in relation to pertinents lacks clarity.

In his treatment of positive prescription, Mackenzie does not offer any notable commentary on the quality of description which must be present in the foundation writ.

<sup>570</sup> However Forbes endorses the views of Stair on this point.<sup>571</sup>

## **2. Bankton, Erskine and Bell**

Bankton largely accords with Stair's assessment of the law in this area. In particular, he reiterates that positive prescription cannot be accomplished outwith the limits set by a bounding description.<sup>572</sup> The commentary on pertinents is again more extensive and this is analysed further in chapter VI.

Erskine provides what appears to be the first specific reference, in institutional writings, to the fact Scots law requires positive prescription of landownership to be based '*upon an habile title of property*'.<sup>573</sup> However, this appears to be a reference to the fact that the deed must be competent or valid. Thus it is not specifically a reference to the fact that the description contained within the deed must be habile to include the land in respect of which positive prescription is sought. Aside from this, Erskine concurs with the view that the principal area is determined by possession unless it is restricted by the terms of a bounding description.<sup>574</sup>

Bell makes similar statements to those made by Stair and Erskine with regard to hability, bounding descriptions and pertinents.<sup>575</sup>

In summary, the Institutional Writers present a relatively united view that a principal area is determined by possession unless it is restricted by the terms of a bounding description. This did not provide a great amount of guidance for situations in which

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<sup>570</sup> Mackenzie II.6.1 and III.7.1-20.

<sup>571</sup> Forbes, *Institutes* Part II, Book II at 118-119.

<sup>572</sup> Bankton II.3.45 citing *Young v Carmichael* (1671) Mor 9636.

<sup>573</sup> Erskine III.7.15.

<sup>574</sup> Erskine III.7.4 and Erskine II.6.3. Again, most of Erskine's commentary is related to the treatment of pertinents and this is analysed further in chapter VI.

<sup>575</sup> Bell, *Principles* § 737-742 and 2015.



the foundation writ contains an ambiguity with regard to the description.<sup>576</sup> It was therefore the Inner House of the Court of Session which provided the key authority on this point, in the case of *Auld v Hay*.

## **F. Development of the concept and terminology of hability under the Sasine system with regard to the conveyance of the principal area in cases involving ambiguous descriptions**

### **1. *Auld v Hay***

The case of *Auld v Hay*<sup>577</sup> involved a dispute over the ownership of an area of land at Inverkeithing in Fife. A bench of seven judges<sup>578</sup> in the Inner House held that positive prescription had fortified a decree of adjudication in respect of the “several shares” of the disputed property. The decree of adjudication had been recorded in 1824 and this was followed by an instrument of sasine which was recorded in 1827. The disputed land had passed to the defender, John Hay, through subsequent conveyances, but the decree of adjudication and the subsequent instrument of sasine were still the foundation for his claim of positive prescription.<sup>579</sup>

As noted, the crucial point upon which this case turned was the issue of whether or not the words “several shares” in the description in the decree of adjudication could be construed as encompassing the entire land which constituted the principal area in question. It was held by the Outer House,<sup>580</sup> and then unanimously<sup>581</sup> by the Inner House, that such a construction was possible and that therefore the completion of the requisite period of possession had allowed the defender to fortify his claim to the ownership of the entire area of the disputed land by virtue of positive prescription. The Inner House was clear in stating that if a description in a deed could be construed so

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<sup>576</sup> Nothing of note appears to have been added to this discussion by Hume, Napier or Menzies. See: Hume, *Lectures*, Volume IV; Napier, *Commentaries*; Menzies, *Conveyancing*.

<sup>577</sup> *Auld v Hay* (1880) 7 R 663.

<sup>578</sup> The Lord President (Inglis), The Lord Justice-Clerk (Moncreiff) (James Moncreiff, 1<sup>st</sup> Baron Moncreiff, 1811-1895), Lord Deas, Lord Ormidale (Robert Macfarlane), Lord Mure, Lord Gifford and Lord Shand.

<sup>579</sup> *Auld* at 665.

<sup>580</sup> The Lord Ordinary seems to have been Lord Adam. See: *Auld* at 663.

<sup>581</sup> There were some minor points of difference in Lord Ormidale’s judgment and in Lord Gifford’s judgment but even these judgments reach the same result and are largely in agreement with the principle expressed in the other five judgments.

as to allow positive prescription to take place, then that deed was able to function as a valid foundation writ for positive prescription. Such an outcome was not to be prevented even if a different construction of the description in the deed was possible. This essential principle is summed up in the words of the Lord Justice-Clerk:

A habile title does not mean a charter followed by sasine, which bears to convey the property in dispute, but one which is conceived in terms capable of being so construed. The terms of the grant may be ambiguous, or indefinite, or general, so that it may remain doubtful whether the particular subject is or is not conveyed, or, if conveyed, what is the extent of it. But if the instrument be conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance, that is enough, and forty years' possession following on it will constitute the right to the extent possessed.<sup>582</sup>

The *ratio decidendi* of *Auld v Hay* is therefore summarised as meaning that if a description can possibly be construed as being habile to include an area of land then that description will be habile to include the area of land in question; this will hold true even if a different construction is possible.<sup>583</sup> This principle appears to have been followed in subsequent case law.<sup>584</sup>

It should be emphasised that the Court in *Auld v Hay* was merely ruling on the ambiguity contained in the words 'several shares'. Although unlikely, it was not impossible that these words could refer to the entirety of the property in question. There was nothing specifically contrary to such an interpretation contained within the description. There was therefore an ambiguity rather than a contradiction before the Court.

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<sup>582</sup> *Auld* at 668 per the Lord Justice-Clerk (Moncreiff).

<sup>583</sup> This is reflected in academic writing in the early and mid-twentieth century. See: Rankine, *Land-ownership* 32-33; Burns, *Conveyancing* 202. The principle also appears to have already been manifest in relation to the conveyance of teinds. See: *Lord Advocate v Balfour* (1860) 23 D 147. However, it appears that it took some time for this principle and the case of *Auld v Hay* to become established as authority in Scots law. In particular, this principle and the case of *Auld v Hay* not seem to be mentioned by Montgomerie Bell or by Wood. See: Montgomerie Bell, *Lectures*; Wood, *Lectures*. Furthermore, Millar only notes *Auld v Hay* as authority for the rule that deeds prior to the foundation writ do not affect the foundation writ once it has been fortified by positive prescription. See Millar, *Prescription* 12.

<sup>584</sup> A form of this principle also appears to have been held as good law by the House of Lords in the earlier case of *Gardner v Scott* (1843) 2 Bell's Appeals 129. In this case it seems that possession determined the extent of a right when the description was ambiguous. However, this case related to the conveyance of a mid-superiority rather than to a real right of landownership and is thus not of the same character as *Auld v Hay*.

As evidenced in the above quotation from the judgment of Lord Justice-Clerk Moncreiff, a deed may contain an ambiguous description and be habile to convey the land in question. However, it must be '*conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance*'.<sup>585</sup>

Thus it would appear logical to state that if a deed contains two elements of description that are contradictory rather than ambiguous, then there would be a vitiation of the consistency which is required for the deed to be a habile conveyance. The deed may be vague or imprecise and yet be habile. However, the deed cannot contradict itself and yet function as a habile foundation writ in relation to both of the contradictory descriptions. This principle is congruent with the *ratio* of *Auld v Hay* and is further manifest during the course of this chapter.

However, it must also be stressed that the *ratio* of *Auld v Hay* relates to a very specific issue which partially limits its utility with regard to hability issues relating to boundary disputes. The fact which must be underlined is that *Auld v Hay* is not a boundary dispute in the sense of a dispute regarding the physical extent of the disputed area. The dimensions of the area in *Auld v Hay* were accepted by all parties; the dispute was simply that of how many *pro indiviso* shares of the disputed area could be claimed by each of the parties in question. Thus the dispute was a semantic interpretation of the words 'several shares'. It was not a dispute in which the Court had to interpret any sort of ambiguity or conflict with regard to the physical extent of the subjects in question; it was merely a semantic argument regarding the shares which each owner held in the same property. As such, although the principles of construction established in *Auld v Hay* are extremely important, it is actually a case which provides very little guidance with regard to the interpretation of ambiguous or conflicting boundary descriptions.

Having noted the possible limitations to the utility of the *ratio* in *Auld v Hay*, it should nonetheless be recognised that this case does seem to affirm that the determination of hability is to be made without reference to deeds which are prior to the foundation writ. As the foundation writ was habile to include all the shares in the property, it was held

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<sup>585</sup> *Auld* at 668 per the Lord Justice-Clerk (Moncreiff).

to be habile to include all the shares in the property. This was held to be the case irrespective of the terms of any prior deeds.

## **2. *Troup v Aberdeen Heritable Securities Company***

The issue of descriptive ambiguity was again before the Court of Session in the case of *Troup v Aberdeen Heritable Securities Company*.<sup>586</sup> In this case the Inner House was presented with an issue of a very similar nature to that which occurred in the earlier case of *Reid v McColl*.<sup>587</sup> In *Troup* the dispute related to a boundary wall between properties in Diamond Street and Union Terrace in Aberdeen. As in the case of *Reid v McColl* the description in *Troup* stated that the prescriber's property was bounded by ground belonging to a party who had been, or was, the proprietor of the neighbouring property. The party who was now the owner of the neighbouring property sought to rely on the *ratio decidendi* of *Reid v McColl* to argue that the prescriber was encroaching on his property by having raised the level of the boundary wall in order to support the building on the prescriber's property.

In contrast to the case of *Reid v McColl*, the Inner House in *Troup* held that if a deed describes a property as being bounded by neighbouring land belonging to another party, this does not prevent positive prescription from later being accomplished on the basis of the said deed in respect of part of the said neighbouring land. Therefore the Lord Justice-Clerk and Lord Dundas both held that the deed in this case was habile to include the wall between the two properties.<sup>588</sup> Lord Salvesen concurred and noted that whilst the doctrine of bounding descriptions is settled in Scots law there are nonetheless occasions on which it is difficult to apply. Lord Salvesen affirmed Erskine's view that a 'fixed or indubitable' line is required in order for a bounding description to exist.<sup>589</sup> Therefore Lord Salvesen held that he was unable to assent to the views expressed by Lord Moncreiff in *Reid v McColl*, as the test should simply be 'whether the ground as possessed, fits the description in the title on which possession

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<sup>586</sup> *Troup v Aberdeen Heritable Securities Company* 1916 SC 918.

<sup>587</sup> *Reid v M'Coll* (1879) 7 R 84; *Reid v McColl* (1879) 17 SLR 56. This is a case which relates more to the hability of description in relation to pertinents rather than in relation to the principal area under conveyance. It is therefore analysed in Chapter VI.

<sup>588</sup> *Troup* at 923 per the Lord Justice-Clerk (Dickson) and at 924-925 per Lord Dundas.

<sup>589</sup> *Troup* at 927 per Lord Salvesen citing Erskine II.6.2 and Erskine II.6.3 as authority.

has followed'.<sup>590</sup> However Lord Salvesen considered it to be the case that Lord Ormidale's judgment in *Reid v McColl* was consistent with this principle.<sup>591</sup>

Lastly, Lord Guthrie concurred with the other judges in *Troup*. However he noted that the prescriptive possession was not established without difficulties in this instance.<sup>592</sup>

In summary, it would appear that *Troup* embodies the principle that a description is only a bounding description if it is effectively absolute in its description and statement of unalterable boundaries and that these boundaries must be fixed by means such as a very detailed plan or an exact verbal description relating to immovable physical objects. If the boundaries are described as relating to features such as neighbouring properties, with boundaries that are susceptible to alteration in the course of time, then the boundaries are not to be regarded as being fixed. Therefore possession will determine the extent of the land held under the relevant foundation writ.<sup>593</sup> This principle is completely consistent with the principle that a deed will be habile if the description is ambiguous. As with *Auld*, the case of *Troup* did not involve any contradiction within the foundation writ; there was merely an ambiguity.

Furthermore, the principle applied in this case is completely consistent with the distinction between ambiguous boundaries and a conveyance which is invalid due to uncertainty.<sup>594</sup> It was quite clear and certain which property was covered by the foundation writ in question. The only ambiguity existed with regard to the location of the boundary which was the focus of the dispute. This ambiguity was simply resolved by means of prescriptive possession on the part of Aberdeen Heritable Securities Company, the successful defender in this case.

Lastly, the decision in *Troup* is consistent with the *ratio* of *Auld v Hay* in that prior deeds were regarded as irrelevant for determining whether or not the foundation writ

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<sup>590</sup> *Troup* at 927 per Lord Salvesen.

<sup>591</sup> *Troup* at 927-928 per Lord Salvesen. This may not be correct as Lord Ormidale does not seem to have applied this test in *Reid v McColl*.

<sup>592</sup> *Troup* at 929 per Lord Guthrie.

<sup>593</sup> This also appears to be supported by reasoning found in the Inner House cases of *Education Trust Governors v Macalister* (1893) 30 SLR 818 and *Young v McKellar Ltd* 1909 SC 1340. However it is the Court in *Troup* which develops this reasoning into a clear principle of construction.

<sup>594</sup> On uncertain conveyances see: Halliday, *Conveyancing* 33.05-33.06; Gordon and Wortley, *Land Law* 12.84.

was habile.<sup>595</sup> As such, it was found to be a habile foundation writ for positive prescription and that positive prescription had been duly accomplished thereon.

### **3. *Suttie v Baird***

The next instance in which the Inner House held that descriptive ambiguity was present in a deed was the case of *Suttie v Baird*.<sup>596</sup> In this case the Inner House was asked to rule on an issue of hability within the context of a boundary dispute between two neighbouring properties in a street in a modern housing estate at Dalgety Bay in Fife. The key judgment is given by Lord President Hope and is significant in discussing the scope of the principle of bounding descriptions in relation to the concept of hability.

In his judgment the Lord President noted that the foundation writ for 2 Dalgety House View contained a plan, a statement of acreage and a statement of the measurements of the boundaries which lay along the supposedly identifiable physical boundaries of the area which was conveyed. However, his Lordship held that the plan was insufficiently detailed, and the measurements were not sufficiently precise, to prevent there from being some margin of doubt as to the exact boundaries of the original grant. Therefore, it was held that it was possible to construe the foundation writ as covering the disputed area which consisted of a narrow, ‘dog leg’ shaped, strip of ground lying between the two neighbouring properties and claimed by both proprietors. It was held that the boundary was not absolutely settled and that the foundation writ was habile to include the ‘dog leg’ shaped area on the edge of the property even though the plan showed the boundary as being a straight line.<sup>597</sup> As Lord Morison stated, there was ambiguity and this allowed for positive prescription to occur.<sup>598</sup> Lord Morton of Shuna concurred and the decision was therefore unanimous.<sup>599</sup>

It could be argued that this case demonstrates the consistency with which the principle of hability is applied. If there is any ambiguity in the description of the boundaries of

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<sup>595</sup> *Troup* at 924 per Lord Dundas.

<sup>596</sup> *Suttie v Baird* 1992 SLT 133

<sup>597</sup> *Suttie v Baird* 1992 SLT 133 at 136-137 per Lord President Hope.

<sup>598</sup> *Suttie v Baird* at 138 per Lord Morison.

<sup>599</sup> *Suttie v Baird* at 138 per Lord Morton of Shuna.

the property then this will be construed to allow for the deed to be habile for positive prescription.

However, it may also be suggested that the Court was too generous in its application of the principle of hability and actually went beyond the principles established in *Auld* and *Troup*. In particular, as the plan, small though it was, showed that the boundaries between the two properties consisted of a straight line, it would seem anomalous that the Court held that the foundation writ could be construed so as to allow for the boundary to exist in a ‘dog leg’ shape rather than as a straight line. The fact that the boundary measurements contained within the deed do not appear to have assisted the inclusion of the dog leg shape also suggests that the principle of hability may have been over extended in this case.

Yet, it might be replied that it is possible that the house and garden ground at 2 Dalgety House View might have occupied an area of ground which was slightly at variance with the plan and the measurements shown in the foundation writ. A discrepancy between the description in the foundation writ and the actual position of the property on the ground is not impossible. Thus the ‘dog leg’ shaped area might actually fall within the area described in the foundation writ for 2 Dalgety House View. This interpretation might be supported by the fact that the plan and the measurements for 2 Dalgety House View could have been read as incorporating an entire small slice of the land occupied by the neighbouring property at 1 Dalgety House View. Thus it may have been the case that the owners of 2 Dalgety House View only possessed the dog leg shaped area from within the said small slice.<sup>600</sup> Given the fact that the disputed area was very narrow in relation to the width of the rest of the property at 2 Dalgety House View, it appears that it is quite possible that 2 Dalgety House View may have been occupying slightly less land than was actually included in the description in the foundation writ.<sup>601</sup> Alternatively, 2 Dalgety House View may have not extended to its full descriptive area on one side whilst it may have occupied more than its descriptive

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<sup>600</sup> *Suttie v Baird* at 137 per Lord President Hope.

<sup>601</sup> It appears that both sides accepted that the area in dispute added very little to the overall area at 2 Dalgety House View. The Lord President specifically states that no argument was led to attempt to show that it was not arithmetically possible to include the disputed area within the description contained in the foundation writ for 2 Dalgety House View. See *Suttie v Baird* at 136-137 per Lord President Hope.

area on the other side. In either case it appears possible to argue that, given the smallness of the area in dispute and given the fact that the property may have occupied an area slightly at variance with the plan and measurements in the deed, it was possible to state that the description in the deed was *habile* to include the disputed area. The fact that the disputed area was of an irregular shape seems to have been resolved by the possibility that it may have formed part of a small slice of land, with straight boundaries, which the owners of 2 Dalgety House View might have successfully claimed under the description in their foundation writ.<sup>602</sup>

However, in spite of the arguments which can be put forward in defence of the decision in *Suttie*, there is still an uneasy impression left that a deed with straight line boundaries was interpreted in such a fashion as to allow for the description to be read as incorporating a boundary which lay in a ‘dog leg’ shape rather than as a straight line.<sup>603</sup> This appears explicable on the grounds that the ‘dog leg’ area was small and that it might have formed part of a small additional slice of land which did have straight line boundaries and which might have been covered by the foundation writ. Yet, the most recent case on descriptive ambiguity, *Smith v Crombie*, seems to demonstrate that the Court of Session will sometimes be more reluctant to read a straight line boundary description as allowing for anything other than a straight line boundary.

#### **4. *Smith v Crombie***

The Outer House case of *Smith v Crombie*<sup>604</sup> turned on the question of the location of a fence between two properties in Sixth Street in Newtongrange in Midlothian. When Mr Smith, the owner of Number 77, went on holiday it seems that Mr Crombie, the owner of Number 75, used this as an opportunity to move the fence and commence the building of an extension. This took place in August of 2007 with the extension being completed in November of 2007.

Mr Smith had purchased his property in 1985 and it appears that the old fence had been in place since 1986.<sup>605</sup> It seems to have been accepted by both parties that the plans

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<sup>602</sup> *Suttie v Baird* at 137 per Lord President Hope.

<sup>603</sup> See additional examination of this point, particularly with regard to land registration, in R Rennie, “Prescriptive possession in the Sasine and Land Registers” (1997) 2(4) SLPQ 309.

<sup>604</sup> *Smith v Crombie* [2012] CSOH 52.

<sup>605</sup> *Smith v Crombie* at para 47.



which were used to describe the boundaries for both the properties were inaccurate.<sup>606</sup> Furthermore, the only other element of description contained in the deeds which was relevant for the disputed boundary simply stated that the properties were respectively bounded by each other. As this element of description simply referred to the postal address of each neighbouring property, it provided no detailed assistance in clarifying the location of the line of the boundary between the two properties.

Lord Matthews held that Mr Smith's foundation writ was not habile to include the disputed area which lay between the line of the old fence and the line of the new fence. This decision may be criticised on the basis that the descriptions contained in the plans and in the written descriptions were ambiguous and therefore the possession between 1986 and 2007 should perhaps have determined the extent of Mr Smith's title. However, the case was heard more than four years after the alleged relocation of the fence. Therefore, a considerable amount of time had elapsed since the demolition of the alleged old fence and the construction of the alleged new fence and the extension. This may have influenced this decision.<sup>607</sup>

Furthermore, it appears that the decision was influenced by the fact that the location of the alleged new fence reflected the division of garden ground which would be expected in a grid pattern arrangement of houses such as that which is found in Newtongrange.<sup>608</sup> This may also explain why the Court appears to have been reluctant to find Mr Smith's foundation writ as habile to include the disputed area.

Most importantly, and again in relation to the grid plan of Newtongrange, it appears from the case report that, although the plan attached to the foundation writ for Number 77 was defective, it was nonetheless clear in showing that the disputed boundary ran as a perpendicular line in relation to the back of the house at 77 Sixth Street. Therefore, as the new fence followed a perpendicular line in relation to the back of the house at 77 Sixth Street, the new fence was held to be located on the true boundary between Number 77 and Number 75 Sixth Street. It appears that the old fence ran did not follow a perpendicular line in relation to the back of the house at 77 Sixth Street. Rather it

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<sup>606</sup> *Smith v Crombie* at paras 30, 31, 40 and 48.

<sup>607</sup> Although it does appear to have been accepted by Lord Matthews that the old fence did mark the boundary between the properties between 1986 and 2007. See *Smith v Crombie* at para 47.

<sup>608</sup> *Smith v Crombie* at paras 22, 25 and 54.

appears to have run in a diagonal line from the back of the house at 77 Sixth Street. Hence the Court held that the plan, albeit defective, could not be read as allowing for a diagonal boundary to exist between the properties. Therefore, the foundation writ could not be read as habile to include the area between the old and the new fences.<sup>609</sup>

It might be argued that this case could have been decided differently if it were possible to read the plan attached to the foundation writ for Number 77 as including an entire small additional rectangular slice of land which in turn included the disputed area. If such a reading were possible, the descriptive boundary of the additional slice would therefore follow a perpendicular line in relation to the back of the house at 77 Sixth Street. Therefore, it could be argued, in view of the decision in *Suttie*, that Mr Smith, the owner of 77 Sixth Street, had a foundation writ which included the entire additional rectangle, but that he was only occupying the disputed area from within that rectangle.<sup>610</sup> If this reading were possible, the perpendicular quality of the boundary shown in the foundation writ would be preserved and yet the disputed area could be held to be included within the ambit of the foundation writ.

However, it appears that in order to allow for the suggested additional slice to be added to Number 77 the foundation writ would have to be read on the basis that the boundary line between the gardens at 75 and 77 Sixth Street does not run from the centre line of the wall that divides the houses at Numbers 75 and 77. Rather, the garden boundary would have to be taken as running from a point somewhere on the back wall of the house at Number 75. This reading of the foundation writ would appear to be very unlikely, particularly in the grid plan context of the town of Newtongrange. Yet, if such a reading is possible, it may be that this interpretation should have been allowed. However, it does not seem that the argument was made that an additional rectangular strip was included in the foundation writ for Number 77. Rather, it seems that the description for Number 77 was simply alleged to be ambiguous in relation to the disputed area and therefore habile to include the disputed area. This argument should perhaps have been sufficient, but it should perhaps also have involved reference to the possibility that an entire additional strip of ground might have been included in the

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<sup>609</sup> *Smith v Crombie* at para 56.

<sup>610</sup> *Suttie* does not appear to have been cited in *Smith v Crombie*.

description for Number 77. This might have assisted the Court if it was possible to read the foundation writ as including the disputed area by virtue it being part of a small additional rectangular area.

On balance, the decision in *Smith v Crombie* might possibly be technically incorrect if the plan for the foundation writ for Number 77 can be read as allowing the boundary between the two gardens to run from a point somewhere on the back wall of the house at Number 75, rather than the point where the back wall of Number 75 meets the back wall of Number 77. Thus the disputed area could be included in the foundation writ for Number 77 if the disputed area was regarded as forming a part of a rectangular slice of additional land under the foundation writ for Number 77.

However, even if the decision in *Smith v Crombie* is technically incorrect,<sup>611</sup> it does appear sensible to hold that a perpendicular boundary should not be read as a diagonal boundary. This contrasts with the decision in *Suttie* in which a straight boundary was read as allowing for a dog leg boundary. *Suttie* may be technically correct, but *Smith* does appear to be the more plausible reading of a foundation writ.

It is recognised that the Court in *Smith* paid particular attention to the surveyor's report regarding the grid plan of Newtongrange. However, the reference to this report does not seem to have affected the fundamental reason for the decision in *Smith*: a perpendicular line should not be read as a diagonal line.

## **5. Conclusion regarding the hability of ambiguous descriptions under the Sasine system**

As can be seen, *Suttie* and *Smith* both exist on the fringe of the concept of hability. They can both be criticised in different respects, however they do not alter the fundamental principle of the hability of ambiguous descriptions. This principle was established in *Auld* and affirmed in *Troup* and can be summarised simply as meaning that if a description can possibly be construed as being habile to include an area of land then that description will be habile to include the area of land in question; this will hold true even if a different construction is possible. In *Smith*, it was held that it was

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<sup>611</sup> This appears to be suggested in K G C Reid and G L Gretton, *Conveyancing 2012* (2013) at 58.

not possible to construe the description as habile to include the disputed area.<sup>612</sup> There was no suggestion that, if it had been possible to construe the description as including the disputed area, the Court would have chosen non-inclusion over inclusion on the basis of probability. The decision is set in terms of possibility rather than probability.<sup>613</sup>

Having examined the fundamental principle that a description will be habile to include subjects if it is ambiguous with regard to those subjects, it is now appropriate to examine situations in which a deed contains a contradiction between elements of description.

### **G. Development of the concept and terminology of hability under the Sasine system with regard to the conveyance of the principal area in cases involving contradictory descriptions**

#### **1. Introduction**

It is argued here that if a deed contains elements of description which are contradictory, the deed will not automatically be habile to the extent of the element of description which covers the larger area. In such an instance of contradiction, the deed is only habile to the extent that one form of description prevails over another. This principle is sometimes most clearly observed in the treatment of conflicting elements of description in cases in which the prescriptive period had not elapsed and as such did not involve questions of hability. However, it is contended here that the principles found in these cases are applicable to the law of hability and have in fact been applied in a number of instances in order to determine the correct rules for when a description is habile to include particular areas.

#### **2. *Ure v Anderson***

The case of *Ure v Anderson*<sup>614</sup> was a boundary dispute in which it was alleged that the prescriptive period had elapsed and it was therefore a case in which the issue of the hability of the foundation writ was decisive. This was not a case which involved

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<sup>612</sup> *Smith v Crombie* at para 56.

<sup>613</sup> *Smith v Crombie* at para 56.

<sup>614</sup> *Ure v Anderson* (1834) 12 S 494.

ambiguity. Rather, *Ure* turned on a contradiction between two forms of boundary description contained within the foundation writ for an area of land in Tillicoultry in Clackmannanshire.

The contradiction existed between a statement of acreage and a description of the physical boundaries of the land which belonged to Ure. The Inner House held that in such an instance of conflict the description of the physical boundaries should prevail over the statement of acreage.<sup>615</sup> Ure was therefore able to claim ownership of an area greater than that contained within the statement of acreage. However, this does not imply that the case was decided on the basis that, in a situation of contradiction, the element of description which covers the larger area should automatically prevail. Rather, the decision was based on the view that the form of description which enjoyed the higher status should prevail over the other form of description. As the Inner House held that descriptions based on the physical boundaries of land should enjoy a higher status than statements of acreage it was therefore possible for the description of physical boundaries to prevail in this instance.<sup>616</sup>

The conflict in *Ure* was clearly of a relatively weak nature as the statement of acreage only serves to limit the extent of the subjects but does not set specific boundaries. However, the case does demonstrate that in situations of contradiction the courts will attempt to discern which element of description should prevail on the basis of status rather than on the basis of which element covers the largest area of ground.

### **3. *North British Railway Company v Moon's Trustees***

As mentioned in the introduction to this section, some of the cases which have turned on the issue of conflicting elements of description are boundary disputes in which the prescriptive period has not yet elapsed. However, it appears that these cases are nonetheless relevant for the determination of the concept of hability in Scots law. As argued earlier in this chapter, the rules for boundary disputes and the rules for the

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<sup>615</sup> *Ure* at 496-497 per the Lord Justice-Clerk (Boyle) and at 497 per Lord Glenlee and Lord Meadowbank.

