

## The Mouse and the Snail: Reappraising the Significance of *Donoghue v Stevenson* Part I – A Case Worth Celebrating?

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The case of *Donoghue v Stevenson* 1932 SC (HL) 31 has been hailed as ‘probably the most famous case in the whole Commonwealth world of the Common Law’.<sup>1</sup> It has been described, by judges and jurists alike, as a significant part of legal ‘folklore’, provided of course that lawyers are understood to be a ‘folk-group’.<sup>2</sup> While English law recognised a tort (or ‘torticle’)<sup>3</sup> of ‘negligence’ prior to this decision,<sup>4</sup> the courts of that jurisdiction would in fact permit actions for such only in a limited (if not necessarily closed) series of categorical instances such those involving occupier’s liability and road traffic collisions, amongst other things,<sup>5</sup> with no attempt made to rationalise or find any common denominator between the categories (see the discussion in *Candler v Crane, Christmas and Co.* [1951] 2 KB 164, at 188). Hence, it has been said that ‘before 1932 the law of torts had developed without any structure’<sup>6</sup> and that the case law under this topic-heading was ‘rigidly formulaic’.<sup>7</sup> *Donoghue* – and in particular the judgment of Lord Atkin therein – is thus celebrated as the case ‘in which the new tort of negligence came to be recognized unequivocally by the House of Lords’<sup>8</sup> and the decision which galvanised the receipt of (at least some degree of) general principle into a legal system which has historically been distrustful of what might be termed ‘high-level theory’.<sup>9</sup>

In contradistinction to their southern partners in the Union, Scots lawyers (and indeed laypersons) have not, traditionally, been hostile to the development of principle and theory.<sup>10</sup> If anything, the opposite has long been the case; ‘it used to be noted that visitors to Scotland without a taste for metaphysics were liable to be nonplussed by the questions publically debated, because of the tendency for arguments about mundane matters to develop into arguments about first principles’.<sup>11</sup> Accordingly, it has historically been something of a point

<sup>1</sup> Alan Rodger, *Mrs Donoghue and Alfenus Varus*, [1988] Current Legal Problems 1, at 2.

<sup>2</sup> See Joel Conn, *Gingerlore: The Legends of Donoghue v Stevenson*, [2013] Jur. Rev. 265; Lord Hope of Craighead, *James McGhee: A Second Mrs. Donoghue?* [2003] CJL 587.

<sup>3</sup> See Bernard Rudden, *Torticles*, 6 Tul. Civ. L.F. 105 (1991-1992)

<sup>4</sup> Rachael Mulheron, *Principles of Tort Law*, (2<sup>nd</sup> edn.) (Cambridge University Press, 2020), para.2.1.

<sup>5</sup> Matthew Chapman, *The Snail and the Ginger Beer: The Singular Case of Donoghue v Stevenson*, (Wildy, Simmonds and Hill, 2010), at 88.

<sup>6</sup> James Edelman, *Fundamental Errors in Donoghue v Stevenson* (Speech to the Friends of University of Western Australia, London, July 2014).

<sup>7</sup> Chapman, n.5, at 89.

<sup>8</sup> Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford University Press, 1990), at 911.

<sup>9</sup> See the discussion in Lady Hale, *Principle and Pragmatism in Developing Private Law*, Cambridge Freshfields Lecture, 7<sup>th</sup> March 2019, at 2.

<sup>10</sup> See the discussion in Alasdair MacIntyre, *Whose Justice, Which Rationality?* (Duckworth, 1988), 226-231.

<sup>11</sup> The Scots, as Cobbett once observed, have as a rule cleaved to the ‘absurd idea that the way to improve the condition of the working man [is] not to give him “bacon” with a small “b”, but “Bacon” with a big “b”’; see George Davie, *The Crisis of the Democratic Intellect*, (Polygon, 1986), at i.

