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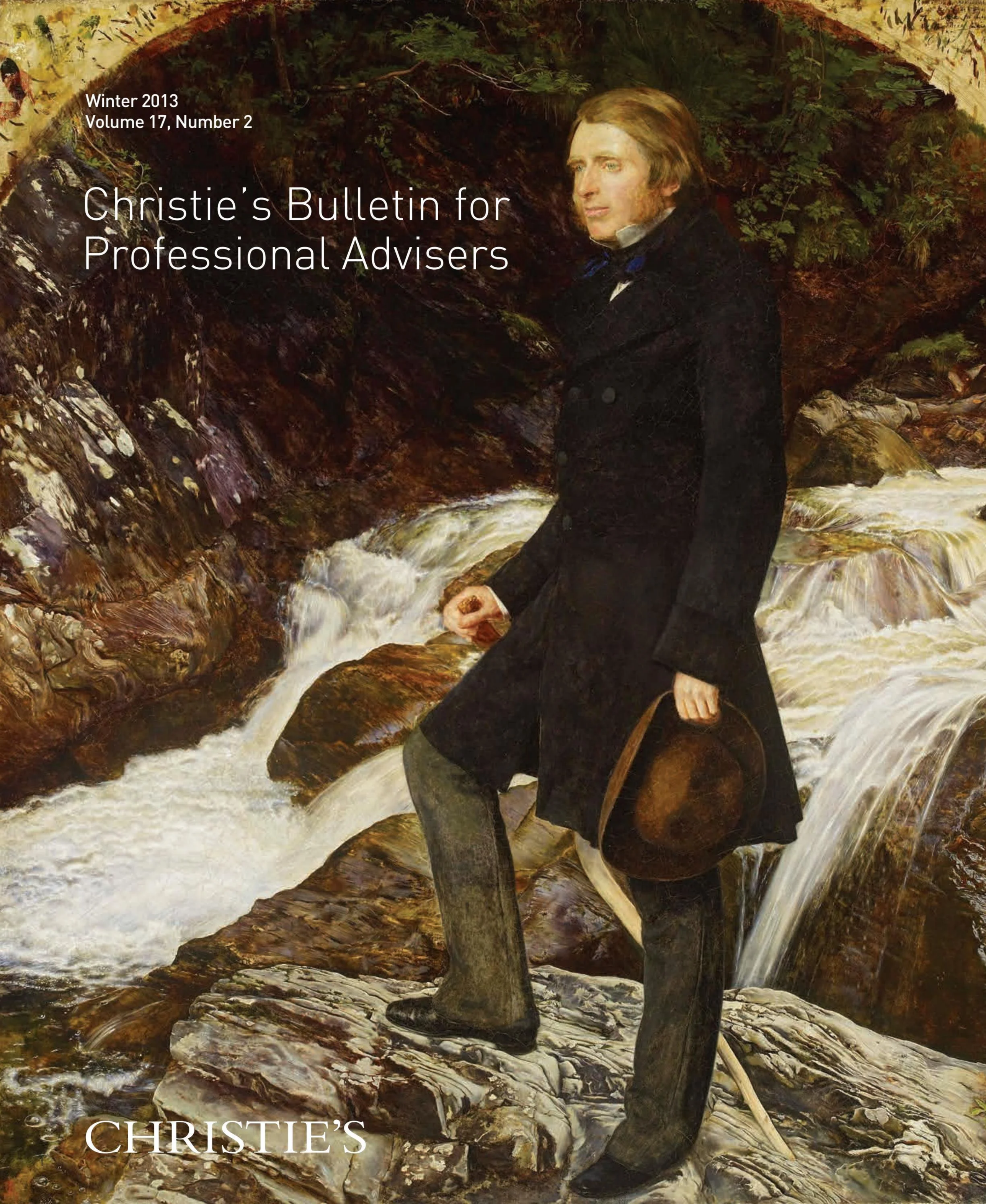

CHRISTIE'S

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Heritage & Taxation Advisory Service

JAN VAN HUYSUM

Still life of roses, tulips, peonies and other flowers in a sculpted vase, and a bird's nest on a ledge
Signed 'Jan Van Huÿsum fecit'
(lower left, on the ledge)
oil on copper
31 x 23 3/4 in. (79 x 60 1/2 cm.)

Negotiated by Christie's and accepted in lieu of inheritance tax; allocated to the Scottish National Gallery

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Negotiated Sales · Heritage Exemptions · Lease of Objects · Pre-Sale Tax Advice
Post-Sale Tax Valuations · Other Tax Valuations

Frances Wilson
Christie's Heritage and Taxation Advisory Service

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EDITORIAL

Is Glenfinlas in the Trossachs of Scotland the most important site in British landscape painting? It was here in 1854 that Sir John Everett Millais painted his celebrated *Portrait of John Ruskin*, reproduced on our cover. The painting sets the theme for this issue of *The Bulletin* in which, with next year's Scottish Independence Referendum in mind, we focus on some topics of particular relevance to Scotland.

It would be premature to speculate on the possible implications of a 'Yes' result, so we will confine ourselves to the current situation, especially in those areas where the position in Scotland differs from that in England and Wales. One of these is the new tax-raising powers granted under the Scotland Act 2012, which are discussed by Christian Melville. Another is the succession of Scottish estates, reviewed by Martin Campbell. In both articles, readers south of the border may find much to surprise them.

Both England and Scotland have maintained a register of buildings at risk since the early 1990s. In Scotland, new ways of tackling the most endangered historic buildings are being explored. Ranald MacInnes of Historic Scotland describes the initiative which, in partnership with other public bodies and private landowners, seeks to bring buildings at risk back into use where appropriate, and to prevent others from ending up on the list in the first place.

Also in this issue, Andy Grainger presents the second part of his article on claims for conditional exemption on the grounds of historical association. This includes the outcome of HMRC's deliberations over the criteria and the guidance which was subsequently issued by HMRC. This will in due course be incorporated into *Capital Taxation and the National Heritage*, but remember that you read it here first.

We also have the regular round-up of heritage news from Ruth Cornett, and a review of the market for Victorian Pictures from our specialist Peter Brown. Included in the latter is a case study of Millais' *Portrait of John Ruskin* mentioned above, which was recently accepted by HM Government in lieu of tax, negotiated by Christie's Heritage and Taxation Advisory Service.

If the result of next year's Independence Referendum is a 'Yes,' there will be implications for many aspects of the heritage such as the rules on the export of works of art, and the scope of the Acceptance in Lieu and Cultural Gifts Schemes. In the meantime, I can't help wondering what Ruskin would make of it all.

Frances Wilson
Editor

Left & Cover
SIR JOHN EVERETT MILLAIS, P.R.A. (1829–1896)
Portrait of John Ruskin (1819–1900)
signed with monogram and dated 1854 (lower left)
oil on canvas · 31 x 26 3/4 in. (78.7 x 68 cm.)
© Ashmolean Museum, University of Oxford

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HERITAGE NEWS

This autumn has seen, at last, a reported return of business confidence across the economy, with indications of improvements in many sectors. Likewise, The Art Fund, the Museums Association and English Heritage have all recently stated that Britain's museums, galleries and heritage sites are more popular than ever. Many institutions have enjoyed rises in visitor numbers over the course of the year, with English Heritage registering a record number of visitors in August 2013. It has also been reported by the Heritage Lottery Fund that heritage-based tourism is currently worth more to the UK than was previously thought (as recently as three years ago) and that this sector is now thought to be worth £26.4 billion.

Notwithstanding this rise in popularity and increased revenue, the sector has seen reductions in government funding which have in turn led to a reliance on volunteer positions, since many museums have been forced to cut staff.

The Historic Houses Association (HHA) has recently reported the results of a survey of its members. The key concern for many members is the increasing backlog of property repairs, a problem which the addition of VAT to repairs of listed buildings has exacerbated. According to the results of the survey, the total backlog can now be estimated at £764 million, having nearly doubled since 2009, while the amount spent annually on repairs has fallen by £37 million to £102 million. The cumulative effect of these reductions in spending on maintenance is very worrying for the heritage sector and the businesses it supports, since the decay of an estate and its buildings almost inevitably suggests a loss of jobs and a fall in prosperity for the local economy which depends on it.

ACCEPTANCE IN LIEU SCHEME 2012–13

The Acceptance in Lieu (AIL) Annual Report for 2012–13 was issued by Arts Council England on 14 November. It includes details of 29 AIL cases which completed during the year, and also the first case under the new Cultural Gifts Scheme (CGS). The total value of all objects offered was £49.4 million, with a tax-settled value of £30 million. This is the maximum amount of tax that can be settled by AIL and CGS together in any one year following the increase to the cap brought in with CGS.

The top item in terms of the amount of tax settled was *Portrait of John Ruskin* by Sir John Everett Millais, illustrated on the cover of this *Bulletin*. The offer, which was successfully negotiated by Christie's Heritage and Taxation Advisory Service, settled £7 million of tax and is described more fully within these pages by Peter Brown in his article on Victorian art.

Another notable case is *Still Life with Flowers* by Jan van Huysum which was announced by the Scottish Government's Cabinet Secretary for Culture and External Affairs, Fiona Hyslop. This case, which settled £2.45 million of tax, was also negotiated by Christie's and is the first Dutch flower painting to enter the Scottish National Collection. The allocation was particularly welcome as the National Galleries of Scotland had identified a gap in their representation of the history of 17th century Dutch painting which this still life filled. Close liaison with the curators ensured that the offer in lieu was completed successfully and is now in the care of the appropriate allocatee. Currently the AIL scheme allows for up to 10 items or collections of items per year to be allocated to Scottish collections.

