Cohabitants, unjustified enrichment and law reform (Part 1)

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HECTOR MACQUEEN[‡]

I. INTRODUCTION

Not much more than a decade after the passage of the cohabitation provisions of the Family Law (Scotland) Act 2006, their possible reform is in the air. In its Tenth Programme of Law Reform, published in February 2018, the Scottish Law Commission indicated that one possible area of work was financial provision upon the breakdown of a cohabitation relationship under section 28 of the 2006 Act, with the provisions of the Family Law (Scotland) Act 1985 for divorce and dissolution of civil partnerships providing still more of a model than they already do.[1] In March 2019 the Law Society of Scotland published a report recommending that common law unjustified enrichment claims between former cohabitants should be allowed despite the expiry of the one-year time limit for a claim under section 28 of the 2006 Act.[2] This would reverse the result of a controversial decision in 2016, *Courtney's Executors v Campbell*,[3] discussed further below. Earlier, in October 2018, the Scottish Government published its response to the results of a consultation on Scottish Law Commission recommendations (made in 2009) to reform cohabitants' succession rights as conferred by section 29 of the 2006 Act.[4] Although the Government intends to think further on the definition of cohabitation, it is minded to legislate to extend the deadline for a section 29 application from six months to one year from death, but not to extend the possibility to testate estates. An approach for intestacy generally, based upon either a 'threshold' system or one of 'community of acquests', was further consulted upon in February 2019, including the possibility of equiparating a surviving cohabitant's rights with those of a surviving spouse.[5]

In all this possible law reform activity the Law Society report alone makes reference to the issues about the relationship between the statutory provisions and the law of unjustified enrichment raised by *Courtney's Executors v Campbell*. The consultees on whose views the report was based made some interesting remarks about unjustified enrichment in particular. One said that 'unjustified enrichment is complicated and hardly ever successful'; another felt that 'whether this remedy should remain in the longer term should be considered as part of a wider review of the law on cohabitation'.

This present two-part paper suggests that, while the second of these views is correct, the first one is not. Unjustified enrichment is less complicated than it looks, and much less so than the current statutory provisions on cohabitation. Further, enrichment claims are more often successful than not, at least to judge from reported case law. This paper will not argue that unjustified enrichment can do all the necessary work for cohabitants' rights. That is

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[1] Scottish Law Commission Report 250, Tenth Programme of Law Reform (February 2018, available at https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF), para 2.30.

[2] Law Society of Scotland, *Rights of Cohabitants: Family Law (Scotland) Act 2006, sections 28 and 29* (March 2019), available at https://www.lawscot.org.uk/media/361911/rights-of-cohabitants-paper.pdf.

[3] *Courtney's Executors v Campbell* 2017 SCLR 387.

[4] Scottish Government response to the consultation on the law of succession (18 October 2018, available at https://www2.gov.scot/Resource/0054/00542136.pdf), 12-14. See further Scottish Law Commission Report 215 Succession (2009) Part 4, 'Cohabitation'.

[5] Scottish Government Consultation on the Law of Succession (17 February 2019, available at https://www.gov.scot/publications/consultation-law-succession/pages/6), chapter 3. The consultation closed on 10 May 2019.

clearly not so. But it will be suggested that it can play a useful role alongside a reformed statutory regime, and that that role should not be constrained by mistaken ideas about the supposed 'subsidiarity' of unjustified enrichment.

II. COHABITATION BREAKDOWN AND UNJUSTIFIED ENRICHMENT

The principal common law solution in Scotland to problems arising from the breakdown of a cohabitation relationship or its dissolution by the death of one of the parties has been through the law of unjustified enrichment. The main vehicle is the 'condictio with the staccato name',[6] the *condictio causa data causa non secuta* (the CCDCNS), received in Scots law from Roman law by way of the European *ius commune*.[7] This application of the CCDCNS started from the classic Roman law example of gifts in anticipation of marriage from which the Scottish institutional writers in the seventeenth and eighteenth centuries held that engagement rings and wedding gifts fell to be returned if the anticipated wedding did not take place.[8] Robin Evans-Jones gives a helpful analysis of *causa* or 'cause' in this context as 'the 'purpose' for which a thing is given'. This may be a specific *quid pro quo* or 'the occurrence of a particular event, such as marriage or succession, which normally, but not always, lies in the power of the transferee to achieve.'[9] 'Cause' is however not to be equiparated with the unilateral motive of the party making the transfer, which may be defeated by events without triggering any entitlement to restoration.[10] 'The purpose which the person who makes the conferral seeks to achieve by the performance must be known and accepted as the basis of the performance by both parties.'[11]

The flow of cohabitation enrichment cases began in the early 1990s,[12] with the leading case, *Shilliday v Smith*, decided in 1998.[13] There the enrichment remedies of repetition and recompense were successfully invoked by an ex-cohabitant (F) who recovered from her erstwhile partner (M) the amount which she had spent on repairs and improvements being carried out on the house in which the couple had been living and the title to which was solely in the defender. Payment of the tradesmen working on the house had been with money provided by F, sometimes directly, sometimes via M. The claim was based upon the principle of the CCDCNS: the *causa* or purpose underlying the expenditure had been F's

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[6] D Visser, *Unjustified Enrichment* (2008) 455 (attributing the description to Reinhard Zimmermann).
[7] On the history see GD MacCormack, 'The *condictio causa data causa non secuta*' in R Evans-Jones (ed), *The Civil Law Tradition in Scotland* (1995) 253.
[8] The relevant institutional writings are Stair, *Institutions of the Law of Scotland*, I.7.7; Bankton, *An Institute of the Law of Scotland*, I.8.21; Erskine, *An Institute of the Law of the Law of Scotland*, III.1.9-10. See also *Digest* 12.4.6-10.
[9] R Evans-Jones, *Unjustified Enrichment*, vol 1 (2003), para 4.09. More generally, for Evans-Jones *causa* is '[c]entral to an understanding of the nature of the causes of action arising from the *condictiones* … the *causa* is the legally recognised purpose that P and D pursued when P deliberately conferred the benefit on D' (ibid, paras 2.04-2.05).
[10] Evans-Jones, *Unjustified Enrichment*, vol 1, para 4.11-4.12.
[11] Evans-Jones, *Unjustified Enrichment*, vol 1, para 4.10.
[12] WJ Stewart, *The Law of Restitution in Scotland* (1992), paras 7.29, 8.25-8.28, drew attention to *Scanlon v Scanlon* 1990 GWD 12-598 (successful recompense action by female in respect of contribution to hire-purchase of car by male, the parties regarding themselves at the time of the transaction as 'common law spouses' but not having sought declarator of MCHR). The first fully reported case was *Grieve v Morrison* 1993 SLT 852.
[13] *Shilliday v Smith* 1998 SC 725. Subsequent cohabitation cases involving reference to the CCDCNS include *Moggach v Milne*, unreported, 22 September 2004, Elgin Sheriff Court, Sheriff Principal Sir Stephen Young QC; *Smith v Barclay*, unreported, Dundee Sheriff Court, 29 August 2006, Sheriff R A Davison (whose judgment refers to a parallel decision in *White v Docherty*, also unreported, Arbroath Sheriff Court, 8 January 2002 and 4 March 2003, Sheriff Principal R A Dunlop QC); *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117 (for which see further below, text accompanying note 16); *McKenzie v Nutter* 2007 SLT (Sh Ct) 17 (for which see further below, text accompanying note 21); *Thomson v Mooney* 2014 Fam LR 15.

contemplation of marriage with M, with the house to become the matrimonial home; and this had been known to M. The break-up of the relationship meant that the *causa* failed to materialise (ie *causa non secuta*). The court awarded F repetition in respect of her payments to M and recompense from him for her direct payments to the tradesmen.

