

REVOLUTION IN SCOTTISH LAND LAW

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Abstract

On 28 November 2004, Scottish land law will be subject to a radical overhaul. The feudal system of landholding, now unique in the developed world, will finally be swept away. This major reform, however, has necessitated substantive changes in the law relating to perpetual conditions affecting land. The law on real burdens will effectively be codified and the law on servitudes amended. The final piece of the revolution is to place the Scottish law of the tenement (apartment ownership) onto a statutory footing. This article gives an overview of the changes and concludes that they should be of great interest to those involved in developing and reforming the law in other jurisdictions.

1. Introduction

Scottish land law is on the threshold of perhaps the most significant changes in its history. On 28 November 2004, the so-called ‘appointed day’, three fundamental pieces of legislation will be brought wholly into force. The first of these, the Abolition of Feudal Tenure etc (Scotland) Act 2000,² will remove the feudal system of landholding. The second, the Title Conditions (Scotland) Act 2003, will effectively introduce a code governing most perpetual obligations affecting land. The third, the Tenements (Scotland) Act 2004, will codify the law relating to flatted property (condominium). Together, the changes amount to a veritable revolution in Scottish land law. This article attempts to give a general account of that revolution, within a comparative law context.³

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² It, together with other Scottish legislation, is available at <http://www.scotland-legislation.hmso.gov.uk/legislation/scotland/about.htm>.

³ The interested reader will also appreciate K G C Reid, ‘Vassals No More: Feudalism and Post-Feudalism in Scotland’ (2003) 11 *European Review of Private Law* 282-300. As the lead Law Commissioner responsible for the draft versions of the legislation, Professor Reid is the prime mover behind the changes.

2. Why now?

As is well known, Scotland, although part of the United Kingdom, has a legal system quite distinct from its larger southern neighbour, England. Nevertheless, from the Treaty of Union in 1707 until 1999 the same Parliament, namely Westminster, was responsible for passing legislation affecting private law both north and south of the border. But legislative time for technical law reform measures was scarce. This changed in 1999, when the devolved Scottish Parliament was established.⁴ Private law measures can now be passed in Edinburgh. The first Scottish Executive⁵ was committed to abolishing the feudal system. It was seen as an anachronism which was open to abuse by feudal overlords - more of which shortly. Draft legislation was prepared by the body responsible for law reform in Scotland, the Scottish Law Commission.⁶ However, it was clear to the Commission that feudal abolition could not be carried out in isolation, but that title condition and tenement law also needed to be overhauled.⁷ The way forward was to deal with these matters as related parts of a wider property law reform project and to effect the changes at the same time, on a date to be fixed by Scottish Ministers. That date was duly fixed as 28 November 2004.

3. Why did feudalism survive so long in Scotland?

To the comparative lawyer, the question of why Scotland retained feudalism for so long is an interesting one. Feudal law permeated through most of Europe in the early Middle Ages.⁸ Of course, feudalism in its pure form involved far more than land law. The feudal overlord, for example, could require his vassal to go out and wage war on his behalf. In relation to the law of property, feudal law collided with Roman law. How could both vassal and superiors(s) be regarded as owner of the same piece of land? The uneasy solution was that of divided ownership (*duplex dominium*).⁹

⁴ By the Scotland Act 1998 (available at <http://www.hmso.gov.uk/acts/acts1998/19980046.htm>). For discussion, see C M G Himsworth and C R Munro, *The Scotland Act 1998* (2nd edn, 2000), W Green/Sweet and Maxwell, Edinburgh.

⁵ In effect, the devolved Government.

⁶ Scottish Law Commission, Report on the Abolition of the Feudal System (Scot Law Com No 168, 2000) (available at <http://www.scotlawcom.gov.uk>).

⁷ See S Wortley and A J M Steven, 'The Modernisation of Real Burdens and Servitudes: Some Observations on the Title Conditions (Scotland) Bill Consultation Paper' (2001) 6 *Scottish Law and Practice Quarterly* 261.

⁸ See K G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003), LexisNexis UK, Edinburgh, para 1.1. See also H L MacQueen, 'Tears of a Legal Historian: Scottish Feudalism and the *Ius Commune*' (2003) *Juridical Review* 1.

