Protecting Legitimate Expectations and Estoppel in Scots Law

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(Response to Questionnaire II.A.4)

Elspeth Reid*  

A. Legitimate Expectations / Estoppel in Scots Law

In Scots law the doctrine of personal bar to a large extent takes on the function of common law estoppel or protecting legitimate expectations. Personal bar is extremely important, in the sense that the plea of personal bar is encountered constantly in the Scots courts in cases on all subjects (including those well beyond the scope of contract law) as will be discussed below.

For all its practical significance, however, the development of the doctrine has been impeded by a lack of extended analysis, either in academic literature or in judicial pronouncements.¹ The entry for “Personal bar” in the standard encyclopaedia of Scots law is brief,² and J Rankine’s *The Law of Personal Bar in Scotland*, published in 1921, was until 2006 the only monograph dedicated to the subject.³ Likewise the case-law has typically contained little discussion beyond bland statements of the doctrine.⁴ One very obvious difficulty for analysis is the sheer range of the doctrine.⁵ Moreover, historical analysis, which in other areas has helped so much to ground the interpretation of the modern law, does not significantly advance

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* Senior Lecturer, School of Law, University of Edinburgh. General Reporter: Professor Bénédicte Fauvarque-Cosson, University Panthéon-Assas, Paris II. This report is draws largely on work which formed the basis for E C Reid and JWG Blackie, *Personal Bar*, (Scottish Universities Law Institute, W Green, Edinburgh, 2006), in which a more detailed account of the Scots law can be found.

¹ The following observation, made in relation to planning law, could equally well apply of personal bar in all subject areas: “the most striking feature of this area of the law is the absence of any systematic treatment of the many problems which can arise.” (C Crawford and C Reid, “Planning officers’ advice and undertakings: estoppel and personal bar in public law”, *Scottish Planning Law and Practice Occasional Paper* (1982) at 65.)


⁴ The standard expositions of the doctrine are to be found in the nineteenth-century case of *Cairncross v Lorimer* (1860) 3 Macq 827 and the later case of *Gatty v Maclaine* 1921 SC (HL) 1. For more extended analysis in a recent case, see *William Grant v Glen Catrine Bonded Warehouse* 2001 SC 901.

⁵ In introducing the scope of personal bar in the SME entry on the subject, Sheriff Bell noted that it “seems to spread over into almost every area of the law” (SME vol 16, para 1601).
understanding, since personal bar is a relatively modern heading under which a variety of older terms combine.6

1) The Scots doctrine in comparative perspective

Scots law is of course a mixed legal system, with elements of both the Common and the Civil Law, and broadly speaking, functional equivalents to the doctrine can be identified in both Common Law, and Civil Law. In general terms, the requirements for the operation of personal bar, once stated to be the embodiment of a doctrine that was part of “the laws of all civilized nations”,7 are as follows:

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<tr>
<th>(A) INCONSISTENCY</th>
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<td>(1) A person claims to have a right, the exercise of which the obligant alleges is barred.</td>
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<td>(2) To the obligant’s knowledge, the rightholder behaved in a way which is inconsistent with the exercise of the right. Inconsistency may take the form of words, actions, or inaction.</td>
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<td>(3) At the time of so behaving the rightholder knew about the right.</td>
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<td>(4) None the less the rightholder now seeks to exercise the right.</td>
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<td>(5) Its exercise will affect the obligant.</td>
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<th>(B) UNFAIRNESS</th>
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<td>In the light of the rightholder’s inconsistent conduct, it would be unfair if the right were now to be exercised. Any of the following is an indicator of unfairness:</td>
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<td>(1) The rightholder’s conduct was blameworthy.</td>
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<td>(2) The obligant reasonably believed that the right would not be exercised.</td>
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<td>(3) As a result of that belief the obligant acted, or omitted to act, in a way which is proportionate.</td>
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<td>(4) The exercise of the right would cause prejudice to the obligant which would not have occurred but for the inconsistent conduct.</td>
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<td>(5) The right is of little value.</td>
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As this framework demonstrates, there are strong parallels to be drawn with the English law of estoppel, although it is now judicially recognised that borrowing from English estoppel is frequently inappropriate, in part because the doctrine of consideration places different demands upon the English rules.8 A further, even more fundamental, difficulty is that, rather

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6 For a more extended historical analysis of the evolution of personal bar as a unitary doctrine see E Reid and J W G Blackie, The Law of Personal Bar (2006), chapter 1.
7 As suggested by Lord Chancellor Campbell in Cairncross v Lorimer, note 4 above, at 829. For a more recent assertion, to similar effect, see Case 63/79, Boizard (Liselotte) v Commission of the European Communities [1982] 1 CMLR 157, per Advocate General Warner at 171: “It seems to me that, if one considers, for instance, the Danish law as to 'stiltiende afkald', the English law as to estoppel, the German law as to 'Rechtsverwirkung', the Italian law as to 'legittimo affidamento' and the Scots law as to personal bar, as well as the French law as to 'renonciation implicite', there emerges a general principle . . . that one who, having legal relations with another, by his conduct misleads that other as to a material fact . . . cannot thereafter base on that fact a claim against him if he (that other) has acted in a relevant way in reliance on what he was led by that conduct to believe. What matters here, of course, is the existence of the principle, not the scope or mode of its application in the law of any particular Member State.”
8 See Armia v Daejan 1979 SC (HL) 56, per Lord Keith at 72: “In English law attempts to mitigate the rigours of the doctrine of consideration have led to introduction of concepts of equitable estoppel and promissary [sic] estoppel in situations where that doctrine rules out a finding of agreed variation of contract. Scots law would not,
like the law of torts, the modern English law of estoppel has developed as a law of estoppels, with each estoppel adopting distinctive rules, whereas personal bar is a unitary doctrine.

Personal bar happens to cover some of the same territory as the various estoppels found in English law, as well as different varieties of waiver, and English authority may sometimes be helpful with regard to the understanding of specific terms (such as what is a “representation”). Nevertheless, the Scots are obliged to take care that borrowing from the wrong sort of estoppel risks confused and confusing results, and, more importantly, general concepts such as unconscionability cannot readily be translated. The principles by which the law of personal bar is governed form a discrete framework which is not directly matched in any of the English or Common Law systems.

It might also be observed that there is a functional overlap between personal bar and the Civil Law doctrine of abuse of rights. Personal bar, like abuse of rights, shares the notion that the person barred is prevented from acting within his or her right because the exercise of an otherwise legitimate right is unfair in the circumstances. Personal bar, like abuse of rights, extends beyond contract law to property law and many other substantive and procedural areas. However, the other central and very specific, concept in personal bar is that the person barred should have acted inconsistently – having previously given the other party reason to believe that he or she would act differently. This element of inconsistency, essential to personal bar, is not fundamental to abuse of rights, although it may be present in many cases. (It should also be noted that Scots law retains a separate rule on abuse of rights in the doctrine of *aemulatio vicini*, although in modern times this has only been applied in the field of neighbour law.)

