A Golden Era? The Impact of the Scottish Law Commission on Property Law

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I. INTRODUCTION

[It is hard to overestimate the influence that the SLC has had on the evolution of Scots law. Consider, for example, property law, or family law, or criminal law, or the law of diligence, or the law of bankruptcy, to mention just some fields. Without the SLC, we would today be looking out on a different legal landscape.]

So wrote my predecessor, Professor George Gretton, in an article published in 2013. My aim is to measure in more detail the impact of the Scottish Law Commission (SLC) on property law. Both the SLC and the Law Commission for England and Wales (LC) were established by the Law Commissions Act 1965 and thus celebrate their golden anniversaries in 2015. But has the result of property law reform by the SLC been to create a golden era?

The first thing is to delineate what is meant by ‘property law’ for present purposes. The chapter will cover immoveable property (which in Scots law traditionally comes under the heading of ‘heritable property’) and moveable property (personal property). Subordinate property rights such as lease and security are included. But, for reasons of space, trusts and succession are excluded. In passing it can be mentioned that the SLC has carried out substantial reviews of both trust law and succession law. A final report in the long-running trusts project was published in 2014. Two reports have been published on succession law but neither has been implemented.
The chapter will be structured as follows. Following this introduction, Section II will consider the setting-up of the SLC and the then expectations of it. Section III will then look at the human resourcing of its work on property law. Section IV will look at the SLC’s Programmes of Law Reform and the place of property law within them. Section V will consider the SLC’s property law projects. Section VI considers the future. Section VII is the conclusion.

II. THE CREATION OF THE SLC

The idea of law reform bodies began before 1965. Examples from abroad include the Louisiana State Law Institute, which was set up in 1938. There were also several ad hoc committees at home including the Law Reform Committee for Scotland, which was established in 1954. But it was the publication of Law Reform Now, edited by Gerald Gardiner QC and Andrew Martin in 1963 that was the catalyst for the creation of the LC and the SLC. Gardiner went on to become Lord Chancellor in 1964 under Harold Wilson and took what became the Law Commissions Act 1965 through Parliament. Law Reform Now is a collection of essays, mainly on particular areas of English law. Thus there is a wide-ranging chapter on land law by Gerald Dworkin calling for reform of land registration, covenants and easements amongst others. The first essay in the book, by Gardiner and Martin, entitled ‘The Machinery of Law Reform’ is a manifesto for the setting up of the LC. It is interesting to compare the first and final sentences:

We think that we are justified in treating as axiomatic the proposition that much of our English law is out of date, and some of it shockingly so … In our opinion all of the immediate reforms urged in this section are necessary if the law is to fulfil its function in contemporary Britain. (Author’s underlining)

But despite the seamless shift from England to Britain, Law Reform Now is very much an English book. So why was the SLC set up under the 1965 Act as well as the LC? Recent research by Shona Wilson Stark has revealed that the then Secretary of State for Scotland (William Ross) and Lord Advocate (Gordon Stott) were pivotal figures. Gardiner’s original intention was that a Law Commission should be created in England and then expanded to Scotland if it was successful, either by establishing a separate body or by having a ‘Commission for Great Britain’. The second of these suggestions was peremptorily dismissed by the Secretary of State on the basis that England and Scotland already had separate Law Reform Committees. He and

5 See Gretton, ‘Of Law Commissioning’ (n 1) 121–22.
7 G Dworkin, ‘Land Law’ in G Gardiner and A Martin (eds), Law Reform Now (London, Gollancz, 1963) 79–121. The LC has been active in a number of the areas which he mentions.
10 Wilson Stark, ‘The Longer You Can Look Back’ (n 9) 69.
the Lord Advocate then lobbied the Lord Chancellor for a separate Scottish body to be established immediately.\textsuperscript{11}

Agreement was then subsequently reached in government that such a body would be set up, although on a smaller scale than that for England. The 1965 Act provided for the two Commissions, the SLC having the purpose of ‘promoting the reform of the law of Scotland’\textsuperscript{12} whereas the LC had the rather wider purpose of ‘promoting the reform of the law’.\textsuperscript{13} Both Commissions are required by the 1965 Act to:

[T]ake and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.\textsuperscript{14}

III. HUMAN RESOURCING

The SLC and the LC each have five Commissioners. The LC Commissioners are all appointed on a full-time basis. At the SLC it is possible to be appointed on a full-time or part-time basis. Both Commissions are chaired by a judge, currently by Lord Pentland at the SLC and Lord Justice Lloyd Jones at the LC.\textsuperscript{15} But the LC is considerably bigger and is divided into four teams, each headed by a Commissioner: Commercial Law and Common Law, currently led by David Hertzell; Criminal Law, currently led by Professor David Ormerod QC; Property, Family and Trust Law, currently led by Professor Elizabeth Cooke; and Public Law, currently led by Nicholas Paines QC. Each team has a manager (a lawyer) and several lawyers and research assistants.

In contrast the SLC has teams for each project, normally\textsuperscript{16} comprising only three people: a Commissioner, a project manager (a Scottish Government lawyer) and a legal assistant. The four Scottish Commissioners other than the Chairman have never had fixed areas of expertise, but there are noticeable trends. There has invariably been a practising QC, who is a part-time Commissioner.\textsuperscript{17} Currently this is Laura Dunlop QC, the first female Scottish Commissioner, who was appointed in 2009, and who leads the Adults with Incapacity Project.\textsuperscript{18} One of her predecessors

