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BREXIT, BORIS JOHNSON AND THE NOBILE OFFICIUM

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Nowhere is off limits, these days, for a discussion of Brexit.¹ Not even the pages of the *Journal of Civil Law Studies* are safely insulated from this all-pervasive subject. This report from Scotland discusses a petition to the *nobile officium* of the Court of Session—a unique equitable jurisdiction—that almost became one of the most dramatic cases in UK constitutional history, and which generated global interest in this little used jurisdiction of the supreme civil court in Scotland. It was just one of the many twists and turns in the Brexit saga, but one that adequately demonstrated how distinctive is this power of the Scottish courts when contrasted with their counterparts in England, Wales and Northern Ireland.

The main, relevant aspects of Brexit can be summarised as follows. The electorate in the referendum on the United Kingdom's membership of the European Union, held on June 23, 2016, voted by a majority to leave the EU. On March 29, 2017, the UK² gave notice to the European Council³ of its intention to withdraw from the EU in accordance with Article 50 of the Treaty on European

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1. This portmanteau of “British” and “exit” has widely become the standard way of referring to the act and/or process of the United Kingdom's withdrawal from the European Union.

2. As required by the UK Supreme Court's decision in *R (on the application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, the UK could only serve notice under TEU Art. 50 with parliamentary consent as expressed in an Act of Parliament. The European Union (Notification of Withdrawal) Act 2017 was subsequently enacted authorizing the Prime Minister to notify, under TEU Art. 50, the UK's intention to withdraw from the EU.

3. This shall be used as shorthand for the Council of the European Union.

Union (TEU).⁴ This triggered a two year withdrawal process that would mean that the TEU and the Treaty on the Functioning of the European Union (the “Treaties”) would cease to apply to the UK on March 29, 2019.⁵ A great deal of water passed under the bridge during those two years, especially in domestic UK politics. Notably, the UK Parliament enacted the European Union (Withdrawal) Act 2018, which, *inter alia*, provided that the Withdrawal Agreement⁶ may be ratified only if parliamentary approval thereof had been obtained.⁷ In the context of three failed attempts by the UK Government to obtain that parliamentary approval in early 2019, the then UK Prime Minister, Rt. Hon. Theresa May MP, twice requested an extension to the Article 50 period from March 29, 2019 until June 30, 2019. The European Council granted, on the second occasion, an extension until October 31, 2019,⁸ thus setting this as the new date on which the Treaties would cease to apply to the UK.

May’s repeated failure to obtain parliamentary approval for her negotiated Withdrawal Agreement led to her resignation as leader of the Conservative Party (and thus Prime Minister), with Rt. Hon. Boris Johnson MP winning the party’s leadership election and thus becoming the Prime Minister on July 24, 2019. Johnson, who prior to his election as leader stated that he would take the UK out of the EU on October 31, 2019 “come what may, do or die,”⁹ came to make similar, firm statements to that effect after entering office. Among these were his statement on September 5, 2019 that he would rather be “dead in a ditch” than request

4. Consolidated version of the Treaty on European Union, Oct. 26. 2012, 2012 O.J. (C 326) 1, Art. 50. [hereinafter TEU].

5. TEU, *supra* note 4, at Art. 50(3).

6. Namely an agreement (whether or not ratified) between the UK and the EU under TEU Art. 50—European Union (Withdrawal) Act 2018, s.20(1) [hereinafter EU Withdrawal Act 2018].

7. EU Withdrawal Act 2018, *supra* note 6, at s.13.

8. European Council Decision (EU) 2019/584, Nov. 4, 2019 O.J. (L 101) 1-3. The first extension was, pursuant to European Council Decision (EU) 2019/476, until April 12, 2019.

