Real burdens and implied enforcement rights: the Scottish Law Commission's recommendations.

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Introduction

In August 2013, the Scottish Law Commission received a reference from the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP:

> "To review section 53 of the Title Conditions (Scotland) Act 2003 in the context of part 4 of that Act and make any appropriate recommendations for reform."[2]

In 2018, the Commission released a Discussion Paper containing its initial proposals.[3] Following the normal process of consultation, we now have the Commission's final recommendations which, if implemented, will have a major impact on the law of implied rights to enforce real burdens. The purpose of this article is to review the SLC's recommendations and make some observations on them. For the sake of brevity, the Title Conditions (Scotland) Act 2003 will be referred to from here on as the "2003 Act".

Enforcement of real burdens

[1] An earlier version of this paper was presented at the *SULI Showcase Conference: Reflections on Scots Law* held in Dundee on 30 August 2019. Acknowledgements are due to participants for a very stimulating discussion. I am also very grateful for comments on a draft of this article by Professor Andrew Steven of the University of Edinburgh and formerly of the Scottish Law Commission. None of these people, of course, bears any responsibility for the contents of this article.
[2] Scottish Law Commission, *Report on Section 53 of the Title Conditions (Scotland) Act 2003* (Scot Law Com No 254, 2019) (hereafter, "2019 Report"), para 1.1. For a brief overview of the proposals contained in the 2019 Report, written by the Lead Commissioner responsible for it, see A Steven, "Burdens and who can enforce them" (2019) 64 JLSS May 35. An overview can also be found in S King, "Implied enforcement of real burdens under a common scheme" (2019) 193 SPEL 54.
[3] Scottish Law Commission, *Discussion Paper on Section 53 of the Title Conditions (Scotland) Act 2003* (SLC DP No 164, 2018).

Section 53 of the 2003 Act is concerned with determining who can enforce a real burden.[4] In principle at least, it is and always has been fairly straightforward to identify the real burdens affecting a particular property, as the common law required the real burden had to be contained in a conveyance of the burdened property or, later, in a deed of conditions which was then incorporated by a conveyance of the burdened property.[5] Where the property is registered in the Land Register, the title sheet for the property will include any burdens potentially affecting the property.[6]

With burdens created since the 2003 Act came into force, it should also be straightforward to identify which properties carry with them title to enforce ("benefited properties"). It was, however, more difficult to determine who had title to enforce the burdens. One of the problems with the common law of real burdens was that it did not require the deed imposing the burden to identify the benefited property or properties. In response to this, the courts developed various rules implied identification of benefited properties. The most important case on this for present purposes was *Hislop v MacRitchie's Trs*.[7] This case was concerned with the case of similar burdens being imposed on co-feuars or co-disponees.[8] This involved (following numbering used by Lord Watson in *Hislop*)[9] either (1) individual plots being disposed of, with each conveyance imposing real burdens reflecting a common scheme of burdens affecting a wider area; or (2) the burdens being imposed in a single deed on a larger area of land, which is then subdivided. Following this numbering, these two situations are often referred to respectively as *Hislop* type-1 and *Hislop* type-2 burdens.[10]

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[4] Or, more precisely, who has title to enforce. A potential enforcer also has to show interest to enforce: 2003 Act, s. 8(1).

[5] Conveyancing (Scotland) Act 1874, s. 32 (now repealed). Since the coming into force of the Land Registration (Scotland) Act 1979, s. 17 (now repealed), it has been competent for a deed of conditions to be directly effective without having to be incorporated by a conveyance.

[6] Land Registration etc (Scotland) Act 2012, s. 9(1)(a).

[7] (1881) 18 R (HL) 95.

[8] *Hislop* itself was concerned with co-feuars. It is accepted, though, that co-disponees were subject to the same rules, albeit complicated by the interaction with the rule laid down in *Mactaggart*. See *Stair Memorial Encyclopaedia*, vol. 18 para. 404.

