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Reforming third party rights in contract: a Scottish viewpoint

Hector L MacQueen*

Introduction: PICC and DCFR on third party rights

Joachim Bonell's personality and intellect made an immediate impression upon me when in 1995 I joined Ole Lando's Commission for European Contract Law. His bravura contributions to the Commission's debates, characterised by a commitment to fairness and commercial good sense as well as legal coherence and principle, were evidently thoroughly informed by his close involvement with the production the year before of the UNIDROIT Principles of International Commercial Law. In the years that followed I continued to witness and enjoy his highly individual, yet always thoughtful and self-deprecatory, contribution to the completion of the Principles of European Contract Law (PECL). I also followed his advocacy for the use of the UNIDROIT Principles in international commercial arbitration, which certainly inspired in me a respect for the Principles that has continued through its successive editions to 2010.

The 2004 edition of the UNIDROIT Principles was the first to include provision (Chapter 5 section 2) on third party rights in contract. The Draft Common Frame of Reference (DCFR) published in 2009 recognised this provision as 'in many ways an advance on the [*corresponding*] PECL provision [*Article 6:110*]',¹ and accordingly remodelled the PECL article to become Articles II.-9:301-303 DCFR. The UNIDROIT Principles 2010 continue to allow contracting parties (known as the promisor and the promisee) to confer by express or implied agreement a right on a third party (the beneficiary). The promisor is the contracting party bound to perform to the beneficiary, while the other contracting party is the promisee. The right's existence and content are determined by the parties' agreement, and it is subject to any conditions or limitations under the agreement.² It follows from this that an express statement in the agreement that no third party rights are intended is effective.³ An example of a third party right arises when a clause in the contract excluding or limiting a liability of the beneficiary may be invoked by the latter.⁴ In general, the beneficiary must be identifiable with adequate certainty by the contract, but need not be in existence at the time the contract is made.⁵ The promisor may assert against the beneficiary all the defences

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¹ Art II.-9:301 DCFR, Comments A (at 615). All URLs cited were last checked on 30 October 2015.

² Art. 5.2.1 UNIDROIT Principles 2010.

³ *Ibid*, Comment (at 163).

⁴ Art. 5.2.3 UNIDROIT Principles 2010.

⁵ Art. 5.2.2 UNIDROIT T Principles 2010.

which it could have taken against the promisee;⁶ this is similar to the position in assignment.⁷ The contracting parties may modify or revoke the rights conferred upon the beneficiary by the contract until the beneficiary has accepted them or reasonably acted in reliance on them.⁸ But it is to be noted that this does not make the existence of the beneficiary's right dependent upon its acceptance, merely the irrevocability of that right. Finally, it follows that the beneficiary may renounce the right conferred upon it.⁹

The DCFR essentially follows the same scheme, but there are some differences.¹⁰ It does not use the terminology of 'promisor' and 'promisee', simply referring to 'the parties to a contract' or 'the contracting parties'. This recognises the possibility that more than one of the contracting parties may have to perform under the third party right. The third party is also simply labelled as such rather than as 'beneficiary'. The DCFR further refers to the 'right or other benefit' which may be conferred on the third party.¹¹ The Comments explain that the word 'right' alone might not be read as covering certain negative benefits such as a third party immunity from liability, or a claim which is subject to the discretion of another person: '[t]he use of the word 'benefit' avoids these problems.'¹² The DCFR further includes an express provision entitling the third party to 'the same rights to performance and remedies for non-performance as if the contracting party was bound to render the performance under a binding unilateral undertaking in favour of the third party',¹³ whereas the UNIDROIT Principles merely contain a Comment to the effect that '[i]n principle, a third party beneficiary will have the full range of contractual remedies including the right to performance and damages.'¹⁴

Perhaps the most significant difference between the UNIDROIT Principles and the DCFR, however, concerns the power of the contracting parties to remove or modify the contract term containing the third party's right or benefit. Where the former allows such adjustments until the beneficiary's acceptance of or reasonable reliance on the term, the DCFR states that, after the contracting parties have notified the third party of its right, '[t]he contract determines whether and by whom and in what circumstances the right or benefit can be revoked or modified.'¹⁵ Further, even if the contract does permit such revocation or modification, the right to do so is lost if the party or parties holding it lead the third party to

⁶ Art. 5.2.4 UNIDROIT T Principles 2010.

⁷ For the position in assignment see Art. 9.1.3(1) UNIDROIT Principles 2010.

⁸ Art. 5.2.5 UNIDROIT Principles 2010.

⁹ Art. 5.2.6 UNIDROIT Principles 2010.

¹⁰ See Arts II.-9:301-303 DCFR.

¹¹ Art II.-9:301(1) DCFR.

¹² Art II.-9:301 DCFR Comments A (at 616).

¹³ Art II.-9:302(a) DCFR.

¹⁴ Art 5.2.1 UNIDROIT PICC 2010 Comment (at 163).

¹⁵ Art II.-9:303(2) DCFR.

believe that its right or benefit is not revocable or modifiable *and* the third party acts reasonably in reliance thereupon.¹⁶

When in 2009 I began work as a Scottish Law Commissioner charged with carrying out a review of the Scots law of contract, it was very much in mind of my participation in the preparation of both the PECL and the DCFR, and the consequent exposure to the UNIDROIT Principles. I was also hopeful that there would be an opportunity to review the law of third party rights in contract (also known as the *jus* or *ius quaesitum tertio*), a subject about which I had already written much and where I knew there were significant doctrinal difficulties in Scotland.¹⁷ In August 2010 Douglas Mathie, a Scottish solicitor in commercial practice, specifically called upon the Scottish Law Commission to reform third party rights in Scots law, confirming that the difficulties were practical as well as doctrinal.¹⁸

The commercial context in which Mr Mathie identified a particular utility for third party rights was that of company groups: what he termed the 'group loss v. single group contracting entity' problem. One company within a group might contract for, say, an IT system for use throughout the entire group; but that company might not continue in existence as the group re-structured itself over time. The way to meet this potential difficulty was for the contract to provide third party rights for member companies in the group. It was also possible for these rights to be created for group members yet to come into existence, given that a contract might create rights for as yet non-existent third parties. Other examples where third party rights could be of use in commercial settings were subsequently identified by the Scottish Law Commission in the course of its further researches on the matter.¹⁹ In construction projects, contractors, sub-contractors and professionals might be made liable for defective work, not only to their immediate employer but also to project funders and to subsequent purchasers and tenants of the completed works. In the North Sea oil industry, a sector of considerable significance for the Scottish and indeed United Kingdom economy, indemnities and cross-indemnities are often deployed in complex arrangements in which a company enters a contract with a contractor but each has to indemnify other members of

¹⁶ Art II.-9:303(3) DCFR.

¹⁷ See e.g., Hector L. MacQueen, 'Title to Sue', in R Black (ed), *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth SME), vol 15 (Edinburgh, 1996) paras 814-52; Hector L. MacQueen, 'Third Party Rights in Contract: *Jus Quaesitum Tertio*', in Kenneth G.C. Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (Oxford 2000), vol 2, 220-51; Hector L. MacQueen, 'Glory with Gloag or the Stake with Stair? T.B. Smith and the Scots Law of Contract' in Elspeth Reid and David L. Carey Miller (eds), *A Mixed Legal System in Transition* (Edinburgh 2005) 138-72; Hector L MacQueen and W. David H. Sellar, 'Scots Law: *Ius Quaesitum Tertio*, Promise and Irrevocability', in Eltjo J.H. Schrage (ed), *Ius Quaesitum Tertio* (Berlin 2008) 357-83; Hector L. MacQueen, 'Third Party Rights in Contract: A Case Study on Codifying and not Codifying', in Lei Chen and C.H. van Rhee (eds), *Towards a Chinese Civil Code: Comparative and Historical Perspectives* (Leiden and Boston 2012) 309-31.

