



# THE HASTIE STABLE

## **Transfer of Undertakings: The Common Law**



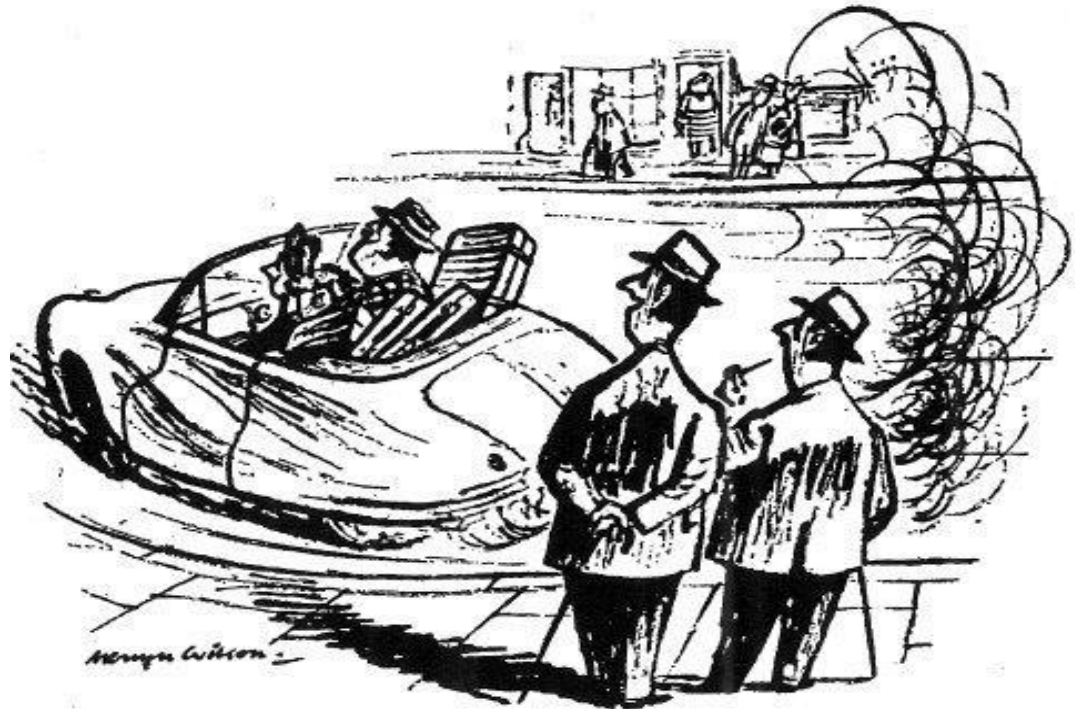


My desire to be well-informed is currently at odds with my desire to remain sane.



## Taking on a new partner

*“It’s my wife  
– but there’s  
probably  
some quite  
simple  
explanation”*



*“It’s my wife—but there’s probably some quite simple  
explanation.”*

(1949)



# THE HASTIE STABLE

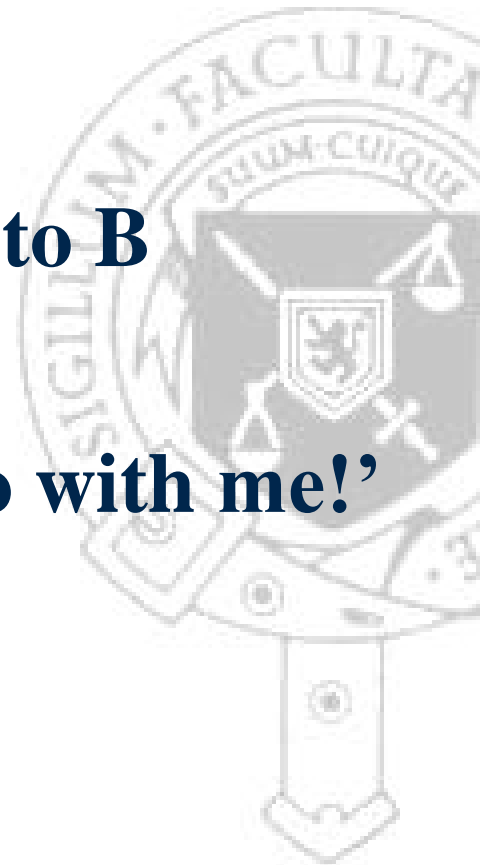
**A owes C money**

**A takes on a partner**

**or otherwise ‘transfers the business’ to B**

**C sues B**

**B says ‘But this has got nothing to do with me!’**







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**‘B’ is the new business vehicle**