[9] (1881) 18 R (HL) 95, 103.

[10] The account in this paragraph has elided a difficulty with Lord Watson's account, which is that Lord Watson does not take account of the possibility of burdens being imposed in a deed of conditions. His type 2 refers specifically to burdens imposed in a feu disposition over land that is then subdivided. For this reason, Professor Reid proposes alternative terminology, whereby enforcement is either "internal" (*i.e.* where both benefited and burdened properties are subject to the common scheme by virtue of the same deed) or "external" (*i.e.* where the burdens are imposed in different deeds). See K G C Reid, "New Enforcers for Old Burdens: Sections 52 and 53 Revisited" in R Rennie ed, *The Promised Land: Property Law Reform* (Edinburgh: W Green 2008) paras 3-37 - 3-40. For the purposes of this article, *Hislop* type-2 can be taken to include cases where the burdens are contained in a deed of conditions.

For burdens that existed before the 2003 Act came into force, and which do not identify benefited properties, the approach taken by the Act was to abolish all implied enforcement rights,[11] albeit with provision for registration of preservation notices,[12] and replace them with a new statutory regime, found in sections 52 and 53 of the 2003 Act.[13]

Of these, section 52 essentially reproduces the rules derived from *Hislop v MacRitchie's Trs*.[14] Where a person claims to be a benefited proprietor in relation to burdens imposed on another property before 28 November 2004, which is the "appointed day" on which the 2003 Act came fully into force,[15] it is necessary under section 52 for that person to show the following:

- the real burdens were imposed as part of a "common scheme" of burdens affecting both properties;
- the deed imposing the burdens makes express or implied reference to that common scheme; and
- no provision to the contrary is made, whether expressly or by implication.

These requirements need some explanation. First, what is a "common scheme"? It is normally said that a common scheme requires similar or identical burdens. Another definition is "some sort of planned or systematic regulation over a certain area."[16] The Scottish Law Commission has proposed a statutory definition. This requires there to be

[11] 2003 Act, s. 49.
[12] 2003 Act, s. 50. Provision was also made in part 4 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 whereby, in certain circumstances, a feudal superior could preserve title to enforce burdens that the superior had in that capacity.
[13] There is also relevant provision in sections 54 and 56. Section 54, though, is concerned with the more specific situation of sheltered housing developments, and is not considered further in this paper. Section 56 is concerned with the special cases of facility and service burdens.
[14] (1881) 18 R (HL) 95.The Scottish Law Commission had recommended a distance limitation of four metres, but this did not appear in the 2003 Act (Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No. 181, 2000), paras 11.48-11.56)..
[15] The 2003 Act, s. 122(1) defines this to be the same day as the appointed day prescribed under the Abolition of Feudal Tenure etc (Scotland) Act 2000, s. 71. This was specified by the Abolition of Feudal Tenure etc (Scotland) Act 2000 (Commencement No 2) (Appointed Day) Order 2003 (SSI 2003/456).
[16] *Thomson's Executor, applicant*, 8 August 2016, Lands Tribunal, para [28].

"the same or similar burdens...imposed on two or more properties", having regard to "the degree of equivalence between the burdens".[17]

Next, if there is a common scheme, the deed imposing the burdens must also give express or implied notice of that common scheme. This again is a requirement taken over from the common law rules, and the requirements are not onerous.[18] A *Hislop* type-2 case will almost of necessity give notice of a common scheme, as it will be clear from looking at it that it imposes burdens upon more than one property. Equally, it will be sufficient notice, for example, that the granter of the deed imposing the burdens has bound himself or herself to impose similar burdens in future conveyances of plots in the neighbourhood.[19]

Lastly, any "provision to the contrary" will exclude reciprocal enforcement rights. The most common example of this is a deed that expressly reserves to the granter the right to vary the burdens. The implication of such provision is that the deed is to regulate the relationship between the granter and the grantee only, and not between the grantee and anyone else.[20] This situation is expressly recognised by section 52(2) of the 2003 Act as excluding reciprocal enforcement rights.

