ALEXANDER ANTON

Alexander Elder Anton

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elected Fellow of the British Academy 1972

by

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Summary. Professor Alexander (Sandy) Anton was in many ways the founder of systematic scholarly exposition and analysis of private international law in Scotland. He was a leading law reformer in Scotland, the UK and globally. As a member and then consultant to the Scottish Law Commission for about 20 years between the mid 1960s and the mid 1980s, Sandy Anton made a major contribution to the reform of the law of Scotland, notably to its private international law. This work was often done in partnership with the Law Commission for England and Wales and led to UK-wide reform of private international law. He was influential in the domestication of the European Community regime on civil jurisdiction into the law of Scotland and the law for intra-UK disputes and on its scholarly analysis. Perhaps his greatest legacy is as a key UK delegate at the Hague Conference on Private International Law making very important treaties on recognition of divorces, and trusts, and being the Chair of the Special Commissions and Diplomatic Session that adopted the Hague Convention on Civil Aspects of International Child Abduction 1980 which has over 100 Contracting States. The Hague Child Abduction Convention has done a lot to make global international family law a reality and in doing so has done much to make the lives of children unilaterally removed from their home country better by getting them promptly returned to their home country.

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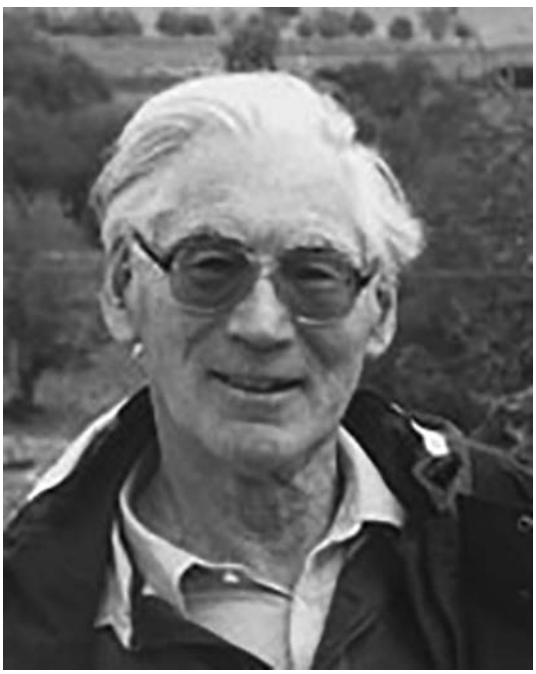

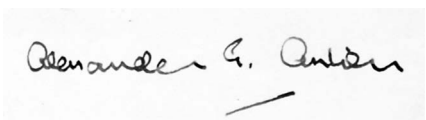

Alexander (Sandy) Elder Anton[1] was born near Buckie in Scotland. He had not long gone to Aberdeen University when he was called up to serve in the Gordon Highlanders from 1941 to 1945. He completed his MA degree in 1946 and then went on to a Bachelor of Laws (combined with a law apprenticeship), which he completed in 1949. He then spent four years as an advocate (solicitor) in Aberdeen before, as Ian Willock put it, T.B. Smith 'plucked him out of the writing chambers of an ancient firm … and pressed him into the academic service of Scots law to its immeasurable benefit.'[2] Anton taught as a senior lecturer in law at Aberdeen between 1953 and 1959, during which time he published extensively (and sometimes in French) on Scottish legal history, comparative law (especially French law), and marriage law as well as private international law.[3]

The intersection of his work on private international law and legal history is analysed in some depth in my tribute to him in the *Juridical Review*.[4] It shows how Sandy documented the influence of continental writers on the development of private international law (notably the law of succession) in Scotland and England in the 18th and 19th centuries.[5] English private international law was influenced by Scots private international law after the Union with Scotland in 1707, through sharing a common final appeal court in civil cases with Scotland, the House of Lords, in the development of its understanding of 'domicile' in line with the meaning given to that concept in the civil law systems of continental Europe. Sadly, by the time English private international law truly embraced a continental European view of domicile from universalist motives, continental Europe

[1] The fullest published account of Anton's life and work is Paul R. Beaumont, 'The contribution of Alexander (Sandy) Anton to the development of private international law' [2006] *Juridical Review* (*JR*) 1–28.

[2] I. Willock, 'Scottish legal heritage revisited', in J. Grant (ed.), *Independence and Devolution: The Legal Implications for Scotland* (1976), p. 3.