THE BURRELL COLLECTION

The Burrell Collection in Glasgow has become the subject of controversy as the Scottish Parliament has been asked to consider a bill allowing the works of art in the collection to tour overseas. This proposal contradicts the wishes of the collection's founder, William Burrell, who bequeathed over 8,000 items to Glasgow in 1944 with the condition that they did not travel overseas, no doubt a sensible precaution in wartime. Although he did not die until 1958, the restriction on lending to foreign institutions was not revoked or amended before his death, despite opportunities to do

so, from which one must infer a strong distaste for lending the collection abroad. The bill to amend the provisions of the bequest will be put before the Scottish Parliament in January 2014, in preparation for the museum's closure during 2016–20 for redevelopment. Setting aside the wishes of a donor is not undertaken lightly. While the proposal for an international tour of the collection would help to raise the Burrell Collection's profile abroad, the desire to change the terms of a bequest is seen as a possible deterrent to modern philanthropists who may fear that their own wishes would be similarly disregarded.

MERGER OF HISTORIC SCOTLAND AND RCAHMS

This year has seen the unveiling of plans for the merger of Historic Scotland and the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS). Historic Scotland was created in 1991 and is responsible for over 300 historic properties, whereas RCAHMS was established by Royal Warrant in 1908 and maintains historic and current archives of maps, drawings, photographs, land documents and surveys and records changes to architecture and archaeology. The organisations will continue to function separately until the new single body is created, and an Advisory Board has been formed. In announcing the proposal for merger and inviting consultation, Fiona Hyslop underscored the need for a long-term vision and strategy for the future protection, management and promotion of Scotland's historic environment. It is currently envisaged that the new body will have charitable status. This sector contributes £2.3 billion annually to the economy, and it is hoped that the merger will only increase this revenue. Following the announcement of the merger, a public consultation period was completed and a factual report and analysis arising from this process will be produced to assist in formalising the legislation. If presented to Parliament in the current 2013–14 parliamentary year, the earliest date for the merger would be in the autumn of 2014.

CHANGES TO ENGLISH HERITAGE

While Historic Scotland and RCAHMS are set to merge, English Heritage has announced plans to separate into two bodies. The new bodies will be a charity and a 'National Heritage Protection Service'. The charitable section will continue to be known as 'English Heritage' and will manage the National Heritage Collection of over 400 historic sites, which includes such properties as Stonehenge and Kenwood House. It has been reported that the charity will be up and running by March 2015. The Government has given support for the new charity with the investment of £80 million for its creation and as seed funding for investment. The hope and intention is that the charity will have more opportunity to generate sustainable funding with this initial capital contribution and ultimately to become financially self-sufficient.

The new protection body is due to be re-launched with a separate name and identity, but is, for the moment, entitled the National Heritage Protection Service (NHPS). The statutory powers previously in the control of English Heritage will be devolved to the NHPS and it will provide the Government with expert advice on all aspects of England's archaeological and built heritage.

A further change was announced during the summer, with the appointment of Sir Laurie Magnus as Chairman of English Heritage by Culture Secretary Maria Miller. Sir Laurie has 35 years' commercial experience in the banking sector and until recently was Deputy Chairman of the National Trust.

INQUIRY INTO SCOTTISH LANDED ESTATES SYSTEM

The House of Commons Scottish Affairs Committee has held an inquiry into land reform in Scotland, in response to claims of tax avoidance by landowners. Under current law, owners of landed estates in Scotland receive public subsidies but are liable for low levels of taxation on land. A recent report commissioned from four land experts alleged that landowners use overseas registered companies and trusts to obscure the beneficial ownership of their land, thereby avoiding tax. The inquiry was launched on 15 July and ran until 28 October; the results will be of particular interest to practitioners involved with Scottish landed estates.

£10 MILLION HLF 'ANNIVERSARY FUND' AND A NEW WWI FUNDING SCHEME

The Heritage Lottery Fund (HLF) has stated that it will be putting aside £10 million in order to fund projects relating to commemorating and remembering important events and anniversaries in UK history. There is a range of events that could benefit from this funding, such as the 800th anniversary of the Magna Carta, important dates from the Second World War and anniversaries of the births and deaths of figures such as Beatrix Potter and Shakespeare.

A new funding scheme has also been announced to commemorate the community impact of the First World War. The scheme is to offer £1 million per annum until 2019 and will provide grants of between £3,000 and £10,000 to communities and local groups across the UK. Although private owners will not be eligible for this funding, they may qualify for some funding if they are in partnership with a not-for-profit organisation. Although the amount available may be small, this is nevertheless a welcome support to local community groups seeking funding.

WEDGWOOD MUSEUM

As regular readers of the *Bulletin* will be aware, over the last few years we have been following developments at, and the threats of closure to, the Wedgwood Museum. It has recently been reported that planning permission has been approved for a £34 million redevelopment of the Waterford Wedgwood Royal Doulton factory complex by Stoke-on-Trent City Council. The budget will allow for renovation of various areas of the museum, including its visitor centre and galleries. Unfortunately, the collection which is housed in the museum still remains under threat due to the pension deficit inherited from

the Wedgwood Pension Plan. It is hoped, nevertheless, that this development of the museum building will increase visitor numbers and help the museum and its collection to remain together and intact.

THREATENED CLOSURE OF PUBLIC ARTS CENTRE

While the Wedgwood Museum remains optimistic following the announcement of the redevelopment plans, another arts centre is under threat of closure. Sandwell Metropolitan Borough Council has announced that it cannot continue to finance the Public Arts Centre in West Bromwich as the £1.6 million needed annually to maintain it has become impossible to find from existing funds.

ANNUAL TAX ON ENVELOPED DWELLINGS

A manual containing guidance on the new Annual Tax on Enveloped Dwellings (ATED) has recently been published by HMRC, in time for the submission of the first returns. This technical guide gives information such as the obligations on property owners to make returns, the reliefs available to them, and the relevant legislation. For the heritage sector, the relief for owners whose houses are open to the general public for at least 28 days per annum is welcome, although the obligation to make the annual return of information to HMRC and claim the relief is an added administrative burden.

WORLD MONUMENTS FUND 'WATCH' LIST 2014

The World Monuments Fund has recently published its 2014 'Watch' list of sites under threat. This is a list of cultural heritage sites around the globe that are considered to be at risk from the forces of nature and the impact of social, political, and economic change. The Watch list for 2014 comprises 67 sites in 41 countries, including five in the UK, namely, Battersea Power Station (London), Deptford Dockyard (London), Sayes Court Garden (London), Grimsby Ice Factory and Kasbah (Lincolnshire), and Sulgrave Manor (Northamptonshire).

CULTURAL GIFTS SCHEME

In the previous issue of the *Bulletin* we reported that the Cultural Gifts Scheme (CGS) had been officially launched in March 2013. The first gift under the scheme has now been formally announced: a set of handwritten lyrics by John Lennon of Beatles songs such as 'In My Life' were donated to the British Library by Beatles' biographer, Hunter Davies. At the time of writing we are aware that there are a number of gifts under consideration and it is encouraging to learn that this scheme has been taken up by those interested in philanthropy and supporting the national heritage. Those contemplating making a cultural gift under the scheme are encouraged to do so as early as possible in the financial year, to ensure both that there is sufficient budget available for it to be accepted and that the Acceptance in Lieu Panel (which evaluates the proposed gifts) has sufficient time to consider it before the end of the tax year.

THEFTS OF WORKS OF ART

Regretfully, the theft of publicly displayed works of art, and in particular, that of large-scale metallic sculpture continues. A bronze statue by Henry Moore was stolen from Glenkiln Sculpture Park in Dumfries and Galloway, Scotland during the summer. The sculpture, entitled *Standing Figure*, was mounted on a rock at a remote location in the Lincluden Estate. The sculpture's scale suggests that this was a pre-meditated theft, although whether the thieves targeted it for the scrap metal value or for its value as a work of art is unclear. The statue is the latest object to be taken in a succession of thefts of the sculptor's works in recent years. Two men were jailed last year for stealing another work by Moore, *Sundial 1965*, from the grounds of the Henry Moore Foundation and in that case, the piece was later recovered. Other cases have not ended so happily; in 2005, a two-ton sculpture, *Reclining Figure*, was also stolen from the Foundation and is thought to have been melted down for scrap metal.

OMAI AND AFTER

Many readers will know that the case concerning Reynolds' *Portrait of Omai*, considered by Kay Aylott in the summer edition of the *Bulletin*, rumbles on. With the taxpayer having secured victory thus far, it is no surprise that HMRC has appealed to the Court of Appeal. We await their lordships' judgment with interest.

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TAXATION UNDER THE SCOTLAND ACT 2012

INTRODUCTION

'The largest transfer of fiscal power from London since the creation of the United Kingdom...'

So wrote the Right Honourable Michael Moore MP, Secretary of State for Scotland, when describing the consequence of the Scotland Act 2012 (the 2012 Act) in his Foreword to the *First Annual Report on the Implementation and Operation of Part 3 (Financial Provisions) of the Scotland Act 2012.*

BACKGROUND

The precursor to the 2012 Act was the Scotland Act 1998 (the 1998 Act) which served, amongst other things, to establish the devolved Scottish Parliament. The 1998 Act was introduced by the then Labour government after the Scotland Referendum of 1997 showed that Scotland was in favour of not only a separate parliament, but also a separate parliament with its own tax varying powers.

The 1998 Act also provided for the creation of 'a Scottish Executive'. I would encourage you to note the use of the indefinite article. Following its election success in 1997, one of the first actions of the then new Scottish National Party administration was to 'rebrand' what was more properly known then as the 'Scottish Executive' as the 'Scottish Government'. At the risk of venturing off piste too early, I can't help but point out that section 12 of the 2012 Act reads as follows:

12 The Scottish Government

(1) The Scottish Executive is renamed the Scottish Government.
(2) Accordingly, in the 1998 Act
(a) for 'Scottish Executive' in each place substitute 'Scottish Government'.