What is now section 53 was added during the Bill's course through the Scottish Parliament.[21] The concern was expressed[22] that having implied enforcement rights rest solely on section 52 would have the result that some real burdens would then not be enforceable by anyone. As we have seen, section 52 broadly codified the common law rules on implied enforcement rights by the owners of other units in a community. Many burdens that did not meet the requirements for those enforcement rights were only enforceable by a feudal superior. With feudal superiorities being abolished at the same time as the 2003 Act came into force,[23] it was thought appropriate to supplement the section 52 rules with further provision, which became section 53.

Where a person is seeking to establish that his or her property is a benefited property, it is enough to satisfy one of these sections. Accordingly, even if the test laid

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[17] 2019 Report, para 3.36.
[18] Nonetheless, they are less often met in practice than this would suggest. See G L Gretton & K G C Reid, *Conveyancing* 5th edn (Edinburgh: W Green 2018) para 14-15. For discussion of the requirements, see W M Gordon & S Wortley, *Scottish Land Law* 3rd edn (vol 2, 2020) para 24-82.
[19] *McGibbon v Rankin* (1871) 9 M 423.
[20] See *e.g. Thomson v Alley & Maclellan* (1883) 10 R 433, where the deed in fact expressly said that this was the intention.
[21] 2019 Report, paras 2.28-2.29.
[22] 2019 Report, paras 2.20-2.27.
[23] See footnote 15.

down by section 52 is not met, it is enough to show that section 53 applies for there to be title to enforce the burdens. The requirements of section 53 are that:

- the properties are subject to the same common scheme of real burdens;[24] and
- the properties are "related properties".

The requirement for a common scheme is thus repeated in section 53. The other requirement, however, is new. As we shall see below, much of the difficulty with section 53 has arisen from these words, "related properties".

The problem with section 53

Section 53 has not been found to be easy to work with. For a start, it is difficult to have two provisions dealing with the same issue. Certainly, students find it confusing, and I cannot imagine that it is any easier to explain the law on this to clients.

More serious, though, is the absence of any clear definition of what section 53 means by "related properties".[25] This term is not defined. Instead, what section 53 does is say that whether properties are related "is to be inferred from all the circumstances".[26] It then gives a list of illustrative examples, which may give rise to that inference, but which, then again, may not. These are listed in section 53(2), and are as follows:

> (a) the convenience of managing the properties together because they share–
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> (i) some common feature; or
>
> (ii) an obligation for common maintenance of some facility;
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> (b) there being shared ownership of common property;
>
> (c) their being subject to the common scheme by virtue of the same deed of conditions; or
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> (d) the properties each being a flat in the same tenement.

[24] For the purposes of section 53, it is enough that the common scheme of burdens was imposed on at least one of the units before the appointed day. This allows developments that were only partially sold off at the appointed day to be accommodated by the rules on implied enforcement rights.
[25] For further discussion of the difficulties of section 53, see K G C Reid, "New Enforcers for Old Burdens: Sections 52 and 53 Revisited" in R Rennie ed, *The Promised Land: Property Law Reform* (Edinburgh: W Green 2008) paras 3-26 - 3-36.
[26] 2003 Act, s. 53(2).