⁹ A J van der Walt and D G Kleyn, '*Duplex Dominium*: The History and Significance of the Concept of Divided Ownership' in D P Visser (ed), *Essays on the History of Law* (1989), Juta & Co, Cape Town.

It was not long, however, before feudalism began its retreat.¹⁰ In England, as early as 1290, the statute *Quia Emptores* prohibited land from being the subject of a feudal grant and allowed it to be transferred without the feudal overlord's permission. Cromwell dismantled much of the rest of English feudal law in the mid-seventeenth century.¹¹ In France, the Revolution of 1789 meant the death there for feudalism. 'L'assemblée nationale détruit entièrement le régime féodal' began the relevant enactment.¹² French military victories in the ensuing decades led to abolition in other parts of Western Europe, for example the Netherlands in 1798. The German states abandoned feudalism in the mid-nineteenth century. Scotland is quite unique in it surviving into the twenty-first century. Why?

The answer lies in the programme of building carried out in Scotland's towns and cities at the start of the nineteenth century. Using a feudal grant allowed developers to impose perpetual conditions affecting the land, dictating how buildings had to be constructed and maintained. The courts became willing to accept the validity of such obligations, which became known as 'real burdens'.¹³

The law became established that for there to be a real burden, there has to be a benefited property and a burdened property. The owner of the former can enforce the burden against the latter. Accordingly, if Ann sells part of her garden ground to her neighbour Bertram, she can impose real burdens on it, for example requiring him to construct and maintain a new fence separating the two plots. In that case, the property which Ann retains will be the benefited property and the property which she sold to Bertram will be the burdened property. What, however, if Ann does not plan to retain any land, but she still wishes to impose burdens? The answer is for her to use a feudal grant, because the law allows a bare superiority to act as a benefited property. This arrangement is rather akin to the Roman emphyteusis.¹⁴ In practical and commercial terms, it is like English leasehold tenure. The superior is equivalent to the landlord and the vassal to his tenant. In place of rent, historically, there was 'feu duty'.¹⁵ The development of real burdens helped give the feudal system an extended lifespan in Scotland. However, in many ways this was not a good thing.

In the first place, feudalism has features which unnecessarily complicate land law. One piece of land may have a multiplicity of superiors. A superior has power to enforce the real burdens, which he or his predecessors imposed. This means that he can charge his vassal

¹⁰ My main source here is G L Gretton in K G C Reid, *The Law of Property in Scotland* (1996), Butterworths, Edinburgh, para 45. This is part of Professor Gretton's important treatment of the Scottish feudal system.

¹¹ His efforts in this regard were homologated by the Tenures Abolition Act 1660 (c 24) on the Restoration of Charles II.

¹² 'The National Assembly wholly abolishes the feudal system.'

¹³ Although, the landmark case of *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296 did not actually involve a feudal grant.

¹⁴ The Roman parallel was made by Craig in his *Ius Feudale* (c 1600) I.9.19 and Stair in his *Institutions of the Law of Scotland* (1681) II.3.34.

¹⁵ See Reid (n 8), para 1.3.

money if the vassal wishes to do something which is contrary to the conditions of the title. So, for example, if the vassal wishes to build a garage and a real burden prevents this, he must approach his superior for permission. The superior will usually then demand money. Their agreement will then be recorded in a document known as a 'minute of waiver'. In recent years, however, the ability of a superior, who had no local connection to the property, to make money out of a vassal who wished to carry out a simple change to his property, was abused. The power to grant minutes of waiver in some quarters became merely seen as an income-generating exercise.¹⁶ Removing the feudal system was recognised as the way to stop such practices.