<sup>616</sup> This appears to be supported by the decision in *Douglas v Lyne* (1630) Mor. 2262. However, it is not clear whether the statement of acreage in this case was actually contradicted by a description of the physical boundaries or whether the Court simply held that the statement of acreage did not bind the extent of the subjects as it was merely demonstrative in character.

determination of hability should essentially accord in order to avoid inconsistency within the law.<sup>617</sup> Thus, despite the fact that the prescriptive period had not elapsed, the boundary dispute case of *North British Railway Company v Moon's Trustees*<sup>618</sup> is important in establishing the principle for addressing the situation in which a deed contains conflicting elements of description.

In *North British Railway Company v Moon's Trustees*, the railway company successfully demonstrated that an area of 0.212 acres near Springfield Station in Fife was their property and defeated the claim to this area which was made by Moon's Trustees. The disposition in favour of Mr Moon had stated that an area of 3.75 acres was conveyed to him and that this area was shown on a plan attached to the deed. However, the deed also included a written description of physical features which constituted the boundaries of the area being conveyed. The written description did not include measurements but it did identify the subjects by reference to physical features consisting of a section of railway track, a road and ground occupied by the adjacent railway station. The area contained within the boundaries described in the written description of physical features included the 3.75 acres and an additional area of 0.212 acres. The written description of physical features therefore conflicted with the area shown on the plan and the statement in the deed that 3.75 acres were conveyed.

The Inner House<sup>619</sup> held that the written description of physical features was of no assistance to Moon's Trustees. It was held that the deed only conveyed 3.75 acres as this was stated in the deed and this conformed precisely to the area shown on the plan.<sup>620</sup>

Three particular points may be observed with regard to the contradiction between the elements of description in *Moon's Trustees*.<sup>621</sup>

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<sup>617</sup> Chapter V, C, 1.

<sup>618</sup> *North British Railway Company v Moon's Trustees* (1879) 6 R 640.

<sup>619</sup> Lord Ormidale (Robert Macfarlane), Lord Gifford and the Lord Justice-Clerk (Moncreiff) (James Moncreiff, 1<sup>st</sup> Baron Moncreiff, 1811-1895). These three judges also sat as part of the bench of seven judges in *Auld v Hay*. See above at Chapter V, F, 1.

<sup>620</sup> *North British Railway Company v Moon's Trustees* (1879) 6 R 640 at 651 per Lord Ormidale, at 654-655 per Lord Gifford and at 657 per the Lord Justice-Clerk.

<sup>621</sup> The concept of contradiction is also categorised by Professors Reid and Gretton. See: K G C Reid and G L Gretton, *Conveyancing 2009* (2010) 170-171; K G C Reid and G L Gretton, *Conveyancing 2012* (2013) 151-152.

Firstly, it appears that none of the three forms of description in this case<sup>622</sup> were stated in the deed to be either taxative or demonstrative. Therefore no form of description was given a status which rendered it as prevailing over, or submitting to, the other forms. This is potentially crucial, as if, for instance, the written description of boundary features had been declared to be taxative then this would have presumably rendered it as prevailing over the other two elements and the case would have been decided differently.<sup>623</sup>

Secondly, as the deed in this case contained a specific statement of the acreage conveyed, this appears to have allowed the plan, which accorded with the statement of acreage, to prevail over the written description of the physical boundaries. Thus the general rule that a written description of physical boundaries should prevail over a plan<sup>624</sup> was not applied in this instance.<sup>625</sup>

Thirdly, it appears that if a deed contains elements of description which are contradictory, the deed will not automatically include the area covered by the element of description which covers the larger area. In such an instance of contradiction, the deed will only include the area which is covered by the form of description which prevails over the other.

In *Moon's Trustees* the deed was not ambiguous; it contained elements of description which existed in clear contradiction. The contradiction was only partial in that the elements of description coincided in respect of most of the subjects described. However, there was a clear contradiction in respect of part of the subjects described. Two forms of description excluded the 0.212 acres; the other form of description

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<sup>622</sup> The three forms of description were: the statement of acreage; the plan; and the written description of the physical boundary features.

<sup>623</sup> On the distinction of taxative and demonstrative see: Halliday, *Conveyancing* 33.13; Gordon and Wortley, *Land Law* 3.08; Gretton and Reid, *Conveyancing* 12.18.

<sup>624</sup> On the general rule that a written description of physical boundaries should normally prevail over a plan see: Halliday, *Conveyancing* 33.13; Gordon and Wortley, *Land Law* 3.08; Gretton and Reid, *Conveyancing* 12.18.

<sup>625</sup> It appears that the *ratio* of *North British Railway Company v Moon's Trustees* was applied by Sheriff Principal Bennet QC in the case of *Anderson v Harrold* 1990 GWD 35-2025; 1991 SCLR 135. See: Halliday, *Conveyancing* 33.13; Professor Robert Rennie's commentary to *Anderson v Harrold* 1991 SCLR 135 at 138. This also appears to be stated by Sheriff Principal Bennet QC in his judgment in *Anderson v Harrold* 1991 SCLR 135 at 137. As with *Moon's Trustees*, *Anderson v Harrold* was a boundary dispute case in which the prescriptive period had not elapsed. The report for this case is relatively brief and it is therefore not possible to say whether the *ratio* of *Moon's Trustees* was definitely applicable in this case.

included the 0.212 acres. Crucially, it was held that the descriptions which included only the lesser area, and which thus excluded the 0.212 acres, prevailed over the description which included the greater area. Thus the principle was established that if a deed contains elements of description which are contradictory, the deed will not automatically include the area covered by the element of description which covers the larger area. In such a situation of conflict, the Court will attempt to discern which element of description should prevail and this will be done without reference to the question of which description will incorporate the largest area.<sup>626</sup>

By assessing the status of the different elements of description it was possible for the Court in *Moon's Trustees* to hold that the plan and the statement of acreage should prevail over the verbal description of boundaries. In particular, it appears that *Moon's Trustees* turned on the fact that the deed contained a written statement of the acreage conveyed and that this statement of acreage corresponded with the plan.<sup>627</sup> If this statement of acreage had not been present then the written description of the boundaries might well have prevailed over the plan.<sup>628</sup> Furthermore, if the plan had not been present, then the written description of the boundaries might have prevailed over the statement of acreage.<sup>629</sup> Thus the specific forms of description involved in

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<sup>626</sup> This seems to be an accepted principle with regard to the interpretation of conflicting boundary descriptions within a deed. See: Halliday, *Conveyancing* 33.13; Gordon and Wortley, *Land Law* 3.04-3.07; Gretton and Reid, *Conveyancing* 12.16.

<sup>627</sup> The decision in the earlier case of *North British Railway Company v Magistrates of Hawick* may be significant in this respect due to the weight that the Court gave to the inclusion of a precise statement of the acreage conveyed in addition to a description contained in a plan. See: *North British Railway Company v Magistrates of Hawick* (1862) 1 M 200 at 203 per the Lord President. The case of *North British Railway Company v Magistrates of Hawick* relates more to the ability of description in relation to pertinents rather than in relation to the principal area under conveyance. It is therefore analysed in Chapter VI.

<sup>628</sup> This was the decision of the Inner House in *Paterson v Carnegie* (1851) 13 D 997. This was again a case in which the prescriptive period had not elapsed. Therefore the concept of ability was not directly involved. The Inner House decision in *Hetherington v Galt* (1905) 7 F 706 appears to show that it may even be possible for a description consisting simply of boundary measurements to prevail over a plan. However, there is a possibility that this case allowed for possession alone to defeat both boundary measurements and plan. Hence, this decision is one which should be treated with caution. It is also not completely clear whether this was a case in which the prescriptive period had elapsed. It appears that the period had elapsed, but this is not absolutely clear.

<sup>629</sup> This was the decision of the Inner House in *Ure v Anderson* (1834) 12 S 494. This approach was also seen in the Inner House decision in *Fleming v Baird* in which the description of physical boundaries prevailed over a statement of acreage. However, this was a case in which the prescriptive period had not elapsed. Therefore the concept of ability was not directly involved. See *Fleming v Baird* (1841) 3 D 1015. The Inner House decision in *Currie v Campbell's Trustees* (1888) 16 R 237 was again a case in which the prescriptive period had not elapsed and which related to a conflict between elements of description within a deed. In this case a description which referred to a house,



any particular conflict are crucial in determining which form is likely to have greater status and is thus more likely to prevail.

Having observed the importance of the assessment of the status of different elements of conflicting boundary descriptions, it is again necessary to emphasise that it would be illogical if questions regarding hability did not respect the principle that the element of description which prevails in a conflict is not automatically the element which incorporates the largest area. It would be strange if, the rules on bounding descriptions, which examine the status of the conflicting elements of description, were replaced, in relation to the concept of hability, with a rule that the description covering the largest area should automatically prevail.

#### **4. *Blyth's Trustees v Shaw Stewart***

As with *Moon's Trustees*, the case of *Blyth's Trustees v Shaw Stewart*<sup>630</sup> is a boundary dispute in which the prescriptive period had not elapsed.<sup>631</sup> However, it is again an important case for setting the context for the treatment of deeds which contain conflicting elements of description.

In *Blyth's Trustees v Shaw Stewart* a boundary dispute had arisen due to an apparent contradiction contained in a feu contract. The feu contract described the subjects<sup>632</sup> in question by means of a statement of acreage, a statement of the measurements of the boundaries, and also by reference to physical features. In respect of the northern boundary, the deed stated that the feu was bounded by:

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owned by one party and occupied by another, as constituting a boundary of a property was held to prevail over specific measurements of the boundaries and an illustrative sketch plan which was not drawn to scale. The verbal description referring to the house was held to prevail even though the house had been demolished subsequent to the granting of the deed which referred to the house for the purpose of boundary description. This decision might be questioned as the physical feature, namely the house, had been demolished. Therefore it might be argued that the boundaries should have been determined by the specific measurements and sketch plan. This could be suggested on the basis that a physical feature should only prevail over boundary measurements and a plan if the physical feature exists. However, it appears that the decision may be correct as it was accepted that it was possible to adduce extrinsic evidence in order to ascertain where the physical boundary consisting of the house had been located.

<sup>630</sup> *Blyth's Trustees v Shaw Stewart* (1883) 11 R 99.

<sup>631</sup> *Blyth's Trustees* do not seem to have made any claim that the disputed area had been possessed for the prescriptive period. See *Blyth's Trustees* at 101.

<sup>632</sup> An area of land beside the River Clyde in Renfrewshire.

... the river Clyde at low-water on the north...<sup>633</sup>

This had not necessarily given rise to a conflict at the time at which the feu contract was granted.<sup>634</sup> However, in the period since the granting of the feu contract, the River Clyde had altered its course with the effect that the northern boundary of the feu now lay one hundred and thirty feet further to the north than at the time at which the feu had been granted. Thus the line of the Clyde no longer corresponded to the position of the boundary measurements given in the original grant. This also meant that the extent of the area described by the physical boundaries was greater than the extent of the area described by the statement of acreage.

Sir Michael Shaw Stewart claimed ownership in respect of the additional area of one hundred and thirty feet between the measured boundary of the feu and the new line of the River Clyde. However, the Inner House held that the verbal description of physical boundaries prevailed over the verbal description of boundary measurements given in the deed.<sup>635</sup> The result is clear in showing that a verbal description consisting of a statement of acreage and boundary measurements may be regarded as inferior to a verbal description based on physical features.<sup>636</sup>

The result in *Blyth's Trustees* may be compared and contrasted with that in *Moon's Trustees* in order to show the difficulties that arise with conflicting elements of boundary description. In *Moon's Trustees* a plan and a statement of acreage outweighed a description based on physical features. In *Blyth's Trustees* a description based on physical features outweighed a description of the boundary measurements

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<sup>633</sup> *Blyth's Trustees* at 99.

<sup>634</sup> *Blyth's Trustees* do not seem to have made any claim that the disputed area had been possessed for the prescriptive period. See *Blyth's Trustees* at 101.

<sup>635</sup> *Blyth's Trustees* at 103-104 per Lord Young, at 104-104 per Lord Craighill and at 105 per Lord Rutherford Clark.

<sup>636</sup> However, this appears to contradict the earlier decision of *Darroch v Ranken* (1841) 4 D 219 which suggests that measurements contained within a deed may overrule a description which is based on physical features and is contained within the same deed. In *Darroch* it was shown that the measurements conflicted with the physical boundaries and that the measurements represented the true extent of the area which had been originally granted. Thus Ranken was not successful in his attempt to claim an additional area outwith the area which was defined by express measurements in the deed on which he based his claim. The deed contained express measurements of the boundaries and thus there was no basis for Ranken to attempt to claim an additional area as part of the principal land contained within his grant. As with *Blyth's Trustees* this was also a case which involved a boundary dispute in which the prescriptive period had not elapsed. However, the fact that this decision contradicts *Blyth's Trustees* does not alter the principle that a deed does not automatically include the element of description which covers the larger area.

and a statement of acreage. It might be observed that it is not simply a question of which elements of description are in the majority, rather there seems to be varying weight attached to different elements of description in different circumstances. This makes the law of boundary descriptions a complicated issue. However, these complexities do not affect the essential principle which emerges from both *Moon's Trustees* and *Blyth's trustees*: if a deed contains elements of description which are contradictory, the deed will not automatically include the area covered by the element of description which covers the larger area. In such a situation of conflict, the Court will attempt to discern which element of description should prevail and this will be done without reference to the question of which description will incorporate the largest area. In *Moon's Trustees* this principle was applied with the consequence that descriptions prevailed which only incorporated the smaller area. In *Blyth's Trustees* it was the description which incorporated the larger area which prevailed. These outcomes were achieved on the basis of the status attributed to the forms of description in the situations in which they occurred. The outcomes did not occur due to an automatic rule that the description which includes the larger area should prevail.

### **5. North British Railway Company v Hutton**

In contrast to *Moon's Trustees* and *Blyth's Trustees*, the case of *North British Railway Company v Hutton*<sup>637</sup> was a boundary dispute in which the prescriptive period had elapsed and it was therefore a case in which the issue of the hability of the foundation writ was decisive.

In *North British Railway Company v Hutton* the Inner House<sup>638</sup> affirmed the principle that positive prescription is not possible in respect of land outwith the boundaries of a bounding description. In this instance it was held that the foundation writ held by Hutton<sup>639</sup> was restricted by the specific exception of an area which had already been sold to the North British Railway Company by virtue of an earlier disposition. The Railway Company's deed contained a statement of the acreage conveyed and a plan showing the area conveyed. The exception in Hutton's foundation writ gave the names

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<sup>637</sup> *North British Railway Company v Hutton* (1896) 23 R 522.

<sup>638</sup> The Lord President (Robertson), Lord McLaren, Lord Adam and Lord Kinneir.

<sup>639</sup> The area of land in this case lay on the north side of the River Tweed near to Peebles.

of the parties and the date of signing in respect of the Railway Company's deed. However, the deeds which Hutton had examined at the time of the purchase of his land did not contain a copy of the plan of the area owned by the Railway Company.<sup>640</sup>

Lord McLaren delivered the judgment for the Court and made a point of stating that positive prescription is not possible in relation to land outwith the boundaries of a bounding description.<sup>641</sup> Thus, although *Auld v Hay* had established that positive prescription could occur if the description in the foundation writ could possibly be interpreted to allow for it, the Inner House in *North British Railway Company v Hutton* were unanimous in holding that there were still clear instances when a description could not be interpreted as being habile to include the area for which positive prescription was sought. Therefore, even though Hutton had not had sight of the plan showing the area owned by the Railway Company, it was held that the reference in his disposition to the Railway Company's deed served to except the entire area covered by the Railway Company's deed from Hutton's foundation writ.<sup>642</sup> Thus the plan showing the exception was incorporated into Hutton's foundation writ despite the fact that he had not seen the plan at any stage.

Given that it may not have been easy to obtain a copy of the Railway Company's plan, the Court's decision might seem quite severe.<sup>643</sup> However, it seems correct to say that the foundation writ did not contain any ambiguity. Rather, the foundation writ simply contained an exception of an area which had already been conveyed. This exception was achieved by means of referring to the earlier conveyance in order to make it clear that the land contained in the earlier conveyance was excepted from the ambit of the foundation writ. The fact that the plan was not readily available did not alter the fact that a valid exception had been made in respect of the area covered by the plan. Hence the exception writ and the relevant plan had been incorporated into Hutton's foundation writ by reference. Thus it seems that whilst the problem of obtaining plans

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<sup>640</sup> *North British Railway v Hutton* at 523.

<sup>641</sup> *North British Railway v Hutton* at 525-526 per Lord McLaren.

<sup>642</sup> *North British Railway v Hutton* at 525-526 per Lord McLaren.

<sup>643</sup> Plans could not be recorded in the General Register of Sasines prior to 1924. See: Conveyancing (Scotland) Act 1924 s.48; Halliday, *Conveyancing* 33.12; Gretton and Reid, *Conveyancing* 12.16.

may sometimes create practical difficulties for conveyancing, it does not appear to alter the effectiveness of incorporation by reference.

This decision also appears to be consistent with the principle that if a deed contains elements of description which are contradictory, the deed will not automatically be habile to the extent of the element of description which covers the larger area. In such an instance of contradiction, the deed is only habile to the extent that one form of description prevails over another.

With regard to reference to earlier deeds, it appears that the decision in *Hutton* established that it is competent to examine earlier deeds if they are incorporated by reference into the foundation writ for the purpose of describing the subjects. Thus an exception was established with regard to the rule that deeds earlier than the foundation writ may not be examined in order to determine whether or not the foundation writ is habile to include the subjects in question.<sup>644</sup>

## **6. *Houstoun v Barr***

As with *North British Railway v Hutton*, the case of *Houstoun v Barr*<sup>645</sup> appears to be a boundary dispute in which it was alleged that the prescriptive period had elapsed. It was therefore a case in which the issue of the hability of the foundation writ was decisive.

The Inner House case of *Houstoun v Barr* is largely concerned with the quality of possession that is required for positive prescription. However, it is also significant with regard to hability. In particular, a conflict existed in the foundation writ for an area of land in Johnstone in Renfrewshire. The foundation writ stated that the area of land owned by Barr was bounded on the east by a road known as Quarrelton Street. Therefore, it was argued by Barr that his eastern boundary lay along the middle line of Quarrelton Street due to the presumption that a boundary consisting of a roadway will be inclusive of the roadway as far as its middle point. However, this was contradicted

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<sup>644</sup> This rule seems to complement the principle that it is competent to refer to deeds earlier than the foundation writ if these deeds are referred to in the foundation writ for the purpose of describing the subjects conveyed. See: *Earl of Dalhousie v M'Inroy* (1865) 3 Macph 1168 per Lord Mure in the Outer House. *Mackintosh v Abinger* (1877) 4 R 1069 per the Lord President, Lord Deas and Lord Mure in the Inner House.

<sup>645</sup> *Houstoun v Barr* 1911 SC 134.

by the extent of the measured boundaries which were also narrated in Barr's foundation writ. Thus a conflict existed between the description based on physical features and the description based on boundary measurements.

It was held by the Inner House that Barr's foundation writ did not extend to the middle point of Quarrelton Street.<sup>646</sup> Rather his foundation writ was limited to the extent of the measured boundaries. This was supported by evidence from an earlier court action and by the fact that his foundation writ described his land as being on the west side of Quarrelton Street. Hence, it was held that the normal presumption regarding ownership of the roadway was overcome due to the existence of the conflicting boundary description and the additional evidence. It can thus be seen that this was again an instance in which it was held that, in a situation of contradiction, the element of description which covers the larger area should not automatically prevail. Rather, the Court attempted to discern which element of description should prevail in this instance of conflict.

The case of *Houstoun* is complex, particularly given the relevance of the presumption regarding roadway ownership. However, the case again demonstrates that in situations of contradiction the courts will attempt to discern which element of description should prevail on the basis of status rather than on the basis of which element covers the largest area of ground.

### **7. *Drumalbyn Development Trust v Page***

As with *Houstoun v Barr*, the case of *Drumalbyn Development Trust v Page*<sup>647</sup> was a boundary dispute in which it was alleged that the prescriptive period had elapsed and it was therefore a case in which the issue of the hability of the foundation writ was decisive.

The Inner House case of *Drumalbyn Development Trust v Page* concerned an alleged conflict within the foundation writ for an area of land at Boleskine Lodge near to Boleskine House in Inverness-shire. Drumalbyn Development Trust owned Boleskine

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<sup>646</sup> *Houstoun* at 139-144 per Lord Dundas and at 144 per the Lord Justice-Clerk (Macdonald), Lord Ardwall and Lord Salvesen.

<sup>647</sup> *Drumalbyn Development Trust v Page* 1987 SC 128.

Lodge and their foundation writ stated that the boundary between Boleskine Lodge and Boleskine House consisted of a fence. The foundation writ also contained a plan which showed the extent of the area held under the foundation writ for Boleskine Lodge. It was alleged by Page, the owner of Boleskine House, that the fence referred to in the foundation writ for Boleskine Lodge did not conform to the boundaries shown on the plan. Hence it was alleged that there was a contradiction between the plan and the physical description of boundaries contained in the foundation writ for Boleskine Lodge. It was further alleged that the plan showed a greater area than that which was contained within the physical boundaries described in the foundation writ.

The Inner House held, by a majority of two<sup>648</sup> to one,<sup>649</sup> that if there was a conflict between a description based on physical features and a description based on the plan, the description based on physical features should prevail. Therefore the case was remitted back to the sheriff in order for evidence to be led with regard to the location of the fence during the prescriptive period.

This case is again complex, particularly due to the fact that it relates both to the description contained in the deed and to possession. However, the key point is again seen in the fact that the Court held that, in a situation of contradiction, the element of description which covers the larger area should not automatically prevail. Rather, the Court attempted to discern which element of description should prevail in this conflict. Hence, this case again demonstrates that in situations of contradiction the courts will attempt to discern which element of description should prevail on the basis of status rather than on the basis of which element covers the largest area of ground.<sup>650</sup>

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<sup>648</sup> *Drumalbyn Development Trust* at 135 per Lord Dunpark and at 135-139 per Lord Kincaig.

<sup>649</sup> *Drumalbyn Development Trust* at 132-135 per the Lord Justice-Clerk (Ross). The Lord Justice-Clerk appears to have only partially dissented from the decision of the Court. This partial dissent appears to have been based on the fact that Boleskine House may have been described by a bounding description and it may therefore have been the case that Page did not have a deed which was habile to include the area of land in dispute at Boleskine Lodge. Thus one of Page's pleas-in-law was considered to be irrelevant by the Lord Justice-Clerk. This view was not shared by Lord Dunpark and Lord Kincaig.

<sup>650</sup> This approach also appears to have been followed by the Inner House in *Luss Estates Company v BP Oil Grangemouth Refinery Limited* 1987 SLT 201. A similar case which followed the same approach but reached a different result was that of *Secretary of State for Scotland v Coombs* 1991 GWD 39-2404. These cases relate to the complex issue of water boundaries and the foreshore. See Reid, *Property* para 314.

## 8. *Rutco Incorporated v Jamieson*

As with *Drumalbyn Development Trust v Page*, the case of *Rutco Incorporated v Jamieson*<sup>651</sup> was a boundary dispute in which the prescriptive period had elapsed and it was therefore a case in which the issue of the hability of the foundation writ was decisive.

This Outer House case related to a conflict within a disposition of the Gannochy Estate in Angus. The description of the Estate in the pursuer's foundation writ incorporated an earlier feu disposition of the Estate which, the defender claimed, contained an exception in respect of an area known as the Shank of Freoch. However the exception stated that the area which was being excepted belonged to Trustees acting under a 1951 Deed of Trust.<sup>652</sup> This exception was problematic as it was accepted, by all parties, that the Trustees in question did not own the Shank of Freoch at the time when the feu disposition was granted.<sup>653</sup> Thus the exception did not appear to be effective as it was empty of content. The pursuer therefore claimed that the Shank of Freoch was not excepted from its foundation writ for Gannochy Estate.

However, the feu disposition also stated that an exception was made in respect of an area 'shown hatched in black' on a plan annexed and signed as relative to the feu disposition.<sup>654</sup> This plan showed the Shank of Freoch as part of an area which was hatched in black.<sup>655</sup> However, the Shank of Freoch was different from the rest of the area hatched in black as the Shank of Freoch was also over-coloured in blue.<sup>656</sup>

It was held by Lord Kingarth that the written description which allowed for the inclusion of the Shank of Freoch should prevail if there was any conflict with the plan which allegedly excepted the Shank of Freoch.<sup>657</sup> Furthermore, his Lordship held that the plan did not necessarily conflict with the written description as the over-colouring

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<sup>651</sup> *Rutco Incorporated v Peter Lindsay Auldjo Jamieson* [2004] CSOH – Reference A315/04 dated 7<sup>th</sup> September 2004; *Rutco Incorporated v Jamieson* 2004 GWD 30-620.

<sup>652</sup> The area which was being excepted does not seem to have been identified by name as being the Shank of Freoch. It does not appear to have been identified by any name whatsoever.

<sup>653</sup> *Rutco Incorporated v Peter Lindsay Auldjo Jamieson* [2004] CSOH at para 6.

<sup>654</sup> *Rutco* at para 6.

<sup>655</sup> *Rutco* at para 6.

<sup>656</sup> *Rutco* at para 6.

<sup>657</sup> *Rutco* at para 14 citing: Halliday, *Conveyancing* 33.13; W M Gordon, *Scottish Land Law* (2<sup>nd</sup> edition, 1999) para 4-08.



in blue could be interpreted as meaning that the Shank of Freoch was not to be excepted.<sup>658</sup> It was stated that it might be reasonable to hold that only the area which was shown as hatched in black, without any over-colouring in blue, was to be excepted.<sup>659</sup>

It might be questioned whether a verbal description by reference to the identity of the owner of an area should prevail over a description based on a plan of the area in question. This form of verbal description cannot be categorised as a boundary description. However, this point was not argued in *Rutco* and it was accepted by both sides that the description by reference to the identity of the owner was problematic due to the fact that the party narrated as owner was not in fact the owner of the land at the relevant time. Thus it appears to have been accepted by both sides that the deed contained two contradictory elements of description: a verbal description and a plan. The verbal description was empty of content. In contrast, the plan appeared to identify the land in question. Thus it is a case which concerned contradiction rather than ambiguity.

Irrespective of any questions which might be raised about the arguments advanced in *Rutco*, the decision is entirely consistent with the principle that if a deed contains elements of description which are contradictory, the deed will not automatically be habile to the extent of the element of description which covers the larger area. In such an instance of contradiction the Court attempts to discern which element of description should prevail on the basis of status. Hence, the deed is only habile to the extent that one form of description prevails over the other.

In this particular instance the contradiction was resolved in favour of the inclusion of the larger area because one element of description, namely the verbal description by reference to the identity of the owner, allowed for the inclusion of the larger area. Therefore, as this form of description was regarded as a form of verbal description with greater status than a description based on a plan, it was held to prevail over the plan.

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<sup>658</sup> *Rutco* at para 13.

<sup>659</sup> *Rutco* at para 13.

## **9. Conclusion regarding hability in relation to the conveyance of the principal area in cases involving contradictory descriptions under the Sasine system**

Irrespective of whether the prescriptive period has elapsed, it appears clear that if a deed contains elements of description which are contradictory, the deed will not automatically be habile to the extent of the element of description which covers the larger area. In such an instance of contradiction, the deed is only habile to the extent that one form of description prevails over another.

As noted above, a written description of boundaries by reference to physical features is usually expected to prevail over any other form of boundary description.<sup>660</sup> However, it was acknowledged that this rule may not always be applied. Furthermore, with regard to other conflicts between the different elements of boundary description, it was also acknowledged that it seems difficult even to state general rules of construction. As also noted above, this makes the law of boundary descriptions a complicated issue.<sup>661</sup> However, these complexities do not affect the essential principle which emerges from the caselaw examined above: if a deed contains elements of description which are contradictory, the deed will not automatically include the area covered by the element of description which covers the larger area. In such a situation of conflict, the Court will attempt to discern which element of description should prevail and this will be done without reference to the question of which description will incorporate the largest area. In *Moon's Trustees* and *Houstoun* this principle was applied with the consequence that the descriptions which only incorporated the smaller area prevailed. In *Ure*, *Blyth's Trustees* and *Rutco* it was the description which incorporated the larger area which prevailed. These outcomes were achieved on the basis of the status attributed to the forms of description in the situations in which they occurred. The outcomes did not occur due to a rule that the description which included the larger area should automatically prevail.

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<sup>660</sup> See discussion above at Chapter V, C, 3.

<sup>661</sup> See discussion above at Chapter V, G, 3.

Having examined contradictions in which it is possible for one element of description to prevail over another, it is now appropriate to examine situations in which a deed contains a contradiction between elements of description which are of equal status.