[3] 'Medieval Scottish executors and the courts spiritual' [1955] 67 *JR* 138–54; 'Some questions of property between spouses' 1955 *Scots Law Times* (*SLT*) *(News)* 193–200; 'The Christian marriage heresy' 1956 *SLT (News)* 201–4; 'Scottish thoughts on French civil procedure' [1956] *JR* 158–75; 'The effect of marriage upon property in Scots law' (1956) 19 *Modern Law Review* 653–68; 'The introduction into English practice of continental theories on the conflict of laws' (1956) 5 *International and Comparative Law Quarterly* (*ICLQ*) 534–41; (with Ph Francescakis) 'Les conflits de lois et de jurisdictions entre l'Angleterre et l'Ecosse' (1956) 45 *Revue Critique de Droit International Privé* 191–221; 'Handfasting in Scotland' (1958) 37 *Scottish Historical Review* 89–102; (with Ph Francescakis) 'Modern Scots runaway marriages' [1958] *JR* 253–85.

[4] Beaumont, 'The contribution', 3–11. The starting point of that analysis is Sandy's article 'The introduction into English practice of continental theories on the conflict of laws' (1956) 5 *ICLQ* 534–41.

[5] For subsequent treatments of this issue see Paul Beaumont & Philip Bremner, 'Inter-Regional Conflicts Within the United Kingdom Relating to Private International Law of Succession – the Development of the Applicable Law Rule' (2010) 54 *Revista Valenciana d'Estudis Autonomics* 238–71; and Paul Beaumont & Jayne Holliday, 'Private International Law of Succession – Scotland', in S. Bariatti, I. Viarengo & F.C. Villata (eds), *EU Cross-Border Succession Law* (Edward Elgar, 2022), pp. 450, 461–3.

had switched to using 'nationality' as the personal connecting factor and any hope of a universal connecting factor vanished.

Interestingly Sandy as a lawmaker helped the development of the new 'universal' personal connecting factor, 'habitual residence' through it being the key connecting factor in the highly successful Hague Convention on International Child Abduction. It is in the context of that Convention that a massive amount of case law in many jurisdictions has developed on how to interpret and apply the connecting factor of 'habitual residence'.[6] In that Convention 'habitual residence' is used as a connecting factor for an applicable law rule – the law that determines who has custody rights under the Convention and can therefore ask for the return of a child who has been wrongfully removed from their habitual residence or wrongfully retained in a country that is not their habitual residence. In the context of applicable law only one connecting factor can apply at a time. Sandy was a pragmatist and therefore where the goal of the legislation is to make it easier to get a divorce granted in one country recognised in another, he advocated the use not only of the global connecting factor 'habitual residence' but also the historic connecting factors of nationality and domicile. Therefore, in the Hague Convention on the Recognition of Divorces and Legal Separations all three personal connecting factors are used.[7]

In 1959 Sandy was appointed to the Chair of Jurisprudence in Glasgow, and while there he published his *magnum opus* on Scots Private International Law in the Scottish Universities Law Institute (SULI) series in 1967. This is an internationally well-received comprehensive work on the subject.[8] He also co-edited with F.H. Lawson and L. Neville Brown the new editions of Amos and Walton's *Introduction to French Law* which appeared in 1963 and 1967. A continuing interest in legal history is demonstrated by his being Literary Director of the Stair Society from 1960 to 1966, while he also oversaw the production of Willock's PhD thesis on the jury in Scotland as volume 21 in the Society's publications series in 1966.[9]

In 1965 Anton was appointed as a part-time Scottish Law Commissioner, eventually going full-time there in 1973. He continued in that post until 1982 (when at the age of 60 he had to retire in those days of compulsory retirement) and worked closely (if not

[6] The HCCH has a case law database in relation to the Hague Convention on International Child Abduction, which at the time of writing had 375 cases on habitual residence and this is by no means a comprehensive collection. https://www.incadat.com/en

[7] See Arts 2 and 3 of the Convention. For a very good overview of personal connecting factors see S.L. Goessl & R. Lamont, 'Connecting Factors', in P. Beaumont & J. Holliday (eds), *A Guide to Global Private International Law* (2022), pp. 47–59.

[8] *Private International Law: A Treatise from the Standpoint of Scots Law* (1967). The book was reviewed by some of the leading scholars in the world, including A Ehrenzweig, see Beaumont, 'The contribution', 11–15.