**Where B is a partnership, what is the personal liability of the incoming partner?**





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## Partnership Act 1890, sec. 17(1)

*“A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.”*



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## Law Commissions' Joint Consultation Paper Partnership Law

(S.L.C. Discussion Paper No. 111)

*“Courts in Scotland have taken a variety of approaches . . . ”*





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**Fourteen cases**

**1831 to 2018**

**7 in the 19<sup>th</sup> century, 4 in the 20<sup>th</sup>, 3 this century**

**Abbreviations:-**

*ST - Sole trader*

*P - Partnership*

*Co - Company*





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**Ridgway v. Brock, 1831 – P to P**

**M'Keand v. Laird's Tr., 1861 - ST to P**

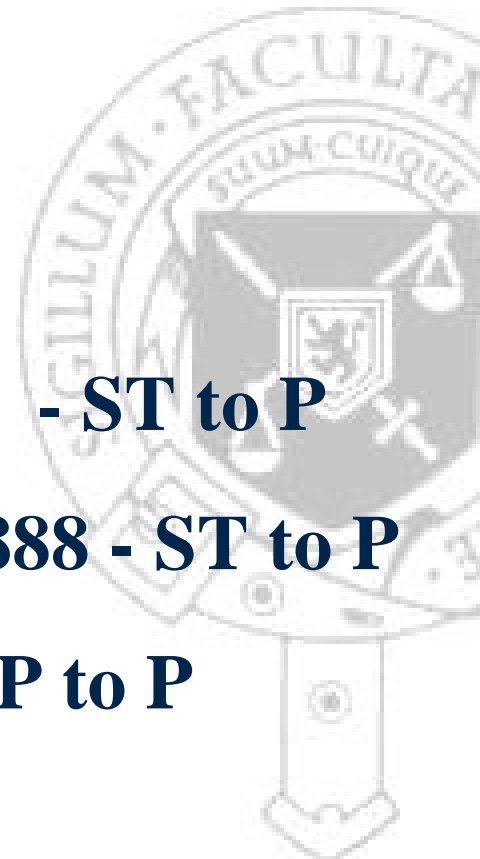
**Miller v. Thorburn, 1861 - ST to P**

**Nelmes & Co. v. Montgomery & Co. 1883 - ST to P**

**Heddle's Exx. v. Marwick & Hourston, 1888 - ST to P**

**Stephen's Tr. v. Macdougall's Tr., 1889 - P to P**

**Henderson v. Stubbs, 1894 - Co to Co**





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**Thomson & Balfour v. Boag & Son, 1936 - ST to P**

**Miller v. MacLeod, 1973 - ST to P**

**Britton v. Maple & Co., 1986 - Co to Co**

**Clark v. Clark, 1989 – ST to P**

**Ocra (Isle of Man) v. Anite Scotland, 2003 - Co to Co**

**Sim v. Howat, 2011 - P to P**

**Heather Capital v. Levy & McRae, 2015 – P to P**





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**Scottish Pension Fund Trs. v. Marshall Ross & Munro,**  
**[2018] C.S.I.H. 39 – P to P**





# THE HASTIE STABLE

*“does not thereby become liable”*

**But a presumption may arise –**

**- that liability was agreed.**

**When does the presumption arise?**





## THE HASTIE STABLE

*“where the whole estate of a company is given over to and taken possession of by a new concern or partnership,*

*the business being continued on the same footing,*

*the estate goes to the new company suo onere*

*- that is, the liabilities go along with the effects”*

**Lord Adam in Heddle’s Exx.**



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**When does the presumption arise?**







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**only where the original trading entity  
passes its business to a technically new trading entity  
gratuitously  
and without any outward change in the form  
or in the way in which the business is carried on**