2) The role of personal bar in private law

Personal bar, as a broad overarching concept, may be applied in all areas of the law. It is found in most branches of private law, in contract law, in the law of sale and transfer of ownership, landlord and tenant, wills and succession, trusts, agency, rights in security, cheques and bills of exchange, company law and insurance, and in the law governing the valid execution of documents (unlike in Civil law jurisdictions, few documents in Scotland require notarial execution, but several categories, for example relating to land, wills, trusts or non-commercial promises, require to be executed in accordance with a specific format prescribed by statute). In addition, personal bar is applied in procedural law, both civil and criminal, and in the law of bankruptcy and execution of judgments. In all these instances, however, its application can ultimately be reduced to the formulation given in the answer to part 1) above.

I think, be disposed to follow English law down such paths, in the absence of corresponding considerations of justice which might commend such a course. So I would not accept today that no important juridical differences exist between personal bar in Scotland and estoppel in England.”

11 Requirements of Writing (Scotland) Act 1995 s 1(3)-(5).
12 Requirements of Writing (Scotland) Act 1995.
3) The role of personal bar in public law

Personal bar may operate in matters of private law to constrain the Crown and public authorities, in the same way as it does private individuals. Thus it is uncontroversial that it may be applied in order to prevent a public authority from, for example: disputing responsibilities under a contract of employment; insisting on the terms of a lease with its tenant; or denying the right of neighbouring proprietor in a dispute over conflicting proprietary rights.

In addition, the doctrine is commonly invoked in relation to petitions for judicial review of administrative action, typically where the individual petitioner has delayed in requesting judicial review of the decision of a public authority. Unlike in England where there is a statutory time limit for initiating such a procedure, in Scotland there is no specific limit, but the courts will not proceed if there has been delay to a degree which would be considered prejudicial to the interests of good administration.

However, the translation of the rules of personal bar from matters of private law to matters of public and administrative law raises issues as to how far this is compatible with the proper exercise of public authorities’ powers and the performance of their duties in the public interest. In English law the matter has been considered by the House of Lords in *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd*, concerning whether a public authority could be estopped from reneging on an informal determination by one of its officers in connection with an application for planning permission for an industrial development. Rejecting the application of estoppel in this context, Lord Hoffmann commented that “public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet”. In England and Wales, at least in relation to planning law, therefore, it would appear that the focus is no longer upon unconscionability, but upon whether there was a legitimate expectation.

15 *Falkirk District Council v Falkirk Taverns* 1993 SLT 1097. See also *Edinburgh District Council v Parnell* 1980 SLT (Sh Ct) 11.
16 *Dunfermline Parish Council v Niddrie* (1896) 4 SLT 375.
17 Applications must be made “promptly and in any event not later than three months after the grounds to make the claim first arose” unless the court considers that there is good reason for extending the period: *Supreme Court Rules*, part 54(5) (as added by SI 2000/2092), replacing Order 53.4 of the Rules of the Supreme Court.
18 The length of delay likely to bring bar into operation depends therefore very much upon context. A delay of four months was sufficient to bar a petition for judicial review of a university degree classification in *Carlton v Glasgow Caledonian University*, 1994 SLT 549, e.g., and one year in relation to review of a planning application for construction works in *Kwik Save Stores Ltd v Secretary of State for Scotland*, 1999 SLT 193, but in another case there was no bar where the petitioner had delayed for a year in challenging a procedure concerning his application for local authority housing *Noble v City of Glasgow Council* 2001 SLT 2.
20 [2002] 4 All ER 58.
21 At para 35.
expectation that a public authority would act in a certain way. However, there is little modern Scots authority to indicate the stance of the Scots courts in the light of the decision in Reprotech.23 The positive duty to act fairly and the concept of legitimate expectation are certainly familiar in administrative law,24 but there is as yet no indication that these broad general principles have supplanted personal bar. A role for personal bar may well remain, particularly in those public law areas outside planning law where the balance of interests between the parties may problematic,25 and where a “grave injustice” might otherwise be done.26

4) The European Convention on Human Rights
The incorporation of the European Convention on Human Rights into UK domestic law27 of course introduces a further dimension to the consideration of unfairness for the purposes of personal bar. The interaction between the law of personal bar and developing jurisprudence of the ECtHR has come to the fore most recently in recent years in relation to issues of criminal and civil procedure, and a particular problem confronted is whether there are some rights which may not be barred due to the protection of the ECHR.

It has been held by the European Court of Human Rights in a matter of civil procedure that Convention rights may be waived, but only if such waiver derives “from unequivocal statements or documents”.28 However, in the Scottish case of Clancy v Caird29 waiver was inferred on the basis of an individual’s conduct, again in a civil case. A litigant had objected to the mode of appointment of the temporary trial judge who heard his case but did not do so until after the trial had been completed. The reason for his delay was that in the wake of incorporation of the ECHR into Scots domestic law in 1999, there had been controversy as to the mode of appointment of temporary judges.30 However, the court took the view that the litigant could not be said to be “wholly unaware of the possibility of a challenge” to the appointment of the temporary judge in his own case, and he was therefore deemed to have waived his right of challenge under Article 6 (right to a fair hearing). With regard to substantive rights in the civil law, it may be that waiver of rights under Article 8 (right to

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25 As for example in a social security matter where the public cost may be slight and it is likely that the individual did not have separate legal advice: see Robertson v Minister of Pensions [1949] 1 KB 227, and commentary by S Atrill, “The End of Estoppel in Public Law” (2003) 62(1) Cambridge Law Journal 3 at 5.
27 In terms of the Scotland Act 1998 ss 29, 57, 100; and the Human Rights Act 1998.
28 Neumeister v Austria (1979-80) 1 EHRR 136, para 36.
29 2000 SC 441.
30 See the case of Starrs v Ruxton 2000 JC 208.
respect for private and family life), which often involve a balancing of interests, may be more readily inferred.\textsuperscript{31}

The European Court of Human Rights has stated that a waiver of criminal procedural rights requires the “minimum guarantees commensurate to its importance”\textsuperscript{32} and that “absence of constraint” is an absolute prerequisite,\textsuperscript{33} (in particular constraint at the hands of the state). In effect, this means that in Scotland, as elsewhere, there are some Articles, such as Article 3 (freedom from torture), which must be regarded as beyond challenge, since waiver must almost always result from coercion. At the same time, authority exists at the highest level for the principle that there may be waiver of other rights, such as the right to challenge the impartiality of a criminal tribunal under Article 6.\textsuperscript{34}

\textbf{B. Personal Bar and Contract Law}

\textbf{1) Origin and nature of the concept}

“Personal bar” as a term came into general usage in Scots case-law around the middle of the nineteenth century, soon finding its way as a heading into the standard textbooks.\textsuperscript{35} The doctrine which emerged in the second half of the nineteenth century under this new heading was an amalgam of several different elements from earlier case-law.