Shilliday tackled the issue of the need in the CCDCNS to show a mutually agreed understanding of the parties that the transfer was made on the basis of some future event occurring and would be reversed if it did not. Giving the leading opinion, Lord President Rodger explained that the mutually agreed understanding did not need to be contractual in any sense. In *Shilliday* itself, 'the defender knew that the pursuer was expending money on his house which the parties had agreed would be their matrimonial home, and … all that she did was done in contemplation of the parties' marriage'.[14] *Shilliday* thus confirmed that the purpose (*causa*) of the transfer need not be contractual in nature, or based upon any express or implied agreement of transferor and transferee; what matters is the enriched party's knowledge of the impoverished person's purpose and its receipt of the benefit on that basis.[15]

The point was taken much further, however, in the subsequent case of *Satchwell v McIntosh*.[16] The averred facts were that, after becoming engaged in 1992 the parties cohabited at a house the title to which was in the name of the female partner (F), but which had been substantially paid for with monies provided by the male partner (M). Refurbishments of the house had also been paid for with M's money. The parties never married, although M continued to hope that one day they would. M had fallen victim to multiple sclerosis, but averred that at the time of undergoing tests for the disease in 1994 F had assured him that whatever the diagnosis she would stay with him for the rest of his life. It was on this basis that M had agreed to title to the house being taken in F's name. In the event, in May 2001 F formed a relationship with another man, who moved into the house in September, thus compelling M to leave.

M claimed his money back on the basis of the CCDCNS because he had handed it over, not in the expectation of marriage, but in the expectation of living and being cared for by F in the house for the rest of his life. Sheriff Principal Bowen held that this was a relevant *causa* upon which to base an enrichment claim, claiming to follow, but in reality significantly extending, the *Shilliday* decision. What was critical for the Sheriff Principal was M's state of mind alone, rather than any mutual understanding of the parties.[17] Here, however, he may have read more widely than was intended by its author Lord President Rodger's comment in *Shilliday* that it was not necessary to show any contract between the parties. More significant, it is suggested, was lack of evidence that F had not shared M's understanding.

Sheriff Principal Bowen also responded to an argument that the *causa* in this case was an event that had already taken place at the time the transfer was made, namely the cohabitation of the parties, and therefore there was no question of failure of purpose. The judge found it un-necessary to press the case too neatly into the terms of the CCDCNS. This is unconvincing, however. The answer to the point actually lies in adapting another of the Roman *condictiones*, the *condictio ob causam finitam* (COCF), which has been received in

[14] *Shilliday v Smith*, 730 (per Lord President Rodger).
[15] See also Evans-Jones, *Unjustified Enrichment*, vol 1, para 4.10.
[16] *Satchwell v McIntosh* 2006 SLT (Sh Ct) 117.
[17] *Satchwell v McIntosh*, para 10.

Scots law and lies where the shared purpose of the transfer (the cohabitation) existed at the time it was made, but came to an end rather than failed to transpire.[18]

There is no suggestion in the arguments or the judgment that the *causa* of continuing cohabitation was immoral or unlawful, thereby perhaps rendering it ineffective as a basis for the enrichment claim.[19] But even had such an argument been run, one answer might have been that Scots law has also received the *condictio ob turpem vel injustam causam* enabling recovery of a transfer made for an illegal or immoral purpose, provided that the transferor is less responsible for the illegality than the transferee.[20] While it might be difficult to argue that one party was less at fault than the other in their merely continuing to live together, a court could still think there was equity in allowing recovery to the one who in good faith had made a losing investment in the relationship.

Overall, however, *Satchwell* is an important decision in its effect, showing that the active contemplation of marriage by the parties is not an essential foundation for an enrichment claim after the relationship breaks down. Continuing cohabitation can be a lawful purpose in itself. The rationale of *Satchwell* was still further developed in *McKenzie v Nutter*,[21] where the parties did not intend marriage, merely planning to live together; but they never actually achieved even that. Their plan was to sell their respective houses and use the proceeds to buy another one in joint names where they would live together. But the defender (F) was not able to sell her house quickly enough, so the new house was bought in joint names, with a joint loan to make up the balance of the price along with the proceeds of the sale of the pursuer's (M's) house. F was to repay the loan with the proceeds of her house sale when it happened. In the event F's house was not sold, the parties never cohabited in the new house, and their relationship broke down. M brought an action of division and sale to have the new house sold and the proceeds divided between the parties, along with a claim that F was enriched thereby, never having made her contribution to the agreed purchase. This claim had the effect of reducing to nothing the amount due to F in the division and sale. M's arguments were upheld on the basis of the CCDCNS. Once again, no reference was made to any immorality or illegality in the plan to cohabit.

Shilliday v Smith is not only important as a case on cohabitants' rights. The old division of enrichment law, into cases of repetition, restitution and recompense, was replaced by one in which these actions were merely remedies by which unjustified enrichments might be recovered: repetition for the return of money, restitution for the return of other property, and recompense for other cases, including not only those where specific restitution had ceased to be possible in fact,[22] but also those where enrichment arose from the provision of services by the impoverished to the enriched party.[23] This has led on to a general re-working of the law in the books, based on an analysis of the different ways in which enrichment comes about.[24] But the fact that no appellate decision has yet affirmed the re-working in the

[18] See e.g. Craig, *Jus Feudale*, 3.5.23; Stair, *Institutions*, 1.7.7; and further Evans-Jones, *Unjustified Enrichment*, vol 1, paras 6.06-6.11. *Virdee v Stewart* [2011] CSOH 50 may be another example of such a case, as suggested by MA Hogg, 'Unjustified enrichment claims: when does the prescriptive clock begin to run?' (2013) 17 *Edinburgh LR* 405, at 406.

[19] See Stair, *Institutions*, 1.7.8; Bankton, *Institute*, 1.8.22.

[20] See Evans-Jones, *Unjustified Enrichment*, vol 1, ch 5.

[21] *McKenzie v Nutter* 2007 SLT (Sh Ct) 17 (criticised in *Gibson v Gibson and Gavryluk*, unreported, Peterhead Sheriff Court, 4 August 2010, Sheriff Principal Sir Stephen Young QC).

