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## **The Boundaries of Property Rights in Scots Law**

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### **Scots Property Law in Context: an Introductory Comment**

In 1925 a Parisian Professor described the Scottish legal system as “a picture of what will be, some day (perhaps at the end of this century), the law of the civilised nations, namely, a combination between the Anglo-Saxon system and the continental system”.<sup>1</sup> While Professor Lévy-Ullmann’s bold prediction that Scots law could provide a model for harmonisation in the future has not come to pass,<sup>2</sup> his observations regarding the nature of Scots law remain pertinent today. In contrast to English law, Scots law, in its native development, has drawn from the civil law world over time to a significant and telling degree. This crucial difference sets Scots law apart from its larger southern neighbour in which an essentially native development has led to the Anglo-American legal family. This existence of this disparity is striking considering the vast common history the two jurisdictions share.

Bound by a land border extending from the Solway Firth to the River Tweed since medieval times and governed by the same head of State since 1603,<sup>3</sup> the development of Scotland with England in formative legal history has been irresistibly intertwined.<sup>4</sup>

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<sup>1</sup> H Lévy-Ullmann, translated by F P Walton, *The Law of Scotland* 1925 JR 370, 390.

<sup>2</sup> The idea of Scots law as a model for harmonisation has been acknowledged by contemporary comparatists. Professor Jan Smits, *The Making of European Private Law* (2002), at p 114 comments that the chemistry of Scots law “is an important insight for those interested in the development of European private law.” See also J Smits, *Scotland as a Mixed Jurisdiction and the Development of European Private Law: Is There Something to Learn from Evolutionary Theory?*, vol 7.5 EJCL, (December 2003), <http://www.ejcl.org/75/art75-1.html> and K Zweigert and H Kötz, translated by T Weir, *An Introduction to Comparative Law* (3<sup>rd</sup> ed) (1998) at p 204.

<sup>3</sup> This statement is a slight simplification, overlooking Cromwell’s interregnum following the War of the Three Kingdoms and Scotland’s hasty attempt to crown Charles II.

<sup>4</sup> The paradox of a much earlier Roman Wall protecting Roman South Britain from the Pictish and other tribes of *Scotia* also has a relevance to legal history in the differing development of early native

1707 is perhaps the most important date with regard to Scotland's modern legal system, as it saw the passing of the Act of Union and established a single legislature based in London which held sway over the whole of Great Britain.

The case of *Greenshields*,<sup>5</sup> which followed soon after, established that the House of Lords was the highest appellate court for civil disputes in Scotland.<sup>6</sup> From this point forward, Scots private law and English private law were, unsurprisingly, influenced by each other, as would be expected with the same selection of Law Lords hearing causes from both jurisdictions.<sup>7</sup> By modern convention two Scottish judges sit as Law Lords; while there may have been a problem of a majority bias towards English law in the past, the approach of the present Court is studiously directed to recognition of the individuality of Scots law even in the context of perceptions of the aspect concerned being idiosyncratic.<sup>8</sup>

The informed are very well aware that while both English and Scottish law represent essentially intact historical continuity of development, the two systems are built on entirely different foundations. This means that, despite the presence of areas of crossover, any general assumption of affinity is dangerous. In property it is markedly the case that the systems are distinct.<sup>9</sup>

The distinctive, possibly unique,<sup>10</sup> nature of Scots private law, which marks it out as the only "mixed" legal system in Europe,<sup>11</sup> must also be recognised to represent a

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legal institutions which probably meant that Scots law was more open to subsequent Roman influence than English law.

<sup>5</sup> *Greenshields v Magistrates of Edinburgh* (1711) Robertson 12.

<sup>6</sup> This case was successful despite the express provision in Article XIX of the Treaty of Union that "no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas or any other Court in Westminster Hall". Evidently those who drafted the treaty overlooked the existence of the House of Lords, as it is not specifically mentioned nor is it a court in Westminster Hall. Pre-1707 a right of civil appeal to the Edinburgh Parliament existed for "remeid of law"; it seems that the House of Lords accepted this jurisdiction after the Union; see T B Smith, *British Justice the Scottish Contribution*, 1961, 57 & 65-69. The Supreme Court, the framework for which exists in Part III of the Constitutional Reform Act 2005, will continue to hear civil appeals from Scotland, but whether or not it should has been the subject of some academic criticism. See N MacCormick "Doubts about the 'Supreme Court' and Reflections on *MacCormick v Lord Advocate*" 2004 JR 237, at 242-250.

<sup>7</sup> Perhaps the most famous example of English law treating a Scottish private law case as legal authority is *Donoghue v Stevenson* 1932 SLT 317. For an example of Scottish property law being affected by English law see *Brand's Trs v Brand's Trs* (1876) 3 R (HL) 16.

<sup>8</sup> See the comments on speeches in *Burnett's Trustee v Grainger* 2004 SC (HL) 19 in "T B Smith's Property" in E Reid & D L Carey Miller (eds) *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 173, at 195-196.

<sup>9</sup> One historical text on Scots and English land law contains the following observation: "Despite the enthusiasm to unify the laws of the new United Kingdom, Scots law had become and has remained an entirely separate system, especially where land is concerned; and one cannot now foresee a time when union of the laws of England and Scotland is ever likely to be achieved". C F Kolbert and N A M MacKay *History of Scots and English Land Law* (1997) at 13.

<sup>10</sup> See H L MacQueen, "Scots Law" in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2006) at 642: because, rather than being a consequence of overlaying, "the mixture in some shape or form seems always to have been present."

<sup>11</sup> There has been much written on this subject. See, for example, W D H Sellar, "Scots Law: Mixed from the Very Beginning? A Tale of Two Receptions" (2000) 4 EdinLR 3, at note 1 for a list of literature. Cf R Evans-Jones, "Receptions of law, Mixed Legal Systems and the Myth of the Genius of Scots Private Law" (1998) 114 LQR 228, an article written in the immediate aftermath of the controversial case of *Sharp v Thomson* 1997 SLT 636. A bibliography of the main relevant works is given by MacQueen (above note 10) at 650-652.

fundamental divergence from the English law's approach to private rights. The key difference is that while Scots law is essentially an intermingling of a quite diverse range of what might be termed 'native' with Canon and Roman law, English law is very much an indigenous and original development. A property lawyer might suggest that while law of Scotland reflects a *commixtio/confusio* development, the English law being more of a 'new thing' than a mix, could be seen to be better represented by the concept of *specificatio*. The particular mix of Scots property law, drawing most of its controlling substance from Roman law, recognises a systemic difference between real rights and personal rights.<sup>12</sup> In terms of boundary considerations this distinction alone could be thought of as a 'great wall' running the length and breadth of the landscape of private law. This is much less true of English law because, although the real/personal distinction is well known and understood, its significance is frequently subject to the uniquely English competing boundary-relevant distinction between law and equity.<sup>13</sup>

Professor Kenneth Reid, author of the leading text on Scots property law,<sup>14</sup> commenced one paper, (conveniently entitled, for present purposes, "Obligations and Property: Exploring the Border") with the forthright statement "[I]et us begin by excluding England". In the present comparative project, excluding England would be a step too far. This is because there is crossover between Scotland and England in many areas, particularly with regard to commercial law. The UK legislature, in a bid to ease commerce between the two jurisdictions and to facilitate international trade, passed a number of Acts to harmonise the position, often at the expense of the individuality of Scots law.<sup>15</sup> Probably the most noteworthy piece of UK legislation for Scots property law is the Sale of Goods Act 1979, first passed in 1893. This legislation swept aside a fundamental feature of Scots law in abandoning the requirement of an act of delivery to give a real right following the conclusion of a contract for the sale of a corporeal moveable; however, the extent to which this development was truly radical remains a matter of some debate.<sup>16</sup>

While the general Scots law of property is radically different to its English equivalent, the intellectual property law of the two jurisdictions is essentially similar. This is a

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<sup>12</sup> A personal right is a right enforceable against a specific person or a specified group. A real right, or *jus in rem*, is a right relative to a thing (thing in this context meaning a legal object) and can be enforced against the world. Real rights are thus eminently preferable to personal rights against an insolvent individual or business, hence the desire creditors have for rights in security and the prevalence of retention of title clauses in commercial transactions.

<sup>13</sup> See further C Rotherham, *Proprietary Remedies in Context* (2002), ch 1. A review of this book provides comment from a Scottish perspective: D Carey Miller "Book Review: Proprietary Remedies in Context" (2003) 23 LS 190.

<sup>14</sup> K G C Reid, "Obligations and property: Exploring the Border" in Daniel Visser (ed) *The Limits of the Law of Obligations* (1997) 225, at 225.

<sup>15</sup> See E E Sutherland, "Remedying an Evil? Warrandice of Quality at Common Law in Scotland" 1987 JR 24, at 24-25, for a discussion of the harmonisation that was felt necessary to ease commerce in 19<sup>th</sup> century Britain – in this instance effected by the Mercantile Law (Amendment) (Scotland) Act 1856.

<sup>16</sup> See D L Carey Miller, "Scots and South African Property: Transplant Problems" in E Cooke (ed) *Modern Studies in Property Law*, vol I (2001) 293, at 297-301; "Scottish Property: a System of Civilian Principle" in MacQueen et al (eds), *Regional Private Laws and Codification in Europe* (2003) 118, at 127-131; "Passing of Property: Finding the Fundamentals" in S Espiau and A Vaquer (eds), *Bases de un Derecho Contractual Europeo* (2003) 471 at 476-483. See also, generally, D L Carey Miller with D Irvine, *Corporeal Moveables in Scots Law* (2005), (henceforth Carey Miller with Irvine, *Corporeal Moveables*), para 9.01.

consequence of shared legislation, both at a UK<sup>17</sup> and European level.<sup>18</sup> There is no Scottish patents office,<sup>19</sup> nor is there a separate scheme for dealing with personal data of the Scottish population.<sup>20</sup>

But in earlier development – which, of course, may remain relevant to interpretation – Scottish property law and writing on it engaged with intellectual property; Hume urged that the ‘exclusive privilege’ involved in certain intellectual property rights amounted to a real right in the sense of ownership of a corporeal thing.<sup>21</sup> It may be noted, however, that intellectual property rights tend to defy classification in terms of traditional property law categories; most significantly, the treatment of intellectual property by way of analogy to the wider law of property can be problematic because of the conceptual difficulty of classifying intellectual property as something open to definition as a real right.<sup>22</sup>

However, the treatment in the leading modern coverage of intellectual property law in the *Stair Memorial Encyclopaedia* is testimony to the affinity between the two systems deriving from the common modern base of UK legislation.<sup>23</sup> It is, however, the case that certain aspects of the law, such as the law relative to trading names, have a distinctive Scottish basis.<sup>24</sup>

## **The Ambiguous Meaning of Boundaries**

### *Introductory Comments*

The phrase “boundaries of property law” has a number of potential meanings. To the layperson, it may conjure up the image of a boundary dispute between two neighbouring proprietors, the classic instance being a dispute over the delimitation of two plots of ground.<sup>25</sup> The boundaries label is also applicable in a technical context

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<sup>17</sup> Shared legislation includes the Patents Act 1977, the Copyright, Designs and Patents Act 1988 and the Trade Marks Act 1994.

