

## Postscript on *nova species* and *Kinloch Damph Ltd. v. Nordvik Salmon Farms Ltd.*

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Professor van der Merwe has introduced a case from the Court of Session in Scotland, *Kinloch Damph Ltd. v. Nordvik Salmon Farms Ltd.*,<sup>1</sup> and has outlined the history of specification as it has been treated in Roman, Roman-Dutch, and Scottish authorities.<sup>2</sup> The purpose of this Postscript is to ask whether *Kinloch Damph* might have been decided differently, and whether a living thing, undergoing natural growth, might ever be the object of specification.

### I.

The facts may be repeated very briefly.<sup>3</sup> The pursuers supplied salmon smolts to the defenders under two contracts. Under the contracts title would not pass until the price was paid. The defenders fed and husbanded the smolts, and they grew to be salmon thirty times their original size. The defenders defaulted in payment, and went into receivership. The pursuers sued for the return of the salmon under the contract. The defenders claimed that the retention-of-title clauses were ineffective, and that they (and latterly their receivers) were the owners of the salmon by specification. The specification argument is the subject of the discussion below.

Lord Macfadyen accepted that the rule of specification in Scotland was the *media sententia* expressed by Justinian in *Institutes* 2.1.25.<sup>4</sup> Thus the result would turn on the reducibility of the

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<sup>1</sup> 1999 Outer House Cases LEXIS (June 30, 1999).

<sup>2</sup> Above, 96–114.

<sup>3</sup> See *Kinloch Damph*, paras. 1–5.

<sup>4</sup> Whether the *media sententia* relied on by Lord Macfadyen is Justinian's is not clear. What Justinian calls his *media sententia* includes the rule that property is with the maker if the maker adds any of his own materials. *Institutes* 2.1.25. Whether this rule operated without regard to reducibility is an open question. Compare B. Nicholas, *An Introduction to Roman Law* (Oxford, 1962), 137 (suggesting that it does operate even if

final object.<sup>5</sup> The reducibility rule, if applied uncritically, would suggest that the maker of the salmon should be the owner, because the smolts no longer exist and salmon cannot be reduced to smolts. Lord Macfadyen saw correctly that the answer was not so straightforward. He decided against the maker on the ground that, however irreducible salmon might be, the doctrine of specification did not apply to this kind of property. He says:<sup>6</sup>

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

I suggest below that Lord Macfadyen was right to decide against the maker, but that he was not right to exclude natural growth from specification, rather that a better reason for rejecting specification in this case lies elsewhere.

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the thing is reducible) with Buckland, *Text-Book of Roman Law*, 216 (suggesting that if reducibility were ignored the rule would be unreasonable). But since Lord Macfadyen does not include this rule, it is perhaps properly the *media sententia* of the Scottish institutional writers which forms the basis of the opinion. The point would be a purely academic one, except for the uncertainty introduced by this "maker's own materials" rule which, if accepted by Scots law, could weight matters much more in favor of the maker.

<sup>5</sup> Lord Macfadyen decided to address the question of specification without regard to the parties' contract: "I do not find it necessary to decide . . . whether the pursuers are right . . . that *specificatio* only operates in default of the question of ownership of the new thing having been addressed by the parties." *Kinloch Damph*, para. 47. Because specification questions do tend to arise where agreements have gone awry (see the discussion below), Roman law does give some importance to the presence of an agreement, and in particular to the person in whose interest something is made. See, e.g., *D.41.1.25* (Call. 2 *inst.*). Obviously, many manufacturing contracts would be worthless if specification always trumped the contract. Lord Macfadyen's comments on specification may therefore be obiter to the decision.

<sup>6</sup> *Kinloch Damph*, para. 47 (emphasis added).

## II.

The first question is whether Lord Macfadyen correctly interpreted the want of examples on natural growth. The principal list of examples from the classical law is in Gaius 2.79, and it may indeed be a "closed list," in the sense that the Romans would not have treated events outside the established types as specification.<sup>7</sup> But the more important point is that the limited Roman examples were probably not dictated and determined by doctrine, but were derived from disputes which arose in certain commercial matters, and on the basis of which a doctrine developed afterwards. Mayer-Maly says:<sup>8</sup>

These types [listed in Gaius 2.79] . . . cover the most important matters for agricultural and industrial labor, as a comparison with the related cases in *D.19.2*, on *locatio conductio*, show. Accordingly, we are not dealing with examples of School learning, but with certain leading cases from which the legal institution of specification developed.

Thomas adds:<sup>9</sup>

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

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<sup>7</sup> J. A. C. Thomas, *Textbook of Roman Law* (Amsterdam, 1976), 175.

<sup>8</sup> T. Mayer-Maly, "Spezifikation: Leitfälle, Begriffsbildung, Rechtsinstitut," 73 *ZSS* (rom. Abt.) 120, 133 (1956): "Diese Typen decken . . . die wichtigsten Sparten landwirtschaftlicher und gewerblicher Arbeit, wie ein Vergleich mit den in *D.19, 2* zur *locatio conductio* herangezogenen Fälle zeigt. Daher handelt es sich nicht um Beispiele einer Schulgelehrsamkeit, sondern um jene Leitfälle, aus denen das Rechtsinstitut der Spezifikation erwachsen ist." Similarly: T. Mayer-Maly, *Locatio Conductio: Eine Untersuchung zum klassischen römischen Recht* (Vienna, 1956), 76.

