

The *Nobile Officium* in Civil Jurisdiction: An Outline of Equitable Gap-Filling in Scotland

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I. INTRODUCTION

The Court of Session is the supreme civil court in Scotland.¹ It commands a high equitable jurisdiction called its *nobile officium*²—literally its ‘noble office’—which may be invoked to fill ‘gaps’ or lacunae in the law, or to perform some of the other functions expected of equity, such as the amelioration of strict law or the disapplication of legal norms in situations of particular injustice.

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1. With a further right of appeal to the Supreme Court of the United Kingdom.

2. The High Court of Justiciary (the supreme criminal court in Scotland) also has a *nobile officium*.

The *nobile officium* is an ambiguous jurisdiction—exercised too infrequently, and with too little consistency in application, to be committed to incontrovertible definitions or conclusive delineations of scope. Judges have often been vague in their few utterances on this jurisdiction, and even the literature has had remarkably little to say about it. In sketching an outline of the practice and significance of the *nobile officium*, one must draw upon a scattered jurisprudence, and, in so doing, care must be taken not to overstate its doctrinal foundations, nor to represent its form and extent as one of legal-systemic design. As with many features of the Scottish and wider U.K. legal order, the *nobile officium* is characterised by emerging or unfolding design.

This Article will give an overview of the *nobile officium* and its place within the Scottish legal system. It begins by setting out the nature and historical dimension of the jurisdiction, which are bound up with the historical pedigree of the Court of Session itself. The main aspects of its procedure are set out together with the remedies which may be granted in its exercise. An overview is then given of the principal areas in which the jurisdiction has been in use, as well as the sources consulted in, and the restrictions on, its exercise. Finally, it is asked what significance the general trend in the declining frequency of the jurisdiction's invocation may have for equitable gap-filling, and the wider legal system.

By way of final introductory comment, a brief observation is made on point of terminology. This Article refers to 'gaps' in the law and the 'filling of gaps' in line with the theme of the conference at which it was first presented. Even if there is general agreement on what is meant by a 'gap', however, there may remain deeper legal-theoretical questions about whether this is an accurate descriptive term for the phenomenon it represents.

The identification of gaps may be at its least complicated, on the conceptual level, in the case of legislation—a statute has simply failed to make provision for a given situation or has omitted some information required for its completeness or operability. Identifying a gap in the common law seems less conceptually straightforward due to the nature of common law adjudication, and in particular the extension of existing legal norms by analogy. It could, for example, be argued that common law adjudication necessarily entails a form of gap-filling. Furthermore, it may be questioned more fundamentally whether there can be such a thing as 'a gap in the law'. Is the law to be regarded as a normative order which is already complete or one which merely aspires to completeness? Is the very idea of gaps contradicted by the provision of a legal mechanism for filling them? Or do we settle with 'gap-filling' as a term

of convenience for the particular process of the unfolding of law which it represents?

Responses to these questions and the doubts they raise may vary across legal systems. This Article does not address these more general theoretical questions, but it files an acknowledgement that the concept of gap-filling may be contested at a more fundamental level.

II. NATURE AND HISTORICAL DIMENSION OF THE *NOBILE OFFICIUM*

The growth and development of the *nobile officium* is intimately connected with the historical pedigree of the Court of Session. It is therefore necessary to give a brief historical overview of that court for the purpose of locating and understanding its place in the Scottish legal order and the long and rich pedigree of its powers—both statutory and non-statutory.

The Court was established in 1532 as Scotland's first centralised, distinctly judicial, institution. It inherited much of its broad, general civil jurisdiction from the various manifestations of the mediaeval King's Council by which it was preceded. Whilst the King's Council was destined for the performance of executive functions—later to be styled the Privy Council of Scotland, and then effectively subsumed into the Privy Council of the United Kingdom—its judicial work was now largely in the hands of the Court of Session, with which there was a significant degree of jurisdictional continuity.³

The Court was well placed to become a powerful driving force for the improvement of judicial decision making and upholding wider standards of justice, fairness and equity in the Scottish legal order. Located at the apex of an increasingly centralised and systematised judicial order, it commanded a 'strong degree of institutional authority beyond the coercive power to issue decrees'⁴ and soon regarded itself as a general guardian of civil justice. It developed a versatile range of remedies which provided an effective foundation for broad oversight of standards prevailing in the wider legal order, including a comprehensive supervisory jurisdiction over a wide array of bodies.

There has long been a sense that the Court, which is almost five hundred years old, has performed an indispensable equitable function in the Scottish legal system. With much of its jurisdiction being confirmed

3. An excellent historical account of the Court of Session is given by A.M. GODFREY, *CIVIL JUSTICE IN RENAISSANCE SCOTLAND* (Brill, Leiden & Boston 2009).

4. *Id.* at 355, 359.

by statute,⁵ rather than derived from it, the Court has rather viewed its constitutional function as a more fundamental, equity-inspired vehicle for the attainment of justice than as a mere servant of Parliament. It has been described as a ‘court of law and equity’,⁶ in contradistinction to the separated ‘courts of law’ and ‘courts of equity’ in England, no such formal division being found in Scotland. Lord Kames famously said that ‘it is the province, one should imagine, of the sovereign, and supreme court, to redress wrongs of every kind, where a peculiar remedy is not provided’, and that there was growing in the Court a jurisdiction ‘which daily increasing by new matter, will probably in time produce a general maxim, that it is the province of [the Court of Session], to redress all wrongs for which no other remedy is provided’.⁷

Whilst this sentiment has also manifested elsewhere in the Court’s jurisdiction, it was perhaps captured in its purest form in the *nobile officium*. This has been the principal jurisdictional guise under which the Court has acted as ‘gap filler’, drawing on its general fund of equitable powers to see that a remedy could be granted where there was no existing legal remedy, or where the application of existing legal norms would either cause particular injustice or fail to provide a just solution. It is in this sense that the *nobile officium* has been most appropriately regarded as the Court’s ‘extraordinary’ equitable jurisdiction, for whereas a certain degree of ‘equity’ can be delivered in course of ordinary judicial redress (including by inferior courts), only the Court’s *nobile officium* can be invoked to award a hitherto non-existent or unavailable legal remedy, in the exceptional event that such a situation occurs.