In terms of the 1998 Act the 'Scottish Executive', as then correctly named, consisted of a First Minister and other Ministers appointed by the Queen. If the 2012 Act received Royal Assent on 1 May 2012 then any references to a Scottish Government before that date, whether by Alex Salmond or otherwise, have been, technically, incorrect.

Returning to my theme, the background to the 1998 Act was a cauldron of differing political interests. It therefore came as little surprise when a former Chief Medical Officer for Scotland, Sir Kenneth Calman, was charged by an opposition Labour Party motion in the Scottish Parliament in December 2007 (against the wishes of the then Scottish National Party minority government) to lead a Commission on Scottish Devolution to work out how Holyrood 'could serve the people of Scotland better'. This was to be an independent review of the experience of Scottish devolution since 1998.

The resulting Calman Commission began work in April 2008, and published its final report *Serving Scotland Better: Scotland and the United Kingdom in the 21st Century*, on 15 June 2009.

It is worth remembering that the Calman Commission was conceived in conditions which have been described as 'inimical to the maintenance of the United Kingdom'. Wendy Alexander was an unpopular leader of the Scottish Labour Party who at the time was struggling to refute accusations about inappropriate donations. She was also up against a very popular (but only one year old) SNP administration led by Alex Salmond. All of this was prior to the arrival of Yang Guang and Tian Tian at Edinburgh Zoo, and inevitable questioning by onlookers as to which was then a rarer sight in Scotland, a panda or a Tory politician? It seemed that the Unionist thin blue and red line could only be held by meeting Mr Salmond's demand for an independent Scotland with a recommendation that the devolved powers already bestowed upon Holyrood should be further enhanced. And so it has come to be.

With the significant backing of Gordon Brown, Ms Alexander sought to re-take the initiative, and the Calman Commission was the result. Whilst criticised for being low-key and methodical (and, more geographically, for 'not setting the heather on fire'), the

recommendations of Sir Kenneth and his fourteen Commissioners shone far brighter than Mr Salmond's equivalent 'National Conversation'. It seems that little has come of the latter.

So what were Sir Kenneth's main recommendations when he published his Report in 2009?

1. Cutting basic and higher rates of income tax levied by the Government in Scotland by 10p in the pound, with a corresponding reduction in the block grant, calculated using the Barnett formula.
2. Giving Holyrood the power to set a Scottish income tax rate, applicable to all bands. A 10p rate would replace the reduction in the block grant.
3. Devolving Stamp Duty Land Tax, Landfill Tax, Air Passenger Duty and the Aggregates Levy paid on mineral extraction to the Scottish Parliament.
4. Giving Scottish ministers additional borrowing powers to cover the cost of capital projects, or temporary shortfalls in their budget.
5. Devolving powers for the administration of Scottish elections.
6. Devolving the regulation of airguns.
7. Devolving the power to set drink-drive limits.
8. Devolving the power to set speed limits.
9. Devolving responsibility for nature conservation at sea.
10. Improving relations between Holyrood and Westminster by creating mechanisms for regular meetings and discussions between ministers, MPs and MSPs.

The Scottish Government retains, for the moment at least, the power to vary taxes by 3p in the pound - the so-called Scottish Variable Rate or 'SVR'. However, and to date, no party has ever even suggested that this power should be invoked.

For the purposes of this article, Calman's recommendations included the introduction of new tax powers for Holyrood, not for all existing tax powers to be surrendered by Westminster. Calman was keen for the Scottish Parliament to secure responsibility (and be accountable) for a proportion of the taxes it spends. The Commission suggested that the basic and top rates of tax in Scotland should be cut by 10p in the pound, and for the 'block grant' (the cash paid annually by the Treasury to the Scottish Executive) to be cut by an equivalent amount. It would then be for a hypothetical Scottish Finance Minister to set a separate rate of income tax in Scotland. In the event of this being less than 10p (s)he would have less in the public coffers to pay for public services. More than 10p would risk political suicide at the next election. Significantly, the hypothetical Scottish Finance Minister was not to be able to alter the differential between the basic and top rates of tax, thereby making it impossible for the Scottish Parliament to hit higher earners without also harming basic rate tax payers.

Whatever the upsides to all of this, the reader will no doubt be sharing the writer's sense of foreboding at the bureaucratic tail which must inevitably follow on from any implementation of Calman's recommendations as HMRC would be left to deal with different earners on different tax rates on different sides of the Border. Is this the stuff of social union if the majority of welfare payments (including pensions) on both sides of the Border remain the same while tax rates potentially differ?

True to the current Coalition Government's commitment to 'implement the proposals of the Calman Commission' in its paper *The Coalition: our programme for government* published in May 2010, the Scotland Bill was presented to the House of Commons by Michael Moore on St Andrew's Day (30 November) 2010, and received an unopposed second reading on 27 January 2012. As reported above, Royal Assent followed on 1 May 2012.

Having reviewed the background to the new Scottish tax powers, it is to the actual consequences of the 2012 Act for tax payers in Scotland that I now turn.

SO WHERE ARE WE NOW?

1. The Scottish rate of income tax

The 2012 Act empowers the Scottish Government to set a 'Scottish rate of income tax' which will replace the SVR. This will be administered by HMRC and charged on the non-savings income (as defined by Part 3 of the Scotland Act 2012) of those individuals defined as 'Scottish taxpayers'. It is expected to apply from April 2016. The rate paid by Scottish taxpayers will be calculated by reducing the basic, higher and additional rates of income tax levied by the UK Government by 10p in the pound, and adding a new Scottish rate to be set by the Scottish Government in its annual budget. The Scottish block grant will be adjusted to reflect this change in funding streams.

Although the Scottish Government will set only one rate (the Scottish rate of income tax), this will effectively give rise to three rates, namely: (1) the Scottish basic rate; (2) the Scottish higher rate; and (3) the Scottish additional rate. Together these three rates will be referred to as the 'Scottish main rates'.

To preserve the precedence of HMRC, the Scottish rate of income tax will remain subject to existing UK double taxation agreements.

In relation to savings and dividend income (as defined in sections 18 and 19 respectively of the Income Tax Act 2007 (ITA) and to which sections 12 and 13 of the ITA apply) of Scottish taxpayers, the intention is that these will still be taxed at the appropriate UK rate.

So who in all of this is a 'Scottish taxpayer'? The Scotland Act 2012 inserts new sections 80D–80F into the Scotland Act 1998 in order to define a Scottish taxpayer for the purposes of the Scottish rate of income tax. There are a number of aspects of an individual's life which must be examined to determine that individual's status. Amongst others:

1.1 For an individual to be a Scottish taxpayer it seems that they will have to be a UK resident for tax purposes – an individual who is not UK tax resident cannot be a Scottish taxpayer.

1.2 If the individual has one place of residence and this is in Scotland then they will be a Scottish taxpayer.

1.3 Individuals who have more than one place of residence in the UK will need to determine which of these has been their main place of residence for the longest period in a tax year. If this is in Scotland then they will be a Scottish taxpayer.

1.4 Individuals who cannot identify a main place of residence will be required to calculate the number of days they spend in Scotland and elsewhere in the UK. If they spend more days in Scotland, they will be a Scottish taxpayer.

An individual who satisfies the definition of a Scottish taxpayer will be a Scottish taxpayer for a whole tax year.

There are separate rules which will apply to, amongst others, MSPs, MPs representing a constituency in Scotland, and MEPs representing Scotland. These individuals will automatically be treated as Scottish taxpayers, irrespective of where their sole or main residence is located, or where they spend the most days within the UK.

Guidance will clearly be required, and is to be published prior to the introduction of the Scottish rate in order to help taxpayers in identifying their main place of residence for the purposes of the application of the new Scottish rate of income tax.

So much for the 'individual'. What then becomes of trusts, and the estates of deceased individuals? It seems that, generally, these will not be affected by the Scottish rate of income tax. Income arising to trusts will, specifically, not be chargeable to the Scottish rate, which will apply only to individuals. However, trust or estate income arising to or received by an individual Scottish beneficiary will be chargeable to the Scottish rate.

For an effective and digestible summary of what is in prospect I would refer the reader to HMRC's Technical Note *Clarifying the Scope of the Scottish Rate of Income Tax* which was published in May 2012.

2. Scottish tax on land transactions

The 2012 Act provides for the existing Stamp Duty Land Tax (SDLT) regime to be fully devolved to Holyrood. From April 2015, SDLT will cease to apply in Scotland. Instead, the Scottish Government will be able to levy its own tax in respect of land transactions, and a corresponding adjustment will be made to the Scottish block grant.

3. Scottish tax on disposals to landfill

The 2012 Act also provides for Landfill Tax to be fully devolved to Holyrood. Therefore, from April 2015, the UK tax will cease to apply in Scotland and the Scottish Government will be empowered to levy its own tax in respect of disposals to landfill. Again, a corresponding adjustment will be made to the Scottish block grant.

4. Borrowing powers of Scottish Ministers

In terms of the 2012 Act Scottish Ministers will be permitted to borrow for three purposes as from April 2015, namely:

4.1 For capital investment. Scottish Ministers will be able to borrow up to 10% of the Scottish Government's capital Departmental Expenditure Limit (DEL) budget each year within a statutory total borrowing limit of £2.2 billion. It is expected that loans will usually be for whichever period is the greater of ten years and the expected life of the asset.

4.2 To enable the Scottish Government to deal with deviations between forecast and actual revenues. In addition to operating a cash reserve, it is expected that Scottish Ministers will be able to borrow up to £200 million annually up to a total of £500 million. Loans will be for a maximum of four years.

4.3 To provide the 'Scottish Consolidated Fund' with the appropriate cash working balance to deal with temporary shortfalls between receipts and expenditure. A similar facility existed under the Scotland Act 1998.

