# EXTINCTION OF LEASES *CONFUSIONE*

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## Introduction

Suppose that the same person becomes both creditor and debtor in the same obligation. Perhaps the debtor has taken an assignation from the creditor of the right to enforce the obligation. Alternatively, it may be that the debtor has acquired the right to enforce the obligation through the law of succession, on the death of the creditor. It is settled law that, in such a situation, that obligation is normally extinguished by the doctrine of *confusio*.[1] This is not simply a rule of Scots law. It is found in Roman law[2] and in later systems based on it.[3]

This much is beyond question, and to say only this is to say something barely worth saying, both because the point is settled beyond debate and also because, in the simple case of a person becoming creditor or debtor to himself, it can hardly make any practical difference whether we say the right is extinguished. After all, this individual can hardly enforce the obligation against himself. Yet the number of reported cases on the doctrine of *confusio* tells a different story. Through them we find that, when we move beyond this simple scenario, difficulties rapidly emerge.

This article is not however about *confusio* in general, but about its application to a specific case of the application of the doctrine, namely leases. What happens if the landlord acquires the tenant's interest under the lease or, by contrast, if the tenant acquires the landlord's right? Textbook writers have been divided on the question of whether a lease is extinguished when the same person becomes both landlord and tenant and. Thus, for Rankine, there is "little if any doubt that the lease is extinguished",[4] at least where the landlord acquires the tenant's interest. The converse case, where the tenant acquires ownership of the land to which the lease relates, is one of "greater difficulty...but in principle it would seem that the same rule must prevail".[5] Others have taken the same view,[6] or have at least inclined to the view.[7]

On the other hand, Paton and Cameron's view is that extinction *confusione* is "not invariably" the result of the same person becoming both landlord and tenant.[8] Halliday[9] and Gloag and Henderson[10] go even further, and deny the application of *confusio* to leases altogether.

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[1] Stair, *Inst* 1.18.9; Erskine, *Inst* 3.4.23.

[2] Pomponius, D.46.3.107. Pomponius is talking here specifically about the extinction in such circumstances of the obligations arising from a contract of *stipulatio*, but this text is given by W W Buckland, *A Text-Book of Roman Law from Augustus to Justinian* 3rd edn, rev P Stein (Cambridge: University Press), p. 563 and J A C Thomas, *Textbook of Roman Law* (North Holland Publishing 1976), p. 342 as authority for the general principle. See also Papinian, D.46.1.50; Terentius Clemens, D.34.3.21.1.

[3] For Roman-Dutch law, see *e.g.* H Grotius, *The Jurisprudence of Holland* (R W Lee (tr), 2 vols, Oxford: Clarendon Press, 1926), 3.40.4; for France, *Code Civil* art. 1300 gives this as the rule.

[4] J Rankine, *A Treatise on the Law of Leases in Scotland* 3rd edn (1916) 525.

[5] Rankine, *Leases*, 525.

[6] See *e.g.* R P Morison, "Confusio" in J L Wark (ed), *Encyclopaedia of the Laws of Scotland*, vol 4 (Edinburgh: W Green & Son, 1927), para 890.

[7] C Waelde (ed), *Professor McDonald's Conveyancing Opinions* (Edinburgh: T & T Clark, 1998), p. 199.

[8] G C H Paton & J G S Cameron, *The Law of Landlord and Tenant in Scotland* (Edinburgh: Green 1967), p. 102.

[9] D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (Edinburgh: Green, 1992), pp. 377-381

[10] W M Gloag & R C Henderson, *The Law of Scotland* 13th edn, H L MacQueen & Rt Hon Lord Eassie eds (Edinburgh: W Green/Thomson Reuters, 2012), para 3.39.

The issue is of practical significance. If a lease is not extinguished when the same person becomes both landlord and tenant, it will continue in effect if the property is then conveyed to another person. Certainty is desirable in such cases. Of course, the difficulty could be avoided by means of an express renunciation of the lease, but that may not be thought of in time. Equally, if a registered lease is extinguished *confusione*, an inaccuracy will be created in the Land Register if action is not taken to remove the lease from the Register altogether, and this inaccuracy may mislead those relying on the Register. The effect of *confusio* on other parties' rights would also have to be considered, as where the lease is burdened by a standard security or sub-lease. The latter possibility is particularly problematic from a practical point of view, as it may be that the sub-lease does not appear in the Register.

The primary purpose of this article is to determine, if possible, whether the doctrine of *confusio* applies to leases. If it does apply, it will be found that this raises certain further issues, which will also be considered. As it seems likely, though, that at least part of the answer will be found in the nature of *confusio* itself, we shall begin by considering *confusio* generally and how it operates.

## ***Confusio*** **generally**

### *Scope: personal rights only*?

The simplest example of the operation of *confusio* is where the same person becomes both the person entitled to enforce a personal right and also the person bound to comply with it.[11] It has been said that "*confusio* proper is applicable only to obligations which sound in a payment of money, [but] it has been extended by analogy to cases which do not directly come under that category".[12]

O'Brien has made the argument, speaking specifically of servitudes, that there are theoretical difficulties with the application of the doctrine of *confusio* to real rights.[13] The argument is that, in a real right, the relationship is not simply between an individual creditor and an individual debtor. The nature of real rights is to be enforceable, not against some particular person or persons, but against the whole world. In the case of a servitude, the burdened proprietor is not the only person bound; the rest of the world is bound as well. There is therefore no complete identification between creditor and debtor when the benefited proprietor in a servitude acquires the burdened property, or the burdened proprietor acquires the benefited property, and so *confusio* cannot apply. In particular, the servitude ought to be available to that person when he or she has no present right to natural possession of the burdened property, as for example where it is subject to a lease in favour of a third party.[14]

The theoretical attractions of O'Brien's argument are undeniable, and certainly there may be exceptions to the operation of *confusio*, as we shall see below. Nonetheless, as O'Brien himself appears to accept, it is too late to argue for the general proposition that real rights are not subject to the doctrine of *confusio*. Although Stair does not appear to give

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[11] W M Gloag & R C Henderson, *The Law of Scotland* 13th edn, H L MacQueen & Rt Hon Lord Eassie eds (Edinburgh: W Green/Thomson Reuters, 2012), para 3.39.

[12] *Healy & Young v Mair's Trs* 1914 SC 893, 899 (Lord Johnston).

[13] P O'Brien, "The Extinction of Servitudes Through Confusion" 1995 SLT (News) 228.

[14] See though D A Brand et al, *Professor McDonald's Conveyancing Manual* 7th edn (Edinburgh: Tottel, 2004), para 18.62, where it is suggested that "the better view" is that the servitude is extinguished and "any residual entitlement held by the tenant to 'enforce' the servitude arises as a pertinent of the lease." See also D J Cusine & R R M Paisley, *Servitudes and Rights of Way* (Edinburgh: SULI/W Green 1998), para 17.30. This, however, does not address the question of continued enforcement by the landlord as owner of the benefited property, where the burdened property is leased. Hume is supportive of the view that a servitude may survive in such a case (D Hume, *Baron David Hume's Lectures, 1786-1822* (G C H Paton ed, Stair Society vols 5, 13, 15, 17, 18, 19, 1939-1958), III,277).

*confusio* as a ground for extinction of a servitude,[15] Erskine,[16] Bell,[17] Bankton[18] and Hume[19] do, and there is also case law confirming the point.[20] This was the position in Roman law,[21] and has been accepted also in other jurisdictions influenced by the law of Rome.[22] It has also been held that heritable securities are subject to extinction *confusione*.[23]

Even if O'Brien's argument ought to be correct, though, the law has proceeded for too long on the contrary view, and *communis error facit ius*.[24] There appears, therefore, to be no basis for the general proposition that *confusio* does not apply to real rights, although of course individual exceptions may exist. Whether is should so apply is, of course, a different question. There is a particular difficulty with registered real rights. Suppose that the owner of plot A holds a servitude over plot B, constituted in the title to plot A. If the two plots come into the same ownership, the servitude will be extinguished *confusione*. However, if the two plots should subsequently come into different ownership, future acquirers may be misled, for examination of the title to plot A will still appear to disclose the existence of the servitude.[25] The true situation could only be determined by an examination of the title to plot B, which would be onerous,[26] and so not to be undertaken speculatively. Certainly, this is not standard practice. Arguably, therefore, the application of *confusio* to registered real rights in land reduces the reliability of the property registers.

