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Missives and Deposit in Scots Law: Diachronic and Comparative Reflections about the Concept of *Arrha*

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Abstract. A jurisdiction such as the Scottish one, reputedly with solid Roman roots, is practically bereft of the fundamental concept of a deposit in the concluding passage of the missives. Conversely, the relevant ‘ancestor’ (Roman law) has been profoundly permeated, throughout the course of its history, by the notion of an *arrha* (the earnest) in the conclusion of a contract annexed to the transfer of heritable properties. Moreover, in contemporary times and outwith Scotland, a Continental jurisdiction (the Italian one) is resolutely lingering on the Roman *caparra penitenziale* while, ironically, the English system (comprehensively ‘un-Roman’ in its formation) has expressly adopted the ‘deposit’ as part of the closing particulars.

These asymmetries, brim-full with inviting legal ingredients, seem, in the present work, to conjure up an intriguing and captivating plot worthy of an Indiana Jones’ film, where the lost treasure can be deemed replaceable, for the distracted reader, by the ancient Roman notion of an *arrha*, so evidently not inherited by the contemporary Scottish jurisprudence. Ultimately, the contribution engenders the usual unsettling query: in the light of the phenomenology of the *arrha* so neglected in Scotland in contemporary times, is Scottish law still a mixed legal system or, conversely, a jurisdiction progressively getting closer to the English common law counterpart?

Keywords: Missives - Sale of heritable properties – Scots Law - Italian Law - English Law – Comparison – Historical development of the concept of *arrha*

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1. Introduction

The concept of missives – a peculiarity of the Scottish legal system as opposed to its Anglo-Welsh counterpart which traditionally lacks any such analogy – is put under the microscope and duly analysed in this work, both from the peculiar perspective of a comparative analysis with civil law jurisprudence (the Italian jurisdiction is adopted as a yardstick), from which missives have been conceptually borrowed, and through a diachronic investigation into its Roman ancestor.

In respect to the payment of the deposit - a sum usually amounting to a fraction of the agreed price - that some jurisdictions allow and/or require the purchaser to pay before the conclusion of a contract for the transfer of a property (both English and Italian jurisdictions bear testimony to this practice), Scots law basically ignores such procedure save for limited exceptions in the sale of commercial estates or new properties, the latter case commanding a deposit tantamount to a reservation fee.¹ Among a more authoritative calibre of contemporary Commentators ‘North of the Border’, it is not neglected - and to a certain extent is recognised - that ‘the law about deposits [in Scotland] in sale contracts is in some respects unclear’, with its rationale behind even considered ‘obscure’². This is deemed particularly so in cases where (conceptually) such a sum was to be qualified, as actually had already occurred judicially in some circumstances,³ as a ‘security for the performance’, rather than a ‘partial payment’, with the ensuing inextricable contradictions. In this respect, it is appropriately annotated that ‘the law of rights in security has a well-known principle ... that a security is enforceable only to the extent of the obligation secured. Hence to classify a deposit as a security would lead to the conclusion that if the buyer defaults then the deposit is lost only to the extent of the

¹ G L Gretton and KGC Reid, *Conveyancing* (4th edn W. Green 2011) 71.

² G L Gretton and KGC Reid (n 1) 71. Additionally, in the only contemporary textbook dedicated to the missives in Scotland - DJ Cusine and R Rennie, *Missives* (2nd edn Law Society of Scotland/Butterworths 1999) -, no mention seems to be made to the concept of deposit.

³ *Zemhunt (Holdings) Ltd v Control Securities Ltd* (1992) SLT 151.

loss of the seller. If a deposit is wholly forfeited that is presumably because it is to be regarded not as a security but as a pre-payment that is subject to an express right to the seller to take it by way of liquidated damages.⁴

There are plausible grounds for advocating, from a mere academic perspective, the need for a minute tweaking of the Scottish legislation so as to give missives a more credible enforceability. The means of achieving this end, as proposed in this work, would be to look at the concept of the ‘deposit’ or ‘earnest’ and, more specifically, at the Roman law *arrha* or the synonym *arra*, both within its Roman roots and in its application within a typical civil law jurisdiction, in this case the Italian one. The ultimate goal of the discussion is not to pretentiously solicit a fundamental transplant into the Scottish system of a similar concept existing in a foreign legislation, but rather to take stock of some aspects illustrated by both the ‘ancestor’ and the ‘comparator’ to possibly elicit some inspiration as to how to improve some aspects emanating from the entrenched concept of missives in Scotland.

2. Scottish missives: an overview

The ‘derivative acquisition’ of property rights in force of a contract of sale, to be entered into between seller and purchaser through a bargaining process which is sometimes very complex,⁵ is the commonest form of a transmission of corporeal movables, the ‘original one’ being conversely more rarely connected to the fact that ‘a right comes into being as a consequence of an act or occurrence giving a new proprietary position.’⁶

It is usually affirmed that Scotland, differently from England and Wales, affords the seller of a heritable property a ‘safe harbour’ approach for the reason that, ‘North of the Border’, the closing of any transaction is preceded by missives. This should be the magical, laconic and exotic word⁷ defining the two letters exchanged by the solicitor of the seller and that of the buyer, as a result of

⁴ G L Gretton and KGC Reid (n 1) 71.

⁵ The empirical explanation of this process may be read in JH Sinclair and E Sinclair, *Handbook of Conveyancing Practice in Scotland* (5th edn Tottel Publishing 2006).

⁶ Gloag and Henderson, *The Law of Scotland* (Thomson/W. Green 2007) 702.

⁷ *Missiva* in Latin means letter, and the relevant nominative plural is *missivae*.

which the two parties commit themselves to finalise the transfer, within the deadline specified in the missives themselves. Therefore, the payment of the price to the seller and the delivery of the title documents to the purchaser, although – it must be said – it is the third stage, the registration with the land register, that marks the transfer of the ownership between the two parties. At this final stage, the real right is created in the purchaser.⁸

It is also endorsed that in Scotland the missives are the collection of written communications ‘beginning with an offer and ending with an acceptance and, in between, documenting a process of adjustments in which the terms of the contract are fined-tuned.’⁹ Differently from the usual bargaining process, this negotiation occurs via a refusal and counter-offer, instead of an offer and qualified acceptance.¹⁰ With less technical terminology, it is also affirmed that missive is ‘the name we give to the contract for the sale and purchase of heritable property in Scotland that is constituted by a series of formal letters entered into by or on behalf of a purchaser and a seller dealing with the conditions that are to apply to the purchase and sale.’¹¹

Yet, it is recognised that the rights conferred through the missives are merely personal rather than real.¹² Remarkably, in Scotland, differently from England, it is particularly rare for sellers to demand a deposit upon signing the missives. It is said that the main reason for this is that ‘it is assumed that the solicitors acting for buyers will have done at least preliminary check on their clients’ finances.’¹³ In reality, this is not necessarily the case. In fact, no formal obligation lies on the solicitor of the purchaser to check the finances of his own client on the verge of buying a property. Correctly it is emphasised among Scottish Commentators¹⁴ that ‘it is good practice to make reasonably sure (a) that the clients will be able to come up with the purchase price at settlement date and (b) that they will be

⁸ Gloag and Henderson, *The Law of Scotland* (n 6) 655.

⁹ Gloag and Henderson, *The Law of Scotland* (n 6) 654-655.

¹⁰ Gloag and Henderson, *ibid.*

¹¹ E Sinclair and A Stewart, *Conveyancing Practice in Scotland* (6th edn Bloomsbury Professional 2011).

¹² Gloag and Henderson, *The Law of Scotland* (n 6) 655.

¹³ GL Gretton and KGC Reid (n 1) 35.

¹⁴ GL Gretton and KGC Reid (n 1) 35.

able to keep up with the monthly loan payments thereafter.¹⁵ However, this audit is not a mandatory task bestowed on the solicitor of the purchaser, it is merely ‘good practice’.

At this stage of the analysis, two specific aspects are worthy of a discussion and interpretation: first, the deposit (or *arra*) and the way this concept has been historically applied to the missives; second and in connection with the previous point, the missives and their traditional binding nature. These aspects shall be discussed and analysed in the following two Sections 2.1 and 2.2, respectively.

2.1. The history of the deposit in the missives in Scotland: an evolution (or an involution?)

As regards the first aspect, a historical view on the Scots deposit within the missives is necessary from the very beginning.