<sup>18</sup> For example, the EC Directive to Approximate the Laws of Member States Relating to Trademarks (89/104/EEC).

<sup>19</sup> <http://www.patent.gov.uk/>.

<sup>20</sup> The law relating to personal information is contained in the Data Protection Act 1998.

<sup>21</sup> Hume, vol VI, 38-72; K G C Reid *The Law of Property in Scotland* (1996) (henceforth Reid, *Property*), para 5.

<sup>22</sup> On this point, Reid notes that any attempt to classify intellectual property rights using traditional categories of property law is “rapidly abandoned” and that they tend to be “treated on their own” in modern law: Reid, “Obligations and property: Exploring the Border”, above note 14, at 229-230. The use of the term “ownership” in relation to incorporeal moveable property is also controversial. K G C Reid (“Unintimated Assignations” 1989 SLT (News) 267, at 267) has no qualms with using the term ownership in this context, but *cf* the recent remarks of G L Gretton “Financial Collateral and the Fundamentals of Secured Transactions” EdinLR 2006 209, at 215 (particularly note 29).

<sup>23</sup> *The Laws of Scotland, Stair Memorial Encyclopaedia*, vol 18, paras 801-1664 (MacQueen et al); see also Gloag and Henderson: *The Law of Scotland* 11<sup>th</sup> edn (2001) ch 39.

<sup>24</sup> *Williamson v Meikle* 1909 SC 1272, *Haig & Co v Forth Blending Co* 1954 SC 35. Making false use of a trade name can lead to an action in delict for “passing off”. The protection of trading names is not to be confused with protection of trade marks, which is dealt with by UK-wide legislation.

<sup>25</sup> In Scots law this should, theoretically, be impossible where both proprietors hold a title registered in the Land Register of Scotland. Once someone is registered as owner in the Land Register ownership is conferred by statute, under s 3(1) of the Land Registration (Scotland) Act, a position which contrasts with the previous Scottish register of deeds known as the Register of Sasines. Both registers continue to

which goes to structure. Here, we are concerned with a more abstract delimitation issue defining boundaries between types of right with implications for entitlement. This theoretical aspect must be considered in separate private law and public law contexts.

Any concrete issue of a property right boundary, in the sense of how the incidence of rights is defined, can only arise in respect of a particular item of property, but including a grouping of items as an entity for a recognised purpose, as in the case of succession. In this sense the concept of boundary is only a general label concerned with the particular identification and incidence of rights. In any non-specific sense the concept of a boundary is a superfluous generalisation, ‘boundaries’ come to be recognised on the basis of established ‘right-defining’ concepts and there is no structural umbrella notion on the basis of which boundaries come to be determined. Invariably, the quest for a boundary involves the application of specific right-defining tools, the distinction between real and personal rights being the classic one. The recognition of real rights and their interplay is very much the stuff of property law and its structure.<sup>26</sup>

In the private law context, the question whether property has passed may be a preliminary issue in the determination of a ‘boundary’ by reference to the incidence of rights – real or personal. This may have implications for an enrichment claim, but the applicable specialised ‘unitary body of law’<sup>27</sup>, being a matter of obligations, will not be touched on in this property perspective paper.

Another issue in the private law context may be the extent to which a boundary, even though defined, is limited by detracting rights, for example a servitude. Strictly, this is more a matter of the scope of rights rather than their determination. Obviously, determination is a precondition to limitation and, to that extent, a secondary boundary issue. However, where the position and interplay of rights has arisen in a disjointed historical continuity of development there are obvious difficulties in seeking, *ex post facto*, to identify a rational structure.

Rights and duties which arise through public law may have implications for boundary issues. The relationship between citizen and state (or some lesser authority) may be relevant. The relationship may be relevant to boundary issues on the basis of a policy position in terms of which some particular boundary line is redefined.

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co-exist, as only certain transactions in land trigger the requirement to register in the younger Land Register, which can lead to some interesting and potentially confusing situations. Even where two neighbouring properties are registered there is still scope for boundary disputes, as seen in *Safeway v Tesco* 2004 SC 2009. There is a vast amount of writing in this area, but see further the Scottish Law Commission’s Discussion Papers *Land Registration: Void and Voidable Titles* (Scot Law Com D.P. No.125, 2004), *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com D.P. No.128, 2005) and *Land Registration: Miscellaneous Issues* (Scot Law Com D.P. No.130, 2005) – all available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).

<sup>26</sup> See K Reid and C G van der Merwe “Property Law: Some Themes and Some Variations” in R Zimmerman, D Visser & K Reid (eds) *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 637, at 651-658.

<sup>27</sup> R Evans-Jones “Unjustified Enrichment” in K Reid and R Zimmerman *A History of Private Law in Scotland*, II, 369.

From a public law perspective, primary legislation and government policy is impacting on private property rights in a manner that is particularly striking when one considers the traditional protection Scots law gave to those holding the right of *dominium*. Especially with regard to land, there has been considerable erosion of what individuals can do with their property as well as the juristic acts they can perform in relation to it. Paradoxically perhaps, this erosion has occurred despite the newfound backdrop of Article 1, Protocol 1 of the ECHR, which serves to limit any potential interference by the state in private property rights.

In the private sphere, the dichotomy between personal and real rights is central. In a recent major comparison of Scots and South African private law<sup>28</sup> leading property law specialists, identifying this feature as common to the two systems, observed that: “[t]he boundary between the law of property and the law of obligations is marked by the distinction between real and personal rights.” The learned writers went on to note that “[p]roperty law is the law of real rights.”

On occasion, in the past, this distinction has been overlooked or neglected. Clearer general appreciation by lawyers of the tension involved has moved the issue from the realm of the accidental to the healthier position of reasoned argument as to where the boundary line should fall. Behind this debate is the tension, prevalent since Roman law between dogmatic structure essentially controlling, on the one hand, and readiness to allow departure on the basis of a perceived priority for appropriate solution on the other. It is this dissonance within the system of Scots private law that we now turn our attention, before examining the public law encroachment on traditionally private concerns.

### *Private Law*

#### General remarks

Scottish property law is constructed upon and functions by reference to clear dogmatic boundaries that restrict what can be done on a basis which concedes freedom to predictability. The traditional position of the law is that the importance of the distinction between a right of property – in principle, available against all – and lesser rights is a critical one. Inherent to this position, is the notion that a transparent position of property rights is necessary because transacting parties need to be aware of the position as to the priority of rights. This fundamental formalism differentiates property law from the more flexible law of obligations: “there is no freedom of property corresponding to freedom of contract”.<sup>29</sup> As the following illustrations show instances of property/obligations divide problems invariably arise in the circumstances of some form of competition involving an additional party or parties.

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<sup>28</sup> Reid and van der Merwe, above note 26, at 638.

<sup>29</sup> Reid “Obligations and property: Exploring the Border”, above note 14, at 228.

In the sheriff court case of *Munro v Munro*<sup>30</sup> the issue was a special destination clause – a legal device which passes the title of *pro indiviso* common proprietors of a thing to the survivors or last survivor of their number.<sup>31</sup> Could such a clause, inserted in the title to a family home and supported by agreement between the family members concerned that none of their number would attempt to defeat the destination, have proprietary effect? It was held, controversially, that the arrangement had inherent proprietary effect rather than merely provisional effect subject to being triggered by the death of a co-owner.

Scots law recognises two forms of co-ownership, common ownership and joint ownership.<sup>32</sup> The former is a far more frequent occurrence, while the latter only occurs in a limited category of well-defined situations, such as ownership of trust property by trustees or ownership of the property of an unincorporated association or club.<sup>33</sup> The crucial difference between the two forms of ownership for our purposes is that common owners are free to deal with their share in any way they see fit, provided such use is not unreasonable, and can raise an action of division and sale should they wish to terminate the arrangement.<sup>34</sup> This option is not available in the case of joint ownership – a form generally associated with holding a particular office.<sup>35</sup>

*Munro* is of interest because the sheriff in this case, perhaps through misinterpretation of the leading case *Magistrates of Banff v Ruthin Castle Ltd*,<sup>36</sup> held that the contractual scheme established joint ownership, and therefore denied the pursuer an order for the division and sale of the property. While this may seem an equitable result for the signatories to the contract *inter se*, the analysis immediately falls down when a third party enters the equation. If the pursuer had sold his *pro indiviso* share to another party ignorant of the existing contractual arrangement, the *Munro* analysis would provide that no title at all passes. The co-owners held a personal right against each other by virtue of the contract, but on what basis does this arrangement affect a good faith purchaser?

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<sup>30</sup> 1972 SLT (Sh Ct) 6.

<sup>31</sup> The law in relation to special destinations is highly complex, especially considering that destinations have no recognisable purpose in modern Scots law. Section 20 of the Titles to Land (Consolidation) (Scotland) Act 1868 removed the feudal rule that immovable property could not be disposed of by will. Once this rule was abolished, the means to circumvent the rule (i.e. a special destination) were no longer required, so the rationale for continued usage of special destinations is questionable. See D A Brand *Time for Special Destinations to Die?* 2000 SLT (News) 203.

<sup>32</sup> *Magistrates of Banff v Ruthin Castle Ltd* 1944 SC 36. See further Reid, *Property*, paras 17 – 36 and W M Gordon *Scottish Land Law* (1999) paras 15.04 – 15.49.

<sup>33</sup> Cf the English common law concept of joint tenancy; see e.g. R J Smith, *Property Law* 4<sup>th</sup> edn (2003), at 284.

<sup>34</sup> See, for example, *Upper Crathes Fishing Ltd v Bailey's Executors* 1991 SLT 747, which held that the right to insist on division and sale (*actio communi dividundo*) is absolute and cannot be qualified. This case was the sequel to a dispute over use of common property and a successful claim that one co-owner was unreasonably over-fishing a river: *Bailey's Executors v Upper Crathes Fishing Ltd* 1987 SLT 405.

<sup>35</sup> See further D Kleyn and S Wortley, *Co-ownership* in R Zimmerman, D Visser & K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 703, at 704-712.

<sup>36</sup> See K G C Reid, *Common Property – Clarification and Confusion* 1985 SLT (News) 57 at 58 for discussion.