5. Powers to devolve further existing taxes and create new devolved taxes.

A further consequence of the 2012 Act is that it will now be possible for further existing UK taxes to be devolved to Holyrood, but always subject to the agreement of both the Westminster and Holyrood governments. Furthermore, the Scottish Government will be able to introduce new Scotland-specific taxes in support of existing devolved responsibilities.

AND FINALLY...

Any article on the changes to be implemented by the 2012 Act which is limited to 2,500 words will only ever scrape at the surface of the reforms which are now in prospect in Scotland. I nonetheless hope that I have managed to give the reader a flavour of the background to the 2012 Act, and what is in store as a consequence of it.

At a personal level, the fact that this is clearly all about politics is a source of immense frustration. Whether the proposed changes will make my life as a prospective 'Scottish taxpayer' any better will only be revealed in the fullness of time. What is clear to me now is that significant additional costs must inevitably follow from implementation of the 2012 Act, no matter whether in the pursuit of devolution, or of independence. Presumably taxpayers, Scottish and otherwise, will be left to foot the bill.

And if Scotland does vote for independence on the 700th anniversary of the Battle of Bannockburn, what of the 2012 Act then?

In the meantime, and in the words of *The Telegraph's* Scottish Editor, Alan Cochrane, '...if implemented, Calman's recommendations will be another step along the road Mr Salmond wants us to take. And it confirms me in my belief: Beware of devolutionists bearing gifts.'

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BUILDINGS AT RISK IN SCOTLAND

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INTRODUCTION AND LEGISLATIVE BACKGROUND

This article explains the background to buildings at risk in Scotland and outlines the work of Historic Scotland in helping to deal with the issue. The main legislation relating to listed buildings and conservation areas in Scotland is:

- Historic Buildings and Ancient Monuments Act 1953
- Civic Amenities Act 1967
- Town and Country Planning (Scotland) Act 1997
- Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997
- Ancient Monuments and Archaeological Areas Act 1979
- The Planning etc. (Scotland) Act 2006
- Historic Environment (Amendment) (Scotland) Act 2011.

There are considerable powers available to local authorities in Scotland and, by default, to Scottish Ministers, to require owners to carry out works of repair to listed buildings. These can lead, if necessary, to compulsory purchase if it can be shown that the owner has failed to take adequate steps to effect repairs or preserve the building. Under section 49 Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 local authorities may carry out any emergency works which appear to them to be urgently necessary for the preservation of an unoccupied listed building in their area. Buildings at Risk are for the most part unoccupied, so where, we might wonder, is the difficulty? The objective of action under the legislation is to preserve the building as it exists, to prevent it from deteriorating and to do so in a cost-effective manner. The owner must be given a minimum of seven days' written notice (the Urgent Works Notice) of the intention to undertake the works and the notice must describe the proposed works. The notice is a statement by the local authority that it intends to execute the works and not a notice requiring that the owner undertake them. In addition, section 43 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 enables local authorities to serve a Repairs Notice on the owner of a listed building specifying those works which it considers reasonably necessary for the proper preservation of the building. If, after a period of not less than two months, it appears that reasonable steps are not being taken for its proper preservation, the local authority can begin compulsory purchase proceedings under section 42 of the Act. The local authority is thereby committed to potential expenditure. Further, if a planning authority considers that the amenity of any part of land in their district is adversely affected by the condition of neighbouring land, they may serve a notice (an amenity notice) under section 179 of the Town and Country Planning (Scotland) Act 1997 requiring steps to be taken to tidy up the site. The use of such a notice is not limited to land but can be applied to buildings and structures, although not to a scheduled ancient monument. If used early enough it can proactively help to prevent a building from falling into the 'downward spiral' and, in cases of advanced loss of amenity, it can be part of a wider range of sanctions that might be applied.

Although these powers exist, there has in recent years been fairly low use of them by local authorities, who have been generally reluctant to take on the potentially large financial burden of carrying out works for which they will struggle to be reimbursed or to take compulsory purchase to its conclusion. Where authorities have carried out works, fairly recent changes in the legislation have allowed the charge to run with the property and it is therefore open to councils to pursue this line. However, the cases where this can represent public financial return are very few indeed. 'Back-to-back' deals have been successfully employed in the past but these are unlikely to present more than a very limited solution. In most cases, local authorities will end up out-of-pocket. While we will, of course, continue to advise and support local authorities as appropriate in this area, we are now seeking wider measures to deal with existing cases but chiefly aimed at prevention.

DERELICT BUILDINGS OR ROMANTIC RUINS?

Most people would accept without question that Scotland's historic buildings are nationally important cultural assets. Equally, we understand that the burden of maintaining buildings, new or old, must be accepted if we are to make the most of them and protect them for future generations. The vast majority of our historic environment assets are well cared for by private and public owners but a small proportion of them are classified as 'at risk'. Although relatively few in number, these buildings have a disproportionately poor effect on our perceptions of the state of the heritage. An unused, neglected building is a demoralising sight, especially in an urban location or within a disadvantaged community. At a time of economic downturn, the situation is made worse by stalled projects. Historic Scotland has recently embarked on a new initiative to help reduce both the number of buildings currently at risk and, equally importantly, those in danger of falling into that category.

Before looking at the new measures we have put in place, we need to try to define the difficult issue of risk. Historic Scotland makes a broad distinction between 'scheduled monuments' which, ideally, should be consolidated as they are, and listed buildings, to be used in accordance with an ongoing programme of 'change management' which will seek to minimise and mitigate the effects of continuing adaptation.

WHAT IS A BUILDING AT RISK?

Our understanding of abandoned buildings is complex. The positive image of a picturesque ruin in the landscape is embedded in our culture and so the question of when a ruined building should preferably remain in that condition is difficult – and can be highly controversial, as the recent history of proposals around Castle Tioram shows. It is a matter of policy that some architectural monuments of national interest should be treated 'as found' and should therefore be conserved as far as possible in the condition that they have 'come down to us'. This is in order to preserve the cultural evidence they contain, which may be lost through reconstruction or restoration according to what is understood to be their previous form. Paradoxically, 'restoration', in the last 150 years or so of our history, has often been connected with loss of material culture.

Buildings highly valued for their status as ruins are normally 'scheduled' under the terms of the Ancient Monuments and Archaeological Areas Act (1979). Historic Scotland, acting on behalf of Scottish Ministers, has many such ruins in its care, such as Tantallon, Bothwell, Caerlaverock and Mingary Castles. The last of these is a 13th century castle at risk from being destabilised by the fracturing of the rock outcrop on which it sits. Historic Scotland is currently working closely with Mingary Castle Preservation & Restoration Trust on a scheme to stabilise both the rock outcrop and the castle so as to bring the castle back into use.

Historic Scotland seeks to consolidate these ruins in order to preserve their archaeological testimony and their place in the cultural landscape for public benefit. Outside of state care the situation is inevitably more complex. A ruined castle or a Shetland Haa House may have a certain beauty in the landscape, but without action to preserve them, either through consolidation or re-occupation, they may be lost. For this reason, Historic Scotland believes that there is a special category of ruin which is capable of restoration and re-occupation without significant consequent loss of cultural importance.

THE CASTLE CONSERVATION REGISTER

www.historic-scotland.gov.uk/index/heritage/scottishcastleinitiative/castleconservationregister.htm

Historic Scotland advises that re-occupation of ruined tower houses and castles included in the Castle Conservation Register offers an opportunity for sustainable conservation which is not available, for a variety of reasons, through 'treat as found' consolidation. The Register identifies mostly scheduled, ruined castles and tower houses which we believe could be successfully restored and reused without taking away significantly from their special importance. The register is not definitive: there will certainly be other castles or tower houses that might be candidates for restoration, but the scheme seeks to draw attention to castles and tower houses where we believe restoration is acceptable in principle and where we hope that suitable schemes will come forward. The register offers guidance on the factors that Historic Scotland takes into account when responding to restoration proposals. The majority of the castles on the Register are not for sale so it is up to any interested party to make their own enquiries. The Register represents Historic Scotland's view only on whether a castle or tower house is an appropriate candidate for restoration. In terms of consents, planning permission is clearly required for conversion, along with scheduled monument consent or listed building consent depending on the designation. If both scheduled and listed, scheduled monument consent will take precedence and must be obtained directly from Scottish Ministers.

BUILDINGS AT RISK IN COMMUNITIES

Derelict buildings affect community morale and inward investment. It is in everyone's interest to put potentially re-usable empty buildings at the top of the agenda. In line with the Scottish Government's recently-announced Town Centre Initiative, we are therefore advising that, when seeking or commissioning new premises, we will all investigate listed buildings first. Throughout government and the private sector, before we consider procuring new build, we need to look at what is already available on or off the market. There are many good examples, but a recent success with an A-listed building in Paisley is particularly welcome. This redundant building at risk, a superbly-detailed and much-loved local landmark, the Russell Institute, is to be converted for office use by a major public employment agency.

We have become used to seeing industrial buildings and hospitals converted to residential use or to business parks and thereby remaining part of the landscape of our heritage. We want to capitalise on the

Mingary Castle
© Mingary Castle Preservation & Restoration Trust

The Russell Institute
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undoubted skills we have in this area to target the buildings at risk in our communities. We will do this by creating the conditions that favour re-use over new build – by creating a level playing field. We are already seeing this happen through Scottish Government policy measures. New build is almost always 'cheaper' in purely financial terms than conversion. But when we add the expense of securing an abandoned site, the cost to the environment of wasting an existing resource, and the blighting of communities through dereliction, the balance is tipped in favour of existing buildings.