## **H. Development of the concept and terminology of hability under the Sasine system with regard to the conveyance of the principal area in cases involving contradictory descriptions of equal status**

### **1. Introduction**

It is argued here that if a conflict exists between two elements of description within a deed, one element of description will only prevail over the other element of description if a difference in status exists between the elements of description. Therefore, if two elements contradict each other, but neither is of greater status than the other, it must follow that the attempt to include the area which is subject to the contradiction must fail as the deed contains a perpetual vitiation in respect of the area subject to the contradiction. The two descriptions act to cancel each other out. However, it should be emphasised that a contradiction is only irresolvable if the conflicting elements of description are of absolutely equal status and it is therefore not possible for one form of description to prevail over the other.<sup>662</sup>

As with the previous section,<sup>663</sup> the principle analysed in this section is sometimes most clearly observed in the treatment of conflicting elements of description in cases in which the prescriptive period had not elapsed and as such did not involve questions of hability. However, it is contended here that the principles found in these cases are applicable to the law of hability and have in fact been applied in order to determine the correct rules for when a description is habile to include particular areas.

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<sup>662</sup> Such irresolvable contradictions include: both elements being ascribed the status of being taxative; both elements being ascribed the status of being demonstrative; both elements existing as the same form of description, e.g. as plans, and neither being ascribed any status.

<sup>663</sup> See Chapter V, G.

## **2. *Magistrates and Town Council of St Monance v Mackie and Cochrane***

The Inner House case of *Magistrates and Town Council of St Monance v Mackie and Cochrane*<sup>664</sup> was a boundary dispute in which it appears that the prescriptive period had elapsed and it was therefore a case in which the issue of the hability of the foundation writ was decisive.

The case of *Magistrates and Town Council of St Monance v Mackie and Cochrane* related to areas of land at the harbour at St Monans in Fife. Mackie and Cochrane claimed ownership of the areas on the basis of deeds which supposedly included the land running down to the sea at St Monans. Mackie had the most favourable deed; however, even its description was problematic. In particular, Mackie's deed stated that his property's southern boundary was as follows:

...the full sea, the street intervening on the south...<sup>665</sup>

Mackie argued that the wording indicated that the boundary was the sea at high tide and that the reference to the street merely served to exempt the street from his property. However it was held by the Inner House that the southern boundary of Mackie's property was constituted by the street and that his property did not extend beyond this to the sea. Cochrane's deed was weaker than that of Mackie and thus the Magistrates of St Monans were successful in this case.<sup>666</sup>

The decision in this case may be questioned as it does seem very plausible that the terms of Mackie's deed simply created an exception in respect of the roadway and that this exception should not have been read as meaning that Mackie could not claim ownership of the land between the roadway and the sea. Thus it would appear that the Court should perhaps have held that Mackie's deed did include the area which lay between the roadway and the sea. Therefore, the possible contradiction in the deed

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<sup>664</sup> *Magistrates and Town Council of St Monance v Mackie* (1845) 7 D 582.

<sup>665</sup> *Magistrates and Town Council of St Monance v Mackie* (1845) 7 D 582 at 583.

<sup>666</sup> It appears that the disputed areas of ground would have formed parts of the principal areas held by Mackie and Cochrane if Mackie and Cochrane had been successful in this case. The disputed areas of ground do not appear to have had the character of pertinents in relation to the principal areas held by Mackie and Cochrane.

could have been resolved on the basis that the roadway was merely an exception rather than the outermost line of the southern boundary.

However, even if the decision is incorrect, it is important to note the underlying principle which can be seen emerging in this case: if a deed is perceived to contain a contradiction between elements of description, the description will not automatically be interpreted in favour of the largest possible inclusion of land under the deed in question. Rather, if a court is presented with two contradictory elements of description which are of equal status it will hold that the area which is affected by the contradiction is not included within the deed. In this case the Court held that there were two contradictory descriptions of the southern boundary of the property. The contradictory elements of description existed in the form of references to two physical features: a road and the sea, both lying on the south side of the property in question. The Court held this to be an irresolvable contradiction and therefore the deed only covered an area which extended as far as the roadway and did not extend as far as the sea.

### **3. *Royal & Sun Alliance v Wyman-Gordon***

In contrast to *St Monance v Mackie*, the case of *Royal & Sun Alliance v Wyman-Gordon*<sup>667</sup> was a boundary dispute in which the prescriptive period had not elapsed. However, it is an important case for establishing the principle to be applied when a deed contains conflicting elements of description and these elements are of equal status.

The dispute in this Outer House case related to a strip of land lying on the boundary of two properties near Livingston in West Lothian. The disposition which the pursuer<sup>668</sup> relied upon described the pursuer's land as being bounded by a neighbouring property and it was argued by the pursuer that this description was habile to include the disputed area. However, it was argued by the defender that this was not possible as a deed which described the boundaries of the said neighbouring property,

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<sup>667</sup> *Royal & Sun Alliance v Wyman-Gordon* 2001 SLT 1305. This case is discussed in K G C Reid and G L Gretton, *Conveyancing 2001* (2002) 32-33. The professors comment that this was a case regarding a boundary dispute in which the time period for positive prescription had not elapsed. This is correct; however, it is argued here that, the concept of hability must be congruent with the principles established for the interpretation of boundaries. See above at Chapter V, C, 1.

<sup>668</sup> McConnell Properties Ltd claimed ownership of the disputed area of land in question and Royal & Sun Alliance were the assignees of McConnell Properties Ltd. For ease of understanding, Royal & Sun Alliance and McConnell Properties Ltd will both be referred to here as the 'pursuer'.

and which included the disputed area, had been incorporated by reference into the pursuer's disposition in order to describe the boundaries of the pursuer's land.

Lord Eassie held that the neighbouring property was clearly and sufficiently identified by virtue of the deed which described its boundaries.<sup>669</sup> Furthermore, his Lordship held that the deed describing the boundaries of the neighbouring property had been successfully incorporated by reference into the pursuer's foundation writ. Therefore the pursuer's disposition was not habile to include the disputed land as the disputed land formed part of the said neighbouring property and therefore lay outwith the definite boundary of the pursuer's property.<sup>670</sup>

Specifically, both descriptions primarily employed measurements and made reference to the deeds and title numbers under which neighbouring areas were held. The description which was incorporated by reference into the pursuer's disposition made mention of a fence and a road on the north western boundary. However, the reference to physical features consisting of the fence and the road were of no assistance with regard to the determination of the disputed area in this case.<sup>671</sup>

The crucial point in this decision appears to be the holding that the written description of measured boundaries contained in the deed disposing the neighbouring property,<sup>672</sup> and incorporated by reference into the pursuer's disposition,<sup>673</sup> cancelled the effect of the written description of measured boundaries contained in the pursuer's disposition.<sup>674</sup> The two descriptions contradicted each other in respect of the disputed area. The description of the neighbouring property enabled a precise location of its boundaries to be made and these boundaries included the disputed area. Therefore, the pursuer's disposition did not include the disputed area. It was held that in such a situation the description of the boundaries contained in the pursuer's disposition was assumed to be erroneous. The description of the neighbouring property also cancelled

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<sup>669</sup> *Royal & Sun Alliance v Wyman-Gordon* 2001 SLT 1305 at paras 22-26.

<sup>670</sup> *Royal & Sun Alliance v Wyman-Gordon* at paras 22-26.

<sup>671</sup> Professor Rennie appears to treat this case as one in which a written description of physical boundaries conflicts with another form of boundary description. See Rennie, "Boundary disputes revisited" (2013) SLT (News) 189 at 190. However, it appears that *Royal & Sun Alliance v Wyman-Gordon* is actually a conflict between two descriptions consisting of boundary measurements.

<sup>672</sup> Which referred to a demonstrative plan. *Royal & Sun Alliance v Wyman-Gordon* at para 4.

<sup>673</sup> Which also referred to a demonstrative plan. *Royal & Sun Alliance v Wyman-Gordon* at para 5.

<sup>674</sup> *Royal & Sun Alliance v Wyman-Gordon* at para 26.

the effect of the plan contained in the pursuer's disposition as the plan was demonstrative only.<sup>675</sup>

It was also noted in the judgment that the written description of boundaries in the pursuer's disposition could be read as not including any part of the neighbouring property and thus the contradiction could actually be removed in respect of the written descriptions. Therefore, as the plans of the two properties were both stated to be demonstrative only,<sup>676</sup> it was again possible to hold that the written description in the deed for the neighbouring property, which was incorporated into the pursuer's disposition by reference, was the determinative description in this case.<sup>677</sup> However, this of course would have the consequence that a new disputed area would presumably be created at the other end of the land claimed by the pursuer. This solution only shifts the location of the problem rather than resolving it. As such, this approach is potentially problematic.

In either instance, this decision seems to demonstrate that if a deed contains two contradictory elements of description, and these elements of description are of equal status, then it must follow that any attempt to include the area which is subject to the contradiction will fail as the deed contains a perpetual vitiation in respect of the area subject to the contradiction. The two descriptions act to cancel each other out.

It might be argued that such an irresolvable contradiction should be treated as a form of ambiguity as the deed is simultaneously excluding and including the area. Therefore, to the extent that it is including the disputed area, it may be habile to include the disputed area. It could be argued that this is consistent with the principle which was established in *Auld v Hay* and which governs the concept of habilty. However, it is the reasoning found in *Auld v Hay* which actually seems to demonstrate that this argument will not work, at least in respect of the concept of habilty, and also most probably in respect of boundary disputes in which the prescriptive period has not elapsed.

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<sup>675</sup> *Royal & Sun Alliance v Wyman-Gordon* at para 26.

<sup>676</sup> *Royal & Sun Alliance v Wyman-Gordon* at paras 4, 5 and 26.

<sup>677</sup> *Royal & Sun Alliance v Wyman-Gordon* at para 26.

As noted above, the crucial point upon which *Auld v Hay* turned was the issue of whether or not the words “several shares” in the description in the foundation writ could be construed as encompassing the entire land which constituted the principal area in question. This essential principle was summed up in the words of the Lord Justice-Clerk:

A habile title does not mean a charter followed by sasine, which bears to convey the property in dispute, but one which is conceived in terms capable of being so construed. The terms of the grant may be ambiguous, or indefinite, or general, so that it may remain doubtful whether the particular subject is or is not conveyed, or, if conveyed, what is the extent of it. But if the instrument be conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance, that is enough, and forty years’ possession following on it will constitute the right to the extent possessed.<sup>678</sup>

The *ratio decidendi* of *Auld v Hay* is therefore summarised as meaning that if a description can possibly be construed as being habile to include an area of land then that description will be habile to include the area of land in question; this will hold true even if a different construction is possible.<sup>679</sup> This principle appears to have been followed in subsequent case law.<sup>680</sup>

The Court in *Auld v Hay* was merely ruling on the ambiguity contained in the words ‘several shares’. Although unlikely, it was not impossible that these words could refer to the entirety of the property in question. There was nothing specifically contrary to such an interpretation contained within the description. There was therefore an ambiguity rather than a contradiction before the Court.

As evidenced in the above quotation from the judgment of Lord Justice-Clerk Moncreiff, a deed may contain an ambiguous description and be habile to convey the land in question. However, it must be ‘conceived in terms consistent with and susceptible of a construction which would embrace such a conveyance’.<sup>681</sup>

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<sup>678</sup> *Auld v Hay* at 668 per the Lord Justice-Clerk (Moncreiff).

<sup>679</sup> This is reflected in academic writing in the early and mid-twentieth century. See: Rankine, *Land-ownership* 32-33; Burns, *Conveyancing* 202. The principle also appears to have already been manifest in relation to the conveyance of teinds. See: *Lord Advocate v Balfour* (1860) 23 D 147.

<sup>680</sup> A form of this principle also appears to have been held as good law by the House of Lords in the earlier case of *Gardner v Scott* (1843) 2 Bell’s Appeals 129. In this case it seems that possession determined the extent of a right when the description was ambiguous. However, this case related to the conveyance of a mid-superiority rather than to a real right of landownership.

<sup>681</sup> *Auld v Hay* at 668 per the Lord Justice-Clerk (Moncreiff).



Thus it is logical to state that if a deed contains two elements of description that are of equal status and which are contradictory rather than ambiguous, then there is a vitiation of the consistency which is required for the deed to be a habile conveyance. The deed may be vague or imprecise and yet be habile. However, the deed cannot contain an irresolvable contradiction between two elements of description which are of equal status and yet function as a habile foundation writ in relation to both of the contradictory descriptions. A deed cannot simultaneously include and exclude a particular area.

The decision in *Royal & Sun Alliance v Wyman-Gordon* is therefore congruent with the *ratio* of *Auld v Hay*. *Auld v Hay* allows for an interpretation in favour of inclusivity, even if such an interpretation is unlikely. However, the deed must be consistent in allowing for this possible interpretation. Therefore, there would be no basis for holding that a deed was inclusive in respect of two elements of description of equal status which contradicted each other and constituted a perpetual and irresolvable contradiction.

The principle which is seen here can be summarised as follows: if two elements of description contradict each other, but neither is of greater status than the other, it will follow that the attempt to include the area which is subject to the contradiction must fail as the deed contains a perpetual vitiation in respect of the area subject to the contradiction. The two descriptions act to cancel each other out.

#### **4. *The Trustees of Niall Calthorpe's 1959 Discretionary Settlement v (First) G. Hamilton (Tullochgribban Mains) Limited and (Second) The Keeper of the Registers of Scotland***

In contrast to *Royal & Sun Alliance v Wyman-Gordon*, the recent Outer House case of *The Trustees of Niall Calthorpe's 1959 Discretionary Settlement v (First) G. Hamilton (Tullochgribban Mains) Limited and (Second) The Keeper of the Registers of Scotland*<sup>682</sup> was a boundary dispute in which the prescriptive period had elapsed and

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<sup>682</sup> *Sir Charles Christian Nicholson and Others (The Trustees of Niall Calthorpe's 1959 Discretionary Settlement) v (First) G. Hamilton (Tullochgribban Mains) Limited and (Second) The Keeper of the Registers of Scotland* [2012] CSOH 138.

it was therefore a case in which the issue of the hability of the foundation writ was decisive.

In *Calthorpe* the disputed land was an area of ground at Tullochgribban near Dulnain Bridge. The Trustees of Niall Calthorpe's 1959 Discretionary Settlement attempted to found positive prescription of the disputed area on a deed referred to as the 1991 disposition.<sup>683</sup> In relation to the disputed land the dispositive clause of the 1991 disposition contained the following wording:

(in the second place) ALL and WHOLE that area of ground lying partly in the County of Inverness and partly in the County of Moray being the subjects more particularly described in and (in the second place) disposed by and delineated partly in solid red lines and partly in pecked red lines and coloured pink on the said plan annexed and subscribed as relative to the said Disposition by the said Lady Moireach Anstruther-Gough-Calthorpe and others as Trustees therein mentioned in favour of Lord Luke and others as Trustees under Sir Richard Calthorpe's Trust dated and recorded as aforesaid...<sup>684</sup>

It was held that, although only one plan is mentioned in the above description, the description in the 1991 disposition referred back to the deed referred to as the 1977 disposition.<sup>685</sup> In particular, Lady Clark stated:

“As I interpret the 1991 disposition what is being conveyed are subjects “more particularly described in and in the second place of the 1977 disposition”.”<sup>686</sup>

Therefore, it was held that the 1991 disposition incorporated the description that was deployed in the 1977 disposition.<sup>687</sup>

The description in the 1977 disposition read as follows:

ALL and WHOLE that area of ground lying partly in the County of Inverness and partly in the County of Moray delineated in red and coloured pink on the said plan annexed and subscribed as relative hereto ... and which said last

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<sup>683</sup> *Calthorpe* 138 at para 21 and para 38. The 1991 disposition is a disposition by the Trustees of Sir Richard Calthorpe's Trust in favour of the Trustees of the main Calthorpe settlement recorded GRS (Inverness) 6<sup>th</sup> November 1991.

<sup>684</sup> *Calthorpe* 138 at paras 38 and 42. The 1991 disposition is a disposition by the Trustees of Sir Richard Calthorpe's Trust in favour of the Trustees of the main Calthorpe settlement recorded GRS (Inverness) 6<sup>th</sup> November 1991.

<sup>685</sup> *Calthorpe* 138 at paras 35, 38 and 42. The 1977 disposition is a disposition by Lady Nancy Moireach Anstruther-Gough-Calthorpe and others as Trustees in favour of Lord Luke and others as Trustees under Sir Richard Calthorpe's Trust recorded GRS (Inverness) 21<sup>st</sup> October 1977.

<sup>686</sup> *Calthorpe* 138 at para 44.

<sup>687</sup> *Calthorpe* 138 at para 44.

mentioned area of land is part and portion of all and whole those lands and others in the said counties extending to six thousand eight hundred and twenty one acres or thereby Imperial Measure delineated in red and coloured pink on the plan annexed and subscribed as relative to the Disposition granted by Ian Derek Francis Ogilvie-Grant-Studley-Herbert, Viscount Reidhaven in favour of Niall Hamilton Anstruther-Gough-Calthorpe dated twenty fourth September and recorded in the Division of the General Register of Sasines for the counties of Inverness and Moray for 1 November both in the year nineteen hundred and sixty eight...<sup>688</sup>

The plan which was annexed and subscribed as relative to the 1977 disposition included the disputed land. However, the plan which was annexed and subscribed as relative to the 1968 disposition<sup>689</sup> did not include the disputed land.<sup>690</sup> As seen above, the 1977 disposition stated that the subjects which it was disposing and which were shown on its plan were part and portion of the subjects disposed by the 1968 disposition and which were shown on its plan. There was therefore an anomaly contained within the description deployed in the 1977 disposition.

The anomaly contained in the 1977 disposition was the crucial point on which the *Calthorpe* case turned. In particular it was held that:

“In my opinion it is impossible to make sense of the dispositive clause in the 1977 disposition as the description is totally contradictory. The disputed land is included in the 1977 plan but not included in the 1968 plan. This does not make sense.”<sup>691</sup>

As the 1977 description was held to be completely contradictory it was therefore not habile to include the disputed land.<sup>692</sup> As noted above, it was also held that the 1991 disposition incorporated the description which was deployed in the 1977 disposition. Therefore the 1991 disposition could not be regarded as a valid foundation writ for positive prescription as it was also not habile to include the disputed land.<sup>693</sup>

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<sup>688</sup> *Calthorpe* 138 at para 35. The 1977 disposition is a disposition by Lady Nancy Moireach Anstruther-Gough-Calthorpe and others as Trustees in favour of Lord Luke and others as Trustees under Sir Richard Calthorpe’s Trust recorded GRS (Inverness) 21<sup>st</sup> October 1977.

<sup>689</sup> *Calthorpe* 138 at para 29. The 1968 disposition is a disposition by Viscount Reidhaven to Niall Hamilton Anstruther-Gough-Calthorpe recorded GRS (Inverness) 1<sup>st</sup> November 1968.

<sup>690</sup> *Calthorpe* 138 at paras 32-34.

<sup>691</sup> *Calthorpe* 138 at para 37.

<sup>692</sup> *Calthorpe* 138 at para 37.

<sup>693</sup> *Calthorpe* 138 at paras 44 and 47.

Lady Clark did note that if the 1991 disposition had referred only to the plan attached to the 1977 disposition then the 1991 disposition would have been a foundation writ which was habile to include the disputed land. However, it was held that, as the 1991 disposition incorporated the plan and the verbal description used in the 1977 disposition it was therefore not possible to construe the 1991 disposition as a foundation writ habile to include the disputed land. In order for such a construction to be possible it would have been necessary to ignore or delete the wording incorporated from the 1977 disposition. It was held that such a construction would be neither reasonable nor legitimate.<sup>694</sup> This appears to be the issue upon which the entire decision turns.

In particular it seems to be crucial that the dispositive clause of the 1977 disposition specifically stated that the area shown on the 1977 plan was ‘part and portion’ of the area shown on the 1968 plan.<sup>695</sup> The fact that the 1977 disposition so emphatically stated that the 1977 plan showed an area which had been disposed in the 1968 disposition and plan but which in reality was not included in the 1968 disposition and plan seems to have led to the finding that the 1977 description was self-destructive.<sup>696</sup> The fact that the 1977 deed stated that that the 1977 plan was part and portion of the 1968 plan seems to indicate a dependency of the 1977 deed and plan on the 1968 plan in relation to satisfying the criterion of hability. It would appear that the 1977 deed and plan were tied to conformity with the 1968 plan. Therefore the hability criterion was not met as the disputed area was not included within the 1968 plan. In essence, it was held that a description is not habile to include land if the description consists of two plans which contradict each other with regard to the inclusion of the land in question.

It would appear that this judgment is consistent with the principle that if two elements of description contradict each other, but neither is of greater status than the other, it will follow that the attempt to include the area which is subject to the contradiction

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<sup>694</sup> *Calthorpe* 138 at para 44.

<sup>695</sup> The potential importance of these particular words is acknowledged even by those who question the soundness of the decision in this case. See: K G C Reid and G L Gretton, *Conveyancing 2012* (2013) at 154.

<sup>696</sup> *Calthorpe* 138 at para 37.

must fail as the deed contains a perpetual vitiation in respect of the area subject to the contradiction. The two descriptions act to cancel each other out.

As with *Royal & Sun Alliance v Wyman-Gordon*, the decision in *Calthorpe* is congruent with the *ratio* of *Auld v Hay*. *Auld v Hay* allows for an interpretation in favour of inclusivity, even if such an interpretation is unlikely. However, the deed must be consistent in allowing for this possible interpretation. Therefore, there would be no basis for holding that a deed was inclusive in respect of two elements of equal status which contradicted each other and constituted a perpetual and irresolvable contradiction. A deed cannot simultaneously include and exclude a particular area.

The situation in *Calthorpe* is one in which the two contradictory elements of description are of equal status and do not coincide in respect of any part of the disputed subjects. Neither of the two conflicting plans is fortified by a statement that it is taxative nor demoted by a statement that it merely demonstrative. They stand as equals in a state of contradictory deadlock. The 1977 plan depicts the area as being included, but the 1968 plan, upon which the 1977 plan depends, depicts the area as being excluded. Such a deed is therefore only habile to the extent that the conflicting descriptions coincide. In effect, both descriptions are valid, but only to the extent that they do not contradict each other. This principle appears to have been applied in *Calthorpe* with the effect that, as the two descriptions did not coincide in respect of any part of the disputed area, the deed was not habile to include any part of the disputed area.

Professors Reid and Gretton state that the reference to the plan attached to the 1977 deed is the more important element of description as it is more recent and is the only element referred to in full in the 1977 deed.<sup>697</sup> However, the fact that the plan attached to the 1977 deed is more recent does not seem to alter the fact that is in outright irresolvable contradiction in relation to the 1968 plan. Furthermore, the description from the 1968 deed does not need to be incorporated in full in the 1977 deed as the 1977 deed makes it clear that the 1977 plan shows ‘part and portion’ of the area shown

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<sup>697</sup> Reid and Gretton, *Conveyancing 2012* at 153.

on the 1968 plan.<sup>698</sup> Thus the 1968 description and plan are clearly incorporated into the 1977 deed, just as if they had been reproduced in full. The fact that the two contradictory elements of description are of equal weight means that the deed is not habile in respect of the area which is subject to the contradiction.

Professors Reid and Gretton have argued that *Calthorpe* may be incorrectly decided on other grounds.<sup>699</sup> One argument draws heavily on the case of *Nisbet v Hogg*.<sup>700</sup> However, as will be observed below, the decision in *Nisbet* appears to be incorrect. Furthermore, the character of the disputed land as a pertinent in *Nisbet* serves to distinguish this case from that of *Calthorpe*. Although the disputed area in *Calthorpe* was included in a disposition which simultaneously disposed other areas of land, it appears that the disputed area was a standalone area which essentially formed the old quarry at Tullochgribban.<sup>701</sup> There does not seem to be any suggestion that these subjects functioned as a pertinent to a principal area and as such the *ratio* of *Nisbet v Hogg* would appear to be inapplicable to *Calthorpe*.

The other argument advanced by Professors Reid and Gretton is that contradictory descriptions may sometimes allow for subjects to be transferred between parties.<sup>702</sup> Therefore, as a contradictory description may carry land from one party to another it must surely be habile to found positive prescription.<sup>703</sup> This argument is quite correct in instances in which a description is ambiguous or in which one form of description prevails over another form within the deed. The example of a verbal description prevailing over a plan is very correctly given by the Professors and supported by appropriate authority.<sup>704</sup> However, this does not alter the fact that situations of contradiction may occur in which no element can be held to prevail over the other. The case of *Calthorpe* is just such a situation and it is therefore one in which the

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<sup>698</sup> The potential importance of these particular words is acknowledged by Professors Reid and Gretton. See: Reid and Gretton, *Conveyancing 2012* at 154.

<sup>699</sup> See: Reid and Gretton, *Conveyancing 2012* at 153-154.

<sup>700</sup> *Nisbet v Hogg and Another* 1950 SLT 289. This is a case which relates to the hability of description in relation to pertinents rather than in relation to the principal area under conveyance. It is therefore analysed in the relevant section below.

<sup>701</sup> *Calthorpe* 138 at para 2.

<sup>702</sup> See: Reid and Gretton, *Conveyancing 2012* at 154-155.

<sup>703</sup> See: Reid and Gretton, *Conveyancing 2012* at 154-155.

<sup>704</sup> See: Reid and Gretton, *Conveyancing 2012* at 155 citing at footnote 1, Gordon and Wortley, *Land Law* 3.08.

contradiction between the two elements of equal status thus renders the deed as not habile in respect of the area which is subject to the contradiction. In *Calthorpe*, the contradiction existed in respect of the entire area at Tullochgribban Quarry. There was no ambiguity: there was irresolvable inconsistency and contradiction. One plan included the disputed area and the plan upon which this plan depended excluded the area. Thus the deed was not habile to include any part of this area.

##### **5. Conclusion regarding hability in relation to the conveyance of the principal area in cases involving contradictory descriptions of equal status under the Sasine system**

With regard to the analysis of cases involving contradictory descriptions of equal status, it was acknowledged that the decision of the Inner House in *St Monans v Mackie* may be questionable<sup>705</sup> and that *Royal & Sun Alliance v Wyman-Gordon* and *Calthorpe* are decided only at the level of the Outer House. However, it appears that all three cases are decided on the basis of the principle that if two elements of description contradict each other, but neither is of greater status than the other, it will follow that the attempt to include the area which is subject to the contradiction must fail as the deed contains a perpetual vitiation in respect of the area subject to the contradiction. The two descriptions act to cancel each other out.

The principle of mutual cancellation may be criticised on the basis that irresolvable contradiction is a form of ambiguity.<sup>706</sup> However, the principle of mutual cancellation appears congruent with the reasoning found in *Auld v Hay*. In particular, mutual cancellation occurs when the terms of a deed are inconsistent with regard to what is conveyed rather than ambiguous with regard to what is conveyed.<sup>707</sup> Hence, albeit with caution, it is argued that the principle of the mutual cancellation of elements of description of equal status is a part of Scots law.

Having observed the three principles governing hability in relation to the conveyance of the principal area, it is necessary to examine an instance in which the concept of hability may have been applied in a manner which does not appear to accord with any

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<sup>705</sup> See Chapter V, H, 2.

<sup>706</sup> See Chapter V, H, 3 and 4.

<sup>707</sup> See Chapter V, H, 3 and 4.

of the three principles of hability discussed in this chapter. This is the case of *Brown v North British Railway Company*.

### **I. A questionable application of the concept of hability under the Sasine system: *Brown v North British Railway Company***

In *Brown v North British Railway Company*<sup>708</sup> the principles of construction that were developed in *Auld v Hay* were discussed further by the Inner House with regard to a dispute over an area of land extending to 1.016 acres near the Union Canal at Manuel in Stirlingshire. However, *Brown v North British Railway* is a case in which there is neither an ambiguity nor a contradiction contained within the foundation writ in question. It was argued that the dispute related to the terms of the foundation writ, but it appears that this was actually a dispute which related purely to the effect of possession. Furthermore, it also appears that the real question in this case should not have related to positive prescription but rather to the issue of whether the railway company's foundation writ was void due to uncertainty regarding the subjects conveyed.