of pride for Scots to say that their legal system is rooted in principle rather than practice or mere expediency.<sup>12</sup> Accordingly, while ‘the development of the Common law has been founded on actions – notably those of trespass and case – rather than deduced from general principles... Scots law, both before and after 1795 (when the unreported case of *Gardner v Ferguson* was decided), and before and after *Donoghue*, has conformed more closely to the Civilian norm, rather than to the Common law’.<sup>13</sup> Although *Donoghue* was a Scottish case which started life in the Court of Session, and it has been said that the Scots ‘revel’ in the decision’s renown, McBryde notes that ‘the fame of the case is really down to a Welsh judge (who the Australians may well wish to claim as ‘Australia’s most famous legal expert to England’)<sup>14</sup> with a strong Christian belief who was intent on making a general statement of principle applicable in both Scots and English law’.<sup>15</sup> Indeed, as Lord Rodger revealed in a 1992 article, at least one of the Scottish judges (Lord MacMillan, who, with Lord Atkin and the second Scot (Lord Thankerton), formed the majority) was (through whatever means)<sup>16</sup> persuaded to substantially re-write his judgment so as to ‘excise the examination of Scots law which he originally placed at the forefront of his speech’<sup>17</sup> and instead to find that in *Donoghue*’s case ‘there is no specialty of Scots law involved, and that the case may safely be decided on principles common to both systems [i.e., Scots and English]’ (1932 SC (HL) 31, at 71).

From the very beginning of the life of *Donoghue* (that is, the case and resulting folk-tale, not May Donoghue the person), it was taken as an article of faith that ‘the case could proceed on the basis that Scots law and English law were the same’ and indeed ‘no substantial difference in the relevant law of the two jurisdictions could be detected by those experienced counsel’ who argued it before either the Supreme Courts of Scotland or Appellate Committee of the House of Lords.<sup>18</sup> As MacQueen and Sellar note, however, the matter may be less absolute than Lord Rodger suggests; rather than it being the case that counsel could not detect any difference between Scots and English law on the matter, it may instead have been that ‘neither could see any substantial advantage in taking up any differences between Scots and English law’.<sup>19</sup> Indeed, given that Scots law – in 1932 (and before) as in 2022 – ‘recognises neither a law of torts, nor a tort of negligence’, one would think that some doctrinal difference between the two jurisdictions would be discernible. The ‘intellectual superstructure’ of the law of delict (singular), as influenced by Civilian legal thought and jurisprudence, was, at the time of *Donoghue*, and remains today markedly different from the disordered schema of torts recognised by the Common law. As Lord Hope expressed in an oft-quoted (extra-judicial)

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<sup>12</sup> Kenneth McK. Norrie, ‘The *Actio Iniuriarum* in Scots Law: Romantic Romanism or Tool for Today?’ in Eric Descheemaeker and Helen Scott, *Iniuria and the Common Law*, (Hart, 2013), at 49.

<sup>13</sup> Hector L. MacQueen and W. D. H. Sellar, “Negligence” in Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland: Volume 2: Obligations*, at 518.

<sup>14</sup> Edelman, n.6, at 1.

<sup>15</sup> William W. McBryde, *Contract Law: A Solution to Delictual Problems?* [2012] SLT (News) 45, at 45.

<sup>16</sup> Alan Rodger, *Lord MacMillan’s Speech in Donoghue v Stevenson*, [1992] LQR 236, at 246-247; Robin Evans-Jones and Helen Scott, ‘Lord Atkin, *Donoghue v Stevenson* and the *Lex Aquilia*: Civilian Roots of the “Neighbour” Principle’ in Paul J. du Plessis (ed.), *Wrongful Damage to Property in Roman Law: British Perspectives*, (Edinburgh University Press, 2018), at 266-268.

<sup>17</sup> Rodger, *ibid.*, at 239.

<sup>18</sup> *Ibid.*, at 240-241.