\begin{itemize}
\item \textsuperscript{11} Ibid, 70.
\item \textsuperscript{12} Law Commissions Act 1965, s 2(1).
\item \textsuperscript{13} Ibid, s 1(1). This has now been restricted to the law of England and Wales by an amendment made by the Justice (Northern Ireland) Act 2002, Sch 12 para 8.
\item \textsuperscript{15} Lloyd Jones LJ sits in the Court of Appeal and Lord Pentland in the Outer House of the Court of Session.
\item \textsuperscript{16} An exception is the current compulsory purchase project which has two Commissioners: Patrick Layden QC, handling public law aspects and myself handling property law aspects.
\item \textsuperscript{17} Every one of these has subsequently become a Court of Session judge. Patrick Hodge (1997–2003) now sits in the UK Supreme Court as Lord Hodge, along with Lady Hale, Lord Carnwath and Lord Toulson, former Commissioners at the LC.
\item \textsuperscript{18} See Scottish Law Commission, Report on Adults with Incapacity (Scot Law Com No 240, 2014).
\end{itemize}
in the 1970s was JPH Mackay QC, who later became Lord Mackay of Clashfern and Lord Chancellor. There has also always been a professor or two with expertise in private law, beginning with the long-serving Professor Sir Thomas B Smith QC (1965–80)\(^\text{19}\) and Professor Alexander (Sandy) Anton CBE (1966–82).\(^\text{20}\) They were followed by the longest-serving Scottish Commissioner of them all, Professor Eric Clive CBE (1981–99)\(^\text{21}\) who was the principal author of the significant reforms to Scottish family law in the 1980s and 1990s. He was succeeded by Professor Joe Thomson (2000–09)\(^\text{22}\) and Professor Hector MacQueen (2009–present).\(^\text{23}\)

But what about property law? The SLC story mirrors the more general history in Scotland. In the nineteenth century property law got lost. Some of it was taught under ‘Scots law’, for example, moveable property and servitudes.\(^\text{24}\) The rest, was taught under ‘conveyancing’, for example the transfer of land and real burdens (covenants).\(^\text{25}\) The result in the twentieth century was a significant lack of doctrinal coherence. This led to poor property law legislation, the nadir being the Land Registration (Scotland) Act 1979.\(^\text{26}\) The blame for this state of affairs primarily lay in the universities having separate professors of Scots law and professors of conveyancing who were responsible for their own courses. Professors of Scots law, latterly, were full-time academics whereas professors of conveyancing were part-time, because they continued to work in legal practice. Scots law primarily means Scottish private law and the appointments of Professors Smith,\(^\text{27}\) Anton and Clive\(^\text{28}\) gave the SLC experts in this field in its first 30 years. But in the same period the Commission had


\(^{23}\) Professor of Private Law at the University of Edinburgh since 1994.

\(^{24}\) See, eg WM Gloag and RC Henderson, *Introduction to the Law of Scotland* (Edinburgh, W Green & Son, 1927) Preface: ‘We have confined our work to those branches of the law which are usually dealt with in classes of Scots and of Mercantile Law. Conveyancing [and certain other areas] are therefore, only incidentally referred to’.


\(^{26}\) See below, at V.C.v. The property law aspects of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 are another example of deficient legislation, although subsequent amendments have somewhat improved the position.

\(^{27}\) Smith was Professor of Scots Law at the University of Edinburgh from 1968–72. He resigned on becoming a full-time Commissioner.

\(^{28}\) Clive was Professor of Scots Law at the University of Edinburgh from 1977–81, resigning on his appointment as a full-time Commissioner.
two long-serving part-time Commissioners who were professors of conveyancing: John (Jack) Halliday CBE (1965–74) and Philip Love CBE (1986–95).

In the 1980s work commenced on the 25 volume *The Laws of Scotland: Stair Memorial Encyclopaedia*. The General Editor was Professor Smith. He conceived that property law should be treated once again in a unified way and commissioned a young lecturer in the Law Faculty at the University of Edinburgh to write the title on it. That lecturer was Kenneth Reid and in 1993 the title appeared in volume 18 of the Encyclopaedia. What Smith conceived Reid delivered. Few works in modern Scottish law have had as great an influence. Property law became re-established as a coherent subject because of the work of Reid and also his close colleague George Gretton. As Niall Whitty put it: ‘Before vol 18, property law had been the hand-maiden of conveyancing; after vol 18 the roles were very properly reversed’. The professor of conveyancing then became an endangered and, as of June 2014, extinct species. Reid was appointed to a Personal Chair in Property Law at the University of Edinburgh in 1994. A year later he joined the SLC where he directed a series of major projects on land law discussed below. He was a Commissioner for 10 years until 2005 and was awarded the CBE for his contribution to law reform.

Reid was succeeded by Gretton, who served from 2006–11 and was responsible for completing a large project on land registration, as well as starting two

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29 Halliday was Professor of Conveyancing at the University of Glasgow from 1955–79. See DJ Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor JM Halliday* (Edinburgh, W Green & Son, 1987).

30 Love was Professor of Conveyancing and Professional Practice of Law in the University of Aberdeen from 1974–92 and subsequently Principal and Vice-Chancellor of the University of Liverpool from 1992–2002.


32 A revised version was published three years later as Reid, *Property*.

33 See, eg R Paisley, *Land Law* (Edinburgh, W Green & Son, 2000) 1, fn 1; Gretton and Steven, *Property, Trusts and Succession* (n 2) Preface. In a book review published at 1996 *Juridical Review* 74, Lord Hope of Craighead wrote: ‘I do not think that one can speak too highly of this work’. But he also mistakenly said that Reid was now ‘Professor of Scots Law at the University of Edinburgh’. In fact this was prescient as Reid assumed that chair 12 years later.

34 Whitty was a long-serving member of the legal staff at the SLC, who, in an unprecedented move then became a Commissioner from 1995–2000.