[22] As in eg *North-West Securities Ltd v Barrhead Coachworks Ltd* 1976 SC 68.

[23] For an example of a services case see *ELCAP v Milne's Executor* 1999 SLT 58 (claim in recompense for provision of medical care held relevant).

[24] This is the basis for the structure of Evans-Jones, *Unjustified Enrichment* vols 1 and 2 (2013), and will also be deployed in Niall Whitty's forthcoming treatment of the subject in *The Laws of Scotland: Stair Memorial*

books means that courts and practitioners (even those writing books themselves) have still to grasp their full significance.[25]

The cohabitation cases almost uniformly fall within the category where enrichment arises by virtue of a transfer to or conferral upon the enriched party by the impoverished one, with both parties acting voluntarily or deliberately in the transaction. The Roman *condictiones* are important illustrations of why the enrichment involved is unjustified and must be returned. For those who find reference to Roman law off-putting, it may be helpful to think instead about the typical factual situations involved in successful claims. The South African scholar Jacques du Plessis has offered one alternative way of speaking about the subject, at least in English:

> [T]he law of unjustified enrichment dealing with enrichment arising from transfer could be presented in terms of the following typical cases where the failure of the purpose of a transfer indicates that a claim for restitution could potentially be awarded. The grounds for distinguishing between these cases are essentially whether the purposes relate to the present or future, whether they are lawful or unlawful, and whether they failed at the moment of transfer or later."[26]

For completeness, we should note two other ways in which enrichment typically comes about, while observing that they are unlikely to arise in cohabitation cases. One situation is when a party enriches itself by interference with or use of another party's rights (typically property rights) without the right-holder's authorisation. Another situation is where enrichment is imposed upon a party by the actions of another made without the first party's authorisation. The classic cases are unauthorised improvements to another's land or buildings and performance of another's obligation so as to discharge it. Neither of these situations will commonly arise in the context of cohabitation, however. If one cohabitant uses or improves the other's property, or pays the other's debts, it will generally be with at least implicit authorisation to do so.

III. SUBSIDIARITY

The 2006 Act does not explicitly prevent the common law from applying to any of the situations within its purview. So at the very least on the face of the Act enrichment law can continue to provide an alternative claim for a cohabitant. Malcolm *et al* gave the subject eight pages of their 2011 textbook on the law relating to cohabitation, although they suggested that the presumptions of common property and equal ownership in sections 26 and 27 of the Act mean that enrichment would at best be only rarely relevant in cases about moveable property.[27] A number of sheriffs also appeared to think enrichment claims remained available to former cohabitants after the 2006 Act.[28] Gaps existed in the statutory coverage that might be filled by enrichment law: for example, cases where parties live

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Encyclopaedia Reissue. See also HL MacQueen and Lord Eassie (eds) *Gloag & Henderson: The Law of Scotland* 14 ed (2017) ch 24 (by HL MacQueen); MA Hogg, *Obligations* 2 ed (2006) 195-239.

[25] Thus Malcolm *et al*, *Cohabitation*, paras 2.02-2.11, discusses unjustified enrichment without reference to the structure of transfer, interference and imposition described in the paragraph below. For judicial difficulties see MA Hogg, 'Continued uncertainty in the analysis of unjustified enrichment', 2013 *Scots Law Times (News)* 111.

[26] J du Plessis, 'Labels and meaning: unjust factor and failure of purpose as reasons for reversing enrichment by transfer' (2014) 18 *Edinburgh LR* 416, 427.

[27] Malcolm *et al*, *Cohabitation*, paras 2.02-2.11.

[28] See e.g. *Esposito v Barile* 2011 Fam LR 67 (Dundee Sheriff Court); *Harley v Robertson*, unreported, 9 December 2011, Falkirk Sheriff Court, Sheriff C Caldwell.

together, but not as husband and wife or as civil partners.[29] It further followed that, in cases where there is doubt about whether the parties are or were cohabitants within the meaning of the 2006 Act, an alternative enrichment claim could be a prudent precaution for a pursuer.

Malcolm *et al* suggested a potential application of enrichment law in cases where the one-year period for a section 28 claim lapsed without relevant action having been taken, noting that a common law claim prescribes five years after it becomes enforceable.[30] But a 2016 decision in the Outer House of the Court of Session, *Courtney's Executors v Campbell*, held that the 'subsidiarity' of unjustified enrichment, under which it is only to be invoked where no other remedy is available to the pursuer, means that it cannot be used in a case where a claim might have been made under section 28. This is so even when such a claim is no longer possible thanks to the lapsing of the time-limit.[31]

The opinion in *Courtney's Executors* traces the modern development of subsidiarity in Scots enrichment law. It emerged in the pre-*Shilliday* law of recompense on the basis that that remedy's equitable nature made it inappropriate for use where another legal remedy was or had been available. Subsidiarity was deployed, for example, in cases where a contractor performed actions which a public authority had a statutory obligation to carry out but was not doing so. In such cases, the courts ruled that the contractor could and should have sought an order against the authority to perform the statutory obligation, rather than embarking upon what was in effect self-help and then claiming recompense for its expenditure in doing so.[32] The judge in *Courtney's Executors* held that the transformation of enrichment law since *Shilliday* meant that the doctrine was no longer confined to cases where recompense was claimed. Hence it could be applied to both claims in *Courtney's Executors*: one being for repetition of sums of money paid by the pursuer (M) to the defender (F) that the latter used to acquire a house in her name only; the other for recompense in respect of financial contributions M made to the renovation of the property. While the subsidiarity restriction was not absolute, and might be lifted where 'strong and special circumstances' existed to support that,[33] the present case did not show such circumstances.

No reference is made in *Courtney's Executors*, however, to the academic discussion of subsidiarity since the decision in *Shilliday*. Characterisation of unjustified enrichment as a matter of equity rather than law cannot be a justification in a system that does not formally divide law and equity.[34] As Danie Visser has remarked, 'the debate around subsidiarity is

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[29] As in *Lyle v Webster*, unreported, Dunfermline Sheriff Court, 12 February 2018, Sheriff S G Collins QC (where enrichment and contract claims were made). For commentary see HL MacQueen, 'Restitution upon rescission for breach of contract, mutuality, and unjustified enrichment: *Lyle v Webster*' (2019) 23 *Edinburgh LR* 278.

[30] See Prescription and Limitation (Scotland) Act 1973, Sch.1, para 1 (b) See *NV Devos Gebroeder v Sunderland Sportswear Ltd* 1990 SC 291; *McCafferty v McCafferty* 2000 SCLR 256; *Harris v Sales' Exrs*, unreported, 14 February 2003, Outer House Court of Session (Lady Paton); *Thomson v Mooney* 2014 Fam LR 15. *Virdee v Stewart* [2011] CSOH 50, cited by Malcolm *et al*, *Cohabitation*, para 2.06 note 27, may not have been correctly decided on this point: see Hogg, (2013) 17 *Edinburgh LR* 405 at 406-7.