The Lands Tribunal has pointed out the difficulty: "the formulation and statutory 'examples' given do not provide any guiding principle other than, of course, the properties should be, in some way, 'related.'"[27]

It is because of these difficulties that the Scottish Law Commission was asked to consider section 53. As we shall see, the Commission recommends replacing section 53 (and, in fact, section 52 as well).[28]

The reform recommendations

The Scottish Law Commission's recommendations proceed on the basis that:

> "Owners of properties within an identifiable 'community' should have the implied right to enforce any common scheme of real burdens affecting that community against all the other owners (subject to 'community' being appropriately defined)."[29]

This is seen as a continuation of the existing policy underlying section 53.[30] In other words, the difficulty with section 53 is seen as being, to a significant extent, not the policy itself but the manner in which it has been executed.[31]

The Commission Report contains a draft Bill, amending the 2003 Act. This is to amend the 2003 Act by inserting a new section 53A, which is to supersede both section 52 and section 53. In recommending this, the Commission has taken the view that the scope of the reference from the Minister was not restricted to section 53 alone, noting that that section was to be considered "in the context of part 4" of the 2003 Act.[32] This is a reasonable approach to take, particularly given that the overlap between sections 52 and 53 is one of the major difficulties with the current law.

There is considerable continuity between the current law and the draft Bill, but also important change. The draft Bill continues to start from the basis that, where

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[27] *Thomson's Exr, applicant* 8 August 2016, Lands Tribunal, para [43]. See also *O'Gorman v Love* 2019 SLT (Lands Tr) 1, para [35]: "it is difficult to discern from the statutory examples any particular guiding principle by which it can be established that properties are indeed 'related'." For discussion, see W M Gordon & S Wortley, *Scottish Land Law* 3rd edn (vol 2, 2020) paras 24-84 - 24-86.
[28] 2019 Report, paras 3.17-3.21.
[29] 2019 Report, para 3.16.
[30] 2019 Report, para 3.4.
[31] 2019 Report, para 3.5.
[32] 2019 Report, para 3.20.

burdens were created before the appointed day,[33] there should be title to enforce where a common scheme was imposed on related properties. The big change, though, is that, where section 53 gave merely illustrative examples, the proposed section 53A gives five bright-line rules. The case must fall within one of these, or else there are no implied enforcement rights. In the draft Bill, these are listed from paragraph (a) to (e) in the proposed section 53A(4), and this lettering is followed here.

The first (rule (a)) is the least controversial, and takes over one of the current examples.[34] Where each unit "is a flat in the same tenement", they are automatically to be considered related properties.

Second, in terms of rule (b), the properties will be related "if the common scheme provides for" the units "to be managed together for the purposes of some or all of the burdens". This also does not seem to have been controversial. It seems to have been inspired by the current section 53(2)(a), which talks about the "convenience of managing the properties together" because of "some common feature" or "an obligation for common maintenance of some facility". On the whole, however, it is significantly more certain.

Third, rule (c) provides that the properties will be related if each of them is "subject to the common scheme by virtue of the same deed". This follows the current section 53(2)(c), except that there is no need for the deed imposing the burden to have been a deed of conditions. This seems reasonable, because it is possible for burdens to have been imposed over multiple plots of land in a deed other than a deed of conditions. We shall see an example in a moment.

Fourth, in terms of rule (d), the properties will be related if they "share ownership of common property". This again follows a current example under section 53,[35] but now is to exclude common property that is a boundary feature. This is to avoid having "a series of overlapping 'communities' of two properties."[36]

Fifth, rule (e) provides that the properties will be related if they are "at some point" within twenty metres of each other, and also meet the requirements of the current

[33] As we have seen above, this was 28 November 2004. More precisely, section 53 requires the common scheme to have been imposed on at least one of the related properties before the appointed day.
[34] 2003 Act, s. 53(2)(d).
[35] 2003 Act, s. 53(2)(b).
[36] Scottish Law Commission, *Report on Section 53 of the Title Conditions (Scotland) Act 2003* (Scot Law Com No 254, 2019) para 3.67.

section 52. In effect, rights implied by section 52 are retained subject to a distance limitation.

There is also to be a preservation scheme, allowing those who would lose enforcement rights under these rules to preserve them by registration of a notice to that effect. The main purpose of this preservation scheme is to make the new scheme human rights-proof.[37] It can, I think, be taken for granted that very few preservation notices will in fact be registered.[38] Title to enforce real burdens is not the kind of thing that ordinary people think about until it becomes a live issue for them personally. All the more reason, therefore, to ensure that as few people as possible lose enforcement rights who really ought to keep them.