**- Lord Eassie in Ocra v. Anite, 2003**





# THE HASTIE STABLE

## **A contract by presumption**

- What about what was actually agreed?**

**In none of the 7 post-war cases had A & B agreed the point (well, in one case we don't know)**

**But in 6 of the 7 pre-war cases, they had done so**





# THE HASTIE STABLE

## Ridgway v. Brock, 1831

**A & B were taken to have agreed B to be liable**

**Court held B liable**

**Court treated the agreement as determinative**





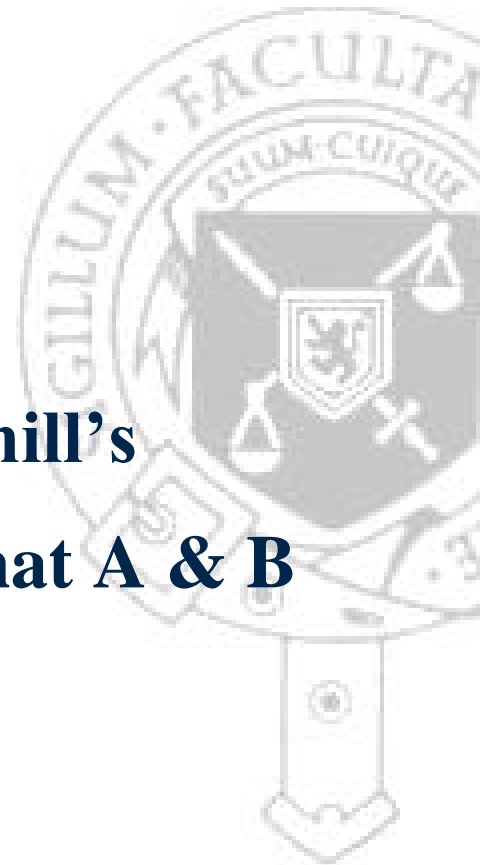
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**Nelmes & Co. v. Montgomery & Co. 1883**

**A transferred no assets to B**

**That sufficed to reject C's claim against B**

**However, LJC Moncreiff's & Lord Craighill's  
discussions of the case-law suggest that what A & B  
agree is crucial**





# THE HASTIE STABLE

**Stephen's Tr. v. Macdougall's Tr., 1889**

**A & B had agreed B would not be liable**

**Court agreed in the result**

**Court took the agreement into account**





# THE HASTIE STABLE

**M'Keand v. Laird's Tr., 1861**

**A & B were taken to have agreed B would be liable**

**Court held B liable**

**But the mere transfer of assets alone seems to have been regarded as more important**





# THE HASTIE STABLE

**Miller v. Thorburn, 1861**

**A & B agreed B would be liable**

**Court held B to be liable**

**But not because of the agreement, but simply because**

**A's assets had been transferred to B**







# THE HASTIE STABLE

**Thomson & Balfour v. Boag & Son, 1936**

**A & B had agreed that B would not to be liable**

**Court agreed, in the result**

**But Court placed more weight on the fact B gave value**





# THE HASTIE STABLE

## Henderson v. Stubbs, 1894

A & B had agreed B would be liable

Court held B *NOT* liable to C

- Because B had given value





# THE HASTIE STABLE

***Moral:* In the later cases, whether the presumption was applied seems to have come to depend chiefly on whether or not B gave value (and so far as what was agreed does matter, the case law is not clear whether what is relevant is agreement between A and B alone, or an agreement with C)**



# THE HASTIE STABLE

*Gratuitous transfer = liable*

M'Keand v. Laird, 1861

Miller v. Thorburn, 1861

Heddle's Exx. v. Marwick & Hourston, 1888

Miller v. MacLeod, 1973

Britton v. Maple & Co. Ltd., 1986

Sim v. Howat, 2011





# THE HASTIE STABLE

*Transfer for value = not liable*

Nelmes & Co. v. Montgomery & Co. 1883

Stephen's Tr. v. Macdougalls Tr., 1889

Henderson v. Stubbs, 1894

Thomson & Balfour v. Boag & Son, 1936

Clark v. Clark, 1989

Ocra (Isle of Man) v. Anite Scotland, 2003

*(but . . .*

Ridgway v. Brock, 1831: *liable despite transfer for value)*





# THE HASTIE STABLE

**Whether the presumption was applied**

**Depended largely on whether B gave value or not**

**So the presumption is not really to do with contracts?**

**But with *gratuitous alienations*?**





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## *Bankruptcy Act & Insolvency Act*

**gratuitous alienation - by A to B**

**inadequate consideration**

**less than 2 years before sequestration, trust deed or winding up**

**or 5 years if B is an associate**

**when A was absolutely insolvent**

*Or fraudulent at common law –*

**A being conscious of insolvency**







# THE HASTIE STABLE

**Special rule governing transfers of ‘business assets’**

**Special rule for trade creditors - not for use by ‘private’  
creditors**

**No need for A to have been absolutely insolvent**

**No need for insolvency proceedings before challenge**

**If debt hasn’t prescribed, no limit to how far back in  
time you can go: C can sue on a transfer 2+ years  
back, without proof B was an associate**

**All provided that: a ‘whole business’ was transferred**



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**Lord Shand in Heddle's Exx. “*intermediate cases will occur . . . In all of them I think it must be a question of circumstances, to be determined by the Court upon the facts*”**

**Such as?**

**B doesn't get the business gratuitously, nor for full value,**

**But half price**

**Is he half liable for its debts?**



## THE HASTIE STABLE

*“intermediate cases will occur . . . In all of them I think it must be a question of circumstances, to be determined by the Court upon the facts”*

Such as?