<sup>9</sup> J. A. C. Thomas, "Non solet locatio dominium mutare," in *Mélanges Philippe Meylan* (Lausanne, 1963), 1:351. Thomas goes on to argue that the School views on specification are such as to accommodate their respective views on *locatio conductio operis*. *Id.* at 354–55. Cf. A. Watson, *Roman and Comparative Law* (Athens, 1991), 47–48: "All these methods of acquisition, but especially [specification and accession], created difficult questions of title, but it is clear from the texts that the problems seldom came before the courts. The discussions illustrate the Roman delight in raising legal questions and establishing principle and detail."

Thus the types of specification we find in the juristic literature perhaps typically would have arisen where a *conductor* accepted a piece of work, but then performed the work *suo nomine*,<sup>10</sup> raising a question of ownership that would not have arisen if he had performed the work according to the parties' agreement.<sup>11</sup> Of course if the Romans had known of a process to transform one kind of living thing into another, that process might have become the subject of *locatio conductio* and specification, and provided the kind of juristic examples which Lord Macfadyen missed. But these disputes simply did not arise, or more accurately, when disputes did arise about the ownership of living and growing things, rules on the acquisition of fruits usually gave a satisfactory answer. The state of industry did not force the Romans to look for more exotic solutions, and they did not do so.

The Roman doctrine on specification is therefore founded on certain limited industrial and agricultural processes. The doctrine might have been different if the jurists had had other processes to hand, but the absence of examples on natural growth is no basis for the conclusion that the jurists categorically excluded natural growth from specification.

On the other hand, it is unlikely that Roman doctrine would have recognized a specification in the natural growth that took place in this case. Treating natural growth as the object of a manufacturing process introduces a novelty (and a paradox) into specification: in the regular course of natural growth, the final

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<sup>10</sup> *D.41.1.7.7* (Gaius 2 *rerum cott.*). In this context, it means "in his own interest." See Mayer-Maly (note 8), 130. Similarly: *D.24.1.31.1* (Pomp. 14 *Sab.*); *D.41.1.25* (Call. 2 *inst.*); *D.41.1.27.1* (Pomp. 30 *Sab.*). The phrase is discussed extensively in B. C. Stoop, "Non solet locatio dominium mutare: Some Remarks on *specificatio* in Classical Roman Law," 66 *T. v. R.* 3, 8–17 (1998).

<sup>11</sup> Daube points out that this aspect of specification was obvious and rarely needed pointing out:

According to the Proculians, if I make a new thing — a chair, a vessel — with your raw material — your wood, your gold — I become owner. The non-application of this principle if I am a worker in your factory is so self-evident that Gaius [2.79] does not trouble about it. A slightly later work based on his [sc. *Institutes*], *Res Cottidianae* [*D.41.1.7.7*], does say that, to become owner, I must have made the thing *meo nomine*, on my behalf. The BGB, the German civil code [§ 950 BGB], follows in Gaius's footsteps. In the second commission a proposal to insert this requirement was rejected. It was declared *selbstverständlich*, manifest, that he who has the thing made is the true maker: *herstellen lassen* equals *herstellen*.

D. Daube, "The Self-Understood in Legal History," 18 *Jur. Rev.* (n.s.) 126 [= *Collected Studies*, 2:1277], 128 (1973) (notes omitted).

product is always irreducible, but the original thing is not destroyed. Yet specification assumes the destruction of the original thing.<sup>12</sup> Even the Sabinians, in giving ownership to the owner of the materials, did not assume that the original thing survived the actions of the maker: a different ownership arose in the new thing.<sup>13</sup> Therefore what is significant in the case of smolts and salmon is not, strictly speaking, that the salmon are irreducible to smolts, but that the smolts were never destroyed and reconstituted in such a way that would have produced either the "discontinuous"<sup>14</sup> ownership of the Sabinians, or the "new" ownership of the Proculians. Neither school would have recognized specification here. The test of reducibility unfortunately obscures the fact that it is the destruction of the original thing which creates the problem in the first place.

Another way of putting it is that if an owner of (former) smolts had gone before the Roman Praetor and attempted to vindicate the salmon which grew from his smolts, the Praetor would have readily given him a trial without seeking the advice of either School. As Wieacker says, so long as something can be put before the Praetor in which he recognizes the former property of the plaintiff, the claim of ownership will be allowed to go forward for trial.<sup>15</sup> What confuses the issue is Justinian's *media sententia*: in ordinary manufacturing processes, irreducibility is a guarantee that the original thing cannot be vindicated; in the case of natural growth it is not a guarantee.

### III.

In what sorts of cases, if any, should a court recognize a new thing, and a new ownership, in the product of natural growth? If one relies on the examples of industrial processes and follows the reducibility test strictly, the maker will always be the owner.

