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Analysis

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Ownership and Insolvency: *Burnett's Trustee v Grainger*

When one person transfers something to another – whether by reason of sale, or donation, or otherwise – how, and when, does ownership pass? The question is not necessarily answerable: ownership might not be a concept that the legal system in question accepts.¹ The Common Law tradition, it is said, does not accept the concept. In that tradition, there is indeed ownership, but it is of rights, not of things. One may own an easement, a mortgage, a fee simple, a fee tail, an advowson, a remainder, a lease and so on, but one may not own Blackacre. The non-lawyer, indeed, speaks of the ownership of Blackacre, but in so doing does not name a right but—to use the time-honoured expression—a bundle of rights. In the Common Law tradition the seller of Blackacre starts off in chapter 1 with a bundle, and by the last chapter all the sticks in the bundle have passed.² But during the middle chapters of the story some sticks may be held by the seller and others by the buyer, and during those chapters the question “who is the owner?” may be unanswerable even in non-legal language.

In the Civil Law tradition, by contrast, ownership is one particular kind of right, and is unitary. Of course, rights can be derived from it, the *jura in re aliena*, nowadays usually as the limited, or subordinate, real rights. But—and this is central to the Civilian idea—what is left is still ownership. You can cut a branch from a tree, and what is left is still the same in kind. Sticks come from the tree, but the Civilian tree is not a bundle of sticks.

Actually, this contrast between the Civilian system and the Common Law is, as such contrasts usually are, too sharp. It is apparent, on reading Common Law texts, that the official bundle-of-sticks theory often causes difficulty, and in unguarded moments Common Lawyers sometimes talk like Civilians. And the converse is also true. When, in Germany, goods are sold and delivered on credit, subject to retention of title, where is ownership? The buyer has an *Anwartschaftsrecht*, which looks like an equitable interest. It is an extra-codal institution, *praeter legem*. (Much German law is like this: judge-made law, based on precedent more than on statute.) Again, in French law, with its adherence to the consensual principle of transfer, itself a result of the influence of the natural lawyers, one sees a theoretical unity of ownership that is in part subverted by the inherent problems of consensualism. Ownership, whether of moveables or of immoveables, passes by consent, regardless of possession or registration, but then it proves necessary to treat the seller as if he were still the owner for certain purposes, until delivery, or registration, has taken place.

In the 1977/78 academic year I attended the Conveyancing class at the University of Edinburgh. We were told by the Professor of Conveyancing (a) that property passes upon delivery of the disposition, and (b) that the donee receives no real right until registration.³ I

1 More radically, the question might be rejected on the ground that ownership is a concept that must be challenged as part of a more general challenge to doctrinalism. With those who think that legal study has “got past” doctrinalism, dialogue is hardly possible.

2 Many sticks may in fact be held by third parties, so that the seller has only a depleted bundle.

3 This view was held by others too. Thus J M Halliday, an authority on conveyancing, wrote that “the process of infestment made no change in ownership: it merely transformed an existing personal right into a real right.” (“The tragedy of sasine” 1965 JR 105 at 114.) The sentence, though in the past tense, was equally about the contemporary law.

was puzzled. If these two statements were both true it would follow, with the force of a proof in Euclid, that *ownership is not a real right*. Since ownership is axiomatically a real right, at least one of the premises *had* to be false. Fellow students did not seem to share my concern: no doubt few of them expected conveyancing to make sense anyway. I pressed the Professor, but received no satisfactory answer. I researched the point. The answer was clear. Ownership passes on registration. There were, indeed, some *dicta* saying that “as between” the parties the property passed on delivery of the disposition, but it was evident to me even at that stage of my studies that such a notion is devoid of meaning. A right that has effect merely “as between the parties” is definitionally a personal right.⁴ Since a disponent remains owner until registration of the disposition, the property remains, until then, subject to the rights of his or her creditors. The only way to escape that conclusion would be if the disponent held the property in trust. But in that argument there seemed little mileage.