The Court played an important role in providing the judicial means by which very significant areas of law were transacted, and the *nobile officium* was in some areas a primary vehicle for that transaction—particularly (though not exclusively) where an area of law lacked a requisite statutory framework. Trusts, guardianship and judicial factory are just some of the areas in which the *nobile officium* played a formative role. As the reach of statute has extended, so has there been a corresponding decline in the need for the *nobile officium* to compensate

5. The Court’s general civil jurisdiction was confirmed in the first instance by the College of Justice Act 1532 and has been confirmed in other, more recent, statutes. It was also confirmed in the Treaty of Union 1707, which was the foundational document of the United Kingdom. The *nobile officium* has itself been recognised in statute—as, for example, in the Civil Jurisdiction and Judgments Act 1982, s.22(3), and the Legal Aid (Scotland) Act 1986, s.30(3)(b)—though far from derived from it.

6. Bankton, *Institute*, IV.7.23; Erskine, *Institute*, I.3.22.

7. LORD KAMES, HISTORICAL LAW TRACTS 228-29 (Bell & Bradfute, Edinburgh, 4th ed. 1817).

for a lack of statutory frameworks in those and other areas.⁸ As such, one finds many more invocations of the jurisdiction in the judicial records of bygone centuries than in present day law reports, the significance of which will be considered later in this Article.

Notwithstanding this decline in usage, the *nobile officium* remains the purest expression of Kames' maxim that it would be the province of the Court to redress all wrongs for which no other remedy was provided, and the jurisdiction is symbolically important in the equitable tradition of Scots law. It is still the highest equitable jurisdiction in the Scottish legal order, and the quintessential device for judicial gap-filling, being the only jurisdiction by which *ad hoc* legal remedies can be created,⁹ and existing legal norms and processes dispensed with. It is fairly summarised in a case from the late 1980s: 'The nobile officium has been defined as an extraordinary equitable jurisdiction of the Court of Session inherent in it as a supreme court; it enables it to exercise jurisdiction in certain circumstances which would not be justified except by the necessity of intervening in the interests of justice.'¹⁰

III. PROCEDURE AND REMEDIES

The *nobile officium* is an indeterminate jurisdiction, and the procedure governing its use is very general. As Lord Keith proclaimed of the Court, 'We are entirely masters of the procedure in a petition, subject to any regulations thereanent made by Act of Sederunt'.¹¹ This point is perhaps best illustrated by citing the formal requirements of petitions from Chapter 14 of the Rules of the Court of Session, which govern petitions made to the *nobile officium*:

- 14.4 (1) A petition shall be in Form 14.4.
- (2) A petition shall include—

8. The *nobile officium* was not always the jurisdiction by which areas of law were transacted in the absence of comprehensive statutory frameworks. Some areas of law, such as contract and delict, have largely been the product of the common law—those areas have been transacted under the Court's ordinary jurisdiction (both original and appellate), rather than its extraordinary jurisdiction (the *nobile officium*). This underlines the point made about the system being one of unfolding (rather than *ex ante*) design.

9. Outside the more specific context of judicial review, governed by Chapter 58 of the Rules of the Court of Session. Rule 58.4 entitles the Court, in exercise of its supervisory jurisdiction on a petition for judicial review, to 'make such order in relation to the decision in question as it thinks fit, whether or not such order was sought in the petition'. This closely tracks the wording used in Rule 14.10(1), applicable to petitions to the *nobile officium*, under which the Court may 'make such order to dispose of a petition as it thinks fit, whether or not such order was sought in the petition'.

10. *Royal Bank of Scotland v Gillies*, 1987 S.L.T. 54 at 55, per Lord Justice-Clerk Ross.

11. *Tomkins v Cohen*, 1951 S.C. 22 at 23, per Lord Keith.

- (a) a statement of facts in numbered paragraphs setting out the facts and circumstances on which the petition is founded;
 - (b) a prayer setting out the orders sought; and
 - (c) the name, designation and address of the petitioner and a statement of any special capacity in which the defender is being sued.
- (3) In a petition presented under an enactment, the statement of facts shall expressly refer to the relevant provision under the authority of which the petition is presented.
-
- (5) The prayer of a petition shall crave warrant for such intimation, service and advertisement as may be necessary having regard to the nature of the petition, or as the petitioner may seek; and the name, address and capacity of each person on whom service of the petition is sought shall be set out in a schedule annexed to, and referred to in, the prayer of the petition.

Form 14.4 is itself a very general template:

UNTO THE RIGHT HONOURABLE THE LORDS OF COUNCIL AND SESSION

The petition of [A.B.]

(name, designation and address of petitioner and statement of any special capacity in which the petitioner is presenting the petition)

HUMBLY SHEWETH:—

1. That (here set out in this and following numbered paragraphs the facts and circumstances which form the grounds of petition).

MAY IT THEREFORE please your Lordships to (insert prayer)

According to Justice, etc.

(Signed)

(Backing of petition)

THE COURT OF SESSION

The Petition

of

[A.B.]

for

(here describe shortly the nature or object of the petition).

(Name of firm of agent for petitioner)

Petitions which relate to the administration of a trust, the office of trustee or a public trust are to be made to the Outer House of the Court of Session (a court of first instance), whilst all other petitions to the *nobile officium* are to be made to the Inner House of the Court of Session (a court of appeal and a court of first instance). Whilst a petition can be

presented to the *nobile officium* in its own right, the Court also has the power to exercise the jurisdiction *ex proprio motu*. There is no requirement for there to be a defender or respondent, such that many instances of petition to the *nobile officium* are simply recorded in the case reports as ‘[Name of petitioner], Petitioner’. In some cases, however, one or more parties might seek to oppose a petition or lodge answers in response.