It is trite view that the *Regiam Majestatem* reflects the law applicable in Scotland in the 16th century.¹⁶ In the *Regiam Majestatem*, the deposit – and particularly the Roman *arrha* – does appear to be well perceived. As regards the specific point of the *arrha*, it is affirmed in that legal source that the sale in Scotland was supposed to be binding not simply by consent alone but only with the payment of the earnest, although the payment of the earnest did not prevent the buyer from withdrawing from the contract, on forfeiture of the earnest given.¹⁷ At judicial level a *decisum* dating back to 1629, *Gibson v Russel*¹⁸, seems to confirm this. In this case, as reminded by a contemporary Author¹⁹, it was held:

‘The buying of victual, or any other goods or gear, where the prices are condescended on, and arles received²⁰, and the day of delivery appointed, may not be resiled from.’

The statement in comment may demonstrate an assumption: the common use of the deposit (or *arra*) in the contract of sale was followed in its entirety in Scotland at the very beginning of its legal

¹⁵ Emphasis not per original text.

¹⁶ See WM Gordon, ‘Sale’ in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland vol II Obligations* (Oxford University Press 2005) 305-332, particularly 306-307. For a general overview, see also R White, ID Willock and HL MacQueen, *The Scottish Legal System* (5th edn Bloomsbury 2013).

¹⁷ WM Gordon (n 16) 305-332, particularly 306-307.

¹⁸ 1 B.S. 276.

¹⁹ AJ Mackenzie Stuart, *Contract and Quasi Contract*, in Various Authors, *An Introduction to Scottish Legal History vol XX* (The Law Stair Society 1958).

²⁰ Emphasis added.

tradition. However, things significantly change later. Among the Institutional Writers, Stair, *Institutions*, I, 14, 3, does refer to the ‘English’ earnest rather, but not any longer to the Roman *arrha*. He reminds that it is still dubious whether its nature is ‘an evidence of the bargain closed and perfected’ or, conversely, a means of allowing ‘the giver of the earnest ... to resile from the bargain if he please to lose his earnest, and the taker ... to resile if he returns the earnest with as much more.’ Despite this, Stair’s propensity seems to be for the former conclusion: the ‘...earnest is so inconsiderable, that it cannot be thought to be the meaning of the parties to leave the bargain arbitrary, upon the losing or doubling thereof.’ ‘Earnest also is reckoned as a part of the price with us, and thereby it stands not *in nudis finibus contractus, nec est res integra*; so that neither party can resile therefrom.’

To similar conclusions comes Erskine, III, Title 3, 5. This Institutional Writer too attempts to address and clarify the phenomenon of the deposit in Scotland, albeit merely in connection to the general contract of sale or, to put in Latin, the *emptio venditio*.

However, after Stair and Erskine, in the 19th century Bell²¹, in referring to the contract of sale of heritable properties, does not linger any longer on the analysis of the deposit. Likewise, the same main nineteenth century Scottish textbook in the matter of the sale,²² in dealing with the sale of immovable property, does not refer to the Roman *arrha* or any correspondent Civilian concept such as the deposit. It is affirmed in a more laconic way that the writing is not required as a proof, ‘but as a solemnity without which the contract will not be binding, even although its existence were admitted, or offered to be proved *aliunde*, Eskine, 3.2.2.’²³

And also:

‘Where the contract is in the form of an offer and acceptance, or of mutual missives, both writings must be probative, otherwise either party may resile, and consequently a written offer, verbally accepted, is not binding ...’

²¹ *Principles* 272-279.

²² MP Brown, *Treatise on the Law of Sale* (Balfour & Clarke 1821).

²³ MP Brown, *ibid.* 55.

Additionally, it is specified with reference to informal contract²⁴, albeit without any mention of the *arrha*:

‘The right of resiling, from an informal contract for the sale of heritage, continues only while matters are entire. If a part of the price has been paid on the faith of the bargain, the rei interventus supplies the want of form, and creates a valid obligation’.

Ultimately, what described in this Section 2.1 may corroborate the view²⁵ that the deposit or earnest in Scotland is a concept progressively and inexorably fading away also as a result of the political integration started as from 1707.

2.2. The binding nature of the missives in Scotland: a myth?

Commentators constantly affirm that missives, usually concluded via two agents representing the two respective contracting parties,²⁶ render the obligations enforceable *inter partes*. This is due to the fact that, in cases where the purchaser decided not to fulfil his own obligations (*ie* to pay the price), the counterparty could rescind the contract and sue the other party for damages.

From a practical point of view, it can be briefly reminded²⁷ that, colloquially, the phenomenon of the purchaser finding a different seller at a lower price for a similar *res* is called for a correspondent property, is usually defined to ‘gazunder’ or ‘gazundering’. Conversely, the seller rescinding because he finds a different purchaser available to pay more for a similar property, is called ‘to gazump’ or ‘gazumping’.

From a legal point of observation, the damages that the aggrieved buyer is entitled to claim would typically amount to the difference between (a) the price at which the property has been sold, after the withdrawal from the contract and its reinstatement in the market, and - if higher – (b) the price at

²⁴ MP Brown, *ibid.* 55.

²⁵ See later the Conclusions.

²⁶ Obviously, in this case, given the general rule of agency, the contract signed ‘by an agent duly authorised on behalf of a disclosed principal binds the principal only, and not the agent; otherwise, the agent is personally bound.’ D Brand, AJM Steven and S Wortley, *Professor McDonald’s Conveyancing Manual* (7th edn LexisNexis Butterworths 2004) 538.

²⁷ HL MacQueen e J Thomson, *Contract Law in Scotland* (3rd edn Bloomsbury Professional 2012) 65.

which the buyer had initially committed himself pursuant to the unfulfilled missives to buy it. The legal expenses in which the aggrieved party (the seller) has incurred shall be the additional item of this 'bill'. Judicially, an example of this dynamic is given by a recent case, *FM Finnieston Ltd v Ross*.²⁸ Alternatively, the seller may decide to sue for implement, therefore 'by an action for payment of the purchase price in exchange for which the seller tenders a disposition'.²⁹ However, it must be said that this action seems to be less likely.

It is obvious that, *mutatis mutandis*, a legal action is nonetheless levied on the buyer in a scenario where the seller decided not to settle the transaction, the right of the purchaser substantiated in the entitlement against the seller 'to have the bargain implemented'.³⁰ More specifically, the default by the seller can be remedied through an action of implement in force of which 'the purchaser will attempt to have the seller ordained to deliver a valid disposition, or, failing that, to acquire a title by adjudication'.³¹ Otherwise, the damages to be awarded judicially, if the seller was not in a position to implement the contract at all. This second circumstance may occur in cases where the seller lacks title and therefore no alternative option is available.³² It is also said among Commentators that in these circumstances the person who enters into the contract to purchase land *et similia* does not have 'a real right against all and sundry: he is in fact the owner until the conveyance to him has been placed on the register'.³³

If this is, theoretically speaking, the general picture typically and earnestly painted in describing the transfer of 'property' in Scotland,³⁴ in reality, from a more empirical perspective, the risk is not inconceivable that the 'binding' missives may result in a misleading and ultimately mischievous ambush of one of the parties, more often of the seller rather than the buyer. In fact, the former may erroneously think that his property shall be sold, after the conclusion of the missives (because of the

²⁸ [2009] CSOH 48. The case is commented on KGC Reid and GL Gretton, *Conveyancing 2009* (Avizandum 2010) 4-5.

²⁹ D Brand, AJM Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (n 26) *passim*.

³⁰ Gloag and Henderson, *The Law of Scotland* (n 6) 702.

³¹ D Brand, AJM Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (n 26) 587.

³² D Brand, AJM Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (n 26) 588.

³³ Gloag and Henderson, *The Law of Scotland* (n 6) 702.

³⁴ Needless to say, in this work, 'property' must be read as the right of ownership or the *res* (the thing) which is the subject of the right of ownership.

alleged binding nature of them), and he will receive due consideration of that sale. However, this scenario does not take into account a variety of possible legal devices that the buyer could figure out.