[31] *Courtney's Executors v Campbell* 2017 SCLR 387. The court referred to an apparent precedent in the unreported sheriff court case of *Jenkins v Gillespie*, 8 September 2015, Alloa Sheriff Court, not available on the Scottish Courts website but described in M Hughes, 'The subsidiarity exclusion: cohabitation and unjustified enrichment' 2016 *Scots Law Times (News)* 7.

[32] See *Northern Lighthouse Commissioners v Edmonston* (1908) 16 SLT 439; *Varney v Burgh of Lanark* 1974 SC 245; *Transco v Glasgow City Council* 2005 SLT 958.

[33] *Lawrence Building Co v Lanark County Council* 1978 SC 30.

[34] 'It is often said, and truly said, that in the law of Scotland law is equity, and equity law' (*Gibson's Trustees, Petitioners* 1933 SC 190, 198 (per Lord President Clyde)). On equity in Scots law, see further DJ Carr, *Ideas of Equity* (2017).

really about the role that a legal system wants to give to unjustified enrichment.'[35] Evans-Jones points out that questions of subsidiarity can only arise where the law provides two or more causes of action in response to a single causative event. Whether one is subsidiary to another depends upon the wider aims of the legal system as a whole. Subsidiarity can also be either strong (an enrichment claim will be refused when some other legal principle applies even if claims under that principle fail) or weak (merely directing a party to bring the primary claim first). A system may also allow that if that primary claim is as a matter of fact not useful – for example, because the defender in that claim is insolvent – then the enrichment claim may still be brought despite the theoretical presence of another remedy.[36]

Comparative study reveals, however, just how unsystematic the Scottish approach to subsidiarity has been, so that the purpose and scope of the concept are quite unclear.[37] In contrast, the concept is much more developed elsewhere, particularly in legal systems heavily influenced by French law. So, for example, the irrecoverability of a gain made under a valid, subsisting contract is to be explained, not by subsidiarity, but because the enrichment is justified by the contract. Apart from Evans-Jones touching upon the question of whether the alternative to enrichment must be one which is practically as opposed to theoretically available to the impoverished party, we do not know how far the impoverished party, or indeed the court, must search for an alternative remedy before launching an enrichment claim. Is it only necessary to look for a remedy against the enriched party, or must possible remedies against a third party (or indeed fourth and fifth parties and beyond) be taken into account as well? Again, we do not know whether the enrichment claim must avoid being what the French call a 'fraud on the law', that is, a circumvention of other rules of law such as prescription and the law of evidence.

In the most detailed discussion of the current position in Scotland, Professor Niall Whitty argues that 'a doctrine of subsidiarity cannot be general throughout enrichment law but must be justified in particular contexts by pertinent evaluations of policy and principle.'[38] Thus we must look at the different typologies of facts in which claims arise, assess whether subsidiarity questions may arise in any of them and, if so, how they should be handled. On such an analysis, Whitty argues, the only case for the application of subsidiarity in Scots enrichment law is that of unauthorised performance of another's obligation (not including payment of another's money debt), where the concept regulates the power of one party to thrust new obligations upon another.[39]

What may perhaps be said, therefore, is that subsidiarity is most likely to be deployed where enrichment has been imposed upon a person without that party's consent, in order to ensure that solutions to difficulties are sought through due legal process rather than by way of self-help. This is the line followed in all editions of *Gloag & Henderson* since 2007.[40] *Courtney's Executors* was certainly not a case about the unauthorised performance of

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[35] D Visser, 'Unjustified enrichment', in JM Smits (ed), *Elgar Encyclopedia of Comparative Law*, 2 ed (2012), 947 at 952.

[36] Evans-Jones, *Unjustified Enrichment*, vol 2, paras 7.05-7.10.

[37] See M Campbell, 'The subsidiarity of unjust enrichment: Anglo-Franco-Scots perspectives', University of Edinburgh PhD 2019, arguing that the concept should play no role at all in enrichment law; and two articles by HL MacQueen, 'Unjustified enrichment in mixed legal systems' (2005) 13 *Restitution LR* 21; 'Unjustified enrichment, contract and subsidiarity' in VV Palmer & EC Reid (eds) *Mixed Jurisdictions Compared: Scotland and Louisiana* (2009) 322.

[38] NR Whitty, '*Transco v Glasgow City Council*: developing enrichment law after *Shilliday*' (2006) 10 *Edinburgh LR* 113 at 130.

[39] As in the case which prompted the Whitty commentary, *Transco plc v Glasgow City Council* 2005 SLT 958.

[40] *Gloag & Henderson*, para 24.19. See for further discussion Hogg, *Obligations*, paras 4.111-4.122.

another's obligation. Like most of the cohabitation cases it was about deliberate transfers of money by the pursuer to the defender, voluntarily received to be and in fact spent on the latter's house in which the parties lived together for three years. There is accordingly a good argument that the doctrine of subsidiarity was in its own terms wrongly applied in this particular case.

Even if subsidiarity is of wider scope than argued by Whitty, the question remains of how strong may be its exclusion of enrichment claims where other possibilities exist. While the doctrine applied in the pre-*Shilliday* law of recompense looks strong in nature, it was clearly not absolute in that the possibility of exceptions was recognised. In that context, the reasons why M did not bring a timeous claim under section 28 in *Courtney's Executors* need careful scrutiny. But the judge held, on the basis of the parties' written pleadings alone and without hearing any evidence, that M's ignorance of his rights under section 28 until after its time limit had expired, that F's lawyers had not mentioned these rights during discussions in the period after the cohabitation broke down, and that M had been unwilling to press F when her son was terminally ill, did not amount to such 'strong and special circumstances' as would justify setting aside the defence of subsidiarity. M had always wanted his payments back after the cohabitation broke down and could have sought independent legal advice on the issue without necessarily asking or telling F that he was doing so.

A final point is the policy question of how far allowing an enrichment claim in the circumstances of cases like *Courtney's Executors* would be a 'fraud on the law', in that it would allow a party to circumvent a rule of law laid down by a legislature, by which another claim on the same facts is not allowed. The aim of the 1992 Report of the Scottish Law Commission recommending the scheme implemented by the 2006 Act was to provide separating cohabitants with rights where at the time of the Report none of any significance or utility were thought to exist; the earliest recognition of enrichment in cohabitation cases in Scotland occurred only after the Report's publication.[41] The preamble to the 2006 Act declares that the Act's purpose was 'to make provision conferring rights … for persons living, or having lived, together as if husband and wife or civil partners'. There is nothing here to suggest that already existing rights are to be taken away. The time limit in section 28 is for claims under the section and no other.