36 On the retirement of Professor Robert Rennie from the University of Glasgow. The Chair of Conveyancing at Edinburgh has been vacant since 1991 when Professor Iain Noble retired. At Aberdeen it has been vacant since Professor Douglas Cusine resigned in 2000 to become a sheriff. Cusine’s natural successor was Roderick Paisley who had been appointed to a Personal Chair in Commercial Property Law in 1999. In a move remarkably similar to what happened with Kenneth Reid at Edinburgh in 2008, Paisley was translated to the Chair of Scots Law in 2013.

37 He subsequently became Professor of Scots Law in 2008. For his inaugural lecture, see KGC Reid, ‘Smoothing the Rugged Parts of the Passage: Scots Law and its Edinburgh Chair’ (2014) 18 *Edinburgh Law Review* 315.

38 On his achievements it has been said: ‘No man has left so large a footprint on the Scottish law of property’. See R Rennie (ed), *The Promised Land: Property Law Reform* (Edinburgh, W Green, 2008) Preface.

39 Lord President Reid Professor of Law at the University of Edinburgh since 1994.

40 See below, at V.C.v.
important projects on moveable property: one on moveable transactions;\textsuperscript{41} the other on positive prescription and corporeal moveables.\textsuperscript{42} I succeeded Gretton in 2011\textsuperscript{43} and at the time of writing am half way through my five-year appointment. The prescription project was completed in 2012,\textsuperscript{44} the moveable transactions project is ongoing and there is a project on heritable securities (mortgages) to be started.

\section*{IV. PROGRAMMES OF LAW REFORM}

The main way in which the SLC initiates projects is to have them included in the programmes of law reform agreed with government. Since devolution in 1999 programmes are agreed with the Scottish Ministers. In recent years these have been for a five-year period and prior to finalisation there has been wide-ranging consultation as to what should be included. The First Programme appeared in 1965 and contained five items. These were: (1) evidence; (2) obligations; (3) prescription and the limitation of actions; (4) judicial precedent; and (5) interpretation of statutes.\textsuperscript{45} The Second Programme, published in 1968, added nine new areas, including succession, criminal procedure and family law, but no property law.\textsuperscript{46} The Third Programme, published in 1973, added only international private law.\textsuperscript{47}

There was then a 17-year gap until 1990 and the publication of the Fourth Programme.\textsuperscript{48} It added two topics: property law; and judicial factors, powers of attorney, and guardianship of the incapable. The reason for the addition of property law is given as follows:

> In a number of our previous exercises (such as matrimonial homes) we have, to some extent, impinged incidentally on property questions. We take the view, however, that a programme on this topic would enable us to take on directly subjects falling under this head and in this connection our first objective is the consideration of land tenure law reform with a view to the completion in due course of statutory reform of feudal tenure. We would also propose in due course to examine other matters and in particular aspects of leasehold property law.\textsuperscript{49}

This signalled the start of the SLC’s work towards feudal abolition. By this time the SLC had accumulated a total of 17 areas for reform. Work on these was at varying stages from complete to just started. In the Fifth Programme, published in 1997 under the new chairmanship of Lord Gill\textsuperscript{50} a fresh approach was taken.\textsuperscript{51} All the

\textsuperscript{42} See below, at V.B.ii.
\textsuperscript{43} I am the first Commissioner who is younger than the SLC.
\textsuperscript{44} \textit{Report on Prescription and Title to Moveable Property} (Scot Law Com No 228, 2012).
\textsuperscript{45} Law Commissions Act 1965: First Programme of the Scottish Law Commission (1965).
\textsuperscript{46} Scottish Law Commission, \textit{Second Programme of Law Reform} (Scot Law Com No 8, 1968).
\textsuperscript{47} Scottish Law Commission, \textit{Third Programme of Law Reform} (Scot Law Com No 29, 1973).
\textsuperscript{48} Scottish Law Commission, \textit{Fourth Programme of Law Reform} (Scot Law Com No 126, 1990).
\textsuperscript{49} Scottish Law Commission, \textit{Fourth Programme of Law Reform} (Scot Law Com No 126, 1990) 1. See also the letter from the Chairman of the SLC, Lord Maxwell to the Lord Advocate, Lord Cameron of Lochbroom dated 21 August 1987 and the reply from the Lord Advocate dated 14 December 1987 agreeing that land tenure reform would be the main objective. Source: SLC internal Fourth Programme of Law Reform file.
\textsuperscript{50} Since 2012 Scotland’s most senior judge, the Lord President of the Court of Session.
\textsuperscript{51} Scottish Law Commission, \textit{Fifth Programme of Law Reform} (Scot Law Com No 159, 1997).
previous programmes were superseded and the areas in which the SLC would be working in the next three to five years set out. The seven areas given can only be described as broad: (1) civil remedies: diligence; (2) codification; (3) general principles of private law; (4) obligations; (5) persons; (6) property; and (7) trusts. Property was then further divided into: (a) feudal tenure; (b) leasehold tenure; (c) mutual boundary walls; and (d) tenement property. What had been described as ‘reform of feudal tenure’ in the previous programme had now become explicitly abolition of the feudal system.

The Sixth Programme, published in 2000, carried over a number of the same items from the previous programme. But this time the sub-topics under the heading ‘property’ were leasehold tenure and land registration. In the Seventh Programme, published in 2005, ‘property’ disappeared, with leasehold tenure and land registration promoted to items in their own right. They were joined in the property law field by assignation of, and security over, incorporeal moveables. In the Eighth Programme, which will be completed at the end of 2014, there are four projects involving property law. The project on incorporeal moveables is extended to include security over corporeal moveables. It is joined by projects on compulsory purchase; heritable securities; and prescription and corporeal moveable property.