Among these stratagems, reference could be made to a person ultimately interested in buying the property but legally committed via a third party, a ‘man of straw’, without creditworthiness, who is acting on behalf of the former. To probe deeper into this sequence of events,³⁵ if for some reason the prospective real buyer decided after the signing of the missives not to fund the ostensive buyer for the purposes of the payment of the price, would the seller be actually and practically satisfied with what, at present but also historically, Scots law would offer him, *ie* a legal proceeding to be brought against the non-performing party, the buyer? In all likelihood, the answer would be no.

The buyer, at least the ostensive one (he who formally but not substantially committed himself), does not have creditworthiness. Therefore, the laborious legal action, albeit successful in its outcome, would end up merely a Pyrrhic victory for the seller; ultimately, the latter would be bereft of any practical possibility to enforce the assets of the non-performing counterparty to recover his damages. Similarly, it seems that the aggrieved party cannot rely either on any action against his own solicitor, for the reason that, in Scotland, among the duties by which a solicitor is burdened during the bargaining process conducive to the sale of a heritable property, the credit check of the counterparty is not encompassed.³⁶

More explicitly, Commentators³⁷ go beyond by warning of the following:

‘... the agent, when making an offer on behalf of a named principal, warrants his authority, although he does not warrant that his principal is solvent nor that his principal will duly carry out the contract.’

Conversely, a duty of care is owed merely by the solicitor of the purchaser to his client. This duty is mainly centred on the *res*: the good to be transferred and, more specifically, physical conditions of the house *et cetera*. However, this does not extend to the creditworthiness of the prospective buyer and,

³⁵ Empirically, one could think of a young un-creditworthy child of a very wealthy person.

³⁶R Rennie, *Opinions on Professional Negligence in Conveyancing The Opinions of Professor Robert Rennie* (Thompson/W. Green 2004) *passim*.

³⁷ D Brand, AJM Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (n 26) 538.

more in general, no duty is owed to the seller or his legal representative. Ultimately, this duty, as it is currently written, does not offer proper safeguards to the benefit of the seller.³⁸

Some websites seem to testify the incredulity and surprise, in some cases accompanied by a certain degree of desperate discomfort, of some sellers in Scotland, who, after the conclusion of the missives, had got to realise that, despite the ostensive binding nature of them, the transaction could not be perfected.³⁹ This contribution, from a more theoretical perspective, attempts to offer a legal explanation of this: it is not a common phenomenon; however, it is a circumstance that cannot be ruled out in the sale and purchase of properties.

3. The lost Scottish concept of the deposit in the missives: a ‘security’, a forfeiture clause or a *tertium genus*?

The deposit, *lato sensu* considered, would not be so extraneous to the theory of contract in Scotland; liquidated damages clauses may already be embedded within any contract, therefore also those concerning the transfer of heritable properties. Doctrinally, it is said that a ‘liquidated damages clause is ... a clause providing a mechanism whereby the damages payable may be calculated and made liquid ...’,⁴⁰ therefore ‘a sum of money which is fixed in amount and payable now’.⁴¹

The liquidated damages are opposed to the illiquid ones. The latter is any other sum, for instance, by definition, prior to any assessment by the court, damages.⁴² Also, it is a quite well-established concept in Scots law that ‘the law of penalties’ somehow restricts the use of these clauses, in order that they

³⁸ G L Gretton and KGC Reid (n 1) 12-14.

³⁹ See, for instance, Money Saving Expert, ‘Missives Signed Buyer still Pulled Out’ (Scotland) <<http://forums.moneysavingexpert.com/showthread.php?t=4003437>> accessed 5 November 2015.

⁴⁰ HL MacQueen and J Thomson, *Contract Law in Scotland* (2nd edn Tottel Publishing 2007) 245, and, in similar terms, the ultimate edition (HL MacQueen and J Thomson, *Contract Law in Scotland* (n 27) 262. See also WW McBryde, *The Law of Contract in Scotland* (3rd edn Thomson/W. Green 2007) 679-680; Gloag and Henderson, *The Law of Scotland* (n 6) 219-223.

⁴¹ HL MacQueen and J Thomson, *Contract Law in Scotland* (n 27) 262; G Black, *Woolman on Contract* (4th edn W. Greens 2010) 150-152.

⁴² HL MacQueen and J Thomson, *Contract Law in Scotland* (n 27) 262.

are not utilised by one of the parties (or, more precisely, by one of the parties that is contractually wielding more bargaining power) ‘*in terrorem* of the offending party’. In this case, the penalty would not be enforceable, other than as a legitimate and genuine means of pre-estimating the damage flowing from the breach, in which case exclusively the penalty would be enforceable. In Scots law, therefore, the Court is well empowered to exercise a control on these clauses, on equitable ground, on refusing to give them effect, and this has been a quite entrenched concepts with several and multifarious applications.⁴³ On this aspect, it is also highlighted by Scots Scholars⁴⁴ that the ‘general tendency of the court is not to find that the clause is penal unless it is clearly exorbitant.’⁴⁵ In any case, ‘it can only be a penal clause if it arises on breach of contract’.

Judicially, for instance, the case *Hannan v Henderson*⁴⁶ may be a lucid example. In a partnership, a clause embodied in the partnership contract entitled each of the parties to terminate the contract for the breach of the contract of one of the other partners. In these circumstances, the capital given to the partnership by the defaulted partner would have been forfeited. This was held as a penalty clause, therefore unenforceable. Practically, it is also synthesised among Scottish commentators that, as regards penalty clauses, the ‘general tendency of the court is not to find that the clause is penal unless it is clearly exorbitant.’⁴⁷, and in any case, ‘it can only be a penal clause if it arises on breach of contract’⁴⁸ However, it is also acknowledged that the distinction between the two dogmas (penalty and liquidated damages) is difficult to apply in practice, for some practical aspects. Among the perplexities of this Commentator as to the general theories of the penalty clauses,⁴⁹ the following one may be emphasised:

‘The phrase “in terrorem” is somehow extreme, because it is difficult to imagine most “penalty” clauses producing fright, fear, dread, panic or terror. However, in so far as they put

⁴³ (1879) 7 R. 380. Among Commentators, see WM Gloag, *The Law of Contract* (2nd edn W. Green 1929) 671.

⁴⁴ *ibid.* on recalling *City Inn Ltd v Shepherd Construction Ltd* (2003) SLT 885.

⁴⁵ G Black, *Woolman on Contract* (41) 150.

⁴⁶ (1879) 7 R. 380.

⁴⁷ G Black, *Woolman on Contract* (n 41) 150.

⁴⁸ G Black, *Woolman on Contract, ibid.*, in recalling *City Inn Ltd v Shepherd Construction Ltd* (2003) SLT 885.

⁴⁹ WW McBryde, *The Law of Contract in Scotland* (n 40) 685.

pressure on one party, this is also achieved by a liquidated damages clause. Contracts have, by their nature, a coercive force, and this is all the stronger when the sum payable on breach is fixed in the mind of the party who might be in breach. To distinguish between different degrees of pressure is not easy.⁵⁰[emphasis added]

Ultimately, the demarcation line between the two concepts remains slim, somewhat invisible and probably evanescent.⁵⁰

In light of these perplexities surrounding the concept of the penalty clause, it is possible to deduce that the test of the enforceable penalty versus the unenforceable one, as shaped by Lord Dunedin in the long-established *dictum Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co*⁵¹, would not prevent a proper deposit from being encapsulated within the Scottish missives. This is particularly so given the fact that one of the practical applications of this concept already exists in Scots law. This is the notion of the ‘forfeiture clause’, in other words sums to be paid under a contract, such as deposits, booking fees and instalments.⁵²

Ultimately, it is possible to assume that, despite the ontological presence of the deposit within the general theory of the contract, the two areas of Scots law - the conveyancing law and the law of contract respectively, have never managed to fully and adequately assimilate with each other on this

⁵⁰ Remarkably, in some areas (securities), Scots statute does not refrain from taking a clear-cut position on penalty clauses attached to bonds, as per the *Debts Securities (Scotland) Act 1856*, particularly ss 5 and 7, allowing the court “to modify and restrict such penalties [for not payment, over and above performance; n.d.r.], so as not to exceed the real and necessary expenses incurred in making the debt effectual.” In this respect see *amplius* WW McBryde, *The Law of Contract in Scotland* (n 40) 686,687 as well as Gloag and Henderson, *The Law of Scotland* (n 6) 221. Similarly, as regards the agricultural lease for the payment of the increased rent or other liquidated damages for breach of the terms of the lease, see the *Agricultural Holdings (Scotland) Act 1991*, s. 48 (Gloag and Henderson, *The Law of Scotland* (n 6) 221).