Further, the judge in *Courtney's Executors* indicated that had there been no section 28 claim he would have held M's enrichment claims to be relevant on the basis of the CCDCNS.[42] No attempt was made, however, to assess whether M would have had a claim under section 28 anyway. As Gillian Black and Daniel Carr have pointed out, the defender F stated that—

> … the relationship between [her and M] was a friendship rather than a lifetime commitment … When the house was purchased, they tried sharing a bedroom, but the relationship did not develop in that way and [M] began to sleep downstairs …[43]

This makes it seem quite possible that had any section 28 claim been made, it would have been defended on the footing that, while the parties lived under the same roof, they did not do

[41] See above, text accompanying notes 12-13. The Scottish Law Commission's preceding Discussion Paper No 86 on the Effects of Cohabitation in Private Law (1991) briefly mentioned the possibility of unjustified enrichment claims for cohabitants (para 1.9). For discussion of when statute supersedes the common law, see A Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (2018), 58-63.

[42] *Courtney's Executors*, para 74.

[43] G Black & DJ Carr, 'Cohabitants' rights in conflict: the Family Law (Scotland) Act 2006 vs unjustified enrichment in *Courtney's Executors v Campbell*' (2017) 21 *Edinburgh LR* 293 at 297, quoting from *Courtney's Executors*, para 14.

so as cohabitants within the meaning of the 2006 Act. In all these circumstances, it is suggested, allowing M's enrichment action to proceed could not have been characterised as a 'fraud on the law'; it was always a valid alternative claim, not at all co-extensive with that under section 28.

It would be unfortunate indeed if legislation intended to improve the legal position of cohabitants was left having the formal effect of cutting off rights that they might otherwise have. But that will be the result if *Courtney's Executor* is left untouched by either the higher courts or the current moves to reform.

Cohabitants, unjustified enrichment and law reform (Part 2)

HECTOR MACQUEEN[‡]

IV. COHABITATION AND THE FAMILY LAW (SCOTLAND) ACT 2006

In the first part of this article we concentrated on how the common law of unjustified enrichment deals with the breakdown of a cohabitation relationship between two living parties. In this second part we turn to how the matter is treated under section 28 of the Family Law (Scotland) Act 2006 before going on to look at the problems where the relationship is ended by the death of one of the parties. This is dealt with not only by section 29 of the 2006 Act, but also, it is suggested, possibly by unjustified enrichment as a claim against even a testate deceased's estate.

(1) *Defining cohabitants*

Very important for the continuing possibilities of the common law outside the 2006 Act is how that legislation defines cohabitants. It avoids the creation of any sort of new status for cohabitants which might be thought to detract from the institutions of marriage or civil partnership. The parties rather than the relationship receive statutory definition, in section 25. A cohabitant is either member of a couple who are (or were) living together as if they were married to each other, including two people of the same sex who are (or were) neither married nor in civil partnership with each other.[44] The use of the word 'couple' excludes living arrangements involving more than two people (e.g. flat-sharing),[45] although it might well be the case that a couple will be cohabiting while also living with others.[46]

What then is meant by living together as if married or as if civil partners? The Act directs a court determining the question to have regard to three factors: (1) the length of time for which parties live together; (2) the nature of their relationship during that period; and (3) the nature and extent of the financial arrangements subsisting during that period. Sexual relations from the outset within the cohabitation are often thought to be of critical importance.[47] This means that many relationships which involve cohabitation but, generally, not sex (e.g. parent-child, siblings, elderly persons living together for mutual support, live-in carers/housekeepers, flat-sharing) are excluded from the rights under the Act even although there may well be vulnerability and potential for its exploitation.[48]

(2) *Section 28: financial provision upon breakdown*

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[44] This reads s 25 in the interpretive light cast by the Marriage and Civil Partnership (Scotland) Act 2014 s 4.

[45] See L Gordon & J Nobbs, 'Cohabitation: the new legal landscape' (2006) 51(5) *Journal of the Law Society of Scotland* 20; *Lyle v Webster*, unreported, Dunfermline Sheriff Court, 12 February 2018, Sheriff S G Collins QC.

[46] For an example of such arrangements see N Lacey, *A Life of H L A Hart: The Nightmare and the Noble Dream* (2004), chs 4 and 5. Hart lived with Jenifer Williams from 1937 and from 1939 they also shared accommodation with a married couple (the Douglas Jays) and a number of other friends. These arrangements continued until 1945, although Hart and Williams married in 1941.

[47] KMcK Norrie, *Annotations to the Family Law (Scotland) Act 2006 (asp 2)* (2006) 59-60; J Thomson, *Family Law Reform* (2006) paras 2.29-2.30. See also the same author's *Family Law in Scotland* 7 ed (2014), para 8.2. Note however that husband and wife are not obliged to have sexual relations: *consensus non concubitus facit matrimonium*. See recently *In the matter of X (a child)* [2018] EWFC 15.

[48] See for another example *Gutcher v Butcher*, unreported, 23 September 2014, Kirkwall Sheriff Court (Sheriff Principal DCW Pyle).

The rights created for cohabitants specifically by the 2006 Act do not include anything akin to the marital or civil partnership obligations of mutual support. Most of the actual rights are however otherwise modelled on, although by no means exact imitations of, those existing in marriage or civil partnership. Those of principal relevance to the present paper are in sections 28 and 29 of the Act. In this part of the article we concentrate on the former, turning to the latter in Part 2.

Section 28 gives the court discretion to make an order for financial provision between parties whose cohabitation has ended for reasons other than death, including orders for payment of a capital sum by one party to the other. Any application under these provisions must be made within one year of the day on which the parties cease to cohabit.[49] The time limit reflects a conscious desire not to allow too much scope for cohabitation-based claims.

There are also deliberate contrasts with what the court can do in divorce or dissolution of a civil partnership under section 9 of the Family Law (Scotland) Act 1985 (which in other respects provides something of a template for section 28 of the 2006 Act).[50] Section 28 makes no reference to fairness between the parties, unlike section 9. There is no power to order transfers of property such as a house or a pension, as in section 9(1)(a) of the 1985 Act. Nor does section 28 contain any over-arching principle that the net value of the cohabitants' property is to be shared equally.[51] And there is no failsafe provision to protect a cohabitant from serious financial hardship as a result of the break-up of the cohabitation.[52]

It is up to the defender against whom an order is made under section 28 from whence the money to fulfil it comes.[53] The section gives complex formulae by which the amount to be paid is to be worked out. Speaking very broadly, the parties' respective economic advantages from the other's contribution, and the disadvantages suffered in the interests of the other, must be determined and balanced against each other. An economic advantage includes gains in capital, income and earning capacity, and economic disadvantage is to be construed accordingly. A contribution may be financial or non-financial and includes looking after a house and children.

How would these rights have applied in the cohabitation disputes that the courts dealt with under the common law? All those discussed above in this paper centred upon the home in which the parties had lived; no children were involved. Each could now be the subject of a section 28 claim to a capital sum. The court would first examine whether the defender derived economic advantage from contributions made by the applicant, and whether and to what extent the pursuer had suffered economic disadvantage in the interests of the defender.

