



# Dissolution of Scottish Partnerships: Laying the Ghost to Rest?

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# The Legal Issues

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The immediate impact of the dissolution of the Scottish partnership-at-will causes practical problems.

Dissolution destroys the legal personality of the Scottish firm.

This is a particular problem as regards:

- (a) Title to heritable property
- (b) Performance of contracts where the firm is a contracting party

Have these problems been resolved by *Sheveleu v Brown and Ducker* 2019 SC 149, or is law reform required?

# Structure of my presentation

- (1) Exploring the legal issues
- (2) Practical problems arising on dissolution
  - (a) Ownership of heritable property
  - (b) Contracts between the firm and a third party.
- (3) Legislative Backdrop, s38 Partnership Act 1890
- (4) Conflicting Case Law: *Inland Revenue v Graham's Trustees* and *Sheveleu v Brown and Ducker*
- (5) The Need for Reform?
- (6) Contractual Drafting as a Possible Solution?



# Part 1: Exploring the Legal Issues

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S32(c) Partnership Act 1890:

A partnership entered into for an undefined time may be terminated by

“...one partner giving notice to the other partner or partners of his intention to dissolve the partnership”.

S4(2) Partnership Act 1890:

“In Scotland a firm is a legal person distinct from the partners of whom it is composed...”

Separate legal personality pre-dates the 1890 Act, see Bell, *Commentaries*, 5<sup>th</sup> edn (1826) vol II, 637.

# Part 2(a) Practical Problems: Ownership of Heritable Property

**Essentially two ways in which the firm can own heritable property**

## **Method 1**

Title may be held **in the name of the firm:**

Abolition of Feudal Tenure etc (S) Act 2000, s.70

## **Method 2**

Title may be held **by partners as trustees for the firm.**

**Method 1** is “...unknown in practice”,

Reid and Gretton, *Conveyancing*, para 28.2.

**Method 2** is the norm.

# Part 2(b) Practical Problems: The Firm's Contracts

## **Method 1**

The firm, as a separate legal person, enters into the contract in its own name.

## **Method 2**

The partners, as trustees of the firm, enter into the contract for and on behalf of the firm (as beneficiary)

## **Method 1**

Dissolution means that there is no contracting party

## **Method 2**

Dissolution means that the partners are trustees for a beneficiary that no longer exists



## Part 3: Legislative Backdrop Partnership Act 1890

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S38 Partnership Act 1890:

Continuing authority of the partners for the purposes of winding up

“After the dissolution of the partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of dissolution...”

# Part 4: Conflicting Case Law

*Gordon v Douglas, Heron & Co* (1795) 3 Pat App 428 HL, the House of Lords approved the Lord Ordinary's interlocutor:

“...every copartnery must, from its nature, **subsist after it has been dissolved, or the term for which it was entered into expired, to the effect of winding-up its affairs**, although there were no proviso in the contract constituting it for that purpose”.

*Inland Revenue v Graham's Trustees* 1971 SC(HL) 1

Dissolution terminates the legal personality of the partnership

Partnership (Prosecution) (Scotland) Act 2013: unnecessary if personality continued?

# An English Lamponist on the Collapse of the Ayr Bank, 1772

John Campbell faced his first crisis as chief cashier of Royal Bank when Bonnie Prince Charlie entered Edinburgh. (RBS © 2019)

George Drummond was a visionary lord provost of the city, but also a director of the Royal Bank and the British Linen Company. (The Signet Library, Edinburgh © 2019)



How an English lampoonist saw the credit crisis of 1772 and the collapse of the Ayr Bank.



## Part 4: *Sheveleu v Brown and Ducker*

Lord Brodie, delivering the judgment of the court, adopted counsel for the defender's analogy that the position was akin to the...

"...ghost of the former firm continuing to manifest its presence until it is finally laid to rest by the completion of the winding up and the payment of surplus assets to the former partners".



# Part 5: The Need for Reform?

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Partnership Law (Law Com No 283, Scot Law Com No 192), para 12.13

Continuing personality, plus a **three-stage** winding up process:

“The first step is where a decision is taken or an event occurs which commences the winding up of the partnership. We call that first step “the **break up**” of the partnership. The second step or process is the **winding up** of the partnership. During the winding up the partnership would continue as an entity. The third step is the **termination** of the partnership on completion of the winding up when the partnership would cease to exist as an entity. We call this stage “the dissolution” of the partnership.”

# Contractual Drafting as a Solution?

## (1) Ownership of Heritable Property

**Owned by the firm:** partnership agreement could provide that, on dissolution, all assets owned by the firm are (automatically?) transferred into the ownership of the partners individually. Disposition would still be required, and query whether a dissolved partnership can grant a disposition.

**Owned in trust by the partners:** partnership agreement could provide that, on dissolution, the partners hold in trust for themselves (is this possible as a matter of trust law?)

## (2) Contracts between firm and third parties

**In name of the firm:** Following *Sheveleu*, the contract can provide that it survives dissolution until the partnership is fully wound up.

**In the name of the partners in trust for the firm:** the contract can provide that, on dissolution, the contracting party becomes the partners as trustees for a different legal person, namely the partners as individuals.

# Some Conclusions

- The problems are more serious where we **don't** use the trust.
- If the problems are more severe where the firm as a separate person holds the rights and duties, how useful is Scottish legal personality?
- Drafting in the partnership agreement has limited effect. The partnership agreement creates rights personal to the partners, no real effect.
- *Sheveleu* is of limited utility. IH - continuing legal personality depends on the wording of the contract. We need continuing legal personality for all purposes. That needs legislation, which is not likely in the near future.

Analysis of legal personality:

L Macgregor, "Partnerships and Legal Personality: Some Cautionary Tales From Scotland" (2020) 20 *Journal of Corporate Law Studies* 237