The Court may grant any remedy that it thinks fit in exercise of its *nobile officium*. This may be one of the principal remedies at the disposal of the Court—declarator, reduction, suspension, interdict, implement, restitution, payment (including damages) and any interim order—or may also comprise any other order or disposal that the Court finds appropriate in the individual circumstances of the case.

The *nobile officium* is a jurisdiction of last resort. Ordinarily, a petitioner must have availed himself of other available remedies and mechanisms for appeal and review before petitioning the *nobile officium*. This significantly restricts the number of instances in which a petition will be regarded as competent and underlines the residual nature of the jurisdiction. For a petition to have a reasonable prospect of success, it should embody a necessary, ‘last ditch’ plea for judicial intervention which shows its underlying circumstances to be of sufficient gravity to merit such indeterminate judicial action.

There is no right to petition the *nobile officium*. A person is said to ‘pray’ for its exercise, because ‘he implores the judge’s office pitiably’.¹² This is especially reflected in the terminology used in some 17th and 18th century cases in which the petitioners were designated as ‘supplicants’. A petitioner seeking invocation of this jurisdiction is in most instances seeking not to vindicate a legal right, but to remedy an injustice for which there is no available legal recourse—such as assistance when there is a gap or lacuna in the law—or no pre-existing remedy which fits the facts of a given case, or where the application of an existing legal rule would result in particular injustice. This underlines both the equitable and extraordinary nature of the *nobile officium*, features captured in the following judicial opinion:

The common law jurisdiction of this Court is ordinary jurisdiction, which is contentious; and extraordinary, in which the Court exercises its *nobile officium*. The present application is certainly not within the ordinary function of the Court, for we have no party called as contradictor, and no

12. See Alberico de Rosate’s legal dictionary, cited in J.D. FORD, LAW AND OPINION IN SCOTLAND DURING THE SEVENTEENTH CENTURY 485 (Hart Publishing, Oxford & Portland, 2007).

matter of right brought into contest as between litigants. The applicants call upon us to exercise our nobile officium. There is, confessedly, no precedent for such an application as the present, so that the exercise of the nobile officium cannot be called for as a thing recognised in practice. It must be rested upon alleged necessity, or such strong and clear expediency as to call for the special intervention of the Court to meet a case of exigency.¹³

IV. PRINCIPAL AREAS IN WHICH THE *NOBILE OFFICIUM* HAS BEEN USED

The cases in which the *nobile officium* has been exercised may be grouped according to their common characteristics. Whilst these could be classified by area of law, they are organised in this section by the nature of the function undertaken by the Court.

A. *Statutory Gap-Filling*

Arguably the classic instance of judicial gap-filling is where the Court supplies norms regarded as missing or omitted from legislation. In Scotland, the Latin term ‘*casus omissus*’ has been used for such an omission. A related defect is the ‘*casus improvisus*’, where the Court improvises in the absence or deficiency of specificity in a legislative provision. It does not appear from the case law that these terms have been used with clear distinction.

An early example of a court supplying a statutory omission can be found in the seminal *Institutions of the Law of Scotland* by James Dalrymple, 1st Viscount of Stair, a seventeenth-century Scottish judge who is credited with cataloguing and expounding the first comprehensive account of Scots law. Stair recorded a *casus omissus* in the Diligence Act 1469, in which it was not specified what should happen to a debt if a debtor’s apparent heir renounced the estate. This gap is reported to have been filled by the court.¹⁴

Another early example is found in a case from 1773, in which the Settling of Schools Act 1696 had specified a procedure to be followed for the establishment of parish schools, but had failed to specify what should happen in the event of non-compliance with that procedure. This

13. *Murray’s Trustees, Petitioners* (1869) 7 M. 670 at 671, per Lord Justice-Clerk Patton. The respective roles of analogy and necessity are addressed below.

14. Stair, *Institutions*, IV.3.2.

was identified as a gap and filled by the Court in exercise of its *nobile officium*.¹⁵

Among a number of nineteenth-century statutes which contained a *casus omissus* was the Salmon Fisheries (Scotland) Act 1862. The Act required a meeting of proprietors to be called by a given date for the purpose of electing a district fishery board, but failed to specify what should happen in the event that such a meeting did not take place, and how the board was to be reconstituted in those circumstances. This particular statutory omission generated cases from the late nineteenth century until as recently as 1963.¹⁶ Taking the most recent of these as an example, certain interested proprietors presented a petition to the *nobile officium* for the reconstitution of a district fishery board. The Court granted the prayer of the petition, with Lord President Clyde confirming that this was the ‘appropriate method of securing that object’ and that this course of action had been adopted by the Court in previous cases.¹⁷

A further example is found in the Bankruptcy (Scotland) Act 1913. The Act provided for an application to be made in the sheriff court for sequestration of a bankrupt’s estate, with the sheriff appointing a meeting of creditors for the purpose of electing a trustee. In the 1967 case of *Fraser, Petitioner*, a meeting was appointed by the sheriff-substitute, but no creditors attended the meeting, and no trustee was appointed. The Act did not specify what should happen in those circumstances, and the bankrupt found himself in a situation in which no trustee had been appointed to oversee his estate in course of bankruptcy—and yet there was no statutory provision allowing for him to be discharged from bankruptcy. Accordingly, the bankrupt presented a petition to the *nobile officium* seeking discharge. The Court, noting that a ‘*casus improvisus* had arisen’ in the Act, and in line with previously decided cases, held that it was competent for the Court to exercise its *nobile officium* in this case, and granted discharge of the bankruptcy.¹⁸

A final example is made of a *casus omissus* in the Representation of the People (Scotland) Regulations 1950, taken together with the Representation of the People Acts. Two persons entitled to vote in a general election discovered that their names had been removed from the

15. *Moderator of the Presbytery of Caithness v Heritors of the Parish of Reay*, 1773 Mor. 7449.

16. *Campbell & Campbell, Petitioners* (1883) 10 R. 819; *Duke of Argyll & Others, Petitioners* (1896) 23 R. 991; *Sandeman’s Trustees, Petitioners*, 1947 S.C. 304; *West Highland Woodlands Ltd, Petitioners*, 1963 S.C. 494.