<sup>19</sup> MacQueen and Sellar, n.13, at fn.183

passage: '[t]here is no such thing as an exhaustive list of named delicts in the law of Scotland. If the conduct complained of appears to be wrongful, the law of Scotland will afford a remedy even if there has not been any previous instance of a remedy being given in similar circumstances'.<sup>20</sup> Hence, in contrast to the system of 'torticles' which prevails in the Common law world, wherein 'the creation of a new tort is a bold, some would say irresponsible, exercise... to embrace something new within the concept of delict is so much easier'.<sup>21</sup>

While English law was, in 1932, still struggling to escape the legacy of the 'forms of action', and to develop a rationalised account of the place of negligence within the legal system, Scots law had in fact recognised a specific action for the recovery of 'assythment' for 'personal injury' since the foundation of the legal system, as well as a general action for 'damage and interest', extended to cases of 'personal injury', since (at least) the turn of the 18<sup>th</sup> century. This general action, as noted by Lord President Dunedin in *Black v North British Railway Company* 1908 SC 444 (at 453), 'stood side-by-side' with the action for assythment as a means of allowing remedy for damage to 'life, members and health' at the time of Stair, though 'the width of the general obligation... meant that it had the potential to incorporate assythment insofar as the latter was seen to be a purely reparative claim', and later institutional writers (save Erskine) seemed to view assythment as 'the appropriate claim in cases of death and injury'.<sup>22</sup>

While, then, it has been said that 'if either side could have shifted the balance of the argument in their favour by citing some passage from a Scottish institutional writer or from a Scottish case, then they would certainly have done so',<sup>23</sup> the fact that counsel for Mrs. Donoghue appeared content to concede that the law of Scotland was – at the time – as hostile to her claim as was that of England is puzzling: the material to support her claim in the law of delict was manifestly present in Scots jurisprudence (and, As Pillans notes, the famed judgment of Lord Atkin itself is couched in terms 'reminiscent of Erskine', *Institute*, 3, 1 13).<sup>24</sup> Using the Scots authorities which he considered, Lord MacMillan had little difficulty in concluding that 'the law of Scotland is... concerned primarily with the question whether delinquency has been established; if so, it gives redress to the person who has suffered by such delinquency',<sup>25</sup> a finding which, it should be noted, accorded with the observations of Lord Moncrieff who decided the case (in favour of Ms. Donoghue) at first instance.<sup>26</sup>

The reasons why counsel were so quick to concede the equivalence of Scots and English law where such did not in fact subsist have not often been explored in the (copious) literature concerning *Donoghue*, but there has been some reasoned comment on the subject. T. B. Smith and Black suggested that 'the answer lies in the legal imperialism of an English-dominated House of Lords, coupled with the Anglicising tendencies of at least some members of the

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<sup>20</sup> Lord Hope of Craighead, 'The Strange Habits of the English', in H. L. MacQueen (ed.), *Miscellany VI*, (Stair Society, 2009), at 317.

<sup>21</sup> *Ibid.*

<sup>22</sup> Donna W. McKenzie and Robin Evans-Jones, 'The Development of Remedies for Personal Injury and Death' in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland*, (The Stair Society, 1995), at 295.

<sup>23</sup> Rodger, n.16, at 241.

<sup>24</sup> Brian Pillans, 'Delictual Liability at Common Law' in Joe Thomson (ed.), *Delict*, (W. Green, 2007), para.5.09.

<sup>25</sup> Rodger, n.16, Appendix at 249.

<sup>26</sup> See Opinion of Lord Moncrieff delivered when giving judgment on 27<sup>th</sup> June 1930, p.6E.

Scottish bench', while MacQueen and Sellar formed the view that 'the apparent shift in direction of the Scots law of negligence... was in large part the result of a gradual and unsurprising convergence between Scots and English law, not least in the matter of the concept of a duty of care'.<sup>27</sup> Yet though the 'duty of care' concept is now thought to be fundamental in the law of delict and tort alike, its full reception into Scotland was not in fact finalised until the case of *Donoghue*<sup>28</sup> and indeed even within English law itself the 'directional' duty of care concept did not become 'fixed' until the late Nineteenth century, with the case of *Heaven v Pender* (1883) 11 QBD 503.<sup>29</sup> Accordingly, it is thought that far from being inevitable, the apparent convergence of the Scot law and English law as regards negligence was in fact consciously or unconsciously driven by developing Anglicising tendencies within Scottish society and the Scottish legal profession itself: As Evans-Jones and Scott have recently noted, 'during the Nineteenth century... the Scots came to view themselves increasingly as British... this shift in the prevailing political culture had a huge effect on how Scottish lawyers came to regard both the content and methodology of Scottish law... the second reception of laws in Scotland [then] was of English law and the doctrine of *stare decisis*, with the result that significant parts of the Scottish Civilian heritage were either forgotten or actively suppressed'.<sup>30</sup>