This is a particular concern with regard to rule (e), which imposes a distance limitation on properties previously only qualifying as benefited properties under section 52. In one sense it is surprising that a limitation of this kind has been recommended, and not surprising at all that the Commission received a range of views on this from consultees.[39] Imagine a pre-2003 Act housing estate, in which each unit is a benefited property under section 52 but not under section 53. Unless the burdens were imposed by the same deed (as with *Hislop* type-2 burdens), each unit will cease to be a benefited property with respect to units that are more than twenty metres distant. This is the case even though a more distant property may easily, in suitable circumstances, be more seriously affected by a breach of a burden than a closer property. For example, failure of maintenance or increased parking at a house thirty metres away but in the same street could have an adverse effect that would not be felt be felt by the owners of closer houses in a different street.

Compare this with a similar development, subject to burdens imposed post-appointed day. Typically the burdens will have been created in a deed of conditions identifying every unit in the development as both benefited and burdened.[40] In other words, in the newer development every unit forming part of the common scheme will

[37] In terms of s. 29(2)(d) of the Scotland Act 1998, the Scottish Parliament may not legislate in a manner incompatible with rights conferred by the European Convention on Human Rights. The relevant Convention right is contained in article 1 of protocol 1 to the Convention, which protects the peaceful enjoyment of property rights. For a successful challenge to a legislative provision on this basis, see *e.g. Salvesen v Riddell* [2013] UKSC 22, 2013 SC (UKSC) 236.

[38] Thus, only relatively small numbers of preservation notices were registered for the preservation of enforcement rights by former feudal superiors, affecting only approximately 0.1% of title units in Scotland (see K G C Reid & G L Gretton, *Conveyancing 2004* (2005) pp. 95-96).

[39] 2019 Report, paras 3.69-3.85.

[40] 2019 Report, para 3.6.

be a benefited property, without any distance limitation, subject only to the requirement for the benefited proprietor to show interest to enforce.[41] There appears to be a conflict here with the view, influential in the introduction of section 53 in the first place, "that housing estates should be treated in the same way as regards the burdens regulating them, no matter the conveyancing niceties of the particular case."[42] Perhaps it would have been simpler just to make it a universal rule, that title to enforce was co-extensive with the common scheme, limited only by the need for interest to enforce in particular cases.[43] This, of course, would have the effect of creating new enforcement rights where there were previously none. Whether that is a disadvantage is a matter of opinion.[44] Even if it is seen in that light, though, the difficulty is at least partly mitigated by the need to show interest to enforce.

In the final part of this article, we shall have a look at some cases considering section 53, and see whether the outcome would be different under the new law if the draft Bill were to be implemented. There is, it is true, a difficulty with such an exercise in that there may be information missing from a case, which was not necessary for its decision under the current law but which would be relevant under the proposed new law. For example, there may be no information in a case as to whether there are common management provisions for the purposes of any of the burdens. Nonetheless, it is hoped that there is at least some merit in the exercise.

Brown v Richardson

First, we have *Brown v Richardson*.[45] This case concerned real burdens imposed on six lots of ground in feu charter dated 9 February 1888, prohibiting building. The owners of the house built on one of these lots sought to have burdens discharged in terms of section 20 of the 2003 Act (the so-called "sunset rule", by which there may be sought