The matter thus appeared clear. Remarks, judicial or academic, suggesting that ownership passes before registration, or, more radically, that Scots law does not have a unitary idea of ownership, were, I had no doubt, inadvertencies.⁵ But I was wrong. I did not foresee the ten-year saga of *Sharp v Thomson*⁶ and *Burnett's Trustee v Grainger*.⁷ Indeed, even in the 1970s it should have been obvious that what I regarded as established was in fact precarious. In *Gibson v Hunter Home Designs Ltd*⁸ property was sold and the buyer paid the price. No deed of conveyance was delivered. The seller went into liquidation.⁹ It was held that the liquidator, not the buyer, took the property.¹⁰ The decision had just come out when I was studying, and had made a stir. Many had been surprised by it.

In retrospect *Gibson* was perhaps the case that saved property law.¹¹ One suspects that it could have gone the other way. Had it done so, equity would have been established, and the language of real rights would have faded gradually away, and become quaint, like, say, “teinds”

4 This absurdity continues to be found in that blend of bad contract law with bad property law known as the Sale of Goods Act.

5 When Kenneth Reid published his important article “Ownership on delivery” on the subject (1982 SLT (News) 149), I admired it, but thought it hardly necessary. His evaluation of the situation was right.

6 1994 SC 503; 1994 SLT 1068 (Outer House); 1995 SLT 837; 1995 SCLR 683 (Inner House); 1997 SC (HL) 66; 1997 SLT 636; 1997 SCLR 328 (House of Lords).

7 [2004] UKHL 8; 2004 SLT 513; 2004 SCLR 433 with a commentary by AJM Steven at 482; affg 2002 SC 580; 2002 SLT 699 (Extra Div); revg 2000 SLT (Sh Ct) 116.

8 1976 SC 23.

9 On a comparative note, it should be explained that in Scots law there is nothing like the English “priority of search” system or the German *Vormerkung*. (Perhaps there should be.) There is typically a short delay of, say, one to two weeks, between “settlement” (when the price is paid to the seller and the disposition is delivered to the buyer) and registration. This delay is mainly due to stamp duty land tax (SDLT), because UK tax law is designed to cohere with English law, and if it causes problems for Scots law, that scarcely matters. To protect the buyer during this period, the seller’s law firm normally grants to the buyer a guarantee, called a letter of obligation. (The law firm has insurance cover for this guarantee.) But this guarantee is limited in time: currently the standard period is three weeks. Finally, transferor and transferee are normally represented by different law firms: there is no notary acting for both.

10 In this case Lord President Emslie said that “no right of property vests in a purchaser until there has been delivered to him the relevant disposition.” That does not logically imply that a “right of property” *does* vest upon delivery of the deed. More importantly the court had not been addressed on that issue. Yet this remark was subsequently much used as establishing that ownership passes on delivery. No rational legal system can allow such offhand verbal formulations to have quasi-legislative force. The Scottish legal system needs to do some hard thinking about the use of authority.

11 *Gibson* can also be viewed the other way round: as the case which, by Lord Emslie’s *dictum*, unsettled settled law. Which view of matters is preferable depends on how precarious the state of the law then was: as to which my own mind has changed.

and “thirlage”. Such a decision would probably not have been challenged: by contrast, if the House of Lords in *Burnett’s Trustee* had decided in favour of the buyers there would have been considerable pressure for the Scottish Parliament to intervene. But whilst *Gibson* discredited the “ownership by contract” theory, it gave a boost to the “ownership by delivery” theory. Property law had survived one crisis but now had to experience a second one.