9. *Boris Johnson and Jeremy Hunt divided over Brexit plans*, BBC NEWS, <https://perma.cc/8VM2-5FNW>.

an extension beyond October 31, 2019;¹⁰ his letter sent on September 6, 2019 to Conservative Party members stating that “beg[ging] Brussels for an extension to the Brexit deadline . . . is something I will never do”;¹¹ his claim on September 7, 2019, in response to a question of whether he would seek an extension if required to do so by law, “I will not. I don’t want a delay”;¹² and his answer in an online “People’s PMQs” on September 12, 2019, in response to the question “Can you confirm we will leave the EU on 31 October?,” “[I have] probably said that five times already, but [I am] delighted to confirm that.”¹³

Set in that context, the UK Parliament enacted the European Union (Withdrawal) (No 2) Act 2019, often informally referred to as the “Benn Act”¹⁴ and pejoratively referred to by Johnson as the “Surrender Act.”¹⁵ This essentially required that, if parliamentary approval had not been obtained either for a negotiated withdrawal agreement or for the UK to leave the EU without such an agreement, in the manner prescribed,¹⁶ then the Prime Minister would be required, no later than October 19, 2019, to seek to obtain from the European Council an extension to the Article 50 period by sending to the President of the European Council a letter in the form set out in the Schedule to the Act.¹⁷ Despite Johnson’s claims that the UK Government would remain in compliance with its legal obligations while taking the UK out of the EU on October 31, 2019—claims that raised widespread speculation

10. *Boris Johnson: ‘I’d rather be dead in a ditch’ than ask for Brexit delay*, BBC NEWS, <https://perma.cc/BJA6-HHPB>.

11. Lanre Bakare, *Boris Johnson ‘could be jailed for refusing to seek Brexit delay’*, THE GUARDIAN, <https://perma.cc/JF79-SK5W>.

12. *I will not seek Brexit delay, Boris Johnson insists*, THE TIMES, <https://perma.cc/WCF7-877X>.

13. *Brexit: government publishes Operation Yellowhammer documents—live news*, THE GUARDIAN, <https://perma.cc/VM75-J8VW>.

14. The bill was introduced to the House of Commons by Rt. Hon. Hilary Benn MP.

15. Henry Nicholls, *PM Johnson defends use of Brexit ‘surrender act’*, REUTERS, <https://perma.cc/T287-FFBR>.

16. *See* *Cherry v Advocate General*, 2019 SLT 1143, para. 22.

17. European Union (Withdrawal) (No 2) Act 2019, s.1 [hereinafter EU Withdrawal Act 2019].

as to what stratagem the government might be intending to deploy in order to do so (it later transpired that there was none, or none that came to fruition¹⁸)—concern mounted in some quarters that Johnson would fail to comply with his obligations under the European Union (Withdrawal) (No 2) Act 2019.

A petition was therefore lodged by three persons—Dale Vince (a businessman), Jolyon Maugham QC (a barrister) and Joanna Cherry QC MP (a Scottish National Party MP)—to the *nobile officium* of the Court of Session. The petition sought, *inter alia*, that the court would authorize and ordain its clerk to sign and send the extension letter, which may be required to be sent to the European Council should Johnson fail to do so by the end of October 19, 2019, as required by law.¹⁹ This thrust the *nobile officium* from the shadows of relative obscurity—and on which this author has written the only text²⁰—into the global spotlight, as this could be the means by which the UK formally sought an extension to its departure from the EU under Article 50, and by which Johnson’s insistence that the UK would leave the EU on October 31, 2019 would come undone.

It is at this juncture that a brief description of the *nobile officium* must be given. The *nobile officium* (literally “noble office”) of the Court of Session (the supreme civil court in Scotland)²¹ is its extraordinary equitable jurisdiction to award any remedy it thinks fit in technically narrow, but substantively wide, circumstances. As an equitable jurisdiction, the petitioner “comes to the court not as a matter of legal right, but of equitable supplication.”²² The two main

18. *Explainer: Looking for loopholes—How could Johnson avoid delaying Brexit?*, REUTERS, <https://perma.cc/344M-RQZB>. The claim of legal compliance was also made by the Advocate General (on behalf of the UK Government) in *Vince v Advocate General* [2019] CSIH 51, para. 3.

19. EU Withdrawal Act 2019, *supra* note 17, at s.1(3).

20. STEPHEN THOMSON, *THE NOBILE OFFICIUM: THE EXTRAORDINARY EQUITABLE JURISDICTION OF THE SUPREME COURTS OF SCOTLAND* (Avizandum 2015).