The other principal way in which the SLC receives work is by references from Ministers. These may have to take priority over projects within the current programme. For example, the judicial factors project, which dates back to the Fourth Programme in 1990, was not completed until 2013 because resources had to be deployed elsewhere, in particular on criminal law references. In the area of property law a notable reference was ‘to consider the implications of the decision of the House of Lords in Sharp v Thomson 1997 SC (HL) 66 and to make recommendations as to possible reform of the law’. Sharp was the most controversial Scottish property law decision in modern times as it cast doubt on registration being needed for the transfer of landownership. The academic literature on it is immense. However, by the time that the SLC came to report the House of Lords had already drawn back from Sharp in the subsequent case of Burnett’s Trustee v Grainger. The report only had to make a very limited set of recommendations relating to corporate insolvency law.

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52 Ibid, para 2.2.
53 Ibid, para 2.32.
54 Ibid, para 2.33–2.35.
55 Scottish Law Commission, Sixth Programme of Law Reform (Scot Law Com No 176, 2000).
56 Scottish Law Commission, Seventh Programme of Law Reform (Scot Law Com No 198, 2005).
57 Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010).
58 See below, at V.B.ii and VI.
59 A judicial factor is a person whom a court appoints to manage property where there is a need for this, eg in common property where the co-owners are in dispute.
63 Burnett’s Trustee v Grainger 2004 SC (HL) 19. See further Gretton and Steven, Property, Trusts and Succession (n 2) paras 4.22–4.27.
64 While these have regrettably not (yet) been implemented, recommendations relating to personal insolvency law made in the earlier Discussion Paper on Sharp v Thomson (DP No 114, 2001) were made law by the Bankruptcy and Diligence etc (Scotland) Act 2007, s 17.
It can be seen that during its first 25 years property law did not appear within the SLC’s programmes of law reform. But since 1990 it has been a constant feature. This is not to say that property law was completely ignored in those early years. Three important examples are the work carried out on prescription (under the item on this in the First Programme), on matrimonial property (under the family law item in the Second Programme) and on execution of deeds (under the evidence item in the First Programme and the obligations item in the Second Programme). But it was only in the second half of the SLC’s near-50 year history that property law became a specific subject on which reform was to be carried out.

V. PROPERTY LAW PROJECTS

A. Introduction

In this section the main projects which the SLC has carried out on property law since its establishment in 1965 will be considered. Projects which are currently ongoing are excluded but will be mentioned later. We will look at moveable property first and then immoveable property. Normally projects result in a report with a draft Bill attached to it which the Government must decide whether or not to implement.

B. Moveable Property

i. The 1970s Memoranda

In 1976, under the principal authorship of Professor TB Smith the SLC published no less than eight consultative memoranda on corporeal moveables. The subjects were: (a) general introduction and summary of provisional proposals; (b) passing of risk and of ownership; (c) some problems of classification; (d) protection of the onerous bona fide acquirer of another’s property; (e) mixing, union and creation; (f) lost and abandoned property; (g) usucapion or acquisitive prescription; and (h) remedies.

65 See below, at V.B.i.
67 Scottish Law Commission, Report on Requirements of Writing (Scot Law Com No 112, 1988) which was implemented by the Requirements of Writing (Scotland) Act 1995.
68 The Report on Boundary Walls (Scot Law Com No 163, 1998) is a notable exception as the SLC concluded that no legislation was needed.
69 Nowadays in devolved matters, the Scottish Government and in reserved matters, the Westminster Government.
70 Scot Law Com Memorandum No 24.
71 Scot Law Com Memorandum No 25.
72 Scot Law Com Memorandum No 26.
73 Scot Law Com Memorandum No 27.
74 Scot Law Com Memorandum No 28.
75 Scot Law Com Memorandum No 29.
76 Scot Law Com Memorandum No 30.
77 Scot Law Com Memorandum No 31.
The question which immediately arises is how this is compatible with the fact that property law only became a programme item in 1990. Was there a reference from the Government? There was not. Only one of the memoranda can immediately be justified, namely that on usucapion or positive prescription, because prescription was the third item on the First Programme of Law Reform.78 The general introduction memorandum states:

In the course of our examination of the law of prescription, it was suggested to us that the law on that subject, insofar as it affects corporeal moveables, should be clarified. Prescription is the ultimate determinant of the right of ownership curing all defects of acquisition on onerous or gratuitous title. Accordingly we came to the conclusion that problems relating to the acquisition of title to corporeal moveables merited a comprehensive separate study.79

The study was further justified by the fact that in ‘the context of transfer of rights in moveables the rules of property law and the law of obligations often intersect’80 and that obligations was also one of the items in the First Programme. These arguments do not persuade as the scope of the memoranda clearly go beyond obligations and prescription law. It is difficult to resist the conclusion that this work cannot clearly be justified within the 1965 Act.81

The memoranda, taken together, contain proposals relating to diverse areas of the law of corporeal moveables. There is no attempt at codification of the subject. It is no surprise given their principal author that the approach is strongly civilian and English law is generally eschewed.82 The only memorandum followed up by a report was that on lost and abandoned property.83 This was then implemented in a modified form by the Civic Government (Scotland) Act 1982, Part VI.84 Thus this work of the SLC on corporeal moveables has had very little impact. The lack of implementation is perhaps not surprising given the unclear foundation on which the work proceeded and there is to some extent less commercial importance in the topics covered than in other areas of property law such as land registration. The proposals touching on sale of goods would have also required approval by Whitehall and Scottish-specific proposals in the field of commercial law have had limited success over the years.85

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78 See above, at IV.
79 Scot Law Com Memorandum No 24, para 2.
80 Ibid.
81 Such a conclusion is supported by the SLC internal Fourth Programme of Law Reform file which contains a memorandum from the Chairman, Lord Hunter to Commissioners dated 26 October 1973 proposing that ‘Property in Corporeal Moveables’ be expressly included in the Fourth Programme in order to make the work on this ‘fully legitimate’. This view was accepted by TB Smith in a reply dated 30 October 1973. The Fourth Programme did not actually appear until 1990 where as we have seen it included the item ‘Property Law’.
82 See DL Carey Miller, ‘TB Smith’s Property’ in Reid and Carey Miller (eds), A Mixed Legal System in Transition (n 19) 173–98.
83 Report on Lost and Abandoned Property (Scot Law Com No 57, 1980).
84 See further Reid, Property (n 31) para 548 (WM Gordon).
ii. Prescription and Title to Moveable Property