There were, however, genuine benefits of using real burdens, whether as part of a feudal grant or otherwise, and the reform process needed to take account of these. In Scotland, the list of servitudes is in practice closed. Despite some judicial pronouncements to the contrary,¹⁷ when a case has turned on the point, the courts have been unwilling to extend the list recognised by Roman law. Thus, pleas in the early 1990s that servitudes of sign hanging¹⁸ and electricity¹⁹ should be approved, have failed because they are not on the established list. More recently, there has been debate over whether the right to park a vehicle on another party's land can be constituted as a servitude. The latest judicial opinion, from Lady Smith, sitting in the Outer House of the Court of Session is that it cannot: 'I cannot conclude that Scots law recognises, in principle, a servitude right of parking independent of any right of access.'²⁰

The Scottish common law position is at odds with that in most other countries.²¹ The resistance by the courts has been fuelled mainly by the fact that servitudes do not need to appear on the public register to bind successors. It is competent to create a servitude by exercise alone for twenty years under the statute relating to positive prescription.²² In addition, an unregistered deed followed by mere exercise of the servitude will also suffice. Such servitudes may not be transparent to a purchaser.²³ To deal with the problem of the fixed list, conveyancers in Scotland have resorted to the mechanism of the real burden, there being

¹⁶ See *Harris v Douglass* 1993 SLT (Lands Tr) 56 and *Strathclyde Joint Police Board v The Elderslie Estates Ltd* 2002 SLT (Lands Tr) 2.

¹⁷ Notably *Dyce v Hay* (1852) 1 Macq 305.

¹⁸ *Mendelssohn v The Wee Pub Co Ltd* 1991 GWD 26-1518.

¹⁹ *Neill v Scobbie* 1993 GWD 13-887.

²⁰ *Nationwide Building Society v Walter D Allan Ltd*, 4 August 2004 (available at <http://www.scotcourts.gov.uk/opinionsv/smi2207.html>). The case reviews the earlier authorities.

²¹ For example, France (see *Code civil* art 186), Germany (see BGB art 1018) and South Africa (see P J Badenhorst, J M Pienaar and H Mostert, *Silberberg and Schoeman's The Law of Property* (4th edn, 2003), LexisNexis, Durban, para 14.1).

²² Prescription and Limitation (Scotland) Act 1973, s 3(2).

²³ For example, a right of way may only be exercised occasionally.

no *numerus clausus* of real burdens.²⁴

There is also another key benefit of using real burdens. An established maxim of the civil law in relation to servitudes is: *servitus in faciendo consistere nequit*.²⁵ That is to say, servitudes may not impose positive acts. The owner of the burdened property may not be required to do something. He may only be required not to do something or to endure the limited use of his property by another.²⁶ But there is no such limitation with the real burden. It is perfectly valid to make the burdened proprietor do something, for example, build a house, maintain a wall or contribute to a repair cost. Hence real burdens would often be placed in the title deeds of property. A task of the reform legislation was to preserve such useful burdens.

4. Effecting feudal abolition

The Abolition of Feudal Tenure etc (Scotland) Act 2000 begins in declamatory fashion: ‘The feudal system of land tenure, that is to say the entire system whereby land is held by a vassal on perpetual tenure from a superior is, on the appointed day, abolished.’²⁷ As already noted, the appointed day is 28 November 2004. It will see the demise of superiorities and the transformation of the right of the vassal at the foot of the feudal structure into one of absolute ownership.²⁸ Henceforth, Scottish landownership will be allodial. To avoid the feudal system effectively being recreated through the use of ultra-long leases, a new maximum duration for leases of 175 years is introduced.²⁹ The legislation goes on to provide a compensation mechanism for superiors in respect of their loss of the periodical payment that is feuduty.³⁰ But this is merely a tidying-up exercise. It has been incompetent to impose new feuduty since 1974 and most feuduties existing at that date have been extinguished through a redemption procedure which operates on the first sale after the 1974 legislation came into force.³¹

What about real burdens? In principle, superiors can no longer enforce these.³² However, the 2000 Act does enable them to register a notice to preserve their rights in very

²⁴ A leading example is *B and C Group Management v Haren* (4 December 1992, unreported). See also M J de Waal, ‘Servitudes’ in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, vol 1 (2000), OUP, p 331.

²⁵ This was probably first used by the Glossators and Post-Glossators. See De Waal (op cit), at p 326.

²⁶ See, for example, BGB art 1018 (Germany) and BW 5.71 (Netherlands).

²⁷ 2000 Act, s 1. The writer is reminded of section 1 of the Scotland Act 1998 (the legislation which gave effect to devolution in Scotland): ‘There shall be a Scottish Parliament.’

²⁸ 2000 Act, s 2.

²⁹ 2000 Act, s 67.