*Basis of operation*

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[15] Stair 2.7.4 is concerned with extinction of servitudes, but discusses only renunciation and negative prescription.
[16] Erskine 2.9.37.
[17] Bell, *Principles* § 997.
[18] Bankton 2.7.37.
[19] Hume, *Lectures* III,276-277.
[20] See *e.g. The Union Bank of Scotland Ltd v "The Daily Record" (Glasgow) Ltd* (1902) 10 SLT 71. For general discussion of the application of *confusio* to servitudes, see Cusine & Paisley, *Servitudes and Rights of Way*, paras 17.22-17.31.
[21] Gaius, D.8.6.1.
[22] For Roman-Dutch law, see Grotius, *Jurisprudence of Holland*, 2.3.72; U Huber, *The Jurisprudence of My Time* (P Gane (tr), 2 vols, Durban: Butterworth, 1939) 2.45.3; J Voet, *The Selective Voet, Being the Commentary on the Pandects* (P Gane (tr), 8 vols, Durban: Butterworth, 1955-1958) 8.6.2. For France, see *Code Civil* art. 705.
[23] *Robertson v Davidson* (1751) Mor 3044; *Hogg v Brack* (1832) 11 S 198; *Murray v Parlane's Tr* (1890) 18 R 287. The case is of course easier to make with rights in security, as they cannot exist without a personal obligation which would, itself, presumably be extinguished *confusione*.
[24] Common error makes law. For the origins and development of this maxim, see W M Gordon, "Communis error facit ius" in A Burrows et al, *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford: University Press, 2013). As Gordon points out, such a common error is not conclusive. Nonetheless, it is an important factor where a particular position has been acted on as correct, without contradiction, for an extended period. Thus, for example, see the observation of the Lord President in *Graham v Gordon* (1843) 5 D 1207 at p. 1210, concerning the disputed validity of an Act of Sederunt: "as it has been acted upon for nearly a century, we must give obedience to it." The particular error we are presently concerned with, if indeed error it be, has been acted on for many times longer than a century.
[25] This will inevitably be so if title to plot A is recorded in the Register of Sasines, that register being simply a register of deeds. In the Land Register, it would be possible for reference to the servitude to be deleted from the title sheet to plot A, but that would only happen if the Keeper was alerted to the extinction of the servitude. It is, of course, possible that the servitude would have been constituted anew by implication on the separation of ownership of plot A and plot B: *Ewart v Cochrane* (1861) 4 Macq 117. However, that is not always the outcome.
[26] Indeed, in the case of property registered under the Land Registration (Scotland) Act 1979, it would often be impossible, there being no provision in that Act or in the relevant subordinate legislation for the consultation of previous versions of title sheets. The position is altered by the Land Registration etc (Scotland) Act 2012, section 2 of which directs the Keeper to maintain an "archive record" as part of the Land Register, which will contain information on registered titles in their earlier states.

Few writers appear to have given much consideration to the basis on which *confusio* operates, most simply stating that it exists and outlining its scope.[27] Yet such consideration seems essential to understanding the nature of *confusio* and, by extension, defining its scope and operation. The tendency, where the question of the basis of *confusio* is considered at all, is simply to dismiss the possibility of the same person being both creditor and debtor in the same obligation as a "clear absurdity"[28] or an "impossibility".[29] On this view, the operation of *confusio* is seen as a legal necessity. The idea of the same person being at once creditor and debtor in the same obligation is, it is said, simply contrary to the nature of an obligation. A person just cannot, as Lord Wood puts it, "to any intelligible purpose, be both debtor and creditor to himself".[30] Thus, for example, Erskine states baldly that "no person can be creditor or debtor to himself".[31] This is not simply a matter of Scots law, this view being mirrored by writers outside Scotland.[32]

This position will be referred to in this article as the "legal necessity view" of *confusio*, being based as it is on the idea that *confusio* necessarily operates to extinguish obligations when the same person is both creditor and debtor. This is the view that the law simply cannot accommodate the same person as both creditor and debtor in the same obligation. In Scotland, the leading authority for the legal necessity view is the opinion of Lord Kinnear in *Motherwell v Manwell*:[33]

> "confusion does not operate either payment or discharge. It prevents the possibility of a debt arising. It extinguishes the *jus crediti*. From the moment that the inconsistent characters of debtor and creditor are combined in the same person both debtor and creditor cease to exist; there is no longer any debt or any relation of debtor and creditor at all".

The legal necessity view of *confusio* is intuitively attractive. Undoubtedly, the idea of the same person being both creditor and debtor in the same obligation is a decidedly odd one. However, the law is not a system of pure logic, "contrived by metaphysicians...and [we] must not expect to find everywhere the beauty and harmony of a Philosophical System."[34] This is not a call to abandon principle in favour of pure pragmatism. Rather, it is a recognition that principle may easily become dogma, and that inconvenient results of the application of principle can quite properly lead us to reconsider what principle requires in a given case. This reconsideration may lead us to the view that the established view is incorrect, and must be replaced or adjusted. Principle must be subject to adjustment in the light of experience. If it should suit the ends of the law that, in certain cases, an obligation be allowed to continue to

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[27] See *e.g.* Gloag & Henderson, *The Law of Scotland*, para 3.39.

[28] C Bury & D Bain, "A, B and C to A, revisited" 2013 Jur Rev 77, at p. 79, considering the specific issue of the application of *confusio* to leases.

[29] R Saleilles, *Étude sur la Théorie Générale de l'Obligation* (1925, reprinted Paris: La Mémoire du Droit, 2001), para 73, referring to "*le principle de l'impossibilité d'être à la fois créancier et débiteur de la même obligation*" (the principle of the impossibility of being at once creditor and debtor in the same obligation). See also R J Pothier, *Treatise on the Law of Obligations, Or Contracts* (W D Evans trans, Philadelphia: Robert H Small, 1826), p. 381: "it is impossible to be both [creditor and debtor] at once".

[30] *Elder v Watson* (1859) 21 D 1122 at p. 1128 (Lord Wood, giving the opinion of the court).

[31] Erskine 3.4.23. Stair's statement (at *Inst.* 1.18.9), in almost identical terms, that "none can be creditor or debtor to himself", gives little support to Erskine's view, however, as Stair's view is that *confusio* operates merely a suspension of obligations rather than an extinction. The obligation, therefore, continues to exist on Stair's view.

[32] See, for example, F Terré, P Simler & Y Lequette, *Droit civil: Les obligations* (10th edn, Paris: Dalloz, 2009), para 1411; Huber, *Jurisprudence of My Time*, 3.41.1; R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford: University Press 1990, reprinted 1996), 759; B Windscheid, *Lehrbuch des Pandektenrechts* (9th edn by T Kipp, 3 vols, Frankfurt am Main: Rüten & Leoning, 1906), § 352.

[33] (1903) 5 F 619 at p. 631.

[34] Hume, *Lectures*, I,6-7.

exist notwithstanding that the same person is both creditor and debtor, and there is no practical disadvantage in allowing this, a principle that will not bend to allow this ceases to be an aid to legal reasoning and becomes an obstacle. In fact, the legal necessity view suffers from just this weakness. As we shall see below, there are various situations in which a right has been allowed to continue in existence notwithstanding that the same person is both creditor and debtor. As we shall see, the reasoning used to justify these exceptions is not always entirely convincing. The point for the moment, though, is this: it is no difficult matter to find arguments in the case law for the non-application of *confusio* to particular facts. It is a strange kind of "absurdity" or "impossibility" that admits so readily of exceptions as *confusio* does. If it is absurd to have the same person both creditor and debtor in the same obligation in the same capacity, that absurdity is not lessened in those cases where, for one reason or another, *confusio* does not apply. The alleged absurdity arises from the identity of creditor and debtor, and that factor is still present where an exception applies. Nonetheless, in those exceptional cases the law is able to accommodate the absurdity. The implication of this is that the continued existence of an obligation, in circumstances where the same person is both creditor and debtor, is less problematic in principle than such terms as "absurdity" and "impossibility" imply. Whether they are accepted in the particular case or not, an argument has often been found that *confusio* should not operate that can, at the very least, be classified as an "intelligible purpose", to adopt Lord Wood's words. As we shall see, even Erskine, despite his bluntness on the general point, allows exceptions to the operation of *confusio*.

There is an alternative view, expressed by Lord McLaren in *Motherwell v Manwell*, holding that where the same person becomes both creditor and debtor in the same obligation, "payment is effected by operation of law".[35] Lord Kinnear appears to be alluding to this view when, in the text from the same case that is quoted above, he says that "confusion does not operate either payment or discharge". Bell's view appears to be the same as Lord McLaren's. He holds that, where *confusio* operates in relation to a debt, it is "satisfied and extinguished". The word "satisfied" appears to imply some form of deemed payment or discharge of the debt. The alternative view, then, is that *confusio* does not operate by legal necessity. Instead, it is a form of deemed payment or, in cases where the right is not a right to payment of money, deemed discharge of the right. Again, Rankine relates *confusio* to renunciation of a lease as a "kindred mode of extinguishing a lease", holding that the acquisition by the landlord of the tenant's interest is "in other words [the acceptance of] a renunciation".[36]

This second view will be referred to in this article as the "deemed discharge view" of *confusio*. The advantage of the deemed discharge view is that it more readily allows for exceptions to the operation of *confusio* where that is considered appropriate. By contrast, the legal necessity view becomes difficult to sustain if exceptions are recognised.