21. The High Court of Justiciary—the supreme criminal court in Scotland—also has a *nobile officium*. The UK Supreme Court does not, however, have a *nobile officium*, even though appeal may lie to it from the Court of Session.

22. THOMSON, *supra* note 20, at 1.

situations in which the *nobile officium* has tended to be used are where (i) a remedy is not provided for by law, typically in exceptional or unforeseen circumstances,²³ often characterised as a “gap” in the law,²⁴ or (ii) an outcome is provided by law, but its application would be particularly oppressive, burdensome or unjust, in which case the court can disapply or mitigate the effect of an existing legal rule. Pertinent to the case at hand, it had also been used on a handful of occasions to ordain substituted authority to subscribe,²⁵ namely to authorize a person, typically the Clerk of Court, to sign a document that was legally required to be signed in place of the rightful signatory who was unable or unwilling to sign that document. This judicial power was regarded as unique to the Scottish courts—with no counterpart available in the courts of England and Wales, or of Northern Ireland—hence, the petitioners’ decision to turn to the Scottish courts in pursuit of their objective.²⁶

The petitioners had certainly been astute to identify this procedural mechanism as a potential means of forcing Johnson’s hand: either of signing and sending the letter himself, as required by the European Union (Withdrawal) Act 2019, or of having it signed and sent on his behalf so as to achieve the objectives of the Act. A small number of cases had seen the court authorize an official (usually the Clerk of Court) to sign on behalf of a recalcitrant person. The underlying principle in such cases has been:

[A]n intention not to permit legal processes to be obstructed by what are typically recalcitrant persons who have not only a right, but an obligation, to sign a particular document or instrument [T]he power may also be exercised where it is not certain that the rightful subscriber is refusing to sign

23. Lord Justice-General Emslie described the existence of extraordinary or unforeseen circumstances as “the primary justification for the exercise of the *nobile officium*.” *Anderson v HM Advocate*, 1974 SLT 239, 240. See also THOMSON, *supra* note 20, at 226-228.

24. Stephen Thomson, *The Nobile Officium in Civil Jurisdiction: An Outline of Equitable Gap-Filling in Scotland*, 29 TUL. EUR. & CIV. L. FORUM 125 (2014).

25. THOMSON, *supra* note 20, at 168-169.

26. For a discussion of limitations on the exercise of the *nobile officium*, see THOMSON, *supra* note 20, at 223-252.

the document or instrument, but where it is nevertheless proving impossible to obtain subscription. In each case, the Court has authorised a clerk or deputy clerk of court to sign in place of the rightful subscriber. As such, the Court ensures that a practical solution is found where it would be inequitable to allow an obstruction or defeat of the realization of legal rights.²⁷

The court thus authorized the Clerk of Court to sign a discharge of bonds on behalf of a bondholder who refused to sign it, even in defiance of a court order.²⁸ In another case it authorized the Clerk of Court to sign an assignation on behalf of a recalcitrant bankrupt.²⁹ The court has authorized the Deputy Principal Clerk of Session to sign a disposition of property on behalf of a person who stated in a letter that she would never sign such a disposition, which she sent alongside the unsigned disposition that had been sent for her signature.³⁰ The court also authorized the Clerk of Court to sign a disposition on behalf of a seller who refused to do so,³¹ and authorized the Deputy Principal Clerk of Session to sign a disposition on behalf of a seller who had travelled to Nigeria and who could not be contacted for signature.³²

These cases provided precedent³³ for the court to authorize one of its officials to sign a document that was legally required to be signed, but which the rightful signatory either could not or would not sign. Clearly, however, the *nobile officium* had never been used to sign and send a document in place of the Prime Minister to

27. THOMSON, *supra* note 20, at 169.

28. Wallace's Curator Bonis v Wallace, 1924 SC 212.

29. Pennell's Trustee, Petitioner, 1928 SC 605.

30. Lennox, Petitioner, 1950 SC 546. There is a curious, if slight, resemblance between these facts and the conduct of Johnson, who not only stated on multiple occasions that he would not seek an extension from the EU, but in the end sent an unsigned photocopy of the extension letter to the European Council together with a letter explaining why his government would prefer not to have an extension to the Art. 50 period.

