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Land Registration and the Decline of Property Law

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A. INTRODUCTION

B. SOME EXAMPLES

- (1) Servitudes
- (2) Sasine descriptions
- (3) Real burdens
- (4) Pertinents
- (5) Positive prescription
- (6) Alteration of flatted properties
- (7) Proprietors in possession
- (8) Offside goals

C. THE PROBLEM OF PROFESSIONAL NEGLIGENCE

D. CONCLUSION

A. INTRODUCTION

Land registration in Scotland has a long history. The Register of Sasines was established as early as 1617.¹ Earlier still there had been a system of public registration of instruments of sasine, and before that the instruments were recorded in the protocol books of notaries.² The point of having a public register was to provide certainty and to regulate preferences. The Register of Sasines, still in operation but now being phased out, is simply a public record of deeds. While real rights in land could not usually be obtained without recording in that Register, the act of recording of itself did nothing to validate or enhance the title. The actual interpretation of the title as to boundaries, burdens and the like remained essentially a private matter in which the Keeper of the Registers of

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1 Registration Act 1617 (RPS 1617/5/30).

2 See J Craigie, *Scottish Law of Conveyancing: Heritable Rights*, 3rd edn (1899) 56-62.

Scotland took no part. The rights and indeed obligations of the owner of the land had to be determined from the deeds themselves.

The Land Registration (Scotland) Act 1979 introduced both a new register, the Land Register of Scotland, and also a whole new system of registration. In place of registration of deeds there was now to be registration of title. Under registration of title the register is, or should be, a register of rights in land. The extent of a real right is defined in the final act of registration and in most systems is, subject to certain qualifications, guaranteed by the state. Accordingly when a property comes to be registered for the first time the registration authority must examine the existing title to ensure its validity and must also ascertain and disclose on the register subordinate real rights such as rights in security. Burdens should also be shown so that the portfolio for an individual property – in Scotland known as the title sheet – contains everything one needs to know, including physical extent, securities and other encumbrances. Once registration is complete the title sheet is the measure of the real right and other rights are, with some exceptions,³ cut off. The extent of the ownership and the encumbrances and burdens affecting ownership are all defined or created at the point of registration in what might be viewed as a “Garden of Eden” moment. In Scotland at least the system can be regarded as a “positive” one in the sense that title flows from the register and not from the deeds or application forms which are merely the instruments used in the process of creating, transferring, restricting or burdening the real right.⁴

It is apparent that the majority of property law issues surrounding a particular title must be settled during the process of first registration, that is to say at the time when the property switches from the Register of Sasines to the Land Register.⁵ The final decision on what is to be registered is of course one for the Keeper or, in practice, for her officials, although there may be discussion with the parties concerned. There are rights of appeal to the Lands Tribunal and the courts.⁶

For a system of land registration to work on a practical level there have to be general policies laid down by the registration authority. In Scotland these can be found in the *Registration of Title Practice Book*, now in its second edition, and in a series of policy updates on the website of Registers of Scotland.⁷ It is obvious

3 Known in Scotland as “overriding interests”. For a definition, see Land Registration (Scotland) Act 1979 s 28(1).

4 See Scottish Law Commission, Discussion Paper on *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004; available at www.scotlawcom.gov.uk) pt 1.

5 Normally this occurs on the first occasion on which the property is transferred on sale: see Land Registration (Scotland) Act 1979 s 2(1)(a)(ii).

6 Land Registration (Scotland) Act 1979 s 25.

7 www.ros.gov.uk/updates.

that, in applying a particular policy to a particular situation, an officer at the Land Register may have to take a view on a particular point of property law. Depending on the seriousness of the point an application for registration may be rejected in whole or in part or registration may be effected but subject to an exclusion of the state indemnity.⁸ It is in these cases that there is often a conflict between the policy adopted at the Land Register and the law of property itself.

To some extent this conflict arises from the very nature of registration of title. Recently the Scottish Law Commission has described the system of registration as “bijural” because it seems to operate under two different sets of laws.⁹ A bijural system recognises that there may be more than one person claiming to be an owner of land. It also recognises, however, that ownership derives from the act of registration itself and that registered ownership will, in the first instance at least, trump the claims to ownership of other parties. It does not matter that an alternative claim would have been preferred in terms of pure property law, and hence under the former system of registration involving the Register of Sasines. A distinction may thus arise between the person registered as owner and the person who is the “true” owner under ordinary property law principles. In some cases it may be possible to rectify the resulting inaccuracy in the Register, but the right of the Keeper to do so is limited.¹⁰ In particular, if the registered owner is in possession it is, generally speaking, only possible to rectify where the inaccuracy was caused wholly or substantially by the fraud or carelessness of that owner.¹¹ The policy of the legislation is thus to favour the registered proprietor over the “true” owner, with the latter receiving compensation rather than the return of the property.¹² This policy can be justified on the ground that the Register is meant to be the measure of real rights in land. Moreover, there is a long-held view that one should be able to rely on “the faith of the records”. In the leading case of *Anderson v Lambie*, Lord President Cooper put it in this way:¹³

The faith of the records is a cardinal and distinctive feature of the Scottish law of heritable rights. If a disposition has been recorded in the public records of Scotland .. how can anyone tell whether the interests of *bona fide* third parties will not be affected if that disposition is now reduced and replaced by another?