BUILDINGS AT RISK REGISTER

Until recently, the main effort in dealing with the issue was the Buildings at Risk (BAR) Register for Scotland, which was set up in 1990. Historic Scotland targeted the A-listed buildings on the Register in order to deal with the most important examples of our heritage and to demonstrate that actions taken in dealing with them can be rolled out across the board. The Scottish Government's National Performance Framework commits Historic Scotland to facilitating an ongoing reduction in the percentage of A-listed buildings at risk. In 2011, 8.2% of A-listed buildings were at risk, compared to 8.7% in 2009, and we want to see this steady improvement continue. However, we are also reviewing the strategy and the Key Performance Indicator (KPI) to make sure it is still delivering an accurate measure of success. The Register is currently run on Historic Scotland's behalf by the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS) and when this body merges with Historic Scotland in 2014 the merged body will continue to perform this function.

THE BUILDINGS AT RISK TOOLKIT

In order to assist local authorities in dealing with buildings at risk, Historic Scotland has commissioned a 'Buildings at Risk Toolkit' as part of an initiative managed by The Architectural Heritage Fund. The initiative was set up in 2011 with funding from Historic Scotland to deliver a special three-year project on historic buildings at risk. Led by Dr Stuart Eydmann, the project is looking at increasing

the number and scope of ways to tackle Scotland's most endangered historic buildings. Dr Eydmann has created a problem-solving 'toolkit' which is located on the BAR Register for Scotland's website and he has worked with Historic Scotland staff to identify likely candidates for rescue.

The toolkit offers advice on ways to tackle Scotland's most important endangered historic buildings. It is one of a number of ways in which Historic Scotland, along with its partners, hopes to facilitate such a reduction. The toolkit comprises a suite of texts on a range of matters relating to buildings at risk, each of which can be downloaded as a PDF document. It briefly considers the different roles and responsibilities of the key players associated with the proper conservation and management of buildings at risk and then goes on to outline the legislative context in which they operate.

The information held in the BAR Register is not exhaustive nor is its coverage comprehensive. This guides local authorities in ensuring that they maintain good information to inform their decision-making and to enable a prioritised, strategic approach. The data collected and maintained by the BAR Register for Scotland can be used by local authorities as a starting point in developing local strategies in response to the buildings at risk challenge. Local authorities have adopted a variety of methods in devising their strategies and are also considering the applicability of such an approach to other public bodies and private estates.

With the support of Historic Scotland, local authorities and others are moving towards asset management planning frameworks to address portfolios containing significant numbers of buildings in poor condition, not fit for purpose, 'surplus to requirements' or deemed unaffordable. With advice from the Scottish Futures Trust, and supported by changes in arrangements for local authority investing and borrowing and directed by Audit Scotland, new council-based Property Asset Management Plans have been developed. These look at the implications for heritage assets and for the buildings at risk challenge that need to be better understood and addressed in the process.

A local authority can adopt policy, normally through a planning or development brief, relating to an individual site where it is felt that clear guidance on how it might be developed would be of benefit to the council, owners and the community. This will represent a move towards creating development briefs for buildings at risk in partnership with the key agencies in advance of the site coming on the market. This will introduce good practice in the marketing of buildings at risk for others to address, including the importance of effective advertising, targeting and the use of innovative proactive techniques such as developer days.

DANGEROUS BUILDINGS

Buildings at Risk can quite rapidly become dangerous. Councils are responsible for enforcement duties set out in the Building (Scotland) Act 2003 to ensure that buildings comply with building regulations and associated technical standards and to make sure that public safety is maintained in relation to defective and dangerous buildings. The Act allows local authorities to take enforcement action where work is carried out without a building warrant or is contrary to building warrant requirements, and to intervene where a building causes a public danger. These wide-ranging powers could be used effectively in combination with those available under the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 in a measured approach to addressing cases of buildings at risk. Once a building has reached such a poor condition, it becomes clear that the strategies in place have not been effective and we need to learn from these examples, looking back at the life of the developing risk.

FUTURE STRATEGY

Our future strategy has two main themes: target deliverable projects and policies around existing buildings at risk; and develop effective estate management strategies in partnership with larger landholders. Historic Scotland has worked successfully with Network Rail, the Scottish Court Service, the NHS, the Forestry Commission, and the Universities of Edinburgh and Glasgow. We have carried out designation reviews with each of these partners and advised on estate management issues related to continued use and flexible adaptation of listed buildings within their public sector estates. We are excited by the prospect of working with a major private sector landowner with whom we are currently in discussion about offering similar services. We are also keen to look at the potential for increasing the discretion available on listed building consent issues for major landholders where they have in-house conservation capacity. Many such landholders employ conservation and planning staff who can make initial decisions on whether consent will be required in cases where alterations or interventions are proposed. Crucially, in the coming months we will be working closely with local authorities and other larger landholders with advice from the Scottish Futures Trust to deal with the issues that can lead to buildings becoming at risk. The key to good management is planning and early action. We will continue to encourage and to support public authorities to plan for continued use, re-use or conversion of their historic buildings – our precious heritage.

Ranald MacInnes
Historic Scotland

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SUCCESSION IN SCOTLAND

INTRODUCTION

The Scottish law governing the distribution of an individual's personal estate has remained largely unchanged over the last fifty years. The Succession (Scotland) Act 1964 (SSA 1964) sets down default rules for the distribution of an individual's estate if they were to die with no will in place. Common law also provides a degree of protection from disinheritance under the deceased's will for the deceased's surviving spouse and children.

HOW THE SUCCESSION RULES WILL APPLY IN PRACTICE TO AN INDIVIDUAL'S ESTATE WILL DEPEND UPON A NUMBER OF FACTORS, INCLUDING:

- the deceased's domicile
- the moveable assets (i.e. chattels, investments, etc.) and heritable assets (i.e. land and buildings) in the deceased's estate
- the deceased's marital status and family circumstances
- the existence of a valid will.

References in this article to spouses also include registered civil partners under the Civil Partnership Act 2004.

DOMICILE

The key factor when considering the distribution of an individual's estate is to establish their country of domicile. Scotland adopts the scission principle when determining the application of private international law to succession. Accordingly, the succession rules to be applied to the distribution of an individual's worldwide moveable estate will be determined by the deceased's domicile and where heritable property is involved by the *lex situs*. A painting hanging on the wall of a Scottish domiciled individual's holiday home in Italy would, for example, be subject to the Scottish rules of succession.

Everyone acquires a domicile of origin when they are born. The domicile of origin will generally follow the domicile of the child's parents if they are both domiciled in the same country and the child has a home with at least one of them (section 22 Family Law (Scotland) Act 2006). Under Scottish law it is possible to shake off a domicile of origin and acquire a domicile of choice from the age of 16 (Age of Legal Capacity (Scotland) Act 1991).

Domicile is a question of fact and circumstances with each case having to be determined on its own merits. It is not simply a case of being able to establish a Scottish domicile by making a declaration in a will.

INTESTATE SUCCESSION

It is estimated that around two-thirds of Scots currently do not have a will in place. The proportion will of course vary depending upon various factors including age, relationship status and wealth. Many Scots without a will wrongly assume that their whole estate will automatically pass to their surviving spouse, whom failing their children. The statutory rules set down in SSA 1964 will, however, determine who inherits. Rights to succeed are dealt with in the following order:

1. Prior rights

On an intestate succession a surviving spouse is given 'prior rights' to the following assets in the deceased's estate once debts have been taken into account:

- the deceased's interest in the family home up to a value of £473,000
- furniture and plenishings up to a value of £29,000
- a cash provision of £50,000 where there are surviving children, rising to £89,000 if there are no children.

The value limit applied to each asset category was last increased by the Scottish parliament in February 2012.

2. Legal rights

The deceased's surviving spouse and children (irrespective of ages) are entitled to 'legal rights' from the remainder of the deceased's estate once the prior rights of any surviving spouse have been satisfied.

A surviving spouse is entitled (in addition to prior rights) to one-third of the net moveable estate where there are surviving children with the proportion increasing to one-half where there are no children. Children are also entitled to claim the same proportions in the deceased's net moveable estate with the level increasing again from one-third to one-half if there is no surviving spouse.

Legitimate, illegitimate and formally adopted children are all given the same rights to the deceased's estate. A formally adopted child may, however, only claim their legal rights over their adopted parents', not their natural parents', estates.

Legal rights are in the nature of a debt on the estate to be satisfied from the deceased's moveable estate only and should be taken into account when calculating the estate's inheritance tax position. The claimant cannot demand the transfer of specific assets or part of the estate to satisfy their legal rights claim. Trust property in which the deceased had an interest cannot, of course, be included in the legal rights calculation unless it is held on bare trusts.

3. Free estate

Any remaining assets in the deceased's estate after prior rights and legal rights have been satisfied will be divided among the deceased's relatives according to a statutory hierarchical system set out in SSA 1964. In general, the whole of the remaining estate will pass equally to any surviving children. If there are no surviving children then the deceased's surviving parents and siblings will have the right to inherit the remainder of the estate and so on, until ultimately the estate will pass to the Crown if there are no surviving relatives. The surviving spouse features somewhat lowly in the ranking, which can come as an unwelcome surprise to some families.

4. England and Wales

The Administration of Estates Act 1925 (as amended) sets down the rules to be adopted when dealing with an intestate estate in England and Wales.

In contrast to Scots law, where the deceased leaves a surviving spouse and children then the surviving spouse will inherit all the chattels, a statutory legacy of £250,000 plus a life interest in half of the residue. The children inherit the remaining half of the residue absolutely and will ultimately be entitled to the assets forming the surviving spouse's life interest.

Where there are no surviving children then the surviving spouse will inherit all the chattels, a statutory legacy of £450,000 and half of the remaining residue. The other half of the remaining residue will pass to the deceased's parents, whom failing siblings and so on.

A hierarchical system, similar to that found under the SSA 1964 for the free estate, is adopted where there is no surviving spouse.

