

# Real Rights: Practical Problems and Dogmatic Rigidity

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### A. INTRODUCTION

Scots law has a *numerus clausus* of real rights in relation to land. This is but one example of the closed lists<sup>1</sup> that mark out Scots property law as a child of the *ius commune*. The structure fosters clarity and precision and gives the Scottish system of landholding great stability and predictability. The Scottish system, however, is not free from criticism. It may be that these strengths have been bought at the

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<sup>1</sup> Other closed lists include the closed list of public rights, and the closed list of common law servitudes. The latter is disapplied for positive servitudes created by express provision: Title Conditions (Scotland) Act 2003, s 76(1).

price of inflexibility and injustice to individuals wishing to own land and enjoy rights in land. This article will seek to show that the Scottish system of real rights is much more flexible and responsive to changes in societal and commercial needs than is often appreciated and Scottish land law is not a slave to dogmatic rigidity. In particular, this article will draw attention to the manner in which public rights have been developed over time to supplement the list of real rights.

### (1) The recognised real rights

Despite its Civilian pedigree, Scots property law did not receive all the real rights in land recognised by classical Roman law. The rejected inheritance includes rights such as *usus*, *superficies* and *habitatio*, albeit some functional equivalents have been developed. The pedigree in Scots property law, while ancient, is not wholly pure when judged by reference to any one source. Native development and some limited borrowings from other sources are apparent, although in the context of judicial development of land law these are usually not common law jurisdictions,<sup>2</sup> a phenomenon which continues to astonish some lawyers from such legal systems.<sup>3</sup> As regards heritable (immoveable) property the real rights recognised by Scots law in the modern era include the following:<sup>4</sup>

- (a) property (*dominium*);
- (b) proper liferent;
- (c) tenant's right in a lease;
- (d) servitudes, certain real burdens and rights of common interest;
- (e) certain exclusive privileges or monopolies;<sup>5</sup>

2 Cf the extensive reference to authorities from Common Law jurisdictions at first instance in *Moncrieff v Jamieson* (2004) SCLR 135 (Sh Ct). This can be explained on the basis that the Common Law jurisdictions have retained much of the Civil Law relative to servitudes. However, on appeal to the IH, 2005 SLT 225, Lord Marmoch, at para 1 referred to Canadian authority but at para 4 stated "...for myself, I decline to derive any guidance as to the Scottish law of servitudes from the Canadian law of easements". Cf the extensive use of English authority in *Nationwide Building Society v Walter D Allan Ltd*, unreported, OH, 4 Aug 2004 (Lady Smith) (available at <http://www.scotcourts.gov.uk/>).

3 In *Burnett's Trustee v Grainger* 2004 SC (HL) 19; 2004 SLT 513; 2004 SCLR 433, HL, the House of Lords unanimously rejected any notion of beneficial interest passing to a purchaser prior to registration of his title. However, Lord Hobhouse observed, at para 53: "...what does surprise me is that Scotland, now a highly developed economy, should have a land law which is still based on the judicial development, albeit sophisticated, of the laws of Rome and the mediaeval Feudal system".

4 K G C Reid et al, *The Law of Property in Scotland* (1996) (henceforth Reid, *Property*) para 5; R R M Paisley, *Land Law* (2000), para 2.4.

5 There remains considerable controversy as to whether rights such as copyright or patent, forms of incorporeal moveable property, are truly real rights. See G L Gretton, "Owning rights and things" 1997 Stell L R 176. References to e.g. "an effectual right" (*Stirlings v Black* (1803) Mor App "Privilege" 4 at 5) tell us nothing as to their nature. However, the separate incorporeal tenements in Scots law, a form of heritable property, which comprise various monopoly rights are treated as land and are clearly real rights.

- (f) tenants' rights in tenancies at will and kindly tenancies;<sup>6</sup>
- (g) creditors' rights in fixed securities, charging orders and attached floating charges;
- (h) possession (albeit it is not an autonomous right);<sup>7</sup> and
- (i) certain statutory rights and rights created in agreements or orders permitted by statute.

## (2) Corrections, clarifications and expansions

Although there is general consensus that Scots law has a *numerus clausus* of real rights relating to land, there is no absolute certainty that the above examples comprise the whole content of that list. It may be that other, as yet unrecognised or undiscovered, real rights remain to be added. This lack of certainty inevitably occasions a certain level of systematic obscurity in the Scottish system. However, it may afford a degree of flexibility in that there is still room for "corrections" or "clarifications" of the list. This may involve the re-discovery of previously little known or wholly disregarded real rights or even, it could be argued, the creation of new real rights *de novo*. In this adventure of discovery there is a role for the courts, the legislature and academic lawyers.

The possibility of the creation of real rights by statute has already been noted. It is particularly difficult to be precise as to the content of this last group of rights. Some statutory rights are poorly conceptualised in the enactments by which they are created. In many cases this is due to the fact that the relevant statutes merely adapt a pre-existing model from England or another Common Law jurisdiction.<sup>8</sup> When the kilt is put on in this way the fit is often poor. As a result, there remains considerable uncertainty as to whether the rights so created can legitimately be regarded as additions to the list of real rights. The courts have not remained silent

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In the modern era they comprise rights such as fairs and markets, free port and harbour, public ferries, rights to salmon fishing, rights to mussel scalps on the seabed and oyster fishings in lochs, and rights to wreck.

6 These are not leasehold rights but permanent rights with some functional equivalence to the right of *superficies* or building grant known to Roman law. Nevertheless, there is probably no direct derivation from Roman law. See, e.g. *Dugald Mctavish v Trustees of Fraser of Lovatt* (1790) Hume 547; *Thomas Clarke v George Brodie* (1801) Hume 548.

7 The continuing debate as to whether possession is a right or a fact is not a matter which will be addressed here. For further details see Reid, *Property* paras 114-194; C G van der Merwe and M de Waal, *The Law of Things and Servitudes*, (1993) para 53.

8 E.g. Land Drainage (Scotland) Act 1930; Land Drainage (Scotland) Act 1958, which are adaptations of Land Drainage Act 1930. The inadequate nature of the adaptation leaves considerable difficulty as to the implied rights to use the drains installed in terms of the statutory provision, see Paisley, *Land Law*, para 2.8. For the Australian approach: *Madden v Coy* [1944] VLR 88 applying the Drainage of Land Act 1928 (Vic). See A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia*, 2nd edn (2000) para 3.5.

in the face of legislative action. For example, the courts have been prepared not only to extend the ambit of existing real rights (such as real burdens,<sup>9</sup> rights of common interest<sup>10</sup> and servitudes) to cope with changes in societal needs but also, in a most dramatic way, have rediscovered the little-known aspect of *dominium* enabling access to enclaved or landlocked land.<sup>11</sup>

Academic lawyers also have much to contribute. The recent revival of property law as an academic discipline after the fascination with the pure technicalities of conveyancing for nearly a century and a half<sup>12</sup> has encouraged academic layers to apply the proper classification to real rights which were previously wrongly classified or wholly ignored.<sup>13</sup> One might argue that the process of correction or clarification by academic lawyers should have only a finite potential for extension of the list whilst the declaration of existing rights by the courts is less constrained and the creation of new rights by the legislature is freer still.<sup>14</sup> Even if this is true, this is not to understate the work of academic lawyers. If there ever is to be a codification of Scottish property law, the work of classification and identification of all real rights will require to be completed first. There remains much to be done in this regard and, at the present stage of development of Scots law, it is perhaps in the clarification of the distinct nature of public rights and the manner in which they complement real rights that academic lawyers have most to offer.

## B. PUBLIC RIGHTS

The list of real rights is supplemented by another list—a list of public rights. Scots common law recognises a limited number of rights in land which generally belong to every member of the general public but in some instances are restricted to limited classes of the general public. These public rights are: (a) rights available to all members of the public, such as right of highway and way on land and navigation on some stretches of water; (b) rights available to a limited class of the public, such

9 On the extension of real burdens to positive rights see *B & C Group Management Ltd, Haren and Wood, Petitioners*, unreported, OH, 4 Dec 1992 (Lord Cullen); Reid, *Property* para 391.

10 See, e.g. *Newton v Godfrey* (2000), in R R M Paisley and D Cusine, *Unreported Property Cases*, (2000) (henceforth Paisley and Cusine, *Unreported Cases*) 86; K G C Reid and G L Gretton, *Conveyancing 2000* (2001) 7. For the previously accepted position in this context see Reid, *Property* para 226, note 5.

11 See text at notes 82-85 below.

12 On “the strange death of property law” see K Reid, “Property law: sources and doctrine”, in K Reid and R Zimmermann, *A History of Private Law in Scotland* (2000), vol 1, 185 at 208-210.

13 The most significant work in this regard is Reid, *Property*, esp paras 1-16. For further development see Paisley, *Land Law*, ch 2.

14 The Scottish Parliament cannot legislate in contravention of the European Convention on Human Rights: Scotland Act 1998, s 29(2)(d). Clearly this may affect legislative introduction of new real or public rights or limitations of existing ones. See K M Springham, “Trespassing on human rights? The Scottish Parliament and land reform” 1999 SLT (News) 227-231.

as community rights in towns around some old towns and cities which were incorporated as burghs; and (c) rights in relation to graves, which are available to surviving relatives of the interred.

Whether or not these public rights are truly real rights within the domain of private law is open to question. Another competing classification is that the rights should be recognised simply as public rights properly belonging to the realm of public law.<sup>15</sup> Traditionally, the issue addressed by many of these public rights—free passage along thoroughfares or across open areas—is deeply imbedded in public law and has been often considered in the context of the public right of freedom of assembly, association and movement. However, they should not be excluded from the category of real rights recognised by private law on that basis alone. A brief overview of the similarities and differences between public and real rights will illustrate the point.

There is some resemblance between public rights and the recognised real rights in that the exercise of both classes of right may be defended by each of the parties entitled to the right. Enforcement of real and public rights requires in each case both title and interest but, in relation to a public right, the relevant interest to determine the appropriate remedy, in theory, should be a public interest and not the private interest of the individual pursuer.<sup>16</sup> However, on that point, the Scottish authorities are scant and unsatisfactory. Further, the manner of creation of some public rights bears a resemblance to the creation of some real rights in the requirement of a certain level of publicity. For example, open exercise for a suitable period of time may create a public right of way by means of positive prescription in a manner similar to the acquisition of a positive servitude.<sup>17</sup> At an early date there was some doubt as to whether these public rights were simply imposed by the law on a certain state of affairs or on an established history of events (i.e. after a certain period of exercise) or, alternatively, whether they were ultimately derived from the title of the burdened owner like a subsidiary real right.<sup>18</sup> In the context of prescriptive acquisition of public rights of way Scots law decisively chose the former explanation.<sup>19</sup>

15 Such a classification is that favoured by South African law in regard to matters such as public rights to navigate on rivers: *Butgereit and Another v Transvaal Canoe Union and Another* 1988 (1) SA 759 (A); *Transvaal Canoe Union and Another v Garbett and Another* 1992 (2) SA 525 (T); 1993 (4) SA 829 (A).

16 *MacDonald v Mags of Arbroath* 1916, 2 SLT 303 at 304 and 305 per Lord Cullen, applying *Grahame v Mags of Kirkcaldy* (1879) 6 R 1066; (1881) 8 R 395; (1882) 9 R (HL) 91.

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

18 See, e.g. *Napier's Trs v Morrison* (1851) 13 D 1404 at 1405 per L J-C Hope; *Dyce v Hay* (1852) 1 Macq 305 at 311 per L C St Leonards; *Marquis of Bute v McKirdy & McMillan* 1937 SC 91 at 131 per Lord Moncrieff.

19 See, e.g. *MacPherson v Scottish Rights of Way and Recreation Society Limited* (1888) 15 R (HL) 68 at 68 per L C Halsbury; *Mann v Brodie* (1885) 12 R (HL) 52 at 57 per Lord Watson.