[9] I am indebted to Professor Hector MacQueen for this reference.

always in full agreement) with T.B. Smith on the Contract Code project, later producing in an issue of the *Juridical Review* in Smith's honour a valuable account of the difficulties faced in that project.[10] Anton's major contribution as a Scottish Law Commissioner was to be the lead Commissioner on several private international law projects, mostly in collaboration with the Law Commission for England and Wales. He worked closely with the lead Commissioner for England and Wales, Sir Peter North, another leading private international law scholar.[11] One of their greatest achievements was the Joint Law Commissions' Working Paper on Choice of Law in Tort/Delict[12] which formed the basis for Part III of the Private International Law (Miscellaneous Provisions) Act 1995. As recorded by C.G.J. Morse,[13] Anton gave written evidence to the UK Parliament when the 1995 Act was a Bill, highlighting his belief that the proposed legislation would be much more certain and less costly for people than the judicially developed solutions as 'tort/delict in the conflict of laws is the paradigm instance of the failure of the judges to develop an adequate and principled set of rules'.[14]

[10] A E Anton, 'Obstacles to codification' [1982] *JR* 15–30. Sandy was broadly speaking against codification of the law and certainly against premature codification partly because of the difficulty of amending codes of law, see Beaumont, 'The contribution', 28 fn 91.

[11] See J. Fawcett (ed.), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (2002).

[12] Scottish Law Commission Consultative Memorandum No. 62 and Law Commission Working Paper No 87, 1984, for Anton's role see xiii. See Family Law: Report on Custody of Children: Jurisdiction and Enforcement within the United Kingdom (SLC Report No.91 (1985) following on from the SLC Memorandum No.23 (1976)). See also the work of the two Law Commissions and of Sir Peter North and Sandy Anton on the choice of law rules in the Draft Non-Life Services Directive (Report by a Joint Working Party of the Law Com and Scottish Law Com, 1979); Private International Law Foreign Money Liabilities (Law Com WP No 80, for Anton's role see 194, implemented by the Private International Law (Miscellaneous Provisions) Act 1995; the recognition of foreign nullity decrees and related matters (Scot Law Com No.88 and Law Com No 137, 1984, for Anton's role see 129) implemented by Family Law Act 1986 (c55), Part II; financial provision after foreign divorce (Scot Law Com No 72 and Law Com No 117, 1982 – here the Scottish report is separate from the English one but the two Commissions co-operated together, see the Scottish Report at 1 and for Anton's role see iii) implemented by the Matrimonial and Family Proceedings Act 1984, Part IV; polygamous marriages (Scot Law Com Con Memo No 56 and Law Com Working Paper No 83, 1982), resulting in the Joint Law Commission and Scottish Law Commission Report on private international law polygamous marriages capacity to contract a polygamous marriage and related issues (Law Com No 146 and Scot Law Com No 96, 1985, implemented by the Private International Law (Miscellaneous Provisions) Act 1995 (c42); and the law of domicile (Scot Law Com Consultative Memorandum No 63 and Law Com Working Paper No 88, 1985, for Anton's role see 86.). See on Sir Peter North's contribution to this, J. Fawcett, 'Introduction', in Fawcett (ed.), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (2002), pp. 1, 3–4.

[13] See C.J. Morse, 'Making English Private International Law', in Fawcett (ed.), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (2002), pp. 273, 287 fn 104.

[14] See HL Paper 36, *Written Evidence Taken before the Special Public Bill Committee on the Private International Law (Miscellaneous Provisions) Bill*.

While Sandy was a Scottish Law Commissioner, he played a crucial role representing the UK at the Hague Conference on Private International Law in the negotiation of a series of important Hague Conventions from 1968 to 1984[15] with the most notable results being Divorce (1970), Child Abduction (1980) and Trusts (1985).[16]

The Hague Convention on the Recognition of Divorces and Legal Separations of 1 June 1970 was negotiated at the peak of Western liberal thinking and has stood the test of time. It enables people to easily get their divorces recognised in other countries that they have connections with and to do so with the minimum of rules preventing such recognition.[17] Sandy described the Convention as a 'glittering prize' because the negotiators had to overcome the 'obstacle' of the 'divergences in the social and religious philosophies of the participating States, especially in their differing views as to the desirability of divorce'.[18] He was proud of the fact that the end product was remarkably liberal and acceptable from a common law standpoint.[19] Sadly, the Hague Divorce Convention has not entered into force for many States, just 20,[20] although it is in force for the UK, but leading scholars are still advocating that more States should become Party to it.[21]