TESTATE SUCCESSION

A Scottish domiciled individual does not enjoy absolute testamentary freedom and Scots law provides protection to a surviving spouse and children. Where an individual's estate is subject to the Scottish rules of succession the surviving spouse and children have an automatic entitlement to legal rights (see above) which, if exercised, will override the terms of the will. The surviving spouse and children must, however, decide whether to benefit under the terms of the will or make a legal rights claim as it is not possible for them to benefit twice. It is worth noting that in Scotland a will is not revoked by a subsequent marriage and, equally, separation and divorce do not revoke a will. In the case of Scottish couples, it is essential that wills are reviewed on these changes of circumstances. This is in contrast to England and Wales where a will is revoked by a subsequent marriage, unless the will was made in contemplation of the marriage, and where on divorce the former spouse is treated as having predeceased and is not able to benefit unless it was clearly intended that he should. The executors will contact all those who have legal rights to the estate advising them of their entitlement and asking them to be claimed or formally discharged. If they do nothing, legal rights become unenforceable under the rules of negative prescription after twenty years. This is in contrast to the rules of succession for England and Wales where there is no automatic entitlement to benefit under the deceased's estate where they have left a will. It is instead open to certain family members or other dependents of the deceased to make a claim through the courts under the Inheritance (Provision for Family and Dependents) Act 1975 to benefit from the estate on both intestate and testate succession. The court will look at various factors including the applicant's financial requirements and resources, the position of the beneficiaries under the will, and the size and nature of the deceased's estate. The court can take into account the whole of the estate when determining the level of any award, unlike in Scotland where legal rights are limited to moveable assets only.

COHABITANTS

Where a Scottish domiciled cohabitant dies the surviving cohabitant currently has no automatic entitlement to any part of the estate. This is a major difference to the position of married couples and civil partners where prior and legal rights offer a degree of protection to the surviving spouse.

On an intestate succession, however, the cohabitant may make an application to the Sheriff court within six months of their partner's death for the grant of financial provision (section 29 Family Law (Scotland) Act 2006).

When determining the level of any award to a cohabitant on intestacy the court will take into account various factors including the length of period of living together, the nature of their relationship during that period and the nature and extent of any subsisting financial arrangements. In one of the few reported cases in Scotland, the Sheriff valued the applicant's claim as nil as a result of the brief period of cohabitation (two and a half years) and the pension and death benefits the applicant received following their partner's death *(Savage v Purches (2009) Fam LR 6)*. Any award by the court cannot be greater than the amount the

applicant would have received if they had been the deceased's spouse.

The Scottish position therefore compares unfavourably with that in England and Wales where a cohabitant is able to make a claim whether or not their cohabiting partner left a will.

HEIRLOOMS

Readers of this *Bulletin* may be interested to know that Scots law makes no separate provision for succession to heirlooms, subject to one minor exception. In relation to the prior rights of a surviving spouse, an heirloom, defined as any article which has associations with the intestate's family of such nature and extent that it ought to pass to some member of that family other than the surviving spouse of the intestate, is not included within furniture and plenishings that can satisfy a prior rights claim (section 8 SSA 1964).

SUCCESSION AND WILL PLANNING

The system of legal rights places restrictions on a Scottish testator's freedom to direct the destination of his estate.

As legal rights in Scotland currently only apply to the deceased's moveable assets, it is possible to pass land and buildings to a chosen beneficiary by will. In the extreme case a deceased may have owned little other than heritable property, leaving less to be subject to legal rights. Individuals should be mindful of unintentionally converting heritable assets into moveable assets that would potentially be caught by a legal rights claim, for example transferring heritable property into a partnership unless it is stated that the property is to remain heritable for the purposes of succession.

Important chattels can be directed to selected beneficiaries by will but, as these comprise moveable property, in the worse case scenario a sale may be required to satisfy a legal rights claim. Lifetime gifting of moveable assets to the intended beneficiaries or trustees would defeat a future legal rights claim. The tax implications of any lifetime gift would need to be taken into account.

In certain circumstances it may be appropriate to ask family members to consider formally discharging their future entitlement to legal rights, having taken suitable independent legal advice.

FUTURE REFORM

The Scottish Law Commission (SLC) in its *Report on Succession* (No.215 (2009)) proposed sweeping reforms to the Scottish law of succession in order to simplify the existing rules and to reflect the substantial changes that have taken place in society and family structures in the last half century. The SLC was looking to make succession rules more equitable in reflecting the needs, resources, personal circumstances, conduct and claims of individual family members.

The following points were put forward by the SLC as proposals or for further consultation:

- the deceased's moveable and heritable property would both be taken into account when establishing the surviving spouse and children's entitlements
- the surviving spouse would inherit the whole of the net estate if the deceased died intestate leaving no issue, with a similar provision for children who are not survived by any parents
- where there are both surviving spouse and issue on an intestate succession then the surviving spouse would receive a threshold sum with any remaining balance being divided evenly between the surviving spouse and issue, the threshold sum of £300,000 being subject to annual review
- where a surviving spouse is disinherited under a will the SLC report recommends that they should be entitled to a 'legal share' amounting to 25% of what they would have inherited if the deceased had died intestate
- where children are disinherited under a will the report asks the Scottish parliament to consider either (i) the children being entitled to a 25% legal share of what they would have received on intestacy; or (ii) dependent children being entitled to a capital sum based on what is required to provide them with reasonable financial support
- protection for cohabitants should be extended to both testate and intestate succession with the court being given the discretion to award the cohabitant a fixed percentage of the estate.

The Scottish parliament has yet to implement any of the SLC report's recommendations.

CONCLUSION

Where someone is either domiciled in Scotland or has heritable property situated in Scotland it is important that they have an understanding of the potential impact of the Scottish rules of succession on the distribution of their estate. This could avoid a situation where, in the words of Robert Burns, 'the best-laid schemes o' mice an' men gang aft agley'.

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Peter is International Head of Christie's Victorian and British Impressionist Art department. Under his leadership the department has led the market for Pre-Raphaelite Art, establishing numerous auction records.

VICTORIAN PICTURES: THREE CASE STUDIES

Victorian pictures have been making headlines recently, three in particular. `Victorians rising from the ruins' declared *The Telegraph* after Christie's July sale in which Burne-Jones's masterpiece *Love Among the Ruins* fetched £14.8 million. Certainly the past three seasons have witnessed a remarkable revival in the fortunes of this sector of the market, as buyers from numerous nationalities have competed for the best works by Pre-Raphaelite masters and exponents of the British Classical tradition, smashing previous auction records.

SIR JOHN EVERETT MILLAIS, P.R.A. (1829–1896)

Portrait of John Ruskin (1819–1900)

Of most pertinent interest to this readership, however, is the negotiated sale of Sir John Everett Millais's *Portrait of John Ruskin* to the Ashmolean Museum in Oxford. The sale, negotiated by Christie's Heritage and Taxation Advisory Service and the Victorian Pictures department, enabled the vendor's family to satisfy £7 million of tax through the Acceptance in Lieu scheme. This has set a new benchmark for a negotiated sale in this field.

The picture can be regarded as the ultimate Pre-Raphaelite portrait. The writer and critic John Ruskin was, amongst other enthusiasms, the great champion and apologist of Turner, who greatly impressed him in the keenness of his response to the natural world. After Turner's death, Ruskin perceived Millais, foremost amongst the Pre-Raphaelites, as Turner's heir, even though he painted in a radically different style and technique. Whilst Turner sought to capture meteorological phenomena, Millais, a natural virtuoso, imbibed Ruskin's dictum that 'the first vital principle of drawing is that man is intended to observe with his eyes and mind': he sought to capture his wonder at the world around him on canvas. Ruskin chose to adopt Millais as his protégé, and hoped that he could mould him to exemplify his artistic theories in paint. Ruskin hoped that all British artists would one day study so intently, and paint without imitation, and famously 'Go to Nature in all singleness of heart, and walk with her laboriously and trustingly, having no other thought but how best to penetrate her meaning, rejecting nothing, selecting nothing, and scorning nothing'. Millais's portrait of Ruskin was carefully composed by artist and sitter as a manifesto to demonstrate this creed.

The site for the portrait was chosen carefully. In contrast to 18th century convention where the landscape was touched in as an afterthought, sitter and backdrop were given equal prominence. Indeed, Ruskin always thought of the picture more as a landscape, predicting that 'it would make a revolution in landscape painting'. On an outcrop of rock outside Brig o'Turk in the Trossachs, at the foot of Glenfinlas, ran a burn. The rock was composed of gneiss, a form of petrified volcanic lava, now covered in lichen. Ruskin's interests, developed in a pre-Darwinian age, encompassed geology, botany, and meteorology as well as poetry and theology. He passionately believed that intense observation of nature would reveal higher truths: that 'to observe nature was to follow the finger of God'.

In its petrified fluidity – an interesting pictorial contrast to the rushing torrent that Millais laboured over, the bubbles causing him particular difficulty – Ruskin thought he could perceive how the present physicality of the world came into being. He drew a study of the rock himself in order to demonstrate the arrested violence of the natural forces that shaped the landscape. Writing to his father, who commissioned the work, in July 1853 Ruskin wrote 'I think you will be proud of the picture, and we will now have the two most wonderful torrents in the world – Turner's *St Gothard*, and Millais's *Glenfinlas*'. A decade before the Impressionists, Millais painted the landscape background *en plein air*, famously covering the canvas at a painstakingly slow pace – approximately one square inch per day. He was plagued by midges and execrable weather, but spent from the end of July until the end of October 1853 slowly constructing

what he knew to be his masterpiece, a geological counterpoint to the botanical *Ophelia* of 1851 (now in Tate Britain). During this time, a human drama unfolded. Ruskin was joined on his Scottish holiday by his wife Effie. While Ruskin read and wrote in the cramped bothy in which they all stayed, Millais and Effie were left to walk and sketch alone. They fell in love. Millais was horrified to discover that Effie's marriage was unconsummated, and the strictures under which she lived. Warmed by Millais's concern and friendship, Effie began to perceive the unnaturalness of her situation, and to formulate a plan for escape.