*Munro* has been the subject of academic criticism,<sup>37</sup> and has never been followed. Property law is properly concerned with matters external to personal agreements, and any attempts to juxtapose contractual dealings and proprietary effects should be resisted. Unfortunately, *Munro* provides us with just one example of how special destinations can cause confusion and perhaps lead to unexpected results.<sup>38</sup>

*Lombard North Central Ltd. v Lord Advocate*<sup>39</sup> provides another example of an unfortunate conflation of contract and property law. In this case, which centred on the ownership of a ship, the court implied an assignation of an incorporeal right without any formal mechanism of transfer or intimation. As Professor Reid observed: “[w]ords of transfer cannot be implied in the same way as contractual terms. Assignations are governed by the law of property and not by the law of contract.”<sup>40</sup> While the decision in *Lombard* may have led to a fair result between the parties, the introduction of a third party to the equation could lead to injustice towards this third party who had no way of identifying the implied assignation.<sup>41</sup>

### Obligations Supplementing Property

An interesting contrast between the strict application of property law and the more flexible law of obligations is provided by the case of *Shilliday v Smith*.<sup>42</sup> Although barely mentioned in the case report, the litigation in *Shilliday* was necessary because of the unforgiving doctrine of accession; a form of original acquisition in Scots law.<sup>43</sup> The facts of the case were fairly unremarkable. Ms Shilliday and Mr Smith began a relationship and moved into a house belonging to Ms Shilliday. Mr Smith then bought a house of his own, with ownership in his name only, and the couple soon after engaged to be married. Mr Smith’s house was in a state of some disrepair and needed a large degree of renovation work and, in spite of the fact there was no common ownership of this property, this work was largely funded by Ms Shilliday.

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<sup>37</sup> Reid, above note 36, at 58. See also D Kleyn and S Wortley, *Co-ownership*, above note 35, at 712.

<sup>38</sup> See, for example, the case of *Gardner’s Exrs v Raeburn* 1996 SLT 745, which highlights the potential problems a destination can cause in the event of a divorce. The old case of *Perrett’s Trs v Perrett* 1909 SC 497 is also apt to cause undesirable results if a destination is forgotten about until after a co-owner dies, as it forbids *mortis causa* evacuation of a destination in certain circumstances. For discussion, see G L Gretton and K G C Reid *Conveyancing* 3<sup>rd</sup> edn (2004) ch 23 and M Morton, “Special Destinations as Testamentary Instructions” 1984 SLT (News) 133.

<sup>39</sup> 1983 SLT 361.

<sup>40</sup> Reid, “Unintimated Assignations”, above note 22, at 268.

<sup>41</sup> In a recent article, Ross Anderson has criticised the role of intimation in the assignation process. He observes that intimation is both commercially inconvenient and fails to publicise the transfer to potentially interested parties, like a creditor seeking arrestment: see R G Anderson, “A Note on Edictal Intimation” (2004) 8 EdinLR 272, at 273. Regardless of this criticism, it is beyond doubt that intimation has been long established as a necessary step in Scots law. See further K Luig, “Assignation” in K Reid and R Zimmerman, *A History of Private Law in Scotland*, I, 398, at 403; citing *Drummond v Muschet* (1492) Mor 843.

<sup>42</sup> 1998 SC 725, 1998 SLT 976.

<sup>43</sup> See further Carey Miller with Irvine, *Corporeal Moveables*, ch 3. Other forms of original acquisition include occupation, specification, commixtion and confusion – all of which reflect Scots law’s Roman basis, especially with regard to moveable property.

The relationship ultimately failed and no marriage took place. This left Ms Shilliday out of pocket, as her investments had acceded to Mr Smith's heritable property in which she had no notional interest following the break up of her relationship. Up until very recently, Scots law denied cohabitantes the right to seek financial provision from each other in the Scottish courts on the break up of a relationship: that right was reserved to married couples and, since 2004, civil partners.<sup>44</sup> The recent Family Law (Scotland) Act 2006 changes this for cohabitants,<sup>45</sup> allowing financial provision to be sought at the break up of a relationship,<sup>46</sup> but this reform came too late for Ms Shilliday.

Ms Shilliday was faced with an obstacle which prevented her case being argued from a property law perspective. Unlike English law,<sup>47</sup> Scots law has never recognised the existence of a constructive or resulting trust in such a situation.<sup>48</sup> The English common law's flexibility to adapt to new situations would have allowed Ms Shilliday to claim she was a beneficiary in the constructive trust brought into existence by the renovation work.<sup>49</sup> While the dogmatic boundaries of Scots property law deny such a development, the law relating to constructive trusts in Scotland remains unclear.<sup>50</sup> It is perhaps telling that a recent Scottish Law Commission discussion paper gave the matter a wide berth.<sup>51</sup> Similarly, 'proprietary estoppel' has been mooted as a solution to this situation in England,<sup>52</sup> but this approach would not necessarily fit Scots law which would require a property law basis for the recognition of a real right.<sup>53</sup>

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<sup>44</sup> The relevant provisions being s 8 (for divorce) and s 17 (for nullity) of the Family Law (Scotland) Act 1985, as amended by the Civil Partnership Act 2004. See further J M Carruthers, "Unjustified Enrichment and the Family: Revisiting the Remedies" 2000 SLPQ 58, at 71 for a discussion of the situation prior to these reforms.

<sup>45</sup> Defined by s 25 of the Family Law (Scotland) Act 2006 asp2. Proposals for reform had been made before but were never acted upon: see the Scottish Law Commission Report on Family Law (Scot Law Com No.135, 1992) para 16.23, available at <http://www.scottishexecutive.gov.uk/library2/doc11/rfl-12.asp>.

<sup>46</sup> S 28, Family Law (Scotland) Act 2006.

<sup>47</sup> *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, [1990] 2 W.L.R. 867. See also *Healey v Brown* [2002] W.T.L.R. 849; (2001-02) 4 I.T.E.L.R. 894; [2002] N.P.C. 59; 2002 WL 498883 (Ch D) – in relation to succession. See H Wood, D Lush and D Bishop, *Cohabitation: Law Practice and Precedents* (2001) – ch 1. With regard to same sex cohabitation, see R B Harris "Same Sex Partnerships in English Family Law" in R Wintemute and M Andenæs (eds), *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* (2001) 605, at 611.

<sup>48</sup> The desirability of having constructive trusts in Scots law for the specific purpose of catering for cohabitants has been argued for before: see K McK Norrie, "Proprietary Rights of Cohabitants" 1995 JR 209. See also A R Wilson, "The Constructive Trust in Scots Law" 1993 JR 99, at 113, where it is noted that the dogmatic law of property would be "vulnerable" to the constructive trust, and J P Chalmers *Trusts: Cases and Materials* (2002) at paras 2.40-2.51.

<sup>49</sup> The versatile constructive trust of English law has played a significant part in the development of matrimonial property law in England; see the various index entries in P Birks (ed) *English Private Law*, (2000); see also Rotherham, above note 13, 197-244; and Carey Miller, above note 13, at 191.

<sup>50</sup> See G L Gretton "Constructive Trusts: I" (1997) 1 EdinLR 281 and, by the same author, "Constructive Trusts: II" (1997) 1 EdinLR 408. The second of these articles is more concerned with the potential development of Scots law, while the first attempts to detail Scots law as it stands.

<sup>51</sup> The Scottish Law Commission Discussion Paper on Breach of Trust (Scot Law Com D.P. No.123, 2003) noted, at para 1.4, that "implied, resulting and constructive trusts are dealt with only in so far as they impinge on express trusts".

<sup>52</sup> Wood, Lush and Bishop, above note 47, ch 1. English law may have also provided Ms Shilliday with a further remedy, under the Married Women's Property Act 1882, which applies where people were engaged to be married, discussed by Wood et al, at 32-34.

<sup>53</sup> See E Reid and J Blackie, *The Law of Personal Bar* (forthcoming) ch 5; see also Carey Miller with Irvine, *Corporeal Moveables*, para 10.20.

This left Ms Shilliday relying on the law of obligations, or more precisely the law of unjustified enrichment. While this may have seemed a “counsel of despair”,<sup>54</sup> it was successful. The crucial factor which made the enrichment of Mr Smith unjust in this case was the promise of marriage and the investment in reliance upon the engagement; Ms Shilliday could, accordingly, found upon the *condictio causa data causa non secuta*.<sup>55</sup> Without the element of injustice, Ms Shilliday would have failed to recover her expenditure.<sup>56</sup> Scots law afforded a remedy but the boundaries of property law remained intact.

In the circumstances of the Family Law (Scotland) Act 2006 providing a statutory scheme for separating cohabitants, fewer *Shilliday* type cases will be raised as unjustified enrichment. Cohabitation, however, does not have a monopoly on such lawsuits, and there is still scope for litigation by family members or business partners who fall out, or those at the end of a relationship who fail to establish they are cohabitants within the terms of s.25 of the 2006 Act.<sup>57</sup>

*Newton v Newton*<sup>58</sup> involves the scenario of improvement by a good faith possessor of another’s immovable property, in this case through a mistake as to title.<sup>59</sup> This error, of course, need not apply solely to immovable property; the case of *Scanlon v Scanlon*<sup>60</sup> highlights the possibility of an action in unjustified enrichment based on a misunderstanding of the effects of a hire purchase agreement relating to corporeal moveable property.

While the issue of accession was not litigated in court, it may be beneficial to examine the Scottish authorities on accession, or *inaedificatio*,<sup>61</sup> to highlight once again the important boundary that exists between real rights and personal rights. It is well established in Scots law that a corporeal moveable attached to land or buildings becomes annexed to the immovable property and therefore belongs to the owner of the land.<sup>62</sup> Scots law does not consider whether the annexor or the landowner intended

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<sup>54</sup> One commentator observed that such an argument based on unjustified enrichment “more closely resembles a counsel of despair rather than one of perfection”; see Carruthers, above note 44, at 71.

<sup>55</sup> R Evans-Jones, *Unjustified Enrichment: vol 1* (2003), at 1.37-1.41.

<sup>56</sup> *Cf Grieve v Morrison* 1993 SLT 852.

<sup>57</sup> This may be the least likely of the scenarios to succeed, as the expectation of the investing party getting something in return would be difficult to establish with no engagement or cohabitation. As noted by Carruthers, before the recent reforms were enacted, “[g]iven that the case was concerned exclusively with engaged persons...it is possible the courts may adopt a strict approach to interpretation and that they may impede the use of the remedy by non-engaged persons”. Carruthers, above note 44, at 71.

<sup>58</sup> 1925 SC 715, the successor case to 1923 SC 15.

<sup>59</sup> In actual fact, the second *Newton* case seems to be based on the mistaken belief that there was an obligation to convey to the improver, rather than a mistaken belief the improver had title. See further R Evans-Jones, “The Distorting Images of *Newton v Newton* and its Lessons for the Law of Property and Unjustified Enrichment in Scotland” (2005) 9 EdinLR 449, at 454 for analysis.