There has been some acceptance of the deemed discharge view outside Scotland. Thus, Buckland regards *confusio* as a case of "automatic payment".[37] Again, Grotius says of the case where the same person becomes both creditor and debtor through succession that the heir to the deceased is "taken to pay himself, or to receive payment from himself".[38]

The present author is inclined to prefer the deemed discharge view of *confusio* as reflecting the current state of the law more accurately and as allowing greater flexibility in future development. The argument is straightforward. The legal necessity view of *confusio* is based on the proposition that it is impossible for the same person to be at once both creditor and debtor in the same obligation in the same capacity. If there is a single exception to the operation of *confusio*, which cannot be justified on other grounds, then it is not impossible for the same person to be both creditor and debtor. The proposition on which the legal necessity view is based is thus falsified, and as a result the legal necessity view must be incorrect. It

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[35] (1903) 5 F 619 at p. 629. Lord McLaren's opinion in this case was a dissenting one. However, the basis of his dissent does not seem relevant to this point.
[36] Rankine, *Leases*, 525.
[37] Buckland, *Text-Book of Roman Law*, pp. 563-564.
[38] Grotius, *Jurisprudence of Holland*, 3.40.5.

will be argued below that there is sufficient basis in the authorities to hold that at least one such exception to *confusio* exists.

*When does* confusio *apply?*

It is clear that *confusio* will not always operate to extinguish a right. Indeed, Stair's view appears to have been that *confusio* did not operate to extinguish rights at all: "confusion is not an absolute extinction, but rather a suspension of obligations."[39] On this view, the right is not extinguished and, although it is in abeyance while the same person is both creditor and debtor, it will revive if the two interests are separated again. However, Stair's view has not been accepted by other institutional writers. Erskine says merely that extinction will not occur in every case:

> "*Confusio* hath not always the effect of a total and perpetual extinction of a debt or right. Sometimes it produces only a temporary suspension of it, while the debtor and creditor continue one and the same person...But when the succession of these rights happens again to divide in two, the obligation or right, which lay for a while sunk or dormant *confusione*, revives, and recovers its first force".[40]

Erskine therefore distinguishes between cases where the right is extinguished and cases where it is merely suspended. However, notwithstanding the approval of the idea of suspension by such high authorities as Stair and Erskine, and also by Bell,[41] it has been said that

> "cases of supposed temporary suspension are not exceptions to the rule, but are cases to which the doctrine of *confusio* does not apply".[42]

This may be the better view. Of course, it will usually make no practical difference whether the right is suspended or not while the same person is both creditor and debtor: even if the right continues to be theoretically enforceable, the holder of the right can hardly enforce it against himself. However, the view that cases where the right is not extinguished outright are cases where *confusio* simply does not apply allows us to account for those exceptional cases where it is desirable to allow for continued enforcement of the right. An example of such a case would be that considered above, of a servitude continuing to be enforceable where the burdened property was occupied by a tenant.

The question then arises, when will *confusio* not apply to extinguish a right? One example is where entailed land is burdened by debts, the right to payment of which has a different destination. This exception to the operation of *confusio* is well established.[43] However, this is hardly a topic of current concern.[44] More generally, Nicolson, in his notes to Erskine's *Institutes*,[45] suggests that a distinction can be drawn between rights acquired *mortis causa* and those acquired *inter vivos*. In the former case, he suggests, there is a presumption against *confusio*, "if the creditor has any interest to keep up the debt". Where the right is acquired *inter vivos*, *confusio* is presumed, even with such an interest. It is not clear that this

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[39] Stair 1.18.9.
[40] Erskine 3.4.27.
[41] Bell, *Principles*, § 580.
[42] *Healy & Young's Tr v Mair's Tr* 1914 SC 893, 902 (Lord President).
[43] *Cuninghame v Cardross* (1680) Mor 3038; *Crawford v Hotchkis* 11 March 1809, FC; *Lawrie v Donald* (1830) 9 S 147; *Welsh v Barstow* (1837) 15 S 537; *Macalister v Macalister* (1865) 4 M 245; *Cuming v Irvine* (1726) Mor 3042; *Colville's Trs v Marindin* 1908 SC 911; Erskine 3.4.27; Bankton 1.24.43. Stair 1.18.9 gives the same rule, but not as an exception to the general operation of *confusio*. Instead, for him this is an example of *confusio* operating as suspension of obligations only, rather than as extinction.
[44] All remaining entails were removed by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s. 50.
[45] At 3.4.27.

is borne out by the cases he cites, however. The idea certainly does not seem to be mentioned in any of them. Thus, in *Elder v Watson*,[46] a debt was extinguished *confusione* on the debtor succeeding to the creditor's right. This was a succession case, but no issue was made of that. Indeed, of the other cases Nicolson cites, *Duke of Roxburgh v Wauchope*[47] seems not even to be a *confusio* case, instead being a case where a wadset was expressly renounced on the same person becoming both creditor and debtor. It is in any case difficult to see why such a distinction as Nicolson suggests should exist.

From the authorities, four situations may be identified where it is possible that *confusio* will not operate.[48]

(i) Debtor and creditor in different capacities

*Confusio* does not operate where the roles of debtor and creditor are held in different capacities. For example, a right held in the capacity of a beneficiary of a trust is not extinguished by the mere fact that the same person is also a trustee, nor would debts owed by a deceased person be extinguished by virtue alone of the fact that the creditor was the executor of the deceased debtor.[49] Likewise, there is no problem with a partner in a partnership holding a right against the firm.[50] Again, where a cautioner acquires the creditor's right, the principal debt is not extinguished, and can continue to be enforced against the principal debtor.[51] The point seems to be that a cautioner is only a debtor in a limited sense, and so is not creditor and debtor in the same capacity. This may also be the justification for the rule that *confusio* does not apply where entailed land is burdened with debts, the right to payment of which has a different destination.[52]

This is the best established of the exceptions to the operation of *confusio*, and can be readily reconciled with both the legal necessity view of *confusio* and the deemed discharge view. After all, if a person becomes creditor and debtor in different capacities, then the interests of debtor and creditor do not fully coincide. Its application, though, may not have been justified in *King v Johnston*.[53] In that case, a builder named Riddagh granted a right in security over an area of ground in favour of a Mr Aitken. A subsequent security was granted by Riddagh in favour of a Mr and Mrs King. Riddagh then granted a disposition in favour of Aitken which was *ex facie* absolute, but which was qualified by an unrecorded back letter in which Aitken acknowledged that he held the subjects in security only. The nature of *ex facie* absolute dispositions has been disputed.[54] In this case, though, it was said that:

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[46] (1859) 21 D 1122.
[47] (1825) 1 W & S 41.
[48] This is not necessarily exhaustive. For example, the application of *confusio* to real burdens is excluded by statute: Title Conditions (Scotland) Act 2003, s. 19.
[49] The theoretical argument would be that the rights and obligations of a trust form a separate patrimony or estate from that of each individual trustee. For the theory of separate patrimonies, see K G C Reid, “National Report for Scotland” in D J Hayton, S C J J Kortman & H L E Verhagen, *Principles of European Trust Law* (The Hague: Kluwer Law International, 1999), pp. 68-69; G L Gretton, "Trust and Patrimony" in H L MacQueen (ed), *Scots Law into the 21st Century: Essays in Honour of W A Wilson* (Edinburgh: Green, 1996); G L Gretton, "Trusts without Equity" (2000) 49 International & Comparative Law Quarterly 599.
[50] *Mair v Wood* 1948 SC 83 at p. 86 (Lord President).
[51] Stair, *Inst* 1.18.9; Erskine, *Inst* 3.4.24; Bell, *Principles*, § 580.
[52] *Macalister v Macalister* (1865) 4 M 245 at p. 249 (Lord President) and p. 250 (Lord Deas); *McKenzie v Gordon* (1837) 16 S 311 at p. 322 (Lord President); *Lord Blantyre v Dunn* (1858) 20 D 1188 at p. 1195 (Lord Ivory). From the point of view of principle, one may doubt whether this is an accurate characterisation of the interests involved. However, the rule itself is too well supported by authority to be doubted.
[53] 1908 SC 684.
[54] For discussion of the issues, see G L Gretton, "Radical Rights and Radical Wrongs" 1986 Jur Rev 51 and 192, especially at pp. 54-57 and 201-209.

> "Aitken was really holding as a *quasi* trustee for behoof of Riddagh...And it was Riddagh who still remained the true proprietor of the subjects, because it was he who had the radical right thereto, and who had an interest in the reversion. That being so, it appears to me that *confusio* cannot be held to have taken place, because Aitken was never truly the absolute proprietor of the subjects over which the bonds were granted, but only an encumbrancer."[55]

If this view is correct, then it would properly exclude the operation of *confusio*. However, there is an alternative view, that the disponee of an *ex facie* absolute disposition does acquire ownership, with the disponer being left with only a personal right against the disponee, entitling the disponer to have the property reconveyed on payment of the debt. This was the view taken in the more recent case *Sexton v Coia*.[56] The decision in *Sexton v Coia* certainly seems the more consistent with property law principles. It is also, as Gretton points out,[57] the view with greater support from the case law. However, the issue is now largely academic, *ex facie* absolute dispositions no longer being a competent form of security.[58]

(ii) Third party rights/obligations

Outside Scotland, there has been some recognition that the operation of *confusio* may properly be restricted where the interests of third parties are involved. Thus, in French law, it appears that the operation of *confusio* will be prevented by the existence of an advantage on or against a third party, arising from the existence of the right.[59] This is broader than the formulation adopted in the Draft Common Frame of Reference, which excludes *confusio* (called "merger") only "if the effect would be to deprive a third person of a right",[60] thus excluding from consideration the operation of *confusio* where it would extinguish a right otherwise enforceable against a third party.