Anton's greatest achievement as a lawyer was being one of the principal architects of the highly successful Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.[22] This is a Convention that prioritises the interests of

15 See Beaumont, 'The contribution', at 2. Professor Anton also led the UK delegation that concluded three Conventions at the Hague Conference on Private International Law Diplomatic Session in 1972 (Administration of Estates, Law Applicable to Product Liability, and Recognition and Enforcement of Maintenance Decisions), and led the UK delegation that concluded three Conventions at the Diplomatic Session in 1976 (Law Applicable to Matrimonial Property Regimes, Celebration and Recognition of the Validity of Marriages, and Law Applicable to Agency). Sadly, none of these Conventions has proved to be successful, although the Recognition and Enforcement of Maintenance Decisions Convention was a useful stepping stone to the much more successful Hague Maintenance and Child Support Convention concluded in 2007.

16 The Divorce Convention was concluded at the Diplomatic Session in 1968 and the Trusts Convention was concluded at the Diplomatic Session in 1984.

17 For Sandy's own enthusiastic account of the Convention see A.E. Anton, 'The Recognition of Divorces and Legal Separations' (1969) 18 *ICLQ* 620–43. Sandy took part in the preparatory meetings and in the final Diplomatic Session during which the Convention was elaborated, see ibid., 620.

18 Ibid., 620.

19 Ibid., 625.

20 See https://www.hcch.net/en/instruments/conventions/status-table/?cid=80

21 M.N. Shuilleabhain & J. Holliday, 'Divorce', in P. Beaumont & J. Holliday (eds), *A Guide to Global Private International Law* (2022), pp. 451–65.

22 See the child abduction section on the Hague Conference on Private International Law website: https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction. The Convention is in force for 103 States, including the UK, more than the membership of the Hague Conference, see https://www.hcch.net/en/instruments/conventions/status-table/?cid=24

children and aims for the prompt return of any child who is abducted (i.e. wrongfully removed from or retained in a State other than their habitual residence) to their habitual residence. The Convention was highly innovative – moving away from the traditional focus of private international law on jurisdiction, applicable law and recognition and enforcement of foreign judgments. Instead, the focus is on restoring the *status quo* before the child is abducted. The working assumption being that an abductor should not gain an advantage from taking a child to another country and that the decision makers in the country of the child's habitual residence are best placed to determine what is in the best interests of the child in relation to who should exercise custody and access rights in relation to that child. The first comprehensive monograph on the Convention was dedicated to Sandy Anton.[23] The Convention has been the subject of very important decisions by the leading courts in the world, and the views of Sandy Anton on the interpretation of the Convention have been acknowledged, notably by Justice Ruth Ginsburg giving the unanimous view of the US Supreme Court in the *Monasky* case, where the Court equated a child's habitual residence to where he or she is 'at home'.[24] Two leading scholars of private international law have cited Sandy Anton's own analysis of the Hague Child Abduction Convention as 'a good example of pragmatism within private international law'.[25]

[23] Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on International Child Abduction* (1999).

[24] *Monasky v Taglieri*, 589 U.S. 68 (2020). The Conference deliberately chose 'habitual residence' for its factual character, making it the foundation for the Convention's return remedy in lieu of formal legal concepts like domicile and nationality. See Anton, 'The Hague Convention on International Child Abduction', 30 *ICLQ* 537, 544 (1981) (history of the Convention authored by the drafting commission's chairman). That choice is instructive. The signatory nations sought to afford courts charged with determining a child's habitual residence 'maximum flexibility' to respond to the particular circumstances of each case. P. Beaumont & P. McEleavy, *The Hague Convention on International Child Abduction* (1999), pp. 89–90. The aim: 'to ensure that custody is adjudicated in what is presumptively the most appropriate forum – the country where the child is at home' (at p. 79). Sadly, the US Supreme Court relegated Sandy Anton to the chairman of the drafting committee when in fact he was the chairman of the part of the Diplomatic Session which agreed the Hague Child Abduction Convention in 1980 and had been the chairman of both of the Special Commissions which developed the Convention. Furthermore, he was one of a group of four people who came up with the original outline text of the Convention that was taken forward at the second Special Commission, see Beaumont & McEleavy, *The Hague Convention on International Child Abduction* (1999), pp. 18–23.