⁵¹ [1915] AC 79. Judicially, the concept is consolidated and further defined in both *Lord Elphinstone v Monkland Iron and Coal Co Ltd* (1886) 13 R. (H.L.) 98 and *Clydebank Engineering & Shipbuilding Co Ltd v Castaneda* (1903) 5 F. 1016, in this latter case the penalty clause being equal to a million for a failure to build a house worth £ 5!

Among Scholars, see also WW McBryde, *The Law of Contract in Scotland* (n 40) 685.

⁵² With clarify, this is emphasised by HL MacQueen and J Thomson, *Contract Law in Scotland* (n 27) 264. The *dictum Zehunt (Holdings) Ltd. v Control Securities plc* (1992) SLT 151, where it was stated that the deposit is ‘a pledge or guarantee of performance by the purchasers and was not merely an advance of part of the purchase price’, might have been a precedent applicable to missives, if it had not referred to a totally different scenario, namely a private auction for the purchase of heritable property. ‘Zehunt’, in its narrative, does not call upon any concept of *arrha* either.

subject.⁵³ As a result of this lack of cohesion, the contractual ‘phenomenon’ of liquidated damages, of a purely contractual nature, as above hinted, has never successfully materialised and never consolidated in the specific contract concerned with the transfer of heritable properties in Scotland. Conversely, this concept is perceived as ‘mysterious’, just to paraphrase *verbatim*, once again, the commonly-held view of the most prominent Scottish jurists on the subject.

Therefore, from an aetiological point of view, it is entirely plausible that Scots law, in its strenuous attempt to distance itself from the historic legal ‘enemy’ located ‘South of the Border’, where the deposit attached to the sale of properties is quite entrenched, has unexpectedly ended up losing touch, on the one hand, with its Institutional Writers, on the other hand, with its Roman roots and with its contemporary civil law counterparts. Needless to say, in this case the counterpart is the Italian one, here assumed as comparator, at least in its abstract model.⁵⁴

4. A diachronic perspective and a comparative analysis about the deposit

Is there any legal avenue offering a solution or explanation to the possible incongruity, somehow affecting the Scottish contract and conveyancing law in the matter of the deposit? The answer is yes. The reason for such optimism surprisingly originates from both the Roman roots and, in terms of comparative analysis, a civil law jurisdiction such as that operating in Italy.

4.1. The deposit and its predecessor: the Roman arrha

The Roman *emptio venditio* was a contract, probably the most important one, based on three elements: (a) the *conventio*, therefore the agreement; b) the *merx*, the good; (c) the *pretium*, the price.⁵⁵ As early

⁵³ C Chessa and P de Gioia-Carabellese, ‘Le “Missive” nel sistema Giuridico Scozzese e la Caparra Penitenziale nella Contrattazione Preliminare in Italia: Riflessioni Diacroniche e Comparatistiche’ (2013)2 *Contratto e Impresa/Europa* 930.

⁵⁴ See below Section 4, as regards the Italian *caparra confirmatoria*.

⁵⁵ E Volterra, *Istituzioni di Diritto Privato Romano* (Edizioni Ricerche 1961) 498.

as Gaius,⁵⁶ this contract would have been defined as a consensual, bilateral agreement. In force of it, a party, the seller, committed himself to transfer the ‘peaceful’ and ‘definite’ availability of a good (the Latin *merx*, if a movable), and the other party, the buyer, committed himself to transfer the full ownership of an amount of money.⁵⁷ More in general, it can be affirmed that, in the sale of heritable properties in the classical period, the *emptio venditio* would be separate from the *traditio*,⁵⁸ the latter being ‘the subsequent conveyance and payment by which these obligations were fulfilled ...’.⁵⁹

In Roman law, since its inception, the sale was accompanied by the practice of giving an *arrha*, symbolizing the seriousness of the bargain.⁶⁰ In classical law the *arrha* would have been merely for evidentiary purposes, although in Eastern systems ‘a right to withdraw on forfeit of *arra* seems to have been a general rule.’⁶¹ However, with Constantine, this twofold approach (*emptio venditio* accompanied by the *arra*), flourished during the Diocletian period, seems to fade away. At this point, the Roman sale and a purchase agreement became merely a consensual contract, hinged upon the

⁵⁶ Gai 3. 139-141; E. Betti, *Istituzioni di diritto romano*, II, 1, Cedam, 1960, 200; G. Grosso, *Il sistema romano dei contratti*, Utet, 1950, 240;

⁵⁷ M Talamanca, *Istituzioni di Diritto Romano* (Giuffrè Editore 1990) 582; M. Talamanca, *L’arra nella compravendita in diritto greco e in diritto romano*, Giuffrè, 1953, 58; M. Massei, *L’arra nella compravendita*, BIDR, 1948, 267.

⁵⁸ M Talamanca, *Istituzioni di diritto Romano* (Giuffrè Editore 1990) 583.

⁵⁹ HF Jolowicz and B Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn Cambridge at the University Press 1972) 144.

As regards broad references to the evolution of Roman law, see G Pacchioni, *Corso di Diritto Romano* (2nd edn Unione Tipografica-Editrice Torinese 1918); P Du Plessis, *Studying Roman Law* (2012 Bristol Classical Press); HF Jolowicz, *Historical Introduction to the Study of Roman Law* (Cambridge at the University Press 1952); U Laffi, *Studi di Storia Romana e di Diritto* (Edizioni di Storia e Letteratura 2001); W Kunkel, *An Introduction to Roman Legal and Constitutional History translated by JM Kelly* (2nd edn based on the 6th German edn Oxford at the Clarendon Press 1973).

⁶⁰ G Pugliese with F Sitzia and L Vacca, *Istituzioni di Diritto Romano* (2nd edn, G. Giappichelli Editore 1990) 896. It is reminded that the giving of an *arra* was not prescribed by any rule, and it was not a necessary element for the sale to be valid.

⁶¹ See G Pugliese, with F Sitzia and L Vacca, *Istituzioni di Diritto Romano* (2nd edn, G Giappichelli Editore 1990) 896. See also WW Buckland, *A Text-Book of Roman Law From Augustus to Justinian (Third Edition revised by Peter Stein)* (3rd edn, Cambridge University Press 2007 – digitally printed version) 481; Id., *A Text-Book of Roman Law From Augustus to Justinian* (WM W Gaunt 1921 – digitally printed version 1990) 478; JAC Thomas, *The Institutes of Justinian. Text, Translation and Commentary* (Juta & Company Limited 1975) 231.

For specific references to the *emptio venditio* in Roman law, see D Johnston, *Roman Law in Context* (Cambridge University Press 1999) 79-83.

agreement of the parties and the payment of the price, with the writing becoming a requirement as far as immovable goods are concerned.⁶²

The *arrha* was either money – and in this case it would have amounted to a deposit - or some other non-fungible goods.⁶³ If the *arrha* had consisted of money, in case of performance the relevant amount would have been credited to the purchaser against the price. Remarkably, the earnest money might have been something valuable, and in this case it would have been a deposit that the purchaser would have forfeited, relative to his lack of performance of the obligations at the closing date. It is emphasised by a Commentator⁶⁴ that, in case of the seller's default, under Roman law it was not so clear how the matter would be settled. The relevant sources are contradictory in this respect, although the Ancient Greek tradition, later on exported to Rome, would have certainly required the seller to return twice the amount of *arrha* received. Probably, based on what clarified later under this Section as regards the Italian jurisdiction, where the defaulted seller must return twice the *arrha* (or *caparra*) received, the Romans might have had a system similar to the some modern Continental jurisdictions.

The *arrha* was never considered requisite in Roman law for the conclusion of contracts of sale. This seems to be confirmed by Gaius:⁶⁵

‘... *quamvis nondum pretium numeratum sit, ac ne arra quidem data fuerit*’⁶⁶

This Gaius' statement, within the Digest of Justinian (Book XVIII, Title I – *De Contrahenda Emptione*) is synthesised as follows:

⁶² M Talamanca, *Istituzioni di Diritto Romano* (Giuffrè Editore 1990) 583.