Except possibly in the context of leases, on which more will be said below, there is no clear authority in Scots law for this exception to the operation of *confusio*, although the rule that we have already seen, that *confusio* does not operate where the same person becomes both cautioner and principal debtor, could also fit under this head. It is, however, possible that Bell's view, that *confusio* only operates "if no interest of the creditor interferes to make it desirable to keep up the debt",[61] could be construed to accommodate this exception. It would, for example, allow the law to deal appropriately with the situation, commented on above, where either the benefited or burdened property in a servitude is occupied by a tenant under a lease. This exception would allow the continued enforcement of the servitude against a tenant of the burdened property.

(iii) Permanent rights

According to Gloag and Henderson, for the operation of *confusio*:

> "The obligation must be for the payment of money, and therefore a permanent right, such as that involved in a lease, a superiority, or a ground annual, is not extinguishable confusione".[62]

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[55] 1908 SC 684, at p. 690 (Lord Ardwall).
[56] 27 January and 10 November 2004, Outer House. For discussion of the case, see K G C Reid & G L Gretton, *Conveyancing 2004* (Edinburgh: Avizandum, 2005), pp. 117-121.
[57] G L Gretton, "Radical Rights and Radical Wrongs" 1986 Jur Rev 51 and 192 at pp. 204-209.
[58] Conveyancing and Feudal Reform (Scotland) Act 1970, s. 9(3).
[59] Terré et al, *Droit civil: Les obligations*, para 1416.
[60] DCFR, art. III.-6:201.
[61] Bell, *Principles*, § 580.
[62] Gloag & Henderson, *The Law of Scotland*, para 3.39.

This passage may be criticised. We have seen, for example, that servitudes may be extinguished *confusione*, even though they are permanent rights and are not rights to payment of money. A lease, by contrast, is by its very definition not a permanent right. Superiorities, of course, no longer exist,[63] and have not done so since 28 November 2004,[64] but the non-application of *confusio* to superiorities is generally said to arise from issues of feudal principle rather than the nature of *confusio*.[65] Ground annuals do,[66] meanwhile, represent a right to payment of money.

However, even though Gloag and Henderson's rationale for their exclusion cannot be accepted, there is authority that *confusio* does not apply to ground annuals. In *Murray v Parlane's Trustee*,[67] the owner of land took an assignation of certain ground annuals affecting the land. She then directed her trustees, by trust disposition and settlement, to convey the land to a named person. The Inner House held that the ground annuals were not extinguished *confusione*, and continued to burden the land, in part because a ground annual is "*ex facie* irredeemable",[68] and therefore forms a permanent burden on the property.

This reasoning is not entirely convincing, and it is not easy to see why such an exception should exist, whatever view is taken of *confusio*. On the legal necessity view, the absurdity of the same person being creditor and debtor is not lessened by the permanence of the right: quite the contrary, in fact. Equally, on the deemed discharge view, for all that a ground annual may be "*ex facie* irredeemable", it is not redemption by the debtor that is at issue, but discharge by the creditor.

In any case, the example of servitudes - also "*ex facie* irredeemable" - demonstrates that this is not a general exception. If there is indeed an exception for ground annuals, it may be that the true reason is found in *Healy & Young's Tr v Mair's Tr*.[69] In that case, Lord Johnston explained the difference between a ground annual and a normal secured debt as being that, in the former case, "there is no obligation to pay a principal sum, there is only an obligation to pay an annuity in perpetuity".[70] Indeed, one might go further, and say that a ground annual did not necessarily impose a personal obligation to pay any sum at all, not being enforceable by personal action against the present owner of the ground.[71]

On the whole, there appears to be insufficient basis for recognition of an exception to *confusio* for permanent rights. In any case, though, as already noted, any such exception would not be relevant to leases.

(iv) Union intended to be temporary

Speaking specifically of servitudes, Bell suggests that *confusio* will not operate, even though both properties belong to the same person, where "a separation or disunion may be anticipated".[72] The suggestion, then, is that *confusio* does not operate when the situation is intended to be temporary. An example for leases would be where a tenant acquires ownership of the land while in the process of assigning the lease, but before the assignation is completed.

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[63] Abolition of Feudal Tenure etc (Scotland) Act 2000, s. 1.
[64] Abolition of Feudal Tenure etc (Scotland) Act 2000 (Commencement No 2) (Appointed Day) Order, SSI 2003/456.
[65] This point is discussed further below.
[66] Or, rather, did: all remaining rights of ground annual were extinguished by the Abolition of Feudal Tenure etc (Scotland) Act 2000, s. 56, subject to provision for compensation to be paid to the party thereby deprived of the right to payment.
[67] (1890) 18 R 287. See, though, Lord Young's dissenting opinion. See also *King v Johnston* 1908 SC 684, 687, where the Lord Ordinary expressed the view that a ground annual could be extinguished *confusione*.
[68] (1890) 18 R 287, 289 (Lord Justice-Clerk).
[69] 1914 SC 893.
[70] 1914 SC 893, 900.
[71] For a brief account of the law on ground annuals, see W M Gordon, *Scottish Land Law* (2nd edn, Edinburgh: W Green, 1999), paras 20-104 – 20-118.
[72] Bell, *Principles*, s. 997.

There is some indication in Roman-Dutch law that *confusio* did not operate where the union was intended to be temporary. For example, Scholtens refers to a Dutch case of 1709, in which a servitude was held to revive when, because one property was sold on the day the other was bought, the two were only owned together for a few hours.[73]

The only reported Scottish case on this point appears to be *Fleming v Imrie*.[74] In that case, the owners of an area of land contracted an obligation to sell the land. The land was subject to a heritable security. After making this agreement, but before delivery of the disposition to the buyer, the sellers took an assignation of the security. The Inner House held that *confusio* did not operate to extinguish the heritable security. The Lord Justice-Clerk said:

> "that there has been no confusion seems to me to be made out by this, that at the time of the acquisition of the rights to the real security there were adverse interests, which prevented the absolute identity of debtor and creditor...There are different rights in the subject which may be brought almost immediately into conflict".[75]

In part, the Lord Justice-Clerk seems to be suggesting that, after agreeing a sale of land, but before the completion of the transfer, the seller is in some way not fully owner of the property. If this view was ever tenable, it is no longer so.[76] However, there is also a suggestion here that the temporary nature of the situation makes a difference.

An exception for temporary concurrence of the interests of debtor and creditor would be convenient to some extent. This approach would certainly avoid the problem of an accidental concurrence of debtor and creditor for a brief period, for example where a group of companies is restructuring its affairs. In a case like the one referred to by Scholtens, it seems harsh to make so much dependent on what may be merely an accident of timing.

*Fleming v Imrie* is, however, a different case altogether. In that case, the agreement to sell the property was made in 1858. The decision in the case was dated in 1868, and even after that period the disposition had not yet been delivered.[77] This is not a case like the one Scholtens mentions. Where, as in that case, the overlap is for only a few hours or days, the risk seems minimal. A more extended period, though, creates risks for third parties who may be affected by matters of which they cannot be aware. Such a rule would therefore create an undue level of uncertainty, and it does not seem appropriate to introduce such uncertainty for the benefit of parties who had it in their power to avoid the situation. In *Fleming,* for example, the seller could have delayed his acquisition of the security burdening the property until after the sale was completed. It is not in any case clear how it is to be judged whether separation is to be anticipated except after the fact, as Cusine and Paisley have pointed out.[78] In the absence of clearer authority, Scots law is free to reject such an exception to the operation of *confusio*, and it is suggested that it should do so.[79]

*The relevance of intention*

The next question is whether intention is relevant to the operation of *confusio*. On one view, described by McBryde as the "common sense view",[80] *confusio* operates automatically, without reference to the intention of any party. Certainly, if the legal necessity view of *confusio* is accepted, there seems no room for intention: something that is legally impossible

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[73] J E Scholtens, "Merger of Servitudes" (1950) 67 SALJ 220.
[74] (1868) 6 M 363.
[75] (1868) 6 M 363 at p. 367.
[76] *Burnett's Tr v Grainger* 2004 SC (HL) 19.
[77] The buyer was required under the agreement to pay certain sums which had not yet been paid.
[78] Cusine & Paisley, *Servitudes and Rights of Way*, para 17.23.
[79] In fact, in *Fleming*, it is difficult not to see the decision as having been influenced by disapproval of the buyer's attempt to get property free of the burden of securities, on the basis of whose existence he had contracted to buy the property. See Lord Benholme's opinion at pp. 367-368.
[80] W W McBryde, *The Law of Contract in Scotland* 3rd edn (Edinburgh: Thomson/W Green, 2007), para 25-20 n 97.

can hardly be made less so by a contrary intention. By contrast, the deemed discharge view of *confusio* does leave room for a possible role for intention, although it does not require one.

There is indeed support in the authorities for the view that intention is irrelevant. In *Healy & Young's Tr v Mair's Tr*,[81] for example, Lord Johnston stated that *confusio* operated "*ex lege* and independently of intention". In *Elder v Watson*,[82] Lord Wood, giving the opinion of the court, referred to "immediate extinction", suggesting that there is no role for a contrary intention. Again, in *Colville's Trs v Marindin*,[83] the Lord President said that *confusio* occurs "automatically the moment that there [is] a *concursus* debitor and creditor in the same person", this occurring "*ipso jure*".