In its Eighth Programme the SLC returned again to the subject matter of the one 1970s memorandum which was clearly justified by the First Programme: prescription. Most countries have a rule that when someone has had possession (in good faith or sometimes not) of a corporeal moveable (chattel) for a certain period then that possession can no longer be challenged. In England this is achieved by limitation with challenges generally being excluded after six years. Civilian systems such as France and Germany tend to vest ownership in the possessor by means of acquisitive prescription. In Scotland, however, there is no clear rule, certainly under statute. This uncertainty could be somewhat of an embarrassment if a case were to come before the courts in relation to a valuable artwork or the like. In a report published in 2012 the SLC proposed a 20-year rule which would require both good faith and an absence of negligence on the part of the possessor. The period is a comparatively long one but this was dictated by the need to protect cultural assets and the near-impossibility of trying to define ‘cultural’ in order to take an alternative approach of having a shorter period for ‘ordinary’ property and a longer period for ‘cultural property’.

The SLC also recommended a 50-year rule allowing holders of property to acquire ownership after that period if they were unable to contact the owner. This recommendation is aimed at helping the museums and galleries sector dispose of assets where the owner cannot be traced. The Scottish Government’s response to the report has been positive, with recognition that ‘legislation in this area would bring clarity and economic benefit’. But it wishes to carry out its own consultation on the area and for the moment is unable to allocate resources due to other priorities.

C. Immoveable Property

i. Prescription

As has been seen prescription and the limitation of actions was an item in the First Programme. The law on prescription under which rights can be created

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88 The elderly decision in Parishioners of Aberscherder v Parish of Gemrie (1633) Mor 10972 concerning a church bell suggests a common law period of 40 years, but the better view is that this is a case about negative prescription. See ARC Simpson, ‘Positive Prescription of Moveables in Scots Law’ (2009) 13 Edinburgh Law Review 445.

89 Scottish Law Commission, Report on Prescription and Title to Moveable Property (Scot Law Com No 228, 2012).


92 See above, at IV.
or extinguished by the passage of time was in a dusty state in the 1960s, being dependent on a number of old statutes dating back to the Prescription Act 1469. In its report on the subject published in 1970, the SLC recommended that these be repealed and replaced by a modern code.\textsuperscript{93} Important substantive reforms were also recommended including reducing the period of possession required for prescriptive acquisition of servitudes from 20 years to 10 years.\textsuperscript{94} One thing deliberately missing from the code, however, was corporeal moveables\textsuperscript{95} and as described in the previous section that gap has yet to be filled. The report was implemented by the Prescription and Limitation (Scotland) Act 1973. It has been a largely successful piece of legislation,\textsuperscript{96} but in more recent years has become complicated by amendments. The time may be coming for another review.

\textit{ii. Feudal Abolition and Title Conditions}

The feudal system of landholding, whereby land is not held outright but rather as a ‘vassal’ of someone else (a ‘superior’) and then ultimately of the Crown was widespread in Europe in the Middle Ages.\textsuperscript{97} By the 1990s it had been abolished just about everywhere apart from Scotland.\textsuperscript{98} Of course it only remained in a diluted form. Vassals were no longer expected to fight battles for their superiors.\textsuperscript{99} But land could still be sold by means of subinfeudation, something which was banned in England by the statute \textit{Quia Emptores} of 1290. This was commonly done to enable real burdens\textsuperscript{100} to be imposed without the need to retain neighbouring land. Thus builders would generally sell plots in a housing development by means of subinfeudation and impose real burdens requiring maintenance or preventing trade, etc. The builders would have title to enforce the burdens because they were superiors. But the law was also regularly abused. The householder wanting to make a modest alteration, such as adding a conservatory to his property, would have to pay the superior for permission to do this if there was a burden against alteration. The house could be in Kilmarnock but the superior could be living in Kent.

The conundrum of what to do about real burdens was one of the main reasons why the feudal system survived for so long. The picture was complicated by the fact

\textsuperscript{94} Thus making proof of possession less difficult. See DJ Cusine and RRM Paisley, \textit{Servitudes and Rights of Way} (Edinburgh, W Green & Son, 1998) para 10.12.
\textsuperscript{95} \textit{Report on Reform of the Law Relating to Prescription and Limitation of Actions}, para 3.
\textsuperscript{96} For an example of an important property law case, see Bowers \textit{v} Kennedy 2000 SC 555, on the meaning of ‘\textit{res merae facultatis}’, one of the imprescriptible rights in Sch 3 to the 1973 Act. The case held that the right of a proprietor of landlocked land to reach that land was such a right.
\textsuperscript{98} KGC Reid, \textit{The Abolition of Feudal Tenure in Scotland} (Edinburgh, Butterworths, 2003) para 1.6. In England and Northern Ireland land law is feudal only to the extent that land is formally held of the Crown. In the Republic of Ireland the last vestiges of feudalism were abolished by the Land and Conveyancing Law Reform Act 2009.
\textsuperscript{99} Tenures Abolition Act 1746, which was passed after the Jacobite Rebellion.
\textsuperscript{100} The nearest English equivalents are covenants.
that real burdens were not purely feudal. They could be imposed in ordinary transfers as well as feudal grants.\textsuperscript{101}

When property law was added to the work of the SLC by the Fourth Programme, reform and ultimately abolition of the feudal system was what the Government had in mind. The project was commenced by Philip Love\textsuperscript{102} and taken over by Kenneth Reid.\textsuperscript{103} Reid realised that for feudal abolition to work there needed to be a separate but related project on real burdens.\textsuperscript{104} A discussion paper on the latter was published in 1998.\textsuperscript{105} This was followed by a final report on feudal abolition in 1999\textsuperscript{106} and on real burdens in 2000.\textsuperscript{107} These both contained draft Bills, which substantially formed the bases of the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. There was strong political will to abolish the feudal system, not least from Scotland’s first First Minister following devolution, Donald Dewar.\textsuperscript{108}

What followed, when coupled with the implementation of the Tenements (Scotland) Act 2004,\textsuperscript{109} was nothing short of a revolution.\textsuperscript{110} Section 1 of the 2000 Act provides:

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.