**B gets just half the business, but he gets it for free . . .**

**Is he liable for half the debts?**

**Or for the debts connected to his half?**

**What if he gets a third of the business? Or 5%?**

**Or just one asset?**



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Lord Hodge in Sim v. Howat -

*“the scope of the mischief and the scope of the presumption are not, in my view, the same”*





# THE HASTIE STABLE

**Scottish Pension Fund Trs. v. Marshall Ross & Munro**

**17 successive partnerships;**

**pursuit for employees' pension-fund deficit**

**Authority only in respect of the law of asset transfers  
between partnerships? and not other business transfers?**



# THE HASTIE STABLE

**Three necessary conditions for liability:-**

- 1. “*The business entity remains essentially the same*”  
e.g. A + B trade under same name, from same premises**
- 2. The business continues without interruption,  
with no significant gap in time.**
- 3. The old partnership should be left without any assets,  
or at least with ‘significantly diminished’ assets**



# THE HASTIE STABLE

**What is not a defence for B?**

- **Anything that B agreed with A**
- **(dubitante) B's having given value to A**







# THE HASTIE STABLE

What A and B agree is res inter alios acta in a question with C:-

*“the agreement to be proved is an agreement with the creditor; and of such an agreement an agreement between the partners is of itself no evidence.”*

- Lord Lindley on Partnership,
- citing Ex. p. Poole (1802)



## THE HASTIE STABLE

**If what A and B agreed is irrelevant to C,  
why should it be relevant to C whether B gave value?  
(After all, C may know absolutely nothing about that)**

**- Lord Drummond Young in Marshall Ross & Munro:**

*“It is not clear why third parties’ rights should be affected by the details of the transaction among the members of the new partnership which, so far as they are concerned, is res inter alios acta.”*

**So good-bye to the gratuitous-alienations analysis?**



# THE HASTIE STABLE

What is a defence for B?

1. Formal winding up of A's business
2. Public notice that B is not assuming A's debts
3. Change of the business name
4. C's knowing that the business has changed hands





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**Other points . . .**

**A remains liable - jointly & severally?**

**But the legal ground of what has happened is novation  
(or delegation)**





# THE HASTIE STABLE

## A remains liable?

- Lord Hodge in Sim: *“the effect of the transaction in cases where B has been held to have assumed the liability for [C’s] claim is that A remains liable but B is treated as having made a binding unilateral undertaking to pay the debt due to [C]. In other words, [C] can sue B as well as or instead of A.”*
- Lord Drummond Young in Marshall Ross & Munro: *“the obligations of the old partnership are novated in such a way that they become obligations of the new partnership; novation is the standard way in which the debtor’s ... obligation may be transferred from one person to another ... the old partnership remains liable as well as the new partnership ... it cannot rid itself of its debts. I agree ... although ... in practice the creditor of the old partnership will at least impliedly consent to the transfer of the obligation to the new partnership”.*
- Erskine, III, 4, 22: *“The first obligation being ... extinguished by novation, the cautioners in it must necessarily get free”.*



# THE HASTIE STABLE

- Erskine, ibid.: *“no creditor can be compelled to accept of one debtor for another against his will”*
- Novation requires C’s agreement:-
- Lord Drummond Young in Marshall Ross & Munro: *“the consent of the creditors of the old firm will be inferred whenever they seek to enforce the old firm’s obligations or liabilities against the new firm”*
- Until they do, what is the position in the meantime?