This support is not, however, unequivocal, and there have been several cases in which intention has been given a role. Before turning to these, though, it is necessary to deal first with two cases that may at first sight appear to give support to the view that intention is relevant but which, on closer examination, do not.

The first of these cases is *Cuninghame v Cardross*.[84] In this case, land was conveyed to the granter's son, subject to an obligation to pay the granter's debts. It was later argued that the obligation was extinguished *confusione* when the same person, the son, became both creditor and debtor under that obligation on the death of his father. However, it was successfully argued that the obligation was not extinguished, on the basis that the deed "must be interpreted according to the rational design and meaning of parties, to take effect at the first time the estate shall happen to divide betwixt the heirs of line and heirs of tailzie". Arguably, then, this is not in fact a case of *confusio* at all. The succession to the right and the obligation was not originally divided, as the granter had only one son alive at the time of his death. It may be argued, therefore, that the granter's intention was that the obligation was only to come into effect when the succession did divide. This is not, therefore, a case of an obligation surviving the coming together in the same person of the roles of creditor and debtor, whether on the basis of intention or otherwise.

The second case is *Murray v Parlane's Tr*.[85] In this case, as we have already seen, the owner of land took an assignation of a ground annual affecting the land, and then directed trustees by trust disposition and settlement to convey the land to a named person. As we saw earlier, the court held that the ground annual was not extinguished *confusione* when the owner of the land acquired right to it, on the basis that a ground annual is a permanent right and *ex facie* irredeemable. However, in the course of his opinion, the Lord Justice-Clerk drew attention to the terms of the trust disposition and settlement, which directed the land to be conveyed "under burden of...[the] ground-annual...affecting it". This, this Lord Justice-Clerk said, was a "distinct expression of her will".[86] Lord Rutherfurd Clark also referred to "the intention of the testator" as being decisive.[87] However, this does not appear from context to be an assertion that the testator's intention prevented the operation of *confusio*. Instead, the Lord Justice-Clerk and Lord Rutherfurd Clark appear to be saying that, *confusio* not having operated for the reasons already stated, the testator had the option of either keeping up or discharging the ground annual. It is at that point that intention was held to be relevant.

These two cases therefore give little support to the idea that intention is relevant in the operation of *confusio*. However, there are other authorities that do support this idea. Erskine, for example, draws a distinction based on how the creditor and debtor's interests come together. Speaking in the particular context of entailed land, he says that *confusio* will not operate where the debtor takes an assignation of the creditor's interest, this being "sufficient indication of the heir's intention that [the debt] should still continue to subsist in

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[81] 1914 SC 893 at p. 899.
[82] (1859) 21 D 1122 at pp. 1127-8.
[83] 1908 SC 911 at p. 921.
[84] (1680) Mor 3038.
[85] (1890) 18 R 287.
[86] (1890) 18 R 287 at p. 290.
[87] (1890) 18 R 287 at p. 290.

his person".[88] The same approach was taken in *Fleming v Imrie*,[89] in which the Lord Justice-Clerk said that the "intention of the parties to the transfer was to keep up the debts and securities. The form of the transaction is assignation, not receipt",[90] although this was noted as not being decisive.

Another case of intention being held relevant was the decision of the Inner House in *McKenzie v Gordon*.[91] In that case, land was burdened by securities in favour of certain parties (collectively A). Another security was then granted to B. The owner of the land took assignations of the securities from A, and then conveyed them to third parties (C). The majority of the Inner House held that *confusio* had not operated. Lord Corehouse, with whom Lord Mackenzie concurred, appears to have based this outcome on the intention, presumed from the fact of taking assignations rather than discharges, to maintain the securities. It was presumed that the intention of the process was to benefit the owner (by maintaining the securities as available to secure further debt without being postponed to B's security) rather than B. The Lord President, by contrast, dissented. This, he said, was a case where a proprietor "pays a heritable debt affecting his estate, for which debt he alone is liable out and out, and takes an assignation of the debt to himself. I am at a loss to see how such a debt should not suffer extinction confusione".[92]

In *Welsh v Barstow*,[93] decided in the same year, intention was likewise held to be relevant. In that case, an argument was accepted that *confusio* did not apply where the circumstances did not show that the right was acquired by the debtor "with the purpose and intention of extinguishing the debt".

Subsequent to this, there was in *McKenzie v Gordon* an appeal to the House of Lords.[94] In this appeal, the same outcome was reached. Unfortunately, though, the House of Lords chose to ignore the issues as argued before the Court of Session. Instead, the Lord Chancellor decided the case on the basis of an apparent English rule that, if C provided the money to pay off the debts to A and induce A to assign the securities, C was entitled to stand in A's position. The position in Scots law was assumed without argument or reference to authority to be the same.[95] This is regrettable, in part for reasons that need hardly be spelled out, but also because it means that there appears to be no decision above Inner House level on the role of intention in *confusio*.

The question seems to be open. This writer would suggest that intention should have no role in *confusio*. As well as reflecting the current understanding of the position, this would reduce uncertainty in the application of the law. After all, where there are competing third party rights, as in *McKenzie v Gordon*, it is not at all clear how such a third party is meant to judge the intention of the party who has become both creditor and debtor.

### *Confusio* and leases

We have seen then that, while it is accepted as a general rule that a right will be extinguished when the holder of it and the person subject to it are the same person, there is a lack of clarity on certain points. *Confusio* will not operate unless the interests of creditor and debtor are held in the same capacity and it has been argued also that *confusio* should not operate where this would extinguish a right held by or against a third party. There is also some authority for the exclusion of *confusio* in the case of so-called permanent rights and in the case where the union of creditor and debtor is intended to be temporary, but it has been argued that these

[88] Erskine 3.4.27. Bankton, by contrast, denies any such distinction (Bankton 1.24.42).
[89] (1868) 6 M 363.
[90] (1868) 6 M 363 at p. 367.
[91] (1837) 16 S 311.
[92] (1837) 16 S 311 at pp. 322-323.
[93] (1837) 15 S 537.
[94] (1839) Macl & Rob 117.
[95] (1839) Macl & Rob 117 at p. 124.

supposed exceptions should not apply. There is also some authority for a role for intention but, again, it has been argued that this should not be relevant.[96]

It has been suggested also that the basis on which *confusio* operates are unclear. Two different views of the matter have been considered, one called here the legal necessity view and the other the deemed discharge view. It has been suggested that the latter provides a better basis for understanding the law. We turn now to the application of *confusio* to leases.

It should be said at the outset that the discussion below assumes that the rule will be the same for both registered and unregistered leases. Although Halliday appears to draw a distinction,[97] recording of a lease in the Register of Sasines or its registration in the Land Register does not appear to make any difference to the nature of the lease. Nothing implying any such change appears in the Registration of Leases (Scotland) Act 1857, which introduced the facility of recording leases. For example, a lease that would not otherwise have been valid is not rendered so by being recorded.[98] While, as has been noted earlier, it may be convenient to exclude registered real rights from the operation of *confusio*, there is no basis in principle for making an exception on that ground.

At first sight, leases do appear to be a promising candidate for extinction *confusione* when the same person becomes both landlord and tenant. We have seen that there is no objection to the application of *confusio* to real rights and, in any case, a lease is real only by statute. According to the common law, a lease is merely a contract. As long as the two interests are held in the same capacity, and no third party interests are affected (an issue which is considered below), then there seems no reason to exclude leases from the operation of *confusio*.

On the other hand, it has been said judicially that *confusio* "ought not to be extended in application out of mere deference to legal logic."[99] If there should be an absence of authority directly on the point, that may be a relevant consideration. We shall see below whether that is the case here. It must be acknowledged, though, that certain writers have denied the applicability of *confusio* to leases.

As noted earlier, Gloag and Henderson state that a lease will not be extinguished *confusione* on the same person becoming both landlord and tenant, on the basis that a lease is a "permanent right".[100] Some criticism has been made of this position above. However, it is necessary now to look more closely at the basis for the position taken by Gloag and Henderson. In support of their view, they cite *Lord Blantyre v Dunn*.[101] Curiously, this case has also been cited in support of the contrary proposition.[102]

The facts of *Lord Blantyre v Dunn* were as follows. A tenant held land under two long leases, each with more than 200 years remaining. The tenant then acquired the landlord's interest. A dispute then arose over the basis for the composition payable to the feudal superior of the lands.[103] This would be based on the rental value of the lands. The question was whether this was the market rent or the rent payable under the leases, which was much lower. The superior argued that there was no current rent payable, the leases having been extinguished *confusione*. The Lord Ordinary agreed. The result of the Lord Ordinary's decision was upheld in the Inner House. However, the judges of the Inner House were in some disagreement as to the basis of the decision. Of the four judges, the Lord President and

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[96] Although it appears to be the view of the Keeper of the Registers of Scotland that intention does have a role with regard to leases: Registers of Scotland, *Legal Manual* para 19.15.4 (available at http://www.ros.gov.uk/public/about_us/foi/manuals/legal/text/ch19~2.htm).

[97] Halliday, *Conveyancing Opinions*, p. 380. By contrast, McDonald denies any distinction: McDonald, *Conveyancing Opinions*, pp. 201-202.