The day appointed was 28 November 2004. On that day vassals\textsuperscript{111} became absolute owners, superiorities were abolished and future subinfeudation was forbidden.\textsuperscript{112} A right to claim compensation was given to former superiors for loss of feu duty.\textsuperscript{113}

In the run-up to the appointed day superiors were given limited rights to preserve enforcement rights in relation to real burdens.\textsuperscript{114} The most important case was the

\textsuperscript{101} Indeed the leading case of Tailors of Aberdeen v Coutts (1840) 1 Rob 296 involved non-feudal deeds. See further DJ Cuisine, ‘Tailors of Aberdeen v Coutts: A Look Behind the Scenes’ in HL MacQueen (ed), Miscellany Five (Edinburgh, Stair Society vol 52, 2006) 145–68.
\textsuperscript{102} Love was the Commissioner responsible for Scottish Law Commission, Discussion Paper on Property Law—Abolition of the Feudal System (DP No 93, 1991).
\textsuperscript{106} Scottish Law Commission, Report on Abolition of the Feudal System (Scot Law Com No 168, 1999).
\textsuperscript{107} Scottish Law Commission, Report on Real Burdens (Scot Law Com No 181, 2000).
\textsuperscript{108} See his 1998 McEwen Lecture available at www.caledonia.org.uk/land/dewar.htm. He was then Secretary of State for Scotland.
\textsuperscript{109} See below, at V.C.iii.
\textsuperscript{111} Or more accurately the vassal who held the dominium utile, ie was lowest in the feudal chain.
\textsuperscript{112} Abolition of Feudal Tenure etc (Scotland) Act 2000, s 2.
\textsuperscript{113} Ibid, ss 7–16.
‘100m rule’ where the enforcement right could be reallocated to neighbouring land held by the superior provided normally that there was a permanent building on it within 100m of the burdened property. The building had to be in use wholly or mainly as a place of human habitation or resort. The policy was that open land did not merit protection from real burdens. On the other hand if the superior lived in a house on the neighbouring property that was within 100m of the burdened property then the right to enforce could be transferred to the property where the house was located. In very restricted circumstances burdens could also be preserved as ‘personal real burdens’, a new type of real burden without a benefited property. Thus, for example, superiors which were designated as ‘conservation bodies’ could preserve burdens relating to conservation as ‘conservation burdens’.

The 2003 Act also came into force on 28 November 2004 and effectively codified the law of real burdens, but its remit stretched wider to other ‘title conditions’, in other words conditions affecting land which the Lands Tribunal for Scotland can vary or extinguish. The legislation overhauled the Tribunal’s jurisdiction. It also tidied up the overlap between servitudes and real burdens. In general, following the appointed day, limited rights to use another’s land had to be constituted as servitudes whereas positive and negative obligations such as duties to maintain and prohibitions on trading had to be constituted as real burdens. In contrast to the common law where real burdens only had to be registered against the title to the burdened property, the legislation promoted transparency by also requiring new burdens to be registered against the benefited property. Burdened proprietors can therefore see exactly who can enforce their burdens. Provision was made for a limited number of personal real burdens (with no benefited property) as mentioned above in the context of superiors preserving rights.

In taking what became the 2003 Act through the Scottish Parliament the Scottish Executive largely followed the SLC’s script. The Justice Minister (Jim Wallace) said:

It is a classic piece of law reform. It has examined the common law with a cool eye. Where the law was sensible and useful, it has been reproduced in the codes that are set out in the bill’s opening sections. Where the law was uncertain, it has been clarified. Where the law was poor, it is being replaced.

But one place where there was deviation was in relation to real burdens affecting building developments, typically housing schemes. Where, as was often the case, the builder had reserved the right to vary the burdens the common law said that the

115 Abolition of Feudal Tenure etc (Scotland) Act 2000, s 18.
116 Ibid, s 27.
117 Title Conditions (Scotland) Act 2003, s 122.
119 Title Conditions (Scotland) Act 2003, ss 2 and 79–81.
120 Ibid, s 4.
122 As it was then called. It is now the Scottish Government.
123 Now Lord Wallace of Tankerness, the Advocate General for Scotland.
individual plot-holders could not enforce against each other.\textsuperscript{125} The SLC proposed no change here. But the Scottish Executive felt that the abolition of superiors would leave housing schemes under-regulated and promoted a provision, which became section 53 of the 2003 Act, which over-rote the rule. This was a mistake. The provision is opaque and over-generous and has caused significant problems in practice in relation to obtaining minutes of waiver.\textsuperscript{126} Ten years on, following a report by the Justice Committee of the Scottish Parliament, the matter has been referred back to the SLC.\textsuperscript{127}