Back in London during the winter, Millais, despite the revulsion and contempt in which he now held his former patron, finished painting the figure: 'the most hateful task I have ever had to perform'. He even returned to Glenfinlas in May 1854 to put the final touches to the portrait. The picture was finished on 28th June, but by 15th July the Ruskins' marriage had been annulled. Millais and Effie subsequently married the following year, amidst much gossip and scandal. Ruskin wrote to Millais: 'I need not, I hope, tell you how grateful I am to you for finishing this picture as you have'. But Millais replied `I can scarcely see how you can conceive it possible that I can desire to continue on terms of intimacy with you'. His break with his former mentor was complete. This had profound consequences for his art, which subsequently lost much of its Pre-Raphaelite intensity of handling, and for the Pre-Raphaelite brotherhood of Holman Hunt and Rossetti, who without Millais subsequently embarked on different paths.

That the painting was completed by the artist and treasured by the sitter – both of whom, under the circumstances, could well have destroyed the work (as Ruskin's father indeed threated to) – is testimony to their joint acknowledgement of its importance. Both protagonists sublimated their emotions to produce this extraordinary document: Millais to paint it, and Ruskin, despite everything, to champion it. For them both, art transcended life in this picture.

The rare fusion of artist, sitter and subject matter makes this portrait the quintessence of Pre-Raphaelitism, and hence of incomparable art historical significance. It can be regarded as the summation of all the Brotherhood set out to achieve in its close study of nature, guided by Ruskinian principles. It was therefore highly appropriate that a wish, but not a condition, should have been made to the Acceptance in Lieu Panel that the picture should be bequeathed to the Ashmolean Museum, whose holding of Pre-Raphaelite pictures is outstanding. The late owner of the picture, who acquired it at auction at Christie's in 1964, outbidding Agnew's who were acting for the Tate, made arrangements for it to be lent to the Ashmolean during her lifetime. From there it was lent to the recent *Pre-Raphaelites: Avant Garde* exhibition at the Tate. Deemed too fragile to travel on to the exhibition's other venues in Washington, Moscow and Tokyo, it was only seen in London.

The picture had been bequeathed by Ruskin to his friend and physician Sir Henry Acland. Acland had a close association with Oxford, and encouraged both the study of art and medicine there. He intended the picture to be hung in the University Galleries, which thereafter became the Ashmolean, so it is serendipitous and justly fitting that after being sold by his descendants in 1964 it is now finally hanging where he wished.

Those interested in the story of Effie, Ruskin and Millais will soon be rewarded with a film, written by Emma Thompson and starring her husband, Greg Wise, as the writer and critic. There is also a fascinating biography of Effie recently published by Suzanne Fagence Cooper. With the Pre-Raphaelite exhibition, the most comprehensive since 1984, the book, and the film, a whole new generation is being introduced to the movement's chief protagonists.

Why is Pre-Raphaelitism suddenly so resonant? The mid-19th century was an age of all-consuming industrialisation. Ruskin railed at the 'dense manufacturing mist' that hung like a pall over much of the country, and took solace in his immersion in the natural world. Could it be that the current generation, seeing nature once again under threat, has come to appreciate what the Pre-Raphaelites were trying to achieve?

WILLIAM JAMES WEBBE (FL. 1853–1878)

The White Owl

In our December sale last year we witnessed a remarkable piece of theatre. Retrieved from the back of an attic cupboard, we offered *The White Owl* by the little-known William Webbe. Although Webbe worked in seclusion on the Isle of Wight he was aware of the ground-breaking developments made by his Pre-Raphaelite contemporaries, particularly Ruskin's most ardent devotee, Holman Hunt. Every feather of the owl is beautifully described, and yet the picture is not a mere study: the owl wears an anthropomorphic, slightly knowing expression which is very beguiling. Estimated at £50,000–70,000, the picture was previewed during the Old Master Pictures sale, as well as prior to the Victorian auction. The interest it generated was phenomenal. It seems that dealers and collectors of Old Master pictures are finding it hard to source exceptional material, and this picture with its timeless appeal, resonant of the German Nazarene school, and reminiscent of Dürer, struck a chord. Bidding came from numerous nationalities, and finally settled at £500,000, ten times the estimate, leaving our vendor weeping in the room, her fortunes transformed. 'Bit of a hoot!' Lord Lloyd Webber tweeted after the sale, adding 'Sorry I wasn't there'.

SIR EDWARD COLEY BURNE-JONES, BT., A.R.A., R.W.S. (1833–1898)

Love among the Ruins

In a year that has seen auction records broken by Christie's for several Victorian artists, including Millais, Rossetti, and Leighton, the most remarkable price is that achieved for Burne-Jones's *Love among the Ruins*. Estimated at £3–5 million, the highest estimate ever placed on a work of the period, it toured to New York, Hong Kong and Moscow, where it met with unprecedented acclaim in each location. It was the quintessential Burne-Jones, 'very me of me'

as the artist wrote. In addition to its mesmerising beauty it carried a universal message: when all else in life fails – when the metaphorical city around us crumbles – love alone endures. Picasso was so struck by the picture's use of blue that he determined to meet the artist, an ambition sadly thwarted. But much of Burne-Jones's ineffable spirit, with its undertow of melancholy, lives on in Picasso's early blue period work. And in addition to looking backwards to the Italian Old Masters – Botticelli and Mantegna foremost amongst them in their use of briar roses – there are glimpses in the picture of some of the paths 20th century art might pursue. During the pre-sale viewing, several observers commented on the dreamlike atmosphere, and the unsettling geometry of the deserted buildings seen through the arch to left: a foretaste of de Chirico and Escher. The picture was celebrated as the finest of the season and once again drew several bidders, all of different nationalities. Bidding quickly soared past the estimate, and carried on until the hammer fell at £13.2 million (£14,845,875 with premium). Three auction records were set: for a work by the artist, for any Pre-Raphaelite picture, and for a British work on paper. Many bidders were new to the category, proving how the finest works of the Victorian period are now being appreciated and competed for on a global stage.

Peter Brown
Christie's Victorian and British Impressionist Art Department

WILLIAM JAMES WEBBE (FL. 1853–1878)
The White Owl
'Alone and warming his five wits,
The white owl in the belfry sits'
oil on board
17 3/4 x 10 3/8 in. (45 x 26.3 cm.)
Sold for £589,250

SIR EDWARD COLEY BURNE-JONES, BT., A.R.A., R.W.S. (1833–1898)
Love among the Ruins
watercolour, bodycolour and gum arabic on paper
38 x 60 in. (96.5 x 152.4 cm.)
Sold for £14,845,875

Andy Grainger
Christie's Heritage and Taxation Advisory Service
Andy joined Christie's as an Associate Director in October 2012, having previously worked in the Heritage Team at HMRC since 2001. Andy graduated as an historian and conducted a parallel career in the Territorial Army during the Cold War whilst he worked at HMRC.

FROM BEDKNOBS AND BROOMSTICKS TO FINE ARTS AND FURNISHINGS: DEVELOPMENTS IN CONDITIONAL EXEMPTION CLAIMS FOR HISTORICALLY ASSOCIATED OBJECTS

PART TWO

In this article I continue my examination of claims for conditional exemption (CE) in respect of historically associated objects (HAOs). Part One covered:

- the background to the legislation
- the outline requirements for a claim
- the role and strategy of English Heritage (EH) especially with regard to Collections Management Plans (CMPs)
- the inspection regime for HAOs.

In Part Two, I now look at:

- the criteria for historical association
- public access and publicity compared to that for pre-eminent chattels
- tax charges and associated property – whether the sale or disposal of a single item in an HAO collection may bring about the fall of the exemption on the entirety
- a summary of the regimes for pre-eminent chattels and HAOs.

In Part One I deferred an explanation of the criteria for historical association on the grounds that they were subject to discussion with HMRC and stakeholders. A meeting was duly held and, following an animated discussion, revised guidance was issued to stakeholders in August (see Historical Association below).

THE BUILDING

As I mentioned in Part One the key point to appreciate about a claim under the historical association criteria is that the objects in question (and they will normally form a collection of several dozen or even hundreds of items) must be historically associated with a building of 'outstanding historic or architectural interest' (section 31(1)(e) of the Inheritance Tax Act 1984).

'Outstanding' is not defined in the legislation but HMRC's guidance *Capital Taxation and the National Heritage 2011 (CTNH)* indicates that if a particular building is listed in England and Wales as Grade I or II*, or is a Scheduled Monument, or Grade A in Northern Ireland and Scotland, then this offers a *prima facie* indication that it meets the criteria, though not a guarantee. By the same token, therefore, it is possible that a building listed Grade II or B might also qualify, but at the time of writing only 8% of listed buildings were graded I or II* with the remaining 92% at Grade II (www.english-heritage.org.uk/caring/listing/listed-buildings/). On this basis one can appreciate the distinction between an 'outstanding' building and an 'ordinary' listed building.

The owner of a Grade II building, who was considering claiming under the criteria for historical association, might well be invited to seek a re-listing in advance. If this was unsuccessful he would need to be prepared to argue a strong case that his building was of 'outstanding historic or architectural interest'.

THE OBJECTS AND HISTORICAL ASSOCIATION

The relevant legislation is found in section 31(1)(e) IHTA 1984: 'any object which in the opinion of the Treasury is historically associated with such a building as is mentioned in paragraph (c) above' [i.e. a building of 'outstanding historic or architectural interest'].