[25] See M.C. Baruffi & J. Holliday, 'Child Abduction', in P. Beaumont & J. Holliday (eds), *A Guide to Global Private International Law* (2022), pp. 481–95, at 483 fn 21, citing A.E. Anton, 'The Hague Convention on International Child Abduction' (1981) 30 *ICLQ* 537. Baruffi & Holliday also note (at 484 fn 29) in their comment on *Monasky* that 'The use of the term "home" to describe the child's habitual residence is seen throughout the Explanatory Report' on the Child Abduction Convention. For further discussion of Anton's contribution to the development of the Child Abduction Convention see, Beaumont, 'The contribution', 16–19.

Professor Anton's contribution as a UK delegate to the negotiation of the Hague Trusts Convention between 1980 and 1983 is thoroughly analysed in my tribute to him in 2006.[26] The Hague Convention on the Law Applicable to Trusts and on Their Recognition of 1 July 1985 is very much lawyer's law. Unlike the Child Abduction Convention, it has not been widely adopted by States, but it is in force for the UK and 13 other States.[27] Sandy wrote very positively about this Convention, which was implemented into the law in the different parts of the UK by the Recognition of Trusts Act 1987.[28] This Convention is an amazing example of Sandy's prescience. In the first edition of his seminal work on Private International Law in 1967 Sandy wrote a chapter on trusts, the first of the major UK books on private international law to do so (long before Dicey in 1980). In that chapter Anton identified the same list of factors that were ultimately chosen by Article 7 of the Hague Trusts Convention to identify the law applicable to a trust when the truster has not made an express or implied choice of the law governing the trust.[29] England's leading private international lawyer on trusts, Professor Jonathan Harris KC (Hon), has recently reiterated the value of the Hague Trusts Convention in the following terms:

> In practice, the [Hague Trusts] Convention represents by far the best and probably the only realistic option for a global solution to the private international law of trusts. In a world where trusts, trust property and parties to the trust relationship are ever more likely to cross-borders, the harmonised solution offered by the Hague Trusts Convention offers considerable benefits to trust and non-trust States alike.[30]

Anton was elected as a Fellow of the British Academy in 1972 and as a Fellow of the Royal Society of Edinburgh in 1977, and was awarded a CBE in 1973. On retirement from the Scottish Law Commission he returned to the University of Aberdeen as a visiting and then honorary professor, and produced another book on civil jurisdiction in Scotland in 1984.[31] He was particularly well placed to write that book because he had been a key member of the Scottish Committee on Jurisdiction and Enforcement (the Maxwell Committee) which had decided to model the civil jurisdiction rules in intra-UK and non-EU cases in Scotland on the Brussels Convention which had been developed

[26] Beaumont, 'The contribution', 20–26. See also P.R. Beaumont & P.E. McEleavy, *Private International Law, A.E. Anton*, 3rd edn (2011), p. 978 fn 44.
[27] https://www.hcch.net/en/instruments/conventions/status-table/?cid=59
[28] A.E. Anton, 'The Recognition of Trusts Act 1987' 1987 *SLT (News)* 377, and the chapter on trusts in A.E. Anton with P.R. Beaumont, *Private International Law*, 2nd edn (1990).
[29] See Beaumont, 'The contribution', 20–6, and P.R. Beaumont & P.E. McEleavy, *Private International Law, A.E. Anton*, 3rd edn (2011), p. 978 fn 44.
[30] J. Harris, 'Trusts'. in P. Beaumont & J. Holliday (eds), *A Guide to Global Private International Law* (2022), pp. 323, 335.
[31] A.E. Anton, *Civil Jurisdiction in Scotland* (1984). For the very positive reviews of this work see Beaumont, 'The contribution', 26 fn 88.

by the European Community primarily for intra-EC (now EU) cases.[32] While at the University of Aberdeen Sandy and I collaborated on a substantial supplement to the work on civil jurisdiction in Scotland[33] and on a second edition of the Scottish Universities Law Institute (SULI) book on private international law, published in 1990.[34] A second edition of the work on civil jurisdiction in Scotland, written by me (benefiting from Anton's 'wise counsel' and comments on all the chapters in draft) appeared in 1995.[35]

Anton's passion was hill-walking, and the depth of his interest is partially reflected in his being chair of the Scottish Rights of Way Society 1988–1992, as well as in his contributions to successive versions of the Society's *Rights of Way* handbook.[36]

Sandy Anton 'was not a great believer in the idea that there is a correct order in which subjects should be dealt with or in the importance of taxonomy in the context of treatise writing',[37] but he had a 'consistent concern with legal certainty'.[38] Anton's work

[32] *Report of the Scottish Committee on Jurisdiction and Enforcement* (1980), for Anton's role see 2–3 and 314. Anton was also on the UK Committee (Kerr Committee) on the implementation of the Brussels Convention.

