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**NOTHING SO PRACTICAL AS A GOOD THEORY: FESTSCHRIFT FOR GEORGE L GRETTON, Ed by Andrew J M Steven, Ross G Anderson and John MacLeod**

Edinburgh: Avizandum (<http://www.avizandum.co.uk>), 2017. xiv + 418 pp.  
ISBN 9781904968870. £40.

This is an extraordinary book in honour of an extraordinary academic. The former is spoken to by the range of chapters contributed by individuals from various walks of legal life and corners of the globe. The latter is also demonstrated by the spread of contributors, and is evidenced by the lengthy bibliography of work towards the end of the book. The affection and esteem held for Professor George Lidderdale Gretton was further corroborated by a well-attended conference (at which the book was launched). I was lucky enough to attend that conference and my attendance gives a certain insight into some of the papers which were spoken to on the day. However, the book stands alone for readers who were unable to be there.

As might be expected in a book with so many contributors, the chapters display differences in style and subject. Fortunately, and most importantly, none fall short in terms of substance. All make welcome contributions to the topics discussed. Some authors are a bit less Gretton-centric than others: for example, David Johnston and Lars van Vliet simply offer insightful essays on their respective subjects, namely the *auctor in rem suam* principle and the treatment of double sales in French law. Others use George's work as a springboard for further analysis. Some offer personal anecdotes: I enjoyed Jan Peter Schmidt's recollection of a game of chess he played against George. The text conveys a sense that many contributors enjoyed themselves: witness Laura Macgregor's adaptation of a Star Trek misquote when she describes how agency sits with Scottish partnerships: "It's agency, Jim, but not as we know it" (94). And there are tangents in the book that are a joy: Hector MacQueen brings the tale of an undelivered deed to life in a glorious historical footnote detailing that a failure to deliver was actually the result of patricide (103-104). Tempting as it is to recount more content in this review, it would be a disservice to paraphrase all that caught my eye. I will simply applaud the writers for their efforts and the editors for allowing the freedom for such flourishes.

As to the substantive content, part one is on "case law". Other than George's own reflections towards the end of the book, this is the sole part that is not based on a traditional doctrinal category. Its *sui generis* chapter is an exhortation by John Blackie for Scots lawyers to read sixteenth and seventeenth century case law. That seems like an ambitious quest, but he makes a convincing case. His study around the remedy of division and sale in situations where a co-owner seeks to exit the ownership arrangement, and whether a co-owner can buy out the other co-owner(s), is one example of his ammunition. His observations on one of George's favourite words – "patrimony" – are enlightening.

Part two is on the law of evidence. This topic's inclusion in the book might be surprising to some, given the specialisms George went on to develop, but Gerry Maher expertly riffs off an old article by a young Gretton on burdens of proof and special defences. I found myself drawn into his fascinating chapter. I suspect the main danger Maher's essay faces is not being noticed by those who could be thought of as his target audience, namely specialists in criminal law and evidence, who may not expect to find such an essay in a collection celebrating a private lawyer. If this review plays a part in staving off that risk, it will have served a valuable function.

Part three begins with a chapter by Ross Anderson, which he describes as a "superficial dusting-down of a forgotten doctrine". He is too modest. Anderson's contribution, entitled "A Whimsical Subject: *Confusio*", is Grettonian. (That neologism is MacQueen's, not mine.) In an essay that uses copious authority from a variety of legal

systems, Anderson explains why his subject matter is indeed whimsical, before setting out two distinct principles threading through the doctrine which comes into play where a debtor in an obligation also becomes the corresponding creditor, or where the holder of a subordinate real right in a thing also becomes its owner, in terms of “validity” (of a legal act) and “consequences” (how that act affects other matters). To my mind, this chapter and his co-editorship discharge rather than suspend the “many and deep” debts Anderson declares he owes George.

Eric Clive’s essay looks at the notion of a “requirement”, using the Unidroit *Principles of International Commercial Contracts* and its commentary as his foil. Clive acknowledges the relevant text he critiques is “excellent and full of insight”, but highlights particular passages where it mischaracterises a requirement (i.e. a need to do something before a legal position changes) as an obligation (i.e. something a person must do, or face legal consequences). The one unfair criticism of this essay I might offer is its relative lack of discussion about language (and other languages) as compared to what accompanied Clive’s presentation at the aforementioned conference: the essay only makes brief reference to the German idea of *Obligonheit* (incumbency). I acknowledge this is the most quibbly of quibbles, and the essay should still stand alone for anyone who was not at the conference.

Patrick Hodge offers the first of the book’s contributions by a judge, on the development of the law of contract. He swings the lovely image of a pendulum into his chapter, explaining how courts have policed wayward swings of this pendulum in matters of ascertainment of contractual terms (through interpretation, implication of terms, and rectification) and regulation of the contract at common law (through penalty clauses and legality).