17. *West Highland Woodlands Ltd, Petitioners*, 1963 S.C. 494 at 496, per Lord President Clyde.

18. *Fraser, Petitioner*, 1967 S.L.T. 178.

electoral register. The electoral registration officer had been wrongly informed by a third party that the two persons in question were dead and had acted *ultra vires* in removing their names whilst failing to intimate to them the proposed alteration to the electoral register. As a consequence of their names failing to appear in the register, those persons were no longer eligible to vote.

There being no statutory mechanism for reinstating the persons' names to the electoral register in those circumstances, a petition was presented to the *nobile officium*. Lord President Clyde delivered the judgment of the Court:

There is no machinery in the statutes or in the regulations for dealing with this situation. . . . It would clearly not have been competent to make an application to the Sheriff or to any other tribunal to remedy what has taken place. . . . [T]he present applications are accordingly made to the nobile officium of the court. That doctrine in the law of Scotland was devised just to meet a situation of the kind with which we are presented in these two applications. . . . No remedy for the registrar's deletion of the two names without intimation to the petitioners is available in the regulations. . . . In these circumstances both these cases appear to me to be appropriate ones in which to invoke the doctrine, and I would move your Lordships that we grant the prayer of each of these petitions and authorise and ordain the electoral registration officer to alter the current register of electors for the registration unit of Thornhill by inserting the names of the two petitioners in the register as persons entitled to vote as electors in the constituency of Kinross and West Perthshire.¹⁹

These cases demonstrate classic instances of judicial gap-filling at the hands of a court commanding high equitable jurisdiction. Due to an oversight or omission by the legislature, or failure to specify a course of action in particular circumstances, the court intervenes to supply the omission in question.

B. Non-Statutory Gap-Filling

It is not just in cases of statutory gaps that the Court has exercised its *nobile officium*: it has performed a similar function with regard to other instruments and documents.

The Court has, for example, supplied omissions in contracts²⁰ and trust deeds.²¹ The *nobile officium* has also been used to supply omissions in the *Edinburgh Gazette*, Scotland's official newspaper of record which

19. *Ferguson, Petitioners*, 1965 S.C. 16 at 19, per Lord President Clyde.

20. See, for example, the early case of *Paterson v Paterson*, 1630 Mor. 7425.

21. See, e.g., *Sinclair's Trustees*, 1921 S.C. 484.

contains official notices such as those relating to statutes, planning and bankruptcy. In one case, a meeting of creditors had been appointed for the purpose of electing a trustee and commissioners, following the sequestration of a Mr. von Rotberg. A notice of the meeting had been published in the *Edinburgh Gazette*, but the hour at which the meeting was to convene had mistakenly been omitted from the notice. Mr. von Rotberg petitioned the Court to cure this omission, the Court granting the prayer sought.²²

In a similar case concerning bankruptcy proceedings, a trustee inserted a notice in the *Edinburgh Gazette* as required by statute. However, the trustee inserted the notice in the wrong edition of the *Gazette*. He petitioned the Court's *nobile officium* seeking to insert a new notice in the *Gazette* in order to cure this omission. The Court granted the prayer sought.²³

C. *Alleviation and Amelioration of Law and Process*

The *nobile officium* has been used to alleviate and ameliorate procedural burdens where these were unduly onerous or obstructive for the achievement of just solutions.

Some examples of this may be given for the purpose of illustration. In one case, creditors in Lerwick, on the Shetland Islands, required the use of a particular court officer in pursuit of a debt. There being no such officer resident on either Shetland or the (relatively) nearby Orkney Islands, the summoning of such an officer to Shetland would have caused disproportionate expense relative to the sum involved. The creditors petitioned the Court to grant warrant to any sheriff-officer in Shetland or Orkney to perform the function of the court officer in this case, and the Court, in exercise of its *nobile officium*, granted the prayer sought.²⁴

In another case, an individual petitioned for discharge from bankruptcy. The Lord Ordinary found the individual entitled to discharge and directed that he take the appropriate declaration required of him under the Bankruptcy (Scotland) Act 1856. Meanwhile, the individual had become insane. Lord President Balfour observed that 'the declaration or oath required by [the statute] relates to . . . things which [the bankrupt] alone could know' and was of the view that the individual should not be prevented from achieving discharge due to his insanity,

22. *Von Rotberg, Petitioner* (1876) 4 R. 263.

23. *Myles, Petitioner* (1893) 20 R. 818.

24. *Robertson, Petitioners* (1893) 20 R. 712.

considering he had fulfilled all of the other statutory requirements—an appeal to fairness. Accordingly, the Court exercised its *nobile officium* to dispense with the declaration required by statute, and ordered discharge.²⁵

In a final example, a seller of a house left Edinburgh for Nigeria without signing a disposition for the conveyance of the house. Two successive dispositions were sent to Nigeria for signature, but neither was returned. This caused financial and liability difficulties for the buyer, who petitioned the *nobile officium* seeking that the Court grant authority to the Deputy Principal Clerk of Session to sign the disposition in place of the seller, in order for the transaction to be completed. The Court granted the prayer of the petition.²⁶

The *nobile officium* has also been used to dispense with other procedural requirements where these were seen to obstruct or burden the administration of justice, such as a time limit,²⁷ or the requirement for a witness to appear in court when he was too ill to do so.²⁸

D. Administration of Public Affairs

The *nobile officium* has played a role in the administration of public affairs. Two areas may be cited as examples.

Public officers were routinely appointed on an interim basis, typically where a previous office-holder had died or become ill. The interim appointment would stand until the normal process of appointment followed its course. These include judicial office-holders, such as sheriff²⁹ and Commissary,³⁰ as well as public administrative office-holders, such as town clerk³¹ and keepers of public records and registers.³²

The Court had oversight of public records by virtue of its *nobile officium*. Cases in which this was exercised included permitting trust documents recorded in the Books of Council and Session (a public register of preservation) to be removed from the jurisdiction for the purpose of exhibition in an action in the Probate Court in England³³ and authorising a new town clerk to complete the registration of various

25. *Roberts & Roberts' Curator Bonis, Petitioners* (1901) 3 F. 779.