<sup>60</sup> 1990 GWD 12-598.

<sup>61</sup> See further C G van der Merwe, “Accession by Building” in K Reid and R Zimmerman, *A History of Private Law in Scotland*, I, 245.

<sup>62</sup> *Stair Institutions* II, I, II. See further Reid, *Property*, paras 11-14.

for the union to be permanent; one may rationalise that, instead, an objective view of the situation is adopted to protect the interests of third parties.<sup>63</sup>

This point was settled in the case of *Scottish Discount Co Ltd v Blin*,<sup>64</sup> a case deemed so important that it was heard by a court of seven Court of Session judges in a bid finally to resolve a degree of confusion caused by a previous case.<sup>65</sup> As noted by Lord Cameron: “it is clear enough that parties by private agreement cannot change the legal character of what the law regards and holds to be heritable [i.e., immoveable] in character so as to be effectual, in a question with third parties who are strangers to and ignorant of such an agreement, to affect the rights of such third parties”.<sup>66</sup> Any role for intention is limited to what would be apparent to onlookers, rather than extrinsic agreements made at the time of the annexation.<sup>67</sup> One commentator observes that “a fixture should be a fixture if it is patent for all the world to see”,<sup>68</sup> while another notes that “appearance determines legal effect”.<sup>69</sup> With one minor exception, relating to a right of severance – or *ius tollendi* – held by agricultural tenants,<sup>70</sup> accession will operate if the physical union is permanent in nature and appearance.

### Intermediary Rights?

A perceived ‘necessity of fairness’ to a party is the usual justification for departure from a position otherwise determined by property law. The incidence of this tension is frequently the context of insolvency, in which, of course, injustice may be seen to be tempered by the general principle of *pari passu* ranking amongst creditors.<sup>71</sup>

Where the property/obligations boundary fence is well defined, as in the case of accession, the essential position of Scots law is that it should not be demolished to compensate for a perceived injustice which the law of obligations can generally satisfy. But this approach does not prevail in the extreme accession situation of major

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<sup>63</sup> See, for example, Lord Cullen’s judgement in *Shetland Islands Council v. BP Petroleum Development* 1990 SLT 82. For a comment see D L Carey Miller “Logical Consistency in Property” 1990 SLT (News) 197, at 198.

<sup>64</sup> 1985 SC 216, 1986 SLT 123.

<sup>65</sup> The case in question being *Cliffplant Ltd v Kinnaird* 1981 SC 9, 1982 SLT 2

<sup>66</sup> 1985 SC 216 at 240. See also the comment at 242, where Lord Cameron notes that proprietary effects should not flow “flow from the terms of private contracts to which heritable creditors were not party and of the existence of which they were in ignorance”. It is perhaps arguable that an extension of this same argument could be utilised against all-sum retention of title clauses, but it is beyond doubt that such clauses are now accepted in Scots law following the House of Lords case of *Armour v Thyssen Edestahlwerke AG* 1991 SCLR 139, 1990 SLT 891.

<sup>67</sup> On this point, see the judgement of Lord President Elmslie 1985 SC 216, at 233.

<sup>68</sup> van der Merwe, above note 61, at 268.

<sup>69</sup> L P W van Vliet, “Accession of Movables to Land: I” (2002) 6 EdinLR 67, at 67. See also “Accession of Movables to Land: II” (2002) 6 EdinLR 199; in this part, at 205-212, the learned author reflects upon differences between the kindred systems of Scots and South African law, regarding which see also D L Carey Miller and A Pope “Acquisition of Ownership” in R Zimmermann, D Visser and K Reid (eds) *Mixed Legal Systems in Comparative Perspective* (2004), 671, at 678-682.

<sup>70</sup> As established in *Brand’s Trs v Brand’s Trs* 1876 3 R (HL) 16. See also Agricultural Holdings (Scotland) Act 1991 s 18.

<sup>71</sup> Goode goes as far as describing the principle of *pari passu* distribution as “hallowed”, and that every extension of the concept of ownership in the context of insolvency represents an erosion of this principle. R Goode, “Ownership and Obligations in Commercial Transactions” (1987) 103 LQR 433, at 435.

encroachment through the erection of a permanent structure; like most other systems,<sup>72</sup> Scots law will not generally require the demolition of a substantial building so that the land on which it has been erected can be restored to the rightful owner.<sup>73</sup>

Circumstances may straddle the property/obligations boundary in terms of perceptions of fairness. How far the law should recognise this tension by greater flexibility has been an open and much debated issue until in recent times. Following the House of Lords decision in *Sharp v Thomson*<sup>74</sup> there was a time when it appeared some kind of intermediary right was transferred after delivery but prior to registration of a disposition of land.

In Scots law, three stages are required before transfer of title to land can be completed. First, the conclusion of missives provides for mutually enforceable personal rights between transferor and transferee. A disposition is then prepared and ultimately delivered to the transferee, who records or registers the deed in the relevant register for land. Scotland currently has two registers for land in co-existence, the older being a register of deeds and the newer being a state guaranteed register of title.<sup>75</sup> The introduction of this system of registration of title has not been entirely smooth, and often led to results contrary to the general principles of Scots law prior to the introduction of the Land Register.<sup>76</sup> These issues are currently under review by the Scottish Law Commission, and as such may be liable to change in the near future.<sup>77</sup> For our purposes, however, it is necessary to note the importance that registration has for constitution of a real right of ownership.<sup>78</sup> The purchase price is ordinarily paid on delivery of the disposition – when the buyer normally obtains possession of the property – rather than on registration. This leads to a gap period where the transferee is potentially at risk of the transferor's insolvency.<sup>79</sup>

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<sup>72</sup> See A-F Debruche "Judicial Fairness in the Realm of Strict Law: Comparative Insights around a Classic Encroachment Case" *Ius Commune Lectures on European Private Law*, 10, May 2005.

<sup>73</sup> See W M Gordon, *Scottish Land Law*, 2<sup>nd</sup> ed 1999, 13.07 (founding on Lord President Dunedin's opinion in *Wilson v Pottinger* 1908 SC 580, 586): "If removal of the encroachment would involve demolition of substantial buildings, it appears that the appropriate remedy is damages rather than removal, if the building has proceeded too far to be stopped by interdict."

<sup>74</sup> *Sharp v Thomson* 1994 SLT 1068, 1995 SLT 837, 1997 SLT 525.

<sup>75</sup> Scots law has had a system of registration of title since the Land Registration (Scotland) Act 1979, but this Act. This system was gradually rolled out over the whole of Scotland, eventually incorporating the more northern areas in 2003. This process has incrementally decreased the importance of the older Register of Sasines, but it retains a role as transactions such as donations or creating standard securities do not trigger the need to register in the land register – meaning properties involved in these transactions remain in the Register of Sasines. See further Gretton and Reid, above note 38, ch 8.

<sup>76</sup> The problems all seem to centre around the Land Register's "curative" effect, contained in s 3(1) of the 1979 Act, and the protection afforded to a registered proprietor in possession, by virtue of s 9(3) of the 1979 Act of the property.

<sup>77</sup> See note 25 above for references to these proposals.

<sup>78</sup> Either under the Real Rights Act 1693 or s 3(1) of the Land Registration (Scotland) Act 1979. See K G C Reid, *Ownership on Delivery* 1982 SLT (News) 149.

<sup>79</sup> S Wortley and D Reid, "Mind the Gap: problems in the transfer of ownership" (2002) 7 SLPQ 211. This gap period tends to be underwritten by the transferor's solicitor, by personal undertaking that no prejudicial acts will occur in a finite period – often in the region of 21 days.

The problem of this gap period has been highlighted by a number of cases over the years,<sup>80</sup> but it was brought into “sharp” focus by the *Sharp* case.<sup>81</sup> In *Sharp* a company sold a flat to a brother and sister who paid the purchase price and commenced occupation. Inexplicably, no disposition was delivered. A latent factor was the existence of a floating charge security over the company’s “property and undertaking” which would be attached for the benefit of the creditor if the debtor company went into liquidation or receivership.<sup>82</sup> In the event, the sellers went into receivership one day after a disposition was delivered. The critical question was: did the floating charge attach when the disposition had been delivered but not registered?

At first instance, Lord Penrose held that it did.<sup>83</sup> At second instance, the Inner House of the Court of Session agreed.<sup>84</sup> Pending registration the real right remained with the company, and a real security was constituted when the receiver was appointed and the floating charge crystallised.

Lord President Hope, as he then was, took the view that, while the result of *Sharp* was “unsatisfactory”,<sup>85</sup> the case served to highlight “a defect in the law which can only now be corrected by the introduction of appropriate measures by the legislature”. Parliament had introduced a form of security that did not sit easily with aspects of Scots law,<sup>86</sup> and it was not for the judiciary to accommodate perceived wrongs to purchasers by subverting principles of property law.<sup>87</sup>

Despite the clear Court of Session position giving effect to the law, a final appeal to the House of Lords was successful.<sup>88</sup> Reversal was supported by all five Law Lords however the concurred-in conclusion was arrived at by different routes in the speeches of the Scottish Lords. To Lord Clyde, the issue was one of statutory interpretation; on his approach, the phrase “property and undertaking” did not necessarily equate to “property” in the sense of *dominium*.<sup>89</sup> The difficulty with this – an instance of judicial law-making at its most potent – is that what is acknowledged to be the debtor’s specific “property” is excluded from its “property and undertaking” in an apparently wide sense. Following Lord Jauncey’s opinion, when the disposition

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<sup>80</sup> *Gibson v Hunter Homes Designs Ltd* 1976 SC 23; *Mitchells v Ferguson* (1781) Mor 10296.

<sup>81</sup> The name of the case has proved fortunate for academics, who seem to thrive on various plays on words in article titles. See, for example, S C Styles, “Sharp Pains for Scots Property Law” 2000 SLT (News) 305.

<sup>82</sup> Insolvency Act 1986, s 53(7).

<sup>83</sup> 1994 SLT 1068.

<sup>84</sup> 1995 SLT 837; 1995 SC 455.

<sup>85</sup> SLT 854.

<sup>86</sup> In the case of *Carse v Coppen* 1951 SC 233, 239 *per* Lord President Cooper remarked that floating charges were “utterly repugnant to the principles of Scots law”. Professor W A Wilson, with characteristic perspicacity, drew specific attention to incompatibility with the conveyancing process in “Floating Charges”, 1962 SLT (News) 53, at 55.

<sup>87</sup> 1995 SLT 837, *per* Lord Sutherland, at 858.

<sup>88</sup> 1997 SLT 636; 1997 SC (HL) 66. It would not be unfair to say that this result surprised some observers. Prior to the decision, Professor Reid wrote “it is not anticipated that the argument based on an inchoate right of property will do any better in London than it has so far in Edinburgh”. Reid, “Obligations and property: Exploring the Border”, above note 14, at 243.