8 Land Registration (Scotland) Act 1979 ss 4, 12(2).

9 Scottish Law Commission, Discussion Paper on *Land Registration: Void and Voidable Titles* (n 4) para 1.11.

10 Land Registration (Scotland) Act 1979 s 9.

11 Other instances are listed in s 9(3)(a).

12 Land Registration (Scotland) Act 1979 s 12(1)(b).

13 1953 SC 94 at 103. The House of Lords in allowing the appeal took no cognisance of this “cardinal principle”: see 1954 SC (HL) 43.

As a result of the work of the Scottish Law Commission, there is likely to be a firm proposal to change from the current “positive” system of land registration to one in which registration will no longer, of itself, confer a valid title.¹⁴ This, if enacted, will herald a shift away from a simple “faith of the records” principle in favour of “pure” property law.

Quite apart from the fundamental point just discussed, there are other areas of property law where the policies adopted at the Land Register appear to be in conflict with established principles of property law. Inevitably, these policies have a profound impact on the practice of conveyancing. This is important especially from the point of view of negligence claims because it is the accepted practice of solicitors from time to time which dictates the standard of care which must be met.¹⁵ The question which arises in a number of cases is whether the policy adopted at the Land Register marginalises or even destroys existing property law rights.

B. SOME EXAMPLES

A number of examples illustrate the tension between registration policy and the law of property.

(1) Servitudes

The policy of the Keeper on the inclusion of servitudes in the title sheet of the benefited property (dominant tenement) is set out in a number of places.¹⁶ The Keeper will not include a servitude unless the right has been constituted by formal grant or reservation in a deed, or by statute, or unless there is a court declarator to the effect that a servitude exists. This list of course excludes servitudes constituted by implied grant, implied reservation, acquiescence, necessity,¹⁷ and, perhaps most importantly, by prescription. Before this policy evolved the Keeper did on occasion accept evidence that a servitude had been exercised for the prescriptive period of twenty years. Such evidence was normally by way of affidavits from owners of the benefited property and others such as visitors, tradesmen and the like, possibly backed up by photographs indicating the use. However, this involved the Keeper in accepting evidence from

14 See Scottish Law Commission, Discussion Paper on *Land Registration: Void and Voidable Titles* (n 4) pt 5.

15 *Hunter v Hanley* 1955 SC 200, discussed at C below.

16 I Davis and A Rennie (eds), *Registration of Title Practice Book*, 2nd edn (2000) paras 6.51-6.61; I Davis, “Positive servitudes and the Land Register” (1999) 4 SLPQ 64.

17 I.e. a right of access constituted in accordance with the rule identified in *Bowers v Kennedy* 2000 SC 555.

one side only in cases where the owner of the property in question might well have disputed, for example, that access had been taken as of right as opposed to by way of personal licence or permission.¹⁸

The current policy dates from 1997.¹⁹ Its effect is to relegate servitudes which have been properly if informally constituted to second or even third class rights. It is true, as the Keeper has pointed out, that a servitude omitted from the title sheet remains perfectly valid. After all, under section 3(1)(a) of the Land Registration (Scotland) Act 1979, registration in the Land Register vests a real right not only in the property but also in any servitude, express or implied, forming part of that property.²⁰ But while the Keeper's policy may cause little or no difficulty in urban areas where, for the most part, roads, footpaths, sewers, drains and other services are public or the subject of various statutory rights, the position in rural areas is likely to be quite different. Suppose, for example, that in 1996 – before the change in registration policy – a solicitor acted in the purchase of a rural cottage to which access was taken by a farm track in the ownership of the local farmer. In addition the sewage discharge was to a septic tank which was beyond the title boundary but lay conveniently in an adjoining field also belonging to the farmer. At the time of the purchase the selling solicitors produced affidavits from the seller, who had used the track and the discharge to the septic tank for twelve years without objection, and the owner before that who had similarly exercised these rights for the previous fifteen years. The purchasing solicitor checked in the standard textbooks and found a number of statements to the effect that, where servitudes are exercised openly, peaceably and without judicial interruption for a period of twenty years, they are legally constituted and so valid and effective. The solicitor therefore accepted the title. Assuming no contrary evidence, this would have been a reasonable view which a solicitor of ordinary competence exercising reasonable skill and care might have taken in 1996. What happens, however, when the 1996 purchaser now wishes to sell the property? In 2010 a solicitor acting for a purchaser will not feel safe if the servitude does not appear in the property section of the title sheet. The net result is twofold. The luckless seller will have to go to the farmer (who may not be the person who owned the farm in 1996) and try to negotiate a deed or deeds of servitude; and the same seller will ask pointedly why the solicitor who acted for him in 1996 did not clear this matter up then.