In *Sharp* a company granted a floating charge to a bank. This was duly registered. The company then sold the property, and was paid, and delivered a disposition. The buyers held the disposition but did not register it until more than a year later.¹² By that time the bank had enforced the charge by means of receivership. If the floating charge had been an ordinary security then obviously the bank would have prevailed, whether the buyers had registered or not. But the floating charge is an exotic animal. When an asset is alienated, the charge ceases to cover it. So the question was whether, at the moment of enforcement, the asset still belonged to the selling company. In the Outer House it was held that it did. The Inner House adhered unanimously. The quality of the opinions was very high. The House of Lords reversed. On what grounds? “What is the *ratio* of *Sharp v Thomson*?” became a favourite examination question. It was as unanswerable as a Zen koan, but, unlike a koan, there was no bliss of enlightenment.¹³

Burnett’s Trustee was a less complicated case because it did not involve the psychedelic obscurities of the floating charge. Mrs Burnett sold a house. She was paid the price. The disposition was delivered to the buyers, Mr and Mrs Grainger. They took possession. Thus far the facts were much the same as in *Sharp*. Again, as in *Sharp*, the buyers did not seek to register for more than a year. By the time they did so, they found that the seller had been sequestrated and that the trustee in sequestration had been registered as owner. The trustee raised an action to obtain possession of the property. The Sheriff Principal found in favour of the buyers, on the basis of *Sharp*. The trustee appealed successfully to the Inner House. The buyers appealed to the House of Lords, which unanimously adhered.

Was the decision right? Of course. The uncertainty was less what the law was than whether the House of Lords would apply it. Final courts of appeal are subject to little restraint save self-restraint.¹⁴ With courts, as with the soul, self-restraint is a weak force. The temptation is to seek to improve the law without the slow, tiresome and unpredictable business of legislation: it is at this point that the familiar and appropriate phenomena of purposive statutory construction and of the general creative development of the common law pass over into full-blooded judicial legislation, in which the law is unambiguously and nakedly altered. I cannot share that equanimity with which most academic lawyers regard judicial legislation. Even if it were constitutionally acceptable, a danger is that it will be done badly. A court looking at single case, and hearing the views of just two sets of lawyers, may not necessarily be in the best position to frame new laws, just and workable. Nowhere is this more true than in the law of property. In the law of obligations, judicial decision is often a good vehicle for legal development, because obligations normally affect only the immediate parties, so that those affected are heard. But many other areas of law, and especially the law of property, are characterised by third-party effect, and in such areas judicial decision is evidently a most unsafe means of legal development.

In *Burnett’s Trustee* an able and distinguished English judge, now departed from this life, said: “What does surprise me is that Scotland, now a highly developed economy, should have a

12 To understand *Sharp* and *Burnett’s Trustee* fully it is necessary to grasp that the events were extraordinary. In practice dispositions are registered more or less immediately, and delay by the solicitor almost invariably implies negligence.

13 On the uncertainty of the *ratio*, see the decision of the Inner House in *Burnett’s Trustee*.

14 That the High Court of Justiciary is more “creative” than the Court of Session is no doubt because from it there is no appeal, except, on devolution issues, to the Privy Council.

land law which is still based on the judicial development, albeit sophisticated, of the laws of Rome...¹⁵ Those who hope for a warm, touchy-feely, convergence of European private law might like to think about what conceptions of the Civilian tradition must have existed for that remark to have been first thought and then uttered, ideas which, as everyday experience confirms, are not confined to the eminent judge in question, even if they are seldom so honestly avowed. “What is ‘diligence’?” is the question with which one of the English judges is said to have interrupted senior counsel for the respondents.¹⁶ To lack knowledge of the elements, and at the same time to be expected to play the part of the supreme expert: this cannot be a happy experience.¹⁷ Such remarks, and such questions, may raise doubts as to the appropriateness of appeals to the House of Lords, or whatever court may replace it, in cases where there is significant divergence from English law.¹⁸

The decision was unanimous, the bench consisting, as is usual, of five judges. We do not know how easily the result might have been other than it was.¹⁹ We do know that at least two of the English judges disliked the result, and one wonders whether some firmness may have been needed on the part of the Scottish judges: if so, they deserve credit for it. But things cannot be right if such firmness is necessary.