26. *Boag, Petitioner*, 1967 S.C. 322.

27. *McKidd, Petitioner* (1890) 17 R. 547.

28. *Lundie v Gourlay*, 1627 Mor. 7424.

29. *Denham & Wallace, Supplicants*, 1746 Mor. 7435.

30. *Lorrain, Petitioner*, 1755 Mor. 7445.

31. *Provost, Magistrates & Councillors of the Royal Burgh of Rothesay v Carse* (1902) 4 F. 641.

32. *Lord Advocate, Petitioner* (1860) 22 D. 555.

33. *Campbell's Trustees, Petitioners*, 1934 S.C. 8.

deeds and instruments which had not been completed by his predecessor by reason of ill health.³⁴

E. Substantive Areas of Law Reliant on the Nobile Officium

The *nobile officium* played a significant role in the administration of trusts. Petition was made to the jurisdiction for the appointment and removal of trustees, as well as for the regulation of their powers. The declaration of the objects of charitable trusts, and the settlement or variance of schemes for their administration, were also made by way of petition to the *nobile officium*.

In sustaining the law on trusts in this way, the Court compensated for the lack of a statutory framework regulating these aspects of trust administration. The Court was keen to see that the ‘will of the trust founder’ was facilitated or carried out, empowering trustees to administer the objects of the trust where empowerment was necessary. In that vein, it was observed in one case that

in exercising [the *nobile officium*], it is our duty to keep as nearly as may be to the will of the founder, and . . . the only thing that justifies us in making any variance on that which he has done is, that if we did not do that, we would not only not be carrying out his purpose, but we would probably be defeating his purpose. . . .³⁵

Correspondingly, the Court did not regard itself as competent to exercise its *nobile officium* in order to alter the provisions of a trust deed or to extend the powers of trustees. Thus where trustees petitioned for power to borrow money on the security of land held in the estate of the trustor, in order to pay certain debts, the Court declined to exercise its *nobile officium* to grant those powers in view of the fact that the trust deed did not contain any borrowing powers.³⁶

Another area of law which saw relatively routine transaction by way of the *nobile officium* was that of guardianship, tutelage and curatorship; that is generally to say, with regard to persons appointed to safeguard and protect the interests of vulnerable persons, those absent in foreign countries, pupils and other persons unable to attend to their own affairs. Guardians, tutors and curators were appointed, regulated and discharged by way of the *nobile officium*. Again, the Court could empower those offices so as to act in the protected or vulnerable person’s best interests. Thus, where a child inherited certain leases over agricultural land which

34. *Provost, Magistrates & Town-Council of Elgin, Petitioner* (1885) 12 R. 1136.

35. *University of Aberdeen v Irvine* (1869) 7 M. 1087 at 1094, per Lord Deas.

36. *Stewart’s Trustees, Petitioners* (1859) 22 D. 174.

required financial outlay that the child could not afford, his tutors-nominate (guardians) petitioned the Court for power to renounce the leases on his behalf. The Court, having satisfied itself that the maintenance required of the child was prohibitively expensive, authorised and empowered his tutors-nominate to renounce the leases.³⁷

V. SOURCES CONSULTED IN THE EXERCISE OF THE *NOBILE OFFICIUM*

There is no standard set of sources to be consulted by the Court when filling gaps. This is perhaps unsurprising for a jurisdiction the very nature of which is to provide for extraordinary situations in which the ordinary application of legal norms is, for whatever reason, insufficient or inappropriate. Apart from the Rules of Court which deal with procedural matters, the rules and principles observed with regard to the *nobile officium* are to be found in the jurisprudence of the Court itself, as suggested by Lord President Clyde:

[I]t at once appears that considerable reserve must be used in accepting too literally some of the descriptions of the *nobile officium* in the textbooks, which might be read as suggesting that the *nobile officium* is only another name for our general jurisdiction, inasmuch as our whole jurisdiction is nothing unless equitable. It may not be easy to trace historically the connection between what the commentators called the *nobile officium* of the praetor, and what we know as the *nobile officium* of the Court of Session. But both the nature of our *nobile officium* and the limitations upon its competent exercise . . . are readily discoverable from even a cursory examination of the law as administered by this court. . . .³⁸

As noted in the following section, the Court will be unlikely to exercise its *nobile officium* where there is a relevant statutory provision or where its exercise would require acting contrary to statute, even if the suggestion has occasionally been made that statute does not altogether remove the applicability of the *nobile officium* in a given area. As such, the Court will typically, in the first instance, satisfy itself that there is no existing statutory provision which would otherwise address the situation raised by the petitioner. This is not necessarily an overt exercise, but if there is an existing statutory procedure or remedy which covers the petitioner's case, the onus will be on the petitioner to demonstrate why this is not being pursued—and the reason will have to be compelling for the Court to respond positively to their petition.

37. *Turner's Trustees, Petitioners* (1862) 24 D. 694.

38. *Gibson's Trustees, Petitioners*, 1933 S.C. 190 at 199, per Lord President Clyde.

Assuming that there is no existing remedy available to the petitioner, consideration will primarily be made of what is equitable in the individual circumstances of the case, on either public or private grounds.³⁹ The Court has tended to stress that the circumstances must be of sufficient need or gravity to warrant equitable intervention. The requirement should be one of necessity, and not mere convenience or desirability.