[98] *Kildrummy (Jersey) Ltd v Inland Revenue Commissioners*1991 SC 1 at p. 13, *per* Lord Sutherland.

[99] *Healy & Young v Mair's Trs* 1914 SC 893, 899 (Lord Johnston).

[100] Gloag & Henderson, *The Law of Scotland*, para 3.39.

[101] (1858) 20 D 1188.

[102] *Clydesdale Bank plc v Davidson* 1998 SC (HL) 51 at p. 58 (Lord Clyde).

[103] Composition was a sum payable to the superior for entry by a new vassal, and was based on the rental value of the land. See K G C Reid, *The Law of Property in Scotland* (Edinburgh: Butterworths, 1996), para. 80 (Gretton).

Lord Deas considered it unnecessary to decide whether the lease itself had been extinguished *confusione*. They held that it was enough to decide that the rent obligation was extinguished as long as the same party was both landlord and tenant. There being therefore no rent payable, composition would be based on the market rent of the lands. Of the remaining two, Lord Curriehill said "I think that these leases themselves became extinct."[104] However, he went on to say:

> "it would be of no consequence, in the present question, whether or not the right of lease might be held to have subsisted to some effect after the purchase; because...at all events, no rent was payable in virtue of it".[105]

Lord Curriehill, therefore, agreed that it was not necessary to decide whether the lease had been extinguished by *confusio*. Arguably, then, his view that *confusio* had operated was *obiter*. Only Lord Ivory unequivocally supported the view that *confusio* had operated.[106]

At most, then, only two of the four judges in the Inner House in *Lord Blantyre v Dunn* were clearly of the view that *confusio* had operated. On the other hand, though, neither of the other judges rejected the idea. This case certainly provides no support for the idea that *confusio* does not apply to leases. The decision weighs rather to the contrary, although of course not conclusively so.[107] The judges of the Inner House can be described as being at least sympathetic to the idea of extinction of the lease *confusione*, although their decision was confined to the question of the effect on the rent. It is interesting to note here that, in so deciding, the Inner House was closer to the legal necessity view of *confusio* rather than the deemed discharge view. As Lord Kinnear pointed out in *Motherwell v Manwell*,[108] the court in *Lord Blantyre v Dunn* held that there was no rent payable, with the result that composition was payable based on market rent. If the decision had been based on *confusio* as a deemed payment or a deemed discharge of the obligation to pay, that would have been a finding that there was a rent payable and, as Lord Kinnear says, "the judgment must have been the very reverse of that actually pronounced."

Halliday also argues that *confusio* does not apply to leases.[109] He gives a number of reasons for taking this view. Unfortunately, though, it is not clear that his view is justified by the reasons he gives.

First, he refers to the *dictum* of Lord Kinnear in *Motherwell v Manwell*,[110] quoted earlier, that "confusion does not operate either payment or discharge. It prevents the possibility of a debt arising". From this, says Halliday, it "follows that *confusio* does not discharge or extinguish the lease: it simply suspends the obligation of payment or rent while the landlord and tenant are the same person."

The response to this is in two parts. First, as was argued above, it is not certain that Lord Kinnear's view of *confusio*, based on the legal necessity view, is correct. Second, even if Lord Kinnear's view is accepted, Halliday's conclusion does not appear to follow from it: Lord Kinnear's argument – which, it will be remembered, was not made in relation to leases – seems just as applicable to the extinction of the lease itself as it is to the rent obligation. Indeed, arguably the absence of a continuing rent obligation is inconsistent with the idea of a continuing lease, rent being one of the essential elements of a lease.

Halliday's second argument is that:

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[104] (1858) 20 D 1188 at p. 1198.
[105] (1858) 20 D 1188 at p. 1199.
[106] (1858) 20 D 1188 at p. 1197.
[107] McDonald, *Conveyancing Opinions*, p. 199.
[108] (1903) 5 F 619, 631.
[109] Halliday, *Conveyancing Opinions*, pp. 379-380.
[110] (1093) 5 F 619 at p. 631.

> "Where a contract between two parties which creates a debtor-creditor obligation involves also some other element, such as the creation of a right of property, *confusio* does not operate to extinguish that other right".

The examples Halliday gives are feu rights and rights of ground annual, citing as authority *Earl of Zetland v Glover Incorporation*[111] and *Healy & Young's Tr v Mair's Trs*[112] respectively. We have already seen that this does not appear to be the *ratio* of *Healy & Young's Tr v Mair's Trs*. As to *Earl of Zetland v Glover Incorporation*, that case concerned a vassal whose title included salmon fishing rights, and who then acquired the superiority title, which did not. He then consolidated these titles. The House of Lords held that the salmon fishing rights were not extinguished by the process. Feudal rights were a well-established case where *confusio* did not operate. This can be justified on the basis that feus could only be extinguished by following certain procedures. This is the approach taken, for example, by Lord Ivory in *Lord Blantyre v Dunn*:

> "I do not think any cases which refer to distinct feudal estates can regulate the present question. These estates require the observance of certain technical forms, both for their constitution and for their extinction."[113]

There is also a theoretical justification. While a lease or a servitude is a burden on the owner's right in the land, the same was not true of the rights of vassal and feudal superior. It is long settled that, instead of the vassal's right (the *dominium utile*) being a burden on the superiority, ownership was divided between superior and vassal.[114] Both had their own separate rights of ownership in the property. Certainly there were also obligations owed by one to the other, and those would be extinguished as performance fell due when the same person was both superior and vassal, but it makes no sense to talk of the vassal's interest itself as being extinguished by that fact.

But in any case, *Earl of Zetland v Glover Incorporation* was not concerned with that issue, but with the effect of consolidation of superiority and feu on salmon fishing rights held by the vassal. The House of Lords' decision, that the salmon fishing rights were unaffected, is only to be expected when it is remembered that the right to fish for salmon is not a pertinent of ownership of the land. Instead, it is separately owned as a legal separate tenement.[115] It is an entirely separate item of property. Suppose that there had been a vassal, A, holding an area of land. Half of the land was held of one superior, B, and the other half was held of another superior, C. A then acquired B's superiority title and consolidated it with his *dominium utile* title. It can hardly be supposed that, by this act, A's rights over the part of the land held of C would have been extinguished. That would be absurd. Yet that was, in effect, what the House of Lords was asked to hold in *Earl of Zetland v Glover Incorporation*, which it refused to do. For present purposes, though, the point is that the case is of no relevance to the issue under consideration here. It is certainly no authority for the proposition that a real right in land is not extinguished *confusione* when the same person becomes both holder of the right and owner of the land.

Thirdly, Halliday argues that the only authority for extinction of a lease in these circumstances is *Campbell v McKinnon*.[116] That case involved building plots in Tobermory. Certain individuals had taken 99 year leases of building plots. The leases included a right of pasturage on land adjoining the village. Some of these individuals then acquired ownership of

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[111] (1870) 8 M (HL) 144.
[112] 1914 SC 893.
[113] (1858) 20 D 1188 at p. 1197.
[114] Reid, *Property*, paras 49-52 (Gretton).
[115] See Reid, *Property*, paras 207-210.
[116] (1867) 5 M 636. The point that is relevant for present purposes was not part of the appeal to the House of Lords (reported as *Campbell v McLean* (1870) 8 M (HL) 40).

the building plots, but without the pasturage rights. The court held that the pasturage rights did not survive the process.

The decision has been criticised. Gloag "doubted whether this result can be reconciled, on any intelligible principle, with the decision in" *Earl of Zetland v Glover Incorporation*.[117] As we have already seen, however, the decision in *Earl of Zetland v Glover Incorporation* is based on quite different principles. For the moment, though, it is enough to note that consideration of the decision in *Campbell v McKinnon* shows that Halliday is incorrect to suggest that there is no other authority for the proposition that a lease is extinguished when the same person becomes both landlord and tenant, the court in that case having been influenced by the views of Stair, Erskine and Craig. It is to these that we shall turn next.

Older discussions

In the passage cited in *Campbell v McKinnon*, Erskine states that "the same person cannot be landlord and tenant".[118] Craig is to the same effect: "no man can be owner and lessee at the same time".[119] At first sight, this looks promising for the view that *confusio* applies to leases, and in particular it is encouraging for the legal necessity view of *confusio*. However, the context of these observations casts a different light on them. Neither Erskine nor Craig is talking about *confusio* at all. The text quoted in each case comes instead from a discussion of the extinction of leases by renunciation. The term *confusio* is nowhere used. Thus, Craig says:

> "a tenant who, during the currency of his tack, acquires the property of the subject by virtue of an alienation thereof in his favour loses all benefit by the tack...The principle is that the acquisition of the property of the subject by the tenant implies a renunciation on his part of the tack."[120]

Erskine is to the same effect,[121] as is Stair.[122]

These views may then be seen as being more helpful to the deemed discharge view of *confusio*, but this is true only up to a point. If Stair is concerned here with *confusio*, that seems difficult to reconcile with his view, considered earlier, that *confusio* operates only to suspend obligations. Here Stair seems to be saying that the lease is extinguished altogether when the tenant acquires ownership of the land. Moreover, Stair, Erskine and Craig are not talking of a deemed renunciation of the lease, but a presumed one. There is a distinction between these. If a tenant is deemed to have renounced the lease, it is not necessarily the case that there has actually been any such renunciation; rather, the tenant is treated as if he or she had renounced the lease. By contrast, a presumed renunciation is one that is presumed to have actually happened, which presumption may, it must be supposed, be rebutted. On the other hand, it may be that this issue is more one of terminology than of practical significance. There are, as we have seen, exceptions to the operation of *confusio*. These can equally well be seen as cases where the presumption of renunciation is rebutted. Either way, with the support of Stair, Erskine and Craig, the decision in *Campbell v McKinnon* seems entirely adequate to justify the view that a lease is extinguished when the tenant acquires ownership of the property.