A faint trace of the latter theory remains in continuing assertions to the effect that a public right of way may be created at the will of the owner at a time of his or her choosing, usually by the grant of an appropriate deed.<sup>20</sup> However, the multiplicity of potential holders of public rights may render the grant or registration of a deed an inappropriate method of creation<sup>21</sup> and it remains unclear whether such a deed requires subsequent possession to create the right.<sup>22</sup> It is uncertain whether these considerations were ever considered by the courts in the context of the more extensive public right of highway but it is established that a public right of highway cannot be created by the voluntary act of dedication of the affected owner.<sup>23</sup> The conclusion must be that public rights and real rights have significant differences in relation to creation.

Fundamental differences also affect public rights and other derivative acquisition in that the various public rights cannot be transferred by the holder but are inalienable because they are already freely available. No issue therefore arises as to the consequences or manner of derivative acquisition. This deprives them of some of their commercial value as no one can fortify or improve an existing public right by acquiring the public right of another. No one can grant derivative real rights or derivative public rights in respect of existing public rights. As a result, such public rights have no re-sale or transfer value, they cannot be registered in the Land Register of Scotland,<sup>24</sup> they cannot be leased or subject to heritable securities, they cannot be transferred into a trust to be held for the benefit of others and, when a person dies or becomes insolvent, no issue arises as to the rights forming part of the estate of the deceased or bankrupt.

All this should not be taken as indicating that public rights have no commercial value at all or that their existence has no economic interaction with traditional real

20 See the divided authorities noted in *Marquis of Bute v McKirdy and McMillan* 1937 SC 93 at 131 per Lord Moncrieff; W M Gordon, *Scottish Land Law*, 2nd edn (1999) (henceforth Gordon, *Land Law*) para 24-109; D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) (henceforth Cusine and Paisley, *Servitudes*) para 19.11. For an example of a purported reference in a deed to a "servitude" right of access granted to members of the public see *Oliver v McLelland or Cameron* 1994 GWD 8-505.

21 The law of trusts may assist to some extent as the grantee could be a trustee or trustees holding the right for the benefit of the public or a section of the public. However, unless it qualifies as a personal real burden (see section K. below) it is difficult to see such a right could be more than a personal right, as Scots law does not recognise personal servitudes.

22 Reid, *Property*, para 498; Paisley, *Land Law*, paras 3.25 and 10.4.

23 See, e.g. *Cumming and others v Smollett and others* (1852) 14 D 885; *John Printer v Sir Archibald Islay Campbell*, 12 April 1865, Sh Ct, Dumbaron, Sheriffs Hunter and Steele, Sh Ct Rep 72 (reported in *Scottish Law Magazine*, vol 4); J Ferguson, *The Law of Roads, Streets, and Rights of Way* (1904), 356, 360. For similar position in Guernsey see *Godfray v The Constables of the Island of Sark Defendants* [1902] AC 534.

24 However, public rights of way and access rights by way of a path delineated in a path order made under Land Reform (Scotland) Act 2003, s 22(9) are "overriding interests" in terms of Land Registration (Scotland) Act 1979, s 28(1), para (g). See *Registration of Title Practice Book*, 2nd edn (2000) paras 5.68, 6.62.

rights. The matter is clearly otherwise. A site owned by a developer is commercially viable only because the real right of property in the site is linked by a real right of servitude or by the functional equivalent, a public right of way, to the public right of highway in the public road. However, beneath the broad fact of co-existence and similarity of function there remain additional parallels and substantial differences between public and real rights. Some doctrines of extinction appropriate to real rights, such as *confusio*,<sup>25</sup> will be wholly inapplicable or only of marginal relevance to public rights. In many cases the public interest in the latter will require a special process for termination inappropriate to real rights.<sup>26</sup> However, just as some real rights are recognised as having a greater strength than others with the result that some, such as ownership of land,<sup>27</sup> are incapable of extinction by mere disuse whilst other, such as servitude, are not,<sup>28</sup> so too has the law acknowledged the public importance of certain public rights, such as public highway<sup>29</sup> and navigation,<sup>30</sup> in protecting them from extinction by mere non-use<sup>31</sup> but allowing such disuse to extinguish other public rights such as rights of way.<sup>32</sup>

A further similarity may be noted in that two public rights may simultaneously affect one servient item of property and a public right may co-exist with a derivative real right in the same item.<sup>33</sup> However, even in this regard there are some limitations. It will not be possible for one servient property to be affected by two identical public rights—the two will simply be the same right.<sup>34</sup> Similarly a right of public highway will subsume any public right of way over the same route. However, if a public right of way existed first and was replaced by a public highway, there may be issues of revival of the former upon cessation of the highway, due to

25 Paisley, *Land Law*, para 3.40.

26 For public rights of way see Countryside (Scotland) Act 1967, s 34 saved by Land Reform (Scotland) Act 2003, Sch 2, paras 4(b) and 7(c); Town and Country Planning (Scotland) Act 1997, s 206. For public rights of highway see Roads (Scotland) Act 1984, ss 12, 68-70 and 152(2); Town and Country Planning (Scotland) Act 1997, ss 202 and 207; A Faulds and J Hyslop, *Scottish Roads Law* (2000) ch 9. For earlier legislation see *Thomas Hart v John Carruthers* (1830) 2 Sc Jur 161; *Murray and others v Arbuthnot* (1870) 9 M 198.

27 Prescription and Limitation (Scotland) Act 1973, s 8(2) and Sch 3, para (a).

28 Prescription and Limitation (Scotland) Act 1973, s 8(2); *Cusine and Paisley, Servitudes* paras 17.33-17.37.

29 Gordon, *Land Law* para 24-149; *Waddell v Earl of Buchan* (1868) 6 M 690. See also *Robertson v Coll* (1830) 2 Sc Jur 190.

30 *Will's Trs v Cairngorm Canoeing and Sailing School Limited* 1976 SC (HL) 30 at 168-169 per Lord Fraser (opinion reserved).

31 This, however, still leaves open the possible application of the separate doctrine of abandonment.

32 Prescription and Limitation (Scotland) Act 1973, s 8(2); *Cusine and Paisley, Servitudes* paras 24.03-24.05.

33 *Smith v Saxton* 1927 SN 98 and 142. See also *Jane Stewart and others v The Greenock Harbour Trs* (1864) 2 M 1155; *Scotland v Wallace* 1964 SLT (Sh Ct) 9, noted in *Moncrieff v Jamieson*, note 2 above, (2004) SCLR 4 at 38 per Sheriff Scott McKenzie.

34 Paisley, *Land Law*, para 2.12(b).

the exercise of certain statutory procedures.<sup>35</sup>

Lastly, the exercise of public rights and real rights may both be protected<sup>36</sup> and also restrained by the law of nuisance<sup>37</sup> but the practice of rendering this protection and restraint bespoke according to the wishes of the parties involved by means of real burdens and similar conditions running with the right in question is confined only to real rights. No public right can be the dominant or servient tenement in a servitude, real burden or common interest.

Just like those rights which are clearly recognised as real, the public rights form a closed list. This is not to say there has not been pressure to add to the list from time to time. This is most clearly evident in the rather limited recognition of public rights in and over land. With the limited exception of *ius spatiandi* on the foreshore<sup>38</sup> and on certain lands in the neighbourhood of some old towns incorporated as Royal and other burghs,<sup>39</sup> the common law has failed to recognise a public right to roam on uncultivated land<sup>40</sup> and recent legislation has been enacted to introduce such a right, albeit on qualified terms.<sup>41</sup> The limited number of common law rights of entry on to land for public purposes, such as the extinguishing of fires, pursuit of criminals and the repelling of an enemy,<sup>42</sup> have been supplemented by a vast array of statutory creations for a legion of other public purposes.<sup>43</sup>

35 For the express reservation of a right (which may be a public right) see the terms of Roads (Scotland) Act 1984, s 68(1). For the revival of a servitude upon the closing up of a public road see Paisley, *Land Law* para 10.12.(a). See also *Brian Gregory Hamilton v J & J Currie Ltd and Robison & Davidson Ltd*, unreported, Dumfries Sh Ct, 20 Nov 2002, ref A578/01 and *Brian Gregory Hamilton v James F S Mundell*, Dumfries Sh Ct, 20 Nov 2002, ref A591/01; rev'd *Hamilton v Mundell, Hamilton v J & J Currie Limited*, unreported, IH, 7 Oct 2004 (available at <http://www.scotcourts.gov.uk/>).

36 For protection of the public right of passage in highways see *Ogston v Aberdeen District Tramways Co* (1896) 24 R (HL) 8; Bell, *Principles* § 974; *The Laws of Scotland: Stair Memorial Encyclopaedia* (henceforth SME), "Nuisance" (Reissue, 2001) paras 164-167.

37 For limitations on the exercise of servitudes see, e.g. *Cloy v Adams* (1998), in Paisley and Cusine *Unreported Cases* 373; 2000 SLT (Sh Ct) 39.

38 *Officers of State v Smith* (1846) 8 D 711, aff'd *Sub nom Smith v Officers of State* (1849) 6 Bell App 487, HL; *Nicol v Blaikie* (1859) 22 D 335; *Marquis of Bute v McKirdy and McMillan* 1937 SC 93; Reid, *Property* paras 318, 528; Gordon, *Land Law* paras 7-04, 9-07; Civic Government (Scotland) Act 1982, ss 120-123.

39 *Paterson v Mags of St Andrews* (1881) 8 R (HL) 117 at 123 per Lord Blackburn and at 125 per Lord Watson; *Grahame v Mags of Kirkcaldy* (1882) 9 R (HL) 91; *Montgomerie and Co v Wallace James* (1903) 6F (HL) 10.

40 *Livingstone v Earl of Breadalbane* (1791) 3 Pat 221 at 222 per L P Hay Campbell of Succoth; Bell, *Principles* § 943; Reid, *Property* paras 174, 181; J Rowan-Robinson and A Ross, "The freedom to roam and implied permission" (1998) 2 EdinLR 225; J Rowan-Robinson and D McKenzie Skene, *Countryside Law in Scotland*, (2000) 262-265.

41 Land Reform (Scotland) Act 2003, Part 1.

42 *Shepherd v Menzies* (1900) 2 F 443; *HMA v McGuigan* 1936 JC 16; Bell, *Principles* § 957; Hume, *Lectures*, vol 3, 205-206; J Rankine, *The Law of Landownership in Scotland*, 4th edn (1909) 139; Reid, *Property* para 181(5); Gordon, *Land Law* para 13-14; S Scott Robinson, *The Law of Interdict*, 2nd edn (1994), 72.

43 E.g. Public Health (Scotland) Act 1897, s 6; Rights of Entry (Gas and Electricity Boards) Act 1954 as amended by Gas Act 1986, s 67(1) and Sch 7; Agriculture (Safety and Welfare Provisions) Act 1956, s 10;

One may observe parallels in relation to fishing. Despite a favourable inheritance from Roman law<sup>44</sup> and some early developments towards recognition of a public right to fish in non-tidal and non-navigable waters such as rivers and lochs,<sup>45</sup> Scots common law ultimately turned away from this position, leaving the fishing in these waters to the riparian proprietors.<sup>46</sup> The only recognised exception was extremely limited and also rather obscure in nature. It seems to have afforded a right to fish in a loch or river owned by another only where the relevant members of the public comprised a community of a Royal or other burgh which had used the fishings since time immemorial.<sup>47</sup> Given modern concerns about over-exploitation of natural resources and conservation of wildlife it is unlikely that statute will reverse the position and expand public rights of fishing,<sup>48</sup> except to the extent of permitting representative community bodies to acquire compulsorily the property right in certain fishings in some rural locations.<sup>49</sup>

All said, there is sufficient difference between public rights and the generally recognised real rights to justify caution when generalisations are made as to the nature or characteristics of the former. Whatever the proper classification, it is manifest that the public rights complement real rights, particularly in relation to passage or access. This interaction has a consequence for the development of the list of real rights. If a certain public right serves a particular purpose efficiently there is likely to be little demand for real right serving a similar purpose and little pressure to extend the existing list of real rights to add a new real right to like

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Building (Scotland) Act 1959, s 18 as amended by the Local Government (Scotland) Act 1973, Sch 15; Offices, Shops and Railway Premises Act 1963, s 53; Docks and Harbours Act 1966, s 32; Health Services and Public Health Act 1968, s 73 as amended by the National Health Service (Scotland) Act 1972, s 64 and Schs 6 and 7, Part II; Health and Safety at Work Act 1974, s 19; Control of Pollution Act 1974, s 91; Water (Scotland) Act 1980, s 38; Civic Government (Scotland) Act 1982, ss 5, 6, 60 and 99; Environment Act 1995, ss 108-110 and Sch 18; Deer (Scotland) Act 1996, s 15; Town and Country Planning (Scotland) Act 1997, ss 269-270; Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997, ss 76-78; Planning (Hazardous Substances) (Scotland) 1997, ss 33-35. See Gordon, *Land Law* paras 7-75, 9-61, 13-14, 15-47, 27-37, 28-60; Scott Robinson, *Interdict* 71; C Smith, N Collar and M Poustie, *Pollution Control: The Law in Scotland*, 2nd edn (1997), 16-21; Cusine and Paisley, *Servitudes* 821, Appendix A.