The railway company's foundation writ had been granted in favour of the construction company which was building the Union Canal. The foundation writ described the subjects disposed as:

....the piece or pieces of ground consisting of 4 acres and 37 thousandth parts of an acre or thereby Scots measurement, being part of my said lands and estate of Manuel Miln, situated within the parish of Muiravonside and county of Stirling, which are required for the purposes of the said canal, and on which the company have commenced their operations...<sup>709</sup>

The railway company argued that this was a description which contained a degree of ambiguity as it did not specify the exact boundaries of the 4.037 acres and that this foundation writ was therefore habile to include the 1.016 acres in dispute. The railway company argued that the prescriptive period had elapsed and that they had acquired ownership of the disputed land as they had been possessing it under the allegedly habile foundation writ. Brown argued that the description contained in the railway

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<sup>708</sup> *Brown v North British Railway Company* (1906) 8 F 534.

<sup>709</sup> *Brown v North British Railway* at 535.



company's foundation writ was a bounding description and that the 1.016 acres were not included within the ambit of the description.

Brown argued that a surveyor's plan produced at the time of the grant of the railway company's foundation writ showed that the 1.016 acres were not included within the railway company's foundation writ. This was supported by the documents relating to the money paid for the land at the time of the granting of the foundation writ. Brown also argued that the railway company were claiming a total area at Manuel which was 1.016 acres larger than the 4.037 acres disposed to them under their foundation writ. He claimed that he owned the 1.016 acres and that the railway company did not have a foundation writ which was habile in respect of this ground.

The Inner House held unanimously that the 4.037 acres mentioned in the railway company's foundation writ must have been definitely identified at the time of the original conveyance.<sup>710</sup> It was held that the precise statement of acreage given in the foundation writ indicated that the boundaries must have been precise; if this had not been the case then the original conveyance would have been invalid by reason of uncertainty.<sup>711</sup> As the boundaries must have been definite when the foundation writ was granted there were therefore no grounds for holding that the foundation writ was invalid due to uncertainty. It was therefore held to be acceptable for the Court to look at the extrinsic evidence consisting of the surveyor's plan and the payment documentation in order to ascertain the location of the definite boundaries. This evidence showed that the 1.016 acres were not included in the ambit of the foundation writ and therefore the railway company did not own this additional area.<sup>712</sup>

This decision may be understood in the context that extrinsic evidence is admissible in order to ascertain the area which is referred to in a description.<sup>713</sup> If the area described in a deed cannot be ascertained by intrinsic or extrinsic evidence then the

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<sup>710</sup> *Brown v North British Railway* at 541 per the Lord Justice-Clerk (Macdonald), at 542-544 per Lord Kyllachy and at 544 per Lords Stormonth-Darling and Low.

<sup>711</sup> *Brown v North British Railway* at 541 per the Lord Justice-Clerk, at 542-544 per Lord Kyllachy and at 544 per Lords Stormonth-Darling and Low.

<sup>712</sup> *Brown v North British Railway* at 542 per the Lord Justice-Clerk, at 543-544 per Lord Kyllachy and at 544 per Lords Stormonth-Darling and Low.

<sup>713</sup> *Murray's Trustee v Wood* (1887) 14 R 856; Erskine II.6.2; Gretton and Reid, *Conveyancing* 12.13; K G C Reid, 'Landownership' in *S.M.E.* vol 18 para 197.

description is invalid due to uncertainty and is not habile to any extent. In *Brown v North British Railway* it appears that the Court took the view that the deed was either habile to include a specific area of 4.037 acres or else it was not habile to any extent. By arguing that the additional area of 1.016 acres was included within the ambit of their foundation writ, the railway company was in effect arguing that the foundation writ was invalid due to uncertainty as to the area conveyed. This can be seen in the fact that the railway company appear to have been arguing that their deed for 4.037 acres was actually habile to include a total of 5.053 acres by simultaneously floating over the 4.037 acres and an additional 1.016 acres. The Court managed to avoid finding the description totally invalid by using extrinsic evidence to identify the location of the subjects. However, the view of the Court on this matter appears questionable.

Although the Court might appear to have found justification for holding the conveyance to be valid, it might well be argued that the deed was simply void due to uncertainty.<sup>714</sup> A description which is simply a statement of acreage combined with the identification that this is the area ‘required for the purposes of the said canal and on which the company have commenced their operations’, does not readily appear to convey a particular area. The Court may have been reluctant to hold the deed to be void if this this created a ransom situation, particularly if the terms of this deed were replicated in other deeds covering the route of the canal or the railway. However, it might well be the case that, however unpalatable the consequences, the deed was nonetheless void.<sup>715</sup>

Fundamentally, whilst the argument in this case related to the concept of hability, it rather appears that the issue was whether or not the foundation writ was void due to uncertainty regarding the subjects conveyed. As such, the case should perhaps not be

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<sup>714</sup> On the principle that a conveyance must be of a certain area see: Erskine II.3.23; Gretton and Reid, *Conveyancing* 12.13.

<sup>715</sup> It could perhaps have been argued that the 1.016 acres constituted a pertinent but that would seem implausible as it appears that it bore the character of an additional part of the principal area in question. See: *Brown v North British Railway* at 536. Furthermore, the 1.016 acres would have been a large addition in relation to an area of 4.037 acres and could not be covered by the use of the term ‘thereby’ in the foundation writ. *Brown v North British Railway* at 544 per Lord Kyllachy. Lord Kyllachy acknowledged that the term ‘thereby’ in the description afforded some latitude. However it is clear that the presence of this term did not affect the decision of the Court in this case.

treated as authority on the issue of hability. Rather, it is a standalone case in which a deed was held to be valid despite strong indications that it was void due to uncertainty. Hability was only relevant in the fact that the Court held the deed to be valid in respect of the 4.037 acres and therefore the description was habile to this extent. There was no question of ambiguity or contradiction contained within the railway company's foundation writ, rather there was just a claim that a deed which stated that it covered 4.037 acres should be habile to include an area of 5.053 acres on the grounds that details of the boundary locations were not given in the description. However, such an argument actually seems to indicate that the description was of a floating area of 4.037 acres and that this is indicative of a deed which did not convey properly identified subjects. Even if this description is not regarded as invalid, it appears that it exists on the very borderline of validity. The case of *Brown v North British Railway* is thus anomalous and does not appear to be solid authority in relation to either hability or the identification of subjects by description.

#### **J. Conclusion regarding hability of principal area**

As can be seen from the analysis provided during the course of this chapter it seems that there are three clear principles of construction with regard to the assessment of the hability of the principal area in a conveyance. Each of these three principles is discussed above and a conclusion is reached for each one. It is therefore unnecessary to rehearse the individual conclusions here. Rather it is sufficient to observe that the three principles are consistent and coherent. However, they have not been previously set out systematically in Scots law and the anomalous nature of the decision in *Brown v North British Railway* does not appear to have been highlighted in earlier discussions of positive prescription.

With regard to land registration, the impact of this on the concept of hability is discussed at the end of Chapter VI of this thesis.<sup>716</sup> This is appropriate as land registration has a similar impact on the hability of both the principal area and the hability of pertinents in a conveyance.

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<sup>716</sup> See discussion of land registration and hability at chapter VI, K.

Having examined hability of description in respect of the principal area under conveyance, it is now appropriate to examine hability of description in relation to the conveyance of pertinents.

## Chapter VI – Hability of Pertinents

### A. Introduction

The principles regarding hability in relation to the principal area are also the principles which govern hability of pertinents. It would be absurd if the principles regarding ambiguity and contradiction observed in relation to the principal area could be ignored or altered merely because an area in a conveyance was a pertinent rather than part of the principal.

However, pertinents are of a different character from the principal area under conveyance. This is due to the fact that pertinents are not the main focus of the conveyance and can be included without any express mention in the foundation writ.<sup>717</sup> Therefore, it is less likely that they will be subject to clear definitions of scope and extent. Hence it is more likely that possession will be the only means of clarifying whether or not an area is included as a pertinent in relation to a particular foundation writ. Furthermore, it sometimes appears to have been held that pertinents should be restricted by descriptions which, on a more careful reading of the deeds in question, actually only appear to limit principal areas. Whether this is, or should be, the law is examined below. Prior to making this examination it is necessary to provide a detailed definition of pertinents in Scots law. Additionally, it must again be emphasised that the principles governing hability under the Sasine system continue to be relevant for determining the extent of subjects at the time of first registration in the Land Register. However, once a property is included in the Land Register, hability is simply determined by a plan based description.<sup>718</sup>

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<sup>717</sup> This is discussed further in the following paragraphs.

<sup>718</sup> See discussion of land registration and hability at chapter VI, K.

## **B. Definition of pertinents for the purpose of this thesis**

### **1. Pertinents as areas of land**

Pertinents are understood here as being additional areas of land<sup>719</sup> which are subordinate and ancillary to the principal area under conveyance.<sup>720</sup> The character of being subordinate and ancillary is crucial. The pertinent must have some character or function which renders it distinct from the principal. Pertinents cannot function as a means of simply extending the grant by means of adding on extra land which is of the same character and function as the principal area.<sup>721</sup> The fact of being subordinate suggests that the pertinent must be of less importance than the principal area under conveyance; whilst the fact of being ancillary suggests that the pertinent must be distinct and additional to the principal area. The principal area must be able to exist as a whole without the presence of the pertinent or pertinents.

It is recognised that pertinents also include subordinate real rights such as servitudes<sup>722</sup> or rights to enforce real burdens. However, for the purposes of this thesis the term is understood only to refer to pertinents consisting of land itself.<sup>723</sup> Furthermore, there are four particular points which should also be emphasised with regard to pertinents.

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<sup>719</sup> Corporeal heritable property. There is some overlap between pertinents consisting of land and pertinents consisting of either loch or foreshore. This overlap is seen in the course of this chapter. However, as stated at chapter V, A, this thesis only analyses the concept of hability in relation to ownership of land at surface level. Therefore, this chapter does not address the complex issue of pertinents, or alleged pertinents, which do not exist at ground level. Due to considerations of space, the complicated issue of pertinents which are alleged to exist above or below ground level cannot be adequately covered in the course of this thesis. It is acknowledged that a number of cases have related to this issue in Scots law. See: *McArly v French's Trustees* (1883) 10 R 574; *Watt v Burgess' Trustee* (1891) 18 R 766; *Mead v Melville* (1915) 1 SLT 107; *Chrichton v Turnbull* 1946 SC 52; *Michael v Carruthers* 1998 SLT 1179; *Property Selection & Investment Trust Limited v United Friendly Insurance plc* 1999 SLT 975; *Compugraphics International Limited v Nikolic* [2011] CSIH 34.

<sup>720</sup> See: Reid, *Property* paras 199 and 200; Halliday, *Conveyancing* 33.38-33.39; Gordon and Wortley, *Land Law* 3.13-3.16; Hume, *Lectures* IV.530; Napier, *Commentaries* 163-168; Menzies, *Conveyancing* 522-527; Montgomerie Bell, *Lectures* 597-608; Millar, *Prescription* 25-35; Wood, *Lectures* 138 and 202-206; Rankine, *Land-ownership* 195-205; Burns, *Conveyancing* 330-341; Johnston, *Prescription* 17.50 to 17.55; D Brand, "Parts and pertinents in conveyancing – what exactly does this mean?" (2000) 5 SLPQ 385.

<sup>721</sup> See: Reid, *Property* paras 199 and 200; Halliday, *Conveyancing* 33.38; Gordon and Wortley, *Land Law* 3.13-3.16.

<sup>722</sup> See: *Gordon v Grant* (1850) 13 D 1 at 7 per the Lord Justice-Clerk (Hope) and at 18 per Lord Medwyn; Halliday, *Conveyancing* 33.38.

<sup>723</sup> See footnote 719 above.

## 2. Four key aspects of pertinents under the Sasine system

### (a) Existence can be contiguous or discontinuous to the principal area

A pertinent can exist as contiguous or as discontinuous with the principal area. This is established in Institutional Writings and recognised by the courts.<sup>724</sup>

### (b) Pertinents may have been or may yet become principals

It is often possible for a pertinent to be reconstituted as a principal if conveyed separately from the principal area to which it exists as a pertinent.<sup>725</sup> This is particularly important as the size of potential pertinents varies in relation to the size of the principal area.<sup>726</sup> For instance, it might be possible for the island of Iona to be counted as a pertinent to Mull. However, Iona could of course be conveyed on its own as a freestanding principal. This accords with Erskine's view that a farm or tenantry could form a pertinent<sup>727</sup> and Bell's view that an area the size of an orchard could constitute a pertinent.<sup>728</sup> As will be seen below, these propositions are endorsed by cases such as *Magistrates of Perth v Earl of Wemyss*<sup>729</sup> and *Earl of Fife's Trustees v Cuming*.<sup>730</sup> In *Magistrates of Perth v Earl of Wemyss* an island of many acres was counted as a pertinent to a large estate to which it was ancillary. In *Earl of Fife's Trustees v Cuming* the same principle was applied with regard to an area of moorland. Hence, the question of what is or is not a pertinent is a question of fact which is entirely dependent on the particular circumstances of the situation in which the attempt is made to claim that an area is a pertinent. Factors which may be of particular importance include: the distance between the principal and the supposed pertinent; and the size of the principal area in relation to the supposed pertinent.

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<sup>724</sup> See: Stair II.3.59; Bankton II.3.170; Erskine II.6.3; Bell *Principles* § 739; *Forsythe v Durie* (1632) Mor 9629; *Glendonwyne v Gordon* (1716) Mor 9643; Montgomerie Bell, *Lectures* 597; Reid, *Property* para 203; Halliday, *Conveyancing* 33.38.

<sup>725</sup> Reid, *Property* para 204.

<sup>726</sup> *Dalrymple v Stair* (1841) 3 D 837; Reid, *Property* para 203.

<sup>727</sup> Erskine II.6.3 and 4. The term 'tenantry' simply appears to mean a farm which is leased as opposed to one which is farmed by the owner of the land. See also Erskine II.6.27.

<sup>728</sup> Bell, *Principles* § 742.

<sup>729</sup> *Magistrates of Perth v Earl of Wemyss* (1829) 8 S 82.

<sup>730</sup> *Earl of Fife's Trustees v Cuming* (1830) 8 S 326.

**(c) Pertinents may be conveyed without express mention provided that the principal area is expressly mentioned**

There is no need for a deed to make express mention of pertinents in order to be habile to include them. Even if no mention is made of individual pertinents, or if the term 'pertinent' is itself omitted, the deed will still convey the pertinents automatically with the principal area in question.<sup>731</sup> It might be argued that a conveyance should make express mention of any pertinents which should be included along with the principal area as this would help to clarify the extent of the subjects conveyed. However, this is not the approach which was followed in relation to pertinents under the Sasine system.<sup>732</sup>

The rationale for the automatic silent conveyance of pertinents would seem to lie in the fact that this minimises the complexity of conveyancing and prevents problems which might occur due to the inadvertent omission of a pertinent such as a servitude right of access or a small discontinuous area which had always adhered to the principal. Thus the necessity for invoking doctrines such as that of the *res merae facultatis* is avoided as the omission of a pertinent from the wording of a conveyance does not mean that the pertinent has been lost forever.<sup>733</sup> If there is any doubt as to what has been conveyed, the question becomes simply that of determining the area which is possessed both as principal and as pertinent under the terms of the express grant of the principal. This is regarded as a logical extension of the principle that possession determines the extent of a grant unless the deed contains specific restrictions on the extent of the grant. As possession determines the extent of the grant it determines both the extent of the principal and the pertinents which are included along with the principal area. Therefore it is accepted that there is no need for express mention of pertinents to be made as they are automatically included with the principal area.<sup>734</sup>

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<sup>731</sup> Craig, *Jus Feudale* 2.3.24; Bankton II.3.170; Erskine III.7.4; *Gordon v Grant* at 7 per Lord Justice-Clerk (Hope); Montgomerie Bell, *Lectures* 600; Reid, *Property* para 199.

<sup>732</sup> The position under land registration is substantially different due to the emphasis on the plan which is used to define the land which is included in each title. See discussion of land registration and hability at chapter VI, K.

<sup>733</sup> *Bowers v Kennedy* 2000 SC 555.

<sup>734</sup> *Gordon v Grant* at 7 per Lord Justice-Clerk (Hope); Erskine II.6.2; Montgomerie Bell, *Lectures* 600; Reid, *Property* para 199.



Thus a description of a principal area is automatically habile to include all pertinents of the principal area without any express mention of the said pertinents.

It might however, be argued that this approach conflicts with the doctrine that the implied grant of a servitude should only be possible where it is necessary for the reasonable enjoyment of the property, as stated in the case of *Cochrane v Ewart*.<sup>735</sup> This may be an arguable point, however it would seem that this is only an issue for pertinents which are servitudes and even in that situation it will only be an issue if the servitude cannot be said to be ‘necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant’ as also stated in the case of *Cochrane v Ewart*.<sup>736</sup> Thus, there should be few instances in which a servitude requires express mention in the break off conveyance in order to be validly created. The same point might now even appear essentially to be the rule in relation to servitudes created by implied reservation, as seen in the case of *McEwan’s Executors v Arnot*<sup>737</sup> in which the sheriff held that the servitude need only be necessary for the comfortable enjoyment of the property. Thus the more severe test of ‘utter necessity’ found in *Fergusson v Campbell*<sup>738</sup> and *Murray v Medley*<sup>739</sup> was not applied.

#### **(d) A pertinent is distinct from a part**

The term ‘part’ is understood to refer to a part of the principal area itself.<sup>740</sup> This is different from a pertinent in that a pertinent is separate from the principal area. This is of crucial importance as it underlines the fact that the existence of pertinents does not allow for the extension of the principal area. If the principal area is extended, this is achieved through the addition of a part. Such an addition can never be counted as a pertinent.

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<sup>735</sup> (1861) 4 Macq 117 at 123 per Lord Chancellor Campbell. See also G L Gretton and A J M Steven *Property, Trusts and Succession* (2<sup>nd</sup> edition, 2013) 12.24-12.25.

<sup>736</sup> (1861) 4 Macq 117 at 123 per Lord Chancellor Campbell. See also *Gow’s Trs v Mealls* (1875) 2 R 729.

<sup>737</sup> 7 September 2004, Perth Sheriff Court. See: Gretton and Steven *Property, Trusts and Succession* 12.24-12.25; K G C Reid and G L Gretton, *Conveyancing 2005* (2006) 89-92. See also *Inverness Seafield Development Co Ltd v Mackintosh* 2001 SC 406.

<sup>738</sup> (1913) 1 SLT 241.

<sup>739</sup> 1973 SLT (Sh Ct) 75.

<sup>740</sup> See Reid, *Property* para 200.

### **C. Policy justification for the implied conveyance of pertinents**

It might be argued that the implied conveyance of pertinents in Scots law could create difficulties for third parties as pertinents are held to be included in deeds without any express mention of individual pertinents or without even a statement that pertinents are included. However this implied conveyance exists in the context that a written description is required in order to convey the principal area to which the pertinents adhere. If there was an inadequate description of the principal area, then there could be no conveyance of the pertinents. This is the overarching safeguard for third parties that is built into Scots law. Thus possession, even of pertinents, must be founded on a written deed in order for positive prescription to operate. Thus third parties are protected to the extent that a possessor must have a written deed in respect of a principal area in order to attempt to positively prescribe either the principal or the associated pertinents. This may seem like a limited protection, but is of course far stronger than that which is found in the systems which allow for positive prescription without a written deed.<sup>741</sup>

### **D. The central question of hability with regard to pertinents: under what circumstances are pertinents restricted by a description of the principal area**

Having considered the definition of pertinents and the justification for implied conveyance of pertinents, the emergence of the concept of hability in relation to pertinents can now be examined.

In the course of this examination it will become clear that the central question of hability with regard to pertinents is that of the circumstances under which pertinents are restricted by a description of the principal area. This issue seems to have received an inconsistent treatment within the cases examined below. However, it will be argued here that the following principle is logically sound: pertinents are not bound by a bounding description unless the bounding description specifically includes pertinents.

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<sup>741</sup> See for example: France under Art 2262 of *Code civil*; Germany under Section 927 *BGB*; South Africa under Section 1 of Prescription Act 68 of 1969. This is also true of the law of adverse possession and limitation in England. See: Section 15 of the Limitation Act 1980 for unregistered land; Schedule 6 of the Land Registration Act 2002 for registered land.

It is tentatively suggested that this may be supported by House of Lords authority and the significance of this principle will be examined through the entire course of this chapter.

### **E. Emergence of the concept of hability with regard to the conveyance of pertinents: The Institutional Writers**

Prior to examining the case law on hability of pertinents, an analysis of the Institutional Writers' contribution to the concept of hability of pertinents is now offered. As with the previous chapter, this analysis of the Institutional Writers' contribution is offered prior to the case law analysis as key cases on hability of pertinents are almost all decided subsequent to the time of the Institutional Writers.

#### **1. Stair, Mackenzie and Forbes**

As will be seen below, Viscount Stair provided a report on one of the earliest cases to occur with regard to the law of pertinents. This was the case of *Young v Carmichael*.<sup>742</sup> Stair also provided specific commentary on this case, as seen in the following quotation:

“Yet prescription will adject that which is within the bounding to another tenement, which will not be elided by possessing the major part of that tenement; but no prescription can give right to what is without the bounding, as part and pertinent, November 17, 1671, *Young contra* Bailie Carmichael [2 Stair 3; M.9636]. But where there is no bounding, possession clears the parts and pertinents of every tenement; and in competition, where any ground is claimed as part and pertinent of several tenements, witnesses are allowed to either party, for proving the possession and interruptions, unless it be alleged, that that ground is *separatum tenementum*, having a distinct infetment of itself, which will exclude the alledgeance of part and pertinent, if the several infetments be not excluded by prescription, as was found in the said case, November 17, 1671, *Young contra* Carmichael [2 Stair 3; M.9636].”<sup>743</sup>

It thus appears that Stair was narrating, in the context of the concepts of pertinents and of bounding descriptions, the emergence of the principle that a deed must contain a description which is habile to include the area in respect of which positive prescription is sought. In this context, Stair is of the view that, if a deed contains a description

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<sup>742</sup> *Young v Carmichael* (1671) Mor. 9636; 2 Stair 3.

<sup>743</sup> Stair II.3.26.

which specifically states the boundaries of the land to which it relates, it will not be possible to positively prescribe in respect of any land which is outwith those specific boundaries.<sup>744</sup>

It is argued in this chapter that Stair's view of the relationship of bounding descriptions and pertinents is illogical. The existence of a bounding description for a principal area does not appear to have the corollary that the said bounding description must automatically prevent the positive prescription of any pertinents outwith the said principal area.

Furthermore, Stair's view of the effect of bounding descriptions on pertinents may not sit altogether easily with his affirmation that individual pertinents do not need to be expressly mentioned in a deed in order to be successfully conveyed and that they do not need to be contiguous with the principal grant.<sup>745</sup> If it is possible for a pertinent to be conveyed as an area discontinuous to the principal and without any express mention being made of it in the deed conveying the principal, then it would surely seem possible for a deed to convey a principal area, subject to a bounding description, and yet also convey pertinents which were not mentioned within the said deed, which were discontinuous to the principal and which lay outwith the boundaries of the principal.

The concepts of hability, bounding descriptions and pertinents were not specifically discussed by Mackenzie in his treatment of positive prescription.<sup>746</sup> However Forbes endorsed the understanding of these issues that was advanced by Stair.<sup>747</sup>

## 2. Bankton

Bankton's analysis of pertinents largely accorded with that which was offered by Stair. In particular, he reiterated that positive prescription could be carried out in relation to

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<sup>744</sup> This view appears to be endorsed by Montgomerie Bell. See Montgomerie Bell, *Lectures* 597. However, Wood does not seem quite so definite in relating this rule. See Wood, *Lectures* 550-552. Rankine also does not seem to emphasise this rule. See Rankine, *Land-ownership* 203. Furthermore, Johnston is actively critical of the view that a bounding description of a principal area will automatically prevent positive prescription of pertinents outwith the area described in the bounding description. See Johnston, *Prescription* 17.54.

<sup>745</sup> Stair II.3.59 and II.3.73. Stair does however comment that less evidence is required for proof of a pertinent which is contiguous with the principal area: Stair II.3.73.

<sup>746</sup> Mackenzie II.6.1 and III.7.1-20.

<sup>747</sup> Forbes, *Institutes* Part II, Book II at 118-119.

pertinents<sup>748</sup> but that it could not be accomplished outwith the limits set by bounding descriptions.<sup>749</sup> However, Bankton noted that an area of land might be discontinuous with the principal area and yet still be counted as a pertinent of the principal area.<sup>750</sup> As will be seen below, this would suggest that it might have been possible for a case such as *Young v Carmichael* to be decided differently as it could be argued that the area of land in dispute was a discontinuous pertinent which had been implicitly conveyed along with the principal area. The existence of the bounding description would thus have only affected the principal area and would have had no bearing on the positive prescription of pertinents. This argument would also be consistent with the fact that Bankton noted that there was no need for there to be an explicit statement that the ‘parts and pertinents’ were included when a principal area was being conveyed.<sup>751</sup> He was clear in maintaining that they would be included with the principal by virtue of the doctrine of *accessorium sequitur suum principale*,<sup>752</sup> meaning that the extent of the area which had been granted was only known by virtue of the extent of the land which was actually possessed.<sup>753</sup>

### 3. Erskine

Erskine provided what appears to be the first specific reference to the fact that Scots law requires positive prescription of landownership to be based ‘*upon an habile title of property*’.<sup>754</sup> This reference is preceded by an affirmation of the doctrine that a subject could be acquired by positive prescription provided that it was possessed as a

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<sup>748</sup> Bankton II.3.45 citing *Young v Carmichael* (1671) Mor 9636. At this point Bankton also cites the case of *Murray v Dundas*, November 17<sup>th</sup> 1675, 2 Stair 369. The report of this additional case is not entirely clear. It seems to hold that a claim of part and pertinent can be defeated by express infeftment combined with possession. However, it might be possible to read the case as holding that express infeftment will alone defeat a claim of part and pertinent. Such a reading of the case might be seen as a foreshadowing of the law of land registration. As noted, the case report is not entirely clear. However it is clear that if both parties were to claim an area as a pertinent without express infeftment then the issue would be decided by possession.

<sup>749</sup> Bankton II.3.45 citing *Young v Carmichael* (1671) Mor 9636.

<sup>750</sup> Bankton II.3.170. There is nothing to suggest that such discontinuity would prevent positive prescription of the areas in question by a party relying on the foundation writ which covered the principal area.

<sup>751</sup> Bankton II.3.170.

<sup>752</sup> The accessory follows the principal.

<sup>753</sup> Bankton II.3.170.

<sup>754</sup> Erskine III.7.15. Although in this context it appears that the word ‘habile’ was used to mean that the overall deed was competent or valid. Hability was not being used as a specific term regarding the quality of the description of the property provided in the deed.

pertinent even though it was not specifically mentioned in the prescriber's foundation writ.<sup>755</sup> This would be effective even against a competitor who had been expressly infeft in the subject in dispute, unless the competitor had possessed the subjects or had interrupted the prescriber's possession thereof during the forty year period.<sup>756</sup> However, the prescriber would not gain such subjects if they could not be counted as a pertinent of the lands in which the prescriber has been infeft.<sup>757</sup>

Erskine affirmed the views of Stair and Bankton by stating that an area could not be claimed as a pertinent if it was outwith the boundaries of a bounding description.<sup>758</sup> Furthermore, Erskine was of the view that:

“Where a tenement of land is possessed by one barely as a pertinent, and by another in virtue of an express right, he who possesses under the express right is *in dubio* to be preferred to the other.”<sup>759</sup>

This restriction on the positive prescription of pertinents was accompanied by the view that the possession of land which was discontinuous to the principal area would seldom allow for the acquisition of the discontinuous area as a pertinent.<sup>760</sup> It was also asserted that if a dispute occurred between two parties in relation to an area of land, then the party whose land was contiguous to the disputed area was to be preferred ‘*upon a more slender proof of possession*’ to the party whose land was discontinuous to the disputed area.<sup>761</sup>

It would appear that Erskine may have thus presented an overly restrictive view of the possibilities of positively prescribing ownership of pertinents. There do not appear to be any obvious justifications for automatically preferring parties with express infeftments of the alleged pertinents or parties with land contiguous to the alleged pertinents. Such disputes would surely be questions of fact in which there would be no need for specific preferences to exist. Rather, each party would simply have to

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<sup>755</sup> Erskine III.7.4.

<sup>756</sup> Erskine III.7.4. Erskine cites the cases of *Grant v Grant* (1677) Mor 10876 and *Earl of Leven v Finlay* (1711) Mor 10816 as authority on this point.

<sup>757</sup> Erskine III.7.4.

<sup>758</sup> Erskine II.6.3 citing *Young v Carmichael* (1671) Mor 9636.