⁶³ P du Plessis, *Roman Law* (5th edn, Oxford University Press 2014) 267-268. In the past, some Scottish jurists (J MacKintosh, *The Roman Law of Sale* (T&T Clark Law Publishers 1892) 68) reconnected the *arrha* ‘to the Hebrew name of earnest (‘*érávón*, the pledge) into Greece and Italy’. Later, the word became *αρραβών* in ancient Greek, ‘and this is copied in early Latin, but in the jurists the form is always *arra*’.

It is also observed, (J MacKintosh, *ibid.* 68), in recalling *Howe v Smith* (1884) 27 Ch. D. At p. 102, that:

‘[T]he resemblance of our word ‘earnest’ (in Welsh ‘*ernes*.’, in Scotch ‘*arles*’) may be accidental’.

⁶⁴ P du Plessis, *Roman Law* (n 57) 268.

⁶⁵ *Institutiones Gai* 3.139.

⁶⁶ Basically, but not literally, translated: ‘A contract of sale is concluded when the parties agree on the price. It makes no difference if it is not then paid, or if no token of agreement is given.’

‘Quod saepe arrae nomine pro emptione datur, non eo pertinet, quasi sine arra conuentio nihil proficiat, sed ut euidentius probari possit conuenisse de pretio.’

This is translated by a Scottish jurist of the nineteenth century:⁶⁷

‘It is common in making a purchase to give something by way of earnest, not because the agreement would be ineffectual without earnest, but to serve as a positive proof that the parties are at one as to the price.’

Having said that, more difficult is to establish the function of the *arra* within the *emptio venditio*. Whereas it was merely proof of serious intent⁶⁸ at least in the classical period⁶⁹, as legacy of the Greek tradition in the Mediterranean areas,⁷⁰ in the future it would emerge, upon consensus of the contractual parties, to be a proper forfeit in case of withdrawal.

Interestingly, an isolated Author⁷¹ seems to look at the trajectory of the *arrha* in Roman law in a slightly different way. In fact, it is affirmed⁷² that the traditional form of *arrha*, called *arra confirmatoria*, in the Justinian times, might have evolved in a second genre, *arra contractu imperfecto data*. The purpose of the latter was to create ‘a certain tie between the negotiating parties who are in treaty with a view to effecting the sale’. The characteristic of this alternate *arrha* was that it was given ‘not upon the completion of the contract but during the preliminaries, and was held to be merely evidence of willingness to complete the contract’⁷³. In this case, according to the this Author ‘[e]ither party was at liberty to draw back from the projected sale if he chose to incur a penalty, and the law, in that event, made the earnest the measure of damages to be paid by the party refusing to go on.’

⁶⁷ J MacKintosh (57) 69.

⁶⁸ P du Plessis, *Roman Law* (n 57) 268. An acceptable translation in English of the *Institutiones Gai* may be found in *The Institutes of Gaius, Translated with an introduction by WM Gordon and OF Robinson* (Cornell University Press 1988) 343-344.

⁶⁹ WW Buckland, *A Text-Book of Roman Law From Augustus to Justinian (Third Edition revised by Peter Stein)* (n 55) 481.

⁷⁰ M Volterra, 498.

⁷¹ JAC Thomas, *Textbook of Roman Law* (n 66) 280. See *amplius* the same Commentator in Id., *The Institutes of Justinian. Text, Translation and Commentary* (Juta & Company Limited 1975) 231.

⁷² *ibid.*

⁷³ *ibid.*

Further, some Authors make a point of drawing attention to the fact⁷⁴ that the *arrha* was, in Roman law, the legacy of a tradition established by Ancient Greek legal systems, quite established in the Mediterranean areas:⁷⁵ because the sale was not consensual, a deposit would have been required for any sale of properties in order to provide the vendor with some form of protection.

4.2. The *arrha* in the civil law tradition: Italy and the *caparra*

Both conceptually and etymologically, the *arrha* has left a lasting imprint on some civil law jurisdictions, such as the Italian one, where the sale of heritable properties is usually accompanied by the *caparra*. Clearly, the Latin *arrha* resonates in a language (Italian) with which its lineage is incontrovertible, in the light of the fact that *caparra* is merely the portmanteaux of the word *arrha*, in its accusative declension, and the verb *capere*, therefore *capere arrham*, to receive the earnest.⁷⁶

More specifically, in the Italian Civil Code⁷⁷, in resemblance to the previous Italian code of 1865⁷⁸, there is a legal provision, article 1382, setting forth the principle broadly applicable to all contracts, not merely to those relating to the transfer of immovable goods.⁷⁹ According to this, a clause whereby the parties agree that, in case of a non-performance or tardy performance of the obligations entailed to that contract, one of the parties is bound by an agreed alternate performance, that clause results in limiting the damages to that agreed alternate performance. In this case, the aggrieved party shall be

⁷⁴ JAC Thomas, *Textbook of Roman Law* (North-Holland Publishing Company 1976) 280.

⁷⁵ E Volterra, *Istituzioni di Diritto Privato Romano* (Edizioni Ricerche 1961) 499.

⁷⁶ *Enciclopedia Italiana Treccani* (1949) vol VIII, 'caparra', 829.

⁷⁷ Henceforth also the 'ICC'.

⁷⁸ It is recalled (*Enciclopedia Italiana Treccani* (n 38) 829-830) that the Italian civil code of 1865, now replaced by the ICC, at its art 1217, used to refer to a *caparra*. See C Chessa and P de Gioia-Carabellese (n 53) 933.

⁷⁹ See, among the main Italian prival law textbooks: E. Lucchini, *Caparra confirmatoria, recesso e risoluzione del contratto*, *Riv. dir. civ.*, Cedam, 2009, II, 327; G. Lener, *Quale sorte per la caparra confirmatoria manifestamente eccessiva? Foro it.*, 2014, 2042-2047.

See, in the Italian literature, see FP Patti, 'Il Controllo Giudiziale della Caparra Confirmatoria' (2014)60 *Rivista di Diritto Civile* 685-707; V Viti, 'I Rapporti fra Caparra Confirmatoria e Risarcimento del Danno' [2014] *Giurisprudenza Italiana* 2423-2433; L Pascucci, 'Sulla Proponibilità della Domanda di Risoluzione Corredata da una Richiesta di Incameramento della Caparra Confirmatoria' [2014] *Giurisprudenza Italiana* 2697-2705; P de Biase, 'La Derogabilità della Disciplina Legale della Caparra Confirmatoria' (2013)34 *Rassegna di Diritto Civile* 633-351; A Marini, *Caparra (Diritto Civile)*, *Enciclopedia Giuridica Treccani* (Treccani 1988); G De Nova, *Clausola Penale*, in *Digesto Discipline Private (Sezione Civile) II* (UTET 1988) 377 ff.

entitled to receive exclusively the alternate agreed performance (the specified penalty), unless the parties initially reached agreement on the recovery of the additional damages. The ‘alternate agreed performance’, set forth by the ICC, art 1382, is referred to in Italian as *clausola penale* which can be translated, *mutatis mutandis*, as deposit or, in literal terms, penal clause⁸⁰. This is, essentially, a sum, in lieu of the actual damages, that the aggrieved party is entitled to receive from the other party.

The relevant tenor of article 1382 of the ICC is as follows:

‘A clause by which it is agreed that in case of non-performance or delay of performance one of the contracting parties is liable for a specified penalty, has the effect of limiting the compensation to the promised penalty, unless compensation was agreed on for additional damages.’

Ancillary to the penal clause prescribed under article 1382 of the ICC are two further provisions. The first is encompassed within the following paragraph of article 1382, according to which:

‘The penalty is due regardless of proof of damages’.

The second is conversely contained within article 1383 (under the heading ‘Prohibition against cumulation’), according to which:

‘The creditor cannot demand both the principal performance and the penalty, unless the penalty was stipulated for mere delay.’

⁸⁰ Such is the suggestion of P Beltramo, *The Italian Civil Code* (Oceana 2005).