¹⁸ D. Mathie, *Third Party Rights – Scots Law stuck in the 17th Century*, August 2010, accessible at: <http://www.brodies.com/blog/2010/08/26/third-party-rights-scots-law-stuck-in-the-17th-century/>

¹⁹ Scottish Law Commission Discussion Paper No 157 on Third Party Rights in Contract (March 2014, henceforth DP No 157), chapter 3.

their respective company groups present and to come, while indemnities and cross-indemnities are also to be provided in respect of sub-contractors, employees, agents, licensees, and others involved in the transaction.²⁰ Commonly it will not be known at the time of contracting exactly which persons will actually be requiring indemnity, since the persons to perform the work have not been specifically identified at that point. Here a rule that the third party does not need to be identified but must merely be identifiable with reasonable certainty — for example, as a member of a class of persons named in the principal contract, such as sub-contractors — comes into play.

In Mr Mathie's view, however, although Scots law had recognised and enforced third party rights for over 300 years, the rules were actually of little use to commercial lawyers. They had become bogged down in technicalities and consequent inflexibility, making it apparently impossible to change a third party right once created. The law was 'stuck in the 17th century', as Mr Mathie expressed it. While that may not have been wholly fair to the lawyers of that century — much more to blame were those of the nineteenth and early twentieth centuries, as I will explain below —, the law now clearly needed modernisation to remain of any value in practice. Meantime the practitioners' work-around was to use instead the relatively new English law, contained in the Contracts (Rights of Third Parties) Act 1999. Here a third party right remains open to change or cancellation by the contracting parties (dubbed, as in the UNIDROIT Principles, the promisor and the promisee respectively) until either the third party communicates its assent to the term providing the right, or the party bound to perform (the promisor) is aware that the third party has relied on the term, or the party bound to perform can be reasonably expected to foresee reliance by the third party, who has in fact relied upon the term.²¹ Further, these rules are subject to any express term the contracting parties may choose to include on the matter.²² Since the forces driving the Scottish Law Commission review include the removal of factors leading contracting parties to opt out of Scots into English or indeed any other law, third party rights was clearly a topic which had to be addressed.

The difficulties with Scots law

The main features of the Scots law of third party rights were first delineated by James Dalrymple, Viscount Stair and Lord President of the Court of Session (1619-1695), in his *Institutions of the Law of Scotland*, the first two editions of which appeared in 1681 and

²⁰ See for an example in the Scottish courts *Diamond Offshore Drilling (UK) Ltd v. Gulf Offshore NS Ltd* 2005 SLT 589.

²¹ Contracts (Rights of Third Parties) Act 1999 s 2(1).

²² 1999 Act s 2(3).

1693.²³ He took a liberal view of the subject by the standards of his time. Parties to a contract could agree to provide a third party with a right to a benefit of some kind. This could not be 'recalled' (as Stair put it) by the contracting parties. The right was seen as flowing from a promise made to the third party which, in line with Stair's general position on promises, was binding without any need for an acceptance by the third party.²⁴ Thus the third party might be somebody who lacked the capacity to accept, such as 'absents, infants, idiots, or persons not yet born'. The third party's right to performance — for example, payment of a sum of money — might be primarily against one of the contracting parties only (the 'obliged'); but all the contractors had an obligation at least to disclose ('exhibit') the existence and content of the contract to the third party.²⁵

Most of this (including the power to create a provision in favour of a person not yet in existence²⁶) has been accepted by subsequent writers and in the case law.²⁷ In addition it has been made clear that the third party need not be specifically and individually identified in the contract. The right can be couched in favour of a general descriptive class of beneficiaries from which the third party or parties to be benefited will in due course emerge, or join subsequently as a person meeting a particular description or set of conditions, including the possibility of later identification for the purpose by the contracting parties.²⁸ Finally, it is not enough for a third party right that a third party benefits from the performance of a contract; it must be clear whether by way of express words or implication that the contracting parties intend to confer a right to that benefit upon that third party.²⁹

The key issue of law reform in Scotland is whether, in order to enable a third party right to come into existence, it is sufficient that there is a term in a contract which purports to do so (as Stair seemed to say), or whether a further step is required of the parties. At the heart of this issue is the freedom which contracting parties normally enjoy to change the contents of the contract by agreement between themselves or to cancel it altogether. Stair also seemed to say that once a third party right had been created, it could not be changed. In

²³ For present purposes I have used the tercentenary 6th edition edited by David M. Walker and published in 1981 by Edinburgh University Press (cited as 'Stair, *Institutions*'). The work is divided into four books, each of which is internally divided into chapters, each of which has numbered paragraphs. It is cited by book, chapter, and paragraph number.

²⁴ See most recently on promises binding without acceptance in Scots law, Hector L. MacQueen, 'Unilateral Promises: Scots Law Compared with the PECL and the DCFR', *European Review of Private Law*, forthcoming.

²⁵ See Stair, *Institutions*, I, 10, 1-6. The quotations are at *ibid.*, I, 10, 4 and 5.

²⁶ *Morton's Trustees v. Aged Christian Friend Society of Scotland* (1899) 2 F 82; *Magistrates of Dunbar v. Mackersy* 1931 SC 180.

²⁷ See e.g. W.M. Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, Edinburgh, 1929) pp 68-9, 234-47; W.W. McBryde, *The Law of Contract in Scotland* (3rd edn, Edinburgh, 2007), chapter 10; SME vol 15 paras 814-52; DP No 157, chapter 2.

²⁸ *Rose, Murison and Thomson v. Wingate, Birrell & Co's Trustee* (1889) 16 R 1132; *Thomson v. Thomson* 1962 SC (HL) 28.

²⁹ *Finnie v. Glasgow and South-Western Railway Co* (1857) 20 D (HL) 2; *Marquess of Aberdeen and Temair v. Turcan Connell* [2008] CSOH 183.

addition, in more recent times the courts have tended to hold that, before contracting parties can be found to have deprived themselves of their ordinary freedom to adjust their relations as they wish by making provision for a third party, there must be something more than just a term to that effect in the contract. In other words, it must be clear that the contracting parties intended not only to confer a benefit upon a third party but also to give up the freedom to change their minds on the matter. In the technical language used by the courts, the contracting parties must have taken additional steps to make the term conferring the third party right irrevocable; the term alone being insufficient for this purpose. It is the effect of this requirement of irrevocability, however, which leads to practitioners' criticism of Scots law. In many cases, especially commercial ones, parties wish to create third party rights by contract; but they also wish to retain the freedom to adjust or even altogether cancel these rights thereafter. As we have seen, the English Act of 1999 allows this to happen unless there is third party acceptance or reliance on its right, and the position is the same under the UNIDROIT Principles and the DCFR. But if third party rights in Scots law are necessarily irrevocable from their creation, this desirable flexibility cannot be achieved.