At a more practical level, it can be inferred that the concession made by Mrs. Donoghue's legal counsel was made on the back of a similar concession made by counsel in the case of *Mullen v Barr* 1929 SC 461 – a case, famously in the words of Lord Buckmaster, 'indistinguishable from [*Donoghue*] excepting upon the ground that a mouse is not a snail' (at 43). *Mullen* had been determined by the Inner House shortly before Ms. Donoghue's claim was raised and had proceeded on appeal from a Sheriff who had, after noting the 'paucity' of Scots authorities on the topic, determined that he did not 'think that there is any difference between the laws of England and Scotland in respect of actions founded upon negligence to make English authorities inapplicable' (*Mullen*, fn.1) and ultimately recalled the interlocutor of the Sheriff-Substitute, who had found the pursuers' action to be relevant. When the case then came to be determined in the Inner House, it did so on the tacit understanding that cases from South of the Tweed could be cited with abandon.

Yet, given the fragmented, unstructured and unsatisfactory state of English law at the time of *Mullen* and *Donoghue*, and the fact that Scots law had long before these cases were heard developed a 'general principle that loss caused by wrongful acts of the defender is recoverable',<sup>31</sup> that the courts and counsel came to conclude that the Scottish position could be equated with the fettered and rigid position of the Common law tradition must be regretted by any who would hope to see jurisprudence founded in reason. While *Donoghue* might rightly be celebrated as a case 'for which much of the English profession had been waiting for some time' and, indeed, for settling the matter 'once and for all for the entire Common law world',<sup>32</sup> those who are conscious of the fact that Scotland is not a Common law jurisdiction should take pause to consider whether the legacy of *Donoghue* deserves as much adulation in its home

<sup>27</sup> MacQueen and Sellar, n.13, at 544-545.

<sup>28</sup> Pillans, n.24, at para.5.05

<sup>29</sup> Percy H. Winfield, *Duty in Tortious Negligence*, [1934] Colom. L. R. 51, at 57

<sup>30</sup> Evans-Jones and Scott, n.16, at 258.

<sup>31</sup> McKenzie and Evans-Jones, n.22, at 309.

<sup>32</sup> Rodger, n.16, at 246.

nation as it has hitherto received. Certainly, in the early days following the determination of the case, there was some considerable cause for believers in principle to feel optimism; though the case ‘represented a clear milestone into the acceptance of Scots law of the concept of a duty of care’,<sup>33</sup> it also emphasised that ‘the categories of negligence are never closed’ (1932 SC (HL) 31, at 70 (*per* Lord MacMillan)). Though this point has always been ‘somewhat suspect in England’,<sup>34</sup> it is one which might be thought quite trite in Scotland.<sup>35</sup> Accordingly, the initial trajectory of *Donoghue* appeared to suggest that if convergence between the Scots law of delict and English law of tort were to occur, then such would occur on the basis of Scots model.

With the case of *Caparo Industries v Dickman* [1990] 2 AC 605, however, the law of England began the process of reverting to type. As Lord Bridge noted in the course of his speech therein, by 1990 ‘the law [had] moved in the direction of attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes’ (at 618). Following the Australian case of *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, his Lordship concurred with the view of Brennan J. that ‘it is preferable that the law should develop novel categories of negligence incrementally and by analogy with established categories’ (at 618). Though *Caparo* was an English appeal to the UK House of Lords, such was the perceived convergence of Scots and English law that the case has been accepted as representative of the law of Scotland with little, if any, controversy. This has, it is thought, given rise to a clear and present danger that the Scots law of delict will be improperly enslaved by precedent and fragmented into a disparate, unprincipled pigeonholed system of nominate wrongs. As Pillans observed in respect of *Caparo*’s so-called ‘tripartite test’, ‘from a Scots law perspective, it could be said that [the] promotion of “incrementalism” by the House of Lords created the potential for an overly conservative approach to the development of the law of negligence in the sense that what was proposed was a shift in emphasis from deductive to inductive reasoning, based on a categorisation of cases and a compartmentalising of precedents’.<sup>36</sup> Such, it hardly needs to be said, is anathema to a principled system of jurisprudence and, indeed, ‘was from what Lord Atkin was so keen to emancipate the law in his speech in *Donoghue*’.<sup>37</sup>