In Italian law it is common to differentiate between the penal clause (*clausola penale*), which gives rise to the obligation to deliver either money or a quantity of goods (see S Mazzaresse, *La Clausola Penale*, in P Schlesinger (ed), *Il Codice Civile. Commentario* (Giuffrè 1999), and the *caparra confirmatoria* (confirmatory deposit). The latter is usually categorised as a ‘real contract’. It is perfected with the delivery of the *res* (M Della Casa, *La Caparra Confirmatoria*, in V Roppo (ed), *Trattato del Contratto*, V (Giuffrè 2006). Therefore, the confirmatory deposit is given, it is not merely promised. See G Amadio & F Macario, *Diritto Civile: Norme, Questioni, Concetti, Vol I* (Zanichelli Bologna 2014) 432 ff; F Roselli, *Clausola Penale e Caparra*, in M Bessone (ed), *Trattato di Diritto Privato* (Giappichelli Editore 2002); S Mazzaresse, *Clausola Penale. Articoli 1382-1384*, in P Schlesinger (ed), *Codice Civile. Commentario* (Giuffrè 1999); F Gabrielli, *La Pena Contrattuale* (Giuffrè 1991). C. Chessa, *Il potere giudiziale di ristabilire l’equità contrattuale nelle transazioni commerciali*, *Riv. dir. civ.*, II, 2006, 439; G. Schiavone, *Funzione della clausola penale e potere di riduzione da parte del giudice*, *Resp. civ. prev.*, 2006, I, 61.

Having said that, in respect to the principle and in paying particular attention to the specific subject of the transfer of immovable goods (mainly properties), it is worth noting that the legal provisions set forth under article 1385 of the ICC (headed ‘*caparra confirmatoria*’⁸¹) prescribe that, if at the conclusion of the contract one party provides the other with a sum of money or other fungible items substantiating a deposit (earnest) then, in case of non-performance, the deposit must be returned (to the aggrieved party) or, alternatively, imputed to the performance still due. Similarly, in light of article 1385(2), if the party who provided the other with the deposit is the non-performing one, then the other party (the performing party or, at least the party available to perform) shall be entitled to withdraw or rescind the contract by retaining the deposit (earnest).⁸²

The concept emphasised under article 1385 of the ICC, with regard to the ‘confirming deposit’, is particularly pertinent and telling when conducting an analysis of the utilisation of the earnest within the context of a contract of sale relating to immovable properties in Italy. In that jurisdiction, which essentially functions in keeping with the process in Scotland, the sale of a property is preceded by missives. The only difference is basically the terminology adopted; in Italy the missive is called *contratto preliminare*, or preliminary contract. The concept of *contratto preliminare* is hinged upon the legal provision of article 1351 of the ICC (headed ‘preliminary contract’), according to which ‘a preliminary contract is void if it is not made in the form that the law requires for the definitive contract.’⁸³ The preliminary contract is usually concluded three or four months prior to the closing

⁸¹ Basically confirming deposit or, more literally and as suggested by an Author (Beltramo (n 61)), the confirming earnest.

⁸² Article 1385(2) of the ICC literally prescribes:

‘If the party who gave the deposit is in default, the other can rescind (withdraw) from the contract, by retaining the deposit’ (our translation)

The second part of the same article keeps on prescribing as follows:

‘If the party who received the deposit is in default, the other one can rescind (withdraw from) the contract and claim back double the amount of the deposit’ (our translation).

For sake of clarity, the final third paragraph of article 1385 of the ICC should be recalled:

‘However, if the party who is not in default prefers to demand performance or dissolution of the contract, compensation for damages is regulated by the general rules.’

⁸³ See G Alpa & V Zeno-Zencovich, *Italian Private Law* (Routledge-Cavendish 2007) 222-223; R. TRIOLA, *Contratto preliminare di vendita di immobili*, Giuffrè, 2014; V. Vitalone, *La contrattazione preliminare*, Giappichelli, 2009; G. Bozzi, *Il contratto preliminare*, Utet, 2007; G. Gabrielli, *Contratto preliminare, Enc. Giur. Treccani*, 1997.

It is worth adding the in Italy too, the preliminary contract (article 1470 of the ICC) is a consensual contract producing the transfer of the property as a result of the mere consent (article 1376 of the ICC), which does not

date. The latter is basically the date of the actual transference of the ownership, with payment of the price in the hands of a notary public and ensuing registration of the new owner with the competent land register.

More practically, it is worth noting that it is unlikely that in Italy the seller will conclude the preliminary contract, unless the buyer is available to pay a confirmed deposit (a *caparra confirmatoria*, according to the terminology of the ICC referred to above). The actual amount of the confirmed deposit depends on the bargaining power existing between the parties, although typically in the neighbourhood of twenty per cent of the value of the property to be transferred.⁸⁴ Instinctively, the higher is the ‘negotiating power’ of the seller, the higher the ‘confirmed deposit’ shall turn out to be. This shall happen in cases where the demand for the target property is so strong that the seller is in a position to reject the offer of a *contratto preliminare* (the Italian missives) accompanied by a risible confirmed deposit, seemingly because there is - or there will be soon - another potential buyer available to acquire the property at a higher confirmed deposit. Incidentally, from a survey conducted in preparation to this work among notaries public in Italy, there has emerged that a deposit or *caparra* fits into ninety per cent of the *contratti preliminari* relating to the transfer of immovable properties in that country.

From what above escribed, it becomes starkly obvious that the scenario greeting the Italian seller is better than that greeting his Scottish counterpart. The Italian missives are not merely theoretically binding, but also *de facto*. If the Italian buyer decided, subsequent to the missives being concluded, to

necessarily coincide with the integral payment of the final price (A Luminoso, *La compravendita* (Giappichelli 2015).

Within the vast Italian literature relating to the preliminary contract in that jurisdiction, reference can be made to: C Cicero, ‘Il Concetto di Pre-preliminare nel Procedimento di Formazione del Contratto “a Tutele Crescenti”’ (2015)69 *Rivista del Notariato* 608-631; CA Mussi, ‘Il Contratto Preliminare di Vendita Immobiliare ad “Effetti Anticipati”’ [2015] *Contratti* 375-393; P Porchi, ‘Errore, Inadempimento, Vizi di Diritto e Contratto Preliminare di Vendita’ (2015) *Contratti* 343-354; G Recinto, ‘Recenti questioni in |Tema di Contratto Preliminare: l’Esecuzione Anticipata’ [2015] *Rivista di Diritto dell’Impresa* 49-63; R Mazzariol, ‘Il Contratto Preliminare di Preliminare: la Parola Passa alle Sezioni Unite’ (2014)30 *La Nuova Giurisprudenza Civile Commentata* 736-741; V Mancinelli, ‘Consegna Anticipata della Cosa ed Inefficacia del Contratto Preliminare di Vendita’ [2014] *Contratti* 156-163; M Tamburini, ‘Una Inesauribile Fonte di Dubbi: il Contratto Preliminare di Preliminare’ [2014] *Giurisprudenza Italiana* 2419-2422; D Pittella, ‘Il Contratto Preliminare “ad Effetti Anticipati”’: Inquadramento Giuridico e Disciplina’ [2013] *Notariato* 59-71.

⁸⁴ C Chessa and P de Gioia-Carabellese (n 53) 935.

withdraw from the contract without good reason, the seller would be entitled to the full 'confirming deposit'. Although the confirming deposit is not mandatory, rather a mere option, it must be remembered, though, that in Italy, the practice to include within preliminary contracts also a 'confirmed deposit' given by the buyer is basically the norm.

Similarly, in Italy, the buyer would think twice before withdrawing from the preliminary contract as he would be fully aware that, by doing so, the first legal act of 'retaliation' legitimately employed by the seller would be to retain the 'confirming deposit'. It is likely that the seller shall retain the confirmed deposit, with the buyer being – merely – entitled to start a legal action aimed to dispute that the retention of the confirmed deposit is not legal, because *inter alia* the buyer's withdrawal from the preliminary contract was justified (*eg* the property forming the subject of the transfer is affected by defects not disclosed by the seller at the time of the missives). The circumstances are exceptional, though, as the buyer usually represents in writing that the property has been fully inspected by the buyer himself and is suitable for the purposes of his habitability or any other purpose connected with the legal nature of that property.⁸⁵

4.3. Asymmetries and inconsistencies between Scots law and Continental tradition

From a broader perspective and in glancing at this legal analysis outside the Edinburgh-Rome axis, it can be ascertained that – to probably corroborate the same stances of this contribution - the experiences encountered by further Civilian jurisdictions, such as the French and the Spanish ones, do not differ by the 'comparator' utilised in this research. The concept of preliminary contract – and relevant deposit or *arrha* - is well known in other Civilian jurisdictions, such as the French one and the Spanish one. As regards the former, it is emphasised as follows⁸⁶:

'For existing properties, a preliminary contract known as a "compromise" or "promesse de vente" (promise of sale) is signed. The preliminary contract commits both the seller and the

⁸⁵ C Chessa and P de Gioia-Carabellese (n 53) 934-935.