In the leading Scottish case, *Carmichael v. Carmichael's Executrix*,³⁰ Lord Dunedin explained that the irrevocability of a third party benefit can be achieved in various ways: (1) delivery or intimation of the contract to the third party; (2) otherwise putting the contract out of the power of the contracting parties; (3) registration of the contract, for example in the Books of Council and Session; (4) third party's knowledge of the contract term in its favour; and (5) third party's reliance upon the contract term in its favour.

By delivery Lord Dunedin was referring to the general rule of Scots law that where voluntary obligations are reduced to writing, whether formal or otherwise, the writing must be delivered to the creditor in the obligation for the creditor's right to come into existence.³¹ Delivery means some act by means of which the debtor in the obligation puts the document beyond its control. In essence, it is a means of completing the intention to be bound by the document. Although delivery may typically be by the debtor physically handing over the document to the creditor, there are a number of recognised equivalents, notably registration of the document in public court books.³² Delivery of paper documents by fax transmission or

³⁰ *Carmichael v. Carmichael's Executrix* 1920 SC (HL) 195.

³¹ McBryde, *Contract*, chapter 4.

³² *Ibid*, paras 4.12-4.30.

email attachment or some other electronic means is now also legally effective.³³ It should also be noted that electronic documents may be delivered electronically.³⁴

Intimation is a familiar means of completing an assignation (assignment) in Scots law. It is notice to the debtor in an obligation, made by either the assignee or the assignor (or both), and accompanied by proof of the assignation, that the assigned claim against the debtor is now to be performed to the assignee. Lord Dunedin clearly had in mind an analogy between this and third party rights as two modes of creating rights against a contracting party for someone not a party to the formation of the obligation. Forms of intimation are provided for by statute, and the law also recognises 'equivalents to intimation' where the notice to the debtor is as strong as those forms of intimation recognised at common law and by statute.³⁵

Lord Dunedin said little about the third party's reliance as a basis for irrevocability, merely recognising it thus: 'There is also the class of cases where the *tertius* comes under onerous engagements on the faith of his having a *jus quaesitum*, though the actual contract has not been intimated to him.'³⁶ The basis for the finding that a third party right existed in *Carmichael's* case was, however, not delivery or intimation to the third party, or registration of the contract, or the third party's reliance, but rather his knowledge of a provision in his favour in an insurance policy taken out over his life by his father. That knowledge was proved by the son's inquiry to the insurance company as to whether his entry into active service in World War I would affect his rights under the policy. The case arose after the son was killed in service, with the question being whether the policy should be paid out to his estate administrators, or to his father (who had paid all the premiums). The court held for the estate administrators.

Finally, with regard to the relevance of the contract terms, Lord Dunedin said:

[T]he only real rule to be deduced is that the mere expression of the obligation as giving a *jus tertio* is not sufficient. ... Now, in examining the evidence, while, as I have already said more than once, the terms of the document are not conclusive, that

³³ Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 s 4.

³⁴ Section 9F of the Requirements of Writing (Scotland) Act 1995 (inserted by the Land Registration etc. (Scotland) Act 2012). Section 9A of the 1995 Act defines electronic documents as documents 'which, rather than being written on paper, parchment or some similar tangible surface are created in electronic form'.

³⁵ On intimation in assignation and its equivalents see the Transmission of Moveable Property (Scotland) Act 1862; McBryde, *Contract*, paras 12.93-12.96; Ross G Anderson, *Assignation* (Edinburgh 2008) paras 6.21-6.29 and 6.34-6.35; Scottish Law Commission Discussion Paper No 151 on Moveable Transactions (June 2011) paras 4.36-4.44, 14.1-14.44.

³⁶ *Carmichael v. Carmichael's Ex* 1920 SC (HL) 195, 203.

does not mean that they are not to be considered. On the contrary, they form a very important piece of evidence.³⁷

This view of the law, and Lord Dunedin's speech in general, has long been the subject of academic criticism.³⁸ The most cogent criticism is based upon the decision in two other cases where third party rights were held to arise and be enforceable despite the fact that the contracts in question included provision whereby the rights might have, but had not, been cancelled or altered. In *Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland*,³⁹ the society operated a scheme which provided certain benefits for the relatives of members who fell sick. The third party right of a relative under the scheme came into existence when a relevant member of the society became ill. But the scheme also provided that the rules of the scheme could be changed by the members, i.e. it was revocable. But when a particular relative claimed a benefit under the scheme, the court found in her favour since the rules had not in fact been changed or revoked at the time the claim was made. Again, in *Kelly v. Cornhill Insurance Company Ltd*,⁴⁰ a motor insurance policy provided indemnity cover against all sums which the car owner or any driver permitted by him should be legally liable to pay by way of compensation for, *inter alia*, 'accidental damage to any property not belonging to the insured or held in trust by him or under his control or charge, caused by the insured car.' The owner gave his son unlimited permission to drive the insured vehicle, bringing into existence a third party right to cover under the insurance policy. As owner of the vehicle, however, the father was still clearly entitled to withdraw that permission at any time. The question in the case was whether the permission was terminated by the father's death, the son having continued to drive the car after that event and then having had an accident with the car causing damage to the property of other persons now claiming against him. The House of Lords held by a narrow majority that the son could still enforce the policy against the insurance company. Although his permission to drive could have been revoked by his father or, after the latter's death, his executor, it had not been. On construction of its terms, the policy (and the permission to drive the car)

³⁷ *Ibid.*

³⁸ See MacQueen, 'Third Party Rights in Contract: *Jus Quaesitum Tertio*', 245-50, for references; and add Phillip Sutherland, 'Third Party Contracts' in Hector L MacQueen and Reinhard Zimmermann (eds), *European Contract Law: Scots and South African Perspectives* (Edinburgh 2006) 203-29; John A.K. Huntley and Aikaterini Dedouli, 'Third Party Rights, Promises and the Classification of Obligations', 2004 *Juridical Review* 303-52; Phillip Sutherland and David Johnston, 'Contracts for the Benefit of Third Parties' in Reinhard Zimmermann, Daniel Visser and Kenneth G.C. Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (Oxford 2004) 208-39.

³⁹ 1912 SC 1078.

⁴⁰ 1964 SC (HL) 46.

continued in force despite the father's death, and for as long as the car continued to be an asset in the father's estate.⁴¹

If rightly decided, these cases (one occurring before, the other after, the decision in the *Carmichael* case) suggest that Lord Dunedin's analysis of the law cannot be wholly correct. The decisions draw attention to the importance of the law on conditional obligations, that is to say, obligations the existence or enforceability of which is dependent upon the occurrence or non-occurrence of events not certain to happen (the conditions or the contingencies). The concept is a familiar one in Scots law;⁴² and it is also to be found in the PECL, the DCFR, and (from the 2010 edition) the UNIDROIT Principles.⁴³ Contingencies or conditions may be categorised as either *suspensive* or *resolutive*. The effect of a suspensive condition may be either to prevent the obligation coming into existence at all (as for example with a provision in an oral agreement that there will be no contract between the parties until the agreement is reduced to formal writing⁴⁴), or, possibly more commonly, to prevent an obligation which has come into existence being enforceable until the condition is fulfilled (as for example a sale of land being subject to the purchaser obtaining satisfactory planning permission for development of the site⁴⁵). The effect of a resolutive condition, on the other hand, is that an obligation comes into existence but may be brought to an end upon the fulfilment of the condition. The UNIDROIT Principles give as an example the appointment of a fund manager to manage a client's investments which will come to an end if the fund manager loses its licence to provide financial services.⁴⁶

Where a condition is suspensive, the debtor in the obligation may not act in such a way as to frustrate the fulfilment of the condition, while with a resolutive condition, although the debtor may act lawfully to prevent its occurrence (e.g. the fund manager may act to keep its licence), the creditor may not act so as to ensure its fulfilment. The DCFR and the UNIDROIT Principles make these rules applicable only where the activity in question has been undertaken contrary to good faith and fair dealing. Whether this is the position in Scots law

⁴¹ The minority view was that the death of the insured terminated the permission and so the third party right also. See further McBryde, *Contract*, ch 26, Part 1.