As Lord Justice-Clerk Patton explained in a case from 1869:

In disposing of this application two questions present themselves for solution,—the first, whether the act which it asks us to do is within our competency, and the second, whether, assuming the act to be competent, a case of expediency has been made out. It is not, however, easy to separate these two questions in considering the case. The nature of the case as to expediency is intimately connected with the question of power, which may depend on the exigency under which it is sought to be evoked.⁴⁰

He continued:

[B]efore we interfere in any case in the exercise of our nobile officium, we must be satisfied of two things, viz. (1) that there is a necessity which requires the remedy of an evil, and (2) that there is a cure direct and palpable for the evil experienced. . . . I am of opinion that the circumstances here are not such as to raise a case of necessity.⁴¹

In other words, the Court regarded the necessity requirement as a prerequisite condition for the competency of intervention *ex nobile officio*. Notwithstanding Lord Justice-Clerk Patton's reference to 'expediency', Lord President Clyde was clear in a case from 1933 that it was not expediency, but necessity, that was the requisite condition for equitable intervention. In *Gibson's Trustees, Petitioners*, he referred to the 'sound principle' whereby

the nobile officium cannot be competently used to vary the powers or directions of a charitable trust merely because the Court thinks that a variation would be expedient in the interests of the trusts, but that, in order to make resort to the nobile officium competent, it must be shown that the variation is one which, in the circumstances, is necessary in order to prevent a failure or breakdown in the operation of the charity.⁴²

He went on to say that 'a change from necessity to expediency as a test of the competency of using the *nobile officium* for the purpose of varying

39. *Tod v Anderson* (1869) 7 M. 412 at 413, per Lord Justice-Clerk Patton.

40. *Id.*

41. *Id.*

42. *Gibson's Trustees, Petitioners*, 1933 S.C. 190 at 198, per Lord President Clyde.

the powers and directions of a charitable settlement may involve far-reaching consequences'.⁴³

As observed below, the Court may turn for guidance to analogous cases. Whilst it has not regarded itself as bound by analogous cases,⁴⁴ the case law shows that the Court generally finds encouragement where analogous exercises of the *nobile officium* can be found. It has, however, retained the open-ended flavour of the jurisdiction, stating that 'it is neither possible nor desirable to define exhaustively or comprehensively all the circumstances in which resort may be had to the *nobile officium*'.⁴⁵

VI. RESTRICTIONS ON THE EXERCISE OF THE *NOBILE OFFICIUM*

The Court has typically been careful to demonstrate self-restraint in its exercise of the *nobile officium*. This has, in the first place, manifested in a general deference to Parliament. As such, the Court has held that it will not exercise its *nobile officium* if to do so would override statutory provisions,⁴⁶ circumvent a clear statutory intention,⁴⁷ or constitute a direction to an individual to act contrary to a statutory duty.⁴⁸ Thus, it has been stated that the jurisdiction is not to be used to extend a statutory time limit where there is no reasonable explanation furnished for failure to comply with that time limit.⁴⁹ Likewise, just as the *nobile officium* will not generally be used to restrict the scope of a statutory provision, nor will it generally be considered acceptable to expand its scope.⁵⁰

The Court has imposed other limitations on access to, and exercise of, the *nobile officium*. Application to the *nobile officium* is said to be a

43. *Id.*; see also *Tod v Anderson* (1869) 7 M. 412 at 413, per Lord Justice-Clerk Patton. Though for an indication that a threshold short of necessity may have been all that was required for intervention in cases of charitable trusts in earlier cases, see *Murray's Trustees, Petitioners* (1869) 7 M. 670 at 673, per Lord Deas.

44. See, e.g., *King's Remembrancer, Petitioner* (1902) 4 F. 559 at 561 and 561-62, per Lord McLaren and Lord President Balfour, respectively.

45. *Royal Bank of Scotland plc v Gillies*, 1987 S.L.T. 54 at 55, per Lord Justice-Clerk Ross.

46. *Baird of Newbyth & Others, Supplicants*, 1711 Mor. 7431; *Adair v Colville & Sons*, 1922 S.C. 672; *Pringle, Petitioner*, 1991 S.L.T. 330.

47. See *West Lothian Council v McG*, 2002 S.C. 411 at 425, per Lord Justice-Clerk Gill; see also *McKenzie of Granville v Stewart*, 1752 Mor. 7443.

48. See *B's Executor v Keeper of the Registers & Records of Scotland*, 1935 S.C. 745 at 752, per Lord Hunter.

49. *Brown v Middlemas of Kelso Ltd*, 1994 S.C. 401; and see also *Manson & Others, Petitioners*, 1946 S.C. 395 at 397, per Lord Justice-Clerk Cooper.

50. *Crichton-Stuart's Tutrix, Petitioner*, 1921 S.C. 840; see also *Maitland, Petitioner*, 1961 S.C. 291 at 293, per Lord President Clyde; *Maguire v Secretary of State for Scotland*, 1994 S.C.L.R. 479; *Jamieson, Petitioners*, 1997 S.C. 195 at 199, per Lord Kirkwood.

course of last resort, such that the Court will regard a petition as incompetent if there exists an available mechanism for appeal,⁵¹ or if another remedy would have sufficed.⁵² As observed above, invocation of the jurisdiction must be regarded as necessary, and not merely convenient or desirable. It has also been stated that the *nobile officium* is not to be used merely as a way out of a difficult situation,⁵³ nor as a way to patch up the incompetence of legal representatives.⁵⁴

What is particularly interesting about these limitations is that they emanate not from Parliament, but from the Court itself. They indicate judicial self-restraint. The question therefore arises as to what extent these limitations are, indeed, limitations—or whether they instead represent a stream of judicial policy which seeks to maintain the viability of the *nobile officium*.

For example, is the Court's jurisprudence which holds that the *nobile officium* may not be exercised incompatibly with statute an actual bar to its exercise in the event of potential incompatibility, or does it merely represent a concern to ensure that the jurisdiction is not seen as a challenge to parliamentary authority? At least one case has already been cited in which a statutory requirement was disapplied by the Court⁵⁵—indeed, the *nobile officium* was exercised precisely to circumvent that statutory requirement.

Further questions arise. Is the Court's insistence that the *nobile officium* is a course of last resort a reflection of its perceived lack of authority to act where other processes or remedies exist? Is this an expression of principle about how it conceives the doctrinal basis of the jurisdiction to fit into the wider law and legal system? Or is it driven by a more practical concern not to be inundated with petitions where existing courses of redress are available? Are these practical considerations the same motivations behind the principle that the jurisdiction's invocation must be necessary, and not merely convenient or desirable, or that it is not to be used merely as a way out of a difficult situation?