31. Mackay v Campbell, 1966 SC 237.

32. Boag, Petitioner, 1967 SC 322.

33. Despite some judicial statements to the contrary, invocation of the *nobile officium* should not—by the very nature of the jurisdiction—require precedent. THOMSON, *supra* note 20, at 241-252.

formally request an extension on behalf of the UK under a provision in an international treaty. The *nobile officium* had also never been used in a manner that would have such spectacular political and constitutional ramifications, nor had there been any reason for it to gain such prominent media attention, both domestically and internationally. It could not, however, be said in the context of those historical precedents that the current petition to the *nobile officium* was without merit.

A petition to the *nobile officium* of this kind must be presented to the Inner House,³⁴ namely the senior division of the Court of Session (the junior division, from which appeals can be made to the Inner House, being the Outer House). The court's judgment (dated October 9, 2019) stated that it would "normally be a necessary precursor to any order authorising the substitution of a signature by the clerk of court" that an order be obtained for specific performance of a statutory duty under section 45 of the Court of Session Act 1988.³⁵ The obtainment of such an order was not successful in a related action, in which Johnson was deemed to accept that he must comply with the requirements of the European Union (Withdrawal) (No 2) Act 2019 and affirmed that he intended to do so.³⁶ The Inner House, on the strength of that related judgment, effectively considered the current petition to be premature inasmuch as coercive measures should normally not be granted unless a party has already failed to comply with their legal obligations within the relevant timeframe. It noted that it was uncertain whether the statutory requirements that would oblige Johnson to send an extension letter to the European Council would be met, and the time for sending that letter (should he be required to do so) had not yet come.³⁷ This petition might, ordinarily, be dismissed on two bases. First, there had not yet been any unlawfulness for the reasons of time already stated. Second, the

34. Rules of the Court of Session, r 14.3(d).

35. *Vince v Advocate General*, *supra* note 18, at para. 5.

36. *Vince v Johnson* [2019] CSOH 77.

37. *Vince v Advocate General*, *supra* note 18, at para. 8.

petition could be dismissed as unnecessary given the alternative remedies sought or potentially available in the related action (including specific performance), noting the general principle that the *nobile officium* cannot be competently invoked where another remedy is available or which was not pursued and which is no longer available.³⁸ However, the court noted that should it be necessary for a petition to be brought afresh after the statutory deadline for sending the extension letter of October 19, 2019, any remedy the court might award could be rendered ineffective as a result of the passage of time (and noting that the UK could still be scheduled to leave the EU on October 31, 2019). The court therefore continued consideration of the petition until October 21, 2019 “by which time the position ought to be significantly clearer.”³⁹

As events unfolded, it became unnecessary for the court to consider whether it should exercise its *nobile officium* to order the Clerk of Court to sign and send the extension letter to the European Council in place of Johnson. This is because, on October 19, 2019, Johnson sent three letters: one (believed to be an unsigned photocopy) to the President of the European Council seeking an extension to the Article 50 period until January 31, 2020 (in putative fulfilment of his obligations under the European Union (Withdrawal) (No 2) Act 2019),⁴⁰ a cover letter from the Permanent Representative of the UK to the EU to the Secretary-General of the European Council,⁴¹ and one (a signed letter appearing to be written in a personal capacity) to “Donald” (Donald Tusk, President of the European Council) expressing his and his government’s dissatisfaction with a further extension to the UK’s

38. See THOMSON, *supra* note 20, at 237-241.

39. *Vince v Advocate General*, *supra* note 18, at para. 12.

40. Letter from Boris Johnson, Prime Minister of the United Kingdom of Great Britain and Northern Ireland to Donald Tusk, President of the European Council (Oct. 19, 2019), <https://perma.cc/H5GB-FJ9S>.