Some of those elements had an identifiable \textit{ius commune} derivation. The most obvious of these is perhaps the broad category of “personal exceptions”, found in Scots writings from the eighteenth century onwards, derived from the Roman \textit{exceptiones ex persona}\textsuperscript{36} While personal exceptions and the later category of personal objection (personal bar’s direct precursor) do not directly equate, there is certainly common ground, and, indeed, the term “barred, personali exceptione” lingers in relatively recent Scots usage.\textsuperscript{37} “Homologation”, in the sense of the expression of consent “by word, writ, or fact, by doing deeds importing consent”,\textsuperscript{38} is similarly found frequently in writings from the eighteenth century onwards. The terms “mora” and “taciturnity” occurred increasingly from the mid-nineteenth century

\begin{itemize}
\item \textsuperscript{31} E.g., in a leading Scots case on breach of confidentiality, \textit{Duke of Argyll v Duchess of Argyll}, it was observed that the right to maintain the confidentiality of a personal diary might be waived by implication where its owner had left it “lying about” (1962 SC (HL) 88, per Lord Reid at 93, under reference to \textit{Creasey v Creasey}, 1931 SC 9 per Lord President Clyde at 17), although this case of course predates incorporation of the ECHR into domestic law.
\item \textsuperscript{32} \textit{Pfeifer and Plankl v Austria} (1992) 14 EHRR 692, para 74.
\item \textsuperscript{33} \textit{Deweer v Belgium} (1980) 2 EHRR 439 at para 49.
\item \textsuperscript{34} See \textit{Robertson v Higson} 2006 SC (PC) 22 (the accused were held to have acquiesced in the composition of the tribunal by which they were tried, because they delayed for two years in asking for suspension of their conviction. This case applies the reasoning of the earlier case of \textit{Lochridge v Miller} 2002 SLT 906. These cases contrast with \textit{Millar v Dickson} 2002 SC (PC) 30, in which the state of knowledge as to the possibility of appeal was less certain, and waiver was not found).
\item \textsuperscript{35} See EC Reid and JWG Blackie, \textit{Personal Bar} (2006) chapter 1. The term “personal bar” appears as a heading in G J Bell’s \textit{Principles of the Law of Scotland}, added by its editor, W Guthrie, as a heading to § 27A in the eighth edition of 1885, where earlier editions had used the specific headings of “rei interventus”, “homologation”, and “ratification”.
\item \textsuperscript{36} See EC Reid and JWG Blackie, \textit{Personal Bar} (2006), paras 1–02–1–03.
\item \textsuperscript{37} The term appears in the defenders’ pleadings e.g. in \textit{Robson v Chalmers Property Investment Company} 1965 SLT 381; \textit{Corvi v Ellis} 1969 SC 312; \textit{Cumming v Quartzag} 1980 SC 276.
\item \textsuperscript{38} Stair, \textit{Institutions}, 1.10.11
\end{itemize}
onwards in the sense of bar arising through delay, although this is a usage which was not clearly connected with ius commune antecedents.

However, other terms with no obvious ius commune connection also occur in eighteenth and nineteenth century case-law: “acquiescence”, “bar” and “waiver” are found – in their natural meaning rather than as terms of art indicating discrete doctrines. Waiver, in the sense of the giving up of a right, had come into relatively common usage by the early nineteenth century, possibly due to acquaintance with the term in English commercial cases in areas such as insurance.

But from this earlier period right through until the first half of the twentieth century no clear dividing line was drawn between waiver and other forms of bar or acquiescence. Although the use of particular terms has persisted, such as “homologation”, “acquiescence” and “(implied) waiver”, and “mora, taciturnity and acquiescence”, such terms denote differences in fact patterns between modes of inconsistent conduct rather than any specific doctrinal distinctions between the terms.

The relatively rich case-law on personal objection from the seventeenth century and then personal bar from the nineteenth century onwards contains surprisingly little analysis, although it does contain some useful statements of doctrine. The judgment of Lord Chancellor Campbell in the House of Lords case of Cairncross v Lorimer in 1860 is often cited as providing the basic framework for the modern Scots doctrine:

[T]he doctrine [applies] which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained,— he cannot question the legality of the act he had so sanctioned,— to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct.

There is underlying these words also an indication of the growing importance of authority drawn from the English law of estoppel, in particular estoppel by representation, in shaping the Scots doctrine. As noted above, however, it is now judicially recognised that borrowing from the English law of estoppel is often inappropriate. Interesting parallels may be drawn with the development of estoppel in South Africa. Professor Zimmermann has suggested that it was estoppel, the English import, which provided the nucleus around which new principles

39 E.g., Mackenzie v Catton’s Trs (1877) 5 R 313 per Lord Ordinary Curriehill at 314 (“The defenders pleaded, inter alia; - … (5) Mora, taciturnity, and acquiescence”) and Lord Deas 317.
40 See EC Reid and JWG Blackie, Personal Bar (2006), para 1–21.
41 E.g. W Murray and Son v J Morrison (1824) 3 S 202 (“waver”); Allan v Macdonald (1827) 6 S 260; Laing v Laing (1829) 7 S 693.
43 See, e.g., Bargaddie Coal Co v Wark (1859) 3 Macq 467 in which “rei interventus” is described as raising a “personal exception” which based upon “acquiescence”, but the term “ratification” is also used in relation to whether there has been a “permitted waiver or variation”. See also Lang v Glasgow Court House Commissioners (1871) 9 M 768; Fraser v Donnie (1877) 4 R 942; Gairdner v MacArthur (1918) 2 SLT 123 in which the pursuer was both “barred from pleading no process” and “held to have waived any… objection”; Bruce v British Motor Trading Corporation Ltd 1924 SC 908.
44 (1860) 3 Macq 827 per Lord Campbell LC at 829.
45 Text to note 8 above.
and doctrines crystallised, although it migrated to South Africa on the “passport marked exceptio doli”. In Scotland it is arguable that the inverse phenomenon occurred. The label of estoppel may have been grasped in some nineteenth and early twentieth century literature as a means of bringing to personal bar the respectability of the English doctrine, but, by and large, indigenous concepts remained the nucleus around which principles and doctrines crystallised in the development of the modern rules for the unitary doctrine.

2) The function of personal bar: rule of behaviour or basis for the binding force of contract (is bar a substitute for consideration?)

Scots law differs from English law in that consideration is not an essential element of contract, and unilateral obligations are recognised. It is not therefore the function of personal bar to provide a substitute for consideration. However, the question whether personal bar may form an independent basis of claim may still be asked.

The fact pattern upon which bar is based is set out in detail in the table above: in summary, personal bar is about preventing inconsistent conduct, not only with regard to contractual relationships but in all spheres. A gives B to expect that A will do X. A then makes to do Y. Where such inconsistent conduct is clearly unfair to B, as assessed against certain well-established indicators, B may invoke personal bar to prevent A doing Y, even though it is otherwise within A’s right to do Y. Thus, on the face of it, personal bar is a doctrine which suppresses rights rather than creates them, working for the most part defensively, as a shield (A is barred from asserting a right against B), but not as a sword – an independent claim against the person barred. Personal bar in this respect appears to differ clearly from English proprietary estoppel, whose offensive capabilities can have proprietary consequences. The metaphors bristling with swords and shields which have fought their way round the Anglo-American literature on estoppel are therefore less persistent in Scotland.