³⁰ 2000 Act, Part 3.

³¹ Land Tenure Reform (Scotland) Act 1974, ss 3 to 5.

³² 2000 Act, s 17.

limited circumstances where this is considered to be legitimate. The first day to register such a notice was 1 November 2003 and the last is 26 November 2004.³³ The most important situation where a superior can preserve his rights is where he owns land which is in the vicinity of the burdened property. If that land has a permanent building on it, which is a place of human habitation or resort and which is within 100 metres of the burdened property, then the superior can 'reallot' the burden to it.³⁴ As can be seen, these criteria are restrictive. The rationale is that in such circumstances the superior has a genuine interest to enforce.

In other limited cases, the legislation lets the superior preserve burdens so that he or she may enforce them simply as a person after feudal abolition, rather than as a landowner. The effect of this is for the burdens to have a burdened property and not a benefited property. Such burdens are given a new name by the Title Conditions (Scotland) Act 2003: *personal real burdens*. They are discussed further below. The leading example is perhaps the conservation burden. If the superior is a conservation body, on a special list drawn up by the Scottish Ministers, then it can register a notice by 26 November 2004 which lets it enforce the burdens after feudal abolition, purely in its capacity as such a body.³⁵ But, it may only do this in respect of *conservation burdens*, in other words burdens which protect natural or architectural features, such as a nature reserve or historic building.

Only in one case is a superior entitled to compensation for the loss of his right to enforce a burden. This is the development value burden and is best demonstrated by an example. Imagine that in 1990 a superior granted some land in the middle of a town for no consideration to a community group. In return for the absence of a price, he imposed a real burden providing that the land could only be used for charitable or community purposes. This would prevent commercial use. It would be unfair to the superior if the community group sold the land to a supermarket after 28 November 2004 and made a profit out of this. Accordingly, the 2000 Act allows the superior to preserve a right of compensation in these circumstances if the burden is breached up to five years before or twenty years after feudal abolition.³⁶ The quantum of the compensation is the difference in value of the land with and without the real burden. However, as this is expected to be measured at the time of the original grant, with inflation not being factored in, the compensation procedure will only be worth pursuing in respect of recent grants. This illustrates one of the general themes of the legislation of only protecting superiors' rights in a narrow way.

5. Reforming title conditions

³³ 26 November being a Friday and the last day that the public registers are open before the appointed day.

³⁴ 2000 Act, s 18.

³⁵ 2000 Act, s 27. For the original list of conservation bodies, see the Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003, SSI 2003/453, available at <http://www.scotland-legislation.hms.gov.uk/legislation/scotland/ssi2003/20030453.htm>.

³⁶ 2000 Act, ss 33-40.

Feudal abolition has necessitated the overhaul of the law of real burdens. The Scottish Law Commission sensibly decided that this should be done by a separate but related piece of legislation. The point was that, although real burdens have been used heavily in a feudal context, they have regularly been used in non-feudal transfers too, for example, where someone sells part of their land by way of an ordinary deed of transfer (disposition) and imposes burdens.

The common law of real burdens suffers from a number of problems. First, it is often confused or complicated. For example, where there is a real burden prohibiting building on a piece of land, it is unclear whether that is enforceable against a tenant as well as the owner.³⁷ In other words, is the right a real one? Secondly, the law lacks transparency. A deed creating a real burden must identify the burdened property and then be registered against the title of that property. But it need not spell out what the benefited property is nor be registered against its title. Where there is silence, the common law, through a set of complicated and unsatisfactory rules, can imply what the benefited property is.³⁸ The rules, however, are so difficult that property owners will often simply not know who can enforce their burdens against them. Thirdly, the common law does not deal effectively with old and obsolete burdens. Many of these appear on title deeds. They have to be read through and considered by a purchaser's solicitor to be part of a conveyancing transaction and can slow the whole process down.

The Title Conditions (Scotland) Act 2003 seeks to address these difficulties. Whilst this legislation is principally about real burdens, it also deals to a lesser extent with other perpetual conditions affecting land, notably servitudes. These conditions are given the umbrella definition of 'title conditions'.³⁹ Their connecting feature is that a special Scottish court known as the Lands Tribunal has power to vary or discharge them.