18 As in e.g. *Neumann v Hutchinson* 2008 GWD 16-297.

19 Davis & Rennie (eds), *Registration of Title Practice Book* (n 16) para 6.58.

20 In fact the current proposal from the Scottish Law Commission is to omit a statutory provision which sets out the effect of registration so that this partial comfort is likely to be removed. See Discussion Paper on *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 108, 2005; available at www.scotlawcom.gov.uk) paras 5.46-5.50.

It can of course be argued that all that the seller has to do is to threaten the current farmer with an action of declarator of servitude and the farmer will immediately capitulate and grant the necessary deed or deeds for no consideration. Unhappily, that rarely happens in the real world. If the action of declarator is defended it can last for far longer than either seller or purchaser is able or willing to wait. One of two things then happens. Either the purchaser withdraws (if the missives are not concluded) or rescinds (if they are) on the grounds that the title is unmarketable, or the seller pays for the appropriate deed or deeds of servitude and then intimates a claim against his or her previous solicitor. For that solicitor there is nothing to be gained by sending the (former) client or the purchaser's solicitor a lengthy dissertation on how servitudes can be created in terms of Scottish property law. The purchaser's solicitor will argue that, if the affidavit evidence is not enough for the Keeper, then the title is not safe. Thus the effect of the Keeper's policy, in practical terms at least, is to restrict the methods of creation of servitudes to creation in a deed or an Act of Parliament.

(2) Sasine descriptions

Being map-based, the Land Register aims at certainty as to the extent of ownership. Although the title sheet also has a verbal description, it is usually restricted to a postal address or, in the case of a flat, a postal address and a description of the situation of the flat within the building. There is then a reference to the title plan in which the extent of the property will normally be outlined in red. The title plan is based on the description in the older deeds which were recorded in the Register of Sasines, and this may or may not include a plan. On an application for first registration the Keeper compares the current physical position of the property as shown on the most up-to-date Ordnance Survey map with the description in the Sasine title. Even where a Sasine description uses a plan it may also contain a narrative of physical boundary markers with lineal and surface measurements, but the Keeper appears to rely more on the plan than on other elements of the description. It is thus unclear how far the Keeper's policy extends to the interpretation of every aspect of a Sasine description. It is true, of course, that some Sasine descriptions are clearer than others and indeed in many cases the original boundary features referred to may have disappeared.²¹

If there is a conflict between different elements of a description a set of presumptions comes into operation.²² One is that plans are generally deemed

21 For example "bounded on the west by Tom Johnstone's Smiddy".

22 J M Halliday, *Conveyancing Law and Practice*, 2nd edn, by I J S Talman, vol 2 (1997) para 33.13; W M Gordon and S Wortley, *Scottish Land Law*, 3rd edn, vol 1 (2009) para 3-08.

to be demonstrative and not taxative. Another is that physical boundaries, such as walls, fences or adjoining properties, are preferred to measurements. Presumptions of this type were still being applied by the Court of Session in 1992 in a case which dealt with prescription and possession.²³

When the Land Register was introduced a hope was expressed that there would be some elasticity built into the system so far as boundaries and descriptions were concerned, and certainly it is no part of the Keeper's policy to encourage disputes between neighbours who have peacefully co-existed within possessed boundaries in the past. For that reason there is an acceptance that measurements may not be scientifically accurate and so should be read as qualified by the words "or thereby". However this policy is balanced, it would appear, by a counter-policy not to become involved in boundary disputes even where both titles are on the Land Register. Boundary disputes are in their nature bitter, expensive and rarely produce outright winners.²⁴ Yet there are many people, including even those who are initially unreasonable, who would accept a statement as to the correct boundary position from an official at the Land Register, especially where the Keeper demonstrably applied the established presumptions in relation to Sasine boundary titles. The current policy of non-involvement can render those presumptions of little value.