⁸⁶ S Glock, *Real Property Law Project – France* (European University Institute) 27 <<http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectRealPropertyLaw.aspx#RPRC>> accessed on 31 October 2012.

buyer to the transaction and the stated price, subject to a number of conditions precedent, or "conditions suspensive" and a seven-day cooling-off period. When the contract is signed, the purchaser pays a deposit, usually between 5% and 10% of the purchase price. The preliminary contract sets out the exact conditions of sale.' [emphasis added]

In Scotland, conversely, as no 'confirming deposit' is usually agreed at the time of the transfer of the property, nor is the concept legislated upon,⁸⁷ the non-performing buyer could wriggle free from the ostensive binding missives, as he is aware that no power of retention is given to the seller (as already emphasised, no money has been given to him at the time of the missives). Of course, a legal prerogative remains with the seller to sue the buyer. In this case the avenue on which to do so would be to rely on his creditworthiness. However, this circumstance, as mentioned above,⁸⁸ cannot be taken for granted if the ostensive buyer was not the real party interested in the purchase.

To summarise the diachronic and comparative deliberations thus far pursued through the analysis of both Roman law and one of the most prominent civil legal systems (the Italian), it is worth drawing attention to some interesting observations:

- a. The Scottish legal system, for some reason, despite its self-proclaimed 'Roman' roots, has abstained from introducing, in its commonest consensual contract (the sale of heritable properties), the concept of *arrha*. Conversely, the Roman tradition has held the *arrha* to be, together with the stipulation in writing, a salient feature of any contract concerned with the *res*, and a viable element to be embodied in any form of contract, written or otherwise.⁸⁹
- b. 'North of the Border', the concept of a 'deposit' in the missives, albeit not opposed on theoretical grounds, is still perceived at an authoritative level to be 'mysterious'. Such a conclusion is argued in the present work; the diachronic analysis carried out in this work has

⁸⁷ It is intuitive that the lack of a concept of a confirming deposit means that the contracting parties, particularly the seller, are not aware of the possibility to ask for it.

⁸⁸ See particularly Section 2 above. As regards the 'ordinary' judicial remedies for the breach of missives on the part of the seller, see in Scots law DJ Cusine and R Rennie, *Missives* (n 2) 231-265.

⁸⁹ It must be specified that in Roman law the *arrha* was concept applicable to all the contracts, either written or verbal. (WW Buckland, *A Text-Book of Roman Law From Augustus to Justinian (Third Edition revised by Peter Stein)* (n 55) 481.

brought to light that both Institutional Writers did refer to the *arra* or deposit, *ergo* the concept should not be mysterious.⁹⁰

- c. The peculiarity of the Scottish legal system, with its apparent but not rare unwillingness to encompass Roman concepts in its legal system (in this case, the *arrha* or the deposit in the sale of heritable properties, as a salient feature of the missives concluded before the settlement),⁹¹ seems to be accentuated by the fact that other proper civil law jurisdictions, such as the Italian one used above as a comparator, not only succeeded in this implementation, but also managed to theorise it (as *caparra confirmatoria*) across the spectrum of the different contracts. The phenomenology narrated in this work, as regards the possible asymmetries existing in Scots law in the matter of the *arrha*, would not be so isolated, and might reverberate in some further sample, such as the unilateral promises.⁹²
- d. Finally and in a something of a paradox, even the English legal system, where missives or indeed any form of preliminary contract (to use the Italian or French legal terminology, *compromesso* or *compromis* being the colloquial wording in each language, respectively) is missing in the sale of heritable properties and where the Roman tradition historically has not exerted (or, *rectius*, should not have exercised) any influence whatsoever, does not totally rule out the deposit in the sale of heritable properties.⁹³ By way of a probably speculative

⁹⁰ See Section 2.1 above, as well as Section 3. In a nutshell, the Institutional Writers, particularly Stair and Erskine, clearly evoke the ‘deposit’ and its own Roman ties to the *arrha*. However, they do so in connection to the general consensual contracts, rather than to the specific missives in the sale of heritable properties.

⁹¹ Remarkably, the Roman *arrha* narrated in this work is not a rare case of missing, misleading transplant and/or uncultivated development of a Roman concept within Scots law. Similarly and as regards the Roman notion of *res domino perit* (*ergo*, the time when the transference of the risk from the seller to the buyer as regards a heritable property occurs), see *Sloans Dairies Limited v Glasgow Corporation* 1976 SLT 147.

⁹² L Vagni, *La Promessa in Scozia* (Giuffrè Editore 2008). See also, from a broader perspective, R Evans-Jones, ‘Receptions of Law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law’ (1998) 114(4) *Law Quarterly Review* 1-15.

⁹³ K Gray and SF Gray, *Elements of Land Law* (5th ed, OUP 2008) 1042. It is not a condition precedent; however, it is a contractual term that, if breached, ‘entitles the injured party to sue for damages including the unpaid deposit.’ Judicially, see *Millichamp v Jones* [1982] 1 WLR 1422 at 1430 G-H; *Alarm Facilities Ply Ltd v Jackson Constructions Ply Ltd* [1975] 2 NSWLR 22 at 28F-29A. In England, the applicable piece of legislation shall be the Law of Property Act 1925. In a prospective anti-gazumping legislation, so far never materialised in England and Wales, a mandatory deposit equal to 0.5 per cent of the purchase price would be the possible solution. F Gray and SF Gray, *ibid.* 1042-1043.

interpretation and in looking back at the diachronic explanations of this Section, it may be assumed – albeit tangentially - that the Anglo-Welsh system may have adopted directly the structure of the Ancient Greek legal systems, where the contract of sale of properties was binding no earlier than the payment of the price and the transfer of the property. In that context, in modern England as in the Ancient Greek cities (and differently from the Roman tradition), the deposit would have been (or is still) the price for the booking of the property.⁹⁴

The points elucidated above may aid in shaping a view - albeit speculative - that Scottish law may have developed over the centuries, particularly in the last three centuries, in this area (the sale of heritable properties) and particularly in respect to the *arrha* (or deposit), a very autonomous micro-system of rules and principles, on the one hand somehow different from the common law system, on the other hand and quite paradoxically, with a sort of annihilation of an important pillar of the Roman tradition, the *arrha*.⁹⁵

5. A theoretical ‘confirmed deposit’ with the Scottish missives

Any possible comparative analysis between and/or among jurisdictions, particularly in cases where the jurists propose Draconian ‘transplants’ rather than a mere juxtaposition of concepts, must be undertaken with the utmost care. Having said that, the possibility to partly amend the Scottish legislation in light of what other jurisdictions have done cannot be roundly dismissed, but rather should be given theoretical consideration especially when bearing in mind possible economic ramifications tied to the protection of the property market and its credibility. If also a transplant were not conceptually accepted in this matter, because deemed not practicable by the practitioners or simply not necessary, at least a mere simulation might show in what the Scottish legal system in this area might have substantiated if, three centuries ago, it had not steadily but inexorably abandoned its Roman routes.

⁹⁴ Among Scholars, see M Paulowski, ‘Return of Deposit’ (2008)209 18-20.

⁹⁵ C Chessa and P de Gioia-Carabellese (n 53) 937-939.

First and foremost, the current Scottish jurisdiction, which does not expressly contemplate the possibility for the parties to transfer - from the buyer to the seller - money in the form of a deposit at the time of the conclusion of the missives, would theoretically recognise the official concept of the 'deposit'. The tenor of the relevant article of this legislation⁹⁶, certainly speculative in its theorisation,⁹⁷ could be - or might have been, more realistically - as follows:

‘At the time of the conclusion of the missives, the committed parties may agree that the prospective buyer provides the prospective seller with a deposit, the "Confirmed Deposit". The Confirmed Deposit shall be imputed to the price of the property, if the sale is concluded; otherwise, the seller is entitled to retain it as damages for the prospective buyer's unjustified refusal to proceed to the final purchase. The parties may agree that the Confirmed Deposit does not prevent the aggrieved party from claiming further damages.’