41. Letter from Sir Tim Barrow, United Kingdom Permanent Representative to the European Union to Jeppe Tranholm-Mikkelsen, Secretary-General of the European Council (Oct. 19, 2019), <https://perma.cc/N54N-Q2W6>.

withdrawal from the EU.⁴² The European Council subsequently agreed to extend the Article 50 period until January 31, 2020, with provision for early termination of that extension should a withdrawal agreement be ratified by both sides at an earlier date.⁴³

The petition to the *nobile officium* therefore became redundant, but its significance should not be underappreciated. This was the first time that the *nobile officium* had been petitioned against such a turbulent legal, political and constitutional background, and importantly, it was not dismissed by the court as unmeritorious. Had Johnson failed to comply with his obligations under the European Union (Withdrawal) (No 2) Act 2019, the court may well have exercised the *nobile officium* to ordain the Clerk of Court to sign and send the extension letter to the European Council on his behalf. There was, for a time, a real possibility of this and it was in this context that the *nobile officium* went from relative obscurity to a surge in national and international interest in what was this unique power of the Scottish courts that could force Johnson's hand in seeking an extension to the UK's withdrawal from the EU.⁴⁴ Since the events of October, 2019, a general election was held on December 12, 2019,⁴⁵ in which Johnson's Conservative Party won a landslide majority, significantly changing the parliamentary arithmetic on all matters Brexit. The European Union (Withdrawal Agreement) Act 2020 was subsequently enacted for the implementation of the revised Withdrawal Agreement, with the UK's departure from the EU taking effect on January 31, 2020.

The significance of the *nobile officium* case nevertheless endures. It launched the *nobile officium* to stratospheric notoriety

42. Letter from Boris Johnson, Prime Minister of the United Kingdom of Great Britain and Northern Ireland to Donald Tusk, President of the European Council (Oct. 19, 2019), <https://perma.cc/V6XP-LF97>.

43. Decision EUCO XT 20024/2/19 REV 2.

44. See, e.g., Reevel Alderson, *What is the nobile officium?*, BBC NEWS, <https://perma.cc/TJ66-EW69> and Kieran Andrews, *Legal Bid to Force Boris Johnson to Delay Brexit*, THE TIMES, <https://perma.cc/RD75-FAGZ>.

45. Legal provision for this election was made in the Early Parliamentary General Election Act 2019, effective October 31, 2019.

relative to its previous, quiet existence. There is now such awareness of the jurisdiction and its highly versatile potential applications that it may in future attract more petitions than the handful submitted each year. The first Deputy President of the UK Supreme Court, Lord Hope of Craighead, wrote in the foreword to this author's text on the *nobile officium* that it "needs to be invoked wherever it is needed to prevent injustice, and the courts need to be encouraged to use it."⁴⁶ This author has also encouraged practitioners to use it, and to use it properly.⁴⁷ It is probably safe to say that no one envisaged that the *nobile officium* would (almost) be used to such dramatic effect as in this case, and the publicity surrounding the case may provide the catalyst for that encouragement. It also shows that equitable jurisdiction, sometimes written off as an obscure backwater of the legal consciousness, can be thrust onto centre stage when the occasion arises, and that it can serve a distinct purpose that is not served by ordinary legal jurisdiction.

The fact that the petitioners turned to the courts of Scotland for resort to this unique judicial power, and not to those elsewhere in the UK which do not enjoy such a power, is further evidence of the practical implications of Scotland's distinct legal system. The Scottish jurist Lord Kames wrote that there was growing in the Court of Session a jurisdiction which "will probably in time produce a general maxim, that it is the province of [the court], to redress all wrongs for which no other remedy is provided."⁴⁸ That has been especially evident in the court's *nobile officium*, and it is a testament to the continuing utility of that high equitable jurisdiction that the petitioners sought to effect the Prime Minister's statutory obligations, not in England, Wales or Northern Ireland, but in Scotland.

46. See THOMSON, *supra* note 20, at x.

47. Stephen Thomson, *The Nobile Officium: Still Relevant, Still Useful*, THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND, available at <https://perma.cc/P9US-96VW>.

48. HENRY HOME, HISTORICAL LAW TRACTS 228-229 (4th ed., Bell & Bradfute 1817).