51. *M. v Kennedy*, 1995 S.C. 61.

52. *Cent. Motor Eng'g Co. v Gibbs*, 1917 S.C. 490; *Glasgow Magdalene Institution, Petitioners*, 1964 S.L.T. 184 at 185, per Lord President Hope.

53. DAVID M. WALKER, *THE LAW OF CIVIL REMEDIES IN SCOTLAND* 1195 (W. Green, Edinburgh, 1974).

54. See *Fraser, Petitioner*, 1950 S.L.T. (Notes) 33; *Maitland, Petitioner*, 1961 S.C. 291 at 293, per Lord President Clyde.

55. *Roberts & Roberts' Curator Bonis, Petitioners* (1901) 3 F. 779, in which the Court dispensed with the requirement of a statutory declaration because the bankrupt required to take it had become insane.

These are questions to which definitive answers cannot be given. It is likely that the Court's self-imposed restrictions are driven by some combination of principle and practical consideration, as reflected in disagreement there has been among judges about the very role and competence of the Court in exercising its *nobile officium*.⁵⁶

VII. SIGNIFICANCE OF GENERAL DECLINE IN USAGE

There has been a general decline in the scope of the *nobile officium* and the frequency with which it is invoked. Whereas it was not uncommon for the jurisdiction to appear in cases involving trusts or the interim appointment of public officers, for example, there are nowadays very few petitions made to the jurisdiction.

The most obvious reason for an area of law such as trusts moving from transaction under the *nobile officium* to that of ordinary jurisdiction is that it has come to be regulated by statute. In the absence of a prescribed statutory framework for the appointment, removal and regulation of trustees, petition was made to the Court for general equitable intervention. The *nobile officium* enabled the Court to respond to those petitions and, in this manner, sustain the law on trusts.

As legislation came to provide a statutory framework for the regulation of trusts and trustees, such as with the Trusts (Scotland) Act 1921, so has there been a decline in the activity of the *nobile officium* in that area. Indeed, the rationale for exercising the *nobile officium* was in principle removed, because the Court was formerly required to draw upon its general fund of equitable powers exactly because of the absence of specific statutory direction.

However, statutory frameworks have not altogether removed the applicability of the *nobile officium* in those areas. To the extent that statutory provision has been made, it seems rather to have displaced the *nobile officium*. In a relatively recent case, it was said that

[t]he Court of Session, in the exercise of its *nobile officium*, has jurisdiction at common law to supervise the administration of trusts and to take such steps as may be appropriate to see that they are properly executed. This includes the removal of trustees from office.⁵⁷

A similar idea is found with regard to the area of judicial factors. The Scottish Law Commission was of the view that even if the powers of judicial factors which had hitherto been regulated by way of the *nobile officium* were instead given a statutory footing, this 'would not

56. See, e.g., *Murray's Trustees, Petitioners* (1869) 7 M. 670.

57. *Shariff v Hamid*, 2000 S.L.T. 294, per Lord Nimmo Smith at 294.

prejudice, however, the residual ability of the court to appoint judicial factors under the *nobile officium* where circumstances arose which had not been foreseen by legislation'.⁵⁸ In other words, the jurisdiction of the *nobile officium* would be displaced rather than replaced by statutory mechanisms, and would still have a role to play in the event of a *casus omissus* or where additional equitable intervention was necessary.⁵⁹ The Commission stated that, with regard to the regulation of judicial factors, it is 'now not generally necessary for the Court of Session to use its powers under the *nobile officium* in this way and they would be exercised only in very unusual circumstances'.⁶⁰

That is, however, a quite different proposition from the view that statutory powers render incompetent the equivalent powers being exercised under the *nobile officium*. This points to the underlying residuality of the *nobile officium* as an expression of a general fund of equitable power invested in the Court, which is not regarded as being erased by statute. Even where statutory frameworks exist, the *nobile officium* remains as a means of supplementing that framework and providing for situations which are not adequately captured by it. Very exceptionally, as noted above, the *nobile officium* may indeed be used to circumvent a statutory requirement—so far from being replaced by statutory provisions, the jurisdiction remains a mechanism by which statutory provisions may be disapplied, even if the Court is very reluctant to do so.

A perhaps less straightforward source for decline in the activity of the *nobile officium* is in areas in which the common law has displaced applications formerly made to the *nobile officium*. Considering that the *nobile officium* is regarded as an extraordinary jurisdiction, and even although one cannot petition the jurisdiction as a matter of right, if particular classes of petition were routinely granted, there may have been a growing sense that there was indeed a right being vindicated in those cases. Over time, there may have been a shift toward the idea that there was a common law right in particular classes of case, and this would presumably militate against the extraordinary, equitable flavour of analogous petitions previously made.

This idea is detectable in the role that analogy has played in the jurisprudence on the *nobile officium*. Even in cases in which petition was patently made to the *nobile officium*, it was not unusual for both

58. Discussion Paper No. 146: '*Discussion Paper on Judicial Factors*' (Scottish Law Commission, Edinburgh, 2010) at 4.

59. Though see *Tod v Marshall* (1895) 23 R. 36.

60. '*Discussion Paper on Judicial Factors*', *supra* note 58, at 39.

petitioner and court to make reference to previously decided analogous cases, and to search for precedents. It was not, for example, uncommon for petitioners to cite previous judicial authority in support of a particular point,⁶¹ or to advance such arguments as that the Court ‘*would always* make an interim appointment where the duties of an office were being abused or neglected, so that the interests of the public might be protected’.⁶² Likewise, it was not uncommon for judges to cite or follow analogous cases,⁶³ it even being stated that, although not confined to such cases, ‘the court tends to limit the exercise of its jurisdiction under the *nobile officium* to cases in which the power has already been exercised’.⁶⁴

Notwithstanding the role that the proliferation of statutory law and, perhaps, the crystallisation of common law ‘rights’ have played in the decline in activity of the *nobile officium*, caution should be exercised in assuming all too readily that these point to a ‘one-way street’ toward the jurisdiction’s inevitable decline.