<sup>89</sup> In the words of Lord Clyde: “The particular construction of the phrase ‘property and undertaking’ in the floating charge does not in any way affect or erode the ordinary law on the transference of moveables or immoveables.” 1997 SLT 636, at 647.

was delivered the purchasers acquired a beneficial interest which took the property outside the reach of the floating charge.<sup>90</sup>

The backlash to the Sharp case was both swift and damning, with one leading conveyancing book noting that “[n]o recent conveyancing case has been so controversial or resulted in so much comment as *Sharp*”.<sup>91</sup> Commentators felt the case amounted to an imposition of English principles of equity on Scots law;<sup>92</sup> the Scottish Law Commission, in a Discussion Paper, identified various problems with the case and recommended its reversal by statute.<sup>93</sup>

Although the focus of the Scottish Law paper was a single controversial case, it provided an opportunity to review the law relating to transfer of ownership. The Paper identified the inherent weaknesses of the system for the transfer of land; one statement noted the inherent problem of a conveyancing process which provided for payment by the transferee in advance of ownership obtained by registration actuating the actual transfer of property.<sup>94</sup> This difficulty is, of course, especially significant in the context of the accepted identification of Scots property law in terms of the civilian model in which the ultimate right of ownership is indivisible in the sense that at any given time the right can only vest in one or more owners.<sup>95</sup>

While conceding this weakness, the Commission sought to justify the position by stating that “the risk arises from the structural (and justifiable) fact that in the transfer of land the final act of the seller – execution and delivery of a deed of conveyance – is not sufficient by itself to bring a change in ownership”.<sup>96</sup> While this is true from the seller’s perspective, it is of little comfort to a buyer who could, through no fault of his own, be severely prejudiced by events in the intervening period prior to registration.<sup>97</sup> Indeed, it is difficult to see the justification for a process which leaves the transferee potentially vulnerable to circumstances beyond his control.

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<sup>90</sup> 1997 SLT 636, at 643.

<sup>91</sup> D A Brand, A J M Steven and S Wortley, *Professor McDonald’s Conveyancing Manual* 7<sup>th</sup> edn (2004) at 4.4. See further Scottish Law Commission Discussion Paper on *Sharp v Thomson* (Scot Law Com D.P. No.114, 2001) and the references to the sizeable amount of literature therein, available at [http://www.scotlawcom.gov.uk/downloads/dp114\\_sharp\\_v\\_thomson.pdf](http://www.scotlawcom.gov.uk/downloads/dp114_sharp_v_thomson.pdf). (Hereafter referred to as the Discussion Paper on *Sharp*).

<sup>92</sup> K G C Reid “Equity Triumphant: *Sharp v Thomson*” (1997) 1 EdinLR 464.

<sup>93</sup> Discussion Paper on *Sharp*, at para 2.17.

<sup>94</sup> At para 3.2, the Discussion Paper on *Sharp* makes the following observation: “In a perfect system of sale, payment of the price and transfer of ownership would be simultaneous events. At one moment, the seller would have the property and the buyer the price. At the next the position would be reversed”. Scots law, by not meeting this paradigm, is deductively imperfect. Scots law transfers possession only, ownership is acquired at the later stage of registration.

<sup>95</sup> See Reid, *Property*, para 603: “Scots law, following Roman law, is unititular, which means that only one title of ownership is recognised in any one thing at any one time.” See also Carey Miller with Irvine, *Corporeal Moveables*, para 1.13.

<sup>96</sup> Discussion Paper on *Sharp*, at para 3.3.

<sup>97</sup> This point was recognised by the Commission at para 3.6 of the Discussion Paper on *Sharp*, where it is noted that “[u]nder our law a buyer can conduct his affairs with all due prudence...and yet still fail to receive the property, or receive it crystallised by a floating charge or diligence. That is a situation that merits reform.”

The existence of a gap between payment and acquisition can probably be traced to the complex and gradual adaptation of a feudal system of landholding.<sup>98</sup> A vassal's becoming 'infert' and entering into ownership with a feudal superior evolved in a legislative development from a ceremony involving certain fixed steps and culminating in delivery of symbolic clods of earth as the perfecting act of 'sasine'. This developed into the modern system in which recording in a register came to be the equivalent prerequisite.<sup>99</sup> While there has been some debate on the point,<sup>100</sup> the prevailing view equates registration with delivery of sasine, thus transferring ownership at this stage rather than any other. This, the only position consistent with civilian thinking, leaves the unsatisfactory position outlined above. Any doubts as to the correct analysis of the conveyancing transaction have been removed once and for all by section 4 of the Abolition of Feudal Tenure etc (Scotland) Act 2000, an Act which finally removes the last feudal relics in Scots law in Scottish Land Law. The wording of the relevant section is identical to the earlier Scottish Law Commission proposal made in the aftermath of *Sharp*.<sup>101</sup>

Despite the problems raised in *Sharp*, and the strong policy arguments in favour of protecting purchasers that rely – and, indeed, can realistically only rely – on information contained in a public register,<sup>102</sup> it was felt wide ranging reform was unnecessary. The Scottish Law Commission felt the relatively low frequency of such problem cases<sup>103</sup> and the existence of insurance to cover the gap period mitigated the need for reform,<sup>104</sup> and the difficulty was also characterised as one of conveyancing practice rather than a defect of the law.<sup>105</sup> Instead, more restricted proposals were made to protect a purchaser of immovable property from the creditors of the seller,<sup>106</sup> while technological advances, by way of introducing electronic conveyancing, were hailed as a means to reduce, if not remove entirely, the period where the purchase was at risk.<sup>107</sup>

In the event, legislation was not needed because, only a few years later, the House of Lords in *Burnett's Tr v. Grainger*<sup>108</sup> had the opportunity to revisit its decision. The facts were similar but not identical to the earlier case. *Burnett's Tr* involved the personal sequestration, or bankruptcy, of an individual rather than corporate receivership. At the time of the litigation, there was uncertainty as to how the Scottish

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<sup>98</sup> See the survey in D L Carey Miller 'Transfer of Ownership' in Reid and Zimmermann (eds) *A History of Private Law in Scotland*, I, 269, at 282-289.

<sup>99</sup> *Idem*, 292-297.

<sup>100</sup> Reid, Ownership on Delivery, above note 78; I Doran, "Ownership on Registration" 1985 SLT (News) 165; and K G C Reid, "Ownership on Registration" 1985 SLT (News) 280.

<sup>101</sup> Discussion Paper on *Sharp*, para 2.18.

<sup>102</sup> See, on this point, Scottish Law Commission *Discussion Paper on Diligence Against Land* (Scot Law Com D.P. No.107, 1999) at para 2.29, available at [http://www.scotlawcom.gov.uk/downloads/dp107\\_diligence.pdf](http://www.scotlawcom.gov.uk/downloads/dp107_diligence.pdf).

<sup>103</sup> Discussion Paper on *Sharp*, para 3.7.

<sup>104</sup> Discussion Paper on *Sharp*, para 3.8.

<sup>105</sup> Discussion Paper on *Sharp*, para 3.9. See also "Memorial and Opinion *Intus Re: Automated Registration of Title to Land*" by Professors Brymer, Gretton, Paisley and Rennie, 2005 Jur.Rev 201. In this Opinion it is observed, at 202, that "[i]t was existing practice and not the underlying law which gave rise to the problems such as that seen in *Burnett's Tr v Grainger* and *Sharp v Thomson*."

<sup>106</sup> See Proposal 4, at para 4.10 of the Discussion Paper on *Sharp*.

<sup>107</sup> Discussion Paper on *Sharp*, Para 3.9. See also Brymer, Gretton, Paisley and Rennie, above note 105, at 203.

<sup>108</sup> *Burnett's Tr v. Grainger* 2004 SLT 513; 2004 SC (HL) 19.

judiciary would rationalise the two judgements in *Sharp*,<sup>109</sup> but the Court of Session preferred the narrow view put forward by Lord Clyde in the House of Lords.<sup>110</sup> In adopting this course of action, the Court of Session also resurrected the analysis of Lord President Hope, as he then was, in the Inner House judgement of *Sharp*.<sup>111</sup> This meant that, absent registration, the house in question become the property of Ms Burnett's trustee in bankruptcy when the necessary steps were taken.<sup>112</sup> Mr Grainger was left to rank as unsecured creditor in the bankrupt estate; he did, however have a claim against his solicitors for their negligent handling of the transaction, a point the trial judges were only too happy to make.<sup>113</sup>

*Burnett's Tr* was also appealed to the House of Lords; the five Law Lords hearing the case (including Lord Hope) reached a decision that has been warmly welcomed by commentators.<sup>114</sup> Lord Rodger and Lord Hope delivered the two leading judgements, with the three other judges concurring. Two of the Lords, reflecting the perspective of English law, concurred only with reservations,<sup>115</sup> essentially going to the unitary character which is so much a feature of property rights in Scots law. Lord Hobhouse of Woodborough took the view that a form of constructive trust should be recognised in the circumstances of payment having been made and received.<sup>116</sup> It should be noted, however, that Lord Clyde expressly denied the existence of a constructive trust in *Sharp*.<sup>117</sup> Lord Hoffman, for his part, was also sceptical concerning the position of Scots law; in his view "the strict division in Scots law between real and personal rights"...had... "in the past been compromised in cases in which justice was thought to require it."<sup>118</sup>

These reservations are concerned with the boundary position of Scots property law. The implication seems to be that even if the definite and controlling identification of the boundary between real and personal rights is not aberrant it is wrong-headed as a

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<sup>109</sup> On this see R Rennie "To *Sharp v Thomson* – an Heir" 2000 SLT (News) 247, in response to the first reporting of the *Burnett's Tr* case at Sheriff Court level. The action had been previously sisted, or stayed, pending the *Sharp* decision.

<sup>110</sup> Interestingly, Lord Coulsfield was in the unique position of being on the bench in the Court of Session for both *Sharp* and *Burnett's Tr*, and in *Burnett's Tr* he made the following observation. "With the greatest of respect to the views expressed by Lord Jauncey, I remain of the opinion which I expressed in *Sharp v Thomson* to the effect that the property law of Scotland should be regarded as a whole and should be given a logical and consistent interpretation and application across the whole field of property, that to recognise the respondents' argument does involve a recognition of some kind of property intermediate between real and personal which is repugnant to the underlying principles of the law of Scotland and that such a recognition is liable to cause difficulty and inconsistency in the interpretation and application of the law." 2002 SLT 699 at 704.

