

<b>Institution: The University of Edinburgh</b>
<b>Unit of Assessment: 20 Law</b>
<b>Title of case study: Case Study 2: Overhauling the Scottish land registration system</b>
<p><b>1. Summary of the impact</b></p> <p>Research underpinning this case study – translated into policy and legislation through service by Reid and Gretton at the Scottish Law Commission – has contributed to the transformation of an outdated system of land law in Scotland and its replacement with a coherent and principled framework for land-ownership. In the census period this has been achieved above all by the Land Registration etc (Scotland) 2012. The impact claimed is the legislative change and its result: the introduction of a new law of land registration in Scotland.</p>
<p><b>2. Underpinning research</b></p> <p>The underpinning research is found above all in the first part of Volume 18 of the <i>Laws of Scotland: Stair Memorial Encyclopaedia</i> (1993) reissued and updated in 1996 in book form as <i>The Law of Property in Scotland</i> (3.1). Extending to 655 pages, the book is mainly the work of Reid (appointed in Edinburgh 1980), with an additional chapter by Gretton (appointed in Edinburgh 1981). Reid and Gretton have written extensively together on matters of property law, and are the authors of the standard work on conveyancing (3.2) which, among other things, has made their academic work more readily available to a professional audience thereby facilitating uptake of the underpinning research.</p> <p>Prior to the publication of <i>The Law of Property in Scotland</i>, this field of law had been little studied: indeed it was hardly taught in universities other than, indirectly, as an aside to conveyancing; and, while there had been books on land law and, especially, conveyancing, no work had attempted a scholarly study of property law in the round, covering land and goods and intangibles. Based on an exhaustive study of sources over a period of some 600 years, Reid's work proposed an overarching theoretical structure which would work for property of all types. By means of a new taxonomy and a series of high-level principles, he showed how it was possible to organise and explain what had often appeared as a jumble of unrelated rules. In short, Reid's work rediscovered and reformulated the law of property in Scotland.</p> <p>One result of that rediscovery was to expose major shortcomings in the legislation which had introduced registration of title in Scotland. Devised at a time when property law was largely unexamined and too little known and understood, the Land Registration (Scotland) Act 1979 undermined a number of principles which, as a result of Reid's work, would come to be seen as fundamental. Some of this had already been pointed out in <i>The Law of Property</i>. In a later paper published in 1996 (3.3) Reid emphasised the resulting conceptual impoverishment:</p> <p style="padding-left: 40px;">Registration of title gives every appearance of having been devised from a severely practical point of view ... The result is that while registration of title works (and works well) in practice, it does not work in theory. This matters. A reform which is insufficiently conceptualised is likely to run into trouble sooner or later. There will be contradictions and paradoxes. There will be overlapping provisions. There will be lacunae which the absence of a more general theory will make extremely difficult to fill. And, in the particular case of registration of title, there will be problems in accommodating the new system within the background law of property.</p> <p>Gretton was blunter still, describing the legislation in the following year as 'overambitious and under-researched' and having 'all the intellectual sharpness of a mashed potato' (3.4).</p>

### 3. References to the research

#### *Publications*

(3.1) KGC Reid and others, *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol 18, pt 1 (Butterworths/The Law Society of Scotland 1993; reprinted as a monograph as *The Law of Property in Scotland* (1996) [to be supplied by HEI on request]

(3.2) KGC Reid and GL Gretton, *Conveyancing* (W Green/Thomson Reuters 1993; 4th edn 2011) [to be supplied by HEI on request]

(3.3) KGC Reid, 'Void and Voidable Titles and the Land Register' (1996) 1 *Scottish Law & Practice Quarterly* 265-76 [to be supplied by HEI on request]

(3.4) GL Gretton, 'Case note on *Kaur v Singh*' 1997 *Scottish Civil Law Reports* 1085-87 [to be supplied by HEI on request]

(3.5) GL Gretton, 'Land Registration Reform', in Robert Rennie (ed), *The Promised Land: Property Law Reform* (W Green 2008) 195-206 [to be supplied by HEI on request]

### 4. Details of the impact

By the time these comments on the Land Registration (Scotland) Act 1979 were made, Reid had been appointed a Scottish Law Commissioner, charged with directing a major programme of land law reform (now fully implemented by legislation). Beginning in 2002 Reid wrote three consultative Discussion Papers on land registration; Gretton, who succeeded him as a Law Commissioner in 2006, was responsible for the final Report and for draft legislation (2010). A Bill based on the Law Commission's draft was introduced to Parliament by the Scottish Government in 2011 and was passed the following year as the Land Registration etc (Scotland) Act 2012. The Act is a substantial piece of legislation comprising 124 sections and five schedules. The impact that is claimed is this legal change, being the culmination of a programme of reform of property law by the Scottish Government (5.1).