⁴² See e.g., Stair, *Institutions*, I, 3, 7-8; Gloag, *Contract*, 276-7; J.M. Thomson, 'Suspensive and Resolutive Conditions in the Scots Law of Contract' in A J Gamble (ed), *Obligations in Context: Essays in Honour of Professor D M Walker* (Edinburgh 1990), 126-40, at 131-2; SME vol 15 paras 5-6.

⁴³ Articles 16:101-16:103 PECL; Articles III.-1:106-107 DCFR; Chapter 5 Section 3 UNIDROIT Principles 2010. As the Notes I(1) to Article III.-1:106 DCFR remark, the rules on conditions have a history stretching back to some of the earliest texts of Roman law, 'and have formed an unbroken thread in the European legal tradition for many centuries.' But none of the texts mentions the potestative condition, the accomplishment of which depends upon the voluntary act of one of the parties, the casual condition, which depends on chance or the act of a third party, or the mixed condition that is partly potestative, partly casual.

⁴⁴ As in *WS Karoulias SA v. The Drambuie Liqueur Co Ltd* 2005 SLT 813.

⁴⁵ As in *Ellis Properties Ltd v. Pringle* 1974 SC 200. This condition may also be seen in at least some circumstances as resolutive.

⁴⁶ Art 5.3.1 UNIDROIT Principles 2010, Comment 3, Illustration 6.

too has been the subject of debate.⁴⁷ It may also be implied that an obligation is discharged if a suspensive condition is not fulfilled within a reasonable time.⁴⁸ But where the effect of the condition is to suspend (or prevent) the existence of any obligation at all, the parties remain free to withdraw from the arrangement during the period of suspension.⁴⁹

The *Love* case may be seen as an example of this last point. Prior to the sickness of her husband, Mrs Love had no right at all against the society or its members. This was true even without the express power in the members' agreement to alter or cancel its terms. The proper significance of that procedure was that the crystallisation of one relative's right, such as happened in *Love*, would not prevent the members thereafter changing the rules of the scheme so that lesser payments fell to be made under it to future claimants, or indeed cancelling it altogether. Likewise, if Mr Love recovered but then fell ill again after the members had changed the rules of the scheme, Mrs Love would not be entitled to make a new claim on the old terms. Possible future creditors have no right at the point where the members of the association agree to the change. A similar outcome could apply in company groups, where one or more companies come into existence within the group and enjoy their third party rights, but it is then decided within the group to change the arrangements. Companies coming into existence in the group thereafter would not be able to claim under the prior agreement setting up the possibility of third party rights.

Another example of this kind of suspensive condition, it is suggested, is the third party right drawn in favour of a party who at the time does not exist. As we have already observed, the possibility of such a term in a contract is as well settled in Scots law as it is in the PECL, the DCFR and the UNIDROIT Principles.⁵⁰ But in private law, at least, the existence of any personal right is dependent upon the existence of a creditor who may enjoy and enforce that

⁴⁷ See J. Murray, 'Potestative Conditions' 1991 SLT (News) 185-8; A.F. Rodger, 'Potestative Conditions', 1991 SLT (News) 253; DP No 157 paras 2.8-2.9.

⁴⁸ Thomson, 'Suspensive and Resolutive Conditions', 132-3.

⁴⁹ Thomson, 'Suspensive and Resolutive Conditions', 126-9; McBryde, *Contract*, paras 5.35-5.40.

⁵⁰ It is also part of English law under the 1999 Act s 1(3). There do not however seem to be any equivalent provisions in the Continental civil codes, in some cases because third party acceptance is a necessary element in constituting that party's right: see e.g., Art. 1257 Código Civil; Art. 6:253 NBW. In other cases the third party's act of acceptance renders the benefit irrevocable, i.e. before that it is revocable: Art. 1121 sent 2 Code Civil; Art. 1411(2) Codice Civile; Art. 412 Greek Civil Code; Art. 112(3) Swiss Code of Obligations. Art. 1206 of the draft French code of obligations (Projet d'ordonnance du 25 février 2015 portant réforme du droit des contrats, du régime général et de la preuve des obligations, accessible at http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf) does allow third party rights to be in favour of '*une personne future mais doit être précisément désigné ou pouvoir être déterminé lors de l'exécution de la promesse*'. The right continues to become irrevocable upon the third party's acceptance, however (Art. 1207).

right.⁵¹ In Stair's time the principal application of the power to provide for a non-existent person by way of a contract was probably in ante-nuptial marriage contracts with provisions in favour of the children to be born to the couple to be married.⁵² The condition for the right coming into existence would perhaps be fulfilled, not by the birth, but rather by the couple's subsequent conception of a child, as a result of the principle of Scots law that *nasciturus pro jam nato habetur quando agitur de ejus commodo* (a child that has been conceived will be treated as though born if subsequently born alive and if it is to the advantage of the child to be so regarded).⁵³ Another possible application of the rule in a modern commercial context is again to company groups, where third party rights may be drawn in favour of companies yet to be created within the group. There may perhaps be more flexibility in Scots law here than allowed for in Mr Mathie's previously quoted comments on the subject. The reason for specific recognition of a term in favour of a third person non-existent at the time the contract is drawn up is perhaps to prevent it failing altogether from uncertainty at the outset.⁵⁴

Kelly v. Cornhill Insurance Company Ltd also usefully illustrates the operation of a suspensive condition. The owner's grant of permission to his son to drive the insured car was necessary before the son could have any right at all under the policy. But equally clearly the permission granted could also be later withdrawn, since the car belonged to the father, and his ownership still entitled him to say who might or might not drive it. He was not trammelled by any obligation to let the son drive as would have been the case if, say, there had been a contract of hire between them. This power, it is suggested, is an example of a resolutive condition in relation to the son's third party right under the insurance policy. The son's right was to indemnity from the insurance company provided that the uncertain act of another person (albeit one who was also a party to the insurance contract) did not occur. The fact that this withdrawal of permission did not happen meant that the resolutive condition was never fulfilled, however, and so the son was entitled to the benefit of the cover.

Kelly nevertheless lets us see how an existent right or obligation may be brought to an end by the fulfilment of a condition. Professor McBryde shows how revocability of a right arises not only from resolutive conditions but also contract terms and other rules of law:

⁵¹ See for further discussion of the general point, D.N. MacCormick, 'General Legal Concepts', *SME*, vol 11, paras 1029, 1035-9 and 1073 ('Rights necessarily belong to or 'vest in' persons') and, in revised form, *Institutions of Law: An Essay in Legal Theory* (Oxford 2007) 76-82, 114-5, 120. Compare §§657-61 BGB under which a public promise of reward for the performance of an act by another becomes binding upon that performance occurring; but is meantime revocable by the promisor (who must however revoke by publicity equivalent to that of the original promise: §658 BGB). The same principle underlies the new French provision quoted in the previous footnote as well as the civil codes cited therein requiring third party acceptance to make its right irrevocable.