As already noted, at common law real burdens can be divided into those which are (1) feudal and (2) non-feudal. Category (1) disappears with feudal abolition. The new binary categorisation is between (1) praedial real burdens and (2) personal real burdens. New category (1) is effectively the same as old category (2). With a praedial real burden, there must be both a benefited and a burdened property. For example, Two High Street, Glasgow, is able to enforce against Three High Street, Glasgow. The vast majority of real burdens will be praedial.

With a personal real burden, there is a burdened property but no benefited property.⁴⁰ It is a person who can enforce. He or she is known as the 'holder'. Such burdens effectively preserve the feudal system, but in very limited circumstances. Only eight types of personal real burden are recognised and they are restricted in terms of content and holder. Often the

³⁷ For discussion, see K G C Reid, *The Law of Property in Scotland* (1996), Butterworths, Edinburgh, para 413.

³⁸ See D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004), LexisNexis UK, Edinburgh, paras 17.23-17.31. The issue of implying benefited properties has caused problems in other jurisdictions such as the United States; see Lawrence Berger, 'A Policy Analysis of Promises Respecting the Use of Land' (1970) *Minnesota Law Review* 167, at pp 195 to 203.

³⁹ 2003 Act, s 122(1).

⁴⁰ 2003 Act, ss 38-48.

holder will be a public body. One of the most important is the conservation burden, which was described above in relation to feudal abolition. Others include maritime burdens which are enforceable by the Crown (in reality the state) in respect of the foreshore and seabed, and economic development burdens which allow Ministers and local authorities to impose conditions promoting such development when selling land.⁴¹

For the more practically significant praedial real burdens, the 2003 Act noticeably improves the common law by requiring the deed creating such burdens to (1) identify both the benefited and burdened properties, and (2) be registered against the title of both of these. This rule of course can only apply to burdens being created on or after 28 November 2004.⁴² For existing real burdens, the complicated rules on implying a benefited property are replaced with a new statutory set, but it too is not without difficulty.⁴³ One worth noting is the provision on facility burdens. Where a burden relates to the maintenance of a common facility, such as a road or boundary fence, all the proprietors who benefit from the facility will be able to enforce.⁴⁴ It does not matter whether the burden was created in a feudal or non-feudal deed. Therefore, such useful burdens will be unaffected by feudal abolition.

The law is clarified to make burdens which impose a restriction, such as a ban on trading, enforceable against anyone using the property. Effectively, they become real rights.⁴⁵ In contrast, burdens imposing a positive obligation ('affirmative burdens'), for example a duty to maintain or contribute to a cost, are only enforceable against the burdened proprietor.⁴⁶ A useful set of default rules is also introduced for developments where all the properties are subject to equivalent or identical burdens and each proprietor can enforce against every other. Such burdens are termed 'community burdens'.⁴⁷

New methods to remove burdens are introduced. The period of negative prescription, which extinguishes a burden following a breach which is not challenged, is reduced from twenty to five years.⁴⁸ Extinction by acquiescence of the benefited proprietor is put on a helpful statutory footing.⁴⁹ The procedure for applying to the Lands Tribunal for discharge of

⁴¹ For a detailed discussion, see D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004), LexisNexis, Edinburgh, paras 15.12-15.21.

⁴² 2003 Act, s 4.

⁴³ 2003 Act, ss 49-58. See A J M Steven, 'Implied Enforcement Rights in Relation to Real Burdens in Terms of the Title Conditions Scotland Act 2003' (2003) *Scottish Law Gazette* 146-153.

⁴⁴ 2003 Act, s 56.

⁴⁵ 2003 Act, s 9(2).

⁴⁶ 2003 Act, s 9(1).

⁴⁷ 2003 Act, ss 25-37.

⁴⁸ 2003 Act, s 18.

