Acquisition of Living Things by Specification

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A. Facts and Decision

In *Kinloch Damph Ltd* v *Nordvik Salmon Farms Ltd*,[1] the pursuers supplied salmon smolts (young salmon) to the first defenders under two contracts. The contracts permitted the pursuers to retain title to the smolts, regardless of any growth they would undergo, until the contracts were paid in full. Under the first defenders' care the smolts grew to salmon thirty times their original size. The first defenders defaulted in payment and receivers (the second defenders) were appointed. The pursuers sought to have the salmon declared their property and delivered to them. In the event, neither of these remedies was practicable, because after the suit was brought the salmon came under suspicion of infection, and their disposition then had to follow the Diseases of Fish (Control) Regulations 1994. Lord Macfadyen, in giving judgment, therefore limited himself to expressing his conclusions on the issue of ownership.

[1] OH Court of Session (30 June 1999), unreported. The author is grateful to Professor Cornelius van der Merwe of Aberdeen for bringing this case to his attention.

The pursuers argued that the retention-of-title clauses gave them ownership of the mature salmon. The defenders argued that the mature salmon were different goods from those supplied under the contracts, and that therefore the so-called "retention-of-title" clauses were, in fact, ineffective attempts to create a security interest over moveables without transfer of possession to the creditor. The defenders also argued that by their labour and materials they had, from the smolts, created a *nova species* irreducible to its constituent parts, and had therefore become owners of the salmon by specification. To the latter of these arguments the pursuers replied that specification would not operate where a contract controlled ownership.

Lord Macfadyen decided the issue of specification in favour of the pursuers without reaching the contract issues. He noted there was no dispute that specification in Scotland followed the rule of reducibility first expressed by Justinian: the maker of a new thing becomes its owner unless the thing can be reduced to its constituent elements, in which event it becomes the property of the owner of the materials.[2] In this case, however, the rule did not come into play:

> In my opinion the proper scope of the doctrine is in relation to inanimate objects or substances created by human effort out of materials which are used up and cease to exist in the process of creation. There is nothing in the authorities to suggest that the doctrine is applicable to the process of growth of living creatures. . . . The examples in the writings on the subject contain no references to *specificatio* of growing animals. I consider that there is force in the [pursuers'] submission that, having regard to the much greater importance of animals in daily life in former times (whether the times of the Roman writers or those of the Scottish institutional writers), the absence of such reference is a strong indication that the doctrine had no such application.[3]

As specification had not taken place, and the retention-of-title clauses were valid, the pursuers would own the mature salmon. <113>

B. Comment

(1) The contracts

Roman texts can give the impression that specification was invented for the

[2] Justinian*, Institutes*, 2.1.25; Stair, *Institutions*, 2.1.41; Erskine, *Institute*, 2.1.16. See D L Carey Miller, *Corporeal Moveables in Scots Law* (1991), 67.

[3] 3 *Kinloch Damph*, para 47. <113>

delight of lawyers.[4] But in fact many rules of specification have their origin in manufacturing contracts, or to be exact, in manufacturing contracts that went wrong.[5] Both the specificator and the workman take the materials of another and work on them. The workman becomes a specificator when he goes outside the contract and performs the work on his own behalf ("*suo nomine*"[6]), acting, as it were, like an owner. If the contract is performed properly this problem does not arise, and where, for example, a person had contracted to make wine from another's grapes and then did so, the irrelevance of specification was so self-evident to the Romans they hardly bothered to mention it.[7] In our case, Lord Macfadyen declined to express an opinion on the relevance of specification in the face of a contract, and thereby missed the opportunity to make an obvious but elusive point.[8]

(2) Limited examples

To treat objects of natural growth under specification is unusual, and Lord Macfadyen correctly says these objects fall outside the Roman examples, such as those Gaius gives.[9] Gaius' examples can indeed be seen as a "closed list" of the kinds of cases the Romans were willing to admit.[10] But again, Gaius is dealing with cases familiar to the Romans from manufacturing contracts, and the Romans obviously lacked a manufacturing process to transform one kind

[4] See A Watson, *Roman Law and Comparative Law* (1991), 47-48.

[5] 5 See T Mayer-Maly, "Specifikation: Leitfälle, Begriffsbildung, Rechtsinstitut" (1956) 73 Savigny Zeitschrift (r A) 133; T Mayer-Maly, Locatio Conductio: Eine Untersuchung zum klassischen römischen Recht (1956), 76; J A C Thomas, "Non solet locatio dominium mutare", in Mélanges Meylan (1963), vol 1, 351:

> The instances discussed are virtually all cases like the making of clothes, vases, rings, etc, out of given materials – cases, that is, where, in the appropriate circumstances, there would be a locatio operis faciendi. In short, the cases discussed in connection with specificatio in juristic literature are fairly concrete cases that could really arise and not situations of the sort to delight purely academic discussion as abstract problems.

[6] See especially D 41.1.7.7 (Gaius 2 rerum cottidianarum), but also D 41.1.25 (Callistratus 2 institutiones); 24.1.31.1 (Pomponius 14 ad Sabinum); 41.1.27.1 (Pomponius 30 ad Sabinum). See generally B C Stoop, "*Non solet locatio dominium mutare*: some remarks on *specificatio* in classical Roman law" (1999) 66 *Tijdschrift voor Rechtsgeschiedenis* 8.