<sup>759</sup> Erskine II.6.3. This may perhaps be based on the case of *Murray v Dundas*, November 17<sup>th</sup> 1675, 2 Stair 369. This case is not cited by Erskine but is mentioned above at footnote 748 as being cited at Bankton II.3.45. As explained in footnote 748, the report of this additional case is not entirely clear.

<sup>760</sup> Erskine II.6.3.

<sup>761</sup> Erskine II.6.3.

show that the requirements of positive prescription had been fulfilled in respect of the disputed area.

The apparent restrictiveness of Erskine's views with regard to pertinents was also manifest with regard to the guidance which he offered regarding subjects which might count as pertinents if they were ancillary to the principal area under conveyance.<sup>762</sup> In this context he went so far as to state that a pertinent might sometimes consist of subjects which had not always formed a pertinent in relation to the principal area in question. However, this was only possible if this additional area had been possessed by the grantee of the principal area since '*past memory of man*'. This was stated to be necessary as '*by the grantee's immemorial possession, such tenements are considered to have belonged originally to the lands expressed in the grant.*' Thus a relatively heavy burden of proof was placed on the party maintaining that such an area was included within their property by virtue of the doctrine of pertinents.<sup>763</sup>

However, the restrictiveness of Erskine's view was tempered in relation to the question of the possible extent of pertinents. In this context Erskine stated that subjects as large as a farm were capable of being counted as pertinents if they had been possessed as pertinents.<sup>764</sup> Thus, even large areas might form pertinents if they were ancillary to an appropriate principal area. This makes sense in the context of estate conveyancing and clearly allows for the possibility that a pertinent may, on occasion, turn into a principal if it is conveyed separately from the principal area to which it has existed as a pertinent. Thus Erskine offers some very useful guidance with regard to the possible extent of pertinents.

#### **4. Bell**

Bell affirmed the principles expressed by Stair<sup>765</sup> and Bankton<sup>766</sup> with regard to hability, bounding descriptions and pertinents.<sup>767</sup> Bell also offered the additional

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<sup>762</sup> Erskine II.6.3 and II.6.4.

<sup>763</sup> Erskine II.6.3.

<sup>764</sup> Erskine II.6.3.

<sup>765</sup> Stair II.3.26 and Stair II.3.73.

<sup>766</sup> Bankton II.3.45 and Bankton II.3.170.

<sup>767</sup> Bell, *Principles* § 737-743, 746 and 2015. Bell cites the following cases in support of the principle that there is no need to expressly name individual pertinents in order to include them in a conveyance:

example of an orchard as an area of land which could exist as pertinent and yet be discontinuous with the principal area.<sup>768</sup> Thus he provided a useful illustration of a pertinent which could cover a considerable area, be discontinuous to the principal area, and could potentially form a separate principal area. Aside from this point, there is nothing of particular note in Bell's discussion of hability, bounding descriptions and pertinents.<sup>769</sup>

## **5. Conclusion regarding the Institutional Writers and the hability of pertinents**

The Institutional Writers recognise that pertinents can be conveyed by implication and that they can sometimes cover large areas of land. However, they seem to have adopted a restrictive approach to the allowance for pertinents in Scots law. In particular, it appears that it was accepted without question that a bounding description which binds a principal area will automatically prevent the acquisition of any pertinents outwith the principal area in question. Yet, this view does not appear to have been accepted without question by the courts. This will become manifest in the remaining part of this chapter in which the case law regarding the hability of pertinents is examined.

In order to assist clarity of analysis the cases are divided by reference to whether or not the alleged pertinent was contiguous to the principal area and whether or not the case involved an alleged bounding description. The analysis begins with cases involving allegedly contiguous pertinents and alleged bounding descriptions.<sup>770</sup>

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*Bruce v Dalrymple* (1709) Mor 9638; *Bruce v Erskine* (1716) Mor 9642; *Nisbet v King* (1624) Mor 9628; *Lord Burly v Sime* (1662) Mor 9630.

<sup>768</sup> Bell, *Principles* § 742 citing *Bruce v Dalrymple* (1709) Mor 9638.

<sup>769</sup> Bell does not appear to mention the case of *Watt v Paterson* (1813) 2 Dow 25 despite the fact that it was a House of Lords case. This case is analysed further below at chapter VI, F, 1.

<sup>770</sup> Bounding descriptions are defined in chapter V at footnote 541 and further discussed in chapter V, C, 2.



## **F. Development of the concept and terminology of hability with regard to the conveyance of contiguous pertinents in cases involving alleged bounding descriptions**

### **1. *Watt v Paterson***

The case of *Watt v Paterson*<sup>771</sup> involved a dispute, in which the prescriptive period appears to have elapsed, regarding an area of land extending to approximately 39 acres at Newburgh near Auchtermuchty.<sup>772</sup> Watt claimed that the area belonged to him as part of his estate at Myllcraig.<sup>773</sup> Paterson and others, including the Burgh of Newburgh, claimed that the 39 acres formed part of a commonty which they shared.<sup>774</sup>

Watt claimed that the Burgh of Newburgh's foundation writ was not habile to include the 39 acres in question. Watt argued that the Burgh of Newburgh's foundation writ contained a bounding description which did not include the 39 acres<sup>775</sup> as the foundation writ stated that the south and west boundaries of the Burgh's lands were located at:

... the outmost marches of the Lordship of Lumbenny, Myllcraig, Kirkpool and Cluny ...<sup>776</sup>

Watt therefore contended that, as the Burgh's foundation writ stated that the Burgh lands were bounded by the estate of Myllcraig, the Burgh's foundation writ was not habile to include any part of the estate of Myllcraig. Watt claimed that the 39 acres

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<sup>771</sup> *Watt v Paterson* (1813) 2 Dow 25. The House of Lords affirmed the judgment of the Court of Session in this case. See *Watt v Paterson* (1813) 2 Dow 25 at 29. There does not seem to be any report of the Court of Session judgment. However, the House of Lords papers state that interlocutors were pronounced by the Court of Session in 1806 and 1808. See House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *John Watt of Denmill v James Paterson of Carpow and others*. The House of Lords Papers can be located by using the Index to the House of Lords Papers which is listed as being Ms. 1711-1835 with Shelfmark 3 D/H in the catalogue for the Advocates Library. This is accessed at the National Library of Scotland, Special Collections Reading Room.

<sup>772</sup> See House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *John Watt of Denmill v James Paterson of Carpow and others*.

<sup>773</sup> *Watt v Paterson* (1813) 2 Dow 25 at 25-27. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *John Watt of Denmill v James Paterson of Carpow and others* at The Appellant's Case page 6.

<sup>774</sup> *Watt v Paterson* at 26. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *John Watt of Denmill v James Paterson of Carpow and others*.

<sup>775</sup> *Watt v Paterson* at 26-27. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *John Watt of Denmill v James Paterson of Carpow and others* at The Appellant's Case page 6.

<sup>776</sup> See House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant's Case page 6.

were part of Myllcraig and therefore the Burgh's foundation writ could not include the 39 acres.<sup>777</sup>

The Burgh of Newburgh contended that its foundation writ was habile to include the 39 acres in question as this area formed a pertinent which was included under the Burgh's foundation writ by virtue of the fact that the Burgh's foundation writ stated that its lands existed:

... with pertinents ...<sup>778</sup>

Thus the Burgh appear to have argued that, even if their foundation writ contained a bounding description with regard to the grant of the principal area, it was still habile to include the 39 acres as a pertinent to the principal area in question.<sup>779</sup>

Although the report is quite brief, it appears to show that the House of Lords held that the Burgh of Newburgh's foundation writ may have described the principal area as being subject to a bounding description which did not include the disputed area but that the foundation writ nonetheless included the disputed area as the foundation writ contained a statement that pertinents were included within the grant in question.<sup>780</sup> It is contended in this thesis that this represents a logical statement of the principle which should govern the hability of pertinents. In particular, the House of Lords seems to have sensibly recognised that pertinents should not automatically be restricted by a bounding description which binds the principal area.<sup>781</sup>

Two particular points may be made in the analysis of this case. Firstly, it might be argued that the 39 acres may have formed part of the principal area under the Newburgh charter. Therefore, there may have been no need for the Court to have discussed any question relating to pertinents. The question would rather have been

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<sup>777</sup> *Watt v Paterson* at 26-27. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *John Watt of Denmill v James Paterson of Carpow and others* at The Appellant's Case page 6.

<sup>778</sup> *Watt v Paterson* at 26. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant's Case page 6.

<sup>779</sup> *Watt v Paterson* at 26. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant's Case page 6.

<sup>780</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon. It appears that Lord Chancellor Eldon delivered the only judgment for the House of Lords in this case. See *Watt v Paterson* at 27-29 per Lord Chancellor Eldon.

<sup>781</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon. It appears that the Court reached this decision even though Erskine II.6.3 and *Young v Carmichael* (1671) Mor 9636 were cited by Watt. See *Watt v Paterson* at 27.

whether or not the Newburgh foundation writ contained a bounding description. However, it appears that a commonty is an area which is of a different character from the principal lands of a Burgh.<sup>782</sup> Furthermore, commonty is always regarded as forming a pertinent which is inseparable from the adjoining principal area. Therefore, a commonty should be regarded as a pertinent to a Burgh's principal area rather than as a part of a Burgh's principal area.<sup>783</sup> Therefore, it appears that the argument in this case was correctly focussed on the hability of pertinents rather than the hability of the principal.<sup>784</sup> Furthermore, it appears that the Court was correct to decide the case on the basis of whether or not the disputed area was a pertinent rather than whether or not it was part of the principal area held by the Burgh.<sup>785</sup>

Secondly, it could be argued that the Burgh of Newburgh's foundation writ did not contain a bounding description. It referred to the name of the neighbouring estate but it did not specify a definite and unalterable location of the boundary between the Burgh lands and the said neighbouring estate. It could therefore be argued that the '*outmost marches of the Lordship of Lumbenny, Myllcraig, Kirkpool and Cluny*' was a boundary which could only be identified by the extent of the actual possession on the ground.<sup>786</sup> If this view had been advanced in *Watt v Paterson* and had been successful, then there would presumably have been no need to consider the question of whether a deed which contains a bounding description may be habile to include pertinents which lie outwith the said boundaries. The case would have been decided on the basis of the extent of possession enjoyed by each party. This would have determined the extent of each party's ownership irrespective of whether the 39 acres were a pertinent or a part of the principal. However, this does not appear to be the basis on which this case was decided.<sup>787</sup>

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<sup>782</sup> See: Reid, *Property* para 37; Gordon and Wortley, *Land Law* 15.179-15.188.

<sup>783</sup> See Reid, *Property* para 37.

<sup>784</sup> *Watt v Paterson* at 26-27. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *John Watt of Denmill v James Paterson of Carpow and others* at The Appellant's Case page 6.

<sup>785</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon.

<sup>786</sup> This would accord with the understanding of the concept of hability observed in chapter V, F of this thesis. In particular this would accord with the *ratio* of *Troup v Aberdeen Heritable Securities Company* 1916 SC 918. The *ratio* of *Reid v M'Coll* (1879) 7 R 84 might appear to support the view that the description in *Watt v Paterson* is a bounding description. However, as discussed at chapter VI, H, 2 below, *Reid v M'Coll* appears to have been incorrectly decided. Furthermore, the description in *Watt v Paterson* is even less definite than that which is found in *Reid v M'Coll*.

<sup>787</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon.

Rather, it appears that Newburgh may have accepted that their foundation writ might contain a bounding description.<sup>788</sup> Having made this acceptance, it appears that the Burgh argued that the inclusion of the words ‘*with pertinents*’ in their foundation writ was sufficient to allow it to be habile in respect of a pertinent consisting of land, irrespective of whether or not the principal area held by the Burgh was bound by a bounding description.<sup>789</sup> Watt argued against this understanding<sup>790</sup> but the House of Lords decided the case in favour of Newburgh. Thus, even though the facts of the case may not have required the argument to be raised, it was held that the wording ‘*with pertinents*’ was habile to include a pertinent consisting of land which lay outwith the ambit of the boundary description of the principal area.<sup>791</sup> The Court therefore held that it was these words which allowed for the inclusion of the disputed land within the terms of Newburgh’s foundation writ.<sup>792</sup>

The case report is brief and the House of Lords papers, whilst useful, are of course of lesser weight than the report itself.<sup>793</sup> However, the principle which seems to have been the basis for the decision in this case, namely, that pertinents should not be restricted by a bounding description which only binds the principal area,<sup>794</sup> appears logically sound.<sup>795</sup> This appears to be a corollary of the fact that pertinents by their

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<sup>788</sup> *Watt v Paterson* at 26. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant’s Case page 6. The acceptance of the possibility that the Burgh’s foundation writ might contain a bounding description could be viewed as a concession which could have an impact on whether the *ratio* of this case is binding. See Maher and Smith ‘Judicial Precedent’ in *S.M.E.* vol 22 para 351. However, the concession does not appear to affect the decision with regard to the question of whether or not pertinents are bound by a description which binds the principal. Hence the *ratio* appears to be binding on this point. Furthermore, even if the binding quality of the *ratio* were challenged, it is submitted that the reasoning in the decision is logically sound and should not be ignored.

<sup>789</sup> *Watt v Paterson* at 26. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant’s Case page 6.

<sup>790</sup> *Watt v Paterson* at 26-27. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant’s Case page 6.

<sup>791</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon.

<sup>792</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon.

<sup>793</sup> The House of Lords papers may be of lesser weight than the case report but they may nonetheless have merit in assisting the understanding of the case to which they relate. This appears to accord with the weight which can be attributed to Session Papers in assisting the understanding of the case to which they relate. See *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151.

<sup>794</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon. The principle also seems to be evident in the arguments put before the Court. See *Watt v Paterson* at 26-27. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant’s Case page 6.

<sup>795</sup> This suggestion is made despite the fact that the decision of the House of Lords in *Watt v Paterson* was described by Rankine as either being inexplicable or bad law. See Rankine, *Land-ownership* 601.

very nature exist as ancillary to the principal area and must therefore exist outwith the boundaries thereof.<sup>796</sup> This principle will be developed and analysed further in the course of the remaining part of this chapter.<sup>797</sup>

## 2. *Kerr v Dickson*

In *Kerr v Dickson*<sup>798</sup> the House of Lords gave judgment in a dispute, in which the prescriptive period appears to have elapsed, over an area of beach and former beach that lay on the shore of the Firth of Tay at Craigie to the east of Dundee.<sup>799</sup> The foundation writ which Kerr relied upon had been granted in 1790 and at that time the disputed area appears to have been entirely a part of the beach beside the Firth of Tay. Kerr claimed that in 1794 his predecessors had extended their land by around thirty to

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This view is surprising given that Rankine only cites Inner House authority as being in direct opposition to the House of Lords decision in *Watt v Paterson*. See Rankine, *Land-ownership* at 601 citing: *Hepburn v Duke of Gordon* (1823) 2 S 459; *Beaumont v Lord Glenlyon* (1843) 5 D 1337; *Gordon v Grant* (1850) 13 D 1. The House of Lords case of *Lord Advocate v Wemyss* is mentioned at an earlier point by Rankine. See Rankine, Rankine, *Land-ownership* at 102 citing *Lord Advocate v Wemyss* (1899) 2 F (HL) 1. However, the view expressed in *Lord Advocate v Wemyss* merely seems to be to the effect that pertinents, in this case minerals, are only restricted if they are clearly included as being within the ambit of a bounding description. Such an inclusion was not present in *Watt v Paterson*. The distinction between bounding descriptions which do include pertinents as opposed to bounding descriptions which do not include pertinents is analysed further below at chapter VI, F, 3 in relation to the Inner House decision in *Gordon v Grant*.

<sup>796</sup> See Reid, *Property* para 205.

<sup>797</sup> The House of Lords cases of *Smyth v Allan* (1813) 5 Paton 669 and *Duff v Magistrates of Inverness* (1813) 5 Paton 762 are also cases which bear some relation to the concept of pertinents. However, in *Smyth* it is not clear whether the disputed area of ground near to Dumfries was claimed by Smyth as a part of the principal area under his foundation writ or as a pertinent to the principal area under his foundation writ. Furthermore, the report does not state whether the pertinents were described as being bound by the bounding description which bound the principal area which Smyth owned.

Additionally, the judgment is extremely brief and does not disclose whether the Court of Session or the House of Lords held that pertinents are restricted by a bounding description which only binds a principal area. Lastly, it is not clear from the judgment whether the case was decided against Smyth on the ground that his foundation writ did not include the disputed area or on the ground that he had not satisfied the requirement of possession.

In *Duff*, it appears that the Court of Session held that pertinents were restricted by a bounding description which only bound the principal area. However, this appears to have been reversed by House of Lords. Thus Duff successfully claimed ownership of 35 acres of marshland near to Inverness. This decision would appear to support the decision and ratio of *Watt v Paterson*.

However, the judgment is extremely brief and it is thus not possible to draw as clear a conclusion as that which is advanced in this thesis regarding *Watt v Paterson*. The report by Dow in relation to *Watt v Paterson* is brief, but it does contain a short account of the judgment delivered by Lord Chancellor Eldon. The reports by Paton in relation to *Smyth* and *Duff* are also brief and they contain hardly any information regarding the judgments. In particular, the reasons for the decisions are not given and the identity of the judges is not disclosed.

<sup>798</sup> *Kerr v Dickson* (1842) 1 Bell's Appeals 499.

<sup>799</sup> *Kerr v Dickson* at 499-502.

forty feet into the Firth of Tay.<sup>800</sup> Thus it was claimed that part of the beach changed from being sea beach to being an additional part of the mainland.<sup>801</sup> Kerr also claimed that the alleged additional area of mainland was enclosed by a new sea wall. This was the alleged state of affairs when the action was raised by Kerr in 1837.<sup>802</sup>

Kerr's foundation writ stated that his land consisted of about three roods and six falls or thereby and was bounded on the south:

...by the sea-wall which divides the subjects hereby feued out from the sea-beach...<sup>803</sup>

The House of Lords unanimously affirmed the decisions of the Lord Ordinary<sup>804</sup> and the Inner House<sup>805</sup> and held that Kerr's foundation writ contained a bounding description.<sup>806</sup> The Court held that Kerr's property was bound by the sea-wall and that Kerr did not own any part of the beach beyond the line of the said sea-wall.<sup>807</sup>

It appears that the House of Lords may well have been correct in holding that the principal area was subject to a bounding description under the terms of the foundation writ. The deed gave details of physical boundaries of the area conveyed and this appears to have successfully confined the ambit of the foundation writ to these boundaries.

However, it appears that neither the Court of Session nor the House of Lords took a view with regard to whether or not the mainland had been extended by Kerr's predecessors in 1794. Thus it is not possible to say whether Kerr's foundation writ was definitely held to be habile in respect of the alleged extension of the mainland. However, it may be significant that the decision in *Kerr* does not appear to make any

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<sup>800</sup> *Kerr v Dickson* at 502.

<sup>801</sup> However, the existence of this additional area of land was disputed by Dickson. Dickson claimed that the sea wall had not been moved by Kerr or his predecessors. See *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 510-511.

<sup>802</sup> *Kerr v Dickson* at 502.

<sup>803</sup> *Kerr v Dickson* at 500-501.

<sup>804</sup> Lord Moncreiff (Sir James Wellwood Moncreiff, 9<sup>th</sup> Baronet 1776-1851). See: *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 504-511; *Kerr v Dickson* (1840) 3 D 154 at 158-161.

<sup>805</sup> The Lord Justice-Clerk (Boyle), Lord Meadowbank, Lord Medwyn and Lord Moncreiff (Sir James Wellwood Moncreiff, 9<sup>th</sup> Baronet 1776-1851). See *Kerr v Dickson* (1840) 3 D 154 at 162-164.

<sup>806</sup> *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 516-517 per Lord Brougham, at 517-518 per Lord Cottenham and at 518 per Lord Campbell.

<sup>807</sup> *Kerr v Dickson* at 516-517 per Lord Brougham, at 517-518 per Lord Cottenham and at 518 per Lord Campbell.

reference to the statement of acreage which was contained in Kerr's foundation writ along with the description of physical boundaries. Therefore, it appears that the Court held that Kerr's foundation writ was bound by the description of the physical boundaries rather than by the statement of acreage.<sup>808</sup> This might indicate that Kerr's foundation writ was *habile* to include the alleged additional area of land as that accorded with the physical description of boundaries.<sup>809</sup> Yet, as the Court did not take a view as to whether the extension had taken place it is simply not possible to make a definite statement as to whether Kerr's foundation writ was *habile* to include the said additional area as part of the principal area held under his foundation writ.

With regard to the doctrine of pertinents, it might be argued that the decision in *Kerr* is questionable. This might be suggested on the basis that the Court should have held that the section of beach was a pertinent of Kerr's land. It might be argued that this would have been justified by the *ratio* of *Watt v Paterson* in which it appears to have been held that a bounding description which binds a principal area will not automatically bind the pertinents. This argument might appear compelling as the bounding description in Kerr's foundation writ did not expressly state that the pertinents were bound by its terms. Rather, the pertinents were mentioned subsequently to the narration of the boundaries of the principal area.<sup>810</sup>

However, it is not clear whether Kerr specifically argued that any part of the beach was a pertinent under his foundation writ. However, he did argue that his foundation writ included a pertinent in the form of a right to extend his land by gaining land from the beach. He argued that this was a pertinent that was recognised as a right which was held by all proprietors of land adjoining the sea.<sup>811</sup> Furthermore, Kerr argued that

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<sup>808</sup> *Kerr v Dickson* at 516-517 per Lord Brougham, at 517-518 per Lord Cottenham and at 518 per Lord Campbell.

<sup>809</sup> This would accord with the Inner House decision in *Fisher v Duke of Atholl's Trustees* (1836) 14 S 880. In *Fisher* an area of land was held to form part of Fisher's property as it had been created by filling in a part of the River Tay which ran past Fisher's original property. As Fisher's foundation writ described his land as being bounded by 'the water of Tay' on the south side of the property, it was held by the Inner House that the additional area was part of Fisher's land. Thus the extension of the physical boundaries of the property was held to have been successfully accomplished even though the prescriptive period had not elapsed.

<sup>810</sup> *Kerr v Dickson* at 501.

<sup>811</sup> In the House of Lords it does not appear that Kerr made any argument specifically based on the doctrine of pertinents. However it appears that his argument was effectively based on the view that the right to extend land into the beach or the sea was a pertinent of land which lay beside the beach or the sea. See *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 512. In the Outer House it appears that

he had a right of access to the beach from his land; this also appears to be a claim to a pertinent.<sup>812</sup>

The argument that proprietors who adjoin the sea have the right to extend their land into the area occupied by the beach seems to be essentially a means of stating that if a beachside proprietor has a foundation writ which is habile to include the beach, then the beachside proprietor may extend the mainland into the area occupied by the beach. If the foundation writ is not habile to include the beach then it would not seem possible for the beachside proprietor to extend their land into the area occupied by the beach.

It therefore appears to be the case that Kerr argued that his foundation writ was habile to include the beach in the sense that he had a right to extend his property by means of turning the beach into mainland.<sup>813</sup> However, the Outer House,<sup>814</sup> Inner House<sup>815</sup> and the House of Lords<sup>816</sup> held that Kerr's foundation writ was not habile to include the right to extend his property by means of turning beach into mainland.

Thus it appears that the Court in this case did not follow the nineteenth century view that the foreshore was a pertinent of a grant of lands which were adjacent to the foreshore.<sup>817</sup> Furthermore, it may also be the case that this decision conflicts with the decision by the House of Lords in *Watt v Paterson*. The House of Lords in *Watt* appears to have held that pertinents were not automatically bound by a description which bound a principal area. However, in *Kerr* the House of Lords appear to have held that a description which binds a principal area will prevent the acquisition of

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Kerr made reference to the doctrine of pertinents but only to state that the right to extend land into the beach or the sea was a pertinent of land which lay beside the beach or the sea. See *Kerr v Dickson* (1840) 3 D 154 at 157. In the Inner House it appears that Kerr may have argued that the beach was a pertinent of the principal area. See *Kerr v Dickson* (1840) 3 D 154 at 161-162. However, it may have been that this was just a further statement of the view that the right to extend land into the sea was a pertinent of land which lay beside the sea. This was not clarified when Kerr confirmed that he was infest in the pertinents in response to a statement made by Lord Moncreiff during his Lordship's judgment in the Inner House. See *Kerr v Dickson* (1840) 3 D 154 at 164.

<sup>812</sup> *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 502-504.

<sup>813</sup> *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 502-504 and 512.

<sup>814</sup> *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 504-511; *Kerr v Dickson* (1840) 3 D 154 at 158-161.

<sup>815</sup> *Kerr v Dickson* (1840) 3 D 154 at 162-164.

<sup>816</sup> *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 516-517 per Lord Brougham, at 517-518 per Lord Cottenham and at 518 per Lord Campbell.

<sup>817</sup> *Macalister v Campbell* (1837) 15 S 490; *Paterson v Marquis of Ailsa* (1846) 8 D 752; *Hunter v Lord Advocate* (1869) 7 M 899; Reid, *Property* para 314. This also seems to be reflected in *Young v North British Railway Company* (1887) 14 R (HL) 53.



pertinents beyond those boundaries.<sup>818</sup> This doctrine is not made explicit in the judgment of the House of Lords in *Kerr*. However, the view that a bounding description of the principal area will automatically bind the pertinents is made express in the earlier stages of this case. This is particularly evident in Lord Moncreiff's judgments.

Lord Moncreiff heard this case in both the Outer House and the Inner House. He appears to be the only judge at any stage of this case to express specifically the view that a bounding description of the principal area will automatically bind the pertinents as well.<sup>819</sup> Whilst this is not specifically stated to be law by any of the other judges, the terms in which they opined suggest that they would have tended to a similar view. However, as this view is not specifically mentioned by any of the judges in the House of Lords decision, it would not seem possible to state that the decision in *Kerr v Dickson* is definite authority for the view that a bounding description of the principal area will automatically bind the pertinents as well. Furthermore, the case of *Watt v Paterson* was not expressly mentioned at any point in the case of *Kerr v Dickson*; hence it cannot be stated that the House of Lords in *Kerr* distinguished the decision of the House of Lords in *Watt v Paterson*.

Thus, after *Watt v Paterson* and *Kerr v Dickson* there was a situation in which decisions of the House of Lords on the positive prescription of pertinents appeared to conflict with each other. The case of *Watt* appeared to show that pertinents should not be restricted by a bounding description which bound the principal area. However,

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<sup>818</sup> With regard to the claim to the right of access, the Outer House held that Kerr could pass over the beach in the same fashion as any member of the public. See: *Kerr v Dickson* (1842) 1 Bell's Appeals 499 at 510-511; *Kerr v Dickson* (1840) 3 D 154 at 161. Thus there was no need for the Court to opine as to whether Kerr had established a specific right of access to the beach.

<sup>819</sup> *Kerr v Dickson* (1840) 3 D 154 at 163-164 per Lord Moncreiff. Although even his Lordship's opinion appears to contain an element of doubt with regard to whether pertinents should be restricted by bounding descriptions which bind principal areas. See *Kerr v Dickson* (1840) 3 D 154 at 163-164 per Lord Moncreiff.

*Kerr* appeared to be decided on the opposite basis.<sup>820</sup> The persistence of the confusion regarding these principles was manifest further in the following case.<sup>821</sup>

### 3. *Gordon v Grant*

In *Gordon v Grant*<sup>822</sup> the Inner House held that if an area was described with parts and pertinents but as existing within a specific parish, then it was not possible to claim positive prescription of any ground outwith that parish on the basis of that particular deed.<sup>823</sup> This case therefore exemplified an understanding of bounding descriptions as creating an absolute restriction both in relation to the principal area under conveyance and in relation to pertinents. This ruling does not appear to be controversial regarding the restriction of the principal area. However, it merits further analysis in relation to pertinents.