<sup>111</sup> See, for example, the observations of Lord MacLean. "As counsel expressed it, the Scottish system is a simple and coherent system. If I might say so, the coherency of that system was fully discussed and amply set out in the opinions of the judges of the First Division in *Sharp*. Indeed, the Lord President's opinion in that case might be regarded as an exegesis of the system." 2002 SLT 699 at 707.

<sup>112</sup> The necessary step being the registration of a disposition.

<sup>113</sup> Lord Coulsfield, for example, noted there was "no explanation...for the apparent gross failure of the defenders' solicitors to take appropriate action to protect their clients' position". 2002 SLT 699, at 701.

<sup>114</sup> G L Gretton, "Ownership and Insolvency: *Burnett's Tr v Grainger* (2004) 8 EdinLR 389.

<sup>115</sup> See the speeches of Lords Hoffmann and Hobhouse in *Burnett's Trustee v Grainger* 2004 SLT 513, at 516 and 524-526. On this point, see S van Erp, "Comparative Case Notes: *Burnett's Tr v Grainger*" vol 8.1 EJCL (March 2004), <http://www.ejcl.org/81/editor81.html>.

<sup>116</sup> 2004 SLT 513, at 524-526.

<sup>117</sup> 1997 SLT 636, at 648.

<sup>118</sup> 2004 SLT 513, at 516.

matter of degree. The criticism of Lords Hobhouse and Hoffman is a manifestation of the history and thinking of English law in which the issue of degree can readily give a departure from a starting point of principle. Through its bifurcated law and equity development, English law is more open to flexible boundaries than Scots law is. Scots law's preference for a more pervasive property structure, not giving scope for this flexibility, explains the concern of Lords Hobhouse and Hoffmann that justice was denied in *Burnett's Trustee v Grainger*. As between the two systems this difference is reflected in the tendency of English law – not shared by Scots law – towards the constructive trust. This device allows property boundaries to be set on an almost 'case by case' basis. But is Lord Hoffman correct in implying that the notion of a definite and controlling division between real and personal rights is, at least as a matter of degree, something new in Scots law? It is certainly true that since the mid-20<sup>th</sup> century Scots law has been attentive to its civilian credentials.

The view that, at very least, *Sharp* should be ring-fenced prevailed in the decision in *Burnett's Trustee*. Recent legislative reform is also relevant. The appointment of a receiver, an essentially private act, has been limited by the provisions of the Enterprise Act 2002.<sup>119</sup> The fact that receivership led to obtaining a real right without registration, in contrast to company liquidation and personal bankruptcy, was significant to both Lords Jauncey and Clyde in *Sharp*.<sup>120</sup> This inconsistency has been removed by the preference for administration over receivership; a method of corporate rescue preferred to a process instigated by a major creditor, usually pursued with only that creditor's interests in mind. The shift away from receivership could be seen to show the *Sharp* case's inroad into principle as disproportionate,<sup>121</sup> at the same time it also reflects the problem of an absence of co-ordination between systematic legislative law reform and judicial law making actuated by concern to do justice in a particular case.

### Other boundary issues

The issues looked at above are by no means an exclusive treatment of those arising at the penumbra of property law. Others include the Scots law rule penalising private knowledge of a prior right, or the so called "offside goals" rule, which comes into play when one party has transacted with two different individuals to sell, or perhaps to secure or lease, the same object or area of land.<sup>122</sup> In the scenario where the second party completes title first while knowing a prior transaction had taken place, this title is defeasible at the instance of the first party. The right of the first grantee can trump the real right, even though it would ordinarily be classed only as a personal right when ranking against unsecured or secured creditors in insolvency proceedings. The increasingly accepted explanation is that the title obtained in bad faith is defective and open to challenge.

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<sup>119</sup> Insolvency Act 1986, ss 72A-72H, as inserted by s 250 of the Enterprise Act 2002.

<sup>120</sup> 1997 SLT 636, per Lord Jauncey at 643 and Lord Clyde at 647.

<sup>121</sup> This disproportionality seems to have been one of the central themes of the Scottish Law Commission's Discussion Paper on *Sharp*, as evidenced by the observation at para 1.8: "It is recognised that the facts of *Sharp* highlight a problem which needs to be solved; but it is accepted that the solution adopted by the House of Lords is flawed, and probably damaging. The disease is harmful, but the cure more harmful still."

<sup>122</sup> The football-related terminology comes from the most famous case on the issue, *Rodger (Builders) Ltd v Fawdry* 1950 SLT 345, at 353.

This rule is both difficult to categorise and, some argue, to justify in a system where the dogmatic boundaries of property law are well defined. While it is clear that the original good faith purchaser has suffered loss as a result of the second transaction, some argue that damages is the proper remedy, rather than a right to the specific thing in question.<sup>123</sup> However, the increasingly accepted explanation is that the title obtained in bad faith is defective<sup>124</sup> and, on one argument, it is only rational that the wronged party should have a right to challenge on that basis and, if successful, obtain transfer of the thing concerned.

Another anomaly that seems to defy categorisation is the real obligation or real condition, known as a real burden in Scots law. These conditions attach to immovable property, binding the current owner and any successors in title to do, or not to do, certain acts in situations defined in their title deeds. Traditionally these obligations would have been enforced by a feudal superior, serving as a pseudo-planning regime in the absence of a modern system of public control,<sup>125</sup> but following the decline and now abolition of feudalism in Scotland real burdens tend to be enforced by neighbouring proprietors. A further class of these obligations can also be identified, where enforcement rights attach to a person or juridical body rather than the owner of an area of land at a specific moment in time.<sup>126</sup>

These real obligations are particularly difficult to classify using the traditional model of real rights and personal rights. One analysis proposes that real obligations are properly classified as personal rights in all but one specialised sense. In this approach, the “real” aspect of a real obligation stems from the fact that the identity of a person, either with title to sue or under an obligation to perform, “is apt to change over time, and is determined by ownership of property”.<sup>127</sup> The effect of a real burden, and any right correlative to a real burden, can be analysed properly as personal.

This particular boundary issue is by no means unique to Scots law,<sup>128</sup> but Scots law may be of particular interest to comparative lawyers as this area of law has recently been reformed and consolidated into statute.<sup>129</sup> The Title Conditions (Scotland) Act 2003 (asp9) was enacted following a major study into the utility of real obligations, and it was recognised that these obligations could have a positive role to play in a

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<sup>123</sup> There is a considerable body of literature on this subject. The seminal treatment of modern law is Reid, *Property*, paras 695-699. See also S Wortley, “Double Sales and the Offside Trap: Some Thoughts on the Rule Penalising Prior Knowledge of a Private Right” 2002 JR 291; R G Anderson, “‘Offside Goals’ before *Rodger Builders*” 2005 JR 277; Carey Miller with Irvine, *Corporeal Moveables*, at 8.31; and D L Carey Miller, “*Mala Fide* Transferees in Scotland: The Case of a Registered ‘Offside Goal’” (2005) 16 *Stell LR* 318.

<sup>124</sup> See the dictum of Lord Rodger of Earlsferry in *Burnett’s Trustee v Grainger* 2004 SLT 513, at 526 (para 17).

<sup>125</sup> See K G C Reid, “Real Rights and Real Obligations” in S Bartels and M Milo (eds) *Contents of Real Rights* (2004) 25 at 35-37 and Reid, *Property*, paras 376-385.

<sup>126</sup> See further R R M Paisley “Personal Real Burdens” 2005 JR 377.

<sup>127</sup> Reid, above note 125, at 45.

<sup>128</sup> For discussion of the real condition in a number of jurisdictions, see the collection of articles in S Bartels and M Milo (eds) *Contents of Real Rights* (2004).

<sup>129</sup> See further A Steven, *Revolution in Scottish Land Law*, vol 8.3 EJCL, (October 2004), <http://www.ejcl.org/83/art83-5.html>.

modern system of property law.<sup>130</sup> That this anomalous device, which is inherently difficult to squeeze into the civil law model of rights *in rem* and rights *in personam*, was retained in an essentially similar form to what existed before perhaps shows that rights which straddle the boundary can, in certain circumstances, happily exist without any major challenge to the foundations of property law.

Finally, when considering intellectual property in the sense of the protection of confidential information, sometimes identified in terms of the wider label of the protection of privacy, also raises a distinctive boundary issue but one endemic to intellectual property. Can a right to private information be proprietary, in the sense of being susceptible to something equivalent to ownership of a corporeal thing?

In this area, the development of Scottish case law has been limited. The Scottish judiciary has not had an opportunity to pronounce on this matter since the ECHR came into force and established a right to private and family life; pending this the precise position remains speculative. By contrast, two high profile cases relating to the right of privacy have been recently litigated in England.<sup>131</sup>

While the Scottish judiciary might be expected to be strongly influenced by the English approach it is still possible, as Professor MacQueen has noted, for the Scottish courts to plough their own furrow on this matter, perhaps drawing from jurisdictions like South Africa in the process.<sup>132</sup> That said, recent remarks made by two Scottish Law Lords in an English appeal to the House of Lords may suggest otherwise.<sup>133</sup> In *Watkins* it was decided that a prisoner had no remedy in tort for having his private mail intercepted and read in front of him, and Lord Hope seemed to indicate that Scots law would have disposed of the case in the same manner.<sup>134</sup> MacQueen has argued that Scots law may have provided a remedy “by way of the *actio iniuriarum* for insult/affront (or its modern equivalent)”.<sup>135</sup> Obviously Lord Hope’s observations in this context are only that: observations.

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<sup>130</sup> See, for example, the observations of the Government formed Land Reform and Policy Group in their papers *Identifying the Solutions* (September 1998) at para 5.1 and Recommendations for action (January 1999) at para 2.4. The Scottish Law Commission Report on Real Burdens (Scot Law Com No.181, 2000) considered the arguments in favour of abolishing real burdens entirely, but rejected them: at paras 1.14-1.21. See also Scottish Law Commission Discussion Paper on Real Burdens (Scot Law Com D.P. No.106, 1998). Both papers are available at [www.scotlawcom.gov.uk](http://www.scotlawcom.gov.uk).

<sup>131</sup> *Douglas v Hello! Ltd* [2005] 4 All E.R. 128 and *Campbell v Mirror Group Newspapers Ltd* [2004] 2 All E.R. 995.

<sup>132</sup> H L MacQueen, “Protecting Privacy” (2004) 8 EdinLR 248, at 254. For an earlier instance of arguing Scots law should take heed of developments in South Africa in relation to the law of privacy see D L Carey Miller, “Privacy: Interceptions of Communications – Could Scots law have a remedy?” 1980 SLT (News) 209, at 211-214.

<sup>133</sup> Appeals to the House of Lords tend to be heard by five Law Lords. Two of the current Law Lords, Lord Hope and Lord Rodger, were former Lord Presidents of the Scottish Court of Session; they both heard the case of *Watkins v. Secretary of State for the Home Department and others* [2006] UKHL 17, [2006] 2 WLR 807, [2006] 2 All ER 353.