⁴⁹ 2003 Act, s 16.

a burden is eased, notably by unopposed applications being granted as of right.⁵⁰ There are special rules for community burdens, including a power to a majority of proprietors in the community to discharge.⁵¹ Finally, there is a novel procedure whereby a burdened proprietor can have most burdens affecting her property over 100 years old removed, by serving notice on her neighbours.⁵² If they do not object by applying to the Lands Tribunal for preservation of the burdens, then these will be removed from the applicant's title. This procedure is known informally as the 'sunset rule'. The Scottish Law Commission, in proposing it, was influenced by the fact that such a rule exists in other jurisdictions, notably Massachusetts.⁵³

Perhaps one of the most important changes made by the 2003 Act is to realign the law of servitudes and real burdens. At common law, only real burdens can impose positive obligations on the burdened proprietors. With regard, however, to negative obligations there is an unnecessary overlap. A small number of negative servitudes protecting view and light are recognised. But this job can be done equally by real burdens. Moreover, the law on negative servitudes does not satisfy the publicity principle, which is a feature of most systems of property law.⁵⁴ Registration is not required.⁵⁵ The 2003 Act sensibly makes it incompetent to create new negative servitudes.⁵⁶ Existing ones can be converted into real burdens by means of a special registration procedure.

A further overlap exists as regards obligations to allow use of the burdened property. This is classically the territory of the servitude, but as noted above real burdens have become used to get round the problem of the fixed list. The 2003 Act deals with this by breaking open the list for servitudes created expressly. Scotland joins other countries in not having a *numerus clausus* in respect of servitudes constituted by deed. But there is a price for this. Such servitudes must be publicly registered and indeed registered twice: once against the benefited property and once against the burdened property.⁵⁷ This means that purchasers can see whether the property is affected. For servitudes created in ways other than by deed, the fixed list continues. It will not be possible to create real burdens allowing use of the burdened property.⁵⁸ The servitude will have to be used to achieve such a result. So, servitudes of

⁵⁰ 2003 Act, ss 90-104.

⁵¹ 2003 Act, ss 32-37.

⁵² 2003 Act, ss 20-24.

⁵³ Scottish Law Commission, Report on Real Burdens (Scot Law Com 181, 2000), paras 5.22-5.25 (available at <http://www.scotlawcom.gov.uk>).

⁵⁴ See, for example, L P W van Vliet, *Transfer of Movables in German, French, English and Dutch Law* (2000), Ars Aequi Libri, Nijmegen, p 30.

⁵⁵ Reid (n 37), para 451.

⁵⁶ 2003 Act, s 80.

⁵⁷ 2003 Act, s 75.

⁵⁸ Other than a small exception, for burdens which are ancillary to another burden, for example, the right to enter a property to check that a burden to maintain is being complied with. See 2003 Act, s 2(3).

parking will become competent under the new law.

The end result of the realignment between servitudes and real burdens can be shown by means of a table:

Type	Servitude	Real burden
Positive obligation	No	Yes
Negative obligation	No	Yes
Obligation to allow use of burdened property	Yes	No

Now the question might be asked,⁵⁹ why the law should not be further rationalised to remove the distinction between servitudes and real burdens, and simply have one type of title conditions? The answer lies in how these rights are created. Real burdens need express provision. In contrast, servitudes can be implied or created by positive prescription. To try and amalgamate them was a step too far.⁶⁰

6. Tenement reform

The last century has seen considerable statutory innovation in the law relating to tenement flats or apartments. Legislation has been passed in a number of countries, such as Belgium in 1924, France in 1938, Germany in 1951 and Turkey in 1969.⁶¹ Most recently, in England and Wales, the Commonhold and Leasehold Reform Act 2002 introduces a new freehold type of ownership for flats. Until the Tenements (Scotland) Act 2004, the position in Scotland has been regulated by the common law. One of the major reasons why this is so is that Scots law did not accept the important civil law maxim *superficies solo cedit* in its purist form.⁶² In fact,

⁵⁹ As indeed it was asked, when the writer gave a seminar on the land law reforms at Utrecht University in April 2004.

⁶⁰ See Reid (n 3), at p 299.

⁶¹ See Badenhorst, Pienaar and Mostert (n 21), para 20.1. See also C G van der Merwe and D W Butler, *Sectional Titles Share Blocks and Timesharing* (1985), Butterworths, Durban, ch 1.

⁶² See F Lyall, 'The Maxim *Cujus Est Solum* in Scots Law' (1978) *Juridical Review* 147, at 159-163.

it has had an established tenement law for many centuries.⁶³ But, for a number of reasons, that law has needed reform.