44 *J Inst* 2.1.2.

45 *Carmichael v Colquhoun* (1787) Mor 9645; Hailes 1033; Stair, *Institutions*, 2.3.69. Cf Erskine, *Institute*, 2.6.6.

46 *Fergusson v Shirreff* (1844) 6 D 1363; 16 Sc Jur 580; *Montgomery v Watson* (1861) 23 D 635; *Lennox v Keith* 1993 GWD 30-1913; N Whitty, "Water law regimes", in K Reid and R Zimmermann, *A History of Private Law in Scotland* (2000), vol 1, 420 at 443-446, 468 and 474.

47 *Beck v Mags of Lochmaben* (1839) 1 D 1212; (1841) 4 D 16; *Dougall v Lowe* (1906) 13 SLT 831. Cf *Warrand v Watson* (1905) 8 F 253.

48 Land Reform (Scotland) Act 2003, s 9(c) excludes fishing from the ambit of public access rights.

49 Land Reform (Scotland) Act 2003, s 33(6)(a) and s 68(2)(d) respectively include salmon fishings in the lands which may be purchased under the community right to buy and the crofting community right to buy. Other fishings would pass together with the acquisition of the riparian land. The proposals are far from uncontroversial.

effect. Even here there is a complication. Until the existence and nature of a particular public right is clarified and well established, those wishing to carry out the activity permitted thereunder are likely to be tempted to create real rights which purport to facilitate the same activity. For example, until relatively recently the extent and nature of the public right of surviving relatives to visit graves remained obscure,<sup>50</sup> with the result that during the early part of the nineteenth century some landowners purported to reserve similar or augmented rights as servitudes or real burdens in favour of their adjacent landed estates.<sup>51</sup> The efficacy of such bespoke provision as a real right has never been tested in the Scottish courts<sup>52</sup> but the phenomenon may be about to repeat itself in South Africa where there is currently considerable controversy over the nature of the burial and associated rights.<sup>53</sup>

### C. ADDING TO AND SUBTRACTING FROM THE LIST

In conjunction with the various public rights the real rights listed above represent the products relating to land which the Scottish legal system has available for its clients— actual and potential landowners and users of land. Where existing rights prove to be inadequate, new products are added from time to time. In recent years this is sometimes by means of statute rather than by judicial development of the common law. It is arguable whether this results from the speed of societal or technological change outstripping the ability of the common law to respond. An instance which provides support for such an argument may be found in the introduction of statutory occupancy rights<sup>54</sup> to remedy the failure of the common law to develop similar rights on the part of a spouse without title to the matrimonial home.<sup>55</sup> In

50 *Hill v Wood* (1863) 1 Macq 360; *McBean v Young* (1859) 21 D 314; Paisley, *Land Law* para 10.16.

51 E.g. the provisions of deeds quoted in *Paterson and others v Beattie and others* (1845) 7 D 561 at 567 per the Lord President Boyle; *Swan v Halyburton*, (1830) 2 J 307. See also *Cunningham and others v Edmiston and others* (1871) 9 M 869 at 869 noticed by Lord (Ordinary) Gifford at 877 and by Lord Ardmillan at 833.

52 Albeit there are other devices of achieving a similar end, the right of burial in favour of a dominant tenement has been recognised as an easement in some Common Law jurisdictions such as England: *Waring v Griffiths* (1758) 1 Burr 440; 2 Keny 183; 97 ER 392; J Gaunt and P Morgan (eds), *Gale on Easements*, 17th edn (2002), para 1-20; C Sara, *Boundaries and Easements*, 3rd edn (2002) (henceforth Sara, *Boundaries and Easements*), para 10.06. See also P W Young, "The exclusive right to burial" (1965) 39 ALJ 50.

53 See, e.g. *Serole and another v Pienaar* 2000 (1) SA 328 (LCC); *Nkosi v Bührmann* 2002 (1) SA 372 (SCA); *Nhlabathi v Fick* (LC42/02) 2003 2 ALL SA 323 (LCC); [2003] ZALCC 9 (8 April 2003).

54 Matrimonial Homes (Family Protection)(Scotland) Act 1981.

55 *MacLure v MacLure* 1911 SC 200; *Millar v Millar* 1940 SC 56; D I Nichols and M C Meston, *The Matrimonial Homes (Family Protection)(Scotland) Act 1981*, 2nd edn (1986), para 2.01.

fast advancing commercial fields such as aviation<sup>56</sup> and the transportation of oil and gas<sup>57</sup> the mechanism of statutory enactment has come into its own with its potential to create swiftly and unequivocally the specialist rights needed to enable these industries to function.

Unfortunately, one cannot celebrate statutory provision as having lived up to its full potential. Instead, one must lament the poor standard of drafting in many modern statutes. This may be exemplified by reference to the legislation relating to the transport of gas, in which there is an express right on the part of gas transporters to break open streets for the purpose of laying gas pipes<sup>58</sup> but the startling, indeed absurd, omission of the right to use the pipes after they have been laid. In Common Law jurisdictions the courts have repaired this basic flaw in similar statutes by implying a right in the form of a perpetually recurring licence to use the pipes.<sup>59</sup> Whilst the issue has never been judicially decided in Scotland, it seems likely that the Scottish courts would resort to the simpler solution of implying a real right to use the pipes which is akin to servitude. There is no shortage of other examples relative to oil and gas pipelines of legislation which appears to be based on only the loosest understanding of the underlying real rights in Scottish land.<sup>60</sup> Whatever the solution to these problems may be, it is clear that there remains a role for judicial creativity.

#### D. REAL RIGHTS: COMMON LAW DEVELOPMENT

It would be unfair to suggest that specialist industrial examples or even the introduction of statutory matrimonial occupancy rights are illustrative of the common law's general failure to develop. The common law evolved over time to fill some of the gaps left by the virtual *numerus clausus* of "classic" servitudes inherited from its Civilian base. Judicial creativity has not only recognised the servitude right of bleaching,<sup>61</sup> which may have been a pressing industrial need several centuries ago

56 E.g. the various rights in Civil Aviation Act 1982, s 43. For an example of an easement to preclude obstruction to airstrip see *City of Oakland v Nutter* (1970) 92 Cal Rptr 347 Cal App.

57 See, e.g. the rights of storage and the rights in relations to wells etc the creation of which is permitted in Gas Act 1965, ss 12 and 13.

58 Gas Act 1986, Sch 4, para 1 (as applied to Scotland by para 7).

59 For England: *Newcastle under Lyme Corporation v Wolstanton Limited* [1947] Ch D 92 at 103 per Evershed J. For Australia: *Commissioner of Main Roads v North Shore Gas Co Ltd* [1968] ALR 111 at 115 (HC) per Barwick CJ, McTiernan, Kitto and Taylor JJ; *State Planning Commission v Della Vedova*, WA(FC), unreported, no 1977/89, Brinsden and Walsh JJ.

60 E.g. Petroleum Act 1998, s 17.

61 *Town of Falkland v Carmichael* (1708) Mor 10916; *Jeffrey v Duke of Roxburghe* (1755) Mor 2340; (1757) 1 Pat 632; *Sinclair v Mags of Dysart* (1779) Mor 14519; (1780) 2 Pat 554; Cusine and Paisley, *Servitudes* para 3.12.

and is now almost wholly unknown, but has also accommodated much more modern and useful activities within the family of servitudes. In this regard one may have regard to the gradual movement towards the recognition of positive servitudes for pipelines and ventilation and extraction shafts;<sup>62</sup> septic tanks<sup>63</sup> (albeit this is perhaps a mere development of a servitude of sinks and cess pool<sup>64</sup>); and other waste disposal systems.<sup>65</sup> Albeit there may be some pressure towards recognition, there is less judicial enthusiasm for acknowledging servitudes of vehicle parking<sup>66</sup> and storage of fuel.<sup>67</sup> An even more timid judicial approach was evident in the refusal to recognise a servitude to lead cables for a private electricity supply.<sup>68</sup>

Far from seeking to restrain this judicial creativity, recent statutory provisions have gone a stage further and have reversed the effect of the overly cautious decision last mentioned. For centuries, the judicial observation: "no servitude ... has ever been introduced by statute"<sup>69</sup> was accurate as regards Scots law. Now statute has added a further type of servitude to the *numerus clausus*: it is deemed always to have been the case that positive servitudes, however created, can relate to leading a pipe, cable, wire or other such enclosed unit over or under land for any purpose.<sup>70</sup> More radically, the *numerus clausus* for positive servitudes is abolished where the right is created by express provision, albeit this is stated not to permit

- 62 *Labinski Limited v BP Oil Development Company* 2002 GWD 1-46, aff'd 2003 GWD 4-93; *Fergusson v Tennant* 1978 SC (HL) 19 at 52 per Lord Fraser; *Munro v Jervey* (1823) 1 S 172 (aperture for sweeping chimney). Cf *Anderson v Brattisani's* 1978 SLT (Notes) 42; Cusine and Paisley, *Servitudes* para 3.67; Report on Real Burdens (Scot Law Com No 181, 2000), (henceforth SLC, Real Burdens Report), para 12.26 and draft bill, cl 73. For the position in Common Law jurisdictions see *Wong v Beaumont Property Trust Ltd* [1965] 1 QB 173 followed in *Auerbach v Beck* [1985] 6 NSWLR 424 and 454; *Jones v Pritchard* [1908] 1 Ch 630; J Gaunt and P Morgan (eds), *Gale on Easements*, 17th edn (2002), para 1-65.
- 63 See, e.g. *McLellan v Hunter* 1987 GWD 21-799; *Todd v Scoular* 1988 GWD 24-1041; *Clark v Craig*, unreported, noted in Cusine and Paisley, *Servitudes* paras 1.41, 1.71, 3.50; *Buchan v Hunter*; (1993), in Paisley and Cusine, *Unreported Property Cases*, 311.
- 64 E.g. *Ewart v Cochrane* (1861) 23 D (HL) 3; 4 Macq 117; *Alexander Scott and John Scott v The Parish Council of the Parish of Cargill* (1906) 2 MLR 162; (1907) Sh Ct Rep 59.
- 65 Cusine and Paisley, *Servitudes* paras 1.06, 3.16.
- 66 See *Moncrieff v Jamieson*, note 2 above; *Nationwide Building Society v Walter D Allan Ltd*, note 2 above. The Scottish approach to some extent reflects developments already seen in Common Law jurisdictions. See P Bland, *The Law of Easements and Profits a Prendre* (1997) paras 2-20 and 2-21; J Gaunt and P Morgan (eds), *Gale on Easements*, 17th edn (2002), paras 1-60-1-61, 1-78, 9-73-9-90; Sara, *Boundaries and Easements*, paras 18.04, 18.22-18.23 and 25.06; A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia*, 2nd edn (2000), para 1.44.
- 67 *Moncrieff v Jamieson*, note 2 above, esp at para 24 per Lord Marnoch. See also *Attorney-General of Southern Nigeria v John Holt & Co Ltd* [1915] AC 599 (PC (S Nigeria)) per Lord Shaw of Dunfermline at 617; *Wright v Macadam* [1949] 2 KB 744.
- 68 *Neill v Scobie* 1993 GWD 13-887. That authority, however, may be criticised as overly conservative: see *Todd v Scoular* 1988 GWD 24-1041; Cusine and Paisley, *Servitudes* paras 1.03, 1.06, 3.44. English law has recognised an easement relative to a private electricity supply: *Frank Melvyn Harrison v Alan George Dace* [1998] EWCA 3928.
- 69 *Dyce v Hay* (1849) 11 D 1266 per Lord Cockburn at 1283.
- 70 Title Conditions (Scotland) Act 2003, s 77.

the creation of any servitude which is “repugnant with ownership”.<sup>71</sup> Although there remains considerable room for judicial intervention in relation to this limitation, the provision appears sufficiently broad to allow the creation by express grant of a range of novel servitudes, such as rights of overflight to and from particular tenements by a set route (previously not accepted at common law although it appears to be no more than a particular variant of a servitude of passage).<sup>72</sup> In relation to positive servitudes created by means other than express provision, these combined legislative provisions leave the *numerus clausus*, with one addition, intact.<sup>73</sup> The future content of this list remains to be determined by further development of the common law.