In particular, this case was significant in demonstrating the conveyancing technicality which allows for pertinents to be restricted so that they cannot be positively prescribed outwith the confines of a particular zone. As the deed in this case was worded to state that the principal area and the pertinents were all contained within the parish of Monymusk it was possible for the Court to hold that the deed was not habile to include any area outwith the parish, even as a pertinent. Specifically, the foundation writ stated that the barony and estate of Monymusk were conveyed:

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<sup>820</sup> *Kerr v Dickson* (1840) 3 D 154 at 164 per Lord Moncreiff. *Kerr v Dickson* (1840) 3 D 154 and *Kerr v Dickson* (1842) 1 Bell's Appeals 499 are cited by Montgomerie Bell as authoritative for the rule that pertinents should be restricted by bounding descriptions which bind principal areas. See Montgomerie Bell, *Lectures* 597-598. Montgomerie Bell also cites the cases of *Berry v Holden* (1840) 3 D 205 and *Smith v Officers of State* (1849) 8 Bell's Appeals 487 (affirming *Officers of State v Smith* (1846) 8 D 711) as being similar to *Kerr v Dickson*. See Montgomerie Bell, *Lectures* 597-598. See also Reid, *Property* paras 313-318, 524-526 and 592-594. These decisions are similar to *Kerr v Dickson*, and, as with *Kerr v Dickson*, these cases relate to the specific situation of properties bounded by tidal waters or by a sea beach. Hence, these decisions do not add anything of significance to the discussion found in *Kerr v Dickson*. The same is also true of the earlier case of *Smart v Magistrates of Dundee* (1796) 3 Paton 606. Furthermore, the cases of *Berry*, *Smith* and *Smart* were all cases in which the prescriptive period had not elapsed. However, they are nonetheless of significance as they seem to support the view found in *Kerr*, namely, that pertinents are automatically bound by a description which binds the principal area.

<sup>821</sup> *Kerr* was used as authority by the successful party in the Inner House case of *Rose v Milne* (1843) 5 D 648. However, it is not entirely clear if the additional area which was claimed by the unsuccessful party in *Rose v Milne* was an area which could be described as a pertinent or whether it was claimed as an additional part of the principal area.

<sup>822</sup> *Gordon v Grant* (1850) 13 D 1.

<sup>823</sup> *Gordon v Grant* at 5-7 per the Lord Justice-Clerk (Hope), at 23-25 per Lord Moncreiff (Sir James Wellwood Moncreiff, 9<sup>th</sup> Baronet 1776-1851) and at 35 per Lord Cockburn.

... cum ... Partibus pendiculis et earund. pertinentis ... omnia jacen. Infra parochiam de Monymusk ....<sup>824</sup>

Which translates as:

... with ... parts, pendicles and the same/their pertinents ... all lying within the parish of Monymusk ...<sup>825</sup>

It is therefore evident that the question of whether or not pertinents can be acquired cannot be answered without careful consideration of the precise terms of the deed in question and it cannot be assumed that any ancillary area outwith the principal area can be automatically claimed as a pertinent. An effective restriction may be present with regard to both principal and pertinents.<sup>826</sup>

However, it is important to recognise that the Lord Justice-Clerk and Lord Medwyn were clear in stating that lesser real rights could be acquired outwith the ambit of an otherwise absolute bounding description.<sup>827</sup> In such instances, it would not be possible to acquire an additional area of land as a part of the principal area, or as a pertinent to the principal area, if the additional area of land lay outwith the ambit of the bounding description for the principal area. Yet, it was accepted that it would still be possible to acquire a real right such as a servitude outwith the boundaries of the bounding description.<sup>828</sup> The rule that a pertinent may be restricted by the terms of a bounding description therefore applies only to a pertinent consisting of land and not to pertinents consisting of servitudes.<sup>829</sup>

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<sup>824</sup> *Gordon v Grant* at 5.

<sup>825</sup> My translation making use of The Oxford Latin Dictionary (1968).

<sup>826</sup> This principle was also supported by the earlier Inner House cases of *Hepburn v Duke of Gordon* and *Suttie v Gordon* in which the pertinents were restricted by means of wording in the deeds which made it clear that the principal areas and the pertinents were subject to the same limitations. See: *Hepburn v Duke of Gordon* (1823) 2 S 459; *Suttie v Gordon* (1837) 15 S 1037. The cases of *Gordon v Grant* and *Hepburn v Duke of Gordon* are cited by Menzies as authoritative for the rule that pertinents can be restricted. See Menzies, *Conveyancing* 522-523. Furthermore, in the Inner House case of *Carnegie v MacTier* (1844) 6 D 1381 both parties claimed an area as a pertinent. The area was not excluded from the ambit of either foundation writ. Hence, it was held that the issue was to be decided simply on the basis of possession as both foundation writs were habile to include the area as a pertinent.

<sup>827</sup> *Gordon v Grant* at 7 per the Lord Justice-Clerk (Hope) and at 18 per Lord Medwyn.

<sup>828</sup> *Gordon v Grant* at 7 per the Lord Justice-Clerk (Hope) and at 18 per Lord Medwyn.

<sup>829</sup> See also *Beaumont v Lord Glenlyon* (1843) 5 D 1337. It is of background relevance that the mid-nineteenth century witnessed a number of cases in which the doctrine of pertinents was applied by the Inner House to allow for positive prescription of a variety of rights other than landownership. These included: a right to a ferry (*Duke of Montrose v Macintyre* (1848) 10 D 896); the right to wreckage

Having observed the extent to which the decision in this case appears to be correct and unproblematic, it is necessary to examine the problematic aspect of this decision. In particular, the Court in this case does not seem to have observed any distinction between bounding descriptions which bind both principal and pertinents as opposed to bounding descriptions which only bind the principal. The Court seems to have ignored the possibility of such a distinction and held that the presence of a bounding description automatically binds the pertinents irrespective of whether or not it specifically states that the pertinents are included within the terms of the said bounding description.<sup>830</sup> It is particularly significant that both the Lord Justice-Clerk and Lord Moncreiff held that the case of *Watt v Paterson* did not bind the Court in this instance.<sup>831</sup> The Lord Justice-Clerk stated that *Watt v Paterson* was a confused case and that the report was too brief to be relied upon.<sup>832</sup> Lord Moncreiff stated that, in *Watt v Paterson*, the alleged bounding description existed only in Watt's averments as to his own property.<sup>833</sup> Furthermore, Lord Moncreiff stated that *Watt v Paterson* was a special case in which there was no deliberate consideration of whether there were circumstances in which pertinents could be positively prescribed outwith the boundaries of a bounding description.<sup>834</sup>

It may however be significant that the case of *Kerr v Dickson* is not mentioned at any point in *Gordon v Grant*.<sup>835</sup> As both Lord Moncreiff and Lord Medwyn sat in the Inner House in both *Kerr v Dickson* and *Gordon v Grant*, and Lord Moncreiff had also been the Outer House judge in *Kerr v Dickson*, it does not seem possible that the Court in *Gordon v Grant* was unaware of the House of Lords decision in *Kerr*. This may therefore be an indicator of the abovementioned suggestion that the decision in *Kerr v*

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(*Lord Advocate v Hebden* (1868) 6 Macph. 489); and the right to salmon fishings (*Lord Advocate v Sinclair* (1865) 3 Macph. 981; *Fraser v Grant* (1866) 4 Macph 596).

<sup>830</sup> *Gordon v Grant* at 6-7 per the Lord Justice-Clerk (Hope), at 24-25 per Lord Moncreiff and at 35 per Lord Cockburn.

<sup>831</sup> *Gordon v Grant* at 6 per the Lord Justice-Clerk and at 24 per Lord Moncreiff.

<sup>832</sup> *Gordon v Grant* at 6 per the Lord Justice-Clerk.

<sup>833</sup> *Gordon v Grant* at 24 per Lord Moncreiff.

<sup>834</sup> *Gordon v Grant* at 24 per Lord Moncreiff.

<sup>835</sup> *Kerr v Dickson* is not mentioned and no mention is made of the cases which are similar to *Kerr v Dickson* and which are listed above, namely: *Berry v Holden* (1840) 3 D 205; *Officers of State v Smith* (1846) 8 D 711; *Smith v Officers of State* (1849) 8 Bell's Appeals 487; *Smart v Magistrates of Dundee* (1796) 3 Paton 606.

*Dickson* is not definite authority for the view that a bounding description of the principal area will automatically bind the pertinents as well.

Returning to the comments made by the Lord Justice-Clerk and Lord Moncreiff with regard to *Watt v Paterson*, it is arguable that their observations are not wholly incorrect with regard to that case. The case report is relatively brief and, as noted above, it may be suggested that the foundation writ in question did not actually contain a bounding description. However, the case report and the House of Lords papers indicate that the Burgh of Newburgh<sup>836</sup> did not contest Watt's claim that there was a bounding description.<sup>837</sup> Rather, it appears that the Burgh simply argued that the inclusion of the words '*with pertinents*' in their foundation writ was sufficient to allow it to be habile in respect of a pertinent consisting of land, irrespective of whether or not the principal area held by the Burgh was bound by a bounding description.<sup>838</sup>

It also appears that, in *Gordon v Grant*, Lord Moncreiff was incorrect to state that *Watt v Paterson* did not contain any deliberate consideration of whether there were circumstances in which pertinents could be positively prescribed outwith the boundaries of a bounding description. The House of Lords papers make it clear that Watt specifically pled that the wording '*with pertinents*' cannot give a right of property beyond express outward boundary limits.<sup>839</sup> Furthermore, the case report shows that central authorities for the proposition that a bounding description always binds pertinents<sup>840</sup> were pled before the Court by Watt.<sup>841</sup> The fact that these arguments were unsuccessful suggests that the Court in *Watt v Paterson* held that the wording '*with pertinents*' was habile to include a pertinent consisting of land which lay outwith the ambit of the boundary description of the principal area.<sup>842</sup> The Court therefore

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<sup>836</sup> The Burgh of Newburgh appeared with Paterson and others against Watt in the case of *Watt v Paterson*.

<sup>837</sup> *Watt v Paterson* (1813) 2 Dow 25 at 26. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant's Case page 6.

<sup>838</sup> *Watt v Paterson* at 26. See also House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant's Case page 6.

<sup>839</sup> House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant's Case page 6.

<sup>840</sup> Erskine II.6.3; *Young v Carmichael* (1671) Mor 9636.

<sup>841</sup> *Watt v Paterson* at 26-27.

<sup>842</sup> *Watt v Paterson* at 28 per Lord Chancellor Eldon.

appears to have held that a description which binds a principal area does not automatically bind the pertinents.

The fact that the outcome of the decision in *Gordon v Grant* is completely compatible with the outcome and, most importantly, the *ratio* of *Watt v Paterson* renders the *ratio* of *Gordon v Grant* all the more surprising. The supposed boundary description in *Watt v Paterson* did not state that the pertinents were included within the boundaries.<sup>843</sup> Therefore it was understandable that the House of Lords held that the pertinents were not subject to the bounding description. In contrast, in *Gordon v Grant* the boundary description specifically stated that the pertinents were included within the boundaries. Therefore it was logical for the Inner House to hold that the pertinents were subject to the bounding description.

It thus appears that the *ratio* in *Watt v Paterson* can be reconciled easily with the outcome in *Gordon v Grant* and that there was no need for the Court in *Gordon v Grant* to hold that pertinents must always be bound if the principal area is subject to a bounding description. Logically, the *ratio* for both cases should be: pertinents are not bound by a bounding description unless the bounding description specifically includes pertinents. It would therefore appear to be the case that the outcome in *Gordon v Grant* is correct but the *ratio decidendi* of this case may be incorrect to the extent that it overstates the effect of bounding descriptions with regard to pertinents. It may be incorrect in stating that pertinents must always be bound if the principal area is subject to a bounding description.<sup>844</sup>

Whilst noting the possible incorrectness of the *ratio* of *Gordon v Grant*, it is again acknowledged that *Watt v Paterson* is only reported briefly and the House of Lords papers are only evidence of the pleadings rather than of the actual decision itself. However, it does appear that the *ratio* of *Watt v Paterson* is not in agreement with the *ratio* of *Gordon v Grant*. Furthermore, as *Kerr v Dickson* and the other cases which relate to the ownership of tidal areas as pertinents are not referred to in the report of

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<sup>843</sup> See House of Lords Papers, Appeal Cases 1813-1814 at Number 2, *Watt v Paterson* at The Appellant's Case page 6.

<sup>844</sup> However, it seems to have become accepted that the *ratio* of *Gordon v Grant* was correct in stating that pertinents must always be bound if the principal area is subject to a bounding description. See for instance: Menzies, *Conveyancing* 522; Montgomerie Bell, *Lectures* 597; Wood, *Lectures* 204.

*Gordon v Grant*, it appears that the Inner House in *Gordon v Grant* did not rely on any House of Lords authority as support for its decision that pertinents are bound if the principal area is subject to a bounding description. Thus, it appears that the authorities on the point continued to exist in a state of conflict and confusion. This confusion may relate to the relationship of the Court of Session and the House of Lords in the nineteenth century.<sup>845</sup> However, it seems evident that the confusion was essentially a doctrinal difference regarding the effect which a bounding description of a principal area should have on the pertinents which might relate to that principal area. This discussion continues to be evident in the following cases.

#### **4. *North British Railway Company v Magistrates of Hawick***

In *North British Railway Company v Magistrates of Hawick*<sup>846</sup> the Inner House held that the channel and *alveus* of the River Teviot adjacent to an area of land owned by the railway company were not included either as part of the principal area or as a pertinent to the railway company's principal area.<sup>847</sup> Although this case is a boundary dispute in which the prescriptive period had not yet elapsed, it appears that the principles evident in this case are relevant for the question of hability.

The decision is significant in that it seems to turn on the fact that the railway company's foundation writ contained a description with a very specific statement of the acreage and a detailed plan of the area which was conveyed.<sup>848</sup> As the River Teviot was outwith the specified acreage and the coverage of the plan, it was held that the foundation writ could not be considered to include the river either as principal or as pertinent.<sup>849</sup> In addition it was noted that the river was not described as forming the

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<sup>845</sup> It appears that decisions of the House of Lords were binding on the Court of Session in the nineteenth century. See T B Smith, *The doctrines of judicial precedent in Scots law* (1952) 48-66. Thus the relationship of these two courts should not have created any confusion.

<sup>846</sup> *North British Railway Company v Magistrates of Hawick* (1862) 1 M 200.

<sup>847</sup> The area of land was in Hawick in Roxburghshire. It consisted of 7.424 acres known as the Under Common Haugh of Hawick.

<sup>848</sup> There is no reference to either the statement of acreage or the plan being described as either taxative or demonstrative in the railway company's foundation writ.

<sup>849</sup> *North British Railway v Magistrates of Hawick* at 203 per the Lord President (McNeill). We are not informed of the identity of the other judges in the Inner House. The case report simply states that the other judges concurred with the Lord President. See *North British Railway Company v Magistrates of Hawick* (1862) 1 M 200 at 203. A similar decision was also given in the Inner House case of *Stewart v Greenock Harbour Trustees* (1866) 4 M 283. This was again a boundary dispute case in which it does not appear that positive prescription was pled.

boundary of the railway company's property and therefore no ambiguity was introduced which could have allowed a portion of the river to be considered as potentially included in the foundation writ.<sup>850</sup>

Although the decision is understandable in view of the *ratio* of *Gordon v Grant*, it appears to be arguable that the railway company's foundation writ was only bounding in relation to the principal area conveyed. The pertinents were included after, rather than within, the terms of the bounding description. Therefore, the pertinents are described in the opposite manner to that which was found in *Gordon v Grant*. Specifically, the railway company's foundation writ stated that a particular acreage was conveyed and that this was shown on a plan attached to the foundation writ. However, the foundation writ then stated that the acreage was conveyed:

... together with all rights and pertinents belonging to the said portions of ground, ...<sup>851</sup>

Therefore, the railway company seem to have had a basis for their argument that the *alveus*, as far as the *medium filum*, of the part of the river adjoining their property formed a pertinent to their land.<sup>852</sup> However, it appears that the railway company may have wished to own the *alveus* as a source of sand or gravel or for possible rental income.<sup>853</sup> Thus it might have been difficult for them to prove that the *alveus* was truly a pertinent in the sense of being subordinate and ancillary to the principal area in question. It might rather be the case that the *alveus* was just a useful additional commercial asset which had a totally distinct character in relation to the principal area in question. Yet, this does not affect the fact that the railway company's foundation writ could potentially have included the *alveus* as a pertinent. It simply means that the

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<sup>850</sup> *North British Railway v Magistrates of Hawick* at 203 per the Lord President (McNeill). If the railway company's foundation writ had described the railway company's land as bounded 'by' the river then the boundary would have been the *medium filum*. See: *Wishart v Wyllie* (1853) 1 Macq 389; *Gibson v Bonnington Sugar Refinery Company Ltd* (1869) 7 M 394; *Magistrates of Hamilton v Bent Colliery Company Ltd* 1929 SC 686; *Stirling v Bartlett* 1993 SLT 763; Halliday, *Conveyancing* 33.11. See also *Scammell v Scottish Sports Council* 1983 SLT 462.

<sup>851</sup> *North British Railway v Magistrates of Hawick* at 201.

<sup>852</sup> *North British Railway v Magistrates of Hawick* at 201 and 203.

<sup>853</sup> *North British Railway v Magistrates of Hawick* at 200-201.



*alveus* in question may or may not have been a pertinent, and that this would have been a factual question for the Court to assess.<sup>854</sup>

It is therefore posited here, that whilst there was a bounding description which restricted the principal area in this case, the decision may be incorrect to the extent that the bounding description was held to bind the pertinents. It is contended that in order to restrict the pertinents as well as the principal, such dual restriction should be made absolutely clear within the wording of the deed. This principle is further demonstrated in the following case.

### **5. *Cooper's Trustees v Stark's Trustees***

In *Cooper's Trustees v Stark's Trustees*<sup>855</sup> we find some very clear discussion of the relationship of bounding descriptions and pertinents. In this case Cooper's Trustees owned an area of ground on Argyle Street in Glasgow. Their foundation writ stated that a tenement block was excepted from their land. Stark's Trustees owned the tenement block and claimed positive prescription in respect of the yard and a saloon<sup>856</sup> as a pertinent. The Inner House held by a majority of six<sup>857</sup> to one<sup>858</sup> that positive prescription was successful in this instance as the tenement block was not considered to be completely confined by a bounding description due to the fact that the description of the block itself was complemented by the inclusion of pertinents. The Lord Justice-Clerk quoted Erskine<sup>859</sup> and held that in order to exclude prescription a foundation writ must have boundaries which are 'obvious and indubitable'.<sup>860</sup> He held that there were no obvious and indubitable boundaries in this instance as the tenement block was

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<sup>854</sup> It appears that the usage of the *alveus* may have been considered as relevant by the Lord President in his judgment. However, his judgment appears to be decided on the basis that there was a bounding description rather than on the basis of whether or not the *alveus* could be considered to be a pertinent. See *North British Railway v Magistrates of Hawick* at 203 per the Lord President.

<sup>855</sup> *Cooper's Trustees v Stark's Trustees* (1898) 25 R 1160.

<sup>856</sup> The word 'saloon' appears in this context to indicate an additional room or similar structure. This case is slightly similar to the Inner House case of *McArly v French's Trustees* (1883) 10 R 574 in which it was held that a shop sign was a valid pertinent to a particular area of land in central Glasgow. However, the case of *McArly v French's Trustees* does not appear to have been cited in *Cooper's Trustees v Stark's Trustees*.

<sup>857</sup> The Lord Justice-Clerk (Macdonald), Lord Young, Lord Adam, Lord McLaren, Lord Kinneir and Lord Moncreiff (Henry James Moncreiff, 2<sup>nd</sup> Baron Moncreiff, 1840-1909)

<sup>858</sup> Lord Trayner.

<sup>859</sup> Erskine II.6.2.

<sup>860</sup> *Cooper's Trustees v Stark's Trustees* (1898) 25 R 1160 at 1164 per the Lord Justice-Clerk.

merely described as ‘that large stone tenement’<sup>861</sup> or ‘that stone tenement of land.’<sup>862</sup> This was also the view of Lord Young on this matter.<sup>863</sup>

Lord Adam reached the same conclusion but held that it was the inclusion of the term ‘pertinents’ within the foundation writ which made positive prescription of the additional areas possible.<sup>864</sup>

Lords McLaren and Moncreiff concurred with the majority decision but went even further and stated that the concept of the pertinent would have allowed for positive prescription to occur even if the principal area had been subject to a bounding description.<sup>865</sup> In particular, Lord McLaren emphasised that pertinents are not automatically confined to land within the supposed boundaries of the principal.<sup>866</sup>

Whilst the judgments of Lords McLaren and Moncreiff might be seen as representing a highpoint for the allowance of positive prescription in respect of pertinents, it is suggested here that their views represent a logical explication of the law in this area. As a pertinent is by its very nature something that exists in addition to the principal area, then it would appear to be a corollary of this concept that if the principal area is subject to a bounding description this should not prevent the existence of pertinents outwith the area covered by the bounding description unless the boundary description is specifically worded to show that it also includes the pertinents.

However, this more expansive statement of the doctrine of pertinents appears to have only been stated by Lords McLaren and Moncreiff. It is not clear if Lord Kinnear<sup>867</sup> concurred merely with the Lord Justice-Clerk and Lord Young or whether he also concurred with the more expansive judgments of Lord McLaren and Moncreiff.<sup>868</sup> Furthermore Lord Trayner dissented from the judgment of the Court and held that the

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<sup>861</sup> *Cooper’s Trustees* at 1160.

<sup>862</sup> *Cooper’s Trustees* at 1161.

<sup>863</sup> *Cooper’s Trustees* at 1165 per Lord Young.

<sup>864</sup> *Cooper’s Trustees* at 1166 per Lord Adam. This might be read as meaning that Lord Adam agreed with the principles expressed by Lords McLaren and Moncreiff below.

<sup>865</sup> *Cooper’s Trustees* at 1169 per Lord McLaren and at 1172 per Lord Moncreiff.

<sup>866</sup> *Cooper’s Trustees* at 1168 per Lord McLaren. His Lordship noted that pertinents could be restricted under certain circumstances, such as those found in the case of *Gordon v Grant*. However, his Lordship was of the view that such a restriction was not present in this case.

<sup>867</sup> *Cooper’s Trustees* at 1169 per Lord Kinnear.

<sup>868</sup> Which, as noted above, may also have accorded with Lord Adam’s opinion.

wording of the foundation writ served to create a bounding description and that this meant that positive prescription of the yard and saloon was not possible even by virtue of the doctrine of pertinents.<sup>869</sup> Therefore it would not seem to be possible to hold that the additional statements made by Lords McLaren and Moncreiff form part of the *ratio decidendi* of the case. However, their comments are nonetheless important, particularly as they seem to accord with the principle which appears to have been decisive in *Watt v Paterson*: a description which binds a principal area does not automatically bind the pertinents.

It is also argued here that the judgments of Lord McLaren and Lord Moncreiff are in accordance with the outcome in the case of *Gordon v Grant* which was examined above.<sup>870</sup> In *Gordon v Grant*, the foundation writ was worded so that it was clear that the principal area and the pertinents were both confined to the parish of Monymusk. Thus, both were subject to the constraints of a bounding description. This was not the situation with regard to the foundation writ in the case of *Cooper's Trustees v Stark's Trustees*. This is evident as, even if the principal area consisting of the tenement building had been confined by a bounding description, this should not have had any effect on the pertinents of the tenement building. This is due to the fact that the pertinents were not stated to be subject to the terms of the alleged bounding description. This can be observed from the terms of the foundation writ which described the subjects as being:

... 'that stone tenement of land ... together with the whole parts, pertinents, privileges and pertinents' ...<sup>871</sup>

Thus it can be seen that the pertinents were described as being additional to the principal area and as being outwith the terms of the alleged bounding description.

In summary, it is accepted that this case is correctly decided.<sup>872</sup> However, the judgments of Lords McLaren and Moncreiff should be recognised as articulating the

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<sup>869</sup> *Cooper's Trustees* at 1170-1171 per Lord Trayner.

<sup>870</sup> See chapter VI, F, 3.

<sup>871</sup> *Cooper's Trustees* at 1161.

<sup>872</sup> In the case of *Brown v Allan* 1950 SLT (Sh Ct) 66 Sheriff Lillie held that the *ratio* of *Cooper's Trustees v Stark's Trustees* did not apply in the instance of attempted positive prescription of an area of garden ground which was claimed as a pertinent. The distinction was made on the basis that an express grant of a flat together with the western half of a garden was a description which excluded any claim to the other half of the said garden. The report is relatively brief but it appears that the essential

logical relationship between bounding descriptions and pertinents. It is argued that pertinents should only be treated as limited by a bounding description if such limitation is clear from the terms of the deed in question. If such clear restriction is not provided, then ambiguity is introduced and such ambiguity allows for positive prescription to occur.<sup>873</sup>

## **6. Conclusion regarding hability of contiguous pertinents in cases involving alleged bounding descriptions**

The analysis of the case law demonstrates that the courts did not wholly endorse the view that pertinents are automatically bound by a bounding description which binds the principal area. However, it is undeniable that this view is found present within some of the judgments examined above. This state of confusion was also manifest in relation to discontinuous pertinents and this will be analysed further below.<sup>874</sup> Prior to making this further analysis of the effect of bounding descriptions it is appropriate to examine the relatively uncontroversial cases which deal with contiguous pertinents in situations in which there was no alleged bounding description.

## **G. Development of the concept and terminology of hability with regard to the conveyance of contiguous pertinents in cases not involving bounding descriptions**

### **1. *Earl of Fife's Trustees v Cuming***

The case of *Earl of Fife's Trustees v Cuming*<sup>875</sup> involved a conflict between a claim which was apparently based on an express grant of the area in dispute<sup>876</sup> and a rival claim which was based on the area being regarded as a part and pertinent of adjoining

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basis for the decision may have been that the alleged pertinent could not be described as subordinate and ancillary to the principal area in question. Positive prescription might have successfully been accomplished in respect of a small section of the eastern area of garden. However, it appears that it would not be possible to claim the entire eastern area as a pertinent.

<sup>873</sup> See Chapter V, F with regard to ambiguity and hability of the principal area. The concept of ambiguity is equally applicable to hability of the principal area and hability of pertinents. This is obviously correct as it maintains consistency within the law.

<sup>874</sup> See Chapter VI, H.

<sup>875</sup> *Earl of Fife's Trustees v Cuming* (1830) 8 S 326.

<sup>876</sup> This was the claim made by the Earl of Fife's Trustees. The report does not relate the actual wording of the deed. The report merely states that the Earl of Fife's Trustees held a foundation writ in respect of the barony of Coxtoun which included an express grant of the area in dispute. See *Earl of Fife's Trustees* at 326-329.

land.<sup>877</sup> The area in question was comprised of moorland to the south west of Elgin. The area of moorland appears to have been contiguous with the principal area in question.

The Inner House<sup>878</sup> held that the claim which included the area as a part and pertinent would be successful if it was fortified by possession for the prescriptive period.<sup>879</sup> The Court affirmed that a claim based on an express grant could be defeated by a claim based on a grant of pertinents, even if the pertinent in question was not specifically mentioned in the grant of pertinents.<sup>880</sup> This decision appears to be a logical outworking of the principle that positive prescription is possible in relation to pertinents.

## **2. Lord Advocate v Hunt**

The case of *Lord Advocate v Hunt*<sup>881</sup> involved a dispute over the ownership of the area of ground containing the ruins of Dunfermline Palace in Fife. It was argued by Hunt that he had acquired ownership by means of positive prescription of this area of ground as a pertinent of his foundation writ in respect of the lands and barony of Pittencrieff. Whilst it was noted by Lord Chancellor Chelmsford that it was not entirely clear whether or not the lands and barony of Pittencrieff were contiguous with the area containing the ruined Palace, the issue of contiguity was not material to the outcome of the case.<sup>882</sup> It was rather the relationship between the lands of Pittencrieff and the

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<sup>877</sup> This was the claim made by Cuming as the owner of the adjoining lands of Blackhills. The report does not state whether Cuming's foundation writ for Blackhills contained a bounding description. However, it would appear that Cuming's foundation writ did not contain a bounding description as this was not contended by the Earl of Fife's Trustees.

<sup>878</sup> Lords Glenlee, Pitmilley, Cringletie and the Lord Justice-Clerk (Boyle) concurred in this decision. These were the same judges which had decided the case of *Magistrates of Perth v Earl of Wemyss* (1829) 8 S 82. *Magistrates of Perth v Earl of Wemyss* is analysed below at chapter VI, I, 1.

<sup>879</sup> *Earl of Fife's Trustees* at 328 per Lord Glenlee and per Lord Pitmilley and at 329 per Lord Cringletie and per the Lord Justice-Clerk.

<sup>880</sup> *Earl of Fife's Trustees v Cuming* is treated as authoritative in respect of this principle by Napier. See Napier, *Commentaries* 165. This is also reflected in Millar's writings. See Millar, *Prescription* 26. The decision in *Earl of Fife's Trustees v Cuming* is similar to the decision of the House of Lords in *Mackenzie v Mackenzie* (1818) 6 Paton 376; 3 Ross LC 338. In *Mackenzie v Mackenzie* it was held by the House of Lords that an area of grazing could be counted as a pertinent to an area of ground which was owned under a foundation writ which made no reference to the area of grazing land. The party whom relied upon the doctrine of pertinents was thus able to defeat the party with an express grant of the disputed area. This was possible due to the degree of possession which had been enjoyed by the party relying on the doctrine of pertinents.