First, there has already been at least one resurgence in the activity of the jurisdiction. Even although, as the present author has observed elsewhere, remarks were made in the mid-nineteenth century that the *nobile officium* was, even then, ‘seldom mentioned . . . except with a sneer’,⁶⁵ there was a spate of successful petitions in the 1960s. These resulted in the exercise of the *nobile officium* in such areas as the supply of a *casus omissus*,⁶⁶ alleviation of process,⁶⁷ trusts and charitable trusts⁶⁸ and bankruptcy.⁶⁹

The frequency with which petitions are made—and successfully granted—may be affected by the extent to which practitioners and even

61. As, for example, in *Myles, Petitioner* (1893) 20 R. 818 at 820, and *Pheysey, Petitioner* (1906) 8 F. 801 at 802.

62. *Provost, Magistrates & Councillors of the Royal Burgh of Rothesay v Carse* (1902) 4 F. 641 at 643 (emphasis added).

63. See, e.g., *Boag, Petitioner*, 1967 S.C. 322 at 324-25, per Lord President Clyde; *Fraser, Petitioner*, 1967 S.L.T. 178 at 179-80, per Lord President Clyde.

64. *Royal Bank of Scotland plc v Gillies*, 1987 S.L.T. 54 at 55, per Lord Justice-Clerk Ross. On occasion it was even regarded as an obstacle to establishing competence where an application to the *nobile officium* had no prior authority, and was the first of its kind—see *Murray’s Trustees, Petitioners* (1869) 7 M. 670 at 675, per Lord Kinloch.

65. See Stephen Thomson, ‘*Scots Equity and the Nobile Officium*’, 2 JURIDICAL REV. 93, 106 (2010).

66. *West Highland Woodlands Ltd, Petitioners*, 1963 S.C. 494; *Ferguson, Petitioner*, 1965 S.C. 16; *Fraser, Petitioner*, 1967 S.L.T. 178.

67. *Maitland, Petitioner*, 1961 S.C. 291; *Campbell-Wyndham-Long’s Trustees, Petitioners*, 1962 S.C. 132; *Bowie, Petitioner*, 1967 S.C. 36; *Boag, Petitioner*, 1967 S.C. 322.

68. *Clutterbuck, Petitioners*, 1961 S.L.T. 427.

69. *Philip Woolfson Ltd, Petitioners*, 1962 S.L.T. 252.

courts are conversant with the *nobile officium*. This point was played out in a fairly recent case which suggested that even the Court's own administration did not correctly apprehend the procedure for invoking the jurisdiction. In accordance with Chapter 14 of the Rules of the Court of Session governing petitions, attempt was made by the Institute of Chartered Accountants of Scotland to petition the Inner House of the Court for exercise of its *nobile officium*. The petitions department refused to accept the petition, taking the view that it was capable of being answered in the Outer House. Relying on that information, the petitioners submitted their petition to the Outer House, which went on to hold that the petitions department had misunderstood the requirements of the Rules of Court, and refused the petition on the ground that it was not competent for the Outer House to answer it.⁷⁰

The paucity of literature on the *nobile officium* has already been adverted to, and if the jurisdiction is mentioned at all in legal curricula, it is typically glossed over or tacked onto the end of a list of remedies without explanation of what it entails. One wonders how often practitioners tell their clients that there is no way of proceeding in a given case due to the fact that the relevant statutory procedure does not quite fit or solve their problem, when a petition to the *nobile officium* could potentially offer a remedy.

The decline of the *nobile officium* should therefore not be overstated. Whilst it is unlikely ever to return to the role it played in the administration of trusts or guardianship, and other substantive areas where it made a significant contribution, the jurisdiction is residual in nature and is far from being rendered obsolete by statutory provisions. The *nobile officium* maintains its position as the quintessential gap-filling jurisdiction, and in that regard it has a continuing role in addressing the *casus omissus* and the *casus improvisus*. Gaps can still arise in any statute; unduly onerous procedures can still require alleviation or amelioration; unforeseen circumstances can still arise which are best dealt with by way of general equitable intervention. Not only is the *nobile officium* regarded as the only competent procedure by which certain situations can be judicially resolved,⁷¹ the jurisdiction remains, by definition, open-ended. The continuing possibility for extraordinary circumstances to arise which cannot be adequately dealt with by existing legal remedies surely reserves to the *nobile officium* a continuing utility—not to mention its symbolic certification that courts

70. *Inst. of Chartered Accountants of Scotland, Petitioners*, 2002 S.L.T. 921.

71. *See, e.g., M. v S.* [2009] C.S.I.H. 44 para. 2, per Lord Justice-Clerk Gill.

are not mere slavish applicators of law, but vehicles for the attainment of justice.

VIII. CONCLUSION

The *nobile officium* has long provided a means of judicial redress where existing remedies or ordinary legal processes have been insufficient or inappropriate for application. This has included the classic function of filling 'gaps' in statutes, and the alleviation and amelioration of law and process, in addition to the transaction of areas of law which were not governed by statutory frameworks.

The decline in frequency with which the *nobile officium* is invoked has been attributed to several factors, some of which are legal-systemic and others of which are perhaps down to more mundane developments such as a decline in knowledge of the rules and principles of the jurisdiction, and how and when it is appropriate to make petition thereto. It may be asked how gaps are being filled in the present day if not by recourse to the *nobile officium*, the answer perhaps being that some of that functionality is being assumed by ordinary common law processes and that, in a number of cases, gaps are simply not being filled when potentially they could have been had petition been made.

The very nature of the *nobile officium*, as an extraordinary, equitable jurisdiction, means that it attracts exceptional cases of miscellaneous substance. It would be unusual if this was routinely invoked in a developed legal system, particularly one in which the common law tradition has such a firm rooting. The jurisdiction is, however, an important aspect of the legal system because it acknowledges that if the law aspires to be a complete normative order, there should exist some mechanism for dealing with those exceptional cases to which existing law and ordinary legal process have no answer. The *nobile officium* is the Scottish answer to that conundrum.