[33] A.E. Anton & P.R. Beaumont, *Civil Jurisdiction in Scotland: Supplement* (1987).

[34] A.E. Anton (with P.R. Beaumont), *Private International Law*, 2nd edn (1990). The book appeared in a third edition in 2011 (the year of Anton's death), with Anton's name in the title, P.R. Beaumont & P.E. McEleavy, *Private International Law, A.E. Anton*, 3rd edn (2011). A 4th edition is in preparation for SULI under the general editorship of Paul Beaumont and will be entitled, *Anton & Beaumont's Private International Law*.

[35] Paul R. Beaumont, *Anton & Beaumont's Civil Jurisdiction in Scotland: Brussels and Lugano Conventions* (1995), p. viii. The then UK Judge on the Court of Justice of the European Union, Professor David Edward, in the foreword to this book said: 'The passing of the Civil Jurisdiction and Judgments Act 1982, which applied the Brussels Convention to the United Kingdom, was important in Scotland for a further reason. The opportunity was taken, in relation to Scotland alone, to reform and codify the law of civil jurisdiction along the lines of the Convention-illustrating, perhaps the ease with which Scots law can still reaccommodate itself to a system of continental origin. A guide to so major a reform was urgently needed and was provided, even before the Act came into force, by Professor Sandy Anton. Now, ten years later, comes the second edition, prepared with the same meticulous care and in the best traditions of the University of Aberdeen, by Sandy Anton's coadjutor, Paul Beaumont … The science of private international law, of which this is all part, is a fascinating study and one that is greatly undervalued both in the law schools and in the profession … This book … is, to say the least, as good a guide to the Brussels and Lugano Conventions as can be found anywhere in Europe.' (at pp. v-vi).

[36] (With Douglas J. Cusine), *Rights of Way: a Guide to the Law in Scotland* (1996); (ed. with E.A. Lawson), *Rights of Way: the Authority of Case Law, illustrated through 79 summaries and commentaries* (1998); (with Roderick M.M. Paisley), *Access Rights and Rights of Way: a Guide to the Law in Scotland* (2006). For a photo of Sandy and a record of his love of Speyside and the outdoors in Scotland see https://www.cicerone.co.uk/authors/sandy-anton?srsltid=AfmBOopHDnG9PcZYtcb159QZ2ti5oPg_btOum2tjYA4ZFu_DAdLuWJHv

[37] Beaumont, 'The contribution', 15.

[38] Ibid., 12.

on private international law showed 'an awareness of trying to stay in step with continental approaches',[39] but he was

> … a true son of a mixed legal system: neither in the civil-law nor the common-law camp. His desire during his working life was to learn from civil-law and common-law systems. He often wanted to merge the best of the judicial discretion-based approach of the common lawyer (justice in the individual case) with the rules-based approach of the civil lawyer (legal certainty and predictability).[40]

Anton did not set out any particular value to be attached to Scottish private international law: 'he was a pragmatist who is content if Scots private international law is analysed and developed carefully by scholars, judges and legislators.'[41]

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Note on the author: Paul R. Beaumont is Professor of Private International Law, University of Stirling, and a Fellow of the Royal Society of Edinburgh.

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[39] Ibid., 12.
[40] Ibid., 27–8.
[41] Ibid., 27 fn 90. For a suggested development of the idea of pragmatism in private international law, especially in a global context, see A. Yekini & P. Beaumont, 'Pragmatism and Private International Law', in P. Beaumont & J. Holliday (eds), *A Guide to Global Private International Law* (2022), pp. 17–29. For support for the idea of pragmatism in private international law being developed as part of a healthy dialogue, see H. Muir Watt's review of the second edition of *Anton's Private International Law* (1990) in (1991) 80 *Revue Critique de Droit International Privé* 637–41.