In *Shilliday v Smith*, F laid out her money on improvements to M's house in which the parties lived together. M's economic advantage lay in not having to pay for the improvements, and the increased value of his house. F was economically disadvantaged by the amount she had spent in M's interest, i.e. on his house. In *Satchwell v McIntosh*, M

[49] For an example showing the difficulties of assessing when cohabitation ends, see *MB v JB*, unreported, 5 September 2014, Edinburgh Sheriff Court, Sheriff Principal MM Stephen.
[50] Contrast the position in New Zealand where since amendments in 2001 the Property (Relationships) Act 1976 makes financial provision upon separation of *de facto* cohabiting parties identical to the claims arising upon the ending of marriage by divorce or the dissolution of a registered civil union other than by death of one of the parties. See further Norrie, *Commentaries*, 209-213. Note also R Gilmour, 'Section 28 and section 9(1)(b) – how do they relate?' 2013 SLT (News) 265.
[51] 1985 Act s 10(1).
[52] 1985 Act s 9(1)(e).
[53] Norrie, *Annotations*, 68.

claimed to have contributed towards the purchase price of F's house in which they cohabited, and towards the refurbishment of the property; again the economic advantage was the increased value of the house.

In each case the defender's economic advantage, if any, would have to be offset by any economic disadvantage that party had suffered in the interests of the pursuer. Perhaps the easier of the two cases in which to see this as a possibility is *Satchwell*, where F had for a period cared for M while he was suffering from multiple sclerosis. But it is not clear to what extent this involved specifically *economic* disadvantage, unless F laid out money on care, or turned down opportunities to increase earning capacity so as to remain available to M. Otherwise it would have to be seen as a non-financial contribution by F.

Finally, the pursuer's economic disadvantage in the interests of the defender has to be offset by any economic advantage gained by the pursuer thanks to the defender's contribution. In cases where the parties have lived together in a house belonging to only one of them, the obvious advantage gained by the non-owner (as in *Shilliday* and *Satchwell*) is living rent- or mortgage-free in the other's property for the duration of the cohabitation. In *Satchwell*, the pursuer may also have had an economic advantage in not having to pay for domestic care in respect of his multiple sclerosis.

What would not have been necessary in any of this would have been exploration of the questions of the beliefs and purposes with which the parties made their contributions to their cohabitation arrangements. Nor is it relevant to consider whether one party was making a gift of his or her contribution to the other party. Instead, the questions are about both parties' financial and non-financial contributions (including looking after the house), their respective interests, and the resulting economic advantages and disadvantages.

Moreover, since the crucial decision of the UK Supreme Court in *Gow v Grant*,[54] we know that this assessment is not to be a matter of precise calculation seeking to quantify appropriate compensation for any clear economic imbalance resulting from the cohabitation. Instead a 'rough and ready' approach is to be used, reflecting the kinds of imbalance arising out of a non-commercial relationship where parties are quite likely to make contributions or sacrifices without counting the cost or bargaining for a return. In a formulation owing something to the unimplemented recommendations of the English Law Commission's 2007 report on cohabitation, the court is to have regard to where the parties were at the beginning of their cohabitation and where they were at the end.[55] Even although the 2006 Act does not use the word, the overriding principle is one of fairness, not precise economic calculation.[56]

The facts of *Gow v Grant* were that the pursuer (F) had sold her home in order to move in with the defender (M) when the parties were respectively 65 and 59. F had given up work at M's request to look after his house and enjoy their life together. The cohabitation lasted for between four and five years. The sale proceeds were used, not only to fund cruises and the purchase of a painting by the couple, but also to pay off her debts and make a loan to

[54] *Gow v Grant* 2013 SC (UKSC) 1.
[55] *Gow v Grant*, para 40 (Lord Hope of Craighead), 54 (Lady Hale). See further Law Commission Report 307 Cohabitation: The Financial Consequences of Relationship Breakdown (2007).
[56] In developing this approach the court was clearly influenced by the criticisms of the Inner House decision in the case (2011 SC 618) made by Malcolm *et al*, *Cohabitation*, paras 1.08-1.31 (compare Lord Hope's judgment at paras 25-36). One of the co-authors was junior counsel for the appellant in *Gow v Grant*. Note too that in the draft Bill produced by the Scottish Law Commission in its Report on Family Law (Scot Law Com No 135, 1992), Part XVI, there was a provision (clause 36(2)(b)) that an award should be 'fair and reasonable' in all the circumstances of the case.

her adult son. M accordingly argued that F's contribution had been made in her own rather than his interests. The Supreme Court held however that, while the sale proceeds as such should be left out of account in assessing the award, the end result of the cohabitation was that F no longer had a major capital asset or employment, while M still had both. She had therefore lost the benefit of an increase in value of her former home, and in fairness that could be the basis for an award of £39,500.

The Supreme Court thought that, despite the deliberate differentiation of section 28 from section 9 of the 1985 Act in general, there was still something to be learned in the application of the former from the way in which the courts approach or have approached the somewhat similar criteria applied to financial provision on divorce and dissolution of civil partnerships. Under section 9(1)(b) of the 1985 Act, fair account is taken of any economic advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of their family.[57] But as commentators have pointed out, section 9(1)(b) has actually not been much used because the section 9(1)(a) claim to fair sharing of matrimonial or partnership property has tended to obviate the need for further balancing between the parties. There is nothing in the 2006 Act to parallel that provision for cohabitants.[58] As has been observed judicially, the rebuttable presumption at the stage of the dissolution of a marriage or civil partnership is that property will be shared fairly if it is shared equally, but the rebuttable presumption at the end of cohabitation is that each party will retain his or her own property.[59]

Shortly after the 2006 Act came into force, Professor Norrie urged the courts to adopt a broad brush approach and give the provisions teeth.[60] Prior to *Gow v Grant*, this was more or less exactly what the courts tended not to do.[61] But the situation is different now, even if, as observed by one sheriff principal, one is 'left with some unease that too much reliance on the broad approach of fairness runs the risk of doing violence to the terms of S. 28(3)(a).'[62] In *M v S*, for example, a couple separated after almost 20 years of cohabitation. The parties had entered their relationship with the defender (M) having assets worth about £102,000 while the pursuer (F) had assets of approximately £127,500. By the end of the relationship M was worth £5,691,624, while F had assets totalling £1,085,721. Both had therefore increased their wealth significantly during the relationship. F had continued her career but on an 80% basis after the birth of the couple's two children. A nanny was employed to care for them until they went to school. F sought an order for financial provision in respect of two items: one the net increase in value of a farm owned by M (which had been used as the couple's home) brought about by renovations which F had partly funded, minus the capital contributions thereto by M; the other loss of income resulting from her reduction in working hours in the interests of the parties' children but accepting that only half of this should be