The unanimity and the overall approach may be linked. The overall approach is a narrow one. This is a leading case on property law, and yet surprisingly little is said of that law. Although *Sharp* prompted an avalanche of academic debate, some of it of the highest quality, that debate is passed over in silence.²⁰ The strategy of counsel for the respondent seems to have been to keep the case a narrow one, to show their Lordships that they were bound hand and foot by precedent, by rules which, being built into the fabric of insolvency law, simply could not be changed even by a court that disliked the law. With that strategy, even a Denning could scarcely have dissented. The case is treated mainly as a matter of statutory interpretation: what is meant by the expression “the whole estate of the debtor” in section 31 of the Bankruptcy (Scotland) Act 1985? Since sequestration is collective diligence, the meaning of this phrase is itself rooted in the law of diligence.²¹ Just as the same court felt able, in *Sharp*, to read another statutory expression, “property and undertaking”,²² narrowly, so in *Burnett’s Trustee* it was able to read “the whole estate of the debtor” broadly. Indeed, not only could it do so, but it had little choice, because that expression, and its predecessors,²³ was (unlike “property and undertaking”) an old one whose meaning was settled by old authorities. Indeed, in *Burnett’s Trustee* the average date of the cases

15 2004 SLT 513 at 524F. The sentence ends “and the mediaeval feudal system.” Not much of feudalism survives. What does survive is of little significance for *Sharp* and *Burnett’s Trustee*.

16 For those unfamiliar with Scots law, “diligence”, as well as bearing its ordinary meaning, means forced execution by a creditor.

17 The same issue arises for the Scottish judges when hearing English cases. But one has the impression that Scottish judges in the House of Lords know more of English law than the English judges know of Scots law.

18 For a forceful view see R G Anderson, “Appeals to London and human rights” 2003 SLT (News) 297.

19 The decision may well go down in history as unsurprising or inevitable, so let me record that almost no one I spoke to between the lodging of the appeal and the final decision wished to predict the outcome with any confidence.

20 Most of the literature is cited in the Scottish Law Commission’s Discussion Paper on *Sharp v Thomson* (Scot Law Com Disc Paper No 114, 2001.) This too is not referred to in the speeches of their Lordships. See also D A Brand, A J M Steven and S Wortley (eds), *Professor McDonald’s Conveyancing Manual*, 7th edn (2004) xxiii for references to the literature.

21 And here one must commend Lord Rodger’s masterly analysis of the older cases.

22 Companies Act 1985 s 462.

23 That is to say, provisions in the previous Bankruptcy (Scotland) Acts.

cited is 1857.²⁴ Of course, the interpretation of the statutory expression was what was required by the parties to the litigation. But behind the established interpretation lies a system of property law which makes the traditional interpretation not accidental but necessary. Of that system one sees little in this case. But here one sees the strategy: counsel for the respondent no doubt did not wish to open up such fundamental issues in a court where a majority of the judges were English. And it seems that counsel for the appellant was equally unwilling to challenge settled principles. He refused to argue that there was a constructive trust, and one must applaud that honourable refusal. Had he been prepared so to argue, perhaps the court would have been divided, and one can only guess as to which side the majority would have been.

Was the result fair? The usual criticism is that the trustee took both the property and the price.²⁵ Is that not unfair? *Of course it is unfair*. It is horribly, grotesquely, unfair. But one does not get even to square one in the philosophy of insolvency unless one understands that insolvency is *definitionally* unfair. Inviolable rights *must* be violated. Outside insolvency, “it’s unfair” is a trump card. Inside insolvency, “it’s unfair” means little. Every claimant in insolvency is the victim of unfairness. To say that the result was unfair to the Graingers is at once true and irrelevant. We see their pain. We do not see the pain of the other claimants. We must recall that to favour one claimant is to increase the pain, perhaps already unbearable, of others, for the pot of assets is limited, and the more that goes to one, the less will go to others.²⁶ An insolvency law that sought to be fair to the individual claimant would be an unfair insolvency law. (Indeed, this is a perfect illustration of the dangers of judicial legislation: the court sees the person who suffers, and naturally wishes to use its power to offer balm. It cannot see in the round.) If there is a problem of fairness it is whether the buyers would be entitled to claim in the sequestration, a point to which Lord Rodger adverts. If they could not, that seems unfair, though of course even if they could, the result would be that they would receive only a percentage of the value of the claim. Much could be said. Here only one thought will be offered. If there is a valid claim, but if it is regarded as a claim arising after the opening of the bankruptcy, then that fact would in practice be likely to be favourable to the buyers, for a post-sequestration claim is not discharged by the discharge of the debtor.

