



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Essays in Honour of CG van der Merwe. Eds H Mostert and M J de Waal

Citation for published version:

Steven, A 2013, 'Essays in Honour of CG van der Merwe. Eds H Mostert and M J de Waal', *Edinburgh Law Review*, vol. 17, no. 2, pp. 265-66. <https://doi.org/10.3366/elr.2013.0157>

Digital Object Identifier (DOI):

[10.3366/elr.2013.0157](https://doi.org/10.3366/elr.2013.0157)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Edinburgh Law Review

Publisher Rights Statement:

©Steven, A. (2013). Essays in Honour of CG van der Merwe. Eds H Mostert and M J de Waal. *Edinburgh Law Review*, 17(2), 265-66doi: 10.3366/elr.2013.0157

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



Reviews

EdinLR Vol 17 pp 265-266
DOI: 10.3366/elr.2013.0157

ESSAYS IN HONOUR OF CG VAN DER MERWE. Eds H Mostert and M J de Waal
Lexis Nexis (www.lexisnexis.co.za), 2011. xxii + 412 pp. ISBN 9780409052015. R400.

Cornie van der Merwe is a personification of the strong bond between Scottish and South African academic private law which has been established since the demise of apartheid. For the greater part of his career he was a professor at Stellenbosch. But, as the preface to this festschrift recounts, his first academic appointment in fact was as lecturer in Roman law at Glasgow. And then on his formal retirement in South Africa he was appointed to the Chair of Civil Law at Aberdeen. During his tenure of that chair, in collaboration with David Carey Miller and Roderick Paisley (both contributors to the volume), he significantly enhanced Scotland's most northern Law School's reputation for research in property law. He had a firm foundation on which to build. His *Sakereg* (first published in 1979) is the foundational text for modern property law in South Africa. His international comparative work on apartment law is unrivalled. This reviewer met him for the first time at a conference in Regensburg in 1997 and could see immediately why he is held in such high regard by his colleagues and students. It is a pleasure to review this volume.

The essays reflect Cornie van der Merwe's interests in property law and more widely. While a couple – by Johann Neethling and Jean Sonnekus – are in Afrikaans and were thus beyond this reviewer, the other seventeen are in English. A number, unsurprisingly, are on the law of apartment ownership. Peter Smith contrasts the very recent reforms in Ireland with the relatively new but failing tenure of commonhold in England and concludes broadly that the latter has things to learn from the former. Lu Xu compares the said commonhold with Scottish law under the Tenements (Scotland) Act 2004. He regards the default scheme for management provided by the 2004 Act as insufficiently comprehensive and hopes that developers will use the more sophisticated, but optional, Development Management Scheme. There are further contributions on apartment law in Portugal (Sandra Passinhas), Singapore (Teo Keang Sood) and South Africa (Riël Franzsen).

There are three essays from Scottish-based academics. David Carey Miller looks at the interesting subject of spuilzie, the Scottish remedy for recovery of possession unlawfully removed. In stark contrast to its South African sister remedy of the *mandament van spolie*, it is little used in modern times. The reasons for this are something which this reviewer has discussed with Cornie van der Merwe. Carey Miller convincingly argues that the true scope of the remedy is one of the difficulties in assessing its utility. In his essay Robin Evans-Jones also deals with scope, this time in relation to what the correct boundaries should be between unjustified enrichment on the one hand and *negotiorum gestio* (benevolent intervention to the modernist) on the other. In a magisterial piece Roderick Paisley uses the South African case of *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd* 1998 (4) SA 62 (D) as his starting point for an examination of the ancillary rights which may benefit and the conditions which restrict the holder of a servitude in Scotland, South Africa and elsewhere. The case concerned an eight foot-wide alleyway which was used as the access to a liquor-selling business. The essay

in typical Paisley fashion ranges wide, from Scaevola in the Digest of Justinian to Voet and Pardessus, with both Winston Churchill and Scotland's alleged worst poet William McGonagall also getting mentions.

The other essays deal with a variety of subjects. Only a selection can be mentioned. Jacques du Plessis explores the correct cause of action in relation to where money is transferred into an incorrect bank account. Fritz Brand discusses the doctrine of notice, which is the South African equivalent of the so-called "offside goals rule" in Scots law – i.e. broadly where a real right in property can be set aside by the holder of a prior personal right to the property if the real right holder knew he or she was breaching that prior right in acquiring the real right. The parameters of both the doctrine and the rule are unclear. Brand regards "wrongfulness" as a key element in attempting to clarify the position. In a thoughtful essay Hanri Mostert considers the problem of landlessness in South Africa in the context of constitutional rights. She concludes that government has more to do. In his essay, co-authored with Reinhard Zimmermann, Marius de Waal looks at unworthiness to inherit or, more colourfully, the concept of the *bloedige hand* i.e. the bloody hand cannot inherit. They show how the rule has developed from the Roman-Dutch sources in a relatively flexible fashion in tune with evolving policy considerations. As with Hanri Mostert, and many of the other authors, the affection which they have for Cornie van der Merwe is expressed in their essays. In editing this handsome volume Hanri Mostert and Marius de Waal have produced a deserved academic tribute to him.

Andrew J M Steven
Scottish Law Commission

EdinLR Vol 17 pp 266-267
DOI: 10.3366/elr.2013.0158

Janet Ulph and Ian Smith, THE ILLICIT TRADE IN ART AND ANTIQUITIES: INTERNATIONAL RECOVERY AND CRIMINAL AND CIVIL LIABILITY

Oxford: Hart Publishing (www.hartpub.com), 2012. xviii + 304 pp. ISBN 9781841139647. £78.

This text represents a systematic exploration of the response, and effectiveness, of current English law to the illicit trade in art and antiquities. The offences, liability and law enforcement measures associated with recently stolen, looted or illegally exported objects are evaluated against clear benchmarks found in domestic law and pertinent international initiatives in this area of law. Recent lootings in Afghanistan, Iraq and Egypt are highlighted.

UK laws are found to be satisfactorily robust (259), but gaps in legal protection are identified. The status of the UK as a non-signatory state of both the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, has significant implications. In addition, using as a criterion for protection the financial value of certain types of objects is all but ideal. Throughout, the work remains true to the complex nature of cultural objects as embodiments of creativity and information, and as repositories of knowledge with commercial value. The legal implications of this duality are deftly dealt with. Considering how easily a cultural perspective on the movement of art and antiquities can be undermined, the effect of non-economic derogations from the free movement of goods on cultural objects in the European Union is handled with notable insight. The text also convinces in respect of pragmatic questions arising in English private international law in the part that deals with private recovery through the civil courts. The publication of the work preceded the agreement that was reached on the final text of the Recast Regulation (EU) No 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 12