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[57] See Thomson, *Family Law*, para 7.17; *Gloag & Henderson*, para 44.31 (at pp 1240-1241) for further detail.
[58] Norrie, *Annotations*, pp 68-69; Thomson, *Family Law*, ch 8.6 (at p 208); Malcolm *et al*, *Cohabitation*, para 1.10.
[59] *F v D* 2009 Fam LR 111, para 7 (Sheriff M G Hendry), quoted approvingly by Lord Hope in *Gow v Grant*, para 32.
[60] Norrie, *Annotations*, 69.
[61] See e.g. *Jamieson v Rodman* 2009 Fam LR 34; *F v D* 2009 Fam LR 111; *M v S* 2008 SLT 871; *Selkirk v Chisholm* 2011 Fam LR 56; *Gow v Grant* 2011 SC 618; *JG v JF*, unreported, April 2011, Falkirk Sheriff Court, Central and Fife at Falkirk, Sheriff T McCartney. But cf *Gow v Grant* 2010 Fam LR 21; *Lindsay v Murphy* 2010 Fam LR 156; *Mitchell v Gibson* 2011 Fam LR 53; *Russo v Scott*, unreported, Hamilton Sheriff Court, 16 December 2011, Sheriff Principal BA Lockhart.
[62] *Smith-Milne v Langler* 2013 Fam LR 58, para 12. This is all the more so when the 2006 Act omits the 'fairness and reasonableness' approach originally recommended by the Scottish Law Commission (above, note 56).

awarded because otherwise the whole economic disadvantage involved would be shifted on to M. Taking the fairness approach set out in *Gow v Grant*, and avoiding making precise mathematical calculations, the court awarded F £912,000.[63] The purpose of section 28, the court also commented, was not the relief of poverty but the redress of any economic disadvantage.[64]

The cases on section 28 tend to emphasise compensation for economic disadvantage rather than the reversal of economic advantage: in other words, loss rather than enrichment is the basis of recovery. Moreover, since *Gow v Grant*, the picture tends to be looked at in the round rather than contribution by contribution as would most probably have to be the case in an enrichment case at common law. Thus, in *M v S*, while F's financial contribution to the renovations of M's farm could probably have been recovered via the CCDCNS or the COCF, it would have been very difficult if not impossible to make any such claim about her loss of income over almost 20 years. Similarly in *Gow v Grant* itself. But while at one level section 28 is easier to understand than the requirements of enrichment law, it cannot be said that the factual inquiry required is any less complex; and the outcome of any balancing exercise remains extremely difficult to predict with confidence.

(3) Claims under section 29 upon death and intestacy of cohabitant

Section 29 of the Act enables the survivor of a deceased intestate cohabitant to make claims to (1) a capital sum payable from the deceased's net intestate estate, and/or (2) the transfer of property, heritable or moveable, from that estate to the survivor. A valid will of the deceased thus prevents any claim being made. Whether or not an order is made is entirely within the discretion of the court. The claim must be made within six months of the death of the deceased cohabitant; another deadline which causes difficulties in practice but to which again the section provides no exceptions. Nor does it provide any guidance on the ends to which the discretion should be exercised, such as meeting the needs of the surviving cohabitant or recognising the contribution that party may have made to the deceased's estate.

The cohabitants must have been living together in Scotland immediately before the death.[65] Further, 'net intestate estate' cannot include immoveable property located outside Scotland.[66] Otherwise it is what remains after payment of inheritance tax, rights having priority over the prior and legal rights of a surviving spouse or civil partner, and, of course, such legal and prior rights themselves. While a surviving cohabitant may thus lose out to a surviving spouse or civil partner, the former can pre-empt the legal rights claim of the deceased's children and their issue, which are not protected against the claim.[67] Finally, the

[63] *M v S* [2017] CSOH 151. See also *Whigham v Owen* [2013] CSOH 29; *Smith-Milne v Langler* 2013 Fam LR 58; *Cameron v Lukes* Glasgow Sheriff Court, 2 December 2013, Sheriff Principal CAL Scott QC; *Saunders v Martin* [2014] Fam LR 86; *Harley v Thompson* unreported, September 2014, Livingston Sheriff Court, Sheriff PGL Hammond); *W v M* 2016 SLT (Sh Ct) 14; *Melvin v Christie* [2016] CSIH 43 (First Division); *Jackson v Burns*, Falkirk Sheriff Court, 12 February 2018, Sheriff SG Collins QC.

[64] *M v S,* para 144.

[65] A period in hospital or a care or nursing home before death, rather than under the same roof as the surviving cohabitant, would probably not defeat the survivor's claim, despite the use of the word 'immediately' in the Act: Thomson, *Family Law*, para 8.7 (p 210); Norrie, *Annotations*, 75.

[66] *Kerr v Mangan* 2015 SC 17.

[67] Norrie, *Annotations*, 76-77; Thomson, *Family Law*, para 8.7 (p 211). For an enrichment case involving a dispute between a surviving cohabitant and the child of the deceased cohabitant and his widow (from whom he had never been divorced) see *Christie's Executor v Armstrong* 1996 SLT 948.

amount to be awarded to the surviving cohabitant must not exceed what that person would have received as a surviving spouse or civil partner.[68]

The section 29 claim on intestacy of a deceased cohabitant is revolutionary in Scots law, inasmuch as it confers a very wide discretion upon a court to interfere with the usually fairly rigid rules of intestate succession in the interests of a party with no other claim under these rules. In the few cases that have arisen, however, the courts have tended to exercise their discretion narrowly,[69] and it has been held in the Inner House of the Court of Session that the overall fairness approach set out in *Gow v Grant* for section 28 cases has no application in section 29 cases.[70] But on at least one occasion the court was able to arrive at what appears to be a humane and fair outcome in a difficult case. In *Windram v Giacopazzi's Executrix*,[71] the cohabitation lasted 24 years, producing two children, aged 15 and 9 at the time of the case. The couple's home was owned by the intestate deceased cohabitant (M), although subject to a mortgage. M had also owned a business. The surviving cohabitant (F) cared for the children and the home, worked part-time, and occasionally assisted in M's business. The couple pooled their income but had only one asset in joint names (an insurance policy in favour of their son). M had a pension fund of £25,451 which on his death from an aggressive cancer aged 46 was payable directly to F and did not form part of his estate. When they learned the cancer was inoperable, the couple planned to marry but were not given the time to put these plans into effect, or for M to draw up a will. He died just three days later.