<sup>881</sup> *Lord Advocate v Hunt* (1867) 5 M (HL) 1 reversing *Lord Advocate v Hunt* (1865) 3 M 426.

<sup>882</sup> *Lord Advocate v Hunt* (1867) 5 M (HL) 1 at 7 per Lord Chancellor Chelmsford.

area containing the ruined palace which was the crucial point in this case.<sup>883</sup> It was therefore held by the House of Lords that, although Hunt had possessed the ruined palace for the prescriptive period, he had not possessed it as a pertinent to the lands and barony of Pittencrieff. It was held that the ruined palace was not an area which could be considered to form a pertinent to an area such as the lands and barony of Pittencrieff.<sup>884</sup>

It was held that a pertinent must be of a character which could be described as 'belonging to' the principal area rather than merely adjoining, or being in the vicinity of, or being occupied at the same time as, the principal.<sup>885</sup> As such, the area in this dispute did not meet the character of being a pertinent. This serves to underline the principle that additional areas of ground are not pertinents to a principal area unless they truly have the character of pertinents in the sense of being subordinate and ancillary to the principal area under conveyance.<sup>886</sup>

### **3. *Scott v Lord Napier***

The dispute in *Scott v Lord Napier*<sup>887</sup> related to the Loch of the Lowes and St Mary's Loch in Yarrowdale in the Scottish Borders. Lord Napier argued that he had exclusive ownership of the Loch of the Lowes and St Mary's Loch on the basis of a deed which contained both an express grant of the estate of Bourhope and an express grant of these two lochs. Lord Napier argued that later conveyances of the estate of Bourhope had transmitted the content of the earlier express grant of the lochs by virtue of the clause in the later conveyances which stated that the estate of Bourhope was being conveyed with pertinents. Lord Napier also argued that his claim to the ownership of the two lochs had been fortified by positive prescription.

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<sup>883</sup> *Lord Advocate v Hunt* at 6 per Lord Chancellor Chelmsford and at 10 per Lord Cranworth.

<sup>884</sup> *Lord Advocate v Hunt* at 6-9 per Lord Chancellor Chelmsford and at 9-12 per Lord Cranworth. The Lord Advocate's argument was supported by reference to the case of *Earl of Stair v King* (1846) 5 Bell's Appeals 82 (affirming *King v Earl of Stair* (1844) 6 D 821) in which it was held by the House of Lords that an estate in Wigtownshire extending to 800 acres and known as Cults had not been possessed as a pertinent of the estates of Castle Kennedy and Inch.

<sup>885</sup> *Lord Advocate v Hunt* at 6 per Lord Chancellor Chelmsford and at 9-12 per Lord Cranworth. This view appears to be supported by the Inner House in *Duke of Argyll v Campbell* 1912 SC 458 in which rival claims were made in relation to Dunstaffnage Castle in Argyllshire.

<sup>886</sup> See discussion above at chapter VI, B, 1.

<sup>887</sup> *Scott v Lord Napier* (1869) 7 M (HL) 35, reversing the decisions of the Outer House and the Inner House of the Court of Session which are reported at *Scott v Lord Napier* (1869) 7 M (HL) 35 at 33-71.

The House of Lords noted that there had been a deed which contained: an express grant of the estate of Bourhope with pertinents; and also an express grant of the two lochs with pertinents.<sup>888</sup> These grants were all made in the same deed but separate feu duties were narrated in respect of the estate and in respect of the lochs and separate infeftment had occurred in respect of the estate and in respect of the lochs. Later conveyances of the estate did not refer to the two lochs but did include the pertinents of the estate.

It was held by the House of Lords that the grant of the lochs had been a separate grant in distinction from the grant of the estate. Furthermore, it was held that the original express grant of the lochs was not included in the later conveyances of the estate by virtue of the use of the term 'pertinents'. Rather, the use of the term 'pertinents' only served to convey the normal right of an adjoining proprietor in and to the lochs. It did not convey the content of the express grant of the two lochs which had been made in the earlier deed.<sup>889</sup>

In this particular case, it appears that a number of different proprietors owned land which adjoined the two lochs. Hence, the lochs could not be treated as being exclusive pertinents of the estate owned by Lord Napier.<sup>890</sup> Rather, it would appear that, as one of a number of adjoining proprietors, Lord Napier would only have been able to claim a pertinent of common or several ownership of the lochs in question. Such a right would exist on the basis that the ownership of a loch is presumed to be either common or several on the part of all the adjoining proprietors<sup>891</sup> and this presumption is not dependent on possession.<sup>892</sup> However, even this presumption may be rebutted if an adjoining owner's foundation writ specifically excludes the loch<sup>893</sup> or if an adjoining

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<sup>888</sup> *Scott v Lord Napier* (1869) 7 M (HL) 35 at 72-80 per Lord Chancellor Hatherley, at 80-84 per Lord Chelmsford, at 84 to 88 per Lord Colonsay and at 88 per Lord Cairns.

<sup>889</sup> *Scott v Lord Napier* at 72-80 per Lord Chancellor Hatherley at 80-84 per Lord Chelmsford, at 84 to 88 per Lord Colonsay and at 88 per Lord Cairns.

<sup>890</sup> *Scott v Lord Napier* at 72-80 per Lord Chancellor Hatherley, at 80-84 per Lord Chelmsford, at 84 to 88 per Lord Colonsay and at 88 per Lord Cairns. It appears that the House of Lords held that the possession which was exercised by Lord Napier over the lochs was insufficient to achieve exclusive ownership of the lochs. See *Scott v Lord Napier* at 72-80 per Lord Chancellor Hatherley, at 80-84 per Lord Chelmsford, at 84 to 88 per Lord Colonsay and at 88 per Lord Cairns.

<sup>891</sup> See: Stair II.3.73; *Menzies v Macdonald* (1854) 16 D 827, affd (1856) 2 Macq 463, HL; F Lyall 'Water and Water Rights' in *S.M.E.* vol 25 (1988) paras 304 to 306.

<sup>892</sup> See *Scott v Lord Napier* at 74 per Lord Chancellor Hatherley. See also Lyall 'Water and Water Rights' in *S.M.E.* vol 25 paras 304 to 306.

<sup>893</sup> See *Meacher v Blair-Oliphant* 1913 SC 417. In this case the Inner House held that the defender had right in the Loch of Fingask as a pertinent due to the fact that the pursuer was unable to show that

owner or a third party holds an express grant of the loch in question.<sup>894</sup> Thus, even the claim to a pertinent of common or several ownership of the two lochs in question could have been defeated if it had been held that another party was the holder of an express grant of these two lochs. However, the Court does not appear to have held that another party was the holder of an express grant of these lochs.

With regard to the *ratio decidendi* of this case, it seems that the House of Lords were correct to hold that if a deed contains express grants of two separate areas, it cannot be assumed that a later conveyance of one of these areas will be habile to include automatically the express grant of the other area by virtue of a clause stating that the said later conveyance is granted with pertinents. This view appears sensible as it is logical to state that if the alleged pertinents do not clearly bear the character of being subordinate an ancillary to the principal area conveyed by the said later conveyance, then the said later conveyance will not carry the alleged pertinents.

This case is also interesting for Lord Chelmsford's comment that a pertinent may be a pertinent of another pertinent if this is expressly stated or is established by possession.<sup>895</sup> However, such grant or such possession does not appear to have been established in this case. Although it might seem strange to think of pertinents existing in relation to other pertinents, it would appear that such a situation could exist. For instance, an island might be a pertinent of an estate, and the island might in turn have a pertinent consisting of a smaller island which could be classified as either a secondary pertinent of the estate or as a primary pertinent of the larger island. Such a classification would not matter as long as the estate owned the larger island, but such a classification might become important if the larger island was sold off by the owners of the estate and it then became necessary to determine the ownership of the smaller island.

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the Loch of Fingask was definitely only located within the particular parish which supposedly bound the extent of the grant in the defender's foundation writ.

<sup>894</sup> See: Lyall 'Water and Water Rights' in *S.M.E.* vol 25 para 304; *Montgomery v Watson* (1861) 23 D 635 (this is an instance of a deed granted by the true owner); *Baird v Robertson* (1836) 14 S 396 (this is an instance of a deede granted *a non domino*).

<sup>895</sup> *Scott v Lord Napier* at 81 per Lord Chelmsford.



#### **4. Conclusion regarding hability of contiguous pertinents in cases not involving alleged bounding descriptions**

The principles found in the case law are clear and uncontroversial with regard to the hability of contiguous pertinents in situations in which there is no alleged bounding description. They simply affirm that positive prescription is possible for pertinents, but only if the alleged pertinent is subordinate and ancillary to the principal area in question.

Having examined the hability of contiguous pertinents in situations with and without bounding descriptions binding the principal area, it is now appropriate to examine the hability of discontinuous pertinents. This examination will again begin with the situation in which an alleged bounding description is present.

#### **H. Development of the concept and terminology of hability with regard to the conveyance of discontinuous pertinents in cases involving alleged bounding descriptions**

##### **1. *Young v Carmichael***

In *Young v Carmichael*<sup>896</sup> a party owned land on the east side of Mary King's Close in Edinburgh and attempted to plead positive prescription in respect of an area of waste land on the west side of the close. It was argued that the area of waste land on the west side was a pertinent of the area of land on the east side. However, the Court held that the disputed area was not susceptible to positive prescription as a pertinent in this instance.<sup>897</sup> This ruling seems to have been based on the fact that the land on the east side of the close was described as being bounded on the west by Mary King's Close and that the waste land lay beyond this boundary.<sup>898</sup>

The Court thus seems to have held that if a principal area has a definite boundary then positive prescription cannot be applied to any area beyond that boundary, even if the area in question might be considered to be a pertinent of the principal area.<sup>899</sup> This

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<sup>896</sup> *Young v Carmichael* (1671) Mor. 9636; 2 Stair 3.

<sup>897</sup> *Young* at 9636; 2 Stair 3.

<sup>898</sup> *Young* at 9636; 2 Stair 3.

<sup>899</sup> *Young* at 9636. This appears to have been affirmed in the cases of *Thomson v Grieve* (1688) 2 Brown's Supp 118 and *Plewlands v Dundas* (1695) 4 Brown's Supp 236.

seems to be underlined by the fact that the Court held that the waste land could have been positively prescribed as a pertinent if it had not been beyond the boundary of the principal area.<sup>900</sup>

The reports of this case are brief but they are consistent in recording that the Court held that an area cannot be positively prescribed as a pertinent if it exists outwith the boundaries which are specified for the principal area in the relevant foundation writ. However, the reports do not contain details of whether or not the bounding description in the foundation writ was worded to make it clear that the pertinents were bound along with the principal. The case reports suggest that this point was not considered and that it was held that a bounding description of the principal area must automatically bind the pertinents. As discussed above in relation to contiguous pertinents, this approach appears to be unsound as the logical position would appear to be that pertinents should only be restricted if a bounding description is explicit in stating that the pertinents are subject to a particular restriction.<sup>901</sup>

## **2. Reid v McColl**

The case of *Reid v McColl*<sup>902</sup> concerns the fundamental relationship of hability and ambiguity and it also concerns the understanding of the concept of the principal area in a conveyance. Thus *Reid v McColl* relates to principles discussed in chapter V of this thesis. However, as it also involves pertinents which are discontinuous in relation to the principal area, it is addressed in this section of the thesis.

*Reid v McColl* concerned a dispute between two neighbouring proprietors on the High Street of Inverkeithing.<sup>903</sup> McColl claimed that positive prescription had extended the

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<sup>900</sup> *Young* at 9636. Additionally, the Court also held that an area might be positively prescribed as a pertinent even if another party held an express infeftment of the area in question. See: *Young v Carmichael* (1671) Mor. 9636; 2 Stair 3. This principle was affirmed in the case of *Countess of Moray v Wemyss* (1675) Mor. 9636; 2 Stair 325.

<sup>901</sup> See above at chapter VI, F.

<sup>902</sup> *Reid v M'Coll* (1879) 7 R 84. The judges in this case were Lord Ormidale (Robert Macfarlane), Lord Gifford and the Lord Justice-Clerk (Moncreiff) (James Moncreiff, 1<sup>st</sup> Baron Moncreiff, 1811-1895). These three judges also sat as part of the bench of seven judges in *Auld v Hay*. See above at Chapter V, F, 1.

<sup>903</sup> The case of *Reid v McColl* is interesting with regard to the time period required for positive prescription. Although the action of declarator was raised in 1878, the period of possession required was still that of forty years. This was due to the wording of the Conveyancing (Scotland) Act 1874 s.34 which stated that actions which commenced prior to the 1<sup>st</sup> of January 1879 would not be affected by the Conveyancing (Scotland) Act 1874 s.34. Therefore the relevant time period for *Reid v McColl*

area which he owned at the east side of the ground at the back of his property by the addition of three separate small parcels of land.<sup>904</sup> The description in the foundation writ for McColl's property stated that it was bounded on the east by:

...the lands belonging to the heirs of Daniel Drummond...<sup>905</sup>

McColl argued that this was not a description of a precise and unalterable location for the eastern boundary of his property. It was therefore argued that possession should be used as the measure to determine the extent of McColl's property on the east.<sup>906</sup> This argument was successful in the Outer House<sup>907</sup> but failed in the Inner House. The Inner House held that the description of McColl's eastern boundary was a bounding description.<sup>908</sup>

The Lord Justice-Clerk and Lord Ormidale held that the eastern boundary of McColl's property could not have altered over time. The wording of the foundation writ, taken together with the fact of there being traces of a boundary wall, was held to mean that McColl's property must have an unalterable straight line boundary on the east. Thus no additional area or areas could have been added to McColl's property on the east by virtue of prescriptive possession.<sup>909</sup> It seems to have been considered relevant that the houses occupied adjoining plots facing onto the street. This appears to have given rise to a degree of expectation that there would be an unalterable straight line boundary between the areas of land at the rear of the two properties.<sup>910</sup> Furthermore, Lord Ormidale particularly emphasised that extra land may only be positively prescribed as a pertinent if the foundation writ does not describe the subjects in question as being bound by a bounding description.<sup>911</sup>

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was that of 40 years rather than 20 years. The Action for declarator was raised by Reid on 30<sup>th</sup> December 1878. See *Reid v M'Coll* at 85.

<sup>904</sup> *Reid v M'Coll* at 85.

<sup>905</sup> *Reid v M'Coll* at 86. The boundary to the west was also described by reference to an owner.

However the boundaries to the north and south referred to roadways. See *Reid v M'Coll* at 85-86.

<sup>906</sup> *Reid v M'Coll* at 87-88.

<sup>907</sup> The decision of the Lord Ordinary (Lord Adam) is reported in *Reid v M'Coll* at 86-87.

<sup>908</sup> *Reid v M'Coll* at 88-91 per the Lord Justice-Clerk (Moncreiff) (James Moncreiff, 1<sup>st</sup> Baron Moncreiff, 1811-1895) and at 91-94 per Lord Ormidale.

<sup>909</sup> *Reid v M'Coll* at 88-91 per the Lord Justice-Clerk (Moncreiff) and at 91-94 per Lord Ormidale.

<sup>910</sup> *Reid v M'Coll* at 90-91 per the Lord Justice-Clerk (Moncreiff) and at 91-92 per Lord Ormidale.

<sup>911</sup> *Reid v M'Coll* at 92-94 per Lord Ormidale.

However, Lord Gifford, whilst not expressly dissenting from the decision in this case, expressed some doubt and suggested that if a property was only described as being bounded by land belonging to another party then it would appear that only possession could determine the actual physical location of the boundary in question. Thus it would appear possible for such a boundary to alter over time and for positive prescription to occur in respect of additional areas gained by virtue of the boundary alteration.<sup>912</sup> This view appears incompatible with the decision of the majority in this case. Therefore, it is surprising that Lord Gifford's view was only expressed as a doubt rather than as a definite dissent.

The majority decision in *Reid v McColl* does not seem to have fully recognised the extent to which the bounding description was of a character which rendered it as being susceptible to alteration. Rather it seems to have been accepted that if an attempt had been made to define the boundaries in the foundation writ, then it would not be possible for the boundaries to be altered at a later date. Yet, as the eastern boundary only appears to have been described by reference to the possible owner of the neighbouring property, and not by reference to an unalterable feature on the ground, it would appear that the majority decision was incorrect in holding that the foundation writ could not be habile to include any additional area on the east. The location of the eastern boundary might have altered over time and it would appear that the foundation writ might have been read as continuing to encompass additional land on the east. The decision in this case does not seem to sit well with the decision in *Auld v Hay* which occurred in the same town in the following year.<sup>913</sup> The ambiguity of the boundary description seems to have been ignored in *Reid v McColl*.<sup>914</sup> However, *Reid v McColl*

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<sup>912</sup> *Reid v M'Coll* at 95-96 per Lord Gifford.

<sup>913</sup> See chapter V, F for discussion of hability and ambiguous descriptions. *Reid v McColl* was only mentioned once in the case of *Auld v Hay*. It was simply cited as authority by Auld in order to try and argue that Hay's foundation writ was not habile to include the disputed subjects. Auld was unsuccessful in this argument. See above at chapter V, F, 1.

<sup>914</sup> The *ratio* of *Reid v McColl* appears to have influenced the decision in *Ross v Martin* (1888) 15 R 282. However, this appears to be a case in which the prescriptive period had not elapsed so the issue of hability was not directly relevant. Furthermore, the decision in *Reid v McColl* appears to have been treated with caution by Rankine. See Rankine, *Land-ownership* 102. The decision of *Reid v McColl* was also partially criticised in the case of *Troup v Aberdeen Heritable Securities Company*. See above at chapter V, F, 2. The decision of *Reid v McColl* was further distinguished and criticised in Sheriff-substitute Christie's decision in the case of *Cosh v Potts* 1950 SLT (Sh Ct) 14. However, this appears to be a case in which the prescriptive period had not elapsed so the issue of hability was not directly relevant.

was a case which appears to have primarily involved pertinents and this may go some way to explaining the result, if not the reasoning, in this case.

With regard to one of the three additional areas, it would appear that, as it was contiguous with the principal area, it could have been categorised as a contiguous pertinent.<sup>915</sup> Alternatively, if this additional area was not subordinate and ancillary to the principal area it may have been a part of the principal. In either event, the description in McColl's title appears to have been habile to include this area as it lay on the eastern side of his property. As the eastern boundary was ambiguous, and the additional area lay within the scope of that ambiguity, it would appear that the Court was incorrect in holding that McColl's foundation writ was not habile to include this additional area.

However, with regard to the other two additional areas of land, these appear to have been discontiguous in relation to the principal area held by McColl.<sup>916</sup> Furthermore, although they may have had the character of pertinents, it appears that McColl's foundation writ may not have been habile to include them.<sup>917</sup> This was due to the fact that it appears that McColl's foundation writ was worded to show that both the principal area and the pertinents were subject to the same boundaries.<sup>918</sup>

It might be argued that the two additional areas fell within the ambit of the description of the boundaries of the principal area. The principal area was described by reference to roadways on the north and south and by reference to the owners of neighbouring properties on the east and the west.<sup>919</sup> It might therefore be argued that the two discontiguous areas fell within the scope of these boundaries as they lay within the property which lay to the east of the principal area under McColl's title.<sup>920</sup> Hence the two discontiguous areas were in a sense within the scope of the boundaries which

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<sup>915</sup> It appears that this area contained a stable that was formerly used as a corn storage barn. See *Reid v M'Coll* at 85 and 92.

<sup>916</sup> *Reid v M'Coll* at 92 per Lord Ormidale.

<sup>917</sup> It appears that these two areas contained a smithy and a stable. See *Reid v M'Coll* at 85 and 92.

<sup>918</sup> *Reid v M'Coll* at 86.

<sup>919</sup> See *Reid v M'Coll* at 86.

<sup>920</sup> See *Reid v M'Coll* at 85-86. It was presumably the case that McColl would have also argued that he held servitude rights of access to these two discontiguous areas. However this does not appear to be mentioned in the case report for *Reid v McColl*.

bound the principal area in McColl's foundation writ. However, this argument appears to contain a particular difficulty.

The principal area in McColl's foundation writ was described as being bounded by roadways on the north and south and by properties owned by two different proprietors on the east and the west. The two discontinuous areas appear to have existed within the eastern property and therefore they appear to have been bounded on all sides by that particular property. Hence, these two discontinuous areas do not actually appear to have been bound by the boundaries which bound the principal area. As McColl's foundation writ appears to state that the principal and the pertinents are subject to the same boundaries, it would appear that the two discontinuous areas could not truly be pertinents of the principal area in McColl's foundation writ. As the two discontinuous areas did not conform to the boundary description for principal and pertinents, it would appear that McColl's foundation writ was not habile to include these two discontinuous areas.

In summary, it appears that the Court in *Reid v McColl* were correct in holding that McColl's foundation writ was not habile to include the two discontinuous areas. This was due to the fact that McColl's foundation writ appears to have stated that the boundary description which bound the principal area also bound the pertinents. Therefore, as the two discontinuous areas appear to have existed outwith the boundary description, it was not possible to read McColl's foundation writ as being habile to include these two areas. However, the Court appears to have been incorrect in holding that McColl's foundation writ was not habile to include the contiguous area. As the boundary description could be read as including the contiguous area it appears clear that McColl's foundation writ was habile to include this area.

With regard to the restriction of pertinents, the foundation writ in *Reid v McColl* contained a description which explicitly stated that the principal area and the pertinents were subject to the same boundaries. Thus the Court was correct to hold that the pertinents were restricted by the bounding description which bound the principal area. However, the Court appears to have been incorrect in holding that the description was not susceptible to some degree of alteration over time. The Court was therefore incorrect in holding that the description was not be habile to include the contiguous

area. However, the Court appears to have been correct to hold that the discontinuous areas lay outwith the ambit of the description in McColl's foundation writ and were thus not susceptible to positive prescription under this deed.

### **3. *Nisbet v Hogg***

The other major case to have occurred with regard to the issue of hability of discontinuous pertinents in relation to bounding descriptions was that of *Nisbet v Hogg*.<sup>921</sup> In *Nisbet* the ownership of a small triangular area of land at Gattonside in Roxburghshire was disputed. A disposition granted in 1929 stated that an area of land known as Raybank<sup>922</sup> was conveyed together with the triangular area of land to John Nisbet. Specifically, the disposition described the heritable property known as Raybank and then narrated:

...together with the whole rights and pertinents thereof, including all rights in any way competent to us (the disponers) in and to the triangular area of ground on the south side of the road or path in front of said houses ... and in and to the washing-house erected thereon.<sup>923</sup>

However, the 1929 disposition also stated that the subjects being disposed were described in a prior disposition recorded in 1921.

The 1921 disposition contained a description of Raybank and the pertinents which was identical to that found in the 1929 deed. Therefore the 1921 disposition appeared to include both Raybank and the small additional triangular area. However, after this first description of the subjects disposed, the 1921 disposition stated:

and which subjects are described in the title deeds thereof as follows, videlicet ...<sup>924</sup>

There then followed a detailed description of Raybank with boundaries that could not be construed as including the small additional triangular area. In particular Raybank was described as being bounded by a road which lay between it and the small additional area. The 1921 disposition therefore contained two contradictory verbal

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<sup>921</sup> *Nisbet v Hogg* 1950 SLT 289.

<sup>922</sup> Containing a small group of houses.

<sup>923</sup> *Nisbet* at 294.

<sup>924</sup> *Nisbet* at 295-296.

descriptions of the physical boundaries of the subjects conveyed.<sup>925</sup> One description included the triangular area; the other description excluded the triangular area.

It was therefore argued that the description contained in the 1929 deed incorporated the description contained in the 1921 deed and that, due to the contradiction between the descriptions contained in the 1921 description, neither deed was habile for positive prescription of the triangular area. Furthermore, on account of the date on which the action was raised, it appears that only the 1921 deed could be used as the foundation writ for positive prescription.

Despite the contradiction, Lord President Cooper and Lord Russell held that the 1921 description, and therefore also the 1929 description, were habile to include the triangular area.<sup>926</sup> As is acknowledged by Professors Reid and Gretton,<sup>927</sup> the decision in *Nisbet* does not provide particularly clear authority on this point as the judgments of Lord President Cooper and Lord Russell were engaged to a considerable extent with the question of whether the words ‘*all rights in any way competent to us (the disponers) in and to the triangular area*’ were satisfactory for the purpose of conveying ownership of the triangular area in question.<sup>928</sup>

Furthermore, *Nisbet* also contains the dissenting judgment of Lord Carmont which is clear in stating that the 1921 disposition, and therefore also the 1929 disposition, were not habile to include the triangular area due to the contradiction contained within the description in the 1921 disposition. Lord Carmont was of the view that the 1921 description made it clear that the small triangular area lay outwith the boundaries of what was being conveyed.<sup>929</sup>

The dissenting judgment appears to be correct as the pertinents of the area known as Raybank were described by means of two contradictory descriptions of the physical

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<sup>925</sup> It might be argued that the second description was stronger than the first description as the second description appears to have more clearly described the physical boundaries of the subjects conveyed. However, this argument does not appear to have been advanced and it is not material for the analysis of this case. It is therefore accepted that the two descriptions contained in the 1921 disposition were descriptions of the physical boundaries of the subjects conveyed.

<sup>926</sup> *Nisbet* at 293-294 per Lord President Cooper and at 294-295 per Lord Russell.

<sup>927</sup> Reid and Gretton, *Conveyancing 2012* at 153-154.

<sup>928</sup> *Nisbet* at 293-294 per Lord President Cooper and at 294-295 per Lord Russell.

<sup>929</sup> *Nisbet* at 295-297 per Lord Carmont.



boundaries of the subjects within the foundation writ. As seen in chapter V of this thesis, if two elements of description contradict each other within the same deed, but neither is of greater status than the other, it will follow that the attempt to include the area which is subject to the contradiction must fail.<sup>930</sup> Therefore, as the two elements of description were of equal status and the triangular area was the area which was subject to the contradiction, the foundation writ in *Nisbet* was not habile to include the triangular area. Hence it would appear that the decision of the majority in *Nisbet* was incorrect. The fact that the triangular area was a pertinent was irrelevant in this case as the wording of the foundation writ made it clear that both the principal area and the pertinents were subject to the bounding description which excluded the triangular area. Hence it was clear that no pertinent could exist outwith the boundaries narrated in the bounding description which excluded the triangular area.

The decision in *Nisbet* is surprising. The judgments of Lord President Cooper and Lord Russell rely on the decisions in *Auld v Hay* and *Cooper's Trustees v Stark's Trustees*. However, neither of these decisions supports the decision in *Nisbet*. *Auld* is not relevant as *Nisbet* turned on a contradiction rather than an ambiguity. *Cooper's Trustees* is not relevant as *Nisbet* involved a foundation writ which contained a bounding description.

Furthermore, there appear to have been a number of decisions in which it had already been evident that if a deed contained elements of description which were contradictory, the deed would not automatically be habile to the extent of the element of description which covered the larger area. In such an instance of contradiction, the deed would only be habile to the extent that one form of description prevailed over the other.<sup>931</sup> Hence the Court in *Nisbet* should have applied this approach rather than holding that the description covering the larger area should automatically prevail if it had been supported by possession. However, there appears to have been only one case in which a contradiction between two elements of equal status within the same deed was addressed and in that case the decision was questionable even if the *ratio* appears to have been sound.<sup>932</sup> This scarcity of authority may have created difficulties for the

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<sup>930</sup> See chapter V, H.

<sup>931</sup> See chapter V, G.

<sup>932</sup> See chapter V, H, 2.

Court in *Nisbet*. This may explain why the Court did not hold that if two elements of description contradict each other within the same deed, but neither is of greater status than the other, it will follow that the attempt to include the area which is subject to the contradiction must fail.

With regard to the hability of pertinents the decision of the Court in *Nisbet* is even more surprising. As observed earlier in this chapter, there appears to be a confusion regarding whether or not pertinents are bound by bounding descriptions which bind the principal area.<sup>933</sup> However, there appears to be no doubt that a bounding description which explicitly binds both the principal and the pertinents will definitely bind the pertinents.<sup>934</sup> Yet the Court in *Nisbet* appears to go against this rule. This appears to be in opposition to both logic and authority. However, the confusion that exists with regard to whether or not pertinents are bound by descriptions which bind the principal area may have created further difficulties for the Court in *Nisbet*. This may explain why the Court did not hold that pertinents will be bound by a bounding description which expressly binds the principal area and the pertinents.