[7] See D Daube, "The self-understood in legal history" (1973) 18 *Juridical Review* (n s) 128.

[8] Surprisingly missed, given the subject, in T Roberts, "A reassessment of historical theories on *specificatio* and the requirement of good faith" (2002) 7 SLPQ 180.

[9] Gaius, *Institutes*, 2.79; D 41.1.7.7 (Gaius 2 *rerum cottidianarum*).

[10] J A C Thomas, *Textbook of Roman Law* (1976), 175.

of living thing into another. They did of course regularly deal with problems relating to living things and natural growth, but problems like these could usually be handled in a satisfactory way under the rules on acquisition of fruits.[11] If they did not use specification in such cases, it was because the state of manufacture did not make it necessary, not because they categorically excluded natural growth from its scope. In this respect it is suggested that the decision is not sound.

(3) Reducibility and identity

The reducibility rule[12] nevertheless makes one hesitate to apply specification to objects of natural growth. This is because virtually everything that grows is irreducible, and applying the rule mechanically would almost always give ownership to the maker. At bottom the problem is that in ordinary manufacturing processes, "irreducibility" is a guarantee that the original thing has been <114> destroyed, but in the case of objects of natural growth, there is no such guarantee: these develop from one state to another without any obvious destruction taking place. Of course one could be pedantic and say, for example, that in our case the *cells* which comprised the smolts were destroyed as the salmon matured, but this only serves to highlight what specification really requires: not destruction *per se*, but a destructive event that changes the identity of the original thing.

In Roman law, change of identity was not simply a "component of specification": it was the problem for which specification was the answer. If a person brought an action to recover an item of property, and the property had been substantially altered by some manufacturing process, the praetor would understandably hesitate to allow that person to prosecute the recovery of "his" property.[13] It was necessary first to determine who was entitled to *claim* to be owner, and on this point views famously differed. But views did not differ on the fact that the property had changed its identity. Even the Sabinians, who would give ownership to the owner of the materials, acknowledged this;[14] the owner of the materials did not "remain the owner of the materials" in their new

[11] With some departures, e.g., the obligation of a good-faith possessor to account for unconsumed fruits.

[12] Above, note 2. <114>

[13] F Wieacker, "Spezifikation: Schulprobleme und Sachprobleme", in W Kunkel and H J Wolff (eds), *Festschrift Rabel* (1954), vol 2, 288.

[14] Thomas, "*Non solet*", 351–52: "On this basis the Schools would thus agree that a new thing existed in place of the materials; it is the disposal of the new thing which is in dispute."

form,[15] but became a new owner of a new thing. The main point, however, is that the Romans did not actively seek out identity problems to solve. If an owner of smolts had come before the praetor to vindicate the salmon which grew from his smolts, the praetor, knowing where salmon come from, would have readily ordered the matter to be heard without seeking the advice of jurists. Nothing had happened to the smolts to make them difficult to identify as the property of the owner of the smolts. In other words, there is no problem. That is why specification did not take place in this case.

(4) Specification of living things

Can there ever be specification in this kind of case? Some might argue that the answer must be no, because nowadays a new thing can be genetically identified with the old. But this is wrong: the issue is identity, not identifiability, as is clear from the fact that specification is present even when one knows, e.g., that this wine came from those grapes.[16] Genetic analysis of the wine would not have told the Romans anything they did not already know. What makes specification of living things rare and unlikely is the fact that living things, in growing and developing, do so according to a biological *pattern* that experience has made familiar. Identity will never be an issue so long as salmon develop from smolts, oaks from acorns, etc.

However, a person by his labour might *alter the natural pattern of development* in such a way that the developed thing can no longer be identified with its predecessor. If he does so he could acquire ownership by specification, because he has disrupted the sole basis by which the product is identified with the materials. This clearly did not take place in the case under discussion: the defenders, however substantially they contributed to the rearing of the salmon, did not change the natural pattern of development of smolts to salmon. A California case from some years ago, however, describes what may be a genuine example of altered natural development.[17] Researchers at the University of California harvested cells from a medical patient and then used <115> them to develop a culture which could reproduce indefinitely.

[15] Cf H Hausmaninger and W Selb, *Römisches Privatrecht*, 8th edn (1997), 228.

[16] The court in *Kinloch Damph* received a report of the Director of the Institute of Aquaculture at the University of Stirling; the report asserted that, biologically, smolts and salmon are of the same species (*Kinloch Damph*, paras 24-25). The point was not contested by the defenders, and it did not need to be.

[17] *Moore* v *Regents of the University of California*, 51 Cal 3d 120, 793 P 2d 479 (1990). The case is discussed briefly in L Skene, "Proprietary rights in human bodies, body parts and tissue" (2002) 22 *Legal Studies* 120–21. <115>

Typically these cells would simply die,[18] but the researchers altered the natural pattern and by their labour created something new. The case, as David Johnston has pointed out, was ripe for discussion of specification,[19] and the patient might even have won the argument. California being a Common Law jurisdiction, however, the patient sued for conversion, and lost.

[18] 18 51 Cal 3d at 127 n 2.
[19] D Johnston, "The renewal of the old" (1997) 80 CLJ 92-93.