⁵² See further Ronald D. Ireland 'Husband and Wife: Divorce, Nullity of Marriage and Separation', in G. Campbell H. Paton (ed), *An Introduction to Scottish Legal History* (Stair Society vol 20, Edinburgh 1958) 90-115, 114; Eric M. Clive, *The Law of Husband and Wife in Scotland* (4th edn, Edinburgh 1997) 312-16.

⁵³ This principle, however, has operated mainly in the law of succession and delict in Scotland.

⁵⁴ For uncertainty making an apparent contract void in Scots law, see McBryde, *Contract*, paras 5.19-5.33.

[A] right once created may be revoked. There are many instances of revocable rights in Scots law, eg rights under some contracts of mandate or deposit, the contract created between a company and its members by ... s.33 of the Companies Act 2006 In Stair's time donations between man and wife, *stante matrimonio*, were revocable by the giver during life. ... Nor should we be surprised if a legal system recognises revocable rights. Many contractual rights are only exercisable if certain conditions are satisfied, and there is no reason why one of these conditions could not be the absence of prior revocation.⁵⁵

Other examples of revocable rights in Scots law can be given. A donation *mortis causa*, under which the donee's right to the gift does not survive his or her predeceasing the donor (a resolutive condition because although the deaths of each party are certain to happen, the order of decease is not), is one such.⁵⁶ The rights of a child *in utero* under the *nasciturus* principle will not survive a still-birth or death in the womb.⁵⁷ In practice, parties commonly agree terms under which their contracts may be brought to an end or be altered by one of them acting unilaterally. In *Kinch Ltd v. Adams*, for example, a contract for the sale of property was concluded on the basis that the buyer could give notice of withdrawal by a certain date and time subject to liability for the pursuer's reasonable legal fees. The question in the case was not whether this was competent (the sheriff gave several examples of other terms of the kind commonly encountered in practice), but whether or not the notice given amounted to withdrawal (it was held not).⁵⁸

A final point in this vein, however, is that if the contracting parties reserve to themselves the power to change or remove altogether the third party's right in a more absolute way than is apparent in *Love*, or indeed in *Kelly*, there may well be a question as to whether they ever intended to give the third party a right at all.⁵⁹ In his discussion of promises, Professor Hogg gives the example of a promise to pay next Monday if the promisor has not changed her mind by then, where the reservation effectively undermines the notion of any commitment. But a promise to pay by a certain date in the more distant future subject to the promisor retaining a power to revoke should the changing nature of his relationship with the promisee so warrant 'is not so sweeping as to be suggestive of a lack of an original intention to be

⁵⁵ McBryde, *Contract*, paras 10.27-10.28.

⁵⁶ SME Reissue, 'Donation', para 40. The legal institution of donation *mortis causa* is to be abolished when section 20 of the Succession (Scotland) Bill 2015 is enacted and comes into force. But this is not to prevent other ways of making a conditional gift in contemplation of death.

⁵⁷ SME Reissue, 'Child and Family Law', paras 4-6.

⁵⁸ *Kinch Ltd v. Adams* 2015 SCGLA 8, especially at para 19 *et seq.*

⁵⁹ Cf Article 16:101 PECL Comment B (at 230); Article III.-1:106 DCFR, Comments C (second para); Article 5.3.1 UNIDROIT Principles 2010, Comment 4.

bound at all'. Professor Hogg states that the second example 'might be argued to be a permissible condition'.⁶⁰

The *Love* and *Kelly* cases clearly fall well within the second category of conditional promise identified by Professor Hogg. It is also arguable that his first example is actually a wholly suspended promise, i.e. one where the right does not exist until the Monday when the promisor has not in fact changed his mind. But the matter is above all a question of construing what is said in the contract, in order to determine whether or not a third party right is intended and to what conditions, suspensive or resolutive, and further terms the existence and enforceability of that right has been subjected by the contracting parties.

Professor McBryde argues that Scots law on third party rights in contract 'is in confusion because of the failure to recognise that revocation can arise on two occasions and each poses a different theoretical problem ... Are we concerned with whether a right has been created (*inter alia* has there been delivery?) or the terms of a right which has been created (a problem of construction with the possible answer that the right may be terminated).'⁶¹ It may however be better, or more accurate, to say, not that there are two occasions for considering revocation, but rather that the first question is whether or not a right has been constituted for a particular person or persons (which is when delivery, intimation and registration may fall to be considered), and that revocation is the second question: can a right once constituted be cancelled or modified without the consent of the right-holder?

Issues about the constitution of a third party right

A further question must also be whether one of delivery or intimation or registration is always required even for the constitution of a third party right. None of these is apparent in the *Love* or *Kelly* cases, or indeed in other decisions recognising the existence of a third party right.⁶² While in *Love* and *Kelly* the third party clearly knew of the existence of the contractual provision in its favour (otherwise the claim could not have been brought), what seems to have mattered in each case was that the conditions on which the claims were based had been fulfilled. It is not clear from the reports when the third parties learned of their possible claims. In *Carmichael* itself the third party's knowledge, whenever and however obtained, was held enough (in the approach outlined in the previous section) to constitute the right, the

⁶⁰ Martin Hogg, *Promises and Contract Law: Comparative Perspectives* (Cambridge 2011) 33-4. See also McBryde, *Contract*, para 5.36.

⁶¹ McBryde, *Contract*, paras 10.27-10.28.

⁶² See e.g., *Melrose v. Davidson and Robertson* 1993 SC 288; *Beta Computers (Europe) Ltd v. Adobe Systems Ltd* 1996 SLT 604 (although note that in other respects this case is not a satisfactory example of third party rights in contract); *Mercedes Benz Finance Ltd v. Clydesdale Bank plc* 1997 SLT 905.

other conditions of his reaching the age of 21 and being ready to take over payment of the premiums on the insurance policy when they fell due also being fulfilled.

In the end, it is suggested, the key question must be the intention of the contracting parties to confer a right upon, or to become bound to, a third. Delivery, intimation or registration of a third party right are strong methods of showing the intention to confer a right upon it, but not the only possible ones, especially where there is no requirement that the right be constituted in writing. In general contract law, communication between the parties is another important way of constituting their mutual obligations. Any form of communication — written, oral or by conduct — will do for this purpose. But for third party rights in Scots law, at least, there may also be a useful analogy with the unilateral promise, which does not necessarily have to be communicated to the promisee to be binding. What matters in many cases is instead the fulfilment of a condition in the promise such as the provision of information to the promisor, or the location of property belonging to the promisor. For example, the promise of reward to any person who finds a lost cat may be enforced by a party unaware of the promise at the time of locating and returning the cat to its owner.⁶³ The concept of a conditional undertaking is, as we have seen, also highly relevant to third party rights, especially where the third party emerges, for example from previous non-existence, or as a person becoming a member of a class of persons designated as the third parties to be benefited.

An example of the practical importance of this point can be given from the contracts in use in the North Sea oil industry where, as already noted, contracting parties have to indemnify other members of their respective company groups present and to come, while indemnities and cross-indemnities are also to be provided in respect of sub-contractors, employees, agents, licensees, and others involved in the transaction. It would seem quite impracticable to require formal notifications to all these parties of their third party rights, but sufficient (especially perhaps against the background of general industry understandings of how risks are distributed in the sector and the use of standard forms of contract) for a right to be claimed that the third party in question meets the description of those to have rights at the time they are claimed and that any other conditions for the existence and enforcement of the right have been fulfilled.