(3) Real burdens

In principle, the abolition of the feudal system of land tenure on the "appointed day" (28 November 2004) resulted in the extinction of all real burdens then enforceable only by a feudal superior.²⁵ Furthermore, real burdens created in or in association with dispositions will be extinguished ten years after the appointed day unless either the original deed nominated a benefited property or such a property is now nominated by service and registration of an appropriate notice.²⁶ The position is, however, complicated by provisions which confer new enforcement rights – and hence preserve the burdens in question – in certain cases where the burdens were imposed on a group of properties under a common scheme.²⁷

Already there are a great many burdens which are no longer enforceable and at the end of the ten-year period there will be many more. The worry is that the Keeper adopts a cautious approach to cleansing the Land Register of dead

²³ *Suttie v Baird* 1992 SLT 133, discussed at B.(5) below.

²⁴ See R Rennie, "Boundary disputes" 2001 SLT (News) 115.

²⁵ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 17. Sometimes it was possible to "reallot" the right to enforce to other land owned by the superior but this was little done in practice.

²⁶ Title Conditions (Scotland) Act 2003 ss 49, 50.

²⁷ Title Conditions (Scotland) Act 2003 ss 52-57.

burdens, relying on the uncertainty created by the, admittedly difficult, provisions relating to common schemes.²⁸ For there seems little doubt that burdens which are not removed from title sheets on the expiry of the ten-year period will be presumed by solicitors to be valid and enforceable, if only because the Keeper will (in terms of the current legislation) have a duty, where there is sufficient information available, to identify the benefited property on the title sheet of the burdened property.²⁹ It is natural to assume that if something still appears on the title sheet and therefore in a land certificate it must be valid or at least there for a purpose, and it can be difficult to persuade prospective purchasers or their solicitors that the burdens in question have been extinguished. The worst-case scenario is that the Keeper leaves burdens on title sheets on the expiry of the ten-year period because she does not have sufficient information to identify the benefited property. On the one hand, many burdens would have been extinguished; on the other hand, due to a cautious policy on the part of the Keeper, those very burdens would appear enforceable because they remain on the title sheets. It is to be hoped that this does not occur, but if it does property law will again have been marginalised by registration practice.

(4) Pertinents

There are few topics in the field of conveyancing upon which judicial decisions are more confusing, Professor Halliday thought, than the law relating to parts, privileges and pertinents.³⁰ In one case the Lord Justice-Clerk stated that a grant of lands without the express addition of parts, privileges and pertinents was just as extensive as a grant of lands with them.³¹ However, as Halliday points out, there are many judicial decisions where the addition of these words has saved the day for an otherwise inadequate description. One thing does seem to be clear is that land or incorporeal rights in land which appear to be accessory to a property can be carried by a clause of pertinents.³² On the other hand, a clause of pertinents cannot expand a description to include subjects which are outwith a bounding title.³³

28 Section 53 of the Title Conditions Act is particularly difficult to apply.

29 Title Conditions (Scotland) Act 2003 s 58.

30 Halliday, *Conveyancing Law and Practice* vol 2 (n 22) para 33-38; see also D Brand, "Parts and pertinents in conveyancing – what exactly does this mean?" (2000) 5 SLPQ 385.

31 *Gordon v Grant* (1850) 13 D 1 at 7 per Lord Justice-Clerk Hope.

32 *McArly v French's Trs* (1883) 10 R 574; *Meacher v Blair Oliphant* 1913 SC 417.

33 *Magistrates of St Monance v Mackie* (1845) 7 D 582; *Gordon v Grant* (1850) 13 D 1; *Lord Advocate v Hunt* (1867) 5 M (HL) 1.

The case in which a description was stretched the furthest by a pertinents clause was *Cooper's Trs v Stark's Trs*.³⁴ In a typically vague Sasine description the property was described in the following terms:

All and whole that lodging, being the east most of the middle flat of that stone tenement of land covered with slate in Brownfield . . . consisting the said tenement of cellars in the sunk storey and three square storeys, which lodging consists of a kitchen and three rooms together with two cellars in the sunk storey, which cellars are situated on the south east corner of that storey . . . together with the whole parts pertinents and privileges of the said lodging.

The description went on to say that the tenement fronted the public street from Glasgow to Anderston and was built on part of larger subjects. There was then a general clause of parts, pendicles, privileges and pertinents of these several subjects. A saloon built on ground behind the house was possessed for the period of positive prescription by the owner of the flat in question. The court, Lord Trayner dissenting, held that the title had been explained by prescriptive possession as including the saloon as a part and pertinent of the house.

A key policy of the Keeper is that she will not improve on a Sasine description when making up the property section of a title sheet on first registration. Accordingly, in a situation such as the one which arose in *Cooper's Trs* no amount of evidence as to possession coupled with a pertinents clause would persuade the Keeper to include the saloon in the property section. Indeed it is not the Keeper's practice to include grants of pertinents as such in the property section of a title sheet. Once, therefore, a property is on the Land Register, a clause of pertinents will cease to help and there will no longer be room for "interpretation" of the title. Property law again has been marginalised.