<sup>134</sup> *Watkins* [2006] 2 WLR 807, at 819.

<sup>135</sup> See “Prisoners Rights and Scots Law” Scots Law News 548, available at <http://www.law.ed.ac.uk/sln/>. MacQueen further criticises the judgement by noting that only one Law Lord, Lord Walker, made any reference to Article 8 of the ECHR.

A detailed analysis of all the above issues is beyond the scope of this paper, but combined these issues demonstrate that the boundary between property and obligations, and the concept of ownership itself, is perhaps not as secure as it first seems. It is clear, however, that traditional notions of Scots property law are threatened from another front simultaneously. This challenge comes from public law, and it is to this challenge that we now turn our attention.

### *Public Law*

The boundary between private law, regulating the interests of private individuals, and public law, bridging the gap between individuals and the State, tends to be neglected. This ambivalence can be traced back to Roman law, with one commentator noting “the boundary between private and public law is scarcely explored in the Roman sources”.<sup>136</sup> Yet there is a recognisable movement in several legal systems towards a more social role for property law.<sup>137</sup> Scots law, particularly set against the backdrop of the newly formed Scottish Parliament, is arguably moving in a similar direction.

Scots law has a tradition of protecting the interests of an owner, generally allowing those holding a right of *dominium* free reign over their property.<sup>138</sup> With regard to moveable property, this analysis generally holds true today – but obviously subject to the caveat that any action must not be prohibited by the criminal law or fiscal rules.<sup>139</sup> The position relative to land is somewhat different, perhaps reflecting the crucial importance of the control of land in any society.

In previous centuries, the British state adopted something of a *laissez-faire* attitude towards Scotland’s landowners.<sup>140</sup> This fitted well with Victorian notions of capitalism and Adam Smith’s model of economics, but led to marked agrarian change throughout Scotland.<sup>141</sup> The first challenge to non-intervention came in the form of the Crofters Holdings (Scotland) Act 1886, which introduced a system of secure tenancies coupled with regulated rents for smallholders in the peripheral areas of Highland Scotland. This response to the vulnerability of crofter to landowner regulated the relationship of private parties in a landlord/tenant relationship in a way

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<sup>136</sup> D Johnston, “The General Influence of Roman Institutions of State and Public Law” in D L Carey Miller and R Zimmerman (eds), *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays* 87, at 89. One anomaly identified by Johnston, concerning the uncertain public or private law status of a town (*civitas*) in Roman law, also existed in Scotland in the context of servitudes in Scottish Burghs: see R R M Paisley, “Personal Real Burdens” 2005 JR 377, at 382-383; see also D Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998), para 1.14.

<sup>137</sup> See, for example, A J van der Walt “Ownership and Eviction: Constitutional Rights in Private Law” (2005) 9 EdinLR 32. See also the assorted papers in (2005) 16 Stell LR.

<sup>138</sup> Reid, *Property*, para 5.

<sup>139</sup> See Carey Miller with Irvine, *Corporeal Moveables*, para 1.12, for a general comment on limitations on the ownership of moveables.

<sup>140</sup> See further M M Combe “Parts 2 and 3 of the Land Reform (Scotland) Act 2003: A Definitive Answer to the Scottish Land Question?” 2006 JR 195 at 196-200. The historical information that follows is an abbreviated version of what appears in that paper.

<sup>141</sup> See further T M Devine, “Social Responses to Agrarian ‘Improvement’: The Highland and Lowland Clearances in Scotland” in R A Houston and I D Whyte (eds) *Scottish Society 1500-1800* (1989) 151. For a uniquely Highland perspective, see J Hunter, *The Making of the Crofting Community* (1976).

which reflected a sea change in land policy.<sup>142</sup> In later years, similar measures were enacted to regulate the position of landlord and tenant throughout rural Scotland.<sup>143</sup> A degree of state led resettlement also occurred, led first by the Congested Districts Board<sup>144</sup> and then by the Board of Agriculture for Scotland.<sup>145</sup> This culminated in the Land Settlement (Scotland) Act 1919, a statute passed in the immediate aftermath of World War I to cater for returning war veterans, described by one commentator as “the last attempt at serious land reform.”<sup>146</sup>

As already noted, these forms of empowering adjustment may be thought of as entirely separate from the boundaries of property law; the state is simply providing a level playing field, in much the same way as consumer protection provisions or controls over unfair contractual terms regulate contract law. While this is true, the measures concerned amount to an erosion of property law’s traditional boundaries, preventing owners from exercising the normal full quota of privileges.<sup>147</sup> Other state interference may be more direct, perhaps through planning control mechanisms or environmental law,<sup>148</sup> but this does not make this indirect interference any less of a challenge to the traditional protection of property rights.<sup>149</sup> All of these measures, taken together, represent a diminution of the relatively absolute traditional model of Scots common law.

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<sup>142</sup> J W Cairns, “Historical Introduction” in K Reid and R Zimmermann (eds) *A History of Private Law in Scotland*, I, 14, at 180 identifies this legislation as reflecting “contervailing trends to the emphasis on individual property.”

<sup>143</sup> The Landholders Acts 1886 to 1931 have now been superseded by The Agricultural Holdings (Scotland) Act 1991 and the Crofters (Scotland) Act 1993. For an account of how tenancies have been regulated in urban Scotland since protections for tenants were introduced by the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, see P Robson and S Halliday *Residential Tenancies* 2<sup>nd</sup> edn (1998) at 1-5. Commercial tenancies were unaffected by such reforms, as parties are afforded more autonomy to reflect the equality of bargaining where businesses are involved.

<sup>144</sup> Congested Districts (Scotland) Act 1897.

<sup>145</sup> Created by the Small Landholders Act 1911.

<sup>146</sup> A Wightman, *Scotland: Land and Power* (1999), at 24. It is perhaps worth noting that the major social upheavals of World War I catalysed land reform on both a rural and urban level, as discussed by Robson and Halliday, above note 143. While it may seem contrived to compare the formation of a Scottish Parliament with the apocalyptic occurrences of WWI, there may be a valid analogy between the expectations returning veterans had of the British State and the expectations Scottish people have of the newly formed devolved administration.

<sup>147</sup> As to the inevitability of this see the comments of S Scott, “Recent Developments in Case Law Regarding Neighbour Law and its Influence on the Concept of Ownership” (2005) 16 (3) *Stell LR* 351, at 351-352.

<sup>148</sup> See further D A Brand, A J M Steven and S Wortley, above note 91, ch 20. One example of a direct planning control measure, which closely resembles a Scottish real burden, is a Section 75 agreement, so called because of the relevant provision in the Town and Country Planning (Scotland) Act 1997. If these agreements are registered in the Register of Sasines or the Land Register, as appropriate, the agreement becomes enforceable as against the owner for the time being by the relevant planning authority.

<sup>149</sup> The human rights case *James v UK* (1986) 8 E.H.R.R. 116 may be relevant here, which involved an English reform that empowered a tenant with a right to buy. At para 41 the court noted that “[t]he taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being ‘in the public interest’”, thus highlighting the wider public benefits of such a scheme.

## Reform Since The Scotland Act 1998

Both the Scotland Act 1998 and the Human Rights Act 1998 brought far reaching changes to Scottish constitutional law and legal culture.<sup>150</sup> The newly formed Scottish Parliament has undoubtedly captured the moment in many areas of law, and has embraced the issue of land reform with some vigour.<sup>151</sup> Indeed, it was clear that land reform was to be high on the agenda even before Parliamentary business had commenced.<sup>152</sup>

A number of the reforms adopted by the Scottish Parliament have addressed anomalies in Scottish land law long overlooked by the busier UK Parliament.<sup>153</sup> One notable piece of legislation has been enacted to address two separate branches of the Scottish Executive's land policy: public access rights over land; and increased community ownership of rural land.

Land subject to legal ownership and consequent use may, of course, be open to public recreational use. A tradition of hill walking in Scotland illustrates the scope for complementary *de jure* and *de facto* use of land based on a mutual appreciation of limits; but, of course, a landowner's controlling right means that *de facto* rights are precarious, for while there is no civil wrong of trespass in Scots law a landowner can, of course, assert his or her right – through removal and, if necessary, interdict – against a party without legal right.<sup>154</sup> The fact that Scots common law does not make the act of trespass itself subject to a civil claim has led to widespread misunderstanding of the position of the law through an erroneous assumption that some form of “right to roam” was implicit at common law.<sup>155</sup> As Paisley notes, if there was no right to restrict unfettered access, there would scarcely be a need for rights of way in Scots law,<sup>156</sup> nor would there have been such a compelling case to introduce access rights in the hugely symbolic Land Reform (Scotland) Act 2003. In any event, the need for access was felt to be so important, that the Land Reform and Policy Group formed by the Labour Government observed the following:<sup>157</sup>

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<sup>150</sup> See The Hon. Lord Reed, *The Constitutionalisation of Private Law: Scotland*, vol 5.2 EJCL, (May 2001), <http://www.ejcl.org/52/art52-4.html>.

<sup>151</sup> It should also be noted that some land reform measures pre-dated the Scotland Act, namely the Agricultural Holdings (Scotland) Act 1991, the Crofters (Scotland) Act 1993 and the Transfer of Crofting Estates (Scotland) Act 1997.

<sup>152</sup> This was evidenced by virtue of a lecture given by Donald Dewar, who went on to become Scotland's first First Minister, entitled Land Reform for the 21<sup>st</sup> Century, and available at <http://www.caledonia.org.uk/land/lectures.htm>. The Land Reform and Policy Group, established in October 1998, also made it clear that land reform would be high on the Scottish Parliament's legislative agenda. See *Identifying the problems* (February 1998) – available at <http://www.scotland.gov.uk/library/documents/lrpg00.htm>.

<sup>153</sup> A J M Steven, “Scottish Land Law in a State of Reform” [2002] JBL 177.

<sup>154</sup> R R M Paisley, *Access Rights and Rights of Way: A Guide to the Law in Scotland* (2006), at 40 explains the position.

<sup>155</sup> On this view, see, for example, H Reid “The home of golf is no place for prejudice to reside” *The Herald* 18/5/2006, where it is observed “The Scottish Land Reform Act of 2003 gave walkers access to [golf] courses - which they probably already had, in theory”.

<sup>156</sup> Paisley, above note 154, at 40. See also *Livingstone v Earl of Breadalbane* (1791) 3 Pat. App. 221.

<sup>157</sup> Recommendations for Action (January 1999) para 4.2. See also the earlier observation that there should be “more public access on a responsible basis”. (*Identifying the solutions* (September 1998) at para 3.3).