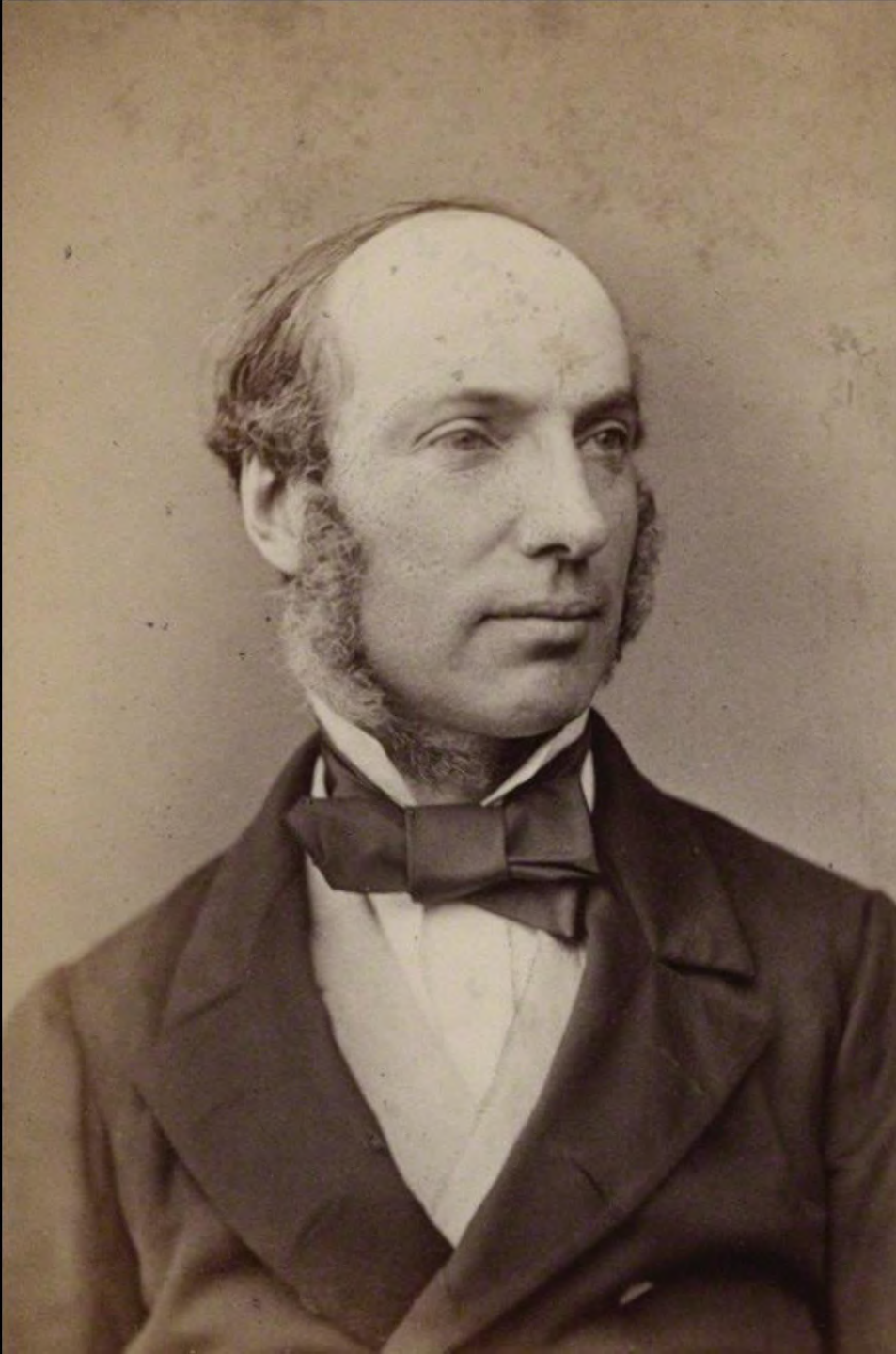


## *An alternative approach:-*

*“The contention ... comes to nothing short of this, that a man who joins any trader as a partner becomes liable in consequence for all the debts which that trader owes so far as connected with the business which he has carried on. Is there any authority for that, or any principle? ... it seems to me irrational ... Such liability would go as far back as it is possible to prove the debts ... the pursuers here seek to limit the liability to cases where the new partner has taken over the assets of the old concern. Does that mean any assets, or is it material that the assets taken over should include the goods the price of which remains unpaid? The whole remaining assets of a business might be taken over, and yet they might not include the goods the price of which is unpaid. The debt might even not be for goods ... It is no matter how the debt arose so long as it is in connection with the business; the new partner is to become liable for it, although he had nothing to do with the business when it was contracted ... there is no authority for that contention. But suppose the debt is for the price of the goods, and that the goods have been taken and used by the new copartnery. That is not taking over the assets of the old business, it is taking over the goods ... In that case the claim must be in connection with the goods themselves. I put the question, however, Would any one else be liable who was found in possession of the goods? To this the answer is, No. Then why, I say, should this partner be liable? ... The new partner has no interest in what occurred before he came into the business, either in the way of profit or loss.”*

**- Lord Young in Nelmes**







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*“We all know that if a proposition be sound in point of law it must have been equally as sound thirty or forty or fifty years ago as it is at the present time”*

**Lord Selborne in Phosphate Sewage v. Molleson (1876)**





*“Please, sir, what did I learn today?”*

*“That’s a strange question”*

*“Well, they’ll ask me when I get home”*





# THE HASTIE STABLE

*Thank you for your attention*