(5) Positive prescription

In order for positive (acquisitive) prescription to run, there must be a registered title capable of including the land in question followed by possession for a period of ten years.³⁵ In practice, however, prescription is largely excluded in the case of Land Register titles because of the additional requirement, rarely met, that indemnity has been excluded,³⁶ and even where prescription is available in principle, the fact that titles are map-based and therefore definite as to boundaries greatly reduces its scope. In a Sasine property the law is more

³⁴ (1898) 25 R 1160.

³⁵ Prescription and Limitation (Scotland) Act 1973 s 1.

³⁶ The Scottish Law Commission has proposed that this requirement be dropped: see Discussion Paper on *Land Registration: Void and Voidable Titles* (n 4) paras 3.4-3.9.

indulgent: what is required as to title is a recorded deed which contains either a description of the land which it is sought to acquire or, rather more flexibly, a description *habile* to include such land.³⁷ Provided, therefore, the description is not obviously bounding, possession apparently outwith the description can be used to explain the description and thus make it *habile*. It is sufficient if the description *might* be interpreted as including the disputed land.³⁸

For Sasine titles, *Suttie v Baird*³⁹ exemplifies the classic neighbour dispute.⁴⁰ In that case, conveyances of various plots were granted by a builder in 1967. At a later date the pursuers bought what had been plot 40, and the deed in their favour contained a description which referred back to the bounding description in the original feu disposition of 1967. The feu disposition included a verbal description of the boundaries and a plan. Between the front gardens of plot 40 and its neighbour to the west, plot 39, there was a strip of ground which formed the sole access to the pursuers' back garden. The strip had been used and maintained by the pursuers since 1970 without objection. However, when the defender acquired plot 39 in 1986 a dispute arose.

The western boundary of plot 40 was ambiguous. The verbal description in the 1967 feu deed did not correspond with the physical features on the ground. Moreover, the shape of the ground possessed by the pursuers was different from the shape of the area as shown on the plan. To accommodate the pursuers' claim to the disputed strip, the straight line on the western boundary as shown in the original feu plan had to be bent into a dog leg. Nonetheless it was held that the original title of 1967 was *habile* to include the disputed strip. Effectively, the court took into account the possession and came to the view that it was not necessary for that possession to be over land which was of exactly the same shape as the description and plan dictated. No doubt the court was unhappy that so much judicial time was being taken up over a trivial neighbour dispute where one party had been in undisturbed possession for a great length of time and the other party had, presumably, bought the adjoining house having seen the boundary in its physical position.⁴¹

It is instructive to re-run the facts of *Suttie v Baird* as an application for first registration in the Land Register. Had the title of either plot 39 or plot 40 been the subject of such an application, the P16 or boundary comparison report would

37 R Rennie, "Prescriptive possession in the Sasine and Land Registers" (1997) 2 SLPQ 309.

38 See *Auld v Hay* (1880) 7 R 663; *Duke of Argyll v Campbell* 1912 SC 458.

39 1992 SLT 133.

40 For a discussion of these disputes, see Rennie (n 24).

41 See the remarks of Lord President Hope at 134-135 where he regrets that litigation on the issue should have been necessary and that it should have been so prolonged.

presumably have shown a discrepancy. In the case of plot 40 it would have shown that more land was being possessed than was contained in the original Sasine title. The Keeper would have been unmoved by the argument that there had been possession for well over the prescriptive period and the title to plot 40 was *habile* to include the strip. At best she would have included the disputed strip with exclusion of indemnity, but that of course would have been to deny the effect of positive prescription. If it had been plot 39 which was the subject of the application, the Keeper might have included the disputed strip within that title but again subject to an exclusion of indemnity because of the possession of the proprietor of plot 40. Now of course here one comes up against a dilemma. In theory it is not possible to have two registered titles (whether with or without indemnity) over the same subjects, even in respect of land which is the subject of a dispute. Cases like this pose a serious policy problem for the Keeper. Any decision, or lack of decision, in this matter is bound to disadvantage one of the parties. So if the Keeper awards the strip to plot 39 then she denies the benefit of prescription, past or future, to the proprietor of plot 40. If, however, the Keeper's decision goes the other way then the owner of plot 39 loses part of the original Sasine title. That result is of course justifiable because prescription has indeed operated. But the fact that the Keeper does not see it as part of her function to decide whether prescription has operated or not tends again to marginalise the law of property.

(6) Alteration of flatted properties

In Sasine titles the description of flats is often very brief: for example “that flatted dwellinghouse consisting of two rooms, kitchen and bathroom being the northmost house on the third floor above the ground floor of the tenement of dwellinghouses at ...” Physical alterations can easily make such descriptions out-of-date, and nowhere is this more acute than in the case of top flats where there has been an attic conversion.