The two English judges who gave reasoned speeches made it clear that they would have liked to allow the appeal, and thought that the seller held the property in trust for the buyers.²⁷ The Scottish judges rejected that view. But according to Lord Hope an express trust clause would have been effective. Lord Hoffmann said the same, adding: “It is a strange form of conclusiveness [of the Register] that can be so easily defeated.” On this point, Lord Hoffmann is right. Public policy in Scotland has been, since 1617, that land rights must be registered if they are to have third-party effect. This is an aspect of the publicity principle. A latent trust of land drives a coach through the publicity principle. For that reason the law was, until 1893, that a latent trust of land was of no effect against creditors of the trustee. The law was altered by the House of Lords in *Heritable Reversionary Co Ltd v Millar*.²⁸ That case is the source of the absurdity rightly

24 An article on *Burnett’s Trustee* has aptly been called “The shock of the old” (D McKenzie Skene at 2004 SLT (News) 65).

25 In an article on the case (“*Burnett’s Trustee v Grainger*: a race not a match” (2004) 72 *Scottish Law Gazette* 41 at 43) Ken Swinton has written that “the legal system ought to provide a suitable method of protecting purchasers like the Graingers who are in good faith and for value.” It does: registration.

26 Ironically, the pain of the Graingers was less than that of other victims, for the Graingers were entitled to compensation from their solicitors. The unfairness argument, were it relevant, would thus work against their claim, not in its favour.

27 In which country might that be the law?

28 (1893) 19 R (HL) 43. This case is often presented as having decided that property held in trust is unavailable to creditors. That is not so. That rule was an old one, but it did not apply to latent trusts of land. It was *that* rule which *Heritable Reversionary Co* changed.

pointed out by Lord Hoffmann.

Trusts are good friends and dangerous enemies. They can be created by secret act, and yet can have dramatic third-party effects. Thus they contravene the publicity principle, a principle that has never taken root in England, but which has, at least since the seventeenth century, been an essential part of the public policy underlying private law in Scotland.²⁹ Indeed, since the seventeenth century there have been suggestions that trusts ought to be registered. One may conjecture that the reason why this has never been made a formal requirement of law is that in practice virtually all trusts are in fact publicly registered. Trusts of land normally appear in the Land Register.³⁰ More generally, *inter vivos* trusts are normally registered in the Books of Council and Session, whilst *mortis causa* trusts will appear in the Sheriff Court books as part of the confirmation process, and usually in the Books of Council and Session too. Double registration—both in the Books of Council and Session and in the Land Register—is quite usual. Such facts are familiar to solicitors but not always to others. Moreover, in normal trusts there will be the usual apparatus of quarterly meetings of the trustees, deeds of assumption and conveyance, sederunt books, authorised investments, annual accounts of charge and discharge and so on. The contrast is between the normal trust and the trust created to circumvent the policy of the law, without registration, without sederunt books, without accounts, without meetings of trustees, without everything. Trusts of the latter sort are normally created *solely for the purpose of defeating the rights of lawful creditors*.³¹ As such they are, it may be argued, contrary to public policy.³² But our legal system has yet to think through these issues fully. So whether a trust clause of the sort contemplated by Lords Hope and Hoffmann would be effectual is uncertain.³³

Sharp is not overruled by *Burnett's Trustee*, but it is now confined to its own facts only. Lord Jauncey's attempt in that case to introduce an English idea of "beneficial interest" has failed. The exposition of the law given by the Inner House in *Sharp*, and especially the opinion of Lord President Hope, to whom the law in this area owes so much, is now re-established.³⁴ I, for one, welcome this. It does not mean that our law is perfect. There is scope for reform, and the Scottish Law Commission has already made constructive suggestions.³⁵ But what is important is

29 It might be said that beneficial rights are personal rights, and the publicity principle does not apply to personal rights. The issue, however, is not whether beneficial rights are personal or real or mixed. The issue is under what conditions the law will permit a separate patrimony to be created. A separate patrimony is virtually a separate juristic person, and in all legal systems the creation of a juristic person is normally, and rightly, subject to the principle of publicity.