One factor has relieved some of the pressure to extend the *numerus clausus* of servitudes. For decades conveyancers had employed real burdens, a more flexible cousin of servitudes, to facilitate positive activity on the servient tenement beyond that permitted by “classic” servitudes, although there was a long wait for judicial confirmation.<sup>74</sup> Statute has constrained this judicial development for the purpose of securing clarity and consistency in that such real burdens requiring the servient proprietor to suffer the activity of a dominant proprietor on the servient tenement are now reclassified as positive servitudes proper.<sup>75</sup>

Similarly, the legally implied form of title conditions known as rights of common interest has been extended beyond regulation of the relations of neighbouring proprietors in traditional situations, such as rivers, to comprise positive rights as for instance access over private roads,<sup>76</sup> entry to neighbouring property to effect repairs<sup>77</sup> and fishing in certain rivers and lochs.<sup>78</sup> It has become clear in recent years that many of these rights are real rights in that they are enforceable not only

71 Title Conditions (Scotland) Act 2003, s 76. See also SLC, Real Burdens Report paras 12.22-12.24 and draft bill, cl 72. There is an equivalent common law rule: *Nationwide Building Society v Walter D Allan Ltd*, note 2 above, at para 23; K Swinton, “Conveyancing—the right to park?” 2004 *Scottish Law Gazette* 100-101, offers the view: “Thus the deprivation of the owners of commercial subjects of the use of their parking area throughout the working day would still be of such a nature as to prevent a servitude being set up.”

72 See Cusine and Paisley, *Servitudes* para 3.06.

73 Such as, *inter alia*, by exercise for twenty years: Prescription and Limitation (Scotland) Act 1973, s 3(2).

74 *B & C Group Management Ltd, Haren and Wood, Petitioners*, unreported, OH, 4 Dec 1992 (Lord Cullen); Reid, *Property* para 391.

75 Title Conditions (Scotland) Act 2003, s 2(1) and s 81, subject to the qualification relative to “ancillary burdens” in s 2(3)(a). See also SLC, Real Burdens Report, para 12.15 and draft bill cls 2(1) and 77.

76 *Bennett v Playfair* (1877) 4 R 321; *George Watson’s Hospital Governors v Cormack* (1883) 11 R 320; *Taylor’s Trs v McCavigan* (1896) 23 R 945; R R M Paisley, “Development sites, interdicts and the risks of adverse title conditions” (1997) 2 SLPQ 249. Cf *Stewart, Pott & Co v Brown Brothers* (1878) 6 R 35.

77 *Newton v Godfrey* (2000), in Paisley and Cusine, *Unreported Property Cases*, 86; K G C Reid and G L Gretton, *Conveyancing 2000*, (2001) 7.

78 E.g. *Fergusson v Shirreff* (1844) 6 D 1363; *Montgomery v Watson* (1861) 23 D 635; *Grant v Henry* (1894) 21 R 358.

against the owner of the servient tenement but also against members of the public.<sup>79</sup> Again, statute has limited this development to some extent. For example, the recent statutory reform of real burdens has excluded the creation of common interest, other than by implication of law, in order to stop avoidance of limitations on creation and enforcement of real burdens.<sup>80</sup> Further, in the law of the tenement, rights of common interest have been abrogated in favour of a clear statutory scheme and default rules relative to issues such as support, shelter and maintenance obligations.<sup>81</sup>

A still more dramatic example of judicial creativity is to be observed in relation to access to landlocked or enclaved land. It may be more accurate to regard the access right to landlocked land as an aspect of the right of *dominium* in both the benefited and burdened lands, which has always existed at common law, and not as an autonomous real right which has been newly discovered. However, a sceptic might argue that even the most diligent scholar could have discovered this prior existence only by extrapolation from particularly obscure sources.<sup>82</sup> This newly uncovered aspect of the right of *dominium* is imprescriptible and is not based in concepts of servitude.<sup>83</sup> The judicial policy appears to involve a wish to reduce the potential for the enclaving or land-locking of land and the creation of "ransom strips". This is a laudable aim which should preserve the marketability of land. In the writer's view this judicial approach is to be commended as both pragmatic and in accordance with principle. The development is strikingly different from the approach of Anglo-American Common-Law-based legal systems<sup>84</sup> but closely

79 Reid, *Property* para 347, note 2; Whitty, "Water law regimes", note 46 above, at 451; Cusine and Paisley, *Servitudes* para 1.09(3); Paisley, *Land Law* para 9.28.

80 Title Conditions (Scotland) Act 2003, s 118. See also SLC, Real Burdens Report para 13.31, draft bill, cl 110. For the unclear common law position see Reid, *Property*, paras 358, 362; Gordon, *Land Law* ch 15 and para 24.05; Cusine and Paisley, *Servitudes* para 1.09.

81 Tenements (Scotland) Act 2004, s 7. See Scottish Executive, *Tenements (Scotland) Bill, Consultation March 2003*; Report on the Law of the Tenement (Scot Law Com No 162, 1998) Part 7.

82 The sceptic overstates the issue, because earlier authorities, albeit inconsistent to some extent, are outlined in Cusine and Paisley, *Servitudes* paras 11.18-11.25.

83 *Bowers v Kennedy* 2000 SC 555; 2000 SLT 1006, discussed in *Inverness Seafield Development Ltd v Macintosh* 2000 SLT 118, and applied in *Marshall v Duffy and Stevenson* 2002 GWD 10-318; *Lord Advocate v Sharp* (1878) 6 R 108; *Brian Gregory Hamilton v J & J Currie Limited and Robison & Davidson Ltd*, and *Brian Gregory Hamilton v James F S Mundell*, both note 35 above; *Mackie v Donaldson*, unreported, Hamilton Sh Ct, 31 May 2000, case ref A879/97, noted in K G C Reid and G L Gretton, *Conveyancing* 2000 (2001) 9 and 52-55; R R M Paisley, "Property law update" (2000) SLPQ 432 at 435. See also D Cabrelli, "The landlocked proprietor's right of access" 2001 SLT (News) 25; R R M Paisley, "Bower of bliss" (2002) 6 EdinLR 101; Cusine and Paisley, *Servitudes* paras 11.18-11.36.

84 *North Sydney Printing Pty Ltd v Sabemo Investment Corporation Pty Ltd* [1971] 2 NSWLR 150; *Nickerson v Barraclough* [1980] Ch 325; [1981] 1 Ch 426 (CA); Sara, *Boundaries and Easements*, paras 13.32-13.35; A Bradbrook and M Neave, *Easements and Restrictive Covenants in Australia*, 2nd edn (2000), paras 4.9-4.17. Cf the earlier approach evidenced in *Packer v Welsted or Wellstead* (1657) 2 Sid 39 and 111.

resembles that of other mixed and Civilian-based legal systems.<sup>85</sup> Whilst the Scottish right has not yet been judicially declared to comprise the full measure of its South African,<sup>86</sup> Sri Lankan<sup>87</sup> or Quebequois<sup>88</sup> counterparts, it is quite possible that it may be developed along these lines. If it is not so extended by the courts a right of access to landlocked land may require to be supplemented by statute, as has already occurred in relation to the installation of some service media to benefit particular types of landlocked property.<sup>89</sup>

From all of this one may conclude that in the context of extending the boundaries of real rights, statute has often been required to restrain, supplement or redirect judicial creativity and not simply to fill a void left by a dormant common law. At the very least, it is clear that statute and judicial development have a potential to interact in a most exciting and creative way.

### E. SHORTENING THE LIST

One might initially think that merely adding to the list of real rights will create more choice and therefore greater flexibility in land transactions. This is not necessarily so. Optimum economic efficiency probably requires some limitation, because untrammelled expansion will lead to obscurity.<sup>90</sup> Periodically the list of real rights must be revised by shortening to retain flexibility and clarity in the legal system as a whole. Only where there is clarity can flexibility operate to its full potential. In Scotland, revision of the list of real rights has usually been done in a piecemeal

85 C G van der Merwe, "The Louisiana right to forced passage compared with the South African way of necessity" (1999) 73 *Tulane Law Review* 1363; A Yiannopolous, *Predial Servitudes*, 3rd edn (2004) ch 5; C G van der Merwe and M von Hinden, "Weegenot, Eigentums garantie und öffentliches Interesse - Der Notweg in Deutschland and Sudafrica", in *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht* (2001) 955-973.

86 See, e.g. *Beukes v Crous* 1975 (2) SA 215 (NC); *Van Rensburg v Coetzee* 1979 (4) SA 655; *SA Yester en Staal Industriële Korpsie Bpk v Van der Merwe* 1984 (3) SA 706 (A); *Naude v Ecoman Investments en Andere* 1994 (2) SA 95 (T); *Sanders No and Another v Edwards No and others* 2002 (5) SA 8; C G van der Merwe, *Sakereg*, 2nd edn (1989), 484-492; P J Badenhorst et al, *Silberberg and Schoeman's The Law of Property*, 4th edn (2003), 299-300.

87 E.g. *Alwis v Silwa* (1882) 8 NLR 76; G L Peiris, *The Law of Property in Sri Lanka*, vol 3 (*Servitudes and Partition*) (1977) 122-136.

88 E.g. Civil Code of Quebec, Arts 997-1001; *Charland v Lefebvre* (1930) 48 RJQ 182.

89 See, e.g. Land Drainage (Scotland) Act 1930; Land Drainage (Scotland) Act 1958; Mines (Working Facilities and Support) Act 1966 as amended; Sewerage (Scotland) Act 1968, s 3A; Civic Government (Scotland) Act 1982, s 88; Gordon, *Land Law*, paras 6-68-6-74, 7-64-7-69, 7-71, 7-76, 15-47, 24-04; Reid, *Property* para 239; Cusine and Paisley, *Servitudes* paras 11.27-11.30 and ch 26; *Montgomerie & Co Ltd v Haddington Corporation* 1908 SC 127; *Fife Regional Council v Crawley* (1977), in Paisley and Cusine, *Unreported Property Cases* 472; *Central Regional Council v Ferns* 1979 SC 136.