Suppose for example that the top flat proprietor obtains planning permission and building warrant to extend into the attic and throw out a dormer. Putting aside any question of interference with the roof (if it is common property), the property then becomes a two-storey flat with whatever extra rooms are included in the attic. In Sasine conveyancing all that would have happened is that in the next disposition there would have been an explanatory description to the effect that the subjects were formerly a top flat comprising, say, two rooms, kitchen and bathroom but were now a top and attic flat comprising four rooms, kitchen and bathroom. There would have been no difficulty in having this disposition

recorded in the Register of Sasines or in persuading a purchasing solicitor to accept that title. The position is different on the Land Register. The Keeper will not normally allow an alteration in the original description, whether that is a Sasine description (the issue then arising on first registration) or one contained in the property section of a Land Register title. Of course in property law terms there would be no doubt that ownership had not changed simply because of a physical rearrangement within that ownership. After all, the default rule is that a top flat extends as far as the triangle of airspace above the slope of the roof up to the level of the ridge.⁴² Nevertheless the property section of the title sheet is not likely to convince a purchaser's solicitor that all is well. The difficulty of making an approach to the Keeper in cases of this type is that a negative answer will only serve to increase the anxiety of the purchaser that all is not well with the title.

(7) Proprietors in possession

If the Land Register is inaccurate—if, for example, the person shown as proprietor should not be proprietor—then, in principle, the error can be corrected by an application for rectification. But it is a cardinal principle of the current system that, with some exceptions, no rectification can take place to the prejudice of a proprietor in possession.⁴³ Sensibly, the Scottish Law Commission proposes to remove this protection.⁴⁴ But as the law stands at present a party's rights may alter overnight because of the surreptitious moving of a boundary fence or the changing of locks.⁴⁵ I have known a case where, due to a mapping error, two registered titles overlapped and indemnity had not been excluded from either. Accordingly, the party who was in possession of the overlap at any time was the registered proprietor in possession and entitled to the statutory protection. Moreover, that party would have been entitled to ask the Keeper to rectify the registered title of the other proprietor who, because he was not in possession, was not entitled to the protection. However, when the proprietor in possession of the disputed overlap went on holiday the other proprietor made a foray through the herbaceous border and moved the line of the small dwarf fence which, up to that point, had been the front line. The invader then planted his own horticultural assortment, no doubt of the quick-growing variety, thus asserting possession. He

⁴² Tenements (Scotland) Act 2004 s 2(7).

⁴³ Land Registration (Scotland) Act 1979 s 9(1), (3)(a). Possession would include civil possession but not that of a heritable creditor who has called up a standard security: see *Kaur v Singh* 1999 SC 180.

⁴⁴ Discussion Paper on *Land Registration: Void and Voidable Titles* (n 4) pt 4.

⁴⁵ As in *Kaur v Singh* 1999 SC 180.

then became the registered proprietor in possession and therefore entitled in turn to the statutory protection.

In this sort of case the Keeper may be asked by one party or another to rectify. Both parties may then assert possession and advance evidence by way of photographs, affidavits and the like. The photographs generally involve stern faces and parked cars (usually 4×4s for maximum effect). Faced with this sort of dilemma what is the Keeper to do? Should he send an unpopular employee to meet the parties and come to a view as to possession? The fact of the matter is that in most cases it is impossible for the Keeper to take any sort of decision. In any event, a decision of this type is bound to be at least quasi-judicial, and the current legislation does not contain any framework for hearing the parties far less for conducting a procedure akin to a proof or debate. Accordingly, it is well-established policy at the Land Register that the Keeper does not adjudicate on matters of possession, or even indicate on the title sheet that possession is disputed. This of course can lead to the absurd results outlined above. It can also allow one neighbour to benefit from a mistake at the Land Register even if possession is not clear. Any dispute as to possession has to be resolved in the Lands Tribunal or in the ordinary courts.⁴⁶

The policy not to adjudicate in possession disputes is both understandable and justifiable. But the problem with this, as with other policies at the Land Register, is that an inability or unwillingness to come to a decision is in effect a decision in favour of one of the parties, because it leaves as owner the person who happens to be registered proprietor. This means that a person who should be owner but is not must either accept compensation from the Keeper and lose his land or incur all the expense and suffer all the worry and uncertainty of litigation to establish possession.

(8) Offside goals

The rule against offside goals has become quite fashionable recently.⁴⁷ At its simplest, it holds that if A purports to convey the same property to both B and C, and C, the second to receive a conveyance, completes his title by registration first but in the knowledge of the prior grant to B, C's disposition is voidable at the instance of B. Due to his bad faith, C's registration is considered to be "offside".⁴⁸

⁴⁶ For a classic case see *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29.

⁴⁷ The rule apparently dates from the 1580s. I am indebted to Ross Anderson and Scott Wortley for this information and for other comments on this difficult issue.