First, it is based principally on a few nineteenth-century cases. One of the drawbacks of Scotland being a small jurisdiction is a limited case law, and hence decisions from other countries are increasingly considered.⁶⁴ But without a Scottish case on the point, a definitive rule cannot be established. For example, it is presumed that an entryphone system in a tenement is owned in common by the flat owners, but there is no reported case on the matter. Secondly, the common law can be unfair. The principal instance is that, unless the title deeds say otherwise, the owner of the top flat is solely liable for the maintenance of the roof.⁶⁵ Thirdly, there is no established management scheme for tenements. Therefore, in the absence of express provision in the title deeds, resort generally has to be made to the common law on co-ownership. This is unsatisfactory because under that law unanimity is normally required to take decisions. Therefore each flat owner effectively has a right of veto and can stop maintenance being carried out.⁶⁶ This can frustrate the others and indeed there was a case reported a few years ago where one owner attempted to arrange the murder of the owner of another flat in the same building because the latter persistently refused to allow repairs to be carried out.⁶⁷ Such problems are addressed by the 2004 Act, a very necessary piece of legislation given that over 25% of the housing stock in Scotland consists of flats.⁶⁸

The 2004 Act codifies Scottish tenement law. The code is a default set of rules, which apply subject to the title deeds. The Act begins by restating the common law as to ownership of the various parts of the building, such as the roof and the stair.⁶⁹ There is a useful new provision which applies to features in respect of which the common law was unclear, such as an entryphone system or a fire escape. The rule is that ownership of these is shared by the flats which they serve.⁷⁰

The legislation provides a detailed management scheme, which will apply to all

⁶³ See Viscount Stair, *Institutions of the Law of Scotland* (1681), II.7.6.

⁶⁴ See H L MacQueen, 'Mixing it? Comparative Law in the Scottish Courts' (2003) 11 *European Review of Private Law* 735.

⁶⁵ *Taylor v Dunlop* (1872) 11 M 25. The roof is treated as if it is a wall and because it covers the top flat it is that flat's owner who is liable for its upkeep.

⁶⁶ Other than so-called 'necessary' repairs, which any co-owner can instruct and then bill the others *pro rata*. See *Deans v Woolfson* 1922 SC 221. But of course there can be a factual dispute as to whether the repair is 'necessary'.

⁶⁷ See 'Editorial', (1997) 1 *Edin LR* 280.

⁶⁸ See Scottish Executive, *Tenements (Scotland) Bill Policy Memorandum* (2004), para 3 (available at <http://www.scottish.parliament.uk/business/bills/pdfs/b19s2pm.pdf>).

⁶⁹ Tenements (Scotland) Act 2004, ss 1-3.

⁷⁰ 2004 Act, s 3(4).

tenement buildings, new and old.⁷¹ It is known simply as the Tenement Management Scheme. One of its key aspects is majority rule as regards a number of decisions affecting the property. These are known as ‘scheme decisions’. No longer can one owner unreasonably block these. They include decisions to arrange maintenance and to acquire a block insurance policy.⁷² If there is not such a policy in place, the owners are obliged to have their flats separately insured.⁷³ Majority rule should help keep the tenement housing stock in better repair.

Perhaps the change of greatest practical significance concerns liability for roof repairs. The top floor proprietors will no longer be solely liable for these where the title deeds are silent. Instead, all the proprietors will bear the cost equally unless one of the flats is more than 1.5 times the size of another. In that case, liability will be calculated by reference to floor area.⁷⁴ The same rule will apply to other integral parts of the tenement, including external and load-bearing walls and any parts held in co-ownership.⁷⁵ This is fair and proper and an important reason why the new legislation is a valuable improvement on the common law.

7. Human rights

The land law reforms are also of interest from a comparative standpoint, as they take direct account of the European Convention on Human Rights. Legislation passed by the Scottish Parliament must comply with the Convention or it is null.⁷⁶ This means that, when the Scottish Law Commission frames new legislation, it needs to take cognisance of the Convention and the existing case law of the Strasbourg court. In relation to the land law reforms, particular attention had to be paid to Article 1 of the First Protocol to the Convention, which protects property rights.⁷⁷ The Scottish Law Commission considered that its draft Bill to abolish the feudal system complied with that provision.⁷⁸ However, the Scottish Executive was not entirely sure that this was so, and therefore introduced some extra methods for superiors to preserve rights. These included allowing a superior who could not satisfy the 100 metre rule discussed above to enter into an agreement with his vassal to

⁷¹ 2004 Act, s 4 and Schedule 1.