CTNH offers the following guidance as to how 'historical association' is interpreted at para 6.5, pages 56–7 on objects claimed under section 31(1)(e):

- The fact that an object belongs to the same historical period as the building is not in itself sufficient. It must have a close association with a particular building and make a significant contribution, whether individually or as part of a collection or a scheme of furnishing, to the appreciation of that building or its history.

- The object need not necessarily be of UK origin. Neither would it be expected that every item should be contemporary with the building as changes will have taken place which reflect the individual taste of different owners.
- If an object has been in or associated with a building for less than 50 years then, it is unlikely to qualify as a HAO; but this is very much a rule of thumb which should yield to specific judgement. And it certainly should not be inferred that an object which had been on the premises for 50 years would on those grounds alone qualify for CE.
- It is difficult to be prescriptive in this connexion but an example of a less-than-fifty years object might be a drawing relating to the development of the building concerned.
- We take advice in relation to such objects as for the outstanding building itself. In any case where the subject of a claim for CE is or includes an archive we also ask The National Archives (TNA) for comment.

It should be noted that apart from seeking advice from TNA regarding archives, HMRC takes advice from EH in England and the equivalent bodies in the other home country advisory agencies concerning all other objects.

Following the consultation in April this year HMRC has amplified its guidance and incorporated it at Appendix 15 of *CTNH*. In the revised guidance HMRC affirms that the definition outlined above in *CTNH* of the word 'historic' is considered still to be valid. Further, *CTNH* now states that 'the purpose of the conditional exemption (i.e. for historical association) is to preserve the historic entity of building and contents'. It can be helpful to bear this in mind when we are embroiled in large and complex claims but we should also be aware of the implications for tax purposes – see **Tax Charges** below.

To qualify under section 31(1)(e) an object must satisfy two criteria. It must:

a) have an historical link with the building in question, and

b) make a significant contribution, either individually or as a group, to the understanding of the building or its history.

The history of the building is bound up with that of its owners and occupants and HMRC acknowledges that objects connected with previous owners and occupants may also qualify.

THE HISTORICAL LINK

CTNH refers to a period of fifty years as the indicative period with which an object needs to have been associated with a building in order to qualify under this heading. The updated guidance amplifies the criteria outlined above. It is important that the owner can show evidence of the association with the specific building over that time, though in my experience both HMRC and EH are sensitive to the difficulties involved. Not every owner can produce contemporary receipts for every piece of furniture or dinner service. Evidence from older members of the family or others who lived or worked at the house can often be valuable, not just to the current owners in building up an historical record, but also to EH in assessing the claim.

One sometimes hears reference to 'the fifty year rule' – even occasionally from officials (!) but as stated in *CTNH*, it is a rule of thumb. For example, an object which had been at the building for a hundred years but which had been stored in the attic or a cellar for most of that time might not qualify since, by definition, it is unlikely to have made a contribution to the history of the building. On the other hand, a collection of architectural drawings or watercolours of the interiors which the owner had acquired twenty years before might qualify, because although it had not been located at the building for fifty years it is historically associated with the building as well as being of direct relevance to an understanding of its history.

THE CONTRIBUTION

As indicated above, the object must be associated with a specific building in order to be considered. Objects and collections that have been made for or assembled at the building and have been located there for a long period of time will contribute to the character of the building. If removed then that character or atmosphere may be reduced or even lost entirely. At this stage it may be helpful to remind ourselves of the statement in the updated guidance: 'the purpose of the conditional exemption is to preserve the historic entity of building and contents'.

Amplifying the guidance at paragraph 6.5 of *CTNH*, HMRC explains that the following categories of objects are likely to qualify:

- Objects with a direct relevance to the appreciation of the building, such as original architect's drawings or models, pictures of the interiors, topographical views or landscape paintings of the building in its setting, historic photographs or records of construction and repair.
- Objects with a direct relevance to the appreciation of the history of the house in a wider sense, as a place to live and work, or a place where significant events took place. Portraits of previous owners and occupants and archival material relating to their lives in the building might fall into this category where there is a demonstrably historical association with the building.
- While objects which are of recent manufacture as well as having been present for fewer than fifty years will be unlikely to qualify, exceptions might be objects such as paintings or drawings of the building which stand as a record of its appearance during the last fifty years.
- Objects with a direct relevance to the appreciation of the history of the building in a wider sense, as a place to live and work, or a place where significant events took place. Archival material relating to a major event which took place at the building may qualify.

DISCONTINUOUS ASSOCIATION

Objects may have an intermittent association with the building in question. They might belong to a family which has owned (or owns) a number of houses and they have moved

between them. Objects may have been lost or found, sold or bought back. None of these factors will necessarily disqualify an object but it will be necessary to exercise care in marshalling evidence and arguments for historical association and the contribution to the building in question.

PUBLIC ACCESS

Since Finance Act 1998 there has been a statutory requirement to provide a period of open public access and to publicise it. Typically HMRC will require that this be for 28 days, or 25 in Scotland and Northern Ireland, though for very large properties up to 100 days or more may be required.

As HAOs only qualify because they are associated with a building, access must be provided in the building itself, though access offered in a neighbouring or nearby building such as a converted stable block may be permissible.

We have already noted that ownership of building and HAOs may be different so that access to the HAOs might not necessarily follow that of the building. For example, a property owned by the National Trust might be open for 180 days but the undertakings relating to the owner's collection of HAOs which furnish it might require only 28 days access. In practice the HAOs might well be on display for all 180 days but owners should be aware of the HMRC requirements since they may well be relevant for collections that are too large to be displayed all at once. In such cases, objects might be rotated or displayed by representative sample to meet the access requirements in the undertakings.

TAX CHARGES

Tax becomes chargeable on HAOs in the same way that it might for pre-eminent chattels, i.e. on disposal or a breach of undertakings. In the case of a sale, tax is chargeable on the net sale proceeds unless the sale is to a Schedule 3 body when douceur arrangements may apply. There is a distinction in respect of HAOs however, in that they are 'associated property'. Paras 7.4 *et seq* of *CTNH* discuss this aspect in some detail and from experience I am aware that it is a matter of concern for practitioners.

HAOs typically form collections and, by definition, are associated with an outstanding building. The collection is a heritage entity and the purpose of the legislation is to discourage the break-up of the entity. Thus an event which leads to a tax charge on part of the entity can result in a charge in respect of the whole of it. One has therefore to consider whether a partial disposal of the entity has materially affected the remainder. If the remainder may still be said to constitute a heritage entity, i.e. one which would still satisfy the criteria for CE on its own, then the tax charge will be limited to the value of the part that has been disposed of. If, on the other hand, the entity that remains would not now fulfil the criteria for a successful CE claim then the tax charge may be extended to the whole of the CE property. Section 32A(10) IHTA and para 7.9 of *CTNH* are in point here.

In order to determine whether the entity has been materially affected HMRC will consult its advisers and in the case of HAOs this will typically be EH or the equivalent bodies elsewhere in the UK.

If owners are thinking about breaking up their heritage entity for whatever reason – and not all of that entity may be CE – they should perhaps consider approaching HMRC Heritage before they take any irrevocable steps.

SUMMARY AND CONCLUSIONS

The raising of the aesthetic criteria for chattels in FA98 means that many objects now designated for CE under section 31(1)(a) will no longer qualify when the next claim comes around. When that happens – though preferably before – owners of 'an outstanding building' may have the option of considering a claim for historical association. *CTNH* already offers valuable guidance in respect of this subject and this will be enhanced when the updates discussed above are incorporated into it. Apart from considering the criteria for historical association and public access, owners will also need to consider the costs of launching a claim and then of maintaining it in succeeding years. Owners of pre-eminent objects may consider loans and forms of access where the costs of display and insurance may be carried by others, but the options for the owner of a collection of HAOs are more limited. It may be that the owner will have a Collections Management Plan (CMP) (see Part One of this article) or similar document in place but if they do not then the costs of commissioning and implementing one should be taken into consideration, particularly if there are large numbers of low value objects in the collection. It should be borne in mind that the value of most collections is disproportionately weighted towards a small number of high value pieces.

Once designation has taken place, the owner will need to ensure that he complies with the undertakings regarding the preservation of the property and to demonstrate this at the periodic inspection conducted by English Heritage or the advisory body in question. The collection will therefore need to be curated to a good standard and professional assistance may be required, at least occasionally, to achieve this.

In brief, claims under historical association can offer substantial savings by deferring capital taxes but there are costs involved in taking advantage of the benefits. In these articles I have sought to highlight those costs in order to give owners a rounded picture against which to make their decisions.

Andy Grainger
Christie's Heritage and Taxation Advisory Service

The Art of Food and Drink

London, South Kensington · 16 January 2014

CHRISTIE'S

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(Closed 25 December – 1 January)
85 Old Brompton Road
London SW7 3LD

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EDWARD LADELL (1821–1886)
A glass of white wine, grapes, peaches and white currants, on a ledge, with a landscape beyond
signed with monogram (lower left)
oil on canvas
13 ¾ x 12 in. (35.6 x 30.4 cm.)
£10,000–15,000

‘I have been involved with the picture for over 25 years. Ruth Cornett and the team at Christie’s Heritage and Taxation Advisory Service dealt with the trust, helping us to consign it through our Edinburgh office. It subsequently passed into a private collection, in doing so achieving a world record for a Rossetti oil on canvas.’

Bernard Williams, Christie’s Edinburgh

World Auction Record for an Oil on Canvas by the Artist

CHRISTIE’S

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DANTE GABRIEL ROSSETTI (1828–1882)
The Salutation of Beatrice
oil on canvas, in the artist’s original frame
22 1/2 x 18 1/2 in. (57.1 x 47 cm.)
Sold for: £2,169,250
Victorian & British Impressionist Art
Christie’s London, 31 May 2012