Because, on this view, the lease simply ceases to exist when the tenant acquires the landlord's interest, there is no room for its revival if the property is alienated. However, all three writers state that the lease will revive if the title acquired by the tenant is reduced:

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[117] W M Gloag, *The Law of Contract: A Treatise on the Principles of Contract in the Law of Scotland* (2nd edn, Edinburgh: Green, 1929), p. 727.
[118] Erskine 2.6.44.
[119] T Craig, *The Jus Feudale* (J A Clyde tr, Edinburgh: W Hodge, 1934), 2.10.7.
[120] Craig, *Jus Feudale* 2.10.7.
[121] Erskine 2.6.44.
[122] Stair 2.9.36.

> "because the implied renunciation...is only provisional, not to take place if the...heritable right should prove ineffectual to him".[123]

Stair states the same rule,[124] as does Craig, commenting that "a transaction which has been reduced [is] regarded as if it had never taken place".[125] Thus, in *McDougal v Campbell*,[126] a party took a lease from his father, who then subsequently conveyed the land to him. The conveyance was later reduced. Following the father's death, his heir raised an action for removing against him. It was held that the lease continued to subsist.

It is notable that these writers are only considering the case where the tenant acquires the landlord's interest, but not the converse case of acquisition by the landlord of the tenant's interest. Rankine considers this to be, if anything, an even clearer case. In such a situation, he argues, "there can be little if any doubt that the lease is extinguished",[127] this extinction occurring on the ground of *confusio* which, it will be remembered, Rankine considers to be equivalent to renunciation of the lease. Certainly, there seems to be little basis for distinguishing the two situations. In both cases, the same person has ended up as both landlord and tenant, and may normally be supposed to have little continuing use for the lease.

Modern cases

Contrary to the expectation from principle, therefore, there is little basis in the institutional writers for the view that *confusio* applies to leases. Instead, the view taken there is that the tenant is presumed to have been renounced when the same person becomes both landlord and tenant. In practical terms, this is consistent with the deemed discharge view of *confusio*. However, the institutional writers do not themselves make that connection, and it defies belief to suppose that they would not have made that connection had it been there to be made in the law as at stood when they were writing. To that extent, then, Halliday's view has some justification. Nonetheless, his view is misleading, for *Campbell v McKinnon* is not in any sense a rogue case. The decision of the Inner House in that case is supported by the views of Stair, Erskine and Craig, and provides ample justification for the view that a lease is extinguished when the tenant acquires the landlord's interest, albeit that the extinction is based on a presumed renunciation rather than on *confusio*.

Thus matters could have rested, but for a series of more recent decisions beginning with *Clydesdale Bank plc v Davidson*.[128] In that case, three co-owners of an area of land purported to grant a lease in favour of one of their number. The lease was held by the House of Lords to be invalid. The case was therefore not one in which the same person had acquired both landlord and tenant's interests under a lease. Rather, it was a case where an attempt was made by one person to grant a right in his own favour. This is something well established as incompetent,[129] the only issue in *Clydesdale Bank plc v Davidson* being whether the presence of co-owners made a difference to the question. Nonetheless, the following was given by Lord Hope as the basis for the decision:

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[123] Erskine 2.6.44.
[124] Stair 2.9.36.
[125] Craig *Jus Feudale* 2.10.7. This also appears to be the rule in French law: rights extinguished *confusione* revive if "*l'acte qui a provoqué la confusion est annulé*", such having retroactive effect (Terré et al, *Droit civil: Les obligations*, para 1416).
[126] (1566) Mor 3082.
[127] Rankine, *Leases*, 525. See also Paton & Cameron, *Landlord & Tenant*, p. 102.
[128] 1998 SC (HL) 51.
[129] For an example of the same principle in operation, see *Kildrummy (Jersey) Ltd v Inland Revenue Commissioners* 1991 SC 1.

> "...it is not possible for a person to have two real rights in the same property at the same time. This is because of the principle of *confusio*, by which the lesser right is absorbed into the greater right and is extinguished."[130]

Because of the reference to impossibility, and because of the link made with the impossibility of constituting an obligation in one's own favour, this seems more consistent with the legal necessity view of *confusio*. However, this does not appear to be the *ratio* of the case. The majority of the court simply concurred with Lord Clyde, whose view does not seem to be based on *confusio* at all. Indeed, he accepts that there is a contractual relationship between the "tenant" and the other two co-owners.[131] Instead, his view appears to be based, not on *confusio*, but on the "tenant's" right to occupy being attributable to his right of co-ownership rather than the lease.[132]

*Clydesdale Bank plc v Davidson* was not the first modern case in which the operation of *confusio* with respect to leases was discussed. For example, in *Sutherland v Sutherland*[133] and *Cameron v Bank of Scotland*,[134] it was held that crofting leases were extinguished when the tenant acquired ownership of the land. However, *Clydesdale Bank plc v Davidson* has been seen as settling the question. For example, in *Serup v McCormack*,[135] the Scottish Land Court held that a lease was extinguished *confusione* when the tenant became a *pro indiviso* proprietor of the subjects, on the basis of *Clydesdale Bank plc v Davidson*. Lord Hope's view was also followed in *Howgate Shopping Centre Ltd v Catercraft Services Ltd*,[136] about which more will be said below.

By contrast, the decision in *B G Hamilton Ltd v Ready Mixed Concrete (Scotland) Ltd*,[137] only a year later than *Clydesdale Bank plc v Davidson*, is a little surprising. In *B G Hamilton Ltd*, the tenants under a 999-year lease registered an *a non domino* disposition in their own favour.[138] The landlords had the Land Register rectified to restore the former position, and then sought to have it declared that, by registering an *a non domino* disposition of the property, the tenants had impliedly renounced their lease. The Lord Ordinary held, however, that this was not the effect of the tenants' actions. An *a non domino* disposition may be used as a legitimate device, for example to resolve title problems, and so it does not imply the giving up of any right. In any case, said the Lord Ordinary, even had implied renunciation been the effect of the *a non domino* disposition, the lease would have revived on rectification of the Land Register.

This final point seems amply justified by the views of Stair, Erskine and Craig, discussed above. Curiously, though, the Lord Ordinary seeks to distinguish *confusio* and implied renunciation. As the case was argued on the basis of renunciation:

> "It is accordingly unnecessary for the purposes of this action to discuss the possible application of confusio where, for example, a tenant, by the registration of a proprietorial title to the subjects, acquires under s 3 of the Land Registration

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[130] 1998 SC (HL) 51, 56. It is not quite accurate to say that a person cannot have two real rights in the same property at the same time. There seems to be no reason, for example, why a person could not have a servitude over a neighbouring property and also a standard security over it. Craig (*Jus Feudale* 2.10.7) refers to the possibility of having both a lease and a liferent over the same property. The problem is not the having of two real rights, but the having of ownership and another real right.
[131] 1998 SC (HL) 51 at p. 59B.
[132] 1998 SC (HL) 51 at p. 63E-F.
[133] 1986 SLT (Land Ct) 22.
[134] 1989 SLT (Land Ct) 38.
[135] 2012 SLCR 129. For discussion of this case, see C Bury & D Bain, "A, B and C to A, revisited" 2013 Jur Rev 77.
[136] 2004 SLT 231 at para [59].
[137] 1998 SLT 524.
[138] The disposition was of the kind later held to be *ex facie* invalid in *Aberdeen College v Youngson* [2005] CSOH 31, 2005 1 SC 335.

(Scotland) Act 1979 a real right to them, under exclusion of indemnity in terms of s 12(2) of the Act."[139]

It is not easy to follow the Lord Ordinary's reasoning here, for this is exactly what had happened in the case. *A non domino* or not, under the law in force at the time registration of the disposition gave the tenants ownership of the property, due to the terms of section 3 of the Land Registration (Scotland) Act 1979.[140] *Clydesdale Bank plc v Davidson* does not appear to have been cited to the court.