90 See T W Merrill and H E Smith, "Optimal standardization in the law of property: the numerus clausus principle" (2000-2001) 110 *Yale Law Journal* 1.

manner by statute<sup>91</sup> and occasionally by other means, such as non-use leading to desuetude at common law.<sup>92</sup> Recently, a more systematic reform has been envisaged in the statutory abolition of the feudal system of landholding.<sup>93</sup>

The existence of the feudal system lengthened the list of real rights, most significantly by the recognition of layers of real rights known as superiority or *dominium directum* and ownership or *dominium utile*.<sup>94</sup> In an earlier form the feudal system appeared to allow greater flexibility by permitting the creation of various types of ownership right in the form of different tenures which were assimilated by statute over a period of time.<sup>95</sup> Whilst these diverse landholdings may have reflected (or purported to reflect<sup>96</sup>) the various loyalties and relationships essential to post-mediaeval society, the feudal system created too many types of rights for a modern era when land is increasingly regarded as a tradable commodity and not the foundation of the social order. Over time, the erstwhile flexibility of the feudal system became regarded as nothing more than ensnaring complexity.<sup>97</sup> The existence of the rights of feudal superiors effectively limited the rights of others, principally the proprietors. It was this crowding or cluttering of the rights of the proprietors which was perceived to be one of the principal defects of the feudal system in modern social conditions. In short, feudal reform was regarded as desirable because it simplified and shortened the list of real rights and effectively liberated other holders of rights to enjoy their rights more fully. To avoid a massive switch to leasehold tenure and the consequent cluttering up of the land system with chains of leases a provision in the feudal reform legislation limited the

91 See, e.g. real warrandice (a type of heritable security) abolished by Conveyancing (Scotland) Act 1924, s 14(1); abolition of securities other than standard securities by Conveyancing and Feudal Reform (Scotland) Act 1970, s 9(2), amended by Abolition of Feudal Tenure etc (Scotland) Act 2000, s 76(1) and Sch 12, para 30(6)(a).

92 This may have occurred in relation to the negative servitude of privacy from overlooking windows: see Stair, *Institutions*, 2.7.9; Erskine, *Institute*, 2.9.10; Bell, *Principles*, § 1006; J Rankine, *The Law of Landownership in Scotland*, 4th edn (1909) 461; T A Ross, *Servitudes in the Law of Scotland* (1933) 65; Cusine and Paisley, *Servitudes* paras 3.34 and 12.113; Real Burdens (Scot Law Com Disc Paper No 106, 1998) para 2.42.

93 Abolition of Feudal Tenure etc (Scotland) Act 2000, ss 1-2.

94 For a brief outline see Gordon, *Land Law*, ch 2, at 24-38; Reid, *Property* paras 38 and 41 *et seq*.

95 Mortification was altered to blench after the reformation, the exact method remaining unclear: *College of Aberdeen v Menzies* (1629) Mor 7945; *Cockburn v The King* (1592) Mor 7200; *Ross v Vassals* (1700) Mor 7985; Annexation of the Temporalities Act 1587 (APS iii, 431); Erskine, *Institute*, 2.4.11; Gordon, *Land Law* para 2-15. Wardholding was converted to blench by Tenures Abolition Act 1746; burgage assimilated to feufarm by Conveyancing (Scotland) Act 1874, s 25; blench assimilated to feufarm by Land Tenure Reform (Scotland) Act 1974, s 7(3).

96 See comments in Reid, *Property* para 46, relative to the "pseudo feudalism" of landholding after the 1715 and 1745 rebellions when the military incidents of the tenures were abolished in terms of Highland Services Act 1715 and the Tenures Abolition Act 1746.

97 *Cassels v Lamb* (1885) 12 R 722 at 762 per Lord Fraser.

duration of new leases to 175 years.<sup>98</sup> Various anachronisms, such as the rights of the Kindly Tenants of Lochmaben, an anomalous form of real right with some similarities to English copyhold,<sup>99</sup> were also extinguished and converted into ownership in terms of the feudal reform legislation.<sup>100</sup>

In the post feudal world outright ownership does not mean unrestricted ownership.<sup>101</sup> Any real right is restricted not only by law and paction<sup>102</sup> but by the existence of other real rights affecting the same or adjacent subjects.<sup>103</sup> Without a legal mechanism to secure and maintain balance among the various real rights Scots property law will gradually become disconnected from societal needs and the prevailing philosophy of the day. This is an ongoing process and almost every legislative enactment relative to land law has provisions bearing on the matter. It may be that the advent of the Scottish Parliament will enable the legislature to react in a more speedy way to perceived imbalances in the list of real rights<sup>104</sup> although some constraints will be imposed because, unlike that of the UK Parliament, the competence of the Scottish Parliament is directly and expressly limited by reference to the European Convention on Human Rights.<sup>105</sup>

## F. ESSENTIAL ELEMENTS AND HYBRID RIGHTS

The existence and maintenance of a *numerus clausus* of real rights<sup>106</sup> requires that any given real right in the list must have certain characteristics, and that beyond a

98 Abolition of Feudal Tenure etc (Scotland) Act 2000, s 67. See Report on Abolition of the Feudal System, (Scot Law Com No 168, 1999) paras 9.39-9.42.

99 *Bruce v Smith* (1890) 17 R 1000 at 1008 per Lord Young. See also *Alexander Mckenzie v Cullen and others*, 4 July 1781, FC 114, case no 70 at 116.

100 Abolition of Feudal Tenure etc (Scotland) Act, 2000, s 64.

101 Report on Abolition of the Feudal System, (Scot Law Com No 168, 1999) para 2.7.

102 The statements of the Institutional writers are made in the context of the right of *dominium* but they hold good for all other real rights: Erskine, *Institute*, 2.1.1; Mackenzie, *Institutions*, 2.1; Craig, *Ius Feudale*, 1.9.9. See Reid, "Property law: sources and doctrine", note 12 above, 198-199.

103 It the nineteenth century the limits were usually found in the rights of others: *Adam and another v The Commissioners of Police of Alloa* (1874) 2 R 143 at 145-146 per Sheriff of Clackmannan (Monro). However, the vast overlay of statutory regulation and restriction, presumably in the public interest, must cause this comment to be questioned today.

104 See, to date, National Parks (Scotland) Act 2000; Sea Fisheries (Shellfish) Amendment (Scotland) Act 2000; Salmon Conservation (Scotland) Act 2001; Leasehold Casualties (Scotland) Act 2001; Housing (Scotland) Act 2001; Mortgage Rights (Scotland) Act 2001; Land Reform (Scotland) Act 2003; Title Conditions (Scotland) Act 2003; Agricultural Holdings (Scotland) Act 2003; Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003; Tenements (Scotland) Act 2004. See A J M Steven, "Scottish land law in a state of reform" 2002 *Journal of Business Law* 177.

105 Scotland Act 1988, s 29(2)(d). The term "convention rights" is defined in s 126(1). The most relevant provisions are Art 1, Protocol 1, and Art 8. See Paisley, *Land Law* paras 1.4-1.7.

106 Known as *Typenzwang* by German scholars.

certain point deviation is impossible.<sup>107</sup> Without the latter principle the former would collapse and it would become impossible to distinguish one real right from another. Scots property law, largely based on Civilian principles, matches its assertion of a *numerus clausus* of real rights in land with a requirement for the identification of essential elements for each real right,<sup>108</sup> or at least the real rights other than ownership (collectively known as the “subordinate”,<sup>109</sup> “subaltern”,<sup>110</sup> or “subsidiary”<sup>111</sup> real rights). Without a code or general statutory re-statement, the essential elements have been identified in a piecemeal way. Perhaps this is inevitable in any legal system where the law is developed by judicial decision. The result is that there has been for some time a reasonable level of clarity in relation to the more regularly encountered subordinate real rights such as lease<sup>112</sup> and praedial servitude.<sup>113</sup> As regards others, such as proper liferent, the matter remains rather obscure. It is difficult to determine a precise reason why this should be so, but a contributory factor is certainly the long fragmentation of the study of property law in Scotland into specialist disciplines such as conveyancing. This has led to a tendency to conflate the essentials of a real right with its method of creation or transmission.<sup>114</sup> Sight of the fundamental principle was lost in a maze of technicality.

The maintenance of the discrete nature of each real right does not necessarily require that two or more real rights cannot serve the same or similar functions. For centuries a number of such overlaps have been known.<sup>115</sup> The most significant has been in the functions of grants of ownership in feudal form and long leases. Such overlaps have afforded choice to those who wish to acquire rights in land and this flexibility is not in itself inimical to the *numerus clausus*. However, any overlap can give rise to a temptation to create hybrid rights. In the context of the overlap of the rights of ownership and lease, these purported hybrid rights have historically been

107 Known as *Typenfixierung* by German scholars.

108 The right of *dominium* is the most comprehensive real right and should not be classified as a mere basket of rights. Cf *Leslie v Leslie* 1987 SLT 232 at 236 per Lord McCluskey.

109 See, e.g., the use of the terminology in Abolition of Feudal Tenure etc (Scotland) Act 2000, s 2(1); Reid, *Property* paras 605, 687; Paisley, *Land Law* para 2.10; SLC, Real Burdens Report, para 4.6; *Menzies v Macdonald* (1854) 16 D 827 at 851 per Lord Deas.

110 *Thomas Wallace v Campbell of Inveresragan* (1750) Mor 2805 at 2806 (per counsel).

111 See, e.g., *Micro Leisure Limited v County Properties & Developments Limited and Keeper of the Registers of Scotland* 1999 GWD 7-320; *Sharp v Thomson* 1995 SC 455.

112 J Rankine, *The Law of Leases in Scotland*, 3rd edn (1916) 5 *et seq*; Gordon, *Land Law* para 19-06 *et seq*; *Gray v University of Edinburgh* 1962 SC 157.

113 Cusine and Paisley, *Servitudes* ch 2.

114 Reid, “Property law: sources and doctrine”, note 12 above, 208-210. See also Paisley, *Land Law* para 10.3.

115 E.g. the extraction of minerals which can be facilitated by a grant of property, a lease, or servitude.

known as “feu-tacks”.<sup>116</sup> In the course of discussions prior to the abolition of the feudal system it became apparent that this overlap should be restricted to avoid effective evasion of the provisions abolishing feudal real burdens. There was considerable lobbying on the part of interested parties in relation to a proposed maximum endurance of leases.<sup>117</sup> As has already been noticed, the Scottish Parliament eventually enacted a maximum duration of 175 years.<sup>118</sup> This is not retrospective but any remaining overlap will be further abrogated if the Scottish Parliament enacts the present proposals of the Scottish Law Commission to provide for conversion of certain long leases into ownership.<sup>119</sup> Although the primary mischief targeted was not the existence of hybrid rights, the temptation to create such rights will be substantially removed by these provisions.

Where a real right has been introduced by statute there is an opportunity to detail its essentials. Unfortunately, many statutes fall well short in this respect. To varying degrees, modern statutory provisions tend to concentrate on the powers of the party entitled to the right,<sup>120</sup> and its method of creation, rather than its essential features. Culprits in this respect are the legislation relative to floating charges<sup>121</sup> and, to a lesser extent, standard securities.<sup>122</sup> Other examples include provisions frequently encountered in practice such as the legislation relative to occupancy rights in matrimonial homes,<sup>123</sup> the laying of sewers by contractors authorised by local authorities,<sup>124</sup> and drainage rights for agricultural land.<sup>125</sup> More specialist

116 See, e.g. the various comments and documents considered in cases such as *Muir of Caldwell v Heritors of the Parish of Dunlop* (1746) Mor 10820; *Ogilvie or Simson v Duff* (1834) 12 S 857; *Buchanan's Trs v Pagan* (1868) 7 M 1; J Rankine, *The Law of Leases in Scotland*, 3rd edn (1916), 1. See also The Dwellinghouses (Scotland) Act 1855, s 13, repealed by the Housing of the Working Classes Act 1890, s 102 and Sch 7.

117 The Scottish Law Commission made no recommendation in this regard: Report on Abolition of the Feudal System, (Scot Law Com No 168, 1999) paras 9.40-9.42.

118 Abolition of Feudal Tenure etc (Scotland) Act 2003, s 67.

119 Conversion of Long Leases (Scot Law Com No 112, 2001).

120 Even in this respect they are scarcely faultless. For the failure to deal with the issue of transmissibility as regards floating charges see *Libertas-Commerz GmbH* 1978 SLT 222, OH; Reid, *Property* para 652.

121 Companies Act 1985, ss 462-466; Insolvency Act 1986, Part III, chs 2 and 3 and Sch 2, all as amended by Enterprise Act 2002, Part X; Paisley, *Land Law* para 3.23.

122 Conveyancing and Feudal Reform (Scotland) Act 1970, Part 2 as amended. See also *Spewart v Wylie* GWD 23-1257; *Albatown Ltd v Credential Group Ltd* 2001 GWD 27-1102 (OH), Lord Macfadyen; *Royal Bank of Scotland v Marshall* (1996), in Paisley and Cusine *Unreported Property Cases*, 445.