At the same time, the issue whether personal bar can only be used defensively or whether it may move on to the offensive is not altogether straightforward. Bar presents the greatest conceptual difficulties when, as is typical, it suppresses the right to object to another’s actions. The issue in the leading Scots case of Gatty v Maclaine, for example, was whether a creditor who on earlier occasions accepted interest payments on a loan after the contractually stipulated date became barred from requiring punctual payment. This common fact pattern can of course be turned several ways: the creditor loses either the right to object to late payment or, alternatively, the right to require punctual payment – or, a further alternative,

46 R Zimmermann, “Good faith and equity”, in R Zimmermann and D Visser (eds), Southern Cross (1996) 221 at 226. See also on this point J W G Blackie, “Good faith and the doctrine of personal bar”, in A D M Forte (ed), Good Faith in Contract and Property (1999), 129 at 133-134.
47 Zimmermann, “Good faith and equity” at 227.
48 E.g. the standard text by J Rankine, The Law of Personal Bar in Scotland (1921), has as its subtitle “collated with the English Law of Estoppel in pais”.
49 E.g. Wayling v Jones 1995 FLR 1029. This decision has been followed in a number of subsequent cases, e.g. Gillett v Holt [2001] Ch 210; Campbell v Griffin [2001] Wills and Trust Law Reports 981; Chan Pui Chun v Leung Kam Ho [2002] Bankruptcy and Personal Insolvency Reports 723.
51 The metaphor was briefly taken up in BP Exploration Operating Co v Chevron 2000 SLT 1374 at 1380, per Lord President Rodger delivering the Opinion of the Court (rev’d 2002 SC (HL) 19).
52 1921 SC (HL) 1.
the debtor gains the right to late payment. To take another example of this type but from a sphere beyond contract law, personal bar may prevent an owner from challenging another’s right to heritable or moveable property. For instance, B builds a wall which encroaches twenty centimetres over A’s land. A watches B going to the expense of the construction works and does not object. A may be barred by his or her acquiescence from objecting at a later date and from requiring B to remove the offending structure. B does not acquire title to land on which the encroachment is built, but the main functional difference between a doctrine which operates as a source of right and one which merely block’s A’s objection is with regard to the position of successors.53 In such cases, personal bar is not itself the sword; but in offering the debtor or the non-owner a shield against the creditor or the owner, it effectively puts the former’s position beyond challenge. It is further possible that bar may take on an offensive aspect by preventing a defence from being stated: when B makes a claim against A, A may be barred from using a defence. In that context it knocks the shield from A’s hand. However, in this context also, personal bar is not the independent source of B’s claim against A, and thus is not itself the sword.

There is no general principle of “legitimate expectation” in the absence of an underlying agreement or unilateral obligation.

C. The Applications of the Concept of Legitimate Expectations or Estoppel / Personal Bar in Contract Law

1) General applications in contract law

a) Would it be possible, on the basis of legitimate expectation or estoppel/personal bar, to force a person to enter into a contract when this person did not intend to do so, assuming that the obligation is not derived from the contract itself but from the relational background of what took place ("déclaration de volonté sans volonté de déclarer" ou "Willenserklärung ohne Erklärungswille"; règle d’imputation en droit suisse)?

In principle, an essential prerequisite for all contracts is that the parties should intend to be legally bound, and, furthermore, that there should be consensus between the parties as to the basic elements. Of course, while the matter of intention is in principle a matter of fact, it is not practical to require the parties’ subjective level of intention to be ascertained in every case. Contracting parties are entitled to rely upon what the intention of the other party appears to be. Leaving aside any formal question of personal bar/estoppel therefore, there is therefore a presumption that certain actions or the use of certain words indicate an intention to be bound. Consequently, it is possible that a party might be held to an obligation where the party gave the objective appearance of intention although there was in fact no subjective intention to be bound, even without the operation of personal bar.54 And conversely, certain actions or the use of certain words may in fact trigger the presumption that the parties did not intend to be

53 The general rule is that successors are bound by bar arising out of the conduct of their predecessors in title only in relation to personal rights. In relation to real rights, bar, in principle, does not apply. Thus, new proprietors are not barred from objecting to nuisance or encroachment perpetrated by neighbours simply because their predecessors in title acquiesced in it (but contrast acquiescence in contravention of real burdens which extinguishes the burden, Title Conditions (Scotland) Act 2003, s 16). See EC Reid and JWG Blackie, Personal Bar (2006), paras 5–02–5–04; Advice Centre for Mortgages v McNicoll 2006 SLT 591 per Lord Drummond Young, esp paras 17 and 23.

There is a general presumption that agreements made in the commercial context are intended to be legally binding unless they are expressly stated as being not being so. There is also a general presumption that agreements made with regard to social obligations are not intended to be legally binding.

b) Pre-contractual negotiations

Is it possible that a contractual relationship arises even before concluding the contract (see the new § 311 al. 2 and 3 of the German Civil Code)?

Offer: see in particular the problem of revocation of an offer (compare the use of the doctrine of estoppel in Walton Stores v. Maher, High Court of Australia, 1988)

i) Liability for misrepresentation

There is in principle a clear distinction to be drawn between statements or acts which are merely part of pre-contractual negotiations and those which are incorporated into the contract itself. Different rules apply to incorrect statements made prior to the contract as opposed to a breach of the actual contract. There are only limited circumstances in which liability by one negotiating party to the other is found on the basis of conduct before a contract has come into being. The right to damages arises at common law if there has been fraudulent misrepresentation, and under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, section 10, if there has been negligent misrepresentation between the negotiating parties. The former does not require that a contract should actually have come into being, but the latter does. (If one of the parties has been induced to enter into a contract on the basis of the other’s innocent misrepresentation, however, damages do not arise, although the contract may be reduced in so far as restitutio in integrum remains possible.)

In the commercial setting in particular, the line between precontractual negotiations and contractual undertakings may not of course be neatly drawn. There is at least one recent (and controversial) case in which the court was prepared to imply the existence of a contract where there had already performance, despite the fact that the parties were still in ongoing negotiation regarding one of its essentials – the price.

ii) Liability arising from precontractual negotiation

There is no direct equivalent for BGB § 311.2.2 in Scots law. Scots courts have allowed recovery in very limited circumstances where precontractual negotiations have led one of the parties to incur expenditure, even though negotiations have not ultimately led to an enforceable contract. The basis for this form of liability is problematic and derives from the nineteenth-century Scots case of Walker v Milne and the cases which followed from it. The

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56 H L MacQueen and J Thomson, *Contract Law in Scotland* (2000) para 2.64.
57 See Clelland v Morton, Fraser and Milligan WS 1997 SLT (Sh Ct) 57.
59 The so-called “Melvill Monument” cases: (1825) 2 S 379 (new ed 338) (followed by sequels (1825) 3 S 82 (new ed 123) and 333 (new edn 478)) in which a landowner sued the subscribers for a monument alleging that they had entered into a contract with him to place it upon his property; that they had taken possession of the site and performed various operations on it; and that he had thereby been induced to alter his plans for selling off the ground. Although the court did not find that an enforceable contract had been concluded, it allowed recovery of the losses and expenses sustained by the landlord in anticipation of the monument being built upon his ground.
principles derived from these cases were relatively recently reviewed in Dawson International plc v Coats Paton plc. In that case Lord Cullen concluded that an equitable remedy might be available following from pre-contractual negotiations to provide for: 60

reimbursement of expenditure by one party occasioned by the representations of another beyond the case where the former acted in reliance on the implied assurance by the latter that there was a binding contract between them when in fact there was no more than an agreement which fell short of being a binding contract...In such circumstances while the latter is within his rights in failing to implement his part without good reason, it is regarded as unconscionable that he should deny reimbursement of what has been expended by the former in implement of his. I should add that I consider that there are sound reasons for not extending the remedy to the case where the parties did not reach an agreement. It is clear that the law does not favour the recovery of expenditure made merely in the hope or expectation of agreement being entered into or of a stated intention being fulfilled.