Where there is a sub-lease or other subordinate right

So far, we have considered only the simple situation, where no third party interests are concerned. There may, however, be a sub-lease or other subordinate right, such as a right in security affecting the lease. If the head lease is extinguished *confusione*, it is not immediately apparent how a sub-lease can survive, especially if the view is taken that the sub-lease is a right in the head lease itself.[141] On that view, it would seem that the sub-lease must fall with the head lease. This is certainly a possible view to take of the situation, and appears to be the position taken in South Africa.[142] In the same way, in Scots law, a sub-lease will fall if the head lease is reduced[143] or is extinguished by irritancy.[144]

There is one case dealing with the issue of *confusio* in these circumstances. *Howgate Shopping Centre Ltd v Catercraft Services Ltd*[145] was concerned with the interpretation of a rent review clause in a sub-lease of a unit of a shopping centre. The pursuers had acquired in 1997, by assignation from the previous tenants, the lease of the whole shopping centre, and then in 2001 the tenants of the unit in question assigned their lease to the pursuers. The defenders were the sub-tenants of the unit. The defenders argued that the lease of the unit, acquired by the pursuers in 2001, was extinguished *confusione* as the pursuers were at that time already the head tenants under the lease of the shopping centre. The Lord Ordinary held that the lease was extinguished *confusione*, but that this did not affect the continued existence of the sub-lease. This appears to have been on the basis that, where there is a sub-lease, the head tenant has a continuing contractual relationship with the sub-tenant.[146] The Lord Ordinary endorsed Halliday's view that:

> "It makes no sense that valid sub-leases or heritable securities created over registered leases can be extinguished by the lessee acquiring the property, a transaction to which neither the subtenants or [*sic*] the heritable creditors are parties."[147]

The problem with this is that Halliday is assuming here that *confusio*, if it operated at all, would extinguish the sub-lease. That is for him a reason for holding that it doesn't operate. McDonald assumes the same and, for the same reason, argues that *confusio* does not operate

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[139] 1998 SLT 524, 528 D-E.

[140] It is settled that the effect of registration under the 1979 Act was to give ownership to the person registered as owner, even if this was not justified by the deed that induced registration, on a literal reading of s. 3(1) of that Act: see *e.g. Stevenson-Hamilton's Exrs v McStay (No 1)* 1999 SLT 1175. This is no longer the case: Land Registration etc (Scotland) Act 2012, s. 50.

[141] Reid, *Property*, para 16. The alternative view would be to say that the sub-lease is a right in the property itself, limited by the existence of the head lease. The same would be true of other real rights affecting the lease, such as a standard security: see *e.g.* G L Gretton, "Owning Rights and Things" (1997) 8 Stellenbosch Law Review 176.

[142] *Gajraj v Hoosen* 1958 (2) SA 630.

[143] Rankine, *Leases*, 197.

[144] Rankine, *Leases*, 198; Paton & Cameron, *Landlord & Tenant*, p. 169

[145] 2004 SLT 231.

[146] 2004 SLT 231, para [60].

[147] Halliday, *Conveyancing Opinions*, p. 380.

at all where the lease is affected by a sub-lease or a heritable security.[148] Halliday seems in the passage quoted to be referring to the idea, discussed earlier, that *confusio* will not operate where it would extinguish a right against a third party or a right held by a third party. Thus, while Halliday's view provides a justification for the survival of the sub-lease, the extinction of the head lease is a different question entirely. Further, as Reid and Gretton point out, the approach taken by the Lord Ordinary runs into difficulties in the case of heritable securities: "it makes no sense to say that what were securities over the lease become securities over the property itself."[149]

Nonetheless, justification for the Lord Ordinary's view may be found in the deemed discharge view of *confusio*. The argument would be that, where the landlord acquires the tenant's interest or *vice versa*, that is treated as a renunciation of the lease by the tenant. In such a case, notwithstanding the extinction of the head lease, the landlord is bound to recognise any valid sub-lease, which thus will continue in operation.[150] This allows the conclusion that a sub-lease will survive the extinction *confusione* of the head lease.[151]

There seems to be no authority on the effect of renunciation of a lease on a security burdening that lease. However, it may be supposed that the law would refuse effect to the renunciation in these circumstances, unless the creditor consented, which consent would presumably be dependent on either fulfilment of the obligation secured or the grant of a new security. On the argument here, the same would apply in cases where the landlord and tenant's interests came into the same hands.[152] *Confusio* would simply not operate. This is consistent with the view, expressed earlier, that *confusio* should not operate where it would extinguish a right held by or against a third party.

Where rights not co-extensive

Gloag suggests:

> "Where a party has two rights to a particular subject, one wider or more extensive than the other...it would seem doubtful whether the principle of *confusio*, or any extension of it, excludes him from founding on the lower or less extensive right, should that right have incidents appertaining to it which the higher right does not possess."[153]

Gloag criticises the decision in *Campbell v McKinnon*[154] on this ground. As we have seen, though, the decision was not based on the doctrine of *confusio*, but on implied renunciation. Despite the stated reluctance of the judges of the Inner House,[155] the decision seems entirely reasonable on those grounds. This was a case in which a number of individuals had possessed plots in Tobermory under leases which gave them rights to take peat, to take stone and to graze one cow each on land retained by the landlord. When some of them accepted feu grants that in substance reproduced the first two rights but omitted the third - intentionally, said Lord

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[148] McDonald, *Conveyancing Opinions*, pp. 201-202.
[149] K G C Reid & G L Gretton, *Conveyancing 2003* (Edinburgh: Avizandum, 2004), p. 60.
[150] Stair 2.9.22; Erskine 2.2.34. For the effect of renunciation of a head lease on an invalid sub-lease, see *Earl of Morton v His Tenants* (1625) Mor 15228. In the case of *confusio*, arguably even an invalid sub-lease should survive, for the head landlord is also in that case head tenant, and so is contractually bound by the sub-lease.
[151] It appears that this is also the outcome in French law: Terré et al, *Droit civil: Les obligations*, para 1416.
[152] This, in fact, is Reid and Gretton's suggested solution. See K G C Reid & G L Gretton, *Conveyancing 2003* (2004), p. 60.
[153] Gloag, *Contract*, p. 727.
[154] (1867) 5 M 636.
[155] See Lord Curriehill at p. 650, Lord Deas at p. 653 and Lord Ardmillan at p. 657.

Curriehill[156] - it is difficult not to see in this an intention to give up the status of tenant and replace it with the status of vassal.

Exceptions may certainly be permitted. This is, after all, only a presumed renunciation. *Cauder v Hamilton*[157] gives an example of a case in which a lease is not extinguished on the acquisition of ownership by the tenant, in circumstances where the lease gives rights that are in some respect more extensive than those of the owner of the land. It is notable that, again, *confusio* is not mentioned. In that case, land was conveyed to an existing tenant, subject to a liferent reserved in favour of another person. It was held that the lease was not extinguished *confusione*, thus preserving the tenant's right to natural possession of the land, which he would not have had solely as owner, due to the existence of the liferent. This is a sensible outcome. It makes no sense to say that a tenant in such circumstances must choose between a temporary right, with a right to natural possession, but subject to payment of rent,[158] and a permanent right, but with no present right to natural possession of the land.

In light of the more recent cases, though, it appears that we are now to think in terms of *confusio* in such cases. Thus the older authorities appear superseded, although it may be possible to accommodate them on the basis of the deemed renunciation view. Certainly Gloag is already talking, at the date of the quoted text (1929), in terms of *confusio*. It is true that his authority for the position taken is *Earl of Zetland v Glover Incorporation*,[159] which, as we have already seen, is also not concerned with *confusio*. However, the general idea expressed seems sound. It was suggested earlier that *confusio* should not operate when it would extinguish either a right against a third party or a right held by a third party, which would seem to be a sensible limitation on the doctrine..

**Conclusion**

In this article, consideration has been given both to the nature and application of *confusio* generally, and also to the application of the doctrine to leases specifically. As far as the general application of *confusio* is concerned, it is clear that it will not apply where the positions of creditor and debtor are held in different capacities, and it has been argued also that it should not apply where its operation would extinguish a right held by or against a third party. It has also been suggested that *confusio* is based on a deemed discharge or renunciation of the obligation by the creditor, a position which, it has been argued, allows the decision in *Howgate Shopping Centre Ltd v Catercraft Services Ltd*[160] to be justified. On the other hand, it has been argued that *confusio* should apply even where the right is permanent in character or where the coincidence of the roles of debtor and creditor in the same person is to be temporary, and that intention should have no role. It cannot be pretended, however, that these matters are free from doubt. There is a great deal that is uncertain, with conflicting positions finding justification in the authorities. The case law shows attempts to look for reasons to exclude *confusio* whenever its operation is inconvenient, attempts which are sometimes successful and sometimes not. When it comes to registered real rights in land, we have seen that there are also practical difficulties. The Draft Common Frame of Reference has characterised *confusio* (there called “merger”) as “a widely recognised rule of evident utility”.[161] With respect, this view appears questionable, given these doubts and complexities.

As far as leases are concerned, there is surprisingly little clear authority on the question. The earlier position seems to have been that leases were extinguished when the same person became both landlord and tenant, at least when this occurred by the tenant acquiring ownership. However, this was based, not on *confusio*, but on a presumed

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[156] (1867) 5 M 636 at p. 650.
[157] (1610) Mor 3082.
[158] In this case, payment of rent was due to the liferenter.
[159] (1870) 8 M (HL) 144.
[160] 2004 SLT 231.
[161] C von Bar & E Clive eds, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (6 vols, Munich: Sellier, 2009), p. 1137.

renunciation of the lease. While the decision in *Lord Blantyre v Dunn*[162] was consistent with the idea that *confusio* applied to leases, it was not until the late twentieth century that there was direct authority justifying that view. The position now seems settled, however, that leases are susceptible to extinction through the operation of *confusio*.

[162] (1858) 20 D 1188.