Under the Succession (Scotland) Act 1964 the children were entitled to M's whole estate. As the children's guardian, however, F was appointed as executrix-dative to M's estate, and then raised an action in her own right but in effect against herself as executrix to claim a share of the estate. An independent curator *ad litem* was appointed to represent the children's interest. As the sheriff pointed out in her judgment—

> Had the deceased been survived by a spouse, that spouse would have been entitled to prior rights consisting of the deceased's interest in the house … subject to the secured loan by the Bank of Scotland, the furniture and plenishings in said house, and the sum of £42,000 ... A surviving spouse would also have been entitled to receive legal rights from the moveable estate, which in this case, following payment of the sum due as a prior right, would have amounted to just over £3,000.[72]

The sheriff made an order for the transfer of the house to F, with the loan secured over it to be repaid with the pension lump sum paid to F plus cash payments from the estate. A sum was also to be paid over from the estate to meet repairs and maintenance of the house. It was noted that in total this was about £11 000 less than F would have received as a surviving spouse, while still leaving £148 500 in the estate. This meant that after expenses had been met each child would still receive £70 000. The humanity of the decision lies in the sheriff's obvious trust, presumably formed from impressions gained in the course of proceedings, that F would in due course pass her share of the estate on to the children. The sheriff's decision in

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[68] 2006 Act, s 29(4).
[69] *Savage v Purches* 2009 SLT (Sh Ct) 36; *Chebotareva v King's Executrix* 2009 Fam LR 66; *Simpson v Downie*, unreported, 17 August 2011, Forfar Sheriff Court, Sheriff Principal RA Dunlop QC; *Fulwood v O'Halloran* unreported, 6 January 2014, Glasgow Sheriff Court, Sheriff IHL Miller.
[70] *Kerr v Mangan* 2015 SC 17. But cf Malcolm *et al*, *Cohabitation*, para 1.40.
[71] *Windram v Giacopazzi's Executrix*, 2009 Fam LR 157 (Jedburgh Sheriff Court, Sheriff JM Scott QC). Sheriff Scott would later be senior counsel for the successful appellant in *Gow v Grant* 2013 SC (UKSC) 1.
[72] *Windram v Giacopazzi's Executrix*, para 7.

effect discounted as minimal the risks that in future F and the children might become estranged, or that she might marry or enter a new cohabitation relationship, or that she would cease to meet her legal obligation to maintain her children if they left home before reaching the age of 25.

V. ENRICHMENT CLAIMS UPON DEATH OF COHABITANT

The question now arises as to whether the law of unjustified enrichment has any role to play in cases of cohabitant intestacy. It must be acknowledged that no enrichment claim has ever been made against a deceased person's estate by one who had been cohabiting with the deceased in a manner that would have been recognised under the 2006 Act; so there is an initial contrast with the position in respect of financial provision where the relationship breaks down rather than being dissolved by death. There have however been cases where a deceased's will contained no or inadequate provision for another party who had been living together with the deceased, not as a cohabitant, but as a carer, in the expectation, justified by statements of the deceased in life, of a bequest to acknowledge the services provided in that role.[73]

In *Gray v Johnston*, decided in 1928, the carer's claim of recompense was unsuccessful despite his management over 16 years having been responsible for accumulating almost the entire value of the intestate deceased's estate and the anticipated return being, thanks to statements made by the deceased during his time with the carer, a bequest of the whole estate.[74] In *Harris v Sales' Executors*, decided in 2003, a carer and his girlfriend moved in with and looked after an elderly couple during their final years at a house in Scone between 1988 and 1997. The elderly couple stated their intention to leave sufficient funds to the carer to enable him to purchase the house with his girlfriend, in recognition of the services they were providing. In the event the carer and girlfriend were left only £5,000 each by the wife of the elderly couple. The carer raised an action of recompense against the estates of the deceased couple; the claim was held relevant and sent for proof.[75] The defenders pleaded the subsidiarity of the enrichment claim to a contractual one which might have been made, but the judge rejected the defence as no contract was made out on the pleaded facts.[76] She did not analyse the basis for the enrichment claim, but in a post-*Shilliday* world, the case looks like one of CCDCNS, as does *Gray v Johnston* (which was not cited in *Harris*).

The 2006 Act would clearly provide no remedy now in cases like *Gray* and *Harris* because the parties were not cohabitants living together as husband and wife and, in *Harris*, because the deceased parties had not died intestate. But a claim in unjustified enrichment would surely be open to the carers in respect of services provided with a common

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[73] Note in addition to the Scottish cases mentioned below the well-known decision of the Supreme Court of Canada, *Deglman v Guaranty Trust Co of Canada* [1954] SCR 725 (carer who had acted under an unenforceable informal agreement with the beneficiary (his aunt) that his services would be rewarded with a bequest in his favour held entitled to recover the value of his services when she died intestate; parties lived under same roof only briefly). In South Africa (unlike Scotland) a *pactum successorium* is illegal and unenforceable as a contract; but it may give rise to an enrichment claim for the non-beneficiary: Visser, *Unjustified Enrichment*, 440, 456.

[74] *Gray v Johnston* 1928 SC 659 (Second Division). The court also found that the statements did not amount to a binding promise which in any event could not be proved, as the law then required, from any writings by the deceased.

[75] *Harris v Sales' Executors*, unreported, 14 February 2003, Outer House Court of Session (Lady Paton).

[76] Possibly an example of 'weak' subsidiarity: see above, text accompanying note 66.

understanding amongst all concerned that the carer would one way or another be able to continue to live in the house where the care had been provided and the parties lived together.

Suppose however the carer to be also a cohabitant of the intestate deceased at the time of the latter's decease within the meaning of the 2006 Act, who nonetheless failed to make a claim under section 29 within the very tight deadline of six months from the death. If the logic of *Courtney's Executors* is followed in such a case, the caring cohabitant's enrichment claim will be defeated by its subsidiarity to the section 29 claim. This will be so even if the parties had understood that the survivor would be provided for by way of a will made by the other but that intention had been frustrated by, say, the death occurring in an accident or (as in the *Windram* case) by a suddenly fatal illness.

As already remarked, it would be unfortunate indeed if legislation intended to improve the legal position of cohabitants was left having the formal effect of cutting off rights that they might otherwise have. But if *Courtney's Executor* is left untouched by either the higher courts or the current moves to reform, that will be the result. Clearly the statutory schemes for both financial provision and intestacy are better geared than unjustified enrichment to untangling the often complicated economic issues arising from long-term relationships. That is especially so if the basic *Gow v Grant* approach of comparing the parties' economic position at the beginning and end of the cohabitation is properly embodied in any revised legislation. But, as the examples discussed in this paper show, not every case is quite so complex, and if the door to an enrichment claim is closed and locked, injustices may arise, not only as between the former cohabitants themselves, but also between cohabitants as a class and other people in closely analogous situations.[77] Nor should the possible relevance in cases involving longer-term relationships of the enrichment defence of 'change of position' or 'loss of enrichment' be overlooked.[78] To adapt slightly some wise words of Kenneth Norrie, the needs of the parties and the justice of claims should not be dependent on the legal form their relationship happens to take.[79]

[77] The Law Society of Scotland Report (above, note 2) also makes this point.
[78] For a detailed treatment of this defence, see Evans-Jones, *Unjustified Enrichment*, vol 1, paras 9.56-9.94.
[79] Norrie, *Commentaries*, 209.