In other words a claim may be made, but only for reimbursement of expenses, not damages as such, and reimbursement may be permitted only where there is already an agreement, not merely the expectation of an agreement. The circumstance in which such a claim might arise in the modern law is where the agreement is such that it requires a specified form of writing, and such cases are discussed further under (3) below.

It is routine that a commercial contracting party issues a “letter of intent” to communicate to another party that it intends to enter into a contract with the latter if certain circumstances come to fruition. For example a commercial entity might issue such a letter to one of a number of parties who had entered a bid or tender for a particular contract, in order to indicate that the latter has been successful subject to further adjustment of the bid. It is open to interpretation in the particular circumstances whether such letters of intent are to be regarded simply statements of intention, or contractual offers in their own right.62 However, there would not appear to be any recent case-law in which mere statements of intention in such a context have been held to give rise to liability in respect of pre-contractual expenditure, as in the Walker v Milne line of cases above.

On the other hand, Scots law does recognise the enforceability of unilateral promises, and so it is possible that a letter of intent might be regarded as embodying a promise, entailing a basis of liability for the other party’s wasted expenditure (although such letters of intent commonly stipulate expressly that they are not intended to be enforceable in this way).

The enforceability of unilateral promises means that Scots law has no equivalent of the doctrine of promissory estoppel, and the debate which took place between their Lordships in Walton Stores as to the applicability of promissory estoppel (equitable) as opposed to estoppel by representation (common law) has no resonance in Scotland. Indeed, had the same circumstances arisen in Scotland it is possible that the respondent in Walton Stores might have attempted to establish that there was a promise to complete the contract. Such a promise, if proved, would have been enforceable without consideration of unconscionability of the appellant’s actions or reliance by the respondent. The other possibility which might have been open, had the respondent in Walton Stores found himself in Scotland, is for the existence of the lease to have been established by the statutory form of bar, discussed in the section below.

60 1988 SLT 854 at 866; aff’d 1989 SLT 655.
61 Requirements of Writing (Scotland) Act 1995, s 1: in the main this would apply to agreements relating to land or to gratuitous unilateral obligations undertaken other than in the course of business.
62 For discussion see e.g. Uniroyal Ltd v Miller and Co Ltd 1985 SLT 101.
c) Validity of the contract: a statutory form of personal bar

For most contracts formal writing is not necessary in order to establish validity, but a written document complying with section 2 of the Requirements of Writing (Scotland) Act 1995 is required for contracts relating to land and also gratuitous unilateral obligations undertaken otherwise than in the course of business (as well as the creation of trusts in which the trustor is sole trustee, and testamentary documents).63 Where a contract or obligation of this type has not been constituted in the appropriate form, it is not, as a general rule, legally enforceable.

However, a statutory form of personal bar exists to rescue such contracts or obligations from invalidity where a written document does not exist or is defective in terms of the formal statutory requirements. If the party seeking to rely upon the contract can establish that the requirements of the Requirements of Writing (Scotland) Act 1995 section 1 (3)-(5) are met, the other party is barred from withdrawing from the contract. Section 1(3) stipulates that one of the parties to the contract, or the creditor in the obligation, should have acted in reliance on the contract, obligation or trust, and that the person denying the obligation should have known about and acquiesced in these actings. The provisions are as follows:

Section 1. Writing required for certain contracts, obligations, trusts, conveyances and wills.

(1) Subject to subsection (2) below and any other enactment, writing shall not be required for the constitution of a contract, unilateral obligation or trust.

(2) Subject to subsection (3) below, a written document complying with section 2 of this Act shall be required for--

(a) the constitution of--

(i) a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land;

(ii) a gratuitous unilateral obligation except an obligation undertaken in the course of business; and

(iii) a trust whereby a person declares himself to be sole trustee of his own property or any property which he may acquire;

(b) the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law; and

(c) the making of any will, testamentary trust disposition and settlement or codicil.

(3) Where a contract, obligation or trust mentioned in subsection (2)(a) above is not constituted in a written document complying with section 2 of this Act, but one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust ("the first person") has acted or refrained from acting in reliance on the contract, obligation or trust with the knowledge and acquiescence of the other party to the contract, the debtor in the obligation or the truster ("the second person")--

(a) the second person shall not be entitled to withdraw from the contract, obligation or trust; and

(b) the contract, obligation or trust shall not be regarded as invalid, on the ground that it is not so constituted, if the condition set out in subsection (4) below is satisfied.

(4) The condition referred to in subsection (3) above is that the position of the first person--

(a) as a result of acting or refraining from acting as mentioned in that subsection has been affected to a material extent; and

(b) as a result of such a withdrawal as is mentioned in that subsection would be adversely affected to a material extent.

(5) In relation to the constitution of any contract, obligation or trust mentioned in subsection (2)(a) above, subsections (3) and (4) above replace the rules of law known as rei interventus and homologation…

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63 Requirements of Writing (Scotland) Act 1995, s 1(2).
Thus, in order for this statutory form of bar to operate, the following requirements must be met:

(i) **The contract obligation or trust must already be in existence**

Notwithstanding that it is defective in form, an agreement or unilateral obligation must be established as having been in existence already. It may have been constituted by writing which is informal, in the sense of not complying with section 2 of the 1995 Act, or it may be oral, or it may be part oral and part in writing of some description. If the prior existence of the obligation cannot be established – where there is no consensus on the essentials of a completed informal agreement – the statutory rules are inapplicable. Moreover, the contract, obligation, or trust must exist before the actings founded upon as supporting bar. In terms of section 1(3) the person upon it must act “in reliance on the contract, obligation or trust” with the knowledge of the person challenging it. Since one cannot act in reliance upon something which does not exist, the actings must necessarily postdate the agreement or other obligation.

(ii) **Knowledge and acquiescence by the person denying the obligation**

Section 1(3) stipulates that the person relying upon the contract, obligation or trust must have acted “with the knowledge and acquiescence of the other party”. While actual knowledge may be difficult to establish, in many circumstances knowledge can be imputed where the person denying the obligation is likely to have been aware of the other’s affairs – if actings were either “known to the other party or must necessarily be held to have been in the contemplation of that party when he entered the agreement”.

The person denying the obligation is required to have known not only that the other person acted, or refrained from acting, in a certain way, but also that he or she acted, or refrained from acting, in reliance upon the contract, unilateral obligation or trust. So knowledge must encompass the other person’s subjective reliance as well as the objective fact of the conduct. Although such knowledge may readily be presumed in many circumstances, it cannot always be so. In *Danish Dairy Co v Gillespie*, for example, landlord and tenants were negotiating the renewal of a lease. On the strength of informal agreement the tenants passed up the chance of looking for other premises. When the landlord withdrew from the agreement and sold the property, the tenants’ plea of bar failed because they could not show the landlord knew that they was relying upon the informal agreement in abstaining from looking for other premises. Lord President Clyde remarked that: “if the pursuers were to rely on their informal and

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65 This is the interpretation applied in *Tom Super Printing Supplies Ltd v South Lanarkshire Council* (No 1) 1999 GWD 31-1496. It is also that favoured by W W McBryde, *The Law of Contract in Scotland*, 2nd edn (2001), para 5-80; and H L MacQueen and J Thomson, *Contract Law in Scotland* (2000), para 2.53.