123 Matrimonial Homes (Family Protection)(Scotland) Act 1981, as amended.

124 Sewerage (Scotland) Act 1968, ss 3, 3A, 16 and 16A. The term “sewer” is defined in 1968 Act, s 59(1). See J Rowan-Robinson and N Hutchinson, “Utility wayleaves: time for reform” 2001 *Journal of Planning & Environment Laws* 1247.

125 Land Drainage (Scotland) Act 1930; Land Drainage (Scotland) Act 1958; Gordon, *Land Law* paras 7-64-7-66; Paisley, *Land Law* paras 2.8; *Mackenzie v Gillanders* (1870) 7 SLR 333; *MacGregor v Balfour* (1899) 2 F 345; *Armstrong v Sproat* (1988), in Paisley and Cusine, *Unreported Property Cases* 482. See also *Madden v Coy* [1944] VLR 88 interpreting Drainage of Land Act 1928 (Victoria).

examples include rights to use accommodation crossings on railway lines<sup>126</sup> and river banks for certain bridges,<sup>127</sup> rights of searching and boring to ascertain the nature of subsoil for a particular work of construction,<sup>128</sup> and rights to use seabed pipelines for the purpose of transportation of substances such as oil and natural gas.<sup>129</sup> In resolving disputes relating to many of these statutory creatures the courts have frequently drawn upon principles appropriate to one or more of the acknowledged real rights, particularly servitudes,<sup>130</sup> but they have stopped short of confirming that any of the statutory rights are real rights. In certain other cases the provisions relative to these rights mirror the limitations commonly found in relation to servitudes.<sup>131</sup> That, however, still falls short of any acknowledgement that the rights are real. Only in a very few cases does the relevant statute expressly declare the right to be a "real right".<sup>132</sup>

There is a parallel development in relation to the list of public rights, albeit this development is commensurately more limited given the comparative brevity of the list of such rights. Perhaps because they have received the attention of property lawyers to a lesser degree than the classic real rights, the essentials of some of the public rights, (such as public rights of navigation<sup>133</sup> and way<sup>134</sup>) have been clarified only relatively recently, whilst the essentials of others (such as public rights of highway) remain uncertain. To this list have been added statutory public rights, both general and specialist, exemplified respectively by the public right to take access over un-enclosed land,<sup>135</sup> and the public right to use uncultivated land on

126 Railway Clauses Consolidation (Scotland) Act 1845, s 60.

127 See, e.g., *Fisher v Duke of Atholl's Trs* (1836) 14 S 880; (1836) 8 Sc Jur 389 in relation to statute 1803, 43 Geo III, c 33 (local Act). See also Forth Road Bridge Order Confirmation Act 1947, Sch, para 47(b).

128 E.g. The Highland Council (Eigg) Harbour Empowerment Order 1999, SI 1999/201, s 15(1); The Highland Council (Muck) Harbour Empowerment Order 1999, SI 1999/203, s 16(1).

129 Petroleum Act 1988, s 17.

130 See, e.g. *McCulloch v Dumfries and Maxwelltown Water Commissioners* (1863) 1 M 334; *Dumfries Water Works Commissioners v McCulloch* (1874) 11 R 975; *Glasgow Corporation v McEwan* (1899) 2 F (HL) 25; *Montgomerie & Co Ltd v Haddington Corporation* 1908 SC 127; *Central Regional Council v Ferns* 1979 SC 136; *British Railways Board v Macbeath* (1990), in Paisley and Cusine, *Unreported Property Cases* 463.

131 E.g. Sewerage (Scotland) Act 1968, s 41 proviso; Water (Scotland) Act 1980, s 22 and Sch 3, para 1, proviso; The Highland Council (Eigg) Harbour Empowerment Order 1999 (SI 1999 No 201), s.15(2); The Highland Council (Muck) Harbour Empowerment Order 1999, SI 1999/203, s 16(2).

132 E.g. Stirling-Alloa-Kincardine Railway and Linked Improvements Act 2004, s 16(1) and (3), but the rights there created are declared "real" only "for the purposes of section 28 of the Land Registration (Scotland) Act 1979, (c.33), subsection (1)" (the definition of "overriding interest" and the position as regards other statutes or the common law is unstated).

133 *Will's Trs v Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30; Reid, *Property* paras 518-520, 523; Gordon, *Land Law* paras 7-05, 7-18, 7-19.

134 Paisley, *Land Law* para 10.3.

135 Land Reform (Scotland) Act 2003, Part 1.

the foreshore for the purpose of fisheries.<sup>136</sup> Again, in a mirror image of the position with statutory additions to the list of real rights, the statutes creating these public rights are not conceptually framed.

### G. OCCUPANCY RIGHTS

It is easy to assume that an occupancy right in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 1, is real, not least because at any one time in respect of a particular matrimonial home only one person may hold such an occupancy right. However, as has been pointed out elsewhere,<sup>137</sup> such occupancy rights fall short of the attributes of real rights in a number of material respects. If one accepts that a public right may benefit a section of the public—as small even as a single person in respect of one property—then one may observe a closer resemblance with public rights.

The original acquisition of a statutory occupancy right does not arise from grant. The right is imposed by law in particular circumstances, where the other party to the marriage has a right, usually a real right such as property or lease, to occupy the matrimonial home.<sup>138</sup> No issue arises as to derivative acquisition because the right cannot be transferred. However, its benefit can be communicated in a form of personal licence in that a non-entitled spouse can reside in the matrimonial home with children<sup>139</sup> and, one assumes, can invite to the home friends and visitors for brief stays and contractors for lawful business. This possibility of communication to third parties for limited purposes is a feature of some other public rights, such as rights of surviving relatives to visit graves in that such relatives commonly employ workmen to protect and adorn those graves. As regards a matrimonial homes occupancy right no derivative real rights such as leases or heritable securities may be granted over the right. The statutory occupancy right cannot be registered in the Land Register of Scotland<sup>140</sup> although it is regarded as an overriding interest.<sup>141</sup> When the party holding the statutory right becomes insolvent it forms no part of

136 White Herring Fisheries Act 1771, s 11; *Stephen v Aiton* (1875) 2 R 470, aff'd. (1876) 3 R (HL) 4; *Campbelltown Shipbuilding Co v Robertson* (1898) 25 R 922; Reid, *Property* para 527; Gordon, *Land Law* paras 8-08, 8-09.

137 Reid, *Property Law* para 10; G L Gretton and K G C Reid, *Conveyancing*, 3rd edn (2004), para 10.04; Paisley, *Land Law* para 2.9(c).

138 Matrimonial Homes (Family Protection)(Scotland) Act 1981, s 1 as amended.

139 Matrimonial Homes (Family Protection)(Scotland) Act 1981, s 1(1A). Child is defined in s 22 as including any child or grandchild of either spouse, and any person who has been brought up or accepted by either spouse as if he or she were a child of that spouse, whatever the age of such a child, grandchild or person may be.

140 Report on Family Law (Scot Law Com No 135, 1992), paras 11.3-11.4.

141 Land Registration (Scotland) Act 1979, s 28(1)(gg).

his or her estate passing to the trustee in bankruptcy, and when he or she dies the right terminates and does not transfer to the executor or beneficiaries. As with the known public rights there are special statutory provisions for discharge or termination of the occupancy right, which are inapplicable to real rights generally.<sup>142</sup> The exercise of the occupancy right can be protected and restrained by the general law of nuisance but an occupancy right, by itself, cannot be the benefited or burdened property in a real burden.<sup>143</sup>

The above leads at least to the suggestion that a reclassification of matrimonial homes occupancy rights as public rights may avoid some of the tensions attendant upon forcing such rights into the list of real rights. It is possible that the same reclassification could be applied to other statutory rights. However, one should not race to reclassify all statutory rights in an unthinking way. Many are enacted to serve a commercial purpose and in this regard it is important to find a closer analogy with real rights because of their potential for transfer and being burdened by derivative real rights. Prime examples in this regard are the rights in relation to the transportation or storage of gas<sup>144</sup> and the rights of contractors to install drains into development sites.<sup>145</sup> The former may require to be transferable between those holding gas transportation licences or secured to heritable creditors. In respect of the latter, the developer may require not only to grant securities over the drain in question but also to grant derivative servitude rights to use the drain to those parties who purchase part of the site served by it.

## H. SOME TENSIONS ARISING FROM THE REFUSAL TO RECOGNISE HYBRIDS

Because of the need to defend the discrete nature of the various real rights, attempts to create hybrid rights have in numerous instances been frustrated by courts<sup>146</sup> and

142 Matrimonial Homes (Family Protection)(Scotland) Act 1981, s 6(3)(e)(i) and (ii), s 6(3)(f) and s 12; Bankruptcy (Scotland) Act 1985, s 41. See *Stevenson v Roy* 2002 SLT 445.

143 The holder of the occupancy right does have a right to enforce real burdens, whether affirmative or negative (Title Conditions (Scotland) Act 2003, s 8(2)(b)), and may have a negative real burden enforced against him or her (s 9(2)(b)).

144 There is no requirement for transfer of the express statutory right to break open streets in terms of Gas Act 1986, Sch 4, para 1 (as applied to Scotland by para 7) as it belongs individually and automatically to all who hold a gas transportation licence in terms of Gas Act 1986, s 7 (as amended by Utilities Act 2000, s 76). However, the implied right to use the pipes so laid appears to belong only to the gas transporter that has carried out the work to break open the streets and has laid the relevant pipes, and therefore it may require to be transferred.

145 Sewerage (Scotland) Act 1968, s 3A.

146 See e.g. the refusal to recognise an intermediate right between liferent and fee in *Cochrane's Exrx v Cochrane* 1947 SC 134; Gordon, *Land Law* paras 17-08 and 17-12; T B Smith, *Short Commentary* (1962) 487. See also the refusal to countenance a hybrid of burgage and feu farm tenure despite a

by administrative means.<sup>147</sup> A significant recent example has been the refusal by the Keeper of the Registers of Scotland to register timeshare salmon fishing rights.<sup>148</sup> Despite a long history of the purported use of such devices without challenge,<sup>149</sup> the Keeper's policy has been extended from the Land Register to the older Sasine Register. The same treatment may be extended to frustrate attempts to create other time share arrangements relative to car parking,<sup>150</sup> garaging of vehicles, holiday accommodation, storage of material or shared use of facilities such as pipelines.

A similar fate has been befallen some attempts to create so called "leasehold servitudes", a term which is taken to denote rights permitting access or drainage, which are similar to servitudes but which benefit only leasehold tenements. Except in those very limited cases where the rule has been relaxed by statute,<sup>151</sup> Scots law requires the dominant tenement in a servitude to be a property right.<sup>152</sup> It does not as yet recognise servitudes benefiting only a lease over the dominant tenement, although the enjoyment of a servitude benefiting a property right in a dominant tenement may be communicated to a tenant of the dominant tenement.<sup>153</sup> Consequently the nature of access rights benefiting leasehold subjects remains obscure particularly where the purported dominant and servient tenements are held in lease from the same landlord.<sup>154</sup> Although a native model for a real right of access in leasehold form has been available for over a century in the context of

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widespread practice purporting to create such a tenure: Crown Charter relative to Dumbarton, R M S (1609/20), 190, 69-72, quoted in Hume, *Lectures*, vol 4, 199; Bell, *Principles*, § 847, note (c); *Edgar v Maxwell* (1743) 5 BS 730; *Little v Dickson* (1749) Mor 14177; *Mags of Aberdeen v Burnett*, 17 June 1808, FC; *Lang v Dixon*, 29 June 1813, FC; *Davie v Dennie*, 2 June 1814, FC; *Dixon v Lawther* (1823) 2 S 176; *Dawson and Mitchell v Mags of Glasgow* (1824) 3 S 136, (1827) 6 S 19; *Johnstone v Mags of Kilrenny* (1828) 6 S 620; *Mags of Perth v Stewart* (1830) 8 S 819, (1830) 9 S 225, (1835) 13 S 1100; *Mags of Perth v Pentland and Paton* (1837) 9 Sc Jur 484; *Earl of Fife's Trs v Mags of Aberdeen* (1842) 4 D 1245; *King's College v Lady Hay and Husband* (1852) 14 D 675; *Mags of Arbroath v Dickson* (1872) 10 R 630; *Alpine (Minister for Dumbarton) v The Heritors of Dumbarton* (1907) 45 SLR 63.