The issue has been compounded further by the judgment of the UK Supreme Court in the 2018 case of *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, another case which has ostensibly been accepted by Scots lawyers and jurists without critical comment concerning its provenance.<sup>38</sup> In *Robinson*, Lord Reed (notably, a Scot) emphasised that the purpose of *Caparo*’s *ratio* was to ‘repudiate the idea that there is a single test which can be applied in all cases in order to determine whether a duty exists, and instead to adopt an approach based, in the manner characteristic of the Common law, on precedent, and on the development

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<sup>33</sup> Pillans, n.24, para.5.05.

<sup>34</sup> R. F. V. Heuston, *Donoghue v Stevenson in Retrospect*, [1957] Mod. L. R. 1, at 4-5.

<sup>35</sup> As Lord Rodger points out, Lord MacMillan’s famous words ‘were originally penned for Scots law alone’: Rodger, n.16, at 242.

<sup>36</sup> Pillans, n.24, para.5.36.

<sup>37</sup> *Ibid.*, fn.2.

<sup>38</sup> Cameron, for instance, recognises the danger that *Robinson* enjoins the possibility that ‘once a precedent is in place then it will prove resistant to change’, yet he does not doubt the authoritativeness (or otherwise) of Lord Reed’s judgment in *Robinson* as a statement of Scots law: See Gordon Cameron, *Negligence and the Duty of Care; the Demise of the Caparo Test; and Police Immunity Revisited: Robinson v Chief Constable of West Yorkshire*, [2019] Edin. L. R. 82, at 88.

of the law incrementally and by analogy with existing authorities’ (para.21). Accepting such in Scotland would, however, have the effect of radically altering the structure of the law of delict, shattering the unified principle that reparation ought to be afforded for any instance of *damnum injuria datum* and reducing a significant (indeed, ‘the most familiar, and probably... most commonly litigated’)<sup>39</sup> element of Scots delict to a pigeonholed system of nominate wrongs (which might then, recalling Rudden, be termed ‘delicticles’ should the term ‘tort’ itself not be received).<sup>40</sup>

Indeed, as a small – and not particularly litigious – jurisdiction, it might reasonably be inferred that accepting the authority of *Robinson*, and what the case enjoins, would have the effect of wholly assimilating the Scots law of delict with the Common law of torts. Such would not arise as a result of any English ‘Imperialism’ – although such, as the infamous case of *Bartonshill Coal Co. v. Reid* (1858) 3 Macq 266 shows, is not absent from the history of the Scots law of delict – nor from any conscious desire to homogenise the law of all UK jurisdictions, but simply as a result of the weight of sheer numbers, since England alone – to say nothing of the wider Anglophone (and so generally Common law) world – generates a much greater volume of precedents both in absolute numbers and *per capita*. Hence, if Scots law is to be developed ‘incrementally and by analogy with existing authorities’, it seems more likely than not that such authorities (if the word, here, is to be understood as denoting only ‘precedents’, rather than secondary sources of authority) will be drawn from furth of the jurisdiction, with the net effect that ideas rooted in a conception of ‘torticles’, rather than ‘delict’, will come to dominate.

The present author, plainly, takes the view that such would be undesirable and ought to be resisted not only by those who value the Scottish legal tradition, but by those who hold the view that precedent should be, to recall Birks’s memorable phrase, ‘the handmaid of reason’,<sup>41</sup> rather than its governor or fetter. Others may be less circumspect, and view the annexation of Scots delict by Anglo-American tort as desirable for some reason(s) or another (as Whitty recognised, ‘extreme Anglicisers exist but usually tend to keep quiet. When they do speak out it is often *ex facie* to support cross-border assimilation which however in practice often means Anglicisation’),<sup>42</sup> but it is thought that even those who would not mourn the passing of Scots law as a distinct system should be made fully aware of what, exactly, would be lost with its demise. For that reason, then, in the 90<sup>th</sup> anniversary year of the decision in *Donoghue*, the present author has penned four inter-related articles which each consider a number of discrete points collectively demonstrating the distinct character of the Scots law of delict as it pertains to negligent conduct, both historically and presently. Taken together, the articles illustrate that it has always been fallacious to presume equivalence between Scots delict and Anglo-American tort. Although the outcomes of particular cases predicated on negligence, at the time of *Donoghue* as now, might correlate with one another as between Scotland and England, it is not