67 1922 SC 656 (a case dealing with the common law precursor of the statutory rules).
incomplete agreement…they should have made the defender acquainted with the line of conduct they were adopting.”

(iii) The person seeking to uphold it has acted in reliance upon the contract, unilateral obligation or trust

Section 1(3) requires that “one of the parties to the contract, a creditor in the obligation or a beneficiary under the trust has acted or refrained from acting in reliance on the contract obligation or trust”. Such actings must be referable to reliance on the contract, unilateral obligation or trust. The person seeking to uphold the obligation must therefore have been aware of its existence at the time of the actings allegedly undertaken in reliance upon it. A promise does not meet this condition, for example, if the person seeking to benefit from it met its terms without knowing of its existence. But while the actings of the person seeking to uphold the obligation must be referable to reliance upon the obligation, the statute does not require that this should have been the exclusive cause of such behaviour. Moreover, reliance upon the obligation must also have been reasonable; it was not so if, in the circumstances, extravagant assumptions were made or facts which were easily ascertainable were disregarded.

(iv) The person seeking to uphold the obligation was affected to a material extent as a result of his or her actings

These statutory provisions use two distinct criteria to assess the issue of the prejudice to the person seeking to uphold the contract. The first requirement, in section 1(4)(a), is that his or her position should have been “affected to a material extent” by his or her conduct in reliance upon the informal obligation, although the statute provides no guidance as to the required level of materiality. (In one instance, the defenders accepted that the pursuers had been affected to a material extent in that they had undertaken several days of preparatory activity, including the setting up of bank accounts and the placing of supply and employment contracts, following on an informal agreement to provide retail and catering services at an airport.)

However, the effects should be proportionate to the contract or obligation founded upon: the heavier the obligation, the heavier the effects that must be shown. So if, for example, A has promised to bequeath a house to B, B’s reliance as demonstrated by working unpaid for A over a period of years is likely to be sufficient. It would not, however, be proportionate, if the services rendered were trivial or the period in question was weeks rather than years.

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68 At 666-667.
69 Caterleisure Ltd v Glasgow Prestwick International Airport Ltd 2005 SLT 1083.
70 The court, however, saw “some force” in the defender’s contention that the loss of contractual benefit per se was not sufficient for the purposes of section 1(4)(b) (per Lord Emslie at para 16).
71 At common law the value of the right relative to the extent of the actings was relevant: see Rutterford v Allied Breweries Ltd 1990 SLT 249 per Lord Caplan at 253 where, set against the value of the transaction of a whole, the conveyancing fees actually incurred were not of sufficient materiality.
The nature of the effects is also of relevance. They are more readily regarded as material where the person affected has been induced to spend money, for example where a purchaser or tenant has incurred significant financial expenditure on improvements to the property in reliance upon an informal contract of sale or lease, but not where the sums involved were trivial, for example, on drafting of the relevant Conveyancing documents. Nevertheless, relevant effects need not be confined to those which diminish B’s economic position. The making of consequential business arrangements may be sufficient to meet this requirement: for example, the person relying upon the obligation has entered into or terminated a contract with a third party, such as an employment contract, or a lease on another property; or sold a property currently owned. Or a person may be regarded as affected to a material extent if he or she has assigned the rights under the obligation, whether gratuitous or onerous. The impact is not sufficiently material, however, if it relates solely to the making of social arrangements.

Mere disappointment of expectations is not relevant since this is not an effect of conduct, but of the belief that there is an obligation in existence, although it may be relevant for the purposes of section 1(4)(b).

(v) The person relying upon the obligation would be “adversely affected” as a result of the other person’s withdrawal

A further requirement, as contained in section 1(4)(b), is that he or she would be adversely affected to a material extent in the event that the other party were now permitted to withdraw from the obligation. This broadly equates with the prejudice requirement in the common law of personal bar. It has been observed that “the mere loss of anticipated benefit under a contract will not necessarily be sufficient” for the purposes of section 1(4)(b). However, such loss of anticipated benefit is seldom the only prejudice. If, for example, a buyer seeks to withdraw from an informal contract for the purchase of a house, even if an equivalent price may readily be obtained from another buyer, the seller may suffer loss in terms of additional advertising and legal costs, and bridging finance for the purchase of another house, all of which, if the contract had been good, could have been recovered as damages for breach of contract and are likely to be adverse effects for the purposes of section 1(4)(b).

d) Interpretation of contract

The starting point in interpreting contractual terms is the ordinary meaning of the words used, placed in the context of the contract as a whole, not the subjective state of knowledge of the parties to the contract. This approach is seen as protecting reliance interests in the general sense. As the Scottish Law Commission summarised in its Report on Interpretation in Private Law:

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73 Rutterford Ltd v Allied Breweries Ltd., 1990 SLT 249, but cf Secretary of State for Scotland v Ravenstone Securities Ltd 1976 SC 171.

74 As in Caterleisure Ltd v Glasgow International Prestwick Airport Ltd 2005 SLT 1083.

75 See examples given in H L MacQueen and J Thomson, Contract Law in Scotland (2000), at para 2.50.

76 Caterleisure Ltd. v Glasgow International Prestwick Airport Ltd. 2005 SLT 1083.

77 See Bank of Scotland v Dunedin Property Investment Company Ltd 1998 SC 657 per Lord President Rodger at 662.

Those whose rights and obligations are liable to be affected by a juridical act ought to be able to assume that the expressions used in it have a normal and reasonable meaning in the context and circumstances in which they were used. They should not be liable to find that their position has been affected by a secret meaning attached to an expression by the user of it. In most cases the policy of protecting reasonable reliance interests can be put into effect by looking at the juridical act from the point of view of an objective third party.

However, where there is ambiguity or uncertainty in the interpretation of the words used, the surrounding circumstances must clearly be relevant. This would include the factual background known to the parties: a description of the subjects of sale in a contract for the sale of land, for example, might require some information as to the physical features on the ground and the development contemplated. In order to determine the factual background, it may also be relevant to consider the conduct of and statements made by the parties at the time the contract was formed. The Scots courts have not yet given extensive consideration to the more radical approach indicated in certain dicta by Lord Hoffmann in English cases such as Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd and Investors Compensation Scheme Ltd v West Bromwich Building Society with regard to the importance of background facts. However, it is suggested in Scotland that in appropriate cases of difficulty, the tension between the objective approach to interpretation (taking the wording of the contract as it stands) and the subjective approach (looking at surrounding circumstances) may be resolved by allowing “a special meaning given to an expression by one party to the knowledge of the other, or by both parties, to receive effect.” At the same time, an alternative approach might be that any representations as to the “special meaning” of contractual terms at the time the contract was made, relied upon by the other party to his or her potential prejudice, bar the person making those representations from subsequently applying a different interpretation.

A clause would not be “deleted” as such by reference to reliance, but the doctrine of personal bar could operate in appropriate circumstances to prevent one of the parties from relying upon it, where the party who sought to do so had given the other to understand that the right to enforce this part of the contract was being waived. For example a party might waive a contractual right to have a dispute resolved by arbitration. It depends on context as to whether reliance and prejudice are required before such waiver may be effective, but in most circumstances these elements would be required as the necessary indicators of unfairness.