A right of responsible access to land for informal recreation and passage, on enclosed as well as open and hill ground, should be enshrined in law. This right should be subject in appropriate circumstances to measures to protect privacy, land management, and conservation needs. Such a new right of access would be an essential element in a new relationship between Scotland's people and the land. It may well be appropriate for legislation on access to be included as part of the main land reform legislation.

Set against this background, Part 1 of the Land Reform Act established that "everyone" had a right of responsible access to land.<sup>158</sup> The access rights in the 2003 Act complement the existing rules on rights of way.<sup>159</sup> In addition to this right of responsible access,<sup>160</sup> local authorities also have a duty to form a "core paths" plan in their area,<sup>161</sup> allowing members of the public to have "reasonable access throughout their area" by virtue of a network of well maintained paths. Landowners, of course, retain ultimate ownership of any land that has a right of way or access rights exercisable over it;<sup>162</sup> moreover, the rights of recreational use are subject to carefully defined restrictions and limitations.<sup>163</sup>

### The Community and Crofting Community Right to Buy

While Part 1 of the Land Reform Act deals with access rights, Parts 2 and 3 of the Land Reform Act address another aspect of the Scottish land reform agenda. These measures allow communities, in certain circumstances, to acquire ownership of land; with Part 2 relevant for the vast majority of rural Scotland and Part 3 relevant for the more marginal areas under crofting tenure.

These measures differ from previous Scottish efforts at land reform and redistribution; they bear little resemblance to the more targeted reforms detailed above that focussed on empowering individuals, by providing access to a secure and tenable way of life through working the land. Instead, these reforms focus on the idea of community empowerment, by allowing communities, in certain circumstances, to buy the land on which they live.

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<sup>158</sup> Land Reform (Scotland) Act 2003 (asp2), s 1(1). See further J Rowan-Robinson "Reform of the law relating to access to the countryside: realising expectations?" J.P.L. 2003, November, 1394 and J Rowan-Robinson, "Public access to the countryside: the new regime" (2003) 97 SPEL 662

<sup>159</sup> For example, a right of way may exist over developed land, which is excluded from the statutory access rights by s 6 of the 2003 Act.

<sup>160</sup> What is "responsible" is defined by s 2 of the Land Reform (Scotland) Act 2003.

<sup>161</sup> S 17, Land Reform (Scotland) Act. Compulsory powers to delineate paths where access rights are exercisable are available under s 22.

<sup>162</sup> *Sutherland v Thomson* (1876) 3 R 485.

<sup>163</sup> See [http://news.bbc.co.uk/1/hi/scotland/tayside\\_and\\_central/5040326.stm](http://news.bbc.co.uk/1/hi/scotland/tayside_and_central/5040326.stm) for the first attempt to do so.

For communities in the majority of rural Scotland – urban land is not covered by the legislation<sup>164</sup> – this right is pre-emptive, allowing communities that have registered their intent to buy land to do so if and when the land is offered by the owner for sale.<sup>165</sup> Part 3 of the Land Reform Act gives communities in crofting areas a stronger right that can be exercised without the consent of the landowner. Admittedly this right only applies to land under crofting tenure,<sup>166</sup> which forms a fairly limited area of Scotland,<sup>167</sup> and there are a number of tests to be met before the Scottish Ministers will sanction such a compulsory purchase,<sup>168</sup> but even with these limitations this marks a fairly radical step away from the traditional protection afforded to Scotland's landowners.

While a detailed analysis of the provisions is outwith the scope of this paper,<sup>169</sup> for our purposes it is interesting to note that Scottish land reform has taken place within a property regime that remains unititular and focuses reform efforts at transferring ownership to a deserving community body within the traditional framework of Scots property law. This approach can be contrasted with South Africa, where land reform, set against the backdrop of a constitutional commitment to the process,<sup>170</sup> appears to be leading to a significant challenge to traditional notions of Roman-Dutch property law.<sup>171</sup> This subordination of private concerns in favour of greater public good has been described as the “functionalisation” or “socialisation” of property law.<sup>172</sup>

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<sup>164</sup> By virtue of s 33(1) of the 2003 Act, the legislation only applies to land not excluded by Scottish Ministers. S 33(2) provides that Ministers must secure the legislation only applies to land that appears to be rural, taking into account population density, and with this in mind a statutory instrument was passed (SSI 2004/296) which stated that settlements with a population of more than ten thousand are excluded from the community right to buy.

<sup>165</sup> A number of hurdles must be met before this pre-emptive right is created, such as forming a suitable company limited by guarantee that meets the requirements of s 34 and registering a “community interest” (s 37) in the Register of Community Interests in Land (formed by s 36).

<sup>166</sup> S 68. Neighbouring land, or “eligible additional land” to adopt the language of the statute, can also be subject to the right to buy under s 70.

<sup>167</sup> Crofting law only applies in areas known as the “crofting counties”. Recent Scottish Executive figures state that there are 770,000 hectares (or roughly 3000 square miles) under crofting tenure: <http://www.scotland.gov.uk/Topics/Rural/Crofting/17096/7491>. See further D J MacCuish and D Flynn *Crofting Law* (1990) for a background to crofting law.

<sup>168</sup> Crofting communities must also meet a number of requirements similar to those community bodies must meet under Part 2 of the 2003 Act, as they must also form a compliant company limited by guarantee (s 71) and any purchase must be both compatible with sustainable development (s 74(1)(j)) and in the public interest (s 74(1)(n)).

<sup>169</sup> See further Combe, above note 140, at 204-227.

<sup>170</sup> Constitution of the Republic of South Africa (Act No. 108 of 1996) section 25. See, generally, D L Carey Miller and A Pope, *Land Title in South Africa* (2000) and “South African Land Reform” (2000) 44 JAL 167; see also “Land Reform” in C G van der Merwe, M de Waal and D L Carey Miller (eds) *Kluwer Encyclopaedia of Comparative Law: South Africa*, Property and Trust Law (2002) 535; regarding the constitutional position see A J Van Der Walt, “Dancing With Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State” (2001) 118 SALJ 258.

<sup>171</sup> See further S Brink, “Legal Pluralism in South Africa in View of the *Richtersveld* Case” (2005) 16 Stell LR 175.

<sup>172</sup> P J Badenhorst, J M Pienaar and H Mostert *Silberberg and Schoeman's The Law of Property* (2003), para 1.3.

Scotland's reforms, in comparison, are pitched at a significantly lower level.<sup>173</sup> To date, the land reform measures have had limited direct impact. A number of community interests have been registered and the first community buyouts under the statutory scheme have taken place,<sup>174</sup> but these buyouts have been largely consensual. Where there is not a willing buyer and a willing seller, communities must go through a fairly arduous administration process to meet the requirements of Part 2 of the Act, and even when these are met it is possible for Ministers to refuse to register a community interest.

The only action brought under the Act to date related to such a Ministerial refusal, but the community was unsuccessful in their appeal to the Sheriff Court against this decision.<sup>175</sup> The Scottish Ministers, or more accurately the civil servants involved in the registration process, felt the community interest should be denied registration for a number of reasons,<sup>176</sup> and the Sheriff ruled that this exercise of, fairly wide, Ministerial discretion was not to be interfered with. Following this case, it would appear that any challenge to a Ministerial decision to register, or indeed not to register, a community interest will prove especially difficult; which serves to highlight the power of Scottish Ministers and civil servants when it comes to putting this particular government policy into place.

The stronger Part 3 right to buy has arguably had more impact, even though there have been no compulsory sales as yet. Only one forced buyout is currently being planned,<sup>177</sup> but at least one buyout has evolved from a previously aggressive forced sale into a consensual transaction.<sup>178</sup> It is impossible to quantify how many sales of land have been influenced by the current climate that seems conducive to land reform, but it is clear that a change of attitudes and a shift in the relative balance of power between landowner and tenant is taking place.<sup>179</sup>

### *Conclusion*

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<sup>173</sup> In their comparative work, Reid and van der Merwe observe that the Scottish reforms are but a "modest response to a modest problem", and that comparison of the reforms in the two jurisdictions leads to "difference and not similarity": Reid and van der Merwe, above note 26, at 670.

<sup>174</sup> See Scottish Executive News Release *First community buy-outs approved 28/2/2005* available at [www.scotland.gov.uk/News/Releases/2005/02/28133515](http://www.scotland.gov.uk/News/Releases/2005/02/28133515).

<sup>175</sup> *Holmehill Limited v The Scottish Ministers* 2006 SLT (Sh Ct) 79, available at [http://www.scotcourts.gov.uk/opinions/b255\\_05.html](http://www.scotcourts.gov.uk/opinions/b255_05.html). S 61 of the legislation gives landowners, community bodies and a limited class of individuals the right to appeal to the Sheriff Court against Ministerial decisions.

<sup>176</sup> S 39 of the Act provides that late registrations, like the one at the centre of this case, have a higher threshold to pass before they can be registered as compared to timeous registrations made under s 37 before land is exposed for sale. The Sheriff ruled that the Ministers were entitled to decide there were no good reasons for why the application was late, and were also justified in deciding the application was not in the public interest, as it appeared the registration was actually a device designed to prevent housing development in the area. See further M M Combe "No Place Like *Holme*: Community Expectations and the Right to Buy" (2007) 11 EdinLR 109 for critique.

<sup>177</sup> *Communities in forced buyout move*, available at <http://news.bbc.co.uk/1/hi/scotland/4584961.stm>.

<sup>178</sup> See *Landmark Agreement Reached by the Community for Galson Estate Buyout* (September 2005) at <http://www.communityland.org.uk/news.htm>.

<sup>179</sup> As an example of this change in attitudes, energy companies are offering crofters on the Isle of Lewis money linked to a proposed wind farm scheme. Whether or not this is out of charity or in a bid to dissuade challenges to the plans of landowners (by effecting a change of owner) is a matter for speculation. See P Rincon *Wind Power Dilemma for Lewis* 25 July 2006 available at <http://news.bbc.co.uk/1/hi/sci/tech/5205430.stm>.

Lord Coulsfield, in his opinion in the Court of Session decision in *Sharp v Thomson*,<sup>180</sup> observed that “although weight should be given to the arguments that the purity of Scots law, as a system based on the civil law, should be maintained and the unitary conception of ownership preserved, these arguments should not be overemphasised or treated as in themselves decisive.”<sup>181</sup>

It is probably trite to note that the tension between dogmatics of structure and substance, on the one hand, and the necessity of policy-driven innovation, on the other, is itself part of the historical tradition of Scots law’s mixed-system. We hope that the present paper, in its presentation of selected property boundary issues, at least succeeds to some small extent in telling something of this tension and its significance to the character of the law of Scotland.

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<sup>180</sup> 1995 SLT 837, at 869.

<sup>181</sup> For general comments based on this dictum see D L Carey Miller, above note 98, at 301-302.