30 Or in the General Register of Sasines, if the property is still in that Register.

31 An example is *Tay Valley Joinery Ltd v C F Financial Services Ltd* 1987 SLT 207. For robust criticism see K Reid, "Trusts and floating charges" 1987 SLT (News) 113. My own view, for what it is worth, is that the case was wrongly decided.

32 *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111 was a decision with more than one *ratio*, but one of the reasons that the trust in that case was held invalid was public policy.

33 *Dicta* let fall in the House of Lords deserve the highest respect. But the issues were not argued before their Lordships. On trust clauses in dispositions see A Steven and S Wortley, "The perils of a trusting disposition" 1996 SLT (News) 365; J Chalmers, "In defence of the trusting conveyancer" 2002 SLT (News) 231; and R Roxburgh, "Nightmares about trust clauses" (2004) 49 JLSS 12.

34 In truth, it continued to be cited as authoritative by authors and by judges even after the House of Lords had reversed it. The predominant view was always that *Sharp* was to be construed narrowly.

35 Discussion Paper on *Sharp v Thomson* (Scot Law Com Disc Paper No 114, 2001).

to have a clear, coherent and well-settled set of principles, which can then be modified by such legislation as reason or experience may suggest.

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Unjustified Enrichment and *Burnett's Trustee v Grainger*

This case-note considers the unjustified enrichment aspects of *Burnett's Trustee v Grainger*¹. The facts are set out in G L Gretton's case-note² which this note complements. Suffice it to state here that the solicitor of the purchasers (the Rev Harvey and Mrs Grainger) took as long as fourteen months to record their disposition from the seller, Mrs Burnett, and thereby allowed the permanent trustee in her sequestration to win the race to the register by recording his notice of title first. The House of Lords, affirming the Court of Session, unanimously held that the permanent trustee's title was to be preferred. Lord Hoffmann however thought that the decision left the Scots law of bankruptcy in an unsatisfactory condition for *inter alia* the following reason:³

It results in the creditors of Mrs Burnett being unjustly enriched at the expense of the Rev and Mrs Grainger and I can see no compelling ground of logic or policy which justifies such a result.

[5] The unjust enrichment arises from the fact that the mistake of the Graingers in failing to record the disposition in their favour before the permanent trustee means that they are not only unable to assert title to the flat (a consequence which might have been reasonable if the contract had remained uncompleted) but that the permanent trustee is also entitled to keep the money they paid. To say this is a consequence of their own fault is in my opinion no answer. Mistake is generally regarded as a ground for relief against unjustified enrichment, not a reason why the victim should suffer the consequences of an error which has caused no prejudice to anyone else.

It seems that his Lordship would have liked to apply, or misapply, the law of unjustified enrichment in order to give a priority in bankruptcy to purchasers whose solicitors, either intentionally or by gross negligence, flout fundamental rules of good conveyancing practice. This note contends that Lord Hoffmann's argument is inconsistent with the Scots law of unjustified enrichment and in any event impolitic.

1 [2004] UKHL 8; 2004 SLT 513; affg 2002 SC 580; 2002 SLT 699 (Extra Div); revg 2000 SLT (Sh Ct) 116.

2 See 389 above.

3 [2004] UKHL 8 at paras [4]-[5]; 2004 SLT 513 at 516D-F. This passage was obiter and according to Lord Rodger was not argued in the appeal: see [2004] UKHL 8, para [147]; 2004 SLT 513 at 545C.