Reid and Gretton's earlier research had pointed to a conceptual flaw at the very heart of the 1979 legislation. According to normal principles of property law, ownership cannot pass from one person to another without a consensual juridical act requiring the participation of both. But while that juridical act – the granting and acceptance of a deed of conveyance – was left undisturbed by the legislation, it had become a meaningless formality. For ownership now passed by the act of registration alone and without reference to the validity or otherwise of the underlying deed. Title, in other words, derived from registration and not to any extent from the deed; and in a phrase of Reid's, taken up by the Law Commission, the registrar had a 'Midas touch': whatever he registered turned to valid. Quite apart from its departure from fundamental principles, this Midas touch suffered from the same defect as in the myth from which the name derived: its inflexible and indiscriminate nature created a valid title even in cases – such as forged deeds – where validity was plainly the 'wrong' response.

Having made this conceptual error, the legislation then sought to ameliorate its consequences, Reid and Gretton pointed out, by sometimes allowing 'rectification' of the Register on grounds of legal (as opposed to factual) inaccuracy. But since, due to the Midas touch, an entry on the Register could never actually be wrong, legal inaccuracy had to be measured by reference, not to land registration law, but to ordinary property law. The resulting 'bijuralism' – the simultaneous application of two different systems of law – was clumsy, complex and uncertain (especially in relation to later transmissions). It was also, as Reid and Gretton demonstrated, unnecessary. Its evident policy aim, of protecting acquirers who relied in good faith on the Register, could be achieved by a direct rule to that effect. The Midas touch could then be abolished, bijuralism discarded, and the normal rules of property law (including consensual transfer) restored. The 2012 Act so provides. The result is not only simplicity and conceptual rigour but also a system which, by

ceasing to privilege fraud and error, strikes an appropriate balance between existing owners and good faith acquirers from a non-owner.

The significance of these changes was conveyed by Fergus Ewing MSP, Minister for Energy, Enterprise and Tourism, proposing the motion in Parliament that the Land Registration (Scotland) Bill 2012 should be passed:

The bill seeks to provide the people of Scotland with a land register that is fit for the 21st century....The bill will also provide for a fairer and more balanced system of land registration ... 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. (5.4)

Commenting on the Land Registration Act, leading legal practitioner Stewart Brymer said: '[A] special mention should be made of the dedicated work and intellectual leadership of Professor Kenneth G C Reid and Professor George Gretton. We are fortunate to have such eminent legal scholars, and their contribution to the development of the Scottish law of property, in what, I am sure, will be regarded in retrospect as a golden age of the law of property in Scotland, cannot be over-estimated' (5.5).

### 5. Sources to corroborate the impact

(5.1) Scottish Executive, *Modern Laws for a Modern Scotland: A Report on Civil Justice in Scotland* (2007), para 2.6 confirming co-ordinated programme of property law reform, based on proposals by the Scottish Law Commission.

<http://www.scotland.gov.uk/Resource/Doc/165338/0045028.pdf> or <http://tinyurl.com/nh2svnc>

(5.2) Lord Hope of Craighead describing his study of Reid's book in preparation for deciding the leading case of *Sharp v Thomson* 1995 SC 455 a year or two after its publication: 'This was a gap in my legal education, which I only really began to appreciate when I began to do my background reading and then to study Professor Reid's title in the Encyclopaedia....I doubt whether the opinions [in *Sharp*] would have been expressed as they were if all that material had not been available.' ((1997) 2 *Scottish Law and Practice Quarterly* 93 at 99) [to be supplied by HEI on request]

(5.3) Robert Rennie, Professor of Conveyancing at the University of Glasgow, referring to both Reid's published work and his work at the Scottish Law Commission stated: 'No man has left so large a footprint on the Scottish law of property'. (R Rennie (ed), *The Promised Land: Property Law Reform* (W Green 2008) preface, xi) [to be supplied by HEI on request]

(5.4) Fergus Ewing MSP, Minister for Energy, Enterprise and Tourism, on the Land Registration (Scotland) Bill, (Scottish Parliament, Official Report, 31 May 2012, cols 9595-96). [to be supplied by HEI on request] demonstrates the social and economic significance of the reforms to land registration brought about as a result of the underpinning research.

(5.5) S Brymer, 'A New Era of Land Registration in Scotland' (2013) 122 *Greens Property Law Bulletin* 1 at 1 [to be supplied by HEI on request] provides evidence of the extent of the impact of the research and the associated law reforms on the legal landscape and the legal practitioner community.