[41] 2003 Act, s. 8.
[42] 2019 Report, para 3.4.
[43] It is only fair to note that the Commission did give due consideration to this suggestion: 2019 Report, para 3.76.
[44] For reasons why this might be considered undesirable, see K G C Reid, "New Enforcers for Old Burdens: Sections 52 and 53 Revisited" in R Rennie ed, *The Promised Land: Property Law Reform* (Edinburgh: W Green 2008) paras 3-14 - 3-17. Professor Reid's comments on interest to enforce must now, however, be read in light of subsequent case law. See in particular R Rennie, "Interest enforced" 2011 SLT (News) 217; G L Gretton & K G C Reid, *Conveyancing* 5th edn (Edinburgh: W Green 2018) para 14-13.
[45] 8 May 2007, Lands Tribunal.

the discharge of burdens that are more than 100 years old).[46] This was opposed by the neighbours, who applied to the Lands Tribunal to have the burdens renewed. The question arose whether the neighbours were in fact benefited proprietors in this burden, because only then would they have title to oppose the application.[47]

In this case, example (c) in section 53(2) was held relevant. Although the burdens were not imposed by a deed of conditions, they were imposed by the same feu charter, which the Tribunal considered to be analogous to a deed of conditions.[48] The Tribunal, therefore, held that the properties were related within the meaning of section 53. The Tribunal also considered relevant the degree of uniformity of the terrace of which the houses formed part. This is one of the difficulties with section 53: it is difficult to know exactly what is relevant. No doubt, given time, clarity would emerge as the decisions of the courts and the Lands Tribunal on the point accumulated. That, though, is of little help in the meantime.

Under the Commission's recommendations, the outcome would be the same, as both properties were "subject to the common scheme by virtue of the same deed", to use the wording of the proposed section 53A(4)(c). The difference, though, is that this outcome would have been reached much more easily. As there were other points in dispute between the parties, it is unlikely that litigation would have been avoided altogether, but it could have that effect in other cases. At the very least, the parties could have received clearer and more certain advice on the issue.

Thomson's Exr, applicant

Next we have *Thomson's Exr, applicant*.[49] This case concerned one of a row of detached houses, numbered 1, 3, 5, 7 and 9. The owner of number 9 applied to the Lands Tribunal to have it declared that the burdens affecting the property were unenforceable, so that she could subdivide her plot and build a new house. The burdens affecting all of the properties were in similar terms, though not identical. It was nonetheless held that there was a common scheme.

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[46] 2003 Act, ss. 20-24.
[47] 2003 Act, s. 95.
[48] Compare, though, *Leehand Properties Ltd, applicants* 2019 GWD 29-468, paras 37-38, where it is doubted whether such an analogy can properly be drawn. This particular difficulty would, however, disappear under the Scottish Law Commission's recommendations.
[49] 8 August 2016, Lands Tribunal.

On the question of whether the properties were related, it was held that only number 7 was related to number 9. There was a boundary fence between them, which was co-owned and in relation to which there was a shared maintenance obligation. Therefore example (a) was relevant, which talks of the "convenience of managing the properties together because they share...an obligation for common maintenance of some facility". In addition, example (b) was relevant, as there was shared ownership of common property. No such features were relevant in relation to the other properties, however, so numbers 1, 3 and 5 could not be held to be related properties.

Under the Commission's recommendations, the new rule (d) would not apply. This is the rule that makes properties related when they share common property. Here, though, the common property was a boundary fence, which is excluded by rule (d). Rules (a) and (c) would also be inapplicable, and rule (e) would be excluded for the same reason that section 52 was excluded.[50]

The only rule that would potentially apply, therefore, would be rule (b), in terms of which properties subject to provision for shared management "for the purposes of some or all of the burdens" are to be considered related properties. In relation to this, the Commission seems to have had in mind such arrangements as rules for residents' associations or for factoring.[51] However, the wording of the rule appears capable of including within its scope arrangements that are much less comprehensive. Arguably, therefore, an obligation of shared maintenance of a fence would constitute such provision. On this argument, then, the outcome would be the same as under the current law. In response to this, it may be pointed out that rule (d) excludes cases of shared ownership of fences and boundary walls. However, there may be co-ownership without express provision for shared maintenance. Equally, a deed may make provision for shared maintenance in the absence of common property. Accordingly, the possibility remains of rule (b) being held to apply to such cases.