In essence the decision of *Nisbet* appears to be incorrect. However, this may be explicable given the confused state of the law of pertinents in relation to bounding descriptions.

#### **4. Conclusion regarding hability of discontinuous pertinents in cases involving alleged bounding descriptions**

As with contiguous pertinents, the analysis of the case law demonstrates that there is a state of confusion with regard to whether pertinents are bound by bounding descriptions which bind the principal area. In *Young* it was held that pertinents were bound by a bounding description which bound the principal area. This also appears to be evident in *Reid v McColl*. However, in *Nisbet* it was held that pertinents were not bound by a bounding description which bound both the principal area and the pertinents. This confusion appears to be quite unsatisfactory and will be examined further in the concluding sections of this chapter.

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<sup>933</sup> See chapter VI, F.

<sup>934</sup> See chapter VI, F.

Having considered the hability of discontinuous pertinents in situations in which there is an alleged bounding description, it is appropriate to complete the examination of the case law with an examination of the cases which deal with discontinuous pertinents in situations in which there was no alleged bounding description.

## **I. Development of the concept and terminology of hability with regard to the conveyance of discontinuous pertinents in cases not involving bounding descriptions**

### **1. *Magistrates of Perth v Earl of Wemyss***

In *Magistrates of Perth v Earl of Wemyss*<sup>935</sup> the Inner House held that it would be possible to use positive prescription to acquire an island in the river Tay as a pertinent to the estate of Elcho which was owned by the Earl and which included the southern riverbank *ex adverso* the island. This was held to be possible despite the fact that the Earl's foundation writ for the estate of Elcho did not specifically mention the island in question as a pertinent. The Earl's foundation writ only described the estate as being the estate of Elcho with parts and pertinents. In contrast, the Burgh of Perth held a foundation writ which specifically included the island, which was known as 'Sleepless', within the subjects granted.<sup>936</sup>

The Court held that the degree of discontinuity between the principal area of the estate of Elcho and the island was insufficient to prevent positive prescription from being accomplished in respect of the island by the owner of the estate. Thus it was affirmed that a pertinent may be discontinuous in relation to the principal, although it appears that the Court held that the degree of discontinuity was relevant in determining whether the island could be considered to be a pertinent.<sup>937</sup> It was also held that the fact that the Burgh held a foundation writ which specifically mentioned the island would not prevent the owner of the estate of Elcho from using positive prescription to gain

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<sup>935</sup> *Magistrates of Perth v Earl of Wemyss* (1829) 8 S 82.

<sup>936</sup> It appears that the area known as Sleepless Inch is now part of the mainland due to the flow of the river Tay. It appears to be occupied by a sewerage works. The area lies on the south bank of the Tay looking north to Kinfauns Castle on the north bank of the Tay.

<sup>937</sup> *Magistrates of Perth* at 83-84 per Lord Glenlee, at 83 per Lord Pitmilley, per Lord Cringletie and per the Lord Justice-Clerk (Boyle).

ownership of the island.<sup>938</sup> Thus, the decision clearly affirms the principle that there is no need for a deed to specifically name a pertinent in order for the deed to be habile to include the said pertinent.

The decision in *Magistrates of Perth* also underscores the breadth of possibility which exists with regard to what may constitute a pertinent. This issue will always remain primarily a question of fact, informed by the principle that a pertinent is an area subordinate and ancillary to the principal area in question.<sup>939</sup> This is manifest in *Magistrates of Perth* in the judgment of Lord Pitmilley when he states:

I am satisfied that a great many islands are possessed merely as part and pertinent of adjoining lands, and that the right to Elcho, with parts and pertinents, is a sufficient title to prescribe a right to this island; ...<sup>940</sup>

Furthermore, in the judgment of Lord Cringletie it is emphasised that an area may be a pertinent in relation to a principal area or may exist independently as a separate entity.<sup>941</sup>

In summary, this decision affirms the principles that a deed may be habile to include pertinents which are neither specifically mentioned nor contiguous with the principal area.<sup>942</sup> However, it also serves to underscore the principle that the determination of what may constitute a pertinent is very dependent on the facts and circumstances of each case. The island of Sleepless appears to cover an area which is several times larger than that which is covered by the Old College of the University of Edinburgh. This might appear large for a pertinent, but in the context of estate conveyancing it would appear to be perfectly appropriate.

## **2. Conclusion regarding the hability of discontinuous pertinents in cases not involving alleged boundary descriptions**

As with contiguous pertinents, the analysis of the case law demonstrates that the principles found in the case law are clear and uncontroversial with regard to the

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<sup>938</sup> *Magistrates of Perth* at 83-84 per Lord Glenlee, at 83 per Lord Pitmilley, per Lord Cringletie and per the Lord Justice-Clerk (Boyle).

<sup>939</sup> See chapter VI, B, 1.

<sup>940</sup> *Magistrates of Perth* at 84 per Lord Pitmilley.

<sup>941</sup> *Magistrates of Perth* at 84 per Lord Cringletie.

<sup>942</sup> This case is treated as authoritative in respect of these principles by Napier. See Napier, *Commentaries* 163-165. This is also reflected in Millar's writings. See Millar, *Prescription* 26.

hability of discontinuous pertinents in situations in which there is no alleged bounding description. They simply affirm that a deed may be habile to include pertinents which are neither specifically mentioned nor contiguous with the principal area. They also underscore the understanding that the determination of what may constitute a pertinent is very dependent on the facts and circumstances of each case.

#### **J. Conclusion regarding the hability of pertinents under the Sasine system**

The analysis of the case law demonstrates that there is a state of confusion with regard to the circumstances under which pertinents are restricted by a description of the principal area. As observed, the courts have not wholly endorsed the view that pertinents are automatically bound by a bounding description which binds the principal area. However, it is undeniable that this view was found present within some of the judgments examined above.

It is argued here that pertinents should not be bound by a bounding description unless the bounding description specifically includes pertinents. This logical position appears to be supported by the House of Lords decision in *Watt v Paterson* and by the comments of Lords McLaren and Moncreiff in the Inner House in *Cooper's Trustees v Stark's Trustees*. These views appear to be eminently logical and correct. If a pertinent is by its very nature something that exists in addition to the principal area, then it would appear to be a corollary of this concept that if the principal area is subject to a bounding description this should not prevent the existence of pertinents outwith the area covered by the bounding description.<sup>943</sup> It should only be possible to hold that pertinents are restricted if a bounding description is explicit in stating that the pertinents are subject to a particular restriction.

However, the House of Lords in *Kerr v Dickson* and the Inner House in *Gordon v Grant*, *North British Railway v Magistrates of Hawick* and *Reid v McColl* appear to have held that a description which binds the principal area under conveyance must automatically bind the pertinents, irrespective of whether or not the pertinents are

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<sup>943</sup> See Reid, *Property* para 205.

explicitly stated to be subject to the boundary description in question.<sup>944</sup> This appears to reflect the view that was expressed by the Court of Session in the early case of *Young v Carmichael*.

Yet, in the most recent case on this matter, *Nisbet v Hogg*, the Inner House held that pertinents will not be bound by a bounding description even if it expressly binds the principal area and the pertinents.

In summary it is argued here that the authority on this point is confused and contradictory. As a definite principle cannot be deduced from the case law, it is contended here that the most logical rule should be applied in any future question regarding the hability of pertinents. This logical rule is simply that which holds that pertinents may be restricted by the terms of a bounding description. However, this should only be possible if the bounding description is explicit in stating that the pertinents are subject to a particular restriction.

Having observed the argument for what the law should be in relation to pertinents under the Sasine system, it is necessary to address the impact of the law of land registration on the hability of pertinents. Whilst the Sasine system is still relevant for determining the hability of the foundation writ for first registrations in the Land Register, it is accepted that land registration has a very considerable impact on the understanding of the hability of pertinents in Scots law.

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<sup>944</sup> This understanding also appears to be manifest in the decision of the Inner House in *Compugraphics International Limited v Nikolic* [2011] CSIH 34 regarding the attempted positive prescription of an alleged pertinent of pipes and ductwork which existed almost entirely above ground level. Yet the decision of Lord Bracadale in the Outer House appears to have tended towards the view that pertinents should not be bound by a bounding description unless the bounding description expressly states that the pertinents are bound by the bounding description. See *Compugraphics International Limited v Nikolic* [2009] CSOH 54. However, Lord Bracadale's judgment on this issue was reversed by the Inner House. See *Compugraphics International Limited v Nikolic* [2011] CSIH 34. This case is not discussed further in this thesis as the alleged pertinent did not exist at ground level. This thesis is only concerned with pertinents which exist at surface level. See discussion above at chapter VI, B.

## **K. Land registration and the hability of pertinents**

### **1. The 1979 Act**

It is argued here that the principles which govern the hability of pertinents are a part of Scots property law and should therefore apply to pertinents in both the Register of Sasines and the Land Register of Scotland. Furthermore, the same principles should apply under both the Land Registration (Scotland) Act 1979 and the Land Registration etc. (Scotland) Act 2012. This is an obvious statement of the fact that property law should be consistent within any legal system. It is however accepted that in the case of pertinents consisting of areas of land, the Land Register will usually only include pertinents which have been shown on a plan included in the application to register the principal area in question. If the pertinents do not appear on the plan they will not be registered in most cases.<sup>945</sup> The only exceptions to this would appear to be rights of common property in respect of shared areas of land and certain rights relating to tenement flats.<sup>946</sup> Aside from these exceptions, it would thus appear that many pertinents which exist as additional areas of land under the law of property may not be recognised by the law of land registration.<sup>947</sup> This issue has been highlighted by Professor Rennie.<sup>948</sup> Although the formulation of the 1979 Act appears to suggest that pertinents do not require to be included on the plan at the time of registration, it would appear that this is usually understood by the Keeper as referring to pertinents in the form of servitudes and other pertinents which do not exist in the form of additional

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<sup>945</sup> See: Registers of Scotland Legal Manual para 6.18.1; Registers of Scotland Registration of Title Practice Book para 8.47. This appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. This rule seems to continue by virtue of Sections 4 and 6 of the 2012 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14.

<sup>946</sup> See: Registers of Scotland Legal Manual para 6.18.1; Registers of Scotland Registration of Title Practice Book para 8.47. See also Discussion Paper on Land Registration: Registration, Rectification and Indemnity (Scottish Law Commission Discussion Paper No 128 (2005)) para 5.3. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14.

<sup>947</sup> See Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14.

<sup>948</sup> R Rennie, "Land Registration and the decline of Property law" (2010) 14(1) Edin LR 62, 69-70.

areas of land,<sup>949</sup> with the possible exceptions noted above.<sup>950</sup> This understanding is further backed up by the Keeper's view that general clauses conveying parts and pertinents are otiose.<sup>951</sup> Thus, even though there may be a technical argument that the 1979 Act allowed for the inclusion of all pertinents without inclusion on the map of the principal area under conveyance, it would appear that pertinents have been understood in a restricted sense as not including surface level pertinents consisting of land which is held in exclusive ownership.<sup>952</sup>

## 2. The 2012 Act

It might be suggested that the system of registration which is now operating under the Land Registration etc. (Scotland) Act 2012 may allow for the possible inclusion of pertinents in the Land Register, even if they are not shown on the title plan. This could

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<sup>949</sup> See: Registers of Scotland Legal Manual para 6.18.1; Registers of Scotland Registration of Title Practice Book para 8.47. This also appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. Furthermore, this is reflected in the understanding of the concept of pertinents found in the Scottish Law Commission Discussion Papers and Report which examined land registration under the 1979 Act and which preceded the 2012 Act. See: Discussion Paper on Land Registration: Void and Voidable Titles (Scottish Law Commission Discussion Paper No 125 (2004)) paras 2.4, 5.20 and 5.36; Discussion Paper on Land Registration: Registration, Rectification and Indemnity (Scottish Law Commission Discussion Paper No 128 (2005)) paras 5.3, 5.5, 5.28, 7.29 and 7.37; Discussion Paper on Land Registration: Miscellaneous Issues (Scottish Law Commission Discussion Paper No 130 (2005)) paras 2.6, 4.3, 4.7, 4.8, 4.10, 4.11, 4.12, 4.21, 4.26, 4.32 and 4.45; Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25, 4.28, 4.58, 5.14, 6.25, 7.24, 7.29, 10.3, 10.8, 10.9, 10.10, 10.13, 11.6, 13.24, 17.42, 17.45, 17.46, 22.6, 22.27, 22.28, 22.30, 23.32, 33.49, 36.2 and Selective Glossary definition of pertinent.

<sup>950</sup> See: Registers of Scotland Legal Manual para 6.18.1; Registers of Scotland Registration of Title Practice Book para 8.47. This also appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14. Furthermore, there also appears to be some allowance for pertinents existing in the form of areas such as cellars, but this would not appear to additional areas of land which exist at ground level. See again: Registers of Scotland Legal Manual para 6.18.1; Registers of Scotland Registration of Title Practice Book para 8.47.

<sup>951</sup> Registers of Scotland Legal Manual para 6.18.1; Registers of Scotland Registration of Title Practice Book para 8.47.

<sup>952</sup> See: Registers of Scotland Legal Manual para 6.18.1; Registers of Scotland Registration of Title Practice Book para 8.47. This also appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. Furthermore, this is reflected in the understanding of the concept of pertinents found in the Scottish Law Commission Discussion Papers and Report which examined land registration under the 1979 Act and which preceded the 2012 Act. See: Discussion Paper on Land Registration: Void and Voidable Titles (Scottish Law Commission Discussion Paper No 125 (2004)) paras 2.4, 5.20 and 5.36; Discussion Paper on Land Registration: Registration, Rectification and Indemnity (Scottish Law Commission Discussion Paper No 128 (2005)) paras 5.3, 5.5, 5.28, 7.29 and 7.37; Discussion Paper on Land Registration: Miscellaneous Issues (Scottish Law Commission Discussion Paper No 130 (2005)) paras 2.6, 4.3, 4.7, 4.8, 4.10, 4.11, 4.12, 4.21, 4.26, 4.32 and 4.45; Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25, 4.28, 4.58, 5.14, 6.25, 7.24, 7.29, 10.3, 10.8, 10.9, 10.10, 10.13, 11.6, 13.24, 17.42, 17.45, 17.46, 22.6, 22.27, 22.28, 22.30, 23.32, 33.49, 36.2 and Selective Glossary definition of pertinent.



be suggested on the basis that the underlying deed which gives rise to the registration of the title number in question may be examined in order to rectify inaccuracies in the register.<sup>953</sup> Therefore, it may be possible to argue that a pertinent could be ‘latent’ on the Land Register in that it might not be shown on the title plan for a property but that it could still exist in written form on the underlying deed which gave rise to the title number in question. Thus the pertinent would not have been eliminated by virtue of non-inclusion on the title plan. Rather, it would be open for a party wishing to have the alleged pertinent included on the title plan to present a plan depicting the alleged pertinent, claim possession of the pertinent for the requisite period of time, and argue that the deed which grounded the original registration was habile to include the alleged pertinent. Thus an attempt to include such an alleged pertinent might appear to be possible as a form of rectification under the 2012 Act.<sup>954</sup>

However, given the complexity of the steps involved in the above argument, it remains to be seen whether many, or indeed any, parties would be prepared to spend the time and money required to attempt such a rectification. It would not seem impossible, but might perhaps seem unlikely. Thus it might be suggested that the change from the system of registration which operated under the 1979 Act to the system of registration which now operates under the 2012 Act may not actually serve to reinvigorate the law of pertinents. It would seem highly likely that the emphasis would remain on making a detailed plan based depiction of all possible areas included in a property at the time of first registration on the Land Register.<sup>955</sup> It would only be in a situation in which a serious omission had occurred that any attempt to rely on a latent pertinent might be made in order to include an additional area on the Land Register.<sup>956</sup>

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<sup>953</sup> Sections 65 and 80-85 of the 2012 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) Parts 17 and 18.

<sup>954</sup> Sections 65 and 80-85 of the 2012 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) Parts 17 and 18.

<sup>955</sup> This appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. This rule essentially seems to continue by virtue of Sections 1-13 of the 2012 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14.

<sup>956</sup> However, Section 16 of the 2012 Act does make allowance for pertinents which relate to tenement flats and which are not included on the title plan for the flat in question. I am grateful to Professor George Gretton of the University of Edinburgh for highlighting the potential importance of this allowance under the 2012 Act.

### 3. *PMP Plus Ltd and Lundin Homes Ltd*

A further outworking of the marginalisation of positive prescription and pertinents is seen in the cases of *PMP Plus Ltd v Keeper of the Registers of Scotland*<sup>957</sup> and *Lundin Homes Ltd v Keeper of the Registers of Scotland*.<sup>958</sup> The current position following these cases would appear to be that, as a consequence of the rigid nature of land registration, there is very little room for conveyancing ambiguities to be clarified by possession based on a deed habile to include pertinents. This is not surprising as, in like fashion, it is only possible in very limited circumstances for possession based on a habile deed to be used clarify the extent of a principal area in the Land Register.<sup>959</sup> This marginalisation of positive prescription seems entirely consistent with the nature of a land registration system in which a plan is essential, such as that found in Scotland under the 2012 Act.<sup>960</sup> Such consequences appear to be inevitable, as is particularly manifest in other plan based registration systems such as England<sup>961</sup> and Germany.<sup>962</sup> The German model of land registration only allows for acquisitive prescription to take

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<sup>957</sup> *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2; 2009 GWD 5-83. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25, 3.26, 5.28, 6.1 to 6.34, 13.8, 13.31, 17.10, 37.30, 37.33 and 37.40.

<sup>958</sup> *Lundin Homes Ltd v Keeper of the Registers of Scotland* 2013 SLT (Lands Tr) 73; 2013 GWD 26-532.

<sup>959</sup> This appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. This rule essentially seems to continue by virtue of Sections 1-13 of the 2012 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14. However, it may be possible for possession to be used to clarify the extent of the principal area as the cadastral map contains a small degree of ambiguity in relation to all boundaries by virtue of the fact that it is a scaled representation of the position on the ground. Hence, possession may have a role in defining the exact location of boundaries in the Land Register. The cadastral map is governed by Sections 11-13 of the 2012 Act. I am grateful to Professor George Gretton of the University of Edinburgh for highlighting this possible role for possession under land registration.

<sup>960</sup> This appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. This rule essentially seems to continue by virtue of Sections 1-13 of the 2012 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14.

<sup>961</sup> The English land registration system provides for the conclusive quality of the land register: Section 58(1) of the Land Registration Act 2002. See also E J Marais, *Acquisitive prescription in view of the property clause* (unpublished doctoral thesis, University of Stellenbosch, 2011) at 9.

<sup>962</sup> The *Bürgerliches Gesetzbuch* states that the *Grundbuch* is presumed to be correct. See *BGB* § 891 and § 892. See also Marais, *Acquisitive prescription in view of the property clause* at 9.

place in an extremely limited range of circumstances.<sup>963</sup> Likewise, the English model is now highly restrictive in relation to adverse possession.<sup>964</sup>

With regard to the consequences of the *Lundin Homes* decision, it is not clear who does own areas which would have been available as pertinents under the Sasine system but which are not available as pertinents in relation to the appropriate principal areas under land registration.<sup>965</sup> All that can be said is that land registration is much more restrictive than the Sasine system with regard to the concept of hability and with regard to positive prescription in general.<sup>966</sup>

#### **L. Policy justification for the Sasine allowance of pertinents and policy justification for the reduced allowance for pertinents under land registration**

Historically, as seen above, it was possible for conveyancing uncertainties to be tidied up by possession based on a deed which could be construed as habile to include the area in question. Thus, as any deed which did not expressly exclude pertinents was habile to include pertinents, a wide allowance was made for the positive prescription of pertinents. However, positive prescription of pertinents was only possible if the principal area to which the pertinents adhered was adequately described in a deed. Thus, under the Sasine system it could be argued that the Scots system maintained a balance between allowing a wide possibility for positive prescription of pertinents whilst simultaneously preventing the positive prescription of any area without a written deed. Thus it was not possible to prescribe a pertinent without a deed to identify the principal area. Possession alone could prescribe nothing in Scots law.

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<sup>963</sup> BGB § 900 and § 927. See also W G Ringe ‘Acquisition of land by Adverse Possession under German law’ at 55-61 in *Report on Adverse Possession by the British Institute of International and Comparative Law for Her Majesty’s Court Service* (British Institute of International and Comparative Law, 2006).

<sup>964</sup> Land Registration Act 2002 ss. 58 and 96 and Schedule 6. See also Marais, *Acquisitive prescription in view of the property clause* at 111-114.

<sup>965</sup> A Todd “Here comes the flood?” (2013) 10 JLSS 35. See also discussion of these issues at: <http://www.legalknowledgescotland.com/?tag=land-registration> (last accessed on 18/09/14).

<sup>966</sup> See also *Miller Homes Ltd v Keeper of the Registers of Scotland* 2014 GWD 21-406. In this case it appears that the Lands Tribunal held that a description was habile to include an area if the area in question was formed by a developer at the time of the grant of the disposition containing the description. However, it was also held that a description would not be habile to include an area if the area in question was not formed by a developer at the time of the grant of the disposition containing the description. See also discussion of this case at: <http://www.legalknowledgescotland.com/?tag=lands-tribunal> (last accessed on 18/09/14).

Therefore, the existence of the deed in relation to the principal area provided some degree of publicity and some degree of warning to third parties that pertinents might also be owned by the owner of the principal area in question. Hence, Scots law was relatively restrictive in its allowance for the positive prescription of pertinents<sup>967</sup> and this restrictiveness was supplemented by judicial decisions which may have overstated the restrictions on the positive prescription of pertinents.<sup>968</sup>

However, with the advent of land registration, particularly in the system which operated under the 1979 Act, and also in all likelihood under the 2012 Act, the allowance for the positive prescription of pertinents would appear to have been very seriously curtailed, indeed, under the 1979 Act it would appear to have been largely eradicated.<sup>969</sup> Thus it might be argued, that Scots law, even under the 2012 Act, is overly restrictive in this matter. It would appear that inadvertently omitted pertinents may only be reunited with the appropriate principal areas in the Land Register if extensive legal work, and possibly a generous interpretation of the deeds which underlie registered titles, is undertaken.<sup>970</sup> This may reflect a wider problem which occurs when there is a requirement for a deed in order to found positive prescription: there are situations in which possession and ownership may never be reunited. This may be a sensible restriction in some instances. However, it may also have the result that an area of land may sensibly appear to adhere to another particular area, yet it may be the case that there is no opportunity to allow for such areas to be united other than by a corrective conveyance.<sup>971</sup>

Thus, it might be argued that Scots law should consider a possession only based form of positive prescription to prevent the crystallisation of long term title problems in the Land Register. It could even be argued that the Scots law insistence on a written deed to found prescriptive possession has been problematic in that it has created a great

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<sup>967</sup> As compared to systems which allow for positive prescription of land without any reference to a written deed. See for instance South Africa (Prescription Act 1969 s.1) and France (Art 2262 *Code civil*).

<sup>968</sup> See for instance the *ratio* of *Gordon v Grant* discussed above at chapter VI, F, 3.

<sup>969</sup> This appears to be the consequence of the wording of Sections 3, 4 and 6 of the 1979 Act. This rule essentially seems to continue by virtue of Sections 1-13 of the 2012 Act. See also Report on Land Registration (Scottish Law Commission Report No 222 (2010)) paras 3.25 and 5.14.

<sup>970</sup> See chapter VI, K, 2 above.

<sup>971</sup> However, Section 16 of the 2012 Act does make allowance for pertinents to be preserved in relation to tenement flats, even if they are not included on the title plan for the flat in question.

degree of public dependence on the legal profession as the creators and interpreters of the deeds which are essential for positive prescription, or any transfer of landownership, to occur. This might be seen particularly clearly in the issue of pertinents, in which it is very much a question of legal interpretation as to when areas may be treated as subordinate and ancillary to a principal area. However, under the Sasine system, the deed was arguably a sensible restriction which facilitated third party knowledge of the landownership situation in any particular area.

It might be noted that there seem to have been fewer cases in the twentieth and twenty first centuries in relation to pertinents. This could perhaps be explained by the fact that it was possible from 1924 onwards for maps to be registered in the Register of Sasines.<sup>972</sup> Hence, less reliance may have been placed on possession and the doctrine of pertinents to explain the extent of landownership under foundation writs following this reform.

As may be noted from these final practical comments, the doctrine of pertinents seems to have been of less significance in Scots law since plan based conveyancing has become more prominent. This may appear sensible in creating a system in which ownership is clearly defined and in which third parties can gain information on land holdings in an accessible fashion. However, such advances may come at the price of the crystallisation of conveyancing errors and omissions. As such, it might appear sensible to create some allowance for possession only positive prescription in order to tidy up the irregularities of landownership under land registration.<sup>973</sup> However, the general impression would be that positive prescription is a doctrine which now occupies a less significant place in Scots law and in the wider European context. This will be the focus of the conclusion to this thesis.

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<sup>972</sup> Conveyancing (Scotland) Act 1924 s.48.

<sup>973</sup> I am grateful to Professor George Gretton of the University of Edinburgh for suggesting the idea of positive prescription based on possession alone as a possibility for Scots law.

## Chapter VII - Conclusion

Each of the chapters of this thesis has contained a conclusion and it is unnecessary to rehearse the contents of those conclusions here. It is sufficient to observe that the Scots law of positive prescription of landownership has a distinct character and that this character is particularly manifest in the longstanding requirement for a written deed in order to commence positive prescription. The historical development of Scots law in this area was analysed in the first three chapters of this thesis and the doctrinal history of three central aspects of the positive prescription of landownership in Scots law was analysed in the fourth, fifth and sixth chapters.

In the doctrinal chapters it was observed that concepts had been developed under the Sasine system in relation to *ex facie* validity and hability. It was seen that these concepts had been applied with varying degrees of consistency and that they are now of less importance due to the advent of land registration. However, it was also seen that they are still of some relevance, even in relation to the Land Register.

It was observed in the fourth chapter that the concept of *ex facie* validity had a clear and definite formulation, but that this clarity has fallen from view during the recent past. In the fifth chapter it was observed that, in relation to the principal area described in a foundation writ, the concept of hability is relatively clear and continues to be applied with a fair degree of consistency in current times. However, it was noted that the law of boundary descriptions is an area closely related to the concept of hability and that Scots law does not contain a clear formulation of the hierarchy of different forms of boundary descriptions. Finally, in chapter six it was seen that, in relation to the pertinents which may be included in a foundation writ, the concept of hability is unclear and is often applied in an illogical manner. However, there have been some important instances in which a logical approach has been applied.

In summary, the Scots law of positive prescription of landownership contains some clear principles of interpretation. However, it also contains some areas of relative confusion. Despite these instances of confusion, Scots law has maintained an important emphasis on the need for publicity and third party awareness of landownership. This has been made possible by the requirement that a deed must be

recorded in order to commence the prescriptive period. This has even been maintained in relation to pertinents to the extent that, even if pertinents do not require to be expressly mentioned in a recorded deed, they can only exist if they relate to a principal area which is described in a recorded deed.

Furthermore, Scots law has not required good faith in relation to the positive prescription of landownership.<sup>974</sup> This raises questions regarding the morality of positive prescription, but avoids the evidential issues and problems which arise when good faith is relevant for positive prescription.<sup>975</sup> Such issues are perhaps reflected in the fact that even jurisdictions which require good faith often dispense with the good faith requirement if a longer period of possession is accomplished.<sup>976</sup>

With regard to the impact of land registration, it was observed that, as technology has advanced, it has become possible for jurisdictions, including Scotland, to attempt to determine landownership by means of land registration, with less emphasis placed on the question of the actual possession of land itself.<sup>977</sup> However, as observed with regard to the 2012 Act, there is a continuation of the role of positive prescription in instances in which it is utilised in order to validate deeds which would otherwise remain permanently invalid.<sup>978</sup> Thus, whilst perhaps reduced in importance, positive prescription of landownership remains a part of Scots law.

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<sup>974</sup> See discussion above at chapter II, C, 3 and chapter II, F.

<sup>975</sup> See for instance Jolowicz and Nicholas, *Roman Law* 155.

<sup>976</sup> See chapter II, F.

<sup>977</sup> This is seen in Germany and England. See discussion in chapter VI, K, 3.

<sup>978</sup> This approach has some similarity to that which is followed in Germany. See discussion in chapter VI, K, 3.

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