Of course, as Lord President Hamilton remarked in the context of a case where a unilateral promise was alleged to have been made, ‘the presence or absence of communication to the other party may be an adminicle of evidence in the question whether

⁶³ See *Regus (Maxim) Ltd v. Bank of Scotland plc* 2013 SC 331, paras 33-34 (Lord President Gill).

the statement amounts to a promise in law'.⁶⁴ Likewise in a third party right claim, notification of the third party could be significant in various contexts on whether or not the contracting parties intended to give that party an enforceable right. But the absence of such notification may not be quite as fatal for third party rights as it tends to be with alleged unilateral promises, if it is established that the contracting parties have already succeeded in establishing a contract binding between themselves which included a provision evidencing their intention to confer a right on a third party, and that all conditions for the existence and enforceability of that right as set out in the contract have been fulfilled. There then seems less reason to suppose that the term cannot in law be enforced by the third party once and however it comes to that person's notice.

The researches of the Scottish Law Commission showed that the Internet was one way in which the existence of third party rights might be made generally knowable by contracting parties. An example is the 'Deed of Conditions' published on the website of the Sinclair Residents Association of Edinburgh.⁶⁵ Deeds of conditions are drawn up by the developers of multi-proprietor residential developments to be incorporated into the sale contracts made with each individual proprietor in the development. These purport to confer third party rights upon proprietors within the development to enable them to enforce the obligations in the deed against other proprietors. The deed sets out to 'declare various reservations, real burdens, conditions, prohibitions, declarations, obligations and stipulations incumbent respectively upon the proprietors hereinafter defined in order to create a *jus quaesitum tertio* in favour of them', and further provides:

The foregoing reservations, burdens, conditions, provisions, declarations and others herein written are declared to constitute a Common Plan or Scheme with the effect of conferring on each of the Proprietors the right to enforce the said reservations, burdens, conditions, provisions, declarations and others against all other Proprietors so far as each Proprietor may in every case have a patrimonial interest so to do.

Once the developer ceased to be involved in the development because it had sold all the properties, thereafter enforcement of the maintenance and other obligations was — and is — for the individual proprietors, including those who come into the development as successors in title of those who first bought from the developer. While that is not a problem-free solution to maintaining the appearance and character of a development, some of the difficulties can

⁶⁴ *Cawdor v. Cawdor* 2007 SC 285, para 15.

⁶⁵ Accessible at <http://sinclairresidents.org.uk/history/title-deeds-sinclair-close-gardens-place/>. The Deed precedes the coming into force of the Title Conditions (Scotland) Act 2003.

be obviated, as in the example, by the formation of a Residents Association able to place much of the burden of overall upkeep on a property management or factoring company.⁶⁶

The crucial point for present purposes, however, is that the website provides a means by which the terms of a contract conferring third party rights may become public and beyond the control of the original contracting parties without any need for delivery, intimation or even direct communication to the relevant third parties. The absence of any express reference to the Deed in later sub-sales should not prevent it continuing to confer third party enforcement rights upon in-coming proprietors.

The means of reform

The analysis so far is entirely dependent on principles that are well established in the Scottish common law. If correct, it is therefore possible for a court of equal or greater authority than the House of Lords which decided the *Carmichael* case to overturn its reasoning in so far as inconsistent with these other principles: that is to say, that the existence of a third party right is not dependent upon its first having been made irrevocable in some way by the parties. It should also be said that Stair was not quite right either in so far as he said that the mere existence in a contract of a term in favour of a third party made that term irrevocable. The correct position would seem to be that a third party right comes into existence by virtue of the externally apparent intention of the contracting parties that it should be so. The existence or otherwise of that intention is to be determined from the substance of the term itself along with any other relevant indicators of their intention, such as delivery or intimation of any relevant documents to the third party, registration or other publication of the terms, communication to the third party, and so on. The right may be conditional, either in the absolute sense that its existence for a particular creditor is dependent upon some uncertain event; or it may be that only the enforceability of the right is so dependent. Fulfilment of the condition may be enough to bring the right into existence even if the relevant third party is unaware of it at the time. It is also possible that the right which exists but has not yet been enforced may be subject to termination or alteration as the result of the occurrence of some event, including the exercise by the contracting parties of a power to end or change the right conferred by the contract itself.

The problem is, however, that the *Carmichael* error has now been in operation for nearly a century, while the House of Lords by-passed the one opportunity for correction that

⁶⁶ In the Deed the developer also reserved a 'right, so long as they remain Proprietor of any part of the Development ... to alter or modify in whole or in part the foregoing conditions'. On the law as stated in *Carmichael* this would prevent any third party rights arising at least until after the developer's departure from the site.

came its way before it was replaced in 2009 by the UK Supreme Court.⁶⁷ Judicial correction now therefore requires the question to arise in a context where the value of the matter is sufficiently high to make litigation worthwhile in the first place and where a party has the means and other resources needed to take a case all the way to the top of the system. One can see that professional advisers might be reluctant to propose that even such a client take on the project. If the present position is actually causing parties to switch away from Scots law in their contracts, then the chances of a judicial solution occurring are even further reduced. A legislative approach thus seems likeliest to produce the speedy outcome that may prevent further haemorrhaging of business from Scots law. While legislation and its preparation is far from cost-free, the expense will fall mostly on the public rather than any private purse, and the result should be achieved with a greater degree of clarity and certainty than is probably possible for a court. This is therefore the route which the Scottish Law Commission is now pursuing.

The difficulty in this approach is that the solutions must still lie within common law principles which it would probably be unwise to try to reduce to statutory language only for the purposes of sorting out the law on third party rights. The principles in question have a far wider application across the law, and a formulation which met the problems of third party rights might create new problems in those other areas. The trick then is to embody the essential reform in legislation which refers to, rather than attempts to re-state, the common law principles, while at the same time being clear as to what is to happen in the usual kinds of case.

The shape of the reform

While at the time of writing (October 2015) a draft Bill has yet to be finalised, the general approach has been largely agreed. The principle that contracting parties may by their contract confer rights upon a third party will be stated. How the intention that the third party provision have legal effect is to be shown will, however, be left to the usual rules of the common law: interpretation of the language in which the third party benefit is stated, including the possibility of implication, being the most important; then delivery, intimation or other notification or communication, registration; or other appropriate means of externalisation, such as some form of publicity, by which the contracting parties put the content of the contract beyond their direct control and lead reasonable third persons to conclude that they intended to become bound by what they said. Professor Gloag's oft-quoted remark about statements made by negotiating parties which fifty years ago won the

⁶⁷ *Allan's Trustees v. Inland Revenue* 1971 SC (HL) 45.

endorsement of the House of Lords⁶⁸ — ‘The judicial task is ... to decide what each [party] was reasonably entitled to conclude from the attitude of the other’⁶⁹ — may be invoked once again in this slightly different context.