As a result of this, where the transfer of a confirmed deposit upon conclusion of the missives is merely optional, the seller of a property in Scotland would be eventually bestowed with a “gift” (the binding nature of the missives) which so far is probably just a too much accentuated legend, at least from a practical perspective, as demonstrated above. In fact, the seller who has signed off on missives into which a confirmed deposit is subsumed would be safe in the knowledge that the prospective buyer would attach serious weight to any thought of withdrawing from the missives, due to the immediate financial repercussions which would inevitably befall him by way of retention of the deposit.

Critically speaking, one cannot refrain from noting that a buyer in a position to provide the prospective seller with a confirmed deposit at the time of the missives is a rarity, due to the fact that the buyer, in buying a property, usually relies on the support of a bank and particularly on the mortgage which is granted, via the buyer's solicitor, in the juncture immediately preceding the closing

⁹⁶ In an even more speculative way, the prospective legislation at stake could encompass, in Scotland, an organic set of principles and legal provisions applicable to the subject of the sale of heritable property, in a jurisdiction where an overall piece of legislation in this matter is missing, and probably, more realistically, will always be missing.

D Brand, AJM Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (n 25) 537.

⁹⁷ C Chessa and P de Gioia-Carabellese (n 53) 939-941.

date. This perplexity is understandable, although it does not appear a serious obstacle to the theoretical discussion at stake. However, despite this, it should be conceded that in the current economic climate (the credit crunch and the ensuing difficulties encountered by customers in gaining access to credit) where banks providing the prospective buyer with the required liquidity to buy a property are reluctant to finance more than eighty per cent of the value of the property (the remainder being a 'deposit', to use a non-technical definition), a prospective buyer must be in a position to deliver a (significant) cash sum, at the time of his decision to buy a property, as he is well aware that the mortgage shall not exceed a certain percentage of the value. This cash sum, contextualised within the progressive scenario envisaged in this work, shall be earmarked for transfer by the prospective buyer to the prospective seller to confirm, vis-à-vis the latter, that the intention of the former to buy the property is a serious undertaking. As a result of this, the seller shall find a source of comfort in the transferred deposit as he will know that, should the worst case scenario come to pass (*ie* the prospective buyer's refusal to finalise the purchase), the damage 'wrought' by this could to an extent be covered by the retention of the confirmed deposit by the aggrieved seller.

Finally, as the system of the confirmed deposit would be optional, the traditional form of the missives, devoid of any confirmed deposit, would continue to exist without, on the face of it, giving rise to any inconsistency or overlap.⁹⁸ Obviously, in this case the prospective seller will be aware that his entitlements connected to the sale could be inherently weakened. In essence, if he was aggrieved by a withdrawal, his sole recourse would be to unleash a legal claim which could, as clarified above, be akin to wielding a blunt instrument! Conversely, in the current system, there is still the likelihood or the possibility – but the final say on this is bestowed on the Scottish practitioners – that the seller is lured into the missives by the seduction of their enforceability, not realising that in reality he has been concurrently entrapped in a 'golden prison', the legal action originating from the non-performance

⁹⁸ It is not a case that in the legal system that we utilised as yardstick, for the purposes of this comparative analysis (Italy), the *caparra confirmatoria* existing in that country is mere optional and not mandatory and it coexists with sale and purchase agreements of property where the prospective seller does not transfer anything at the time of the missives (*rectius*: the preliminary contract).

being the only tool he can brandish, although with dubious force, in some cases, and certainly with elevated legal costs.

6. Conclusions.

Based on the comparative analysis hitherto undertaken, it has been possible to ascertain that the Scottish legal system has managed to create, particularly in comparison to its correspondent jurisdiction south of the border, a long-established dogma in the binding nature of missives. It has been demonstrated in this work that, in reality, there are stratagems which leave this ‘dogma’ open to empirical violation. This is due to the fact that the conclusion of the missives in Scotland are not typically accompanied by any deposit to the benefit of the seller, differently from the ‘comparator’ (Italy) as well as France and Spain, jurisdictions where a concept very similar to the missives (the preliminary contract) does exist.

Furthermore, it has been identified that the modern Scottish legal system for some reason has thus far failed to successfully categorise the concept of the ‘deposit’ within the missives, whereas correspondent jurisdictions of Roman tradition (for instance but not only the Italian one), as well as the Roman law itself, historically and traditionally recognise this concept as part of the general law of contract. More specifically, the correspondent *caparra confirmatoria* is a partial payment that, upon conclusion of the Italian ‘missives’, the buyer pays to the seller, the *caparra* being forfeited if the buyer decided not to settle the final contract. The contractual mechanism, to which the transaction on properties in Italy conforms, albeit ontologically belonging to the law of contract, is - and from an economic perspective – a form of protection for the seller as it allows him to receive, in case of withdrawal, a payment for liquidated damages.⁹⁹

⁹⁹ In this respect, the possibility that, as adumbrated sometimes in Scotland (see previous Section 1), the deposit is a ‘security’, would end up being dismissed, based on the findings of this work.

Quite interestingly, the method of analysis utilised in this work has highlighted that, on the one hand, the concept of the ‘deposit’ in the Scottish missives should not be so ‘obscure’, when viewed from two perspectives: a diachronic perspective (the Roman roots, its consolidated notion of *arrha* and the fact the same Institutional Writers - at least the ‘initial’ ones - refer to it); a comparative one (the Italian jurisdiction, where the *caparra* fulfils a dual role as both a pre-payment and liquidated damages, and has been part of that system since its codification in 1865). On the other hand, the ontological nature of the deposit in the Scottish missives having been deemed not so obscure, the present work suggests, a possible ‘oneiric’ reading of the Scottish jurisdiction, as if three centuries ago it had evolved through the trajectory of a pure Civilian jurisdiction.

Essentially, in this theoretical simulation, it has been put forward the possibility to shape within Scots law a concept of ‘confirming earnest or deposit’ or, to be even more explicit, an *arrha* consistently with the alleged Roman roots of Scots law. The purpose of this revamped Scottish contemporary *arrha*, upon which the parties to the missives would be entitled to agree or not, would practically increase the degree of real enforceability of the missive in that jurisdiction, as it happens so commonly - and efficiently - in European continental jurisdictions. Needless to say, the final choice should be bestowed upon Scottish practitioners, who, however, are made aware, also thanks to the findings of this work, that a similar process is already in place in countries such as Italy, France and Spain, where the preliminary contract in the transfer of heritable properties has been part of the relevant legal systems for centuries. In actual terms, the Scottish *arrha* would lend itself as anticipated damages that the aggrieved party - usually the seller - would be entitled to retain in cases of unjustified withdrawal.

From a procedural point of view, a prospective, actually impossible, Scottish *arra* would also be fruitful. It would discourage the parties from seeking resolution through the courts, becoming an alternative contract dispute mechanism, entailed – optionally, if the parties wanted to - to the sale of heritable properties via the missives. Incidentally, as the concept to be legislated upon would introduce an optional mechanism to be selected (or not) by the contracting parties in addition to the

already existing and widely utilised missive devoid of any confirming deposit (earnest), the amendments would not alter the solid foundations of conveyancing law in Scotland. Rather, they would simply add a degree of robustness and bring that area of law into line with its historical Roman roots¹⁰⁰ and - but this is less significant - contemporary Italian legislative counterpart.¹⁰¹

Ultimately, in the light of the findings of a potentially unfulfilled Scottish legal system, a self-proclaimed mixed legal system, a question seems to legitimately arise: in order to find a more clear ontological identity, should Scots law embark on a Colossal process of re-foundation of its worn Roman roots, and also adopt, in what would be probably an anti-historical move, a civil code? Otherwise, the real identity of Scots law should be revealed once again: a mainly common law system,¹⁰² alternative to the counterpart south of the Border because of its own specific and atypical evolution, based also on very, very ancient Roman roots. It is also possible to assume, as an important attenuating circumstance for Scots law, that the implementation 'North of the Border' of the *arrha* within the missives has been prevented because of the new political scenario emerged as from 1707, with the increasing difficulties of the Scottish jurists in keeping the pace with the developments occurred in the Continent, including the Napoleonic codification.

¹⁰⁰ See previous Section 4.

¹⁰¹ C Chessa and P de Gioia-Carabellese (n 53) 941-943.

¹⁰² A Rodger, *Thinking about Scots Law* 1996 1(1) *Edinburgh Law Review* 3-24.