⁴⁸ The use of "offside goal" in this context comes from the judgment of Lord Justice-Clerk Thomson in the leading case of *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 501. For accounts of the rule, see

As the most recent case, *Gibson v Royal Bank of Scotland plc*,⁴⁹ shows, however, the rule is not confined to double grants. The action was for the reduction of a standard security granted by a predecessor in title in favour of a bank. The granter of the security had already agreed to give the pursuers an option to purchase the property and had in the interval entered into a lease with them. The standard security was granted in January 2006 but the option had already been exercised on 2 March 2005 with a date of entry of 8 February 2006. Naturally, the pursuers wanted to acquire a property unencumbered by the security. The bank argued that mere personal rights, such as options, could not bring the rule against offside goals into play. Instead of being a personal right which could be converted into a real right, as the rule required, it was only a right to enter into a further personal contract, namely missives of sale. Lord Emslie, however, held that the case should go to proof. He did not accept that the holder of an option was powerless to challenge a subsequent right acquired in bad faith.

For the offside goals rules to apply, knowledge of the prior right is essential, for otherwise there is no bad faith. If an option appears in a disposition rather than in a separate agreement, the policy at the Land Register is not to weed out such personal obligations when making up the burdens section of a title sheet. Accordingly, if the registered proprietor agrees, for whatever reason, to sell to another party and the land certificate is produced during the course of the transaction (even after conclusion of missives),⁵⁰ the luckless purchaser is in bad faith and the offside goals rule will apply to render any disposition liable to reduction. Now there will of course be those who say that this is an entirely fair and just result. After all, the registered proprietor was trying to defeat an obligation which he had voluntarily undertaken in terms of the option. Nevertheless it is the policy of the Keeper in allowing a personal obligation which could never be a real burden into the burdens section of the title sheet which creates the knowledge which brings the offside goals rule into play. As it happens, this policy goes against the principle that the title sheet should show only real rights. In the result, the disposition is liable to reduction and the Register to rectification in circumstances where pure property law would have regarded the option as purely personal.

e.g. K G C Reid, *The Law of Property in Scotland* (1996) paras 695-700; D Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual*, 7th edn (2004) paras 32.51-32.62.

49 [2009] CSOH 14, 2009 SLT 444. For a discussion, see: P Webster, "*Gibson v Royal Bank of Scotland plc*: options for the offside goals rule" (2009) 13 EdinLR 524; R G Anderson and J MacLeod, "Offside goals and interfering with play" 2009 SLT (News) 93; R Rennie, "Marching towards equity – blindfolded" 2009 SLT (News) 187.

50 *Alex Brewster & Sons v Caughey* 2002 GWD 15-506.

C. THE PROBLEM OF PROFESSIONAL NEGLIGENCE

We live in a claim-conscious society. Since I took the Chair of Conveyancing in the University of Glasgow some eighteen years ago I have delivered over 3,000 opinions. It is a salutary statistic that about a third of these do not relate to conveyancing issues as such but to professional negligence. In such opinions the question being asked – a practical rather than a legal one – is whether a solicitor of ordinary competence exercising reasonable skill and care would have done or omitted to do the act in question. In *Hunter v Hanley* Lord President Clyde stated that:⁵¹

To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care.

In a very real sense therefore the legal profession sets its own standard of care when a usual and normal practice is established. The test is essentially a negative evidential test and the use of expert witnesses, who must be practising solicitors of some standing and experience, is normal.

When I am asked to give evidence in a negligence case I am not called as a professor or indeed as an author of text books and articles; I am called as an experienced member of the profession who has practised in conveyancing and property law matters for about forty years. I am not allowed to give any opinion in relation to property law or for that matter land registration law; these are matters for the court. This important distinction can be illustrated by the servitudes example given earlier in the article.⁵²

A purchase is made in 1996 of rural property which is reached by a private farm track. Although the title does not contain an express servitude of access, there is ample evidence by way of affidavits, photographs, and receipted invoices for pothole repairs to indicate use for the twenty-year period needed to acquire a servitude by positive prescription.⁵³ In accordance with what I would have regarded as usual and normal practice at the time the title is accepted and copies of the affidavits handed over, and the disposition is duly recorded in the Register of Sasines. Much later, in 2010, the owner seeks a buyer. The market is, to say the least, sticky but there is interest from one couple. However, on examining the

⁵¹ 1955 SC 200 at 206.

⁵² See B.(1) above.