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79 E.g. Stewart Milne Group Ltd v Skateraw Development Co Ltd 1995 GWD 1650 per Lord Penrose: “The terms of this contract appear clearly to assume a wider knowledge of the matrix of circumstances and facts relevant to its conclusion than its terms disclose. Without knowledge of those surrounding facts and circumstances, in my opinion, interpretation would be hazardous.”


83 E.g.: “The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words. In this area, we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey” (Mannai Investment at 779). These cases have been noted without further discussion in subsequent Scottish cases, although one Sheriff (local court judge) stated from the bench that he was “taken aback” by their implications: Partnership of Ocean Quest v Finning Ltd 2000 SLT (Sh Ct) 157 at 161.


85 E.g. La Pantofola D’Ora SpA v Blane Leisure Ltd 2000 SLT 105.

e) Termination by breach of contract

It is possible that personal bar may operate to prevent a contracting party from terminating the contract following breach by the other party. The most common illustration of this principle is in relation to leases. A landlord may be entitled to remove a tenant due to non-payment of rent. If, however, the landlord accepts new payment of rent and permits the tenant to remain in the property after serving notice to quit, then he or she may be regarded as waiving the right to remove the tenant.  

In such circumstances, acceptance of rent is regarded as significant evidence that the landlord acknowledges the relationship with the tenant as a continuing one. A landlord who accepts rent implies that the right to remove the tenant has been abandoned and “cannot avoid that conclusion by accepting the rent payment under express, far less implied, reservation of his right”. Whether the rent has been demanded by the landlord or merely accepted when offered by the tenant, “acceptance of rent is, in all normal circumstances, an act so unequivocal that it must be taken to amount to a waiver”. However, it should perhaps be added that the assessment of what constitutes “normal circumstances” is problematic, and it would seem that the simple fact that landlord and tenant have been in negotiation may be interpreted as abnormal circumstances pointing against waiver.

f) The position of third parties in relation to personal bar

In principle, Scots law has traditionally had no difficulty in recognising the contractual rights of third parties in a variety of contexts. However, the problem posed here is twofold. In the first place, as discussed above, legitimate expectations or personal bar do not in themselves create contractual obligations, whether in favour of the parties to the contract or third parties, although they may prevent one party from denying to another the existence of a contractual obligation.

Second, even where personal bar is effective to prevent one party from denying an obligation, bar is “personal” because it works in a way which is said to be “personal” between the person who pleads it and the individual barred. Lord President Rodger noted in *William Grant v Glen Catrine Bonded Warehouse* that:

“It is a defence, or exception, which is "personal" because it arises out of the actings of the pursuer. The defender, who might have no defence to proceedings of a similar kind raised by someone else, can defend himself against proceedings raised by that particular pursuer because of something which the pursuer has done or not done.

87 E.g. *Milner’s Curator Bonis v Mason* 1965 SLT (Sh Ct) 56.
88 See e.g. *Cayzer v Hamilton* 1996 SLT (Land Ct) 21.
89 *HMV Properties v Bracken Self Selection Fabrics Ltd* 1991 SLT 31 per Lord Coulsfield at 35-36.
90 *HMV Properties v Bracken Self Selection Fabrics Ltd* 1991 SLT 31 per Lord Coulsfield at 37K.
91 See *MacDonald’s Trustees v Cunningham*, 1998 SLT (Sh Ct) 12 at 15; *HMV Fields Properties Ltd v Bracken Self Selection Fabrics Ltd* 1991 SLT 31, where the rent payments had been made by credit transfer and there was administrative delay in returning them to the tenants. The landlords were thus found not to have waived the right to terminate the lease.
93 See *Callander v Callander’s Exr* 1975 SC 183 per Lord Cameron at 211 to the effect that a plea of personal bar is “effectual only against those against whom it can be personally and successfully pled”.
94 2001 SC 901 at 913, para 29.
Thus personal bar "arises out of, and is peculiar to, the relationship between"95 those parties and as such is not generally relevant to those outside that interaction. Thus, if party A is barred from denying the existence of a contractual obligation vis-à-vis B, the other contracting party, bar will have arisen out of A’s representation or other such conduct with regard to B; if the obligation is in fact a nullity, C, a third party, cannot invoke such conduct vis-à-vis B to bar A from denying its existence to C.

D. Specific Applications

1) Agency

a) Apparent authority

In the law of agency the most frequently encountered application of personal bar relates to apparent or ostensible authority, where the person barred – the putative principal – has acted in a manner which implies the idea that another is his or her agent, but later denies the existence of agency. If such denial would result in unfairness to a third party who has entered into dealings with the putative agent, it is blocked by personal bar.96 The issue of whether a person has held out another as his or her agent arises in relation to such matters as the negotiation of contractual terms,97 or the performance of contractual obligations.98 Statutory provision is also made for personal bar in relation to the sale of moveables by the Sale of Goods Act 1979, section 21, which precludes the owner from disputing the authority of an agent to sell goods where the owner has appeared to confer relevant authority upon that person.99 (The issue of apparent agency does not arise in connection with the transfer of heritable property since title cannot be validly conveyed other than by the owner or with his or her express consent.)

The standard view is that apparent or ostensible authority is based upon the doctrine of personal bar.100 On this analysis, personal bar is not constitutive of the agency relationship as

95 Bank of Scotland v Brunswick Developments (1987) Ltd (No 2) 1997 SC 226 per Lord President Rodger at 235B (rev’d, but not on this issue, at 1999 SC (HL) 53). See also Swan v Secretary of State for Scotland (No 1), 1998 SC 479 per Lord President Rodger delivering the Opinion of the court at 486B: “Any prejudice to Mr Dykes is prejudice to a third party and is not something on which the respondent can found to argue that proceedings against the respondent are barred.”


99 The owner is then “by his conduct precluded from denying the seller’s authority to sell”.

100 See J Rankine, The Law of Personal Bar in Scotland (1921), at 217ff. See also Erskine, Principles, (21st ed, 1911), 431; Bank of Scotland v Brunswick Developments (1987) Ltd (No 2) 1997 SC 226 per Lord President Rodger at 234D, referring to Diplock L.J.’s classic statement on apparent authority in the English case of Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] QB 480 at 503: “An "apparent" or "ostensible" authority…is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an
such. The person whose authority has been disputed does not step into all the rights and liabilities of an agent. Instead personal bar is merely instrumental in preventing the principal from denying the authority of an agent a) to the third party or parties who have been taken in as to the agent’s authority by the principal’s conduct, and b) vis-à-vis the transaction or transactions to which that conduct related.\textsuperscript{101} It does not, however, prevent agency from being denied in relation to dealing with other persons or for other purposes. In this respect apparent agency may be distinguished from actual agency (express or implied), since the latter is operative in dealings with all parties.

The terms “apparent authority”, “ostensible authority”, and “holding out” are found in contexts where the putative agent has no actual authority (express or implied) to act for the principal in dealings with a third party, yet the principal is barred by its conduct from founding upon the agent’s lack of authority.\textsuperscript{102}

It is possible, although unusual, for the issue of apparent agency to arise without a prior relationship of agency between the alleged principal and the alleged agent: a person who has not previously acted as agent for the alleged principal may be held out as such. However, the issue of apparent authority more commonly presents itself when an agency relationship of sorts is already in place, but the agent has exceeded his or her authority. And in practical terms, bar may be more readily established in cases where limited authority already exists, than in cases where there is no authority at all.\textsuperscript{103}

\textbf{b) Apparent authority distinguished from actual and implied authority}

The actual authority enjoyed by an agent encompasses that which the principal has conferred expressly in writing or by oral agreement.\textsuperscript{104} Any question as to whether an agent has acted within his or her actual authority from the principal is determined as matter of fact by considering the agreement between agent and principal, and personal bar has no role in that enquiry.\textsuperscript{105} The focus is therefore on whether the disputed transaction is authorised. If the transaction is found to be authorised, then it is regarded as such for all purposes: the relationship between the principal and agent; principal and third party; and agent and third party.