⁷² Tenement Management Scheme, rule 3.

⁷³ 2004 Act, s 17.

⁷⁴ Tenement Management Scheme, rule 4.2.

⁷⁵ Tenement Management Scheme, rule 2.1.

⁷⁶ Scotland Act 1998, s 29. For an example of an unsuccessful challenge, see *Adams v Scottish Ministers* 2003 SLT 366.

⁷⁷ For a Scottish-based discussion, but which considers this provision in various languages, see G L Gretton, ‘The Protection of Property Rights’ in A Boyle et al, *Human Rights and Scots Law* (2002), Hart Publishing, Oxford, p 275.

⁷⁸ Scottish Law Commission, Report on the Abolition of the Feudal System (Scot Law Com No 168, 2000), paras 5.65-5.68. The Commission refer to a number of cases, including *James v UK* (1986) 8 EHRR 123.

preserve a burden, with a right to apply to the Lands Tribunal for preservation if the vassal would not agree.⁷⁹

Similarly, the title conditions and tenement legislation has been carefully vetted to ensure compliance with the Convention. An early possibility mooted to make everyone liable for roof repairs where the title deeds were silent was to make the roof common property.⁸⁰ But, in the absence of compensation being paid to the existing owner, this would probably amount to an unlawful deprivation of property in terms of Article 1 to the First Protocol. Such a compensation scheme would be unworkable. Human rights law was therefore one of the reasons why the Scottish Law Commission moved to a scheme which did not increase the amount of common property in a tenement. The direct effect of the Convention was therefore felt.

8. Conclusions

A number of conclusions can be drawn from the revolution which is taking place in Scottish land law. The first is that the project has only achieved a successful conclusion through sufficient legislative time being made available and the Scottish Executive being willing to accept the Abolition of Feudal Tenure etc (Scotland) Act 2000, the Title Conditions (Scotland) Act 2003 and the Tenements (Scotland) Act 2004 as a package. Without the devolved Scottish Parliament, it is very unlikely that this would have happened.

Secondly, it is a well-known feature of Scots law that it is not codified. However, the 2003 Act amounts to a code on real burdens and the 2004 Act to a code on apartment ownership. The result is a good one, giving one point of reference for lawyers in these areas rather than a disjointed body of case law, which fails to address many issues. There may be a useful lesson here for those seeking to achieve a European Civil Code, that codifying specific areas depending on need is more beneficial than trying to codify the law as a whole.⁸¹

Lastly, the effective way in which this legislation improves Scottish land law is due to a large extent to the detailed research and consultative work carried out by the Scottish Law Commission. That work included much consideration of the law in other jurisdictions. Without the ideas obtained from other systems - for example, the sunset rule for real burdens - the new land law which Scotland will have as of 28 November 2004 would not be as good. It is to be hoped that in turn other countries may learn now from the Scottish reform experience and that this debt can be repaid.

⁷⁹ 2000 Act, ss 19 and 20. However, the power of the Tribunal to preserve is very limited.

⁸⁰ See Scottish Law Commission, Report on the Law of the Tenement (Scot Law Com No 162, 1998), paras 3.1-3.5.

⁸¹ It need hardly be said that this whole issue is a controversial one. See E Hondius, 'Towards a European Civil Code' in A Hartkamp et al (eds), *Towards a European Civil Code* (2nd edn, 1998), *Ars Aequi Libri*, Nijmegen / Kluwer Law International, The Hague, p 8; N R Whitty, '“A Token of Independence”: Debates on the History and Development of Scots Law' in H L MacQueen, A Vaquer and S Espiau Espiau (eds), *Regional Private Laws and Codification in Europe* (1993), Cambridge University Press, p 60; and Lord Rodger of Earlsferry in 'The Costs and Benefits of Mixed Legal Systems' (2003) 78 *Tulane Law Review* 419, at 430-431.