O'Gorman v Love

The final case is *O'Gorman v Love*.[52] This was an application by the owner of a house for determination of validity of enforceability of title conditions. The application was

[50] This was absence of notice of the common scheme. See paras [39]-[42] of the Tribunal's decision.
[51] 2019 Report, para. 3.54.
[52] 2019 SLT (Lands Tr) 1.

intimated to the other owners in the street, but only the immediate neighbours lodged representations. The applicant wanted to subdivide the land to build a second house. The property was, however, subject to a burden imposing building restrictions.

The Lands Tribunal held that the properties were not related. The only two potentially relevant examples were (a), which looks to the convenience of managing the properties together, and (b), which is concerned with common property. Example (a) required, the Lands Tribunal said, some "evidence or likelihood of management or factoring of the properties together",[53] which was not present here. Example (b) was also not relevant, as the boundary wall was not common as in *Thomson's Exr*, but mutual, with each neighbour owning to the midpoint.[54]

Under the Commission's recommendations, the outcome would be the same. None of the new rules would appear to apply to the situation. What is less certain is whether this is the right outcome. If, as the respondents said,[55] their solicitor informed them of the burdens when they bought their house, it is not difficult to feel sympathy for them.[56] It was not unreasonable of them to consider themselves bound by the burdens affecting them and to assume that their neighbour would likewise consider herself bound by the effectively identical burdens affecting her. Moreover, while the burdens were not imposed in the same deed (as required by rule (c)), they were imposed in deeds granted by and to the same two parties, albeit three years apart. It seems *prima facie* probable that, had the two houses been built closer together in time, there would have been a single feu disposition, followed by a subdivision. Should enforceability depend on commercial and conveyancing decisions made a century and a half ago, when the enforcement of real burdens formed no part of the process of reaching those decisions? Of course, the Commission has a near impossible task here of, in effect, rebuilding a ship while it is sailing. It does not have the luxury of a blank slate. Still, it is possible to suggest that the Commission's approach has been too restrictive.

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[53] 2019 SLT (Lands Tr) 1, para [36].
[54] 2019 SLT (Lands Tr) 1, para [37].
[55] 2019 SLT (Lands Tr) 1, para. [23].
[56] It is some answer to this to say that they may then have recourse against their solicitor, but it is not a complete answer. To receive compensation because of an undesired outcome is, at its highest, a second-best outcome. Moreover, the mere fact that advice has subsequently turned out to be incorrect does not of itself apply that the solicitor will be liable for having given it. The solicitor's conduct in giving the advice must be judged at the time that it was given, and it may be that it was appropriate at that time. On the test to be applied in questions of professional negligence, see in particular *Hunter v Hanley* 1955 SC 200.

On the plus side, at least, the decision would have been much more straightforward under the recommendations and, presumably, the respondents would (if properly advised) not have opposed the application. Still, the respondents would be almost bound to feel that they lost the case on a technicality that had nothing to do with the justice of the matter.

Final observations

The Scottish Law Commission's recommendations are not perfect. Various criticisms of them have been made here. In particular, it is suggested here that the recommendations, if implemented, may have the effect of making an unjustified distinction between those currently relying on section 52 to allow them to count as benefited proprietors in *Hislop* type-1 cases, and those whose rights were created after the appointed day. It is not clear why, for example, a case like *O'Gorman v Love* should depend so much on whether the common scheme was imposed in the same or different deeds. On the other hand, though, the recommendations are a significant advance on the current section 53 in terms of certainty and clarity. One thing, at any rate, is however certain. If implemented, they will have a real impact, so it would be appropriate for anyone potentially affected to consider whether it was worthwhile to preserve enforcement rights that currently exist under section 52 or section 53. Without this, the risk exists of owners losing enforcement rights that they would subsequently wish to rely on.