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Douglas Brodie, THE CONTRACT OF EMPLOYMENT

Edinburgh: Thomson/W Green (www.wgreen.co.uk), Scottish Universities Law Institute, 2008. xxxix + 270 pp. ISBN 9780414017221. £125.

Ever since the late 1960s and 1970s, but particularly since the election of the Labour Government in 1997, there has been a substantial growth in the statutory regulation of employment relations. Employees today enjoy statutory rights to *inter alia* a minimum wage, maximum working hours, fair disciplinary procedures, and protection from discrimination and from unfair dismissal. To the extent that these rights cannot be contracted out of, freedom of contract is consequently limited. Nonetheless, the contract of employment remains, in Otto Kahn-Freund's much quoted phrase, "the corner-stone of the edifice" of the individual employment relationship. Because of the way in which the statutory law has been drafted, resting on a presupposition of the existence of a contract of employment, the importance of the contract of employment can even be said to have increased as a result of the growth in statutory law. Not only does the contract constitute the apparatus for the legal enforcement of agreements to employ and to be employed, and for the adjudication of disputes arising out of those agreements, it also performs the less direct function of providing the body of law necessary for the interpretation and application of statutory employment rights.

In Douglas Brodie's new work, *The Contract of Employment*, the focus is very firmly with the first, more direct of these functions. The book deals with such topics as identifying the contract of employment, formation and variation of the contract, implied terms, damages, and termination by reason of material breach or wrongful dismissal. It does not deal, except in passing, with any of the statutory rights enjoyed by employees. In fact a more accurate, though admittedly rather unwieldy, title for the work might have been "The Common-law-based Law of the Contract of Employment", a title suggested by Mark Freedland in a slightly different context in his *The Personal Employment Contract* (2003). A second volume dealing with the statutory protection of employment rights is planned for publication by W Green at an unspecified future date.

As is fitting for any work dealing with the common law of the contract of employment, much of the book is devoted to a discussion of implied contractual terms. For many years now, Brodie has been at the very forefront of scholarship dealing with the implied term of "mutual trust and confidence". As he illustrates in this latest work, it is the development of such implied terms by the courts which most clearly differentiates the contract of employment from the general law of contract. In recognition of the importance of work to people's lives, of its centrality to people's "sense of identity, self-worth and emotional well-being" (Dickson CJ in the Canadian case of *Reference Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 368), the courts have shown themselves willing to imply terms with the aim of furthering such goals as fairness or the protection of an employee's dignity. In *The Contract of Employment*, Brodie continues to endorse this approach, arguing in a number of places for an expansive interpretation and application of implied terms. For example, he describes the duty of mutual trust and confidence as a term "of wide application . . . capable of addressing many of the issues which may give rise to conflict between employer and employee" (65). In a chapter dealing with the duty (ch 8), he analyses situations in which the courts, to date, have elaborated specific requirements said to flow from its implication, and also goes on to indicate possible future developments of its scope.

The Contract of Employment follows fairly closely on the heels of an earlier book by the same author, *The Employment Contract: Legal Principles, Drafting and Interpretation* (2005).

In respect of subject matter, there is a fair amount of overlap between the two volumes. The key difference is that the new book deals specifically with Scots law. As Brodie explains, there have been far fewer relevant decisions in Scotland than in England, particularly since the 1980s. In *The Contract of Employment*, Brodie relies on Scottish cases wherever possible and where not, is careful to indicate whether he believes the position in Scotland to be the same or different to that in England. For the reason that it analyses the Scots law of the contract of employment, and in considerable detail, Brodie's book must be welcomed. That said, it should also be emphasised that the value of the book is not confined to Scots lawyers. For its careful and clear analysis of the case law and for its characteristically thoughtful and considered commentary, *The Contract of Employment* will be both interesting and useful for academics and practitioners north and south of the border.

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Ross Gilbert Anderson, ASSIGNATION

Edinburgh: Edinburgh Legal Education Trust, 2008. viii + 299 pp. ISBN 9780955633201. £30.

This is a welcome addition to Scots law literature. Money claims comprise a significant proportion of personal and corporate wealth. Yet Scotland has lacked a rigorous analysis of the transfer of claims to cut through the confusion in many of the authorities and to remind practitioners of the building blocks of the law.

Ross Anderson has revised his doctoral thesis to publish this book. He describes Scots law as "old, sometimes cosmopolitan and often undiscovered" and has unearthed forgotten case law. He sets the Scots law of assignation in its historical context and usefully draws on French, German, Dutch and South African law as well as Roman law to inform his analysis. This is valuable particularly where there is little Scots law authority and where older authorities need to be explained. His work shows clearly the influence of his mentors, Professors Gretton and Zimmermann.

What is particularly welcome to the practising lawyer is the careful analysis which distinguishes between the different transactions which have often been bundled together in legal literature as assignations. Anderson confirms that assignation properly so called is the transfer of a money claim by the cedent to the assignee, that the consent of the debtor is not required, and that intimation of the assignation or its equipollent (such as judicial intimation) is an essential requirement for the transfer. He contrasts assignation with the order or mandate to pay and the mandate to uplift. The mandate to pay involves no transfer, requires the acceptance of the person mandated to pay, and does not transfer any of the mandant's rights against the payee. The mandate to uplift or *procuratio in rem suam* Anderson analyses as a mandate to uplift the debt, grant a discharge and, if necessary, sue in the cedent's name and to retain the proceeds. Each transaction gives rise to different consequences on insolvency. Anderson separately analyses the different institutions of delegation and sub-contracting. He persuasively argues that one cannot assign liabilities without the consent of the creditor, and seeks to place in their proper context, namely the adoption of contracts by insolvency administrators, the cases such as *Asphaltic Limestone Concrete Ltd v Glasgow Corporation* 1907 SC 463 and *Cole v Handasyde* 1910 SC 68, which have been used to suggest otherwise. The law relating to the transfer of entire contracts needs to be uncoupled from the discussion of the assignation of claims and developed in its proper context.