Niall Whitty’s chapter on mandates to pay is characteristic of the book, providing further thorough analysis of its subject matter and making use of Gretton’s scholarship in the process. He works through older and comparative sources before considering contemporary issues of electronic funds transfers. In terms of future work in this area, Whitty’s essay set me thinking about cryptocurrency: what would the implications of a misplaced Bitcoin payment be? The comprehensive contributions of Macgregor and MacQueen have been alluded to above. Both offer observations about future reform. Macgregor argues Scottish partnership law should be near the top of the issues for the Scottish Law Commission to consider, although it can be noted that it does not feature in the recently announced Tenth Programme of Law Reform. Meanwhile, and notwithstanding recent statutory reforms, MacQueen ponders whether there might be wider recognition of party autonomy when it comes to delivery.

This part also contains Peter Webster’s consideration of the continued existence of the contract of lease. This partially continues a scholarly dialogue between Douglas Bain and Catherine Bury (“A, B and C to A, Revisited” 2013 *Jur. Rev.* 77) and Lord Gill’s analysis in another festschrift (Frankie McCarthy, James Chalmers and Stephen Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015)). In contrast to Lord Gill, Webster argues that a (personal) lease can still exist between a landlord and tenant even where the arrangement falls short of the requirements of the Leases Act 1449 or the Registration of Leases Act 1857. The location of this chapter is also worthy of comment: Webster’s case evidently convinced the editors to file it under “obligations”, a positioning land lawyers reading this book will need to stay wise to. Land lawyers should also be careful not to miss Cusine’s exposition of the doctrine of coming to the nuisance, which is also (properly) in the part on obligations. Finally, the positioning of Johnston’s chapter on *auctor in rem suam* might surprise some, who may associate the doctrine with the rules applicable to trustees. Johnston’s study maps the Roman sources (and the rules relating to tutor and pupil, to prevent a tutor acting where he was personally interested) then explains how Scots law came to diverge from it, including in circumstances beyond a trust.

Part four is on the law of property. I draw particular attention to the contribution of Kenneth Reid as I fear his contribution might not reach all interested readers. This is not because lawyers of the relevant specialism are unlikely to find it; rather, my concern is those involved in wider questions of land reform, land policy and transparency of ownership other than lawyers might not. Questions of transparency and follow-on questions of accountability influenced the passage of Part 3 of the Land Reform (Scotland) Act 2016. This provides a framework for a register of controlling interests in land. Reid's essay shows that Scotland was surprisingly close to introducing a system for disclosing the beneficial ownership of any landowning entity as part of the Land Registration (Scotland) Act 1979, but that proposal was dropped from the relevant bill and forgotten. Some forty years later, issues of transparency remain. Without meaning to criticise, I only wish this essay had been published sooner, although now Reid has brought the matter to light this might influence future development.

Three chapters consider "rights" of security. Those inverted commas are prompted by the work of Lionel Smith, who suggests that the core of proper security is not a right at all, but rather a set of Hohfeldian powers and privileges. This curiously named chapter – "Powership and its objects" – is yet another offering of deep thinking which builds on George's work. In a way, it sits alongside Clive's study of requirements, owing to its detailed consideration of what words and concepts mean, albeit Smith's focus is very much on (real) security interests. Unperturbed by Smith's analysis of powers and privileges in security, Andrew Steven offers a chapter entitled "George Gretton and the Scots Law of Rights in Security". Funnily enough, this builds on George's immense contribution in this area, which has culminated in the recent Scottish Law Commission Report on Moveable Transactions. Steven's chapter serves as useful background to that report; a report which he and George can be proud of. The third submission on security comes from John MacLeod, who revisits another Gretton greatest hit on the concept of security with aplomb. This is another essay that is – dare I say it – Grettonian. I particularly appreciated MacLeod's comparison of 1987 Gretton and 2017 Gretton. The sole meaningful observation this reviewer might offer to this comprehensive coverage is a slight regret that these chapters did not cross-refer to each other more; but again, that is to quibble.

The remaining property chapters are on standalone topics. John Lovett considers "tacking", which is the Louisianan term for joining periods of possession by different individuals together for the purposes of acquisitive prescription. Lovett's engaging chapter concludes by noting how Scots law could have avoided the litigious saga that forms his backdrop, in this scenario because the Prescription and Limitation (Scotland) Act 1973 would have forced early consideration of the authenticity of a disputed deed. Intriguingly, Gretton has recently offered a counterpoint to this in a different edited collection, where he argues the Scots law requirement of a "colour of title" could be sensibly abolished or restricted ("Reforming the law of prescriptive title to land" in Douglas Bain, Roderick R M Paisley, Andrew R C Simpson and Nikola Tait, *Northern Lights: Essays in Private Law in Memory of Professor David Carey Miller* (2018)). Lars van Vliet offers a Dutchman's perspective on French law in English. His study relates to what Scots property lawyers call the "offside goals" rule. His mapping of the fluctuations of Roman law, the writing of Baldus, then subsequent French approaches is quietly efficient, especially in its analysis of the most recent French reform that was implemented in 2016. Elizabeth Cooke then provides perspective on English land law and specifically land registration litigation. Her view on the English tribunal system is timely, especially as Scotland has recently moved much of its decision making to the tribunal system. I confess I found it hard to visualise the tribunal system Cooke was describing at times, although this is more to do with the structure itself than her description of it. Her perspectives as the Principal Judge of the Land Registration Division of the First-Tier Tribunal on dispute resolution are particularly welcome. To those observations, the thoughts of Robert Rennie as occasional expert determiner in boundary disputes can be added. His robust analysis of such disputes, with his comparison between Sasine and Land Registered