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<sup>12</sup> A point made by the pursuers: *Kinloch Damph*, para. 44.

<sup>13</sup> Thomas (note 9), 351–52. "On this basis the Schools would thus agree that a new thing existed in place of the materials; it is the disposal of the new thing which is in dispute." *Id.* at 352. Cf. H. Hausmaninger and W. Selb, *Römisches Privatrecht*, 8th ed. (Vienna, 1997), 228: "Die Sache [den Sabinianern nach] bleibt trotz Verarbeitung im Grunde dieselbe, sie kann deshalb vom Stoffeigentümer vindiziert werden."

<sup>14</sup> Thomas's word: Thomas (note 9), 352.

<sup>15</sup> F. Wieacker, "Spezifikation: Schulprobleme und Sachprobleme," in W. Kunkel and H. J. Wolff (edd.), *Festschrift für Ernst Rabel* (Tübingen, 1954), 2:288 ("Sofern dem Prätor nur etwas vorgewiesen werden konnte, in dem er die frühere Sache des Klägers wahrnahm, oder — bei Grundstücken und Sachinbegriffen — sobald eine *pars pro toto* vor Gericht gebracht war, traf das hanc rem suam meam esse aio der alten Spruchformel zu . . .").

This is obviously not satisfactory. However, the industrial accession theory, which appears to be followed in Scotland,<sup>16</sup> gives some guidance. Industrial accession says that the labor expended in creating a new thing is so great that the original materials lose their identity in that labor. It is not clear how much labor is needed to make a difference; in this respect the theory is not helpful. But the theory rightly recognizes that identity-loss is the event that needs explaining. As just discussed, when the identity of a thing is lost by some process, vindication is an inadequate remedy, whence the need for the institution of specification. The industrial accession theory focuses on this identity-loss: where a process leads to identity-loss, there is accession to the maker's labor, and specification.

Salmon are readily identifiable as the product of smolts because their development follows a familiar model. This will be the case in virtually all instances of natural growth, no matter how much effort a person may put into tending the thing, no matter how much of his own materials he introduces,<sup>17</sup> and no matter how new the final product seems to be. But if a person somehow averts the natural pattern of growth of a thing, so that its development no longer follows a familiar model, it may lose its identity.

A possible case of "averted natural growth" was the subject of an opinion by the California Supreme Court, and was analyzed by David Johnston in light of specification.<sup>18</sup> The case concerned cells that were taken from Moore, a medical patient. Moore possessed white blood cells which overproduced a certain protein with therapeutic value; the overproduction made it more easy to identify the gene which produced the protein.<sup>19</sup> The court explained:<sup>20</sup>

Cells taken directly from the body (primary cells) are not very useful for these purposes. *Primary cells typically reproduce a few times and then die.* One can, however, sometimes continue to use cells for an extended period of time by developing them into a "cell line," a culture capable of reproducing indefinitely.

The University of California used Moore's cells to develop such a cell line, and obtained a patent. Moore then sued for conversion,

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<sup>16</sup> Above, 110.

<sup>17</sup> See, however, note 4 above.

<sup>18</sup> See *Moore v. Regents of the University of California*, 51 Cal. 3d 120, 793 P.2d 479 (1990); D. Johnston, "The Renewal of the Old," 56 *Cambridge L.J.* 80 (1997).

<sup>19</sup> 51 Cal. 3d at 127 n.2.

<sup>20</sup> *Id.* (emphasis added).

among other claims.<sup>21</sup> The court rejected the claim for conversion.<sup>22</sup> The court did not analyze the dispute in light of specification; Johnston suggests it would have done well to do so, because the policy arguments on which it did rely were not compelling, and in any event were unconnected to the underlying question of property rights.<sup>23</sup>

This is the kind of case in which we can speak of a *nova species* created from a growing, living thing. The identity of Moore's cells has been lost: we could identify them as Moore's only by their natural pattern of growth (which is "to reproduce a few times and then die"<sup>24</sup>), but their natural pattern of growth has been averted by the labor of the University of California.

The theory of industrial accession does not give a bright-line rule, but this, in any event, is the kind of analysis that the history of specification suggests is the right one.

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<sup>21</sup> *Id.* at 125–28.

<sup>22</sup> *Id.* at 134–47.

<sup>23</sup> Johnston (note 18), 92–93. Johnston's argument is that it is better to postpone policy arguments until one has revealed the structure of rights which underlies the dispute. *Id.* He assumes for the sake of argument that there has been a specification of Moore's cells, and considers whether the law ought to compensate Moore on that assumption. *Id.* A recent article which discusses *Moore* has not taken Johnston's advice, but retreated into arguments of pure policy. Under the proposed policies the matter would turn on the patient's (or his representative's) consent. The policies are commendable, but the key question of ownership remains: what proprietary right passes by consent? See L. Skene, "Proprietary Rights in Human Bodies, Body Parts and Tissue: Regulatory Contexts and Proposals for New Laws," 22 *Legal Studies* 102, 120 (2002).

<sup>24</sup> Above, text accompanying note 20.