147 Such as the exercise of the Keeper's statutory discretion in terms of Land Registration (Scotland) Act 1979, s 4(2)(b).

148 *Registration of Title Practice Book*, 2nd edn (2000), para 6.106; A G Rennie, "Timeshare interests in salmon fishing" (2000) 45 JLS 38; Paisley, *Land Law* paras 1.28 (c), 2.6.

149 See, e.g., *Middleweed Ltd v Murray* 1989 SLT 11. The custom of fishing on alternate days observed on some Scottish rivers is a personal arrangement and not a real right: *Fotheringham v Passmore* 1984 SC (HL) 96; *Robertson v Foote & Co* (1879) 6 R 1290; *Gray v Malloch* 1959 SLT 132.

150 For an example of a car parking leasehold arrangement accepted for registration see the subjects registered in the Land Register of Scotland under Title Number ABN61140 (updated to 11 Feb 2003) relating to ten separate leases all previously recorded in the General Register of Sasines.

151 E.g. Ancient Monuments and Archaeological Areas Act 1979, s 16(4),(5),(7) and (8).

152 *Metcalfe v Purdon* (1902) 4 F 507; Paisley and Cusine, *Servitudes* para 2.12.

153 Paisley and Cusine, *Servitudes* paras 1.51-1.61.

154 J Rankine, *The Law of Landownership in Scotland*, 4th edn (1909), 414; Gordon, *Land Law* para 24-09; Paisley and Cusine, *Servitudes* paras 2.12. See also *TCS Holdings Limited v Ashted Plant Hire Company Limited and Others* 2003 SLT 177.

the crofting system,<sup>155</sup> there has been no clear extension of the concept into the general law of leasing. Existing legislative provision has proved inadequate to deal with the matter<sup>156</sup> and, subject to the possibility of some bold judicial creativity, it may be that new legislative provision will be required to fill a significant gap in the real rights recognised by Scots law.

Other attempts to create hybrid rights may be explained on the basis that they were unintentional and the relevant deeds simply badly expressed.<sup>157</sup> Nevertheless, some at least of these efforts suggest that potential users are dissatisfied with the real rights presently on offer. A legal system should never take for granted that it satisfies all the wishes of actual and potential owners and users of land. Even a perception of inflexibility may have detrimental effect on the use of certain products offered by Scots law and render Scottish property less marketable. It is important therefore that investors and other users are aware that the real rights offered are not wholly rigid but are able to respond to their needs.

A failure to convey this message effectively may be exemplified in relation to proper liferents. Where documents are professionally drafted, proper liferents are now virtually unknown<sup>158</sup> having been eclipsed by their rival, the "trust" or "improper" liferent.<sup>159</sup> It would seem that part of the reason for the demise of proper liferents is that they are perceived as being inflexible: trusts, by contrast, are regarded as malleable almost without limit. Certainly trust liferents may have a great potential for flexibility because the two classes of trust beneficiary, liferenter and fiar, have mere personal rights<sup>160</sup> which may be freely shaped and restricted by the creator.<sup>161</sup> It is perhaps ironic that much of the basic nature of a trust itself

155 E.g. *Kennedy v Kershaw and others* 2000 SCLR 1; *Adamson v Sharpe's Trs* 1917 SCLR 76.

156 Registration of Leases (Scotland) Act 1857 s 3(2) as inserted by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 3, discussed in *Griffiths v The Keeper of the Registers of Scotland*, unreported, Lands Tribunal, 20 Dec 2002, commented upon in K G C Reid and G L Gretton, *Conveyancing* 2003 (2004) 62-63.

157 See, e.g., Gordon, *Land Law* para 15-04 (co-ownership and common interest); para 17-09 (liferent); paras 24-05-24-06 (servitudes).

158 *Robertson or Stronach's Exrs v Robertson* 2002 SLT 1044 (proper liferent in Orkney), discussed in K G C Reid and G L Gretton, *Conveyancing* 2002 (2003) 19 and 79. For an earlier example of an Orkney proper liferent see *Warren v Marwick* (1835) 14 S 944. For a recent example elsewhere see *Newton v Godfrey* (2000), in Paisley and Cusine, *Unreported Property Cases* 86 (Stranraer Sheriff Court). A proper liferent used in Lanarkshire was encountered in *Yule v South Lanarkshire Council* 1999 SCLR 985, 2001 SCLR 26.

159 SME, vol 13 (1992), para 1609; Gordon, *Land Law* para 16-01; Paisley, *Land Law* paras 6.1-6.2; G Gretton, "Trusts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland* (2000), vol 1, 480 at 498.

160 Reid, *Property* para 74.

161 A number of statutory restrictions apply in particular situations: Law Reform (Miscellaneous Provisions)(Scotland) Act 1968, s 18(1) and (2); Land Tenure Reform (Scotland) Act 1974, s 8(4)(b).

remains a mystery<sup>162</sup> but it is clear that the trust liferent works only because of the existence of a fundamental anchor, the real right of ownership held by the trustee.<sup>163</sup>

### I. TRUSTS: TIMESHARES

There is no closed list for the functions of trusts. Trusts are protean in nature and it comes as no surprise that an improper liferent is not the only example of their use to emulate a recognised real right.<sup>164</sup> Trusts, however, become particularly significant where they are used to achieve an end which cannot be accomplished by the use of the recognised real rights. This may be illustrated by the example of the timeshare, which does not constitute a recognised real right in Scotland.

To circumvent the limitations of the *numerus clausus* of real rights some timeshares exploit personal rights in the context of the law of trusts or, alternatively, the law of persons.<sup>165</sup> The basic structure is usually as follows. The operator enters into a contract with the potential timeshare purchaser and, in exchange for payment, the operator issues a certificate entitling the purchaser to become a "club" member and, as such, a beneficiary in a trust or a member of a corporate body such as a company incorporated under the Companies Acts. For simplicity the following sketch will refer only to the former. The trust property comprises the accommodation. The trustee is usually a party independent from the operator and is frequently a corporate body which has a reputation for probity and a reasonable covenant. The beneficiary's right in the trust comprises a personal right of exclusive occupation for a limited period of time as set out in his certificate of membership. The terms of the trust may exclude corporate bodies as beneficiaries. The trust deed may state that the entitlement of the beneficiaries is perpetual or will terminate after the expiry of a number of years. In any event there is generally a provision that the operator (or the trustee at the instigation of the operator) is entitled to withdraw the entitlement if the beneficiary fails to pay ongoing costs such as maintenance charges. There is a finite limit to the number of potential beneficiaries and this is directly proportional to the total time available to be sold.

162 G Gretton, "Trusts", note 159 above; G Gretton, "Trusts without equity" (2000) 49 ICLQ 599; M J De Waal, "The core elements of the trust: aspects of the English, Scottish and South African trust compared" (2000) 117 SALJ 548.

163 Reid, *Property Law*, para 40.

164 A trust may even be used to emulate a property right pending registration of a purchaser's title. The practice is noted in *Burnett's Trustee v Grainger* 2004 SC (HL) 19, discussed in A J M Steven and S Wortley, "The perils of a trusting disposition" 1996 SLT (News) 365; G L Gretton and K G C Reid, *Conveyancing*, 3rd edn (2004), para 11.27; J Chalmers, "In defence of the trusting conveyancer" 2002 SLT (News) 231.

165 Reid, *Property* para 39; Paisley, *Land Law* 5.13. For overseas timeshares see J Edmonds, *International Timesharing*, 3rd edn (1991), 16-17, 20-21, 45-49, 89-93.

When the whole time has been sold the role of the operator will usually come to an end, leaving the beneficiaries to organise themselves as a club and deal with management by means of a committee,<sup>166</sup> unless the operator has retained a role as factor. The terms of the relevant trust may dictate whether the beneficiaries can sell their timeshare entitlements on the open market or whether they must surrender it back to the operator in exchange for a price calculated according to a set formula. The operator frequently retains a contractual right to be factor to the timeshare and to recover maintenance costs from the various beneficiaries under that contract. The trustee usually has no concern with the day-to-day running of the timeshares but may, depending on the drafting employed, retain a right to terminate the contract of the operator as factor in cases of material breach. Certain “cooling off” periods are imposed by statute in relation to timeshare agreements but this has only a limited application to offshore timeshares.<sup>167</sup>

The above is only one instance of the application of trusts to rights in land. Only in very limited respects, such as the general exclusion of trusts to effect securities over land,<sup>168</sup> has this flexibility been curtailed by statute. It is clear that the flexibility afforded by the law of trusts serves to reduce some of the pressure to extend the closed list of real rights.

## J. PUBLIC RIGHTS: LIMITATIONS ON REAL RIGHTS

It is arguable that some flexibility has been introduced into the closed list of public rights by the extension of the list almost incidentally. The manner of achieving this is to place a limitation on the enforceability of certain of the existing real rights thereby achieving a total or partial abrogation of the power to prevent particular conduct. The effect is to create a sort of legal vacuum in which all members of the public are free to carry out activity subject only to restraints arising from public law.

The most extreme application would be an extension of the list of things regarded as *res communes* or *res publicae* and thus *extra commercium*, so excluding real rights in relation to these things.<sup>169</sup> The modern trend in Scotland, however, has been less

166 See, e.g. *Forest Hills Trossachs Club v Assessor for Central Region* 1991 SLT (Lands Tr) 42, 1992 SLT 295; *Barratt International Resorts Limited v Barratt Owners' Group and Others* 2003 GWD 1-19; *Abbot v Forest Hills Trossachs Club*, unreported, Stirling Sheriff Court, 29 Nov 2000, noted in K G C Reid and G L Gretton, *Conveyancing 2000* (2001) at 9.

167 Timeshare Act 1992, ss 2 and 3; Timeshare (Cancellation Notices) Order 1992, SI 1992/1942; Timeshare Act 1992 (Amendment) Regulations 2003, SI 2003/1922.

168 Conveyancing and Feudal Reform (Scotland) Act 1970, s 9(3).

169 This presently extends to items such as sunlight, running water in the sea, the atmosphere and clouds. See *Morris v Bicket* (1864) 2 M 1082 at 1092 per Lord Neaves; Craig, *Ius Feudale*, 1.5.13; Stair, *Institutions*, 2.1.5; Erskine, *Institute*, 2.1.5; Bankton, *Institute*, 1.3.2; Whitty, “Water law regimes”, note 46 above, at 454; Reid, *Property* paras 252 and 605; Gordon, *Land Law* paras 7-02, 7-03, 8-04;

dramatic. Certain statutory provisions limit the remedies of the holders of the various existing real rights. This device has been utilised in statutes relating to matters as diverse as the ownership of certain gas pipes<sup>170</sup> and the overflight of land.<sup>171</sup>

As regards overflight, the relevant statute does not declare that the parties wishing to carry out the activity of flying have a right to do so. It merely precludes the enforcement of other rights, whether real or public, to frustrate such flight; it declares that no action is to lie in respect of trespass or nuisance by reason only of flight at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable.<sup>172</sup> On one view this may be regarded as a public right to fly in all but name, but in truth the issue of recognition of a new public right has simply been avoided. This may be contrasted with the approach used in relation to the new public access right to un-enclosed land. The relevant statutory provision declares that “the exercise of access rights does not of itself constitute trespass”.<sup>173</sup> However, the statute does not leave the matter there and, in addition, it expressly creates access rights on the part of the public, albeit in a highly qualified form.<sup>174</sup>

## K. PERSONAL REAL BURDENS

A variant of the above was seen in relation to legislation relative to public open air recreation, which has only recently been repealed and superseded by the creation of a much wider statutory right of public access to land.<sup>175</sup> The peculiar and

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Paisley, *Land Law* para 1.25; M A Rabie and M M Loubster, “Legal aspects of weather modification” (1990) 23 CILSA 177-218. For the position in Common Law jurisdictions such as England see *Embrey v Owen* (1851) 6 Ex 353 at 372 per Parke B. English law appears to have been influenced by Scots law to some extent: *White (John) & Sons v J & M White* (1906) 8 F (HL) 41, also reported at [1906] AC 72 and noted in Sara, *Easements and Boundaries* paras 8.02, 21.03, 21.18; J Gaunt and P Morgan (eds), *Gale on Easements*, 17th edn (2002), para 6-37.