⁵³ Prescription and Limitation (Scotland) Act 1973 s 3(2).

title the potential purchasers' solicitor takes fright because no servitude appears in any of the recorded deeds. The affidavits and photographs are produced but the solicitor points to the policy at the Land Register, introduced in 1997: the title is not marketable (at least in the commercial sense of the term) because the servitude will not appear in the property section of the new title sheet. In vain will the selling solicitors point to the law of prescription. The upshot of all of this is of course that the owner then turns to the solicitors who acted in the purchase and who may or may not be the same solicitors who are defending the title on the sale. Why, she will ask, was she allowed to buy this property when there was no valid right of access? The legal answer is that there was and indeed still is a valid right of access constituted by prescription. But it will always be easier to pay for a deed of servitude than to litigate to prove that a servitude already exists, and it is plain that the bill for that will eventually end up on the desk of the solicitors who acted in 1996 and thereafter with the solicitors' insurers.

If an expert solicitor is being cross-examined in a professional negligence claim, the question will not be whether a servitude has been constituted by prescription but whether a solicitor ought to have accepted such a servitude or insisted on a formal deed of servitude. Now I think that most experts would say that in 1996 it was a normal and usual practice to accept affidavit evidence of servitudes constituted by prescription. But would one say that in, for example, 2002 that was still the normal practice? If it is accepted that by 2002 the new policy of the Keeper had become well-known then it becomes increasingly difficult to answer that question in a positive way. If the expert has to say that by 2002 solicitors only accepted titles where the servitude was constituted by deed then, effectively, servitudes constituted by any other means are worthless. For all practical purposes the policy at the Land Register has removed that part of property law which allows for servitudes to be constituted without written deed.

It might, of course, be said that the solicitor acting for the seller in 2010 should insist that the title is marketable (in the legal sense) because a servitude has indeed been constituted. In a former age, when missives were concluded before the purchaser's solicitor ever saw the title, one can see how such an argument might be made. If the purchaser sought to rescind, and was challenged, a court could quite easily decide that there was a servitude and accordingly the title was marketable, thus leaving the purchaser with a substantial damages claim and expenses. In these circumstances it might be a bold solicitor who advised a purchaser simply to rescind. Today, however, it is almost universal practice, both in residential and commercial transactions, for the title to be produced with the qualified acceptance, which will contain a clause to the effect that the purchaser will accept the title (description, rights and burdens) as disclosed in

that title. Accordingly, if the purchaser's solicitor does not like the title, there is no question of rescission as such; there being no concluded contract, all that happens is that the purchaser withdraws the offer. The seller therefore does not have the bargaining strength which might be available if the point was taken after conclusion of missives.

If one were looking at this purely from the Keeper's point of view one would say that the problem arises not because of Land Register policy but because either of a lack of knowledge of property law or even of simple cowardice within the legal profession. Is it not up to the legal profession to stand up for the principles of property law? The plain fact of the matter is, however, that the legal profession, in common with every other profession, is increasingly concerned about negligence claims. It is a salutary fact that of all claims intimated to the insurers by solicitors only a small number go to court and an even smaller number⁵⁴ to the length of a defended proof. The question of expenses is always at the forefront of the insurers' mind. No insurance company is going to risk a five-day proof in the Court of Session on the practice of solicitors relating to the acceptance of servitudes constituted by prescription if the action can be settled for a reasonable sum.

D. CONCLUSION

The purpose of this article is not to criticise all or indeed any of the policies adopted at the Land Register. These policies have evolved over many years and reflect a desire to restrict claims for indemnity. It must be remembered that Registers of Scotland is an agency with its own budget and that claims simply come out of that budget. It is therefore necessary and sensible that policies are in place to minimise such claims. Moreover, there will be a perfectly justifiable view that, under a system of registration of title, conveyancing should become a purely clerical or administrative process with attendant cost savings. It is easy for an academic or practitioner, or someone like myself with a foot in both camps, to criticise the effect that these policies have in relation to the practice of conveyancing. The Keeper can argue that nothing has changed for the worse, but change it certainly has. In the Sasine system the Keeper guaranteed nothing, but neither did she remove anything from the title documentation nor interpret it in a particular way. This was left to the parties and their solicitors. Those who practice conveyancing today take decisions based on what they think the Keeper will or will not do rather than having regard to the principles of property

⁵⁴ Under 2%.

law. When, many years ago, I was an apprentice and then an assistant in the Glasgow firm of which Professor Halliday was senior partner,⁵⁵ all of the partners (not just Professor Halliday) were prepared to take a view on the sufficiency or marketability of a title based on their own knowledge of the principles of property law and the practice of conveyancing. How many solicitors today would risk taking a view on a servitude or be prepared to argue that the principles of law relating to the interpretation of a Sasine description supported a larger area than the Keeper was prepared to include in a title plan and so advise a client to accept the title? It does seem a pity that these skills have been lost and with it, I would suggest, some of our property law.

⁵⁵ The firm was then known as Bishop, Milne Boyd & Co.