The abolition of the feudal system and reform of title conditions was a quiet triumph for the SLC. No challenge was made on the basis of the European Convention on Human Rights (ECHR). It was accepted that Scottish land law needed to be modernised. As Lord Rodger of Earlsferry noted, albeit provocatively, the feudal system was ‘unceremoniously binned by the Scottish Parliament—unmourned even by its supposed acolytes, the Professors of Conveyancing’.\textsuperscript{128}

iii. Tenements

The appointed day of 28 November 2004 was also important for a third piece of legislation coming into force: the Tenements (Scotland) Act 2004. Once again this was based on the work of the SLC. The law of the tenement (or apartment ownership or condominium ownership as it might be known elsewhere) had previously been non-statutory, in effect governed by case law and the work of the institutional writers.\textsuperscript{129} The result was uncertainty (for example, as to ownership of parts of the building used by more than one proprietor), unfairness (in the absence of real burdens to the contrary, the top floor proprietor had sole responsibility for roof repairs) and the lack of a system of management (unless there were appropriate real burdens, recourse had often to be made to the rules of common property where unanimity was required for decisions).\textsuperscript{130}

In a discussion paper published in 1990 the SLC took the approach that many of the problems under the common law could be solved by the greater use of common property.\textsuperscript{131} The roof would thus be made common and all the flat owners would have to share in its repairs. Following Kenneth Reid’s arrival in 1995 this approach was departed from. Reforming the law of the tenement would have modest benefit if the reform only applied to new buildings. If, as was clearly sensible, the reform

\textsuperscript{125} Reid, \textit{Property} (n 31) para 399.

\textsuperscript{126} For criticism, see K Reid, ‘New Enforcers for Old Burdens: Sections 52 and 53 Revisited’ in Rennie, \textit{The Promised Land} (n 38) 71–90 and S Wortley, ‘Love Thy Neighbour: The Development of the Scottish Law of Implied Third-Party Rights of Enforcement of Real Burdens’ 2005 \textit{Juridical Review} 345.


\textsuperscript{128} Lord Rodger of Earlsferry, \textit{The Courts, the Church and the Constitution: Aspects of the Disruption of 1843} (Edinburgh, Edinburgh University Press, 2008) 95.

\textsuperscript{129} Eg Stair, \textit{Institutions of the Laws of Scotland} (Edinburgh, 1681) II.7.6.


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should apply to all tenements redistributing ownership would engage article 1 Protocol 1 of the ECHR as a deprivation. No compensation scheme was workable. The new approach was therefore to separate ownership and management. For the most part the common law rules on ownership would be codified with some uncertainties tidied up. But there would be a default management scheme which would apply in all tenements, subject to the terms of any real burdens. Majority rather than unanimity would be required for decisions on maintenance, whether to employ a property manager or install an entryphone system and the like. The SLC published a report to this effect in 1998. 132

The new approach found favour with the Scottish Government and the draft Bill formed the basis of what is now the Tenements (Scotland) Act 2004. While there have been a series of cases where the legislation has not been properly interpreted by the lower courts, 133 the 2004 Act can also be regarded as a success. Some would have preferred a more expansive approach involving compulsory residents associations, such as under the English commonhold legislation. 134 But the very limited take-up of that legislation rather vindicates the policy of the SLC.

iv. Leasehold Reform

When the feudal system was abolished a risk was that it could simply be recreated by the back door through the use of ultra-long leases. Thus the 2000 Act, following a recommendation of the SLC, bans the creation of any new lease over 175 years in length from 9 June 2000. 135 But there are many existing ultra-long leases in certain parts of Scotland. In effect they were quasi-feudal grants. In parallel with its work on feudal abolition the SLC considered what should be done about these. A discussion paper was published in 2001 followed by a report in 2006. 136 The report was implemented by the Long Leases (Scotland) Act 2012. The approach taken mirrors that taken in feudal abolition. There will be an appointed day, 28 November 2015, on which the rights of landlords in ultra-long leases 138 will be abolished and the tenant will become owner of the land. 139 The former landlord will then be entitled to claim compensation in respect of lost rent. 140 In the run-up to the appointed day certain lease conditions can be converted into real burdens, for example in favour

133 Eg Hunter v Tindale 2012 SLT (Sh Ct) 2, discussed in KGC Reid and GL Gretton, Conveyancing 2011 (Edinburgh, Avizandum Publishing, 2012) 129–32.
135 Abolition of Feudal Tenure etc (Scotland) Act 2000, s 67.
137 Scottish Law Commission, Report on Conversion of Long Leases (Scot Law Com No 204, 2006).
138 An ultra-long lease (subject to some exceptions) is a registered lease granted for more than 175 years and with an unexpired duration, immediately before the appointed day, of more than 175 years (or 100 years in the case of houses).
139 Long Leases (Scotland) Act 2012, s 4.
140 Ibid, ss 45–61.
of neighbouring land owned by the landlord.\textsuperscript{141} The implementation of this legislation brings to a conclusion the work on land tenure reform identified in the Fourth Programme.

\textit{v. Land Registration}

Scotland introduced land registration very early in 1617 by establishing the Register of Sasines, a register of deeds.\textsuperscript{142} But after 300 years the drawbacks of that register were increasingly recognised. In particular, there was no national map on which all titles were plotted and conveyancing was complicated. This resulted in the passing of the Land Registration (Scotland) Act 1979 which introduced a new register known as the Land Register of Scotland, a register of title.\textsuperscript{143} Properties transferred from the old register to the new when they were sold.