170 Gas Act 1986, s 10(6) as substituted by Gas Act 1995, Sch 3, para 4. This relates to the ownership of a pipe supplied and laid by the owner or occupier from his or her premises to the transporter’s main. The provision does not deal with the converse situation of a pipe laid by the public gas transporter from the main to the premises of the owner or occupier. The provision probably does not entail annexation, leaving ownership with whoever laid the pipe.

171 Civil Aviation Act 1982, ss 76 and 77, replacing Civil Aviation Act 1949, s 40(1), in turn derived from Air Navigation Act 1920, s 9(1); *Steel-Maitland v British Airways Board* 1981 SLT 110; SME, vol 2 (1988), paras 1020 and 1021; “Nuisance” in SME, Reissue (2001), paras 86 and 116. Common Law jurisdictions take a different approach: see *Baron Bernstein of Leigh v Skyviews and General Limited* [1978] QB 479.

172 Civil Aviation Act 1982, s 76; Reid, *Property* para 198; *Scott’s Trs v Moss* (1889) 17 R 34.

173 Land Reform (Scotland) Act, 2003, s 5(1).

174 Land Reform (Scotland) Act, 2003, s 1.

175 Countryside (Scotland) Act 1967, ss 11, 13, 16 and 30 have been repealed by Land Reform (Scotland) Act, 2003, Sch. 2, para 4(a), with savings in paras 6 and 7.

indirect nature of the rights conferred on the public in this repealed legislation indicates the limitations of that legislation and demonstrates one of the reasons why it was necessary to expand the public rights of access by new legislation. In terms of an access agreement or order made under the repealed legislation the landowner could enter into an agreement with the relevant local authority, binding him or her and successors to allow members of the public to enjoy such recreation on the land.<sup>176</sup> It was provided that a person who entered on the land for the purpose of open air recreation without causing damage should “not be treated as a trespasser on that land or incur any other liability by reason only of so entering or being on the land”.<sup>177</sup> Unlike the provisions of the statutory provisions now in force,<sup>178</sup> no separate public right of access was created which could have been directly enforced by members of the public against the landowner but it was clearly not intended that only the local authority should take access. Instead, the agreement or order could have been enforced against the landowner and his or her successors by the relevant authority, and members of the public took access as invitees of that authority.

The foregoing is but one example of what has recently become known as a personal real burden. This confusing term indicates that the right is personal to the entitled authority but real insofar as it burdens the landowner and his or her successors.<sup>179</sup> However, as regards open-air access the very purpose of the authority's right indicates that its enjoyment is intended to be communicated to members of the public. Odd though this arrangement may at first appear it is not unique. Although personal real burdens are unknown to common law, where the rule remains as *praedium non servit personam*,<sup>180</sup> other examples of such statutory creations in favour of local authorities or other public bodies abound. Nevertheless, they form a closed list. In relation to some of these statutory rights the original intent of enabling use of the provision to secure public access or other public activity is manifest from the terms or purpose of the legislation.<sup>181</sup> As regards others

176 Countryside (Scotland) Act 1967, s 11 (repealed); J Rowan-Robinson and D McKenzie Skene, “Area access”, in J Rowan-Robinson and D McKenzie Skene (eds), *Countryside Law in Scotland* (2000), (ch 14) 261 at 266, note 39.

177 Countryside (Scotland) Act 1967, s 11(1) as restricted by s 11(3) and (4) and Sch 2 (all now repealed).

178 Land Reform (Scotland) Act 2003, Part 1.

179 Title Conditions (Scotland) Act 2003, s 1(3); K Reid, *The Abolition of Feudal Tenure in Scotland* (2003) para 2.9.

180 See the opinion of Lord Meadowbank in the *Burntisland* case quoted in *Home v Young or Gray* (1846) 9 D 286 per Lord Cunninghame at 294.

181 E.g. obligations in agreements relative to ancient monuments: Ancient Monuments and Archaeological Areas Act 1979, s 17 considered in *Duffield Morgan Limited v Lord Advocate* 2004 SLT 413; obligations in access agreements with Scottish Natural Heritage and planning authorities: Countryside (Scotland) Act 1967, ss 13, 16 and 30 as amended (now repealed).

one may legitimately query whether that was the central intent, because the provisions are usually aimed at imposing positive obligations to do something or securing negative restraints on the servient landowner, and not at requiring him or her to suffer the exercise of positive rights on the part of others to use the servient land.<sup>182</sup> Indeed this is expressly confirmed as regards the most recent group of personal real burdens, introduced as part of the statutory abolition of the feudal system and the reform of real burdens.<sup>183</sup> However, the statutory wording employed is frequently so general as not to exclude altogether an obligation to suffer activity by someone, perhaps a member of the public, at least where this is ancillary to an affirmative obligation or a negative restriction on the use of the servient land.<sup>184</sup> Even if an obligation to suffer such public access or other use may be permitted there remains a potential weakness in the right of the general public. The entitled authority can require the landowner to give access to the public or permit the relevant use by the public but, subject to one exception, the public cannot require the entitled authority to force the landowner to give them access or permit the relevant use.<sup>185</sup> The exceptional case, which appears to be relatively rare in practice, occurs where the entitled authority declares that it holds the right of enforcement in trust for the general public (or a section thereof), thus conferring personal rights on the trust beneficiaries to require such enforcement.<sup>186</sup>

182 E.g. obligations in agreements with planning authorities: Town and Country Planning (Scotland) Act 1997, s 75; Gordon, *Land Law* paras 21-25 and 28-39; A J McDonald et al, *Professor McDonald's Conveyancing Manual*, 7th edn (2004), paras 18.71 and 20.14; J Rowan-Robinson and E Young, *Planning by Agreement in Scotland* (1989), esp at 88. Management agreements with Scottish Natural Heritage and planning authorities: Countryside (Scotland) Act 1967, s 49A. In forestry dedication agreements: Forestry Act 1967, s 5; Gordon, *Land Law* para 27-23. Agreements with the roads authority restricting the use of land near a road: Roads (Scotland) Act 1984, s 53; SME, vol 20, (1992) para 674. Conservation burdens: Abolition of Feudal Tenure etc (Scotland) Act 2000, ss 26-32 as supplemented and amended by Title Conditions (Scotland) Act 2003, ss 38-42, 114(6) and 128 and Sch 13, paras 5 and 6 and Sch 15; Abolition of Feudal Tenure etc (Scotland) Act 2000, ss 27A and 28A as inserted by Title Conditions (Scotland) Act 2003, s 114. Maritime burdens: Abolition of Feudal Tenure etc (Scotland) Act 2000, s 60 as amended and supplemented by Title Conditions (Scotland) Act 2003, ss 44 and 128 and Sch 15. Agreements with the National Trust for Scotland: National Trust for Scotland Order Confirmation Act 1938, Sch 4, para 7. Economic development burdens: Abolition of Feudal Tenure etc (Scotland) Act 2000, s 18B as inserted by Title Conditions (Scotland) Act 2003, s 114, and Title Conditions (Scotland) Act 2003, s 45. Health care burdens: Abolition of Feudal Tenure etc (Scotland) Act 2000, s 18C as inserted by Title Conditions (Scotland) Act 2003, s 114, and Title Conditions (Scotland) Act 2003, s 46. Agreements with Scottish Enterprise or Highlands and Islands Enterprise: The Enterprise and New Towns (Scotland) Act 1990, s 32 as substituted by Title Conditions (Scotland) Act 2003, s 113.

183 Title Conditions (Scotland) Act 2003, s 2(2).

184 Title Conditions (Scotland) Act 2003, s 2(3).

185 See, e.g. the failure for fifty years to give public access in terms of Ancient Monuments and Archaeological Areas Act 1979, s 17, noted in *Duffield Morgan Limited v Lord Advocate* 2004 SLT 413.

186 Provision for trusts holding conservation burdens is made in Title Conditions (Scotland) Act 2003, s 38(6). Several trusts are listed as conservation bodies in Title Conditions (Scotland) Act 2003

In consequence of the above, it is clear that the device of personal real burden is an ingenious addition in the catalogue of rights affecting land in Scotland. In some cases the positive activity carried out by the public in exercise of the personal licence granted by the entitled authority is one, such as parking, which is not otherwise readily available as a public or real right. In other cases the arrangement may even emulate a real right unknown to Scots law, such as a personal servitude.<sup>187</sup> This could be the case where the entitled authority itself is permitted to carry out activity on the servient tenement.<sup>188</sup> Alternatively the person permitted to take access over or carry out activity on the servient tenement could be a section of the public authorised by the entitled authority, whether such a section is limited to a single individual<sup>189</sup> or a small group of individuals such as the owner of an adjacent site.<sup>190</sup> A limitation on the usefulness of such a device for an adjacent landowner is that the right is not a real right. Consequently he or she cannot create derivative real rights in the form of servitudes or heritable securities over the personal licence to take access or carry out an activity. Clearly an access right obtained by such means has limitations if the adjacent landowner wishes to sub-divide the site or grant securities to a lender. However, the right may be regarded by some local authorities as conferring sufficient control over the servient subjects to carry out an activity such as maintaining a visibility splay where that visibility splay is required to comply with a condition of a planning permission relative to a development on the landowner's site. Within these limitations the device of personal real burden enables a degree of flexibility in certain cases where other real or public rights are difficult to use or are insufficiently adaptable. Nevertheless, it appears likely to have only a marginal effect in the development of the *numerus clausus* of real or public rights and is likely to continue to be regarded as an anomaly.

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(Conservation Bodies) Order 2003, SSI 2003/453, and Title Conditions (Scotland) Act 2003 (Conservation Bodies) Amendment Order 2004, SSI 2004/400. *Quaere* whether such a declaration of trust in particular cases might contravene the terms or purpose of the statute under which the personal real burden was created.

- 187 This appears to be a direct counterpart of the device known in some Common Law jurisdictions as an easement "in gross".
- 188 E.g. Gas Act 1965, ss 12 and 13 which relate respectively to (a) the right to store gas underground and related rights; and (b) compulsory purchase of rights as respects wells, boreholes and shafts in storage areas and protective areas.
- 189 In such a case it may be practical for the individual to secure his or her position *quoad* the entitled authority by a contract rather than a trust.
- 190 E.g. the obligation to provide a road to service an adjacent development, considered in connection with agreements in terms of Town and Country Planning Act 1971, s 52, in the English case of *R v Gillingham Borough Council, ex p F Parham Ltd* [1988] 58 P&CR 73; [1988] JPL 336; *R v Wealden District Council & Federated Homes Limited, ex P Charles Church South East Limited* [1989] 59 P&CR 150; [1989] JPL 837. See J Rowan-Robinson and E Young, *Planning by Agreement in Scotland* (1989) 25.

## L. CONCLUSION

The Scottish system of property law is not inflexible, despite its reliance on more than one *numerus clausus* of rights. The contents of the fixed list of real and public rights are revised from time to time by various means to keep them in touch with current needs. The statutory reform of real burdens and conditions and the legislation relative to feudal reform has provided a welcome opportunity for a general updating. Quite apart from this, within each *numerus clausus* there is a sufficient degree of flexibility to enable Scots law to react and respond to modern societal and commercial requirements. Minor overlaps in the content of certain real rights provide, without creating obscurity and confusion, a degree of choice for those wishing to use land. The dismal fate of the proper liferent is an exception to the otherwise vibrant state of Scottish property law but, on one view, that merely evidences the success of trusts. Scottish property lawyers may therefore be optimistic in their outlook. Traditional Scottish property law doctrines are not fossilised by dogmatic rigidity but provide sufficient strength and flexibility to cope with even the most extreme needs of modern commercial requirements.