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\textsuperscript{101} See, e.g. John Davidson (Pipes) Ltd v First Engineering Ltd 2001 SCLR 73 per Lord Macfadyen at para 26 (apparent authority to claim that company A was in a position similar to a subsidiary of company B did not include apparent authority to claim company B would guarantee company A’s debts).


\textsuperscript{103} See E C Reid and J W G Blackie, Personal Bar (2006) para 13–04

\textsuperscript{104} FMB Reynolds, Bowstead and Reynolds on Agency (18th edn, 2006), para 3-003.

\textsuperscript{105} Diplock LJ in Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] QB 480 at 502. Indeed verification of the agent’s actual authority may be demanded in certain types of onerous transaction: a person buying heritage from an agent of the owner, for example, cannot proceed to record the title after the purchase without reference to the relevant power of attorney. Personal bar thus has no relevance to the determination of actual authority.
In addition to authority expressly conferred, an agent may also be regarded as vested with a level of implied authority. Authority to undertake certain transactions may be implied because such powers are considered as necessarily concomitant with the authority specifically given; they are regarded as normal for agents of the type in question, or they are necessary to comply with established business customs.

Although some accounts explain implied authority, like apparent authority, by reference to personal bar (or estoppel), the essential elements of personal bar are absent. The central consideration in determining whether such implied authority should be recognised is factual and objective, namely what authority can be regarded as impliedly attaching to agents in this specific circumstance or to agents of this particular type. By contrast, the focus in cases involving apparent authority is upon the actions of the parties themselves: inconsistent and misleading conduct on the part of the principal, and the effect of this upon the third party. Moreover, the effect of recognising implied authority is not simply that the principal is barred from relying upon the agent’s lack of actual authority: the agent whose range of powers is implied is regarded as having real authority for the purposes of the disputed transaction. This contrasts with the doctrine of apparent authority which the Scots authorities at least suggest merely prevents agency from being denied by the principal.

2) Partnerships

A partner is regarded as an agent for the firm vis-à-vis third parties “for carrying on in the usual way business of the kind carried on by the firm of which he is a member”. In addition, in terms of section 14 of the Partnership Act 1890, a person “who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.” Such a person is thus liable to those who have acted in reliance upon the representation that he or she is a partner, in the same way as if he or she had actually been a partner of the firm. However, this form of bar is not actually constitutive of partnership. Liability extends only to those transactions entered into on the strength of this false representation.

3) Other applications

The range of personal bar is potentially extremely extensive. Aside from those areas already mentioned – contractual rights, agency, property rights, leases – it has application in relation to sale of goods, conduct indicating an intention to keep the goods after discovery that they are faulty may bar a buyer from rejecting goods. Alternatively, the “true owner” may be barred from recovering goods sold without authority to a third-party purchaser if he or she has

106 Murray v Campbell and Co (1827) 6 S 147.
107 Bell, Principles, § 225; FMB Reynolds, Bowstead and Reynolds on Agency (18th edn, 2006), para 3-003.
108 E.g. Danish Dairy Company Ltd v Gillespie 1922 SC 656 (normal authority of law agent). See SME vol 1, Agency (reissued 2002) para 82.
109 Unless the person specifically has no authority for this particular matter and the third party knows this: Partnership Act 1890, s 5.
created a false impression with regard to the seller’s title to the goods.\textsuperscript{111} In the law of insurance, an insurer might be deemed to have waived disclosure of material information by the insured or the proposer.\textsuperscript{112} And personal bar may operate to prevent repudiation of forgery or unauthorised cheques on bills of exchange or cheques.\textsuperscript{113} Personal bar has further applications in the law of trusts and the law of unjustified enrichment, company law, and rights and security and cautionary obligations (surety).\textsuperscript{114}

4) Limitation of action

In this connection, the defence of prescription (by which substantive obligations are extinguished) should be distinguished from limitation (by which the procedural right to enforce an obligation is time-barred). The relevant legislation is the Prescription and Limitation (Scotland) Act 1973.

It is possible in principle that a party might be barred in appropriate circumstances from pleading prescription, but section 6(4)(a) of the 1973 Act, which, \textit{inter alia}, deals with extinction of contractual obligations after a period of five years, provides expressly that no time period is included in the calculation in which “the creditor was induced to refrain from making a relevant claim”. It is therefore more likely in practice that this statutory exception would be argued rather than the common law of personal bar.\textsuperscript{115}

Generally speaking limitation is applicable to delictual (rather than contractual) obligations resulting in forms of personal injury. Similarly, although the right to bring an action is limited to a period of three years, this period is only computed from such time at which the litigant “became, or on which…it would have been reasonably practicable for him in all the circumstances to become, aware of” all the facts surrounding the harm sustained.\textsuperscript{116} If there had been some form of deception by the defender in the action it is possible therefore that the operation of limitation would be suspended. There is in addition a general equitable power on the part of the court to disregard limitation time-limits.\textsuperscript{117} However, these provisions operate independently of personal bar.

E. Remedies: Specific Performance or Damages?

In contrast with specific performance in English law, specific implement (the Scots counterpart) is given as of right where implement is appropriate. To that extent implement may be seen as the primary remedy for enforcement of a contract, although in practice many creditors seek damages rather than implement, and there are certain restrictions as to when implement is suitable.\textsuperscript{118} However, the right to implement or damages arises only on the basis of a contractual obligation; personal bar/reliance cannot itself operate as the source of

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\item\textsuperscript{111} Sale of Goods Act (1979) s 21; see generally E C Reid and J W G Blackie, \textit{Personal Bar} (2006) chapter 11.
\item\textsuperscript{112} See E C Reid and J W G Blackie, \textit{Personal Bar} (2006) chapter 15.
\item\textsuperscript{113} See E C Reid and J W G Blackie, \textit{Personal Bar} (2006) chapter 17.
\item\textsuperscript{114} See E C Reid and J W G Blackie, \textit{Personal Bar} (2006) chapters 9, 12, 14 and 16 respectively.
\item\textsuperscript{115} See, e.g., \textit{BP Exploration Operating Co Ltd v Chevron Shipping Co [2003] 1 AC 197}, 2001 SC (HL) 19.
\item\textsuperscript{116} Prescription and Limitation (Scotland) Act 1973, s 17(2)(b). See also ss 18(2)(b); 18B(2)(b).
\item\textsuperscript{117} Prescription and Limitation (Scotland) Act 1973, s 19A.
\item\textsuperscript{118} See further W W McBryde, \textit{The Law of Contract in Scotland}, 2\textsuperscript{nd} edn (2001), paras 23-08ff.
\end{enumerate}
\end{footnotesize}
entitlement (subject to comments on precontractual negotiations above). At the same time, personal bar may operate to prevent denial of the existence of an enforceable obligation.