It soon became clear that the 1979 Act was defective for various reasons. It was far too short, extending to only 30 sections some of which were on other subjects. ‘Nobody could accuse the Act of being well drafted’ said a judge in the highest court in the land.\textsuperscript{144} Moreover, the 1979 Act lacked solid conceptual foundations. ‘[It] has all the intellectual sharpness of a mashed potato’\textsuperscript{145} wrote George Gretton. The 1979 Act created a system later labelled by the SLC as ‘bijuralism’\textsuperscript{146} whereby it did not obey the underlying rules of Scottish property law. In particular it provided for what is immediate indefeasibility.\textsuperscript{147} No matter what problems there might be with a deed of transfer provided that it was given effect in the Register it did not matter.\textsuperscript{148} The Keeper of Registers of Scotland,\textsuperscript{149} had in the words of the SLC, a ‘Midas touch’.\textsuperscript{150} Inappropriate emphasis was given to possession by a proprietor in preventing rectification of the register. Even at a practical level the 1979 Act was not working. Since transfers onto the new register were generally only induced by sale, as of 2012 only 56 per cent of titles and 23 per cent of the Scottish land mass was on the new register.\textsuperscript{151}

As a result of all these problems the Keeper asked the SLC to review the 1979 Act. Land registration appeared in the Sixth Programme in 2000. The SLC produced

\textsuperscript{141} Ibid, ss 10–36.
\textsuperscript{142} Registration Act 1617.
\textsuperscript{143} The 1979 Act was based on two reports, neither the work of the SLC: Scottish Home and Health Department, \textit{Registration of Title to Land in Scotland} (1963, Cmnd 2032) and Scottish Home and Health Department, \textit{Scheme for the Introduction and Operation of Registration of Title to Land in Scotland} (1969, Cmnd 4137).
\textsuperscript{144} \textit{Short’s Tr v Keeper of the Registers of Scotland} 1996 SC (HL) 14, 26 per Lord Jauncey of Tullichettle. But the blame should not be heaped on the draftsman. The underlying policy was not sufficiently thought through. See \textit{MRS Hamilton Ltd v Keeper of the Registers of Scotland} 2000 SC 271, 275 per Lord President Rodger.
\textsuperscript{145} In his case comment on the case of \textit{Kaur v Singh}: see 1997 SCLR 1075, 1085.
\textsuperscript{148} Land Registration (Scotland) Act 1979, s 3(1)(a).
\textsuperscript{149} The equivalent of the English Chief Registrar.
\textsuperscript{150} \textit{Discussion Paper on Land Registration: Void and Voidable Titles} (n 146) para 5.34.
\textsuperscript{151} See www.ros.gov.uk/pdfs/landmasscoveragereport2012.pdf.
three discussion papers—principally authored by Kenneth Reid and then a report—perhaps the lengthiest that it has published on any topic—under the leadership of his successor George Gretton. Members of staff from Registers of Scotland were seconded to the SLC to help. The report appeared in 2010 and was swiftly implemented by the Land Registration etc (Scotland) Act 2012. It is expected to come fully into force later in 2014.

If the 1979 Act is a mashed potato then the 2012 Act is a chip off the Gretton and Reid block. Incoherence is replaced with coherence and brevity with appropriate depth. The various parts of the register such as the national (cadastral) map are put onto a statutory footing. Land registration law is reformed to bring it into line with the general rules of property law. Immediate indefeasibility is replaced with deferred indefeasibility. Thus a defective deed of transfer is not cured by registration but a subsequent acquirer can rely on the entry in the register, subject to some qualifications. The Midas touch is thus abolished. Electronic conveyancing is facilitated. A new system of ‘advance notices’, influenced by comparable institutions in England and Germany, is introduced which allows prospective grantees of rights in land to make a registration which will protect them against certain events happening prior to them registering their deed, for example the owner fraudulently transferring the land to someone else. The overall result is to produce a sophisticated system which meets the needs of Scotland in the twenty-first century.

VI. THE FUTURE

At present there is much property law work ongoing at the SLC. There are two major projects on compulsory purchase and moveable transactions. The SLC will then undertake a project on heritable securities (mortgages) and the review of section 53 of the Title Conditions (Scotland) Act 2003 mentioned above. Other property law

154 For an overview of the new law, see Gretton and Steven, *Property, Trusts and Succession* (n 2) ch 6.
155 Land Registration etc (Scotland) Act 2012, s 48.
157 ‘By bringing registration law more closely into line with general property law, the bill addresses legal tensions that have caused confusion and uncertainty for property owners since the introduction of the land register. The changes will ensure that the land register continues to underpin the Scottish economy’; Scottish Parliament, Official Report, 31 May 2012 col 9596 (Fergus Ewing MSP, Minister for Energy, Enterprise and Tourism).
158 Land Registration etc (Scotland) Act 2012, s 86.
159 Ibid, ss 99–100.
160 Ibid, ss 56–64.
162 See above, at V.C.ii.
topics may be chosen as part of the SLC’s Ninth Programme. As the then Chairman of the SLC, Lord Drummond Young, said to me when I became a Commissioner, reform of property law is rather like painting the Forth Bridge.163 More generally, the introduction of a new streamlined procedure in the Scottish Parliament for SLC draft Bills which can be regarded as technical law reform may also offer opportunity for speedier implementation.164

VII. CONCLUSION

The question suggested by the title of this chapter is whether the work done by the SLC on property law in its near-50 year existence has created a golden era. In the field of land law, this is certainly true. The projects on feudal abolition, title conditions, ultra-long leases, tenements and land registration, which were carried out over many years, have revolutionised our law. No other body could have achieved this. Government departments have neither the time nor resources, given other priorities, and the systematic reform achieved could have never been done by the courts.165 Even although the Midas touch will disappear from land registration, in terms of modernising Scottish land law, my view is that the SLC’s work has been worth its weight in gold. In relation to moveable property less work has been carried out and less achieved. But it is to be hoped that the projects on prescription and moveable property, and moveable transactions will in due course also lead to much needed reform.

163 The metaphor is not quite as accurate as it once was, due to developments in paint. See news.bbc.co.uk/1/hi/magazine/7252561.stm.
165 This prompted Kenneth Reid to comment in his inaugural lecture as Professor of Scots Law at the University of Edinburgh that ‘the new rulers of the universe are the members of the Scottish Law Commission’. See Reid, ‘Smoothing the Rugged Parts of the Passage’ (n 37) at 339.