There may still be assistance to be obtained on this point from a discussion by Stair to which I have also recently referred in discussing what constitutes a unilateral promise, bearing in mind that such a promise requires no acceptance to be binding in Scots law and gives even the promisee who knows nothing of its existence the opportunity to acquire a right by fulfilling the conditions upon which the promise is otherwise dependent.⁷⁰ Stair wrote: ‘[I]t is not every act of the will that raiseth an obligation, or power of exaction ... We must distinguish between three acts in the will, desire, resolution and engagement’.⁷¹ Neither desire (a tendency or an inclination of the will towards its object), nor resolution (a determinate purpose to do that which is desired), are enough to create a right in another. To achieve a right, there has to be engagement (the conferral or statement of a power of exaction in another). Such engagement is possible by one person alone by way of a promise, with no requirement for any action by the promisee: ‘the obligatory act of the will is sometimes absolute and pure’.⁷² In determining whether or not any voluntary obligation exists, ‘it is much to be considered, whether the consent be given *animo obligandi*, to oblige or not’.⁷³ The same words may or may not be interpreted as obligatory, depending on the circumstances in which they are uttered and the speaker’s intent, derived mostly (but not entirely) from an external perspective:

[I]f it be jestingly or merrily expressed, whatsoever the words be, there is no obligation; because thereby it appears there is no mind to oblige; [but] if the words be in affairs or negotiations, they are interpreted obligatory, though they express no obligation but a futurity, which otherwise would import no more than a resolution; as Titius is to give Mevius an hundred crowns, in any matter of negotiation, this would be obligatory, but otherwise it would be no more but an expression of Titius’ purpose so to do; yet because it is inward and unknown, it must be taken by the words or other signs, so if the words be clearly obligatory and serious, no pretence that there was no purpose to oblige will take place.⁷⁴

⁶⁸ *McCutcheon v. David MacBrayne Ltd* 1964 SC (HL) 28 per Lord Reid at 35.

⁶⁹ Gloag, *Contract*, 7.

⁷⁰ See MacQueen, ‘Unilateral promises’, above note 24.

⁷¹ Stair, *Institutions*, I, 10, 2.

⁷² *Ibid*, I, 10, 3.

⁷³ *Ibid*, I, 10, 6.

⁷⁴ *Ibid*, I, 10, 6.

Stair's emphasis on 'affairs or negotiations', i.e. business dealings, as a context in which the necessary obligatory intention can be taken as a given is particularly noteworthy here, as also the point that words, spoken or written, and 'other signs' rather than that which is 'inward' and so 'unknown' outside the person concerned cannot create any obligation for that party.

An emphasis upon the contracting parties' intentions as the basis for any third party right will of course mean that express exclusion of such intention will be conclusive on the matter. It will however be made clear that the right may be conditional in the senses discussed above, although there will be no detailed definition of the different effects a condition may have, either suspensive or resolutive. The crucial point will be to be clear that the presence of a resolutive condition or other resolutive provision that is not a condition will not be fatal for the existence or enforceability of a third party right at least while the condition or other provision remains unfulfilled or un-executed.

There will be provision that at the time the contract was formed the third party need not be in existence or a member of the class of persons from whom the third party or third parties to enjoy the right are to be drawn. There will also be no requirement of third party acceptance to constitute the right, continuing the present position in Scots law and so still similar to the models in the UNIDROIT Principles and the DCFR.⁷⁵ Although this will be helpful again in the commercial context of company groups, the rule is also valuable in social settings involving business only incidentally if at all. An example is the third party who is an individual lacking full active capacity to carry out juridical acts (such as acceptance of an offer) but nevertheless has a passive capacity to hold rights such as property or to be the beneficiary of personal rights under a contract between others. Examples of such passively capable persons include the child below the age of legal capacity (now 16 in Scots law) and the adult suffering from mental health problems. Such passively enjoyed rights may have to be enforced by the beneficiary's guardian in each case; but the rights are unquestionably those of the beneficiary. An example of a contract with a third-party right in favour of young children might arise when a parent books a family holiday for him- or herself and the rest of the family.⁷⁶ The children could have an independent claim to damages as third parties without any need to accept the right in their favour, albeit their actions would have to be raised for them by their guardians.

No particular issues arise for the third party who is an incapable adult with a duly appointed attorney or guardian (who in that position may act in Scots law on the adult's

⁷⁵ See above, text accompanying notes 8-10.

⁷⁶ Example based on the English case of *Jackson v. Horizon Holidays Ltd* [1975] 1 WLR 1468.

behalf in making contracts which not only bind the latter's estate but give the adult rights directly⁷⁷). But difficult situations may arise for *de facto* carers without any duly authorised powers. By virtue of the incapacity an already incapable adult cannot appoint the carer as an agent, mandatory or personal representative.⁷⁸ Thus a carer who contracts for the benefit of the adult — for example, by arranging personal services to be rendered to him or her, or ordering repairs to the adult's property — undertakes personal liability under such contracts (safeguarded by also having a claim against the adult's estate for the expenses thereby incurred by reference to the doctrine of *negotiorum gestio* [or benevolent intervention]).⁷⁹ But if the services or repairs are unsatisfactory in breach of the contract, the carer's damages claim may be insufficient to take full account of the interests of the adult. For example, the latter may suffer distress as a result of negligently administered services, or failure to render the services at all. Or the adult's property may be damaged by a botched repair. In each of these cases, it may be useful if the contract can be treated as one intended to give the adult enforceable rights to the benefit of the service or repair in question for breach of which damages or any other appropriate remedy is available, albeit that any action will have to be brought by a guardian or representative of the incapable adult's interests.

The opportunity is to be taken in the draft legislation to deal with other questions on which the common law as it relates to third party rights specifically is uncertain, in particular because either the matter has never come up in a decided case or judges and writers have expressed doubts or uncertainties on particular points. In the latter category is the question of whether the third party can claim damages for non-performance of its right.⁸⁰ The UNIDROIT Principles and the DCFR are clear that the principled answer to this is affirmative,⁸¹ and the Scottish Law Commission's draft Bill will simply propose that the third party has all the remedies that would be available to it were it a contracting party. In the former category is the question of whether the third party can renounce its right. While in principle the answer is clearly affirmative — no third party can be forced to have a right it does not want —, there is no case authority on the matter and virtually no discussion in the literature. A statutory provision to put the point beyond doubt seems useful, particularly in a system under which no acceptance will be required to constitute the third party right.⁸²

⁷⁷ See the Adults with Incapacity (Scotland) Act 2000 (as amended by the Adult Support and Protection (Scotland) Act 2007), Parts 2, 3 and 6.

⁷⁸ Laura J. Macgregor, *The Law of Agency in Scotland* (Edinburgh 2013), paras 3.12-3.14.

⁷⁹ See further SME vol 15, para 143 for the (probably enrichment, certainly not contractual) claim of the contractor against the estate of the incapax, possibly subject or subrogated to the carer's claim for its expenses. The leading example in the relevant case law is *Fernie v. Robertson* (1871) 9 M 437. The term 'benevolent intervention' comes from Book V of the DCFR.

⁸⁰ See DP No 157, paras 2.84, 7.9-7.13.

⁸¹ See above, text accompanying notes 13-14.

⁸² See DP No 157, paras 2.79, 7.2-7.8.

A similar issue is that of the defences available to the contracting parties against the third party's claim. In so far as Scottish writers have expressed any view in the absence of case law, they have tended to agree with the UNIDROIT Principles and the DCFR: the contracting parties can use any defence available between themselves against the third party.⁸³ So if the contract is void or illegal or frustrated, for example, so is the third party right. The English Act takes a different approach, however: the contracting party due to perform to the third party can only use those defences where they are specifically relevant to the third party right.⁸⁴ So it is conceivable that the nullity, illegality or frustrating event might have no relation to the term embodying the third party right, which accordingly can survive while the rest of the contract fails. This seems more in accord with principle — the third party's right, although dependent on the contract, is distinct from those of the contracting parties, and any analogy with assignment (whence the rule that all defences between the contracting parties can be taken against the third party as well) accordingly inapt because the assignee merely stands in the shoes of the assignor. The Scottish Law Commission's recommendations will therefore follow the English model in this regard rather than the UNIDROIT Principles or the DCFR.