titles and attempts to tease out principles for disputes involving the latter, will be of use to Scots practitioners. The last essay in this part comes from Sarah Wolffe (the book's second judicial contributor) and James Wolffe (the current Lord Advocate). They supply an essay on a topic that might seem obscure, namely property problems in building contracts. This is another study that will prove helpful to those in practice when faced with difficult questions around ownership of building materials, which could feasibly be of commercial rather than purely academic concern.

The chapters on succession begin with Alan Barr's offering on the mental capacity needed to write a valid testament: the will to make a will, if you will. In another essay of both practical and theoretical significance, Barr persuasively argues on numerous fronts that there should be no power for an authorised individual to write a will for an adult with incapacity. Jan Peter Schmidt's paper looks at universal succession, explaining what that is generally thought to mean and how creditors are catered for where such a complete transfer takes place. Alexandra Braun probes at the penumbra of succession law, looking at devices straddling the boundaries between succession law and other doctrinal areas like property, contract, trusts and indeed company law. Reinhard Zimmermann and Jakob Gleim offer another comparative masterpiece on "common calamities"; that is to say, a situation where two people die together but with no indication of the order of death. They set out why it is most appropriate for a legal system not to presume any order of death in such circumstances. Again, I am restricted to one minor observation: would it not have been possible to make more reference to the Succession (Scotland) Act 2016, which now reflects their preferred position? The final chapter in the succession part is from Roddy Paisley, which is surely the most comprehensive essay on the meaning of the word "ademption" written in the English language.

Marius de Waal begins the part on trusts, with a targeted and effective comparison of specific aspects of trust governance in Scotland and South Africa. Scots readers will be interested in his proposals for reform in relation to: the permissibility of a trustee's resignation in the face of a prohibition in the trust deed; the formalities of a resignation; and in relation to judicial removal of trustees. The other chapter in this part is provided by James Drummond Young, offering a vital perspective on the use of trusts in modern commercial practice. In the process, he makes the case that an express trust is much preferred to an implied trust, and gives a valuable perspective on the views expressed by Lord Hope in *Lehman Brothers International (Europe) v CRC Credit Fund Ltd* [2012] UKSC 6. Granted, this is Lord Drummond Young writing extra-judicially, but his remarks here will be impossible to ignore in any similar future disputes. Whilst Lord Drummond Young's essay is saved until the end, he also appears earlier in the book. MacLeod refers to his judicial output, scrutinising his treatment of diligence in *McMillan v T Leith Developments Limited* [2017] CSIH 23. More intriguingly, his pre-bench career is referred to by Steven, when readers discover that Mr Drummond Young acted as advocate at various stages of the "all sums" retention of title clause saga. The book has several delightful revelations such as this.

The final substantive words in the book fall to the honoree. Again, it would be both wrong and unwise to seek to paraphrase them in this short review, but his championing of comparative law, which this collection undoubtedly adds to, and his (philosophical) observations on legal scholarship are noteworthy. Also of interest are George's observations on academic life and his attempt to explain the changes that have transpired since he started at the University of Edinburgh in 1981. Readers are told the story is one of "evolution, not revolution" (395). This put me in mind of an article in the *Journal of the Law Society of Scotland* ("The Shape of Things to Come" (2010) 55(3) JLSS 22), where George used that very phrase twice as he sought to reassure the Scottish legal profession that they had nothing to fear from reforms to land registration law. It is almost as if George was trying to underplay the law reform exercise to which he contributed so much. Readers of this book will be left in absolutely no doubt as to the impact George has had.

Alas, the book is not error free. The occasional rogue punctuation mark, formatting error or typo distracts the reader. None of the mistakes I spotted have a material impact. That said, I will highlight two unfortunate errors: the incorrect use of “dispones” rather than “disponee” in one essay briefly confounded me, and for some reason the contents page suggests Blackie’s study is of seventeenth and eighteenth, rather than sixteenth and seventeenth, century case law.

The final words in this review are given over to another factor which makes this book so attractive, namely the picture worth a thousand words that adorns the book’s cover, of the Old College Quad (by Paul Dodds, reproduced with the permission of the University of Edinburgh). That the Quad is resplendent with a lawn rather than a car park is yet another thing that was influenced by George, who made a nuisance of himself to champion this change of use. (Did George come to the nuisance? Perhaps Cusine’s chapter can offer some guidance, if so.) This landscape itself now offers tribute to a man who did so much for Scottish land law. He can be proud of that. In turn, the editors and contributors to his festschrift can be proud of the tribute they have offered to him.

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