<sup>39</sup> Brian Pillans, *Delict: Law and Policy*, (W. Green, 2014), para.11.01.

<sup>40</sup> This term appears to have been first used in print by Reid, who noted that ‘the proliferation of “delicticles” [in Scotland] has not entirely obscured the Civilian general principle. Unlike English law, the law in Scotland is not burdened with the legacy of the forms of action’: Elspeth C. Reid, ‘Personality Rights: A Study in Difference’ in Vernon V. Palmer and Elspeth C. Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland*, (Edinburgh University Press, 2009), at 394.

<sup>41</sup> Peter Birks, ‘The Foundation of Legal Rationality in Scotland’ in Robin Evans-Jones (ed.), *The Civil Law Tradition in Scotland*, (The Stair Society, 1995), at 97.

<sup>42</sup> Niall R. Whitty, *The Civilian Tradition and Debates on Scots Law*, [1996] J. S. Afr. L. 422, at 422-423.

correct to conclude from this that the relevant Scots law is ‘the same’ as the law of England on the subject. As a result of this, it is submitted, the dual cases of *Mullen* and *Donoghue* did considerable damage to the fabric of the Scottish legal system.

The present article can thus conclude with a word of caution; Scots lawyers and scholars should treat the case of *Donoghue* with less veneration, and considerably more scepticism, than they have hitherto done. The fame that *Donoghue* has enjoyed in the Common law world has in some measure encouraged the adoption of Anglo-American legal reasoning within Scots delict. Accordingly, the Scottish legal profession has allowed the incremental approach which the English courts sought to escape from in 1932 to creep in through the back door. This is not a development which should be uncritically celebrated; rather, it is one which should give Scots lawyers pause for reflection. The ‘intellectual superstructure’ of the law of delict differs considerably from the taxonomical organisation (or lack thereof) of the Common law world and so, it might be thought, if Scots delict is to retain a coherent or functional ‘intellectual superstructure’ at all then unreflective adoption of Anglo-American precedents ought to be resisted.

The next article in this series will accordingly begin by sketching out that ‘intellectual superstructure’ of the Scots law of delict, with reference to the general action(s) which govern the topic-heading as a whole. Noting that ‘delict’, within the Scottish legal system, subsists under the taxonomical category of the law of ‘obligations’, the article will briefly consider the structure of such, noting that in addition to being organised quite differently from the ‘functionally equivalent’ categories of the Common law, Scots law has consistently recognised both modes and classes of obligation which have not (traditionally, or in some cases, ever) formed part of Anglo-American jurisprudence (see *Ted Jacobs Engineering Group Inc. v Johnston-Marshall and Partners* [2014] CSIH 18, at para.90). From this, it is posited that not only did (at the time of *Mullen* and *Donoghue*) and does (at present) the Scots law relevant to claims of ‘negligence’ and ‘personal injury’ differ considerably from the equivalent position in the Common law world, but that in all cases Scots lawyers would benefit from taking a more holistic view of the law of obligations in factual circumstances which might, in other jurisdictions, be thought of as leading to wholly ‘tortious’ claims. Against this background, then, the forthcoming series of articles seeks to argue that rather than adopting or following an ‘incremental’ approach to the development of the ‘duty of care’ concept, Scots lawyers should return to employing a principally deductive approach to determining liability for ‘wrongful’ or ‘unlawful’ acts and omissions committed negligently. This, it is submitted, will primarily involve recognition of the fact that the governing principle of ‘remoteness of damage’ already carries out the primary function of the directional ‘duty of care’ concept, rendering the latter idea otiose within Scots law.