The most important issue is, however, whether the revocable third party right which the reform makes clearly possible can ever become irrevocable. Since for post-*Carmichael* Scots law a revocable third party right is a contradiction in terms, the question is one needing to be answered in legislation un-ravelling that seeming difficulty. The UNIDROIT Principles, the DCFR and the 1999 Act all give an affirmative answer to the question, although they differ as to when it happens.⁸⁵ The key feature in common ultimately between all the measures is third party reliance on the right, although they also variously recognise notification of the third party and acceptance by the third party. Given that such notification or acceptance will not be essential for the constitution of a third party right under the new Scottish rules, however, it would be confusing then to recognise them as a way of making an otherwise revocable right irrevocable; and it is not clear in principle why this result should follow, even although such a rule is found in, not only the UNIDROIT Principles, but also a number of the civil codes.⁸⁶ The DCFR on the other hand does allow a right to remain revocable after third party notification if the contract so provides. This may however be overcome, and the third party right made irrevocable, where the third party is led by the contracting parties to believe that the right is irrevocable and then acts in reasonable reliance on that belief.

⁸³ See DP No 157, paras 2.82-2.83, 7.15-7.24.

⁸⁴ 1999 Act s 3. For the background, see Law Commission Report on Privity of Contract: Contracts for the Benefit of Third Parties (Law Com No 242, 1996), Part X.

⁸⁵ See above, .text accompanying notes 8, 15, 20-21

⁸⁶ For references see above notes 8 and 50.

The proposed Scottish scheme will start from the position that a third party right may come into existence under a contract but remain revocable in the sense that it may still be altered or cancelled by the contracting parties. This may spring from the contract's terms, express or implied; or it may arise as a result of other rights enjoyed by one or more of the contracting parties, such as the right of property enjoyed by the car owner in *Kelly v. Cornhill Insurance*. On consultation, however, it was clear that the third party's reliance even on such a revocable right should receive protection from the law in at least some circumstances — for example, being known to and not objected to by the contracting parties.

But if third party reliance is to form any sort of basis for making the third party right irrevocable there needs to be some protection for the contracting parties, to deal with such matters as what kind of knowledge they need to have of the third party's actings, and how much third party reliance and detriment are necessary to deprive them of any entitlement to vary or cancel the right. The Scottish Law Commission found a model readily to hand in the Requirements of Writing (Scotland) Act 1995.⁸⁷ This statute, itself based on a Commission report of 1988, spells out the written formalities needed to conclude a sale of land, but allows a contract to be formed despite the absence of such formalities where one of the parties acts in reliance as if a contract was in place.⁸⁸ Paraphrased to fit the context provided by third party rights, and with a requirement of foreseeability added in response to consultees' views on the question, this provides that where the third party acted or refrained from acting in reliance on its right with the knowledge and acquiescence of, or in a way that ought to have been foreseen by, the contracting parties, the latter would not be entitled to vary or cancel the right, provided that (1) the third party's position had been affected to a material extent by its actings or by refraining from acting and, further, (2) the third party would be adversely affected to a material extent by the contracting parties' revocation or variation of the contract. While a provision like this would not eliminate all uncertainty about third party reliance and detriment, it would make clear that the contracting parties had to know about the third party's behaviour, *and acquiesce* in it, or, alternatively, that they ought to have foreseen the actings in question. Further, not only must the third party's interests have been *materially* affected by its own conduct but also they must be further materially affected by the proposed revocation or modification. It seems clear that two distinct effects are required: the first the detriment resulting to the third party from its conduct in reliance, the second more forward-looking to adverse consequences that will follow from the non-performance of the right, such as leaving the third party without the means to repay loans taken out on the basis of the prospective right.

⁸⁷ DP No 157, paras 6.24-6.27.

⁸⁸ See Requirements of Writing (Scotland) Act 1995, s 1(3), (4). See Scottish Law Commission Report on Requirements of Writing (Scot Law Com No 112, July 1988).

A final point is that, as with the English Act, all this can be over-ridden by contractual provision on when, if ever, the third party right may become irrevocable. This includes the possibility of a declaration by the contracting parties that the right is irrevocable, whether made in the contract itself or at some later point. This is unproblematic for a system which recognises the enforceability of unilateral promises without any requirement of the promisee's acceptance and thus also recognises, for example, that offers and other pre-contractual statements of intention, otherwise generally revocable in Scots law, may be made irrevocable at least for a period of time without any act of acceptance by anybody else.⁸⁹

Conclusion

The main aim of this piece has been to demonstrate the lessons which law reformers in Scotland have learned from the models of the UNIDROIT Principles, the DCFR and the English Act of 1999 in relation to the question of third party rights in contract. In the absence of any realistic prospect of a Scottish civil code, or even a contract code, the article has also sought to show something of the complexities of fitting statutory law reform of a basic doctrine into the body of what is still very much a common law of obligations and contract. In some ways, the problem in Scotland has been even greater than in England & Wales, where the 1999 Act was definitely grafting something new and different into the law. The issue in Scotland is essentially the correction of a judicial error and a restatement so far as necessary of the existing law in its proper context. Difficult decisions have to be made about how much of the doctrine to render into statutory language, how much to leave instead in silence to the existing law (uncertain in some ways as it may be, as for example with when manifestations of intention take on legal effectiveness), and how much to proceed by way of reference to that law rather than stating it in detail (as with suspensive and resolutive conditions, remedies and defences). In the codal form of the UNIDROIT Principles and the DCFR, by contrast, there is no need for such subtleties in setting out the basic rules on third party rights. It can be taken that other parts of the code (such as those on conditions and remedies) apply to third party as to other rights in the system unless they are specifically excluded or modified in some way.

Scottish law reformers can therefore look only with envy at the systematic overviews achieved in these documents, and the work being done on a new code of obligations in

⁸⁹ McBryde, *Contract*, para 6.57. See further Hector L MacQueen and Joe Thomson, *Contract Law in Scotland* (3rd edn, Haywards Heath, 2012), paras 2.12, 2.21, 2.96; Martin Hogg, *Obligations* (2nd edn, Edinburgh, 2006) paras 2.32-2.44.

France. The Scottish struggles may however still draw attention to some of the less obvious ways in which the inter-action of different parts of the system (codified or not) can be significant and in need of careful basic analysis before any answers can be given. Finally, while in practice and especially commercial practice it may still be most common for contracting parties to exclude third party rights expressly, the demand, indeed need, for such rights in many different situations is clear. The objective must be therefore a law on third party rights not stuck in the seventeenth century but rather meeting the requirements of the twenty-first.⁹⁰

⁹⁰ For a helpful short comparative survey of the current state of general legal development in this area, see Stefan Vogenauer, 'Contracts in Favour of a Third Party' in J Basedow, K.J. Hopt, R. Zimmermann and A. Stier (eds), *The Max Planck Encyclopaedia of European Private Law* (2 vols, Oxford 2012), vol 1, pp 385-388.