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Scottish Land Law

William M. Gordon and Scott Wortley, 3rd Edition, Volume 2, W. Green, 2020

In many ways, this is a strange book review. This is partly because of the reviewer/reviewee relationship, and partly because of the text under review.

Taking the latter point first, it seems strange to focus on only one Volume of the book under review. Admittedly, there are over 400 pages of substantive coverage of key aspects of immoveable property law in Volume 2 of *Scottish Land Law*, covering: rights in security; title conditions; public access to land; nuisance and other land-related delicts; and settings where private property meets the common good (social control of land use, compulsory acquisition of land, and redistribution of land). These are all important topics. However, there is no denying that the complete third edition of *Scottish Land Law* comprises unorthodox constituent parts: Volume 1 published in 2009, augmented by a supplement published in 2011;¹ then Volume 2 published in 2020. Those reading Volume 1 are accordingly in a time warp when dealing with issues such as private residential leasing, nature conservation or water rights. More strikingly, Volume 1 pre-dates the Land Registration etc. (Scotland) Act 2012, whereas Volume 2 caters for it (albeit there is a lingering reference to the possibility of newly registering something in the closed Register of Sasines).² Separately, it is perhaps regrettable that there is no single composite index for the two Volumes and the supplement. So be it: we are where we are, and we are undoubtedly in a better position to have Volume 2 of this significant edition of a Scottish Universities Law Institute book than not.

For reasons explained in the preface, what began as a project between two authors became a team effort building upon the groundwork of those authors. Professor William (Bill) Gordon, the author of the first two editions, sadly died in 2012. Scott Wortley has faced illness. That goes some way to explain why there are two, time-separated volumes, and also leads to a second, unrelated reason that this is perhaps a strange book review, namely my fondness for one of the co-authors. I owe Scott Wortley a great personal debt for the support he provided to me as an undergraduate LLB student and beyond.³ Scotland is a small jurisdiction, meaning such interactions are unavoidable, but for full disclosure, I also know all members of the team who steered Volume 2 to publication. That team comprised Kenneth Reid (as editor and contributor), Craig Anderson, Alisdair MacPherson, Elspeth Reid, Jill Robbie, and Andrew Steven (as contributors).⁴

Enough on the context, and with that disclaimer of potential partiality, what of the substantive content? Again, as explained in the preface, there have been changes from the second edition (published in 1999). Town and country planning has been excised, being a specialist topic that deserves its own treatment. Servitudes and public access rights are now (sensibly) treated separately; retaining the previous single chapter would make little sense now that public access to land is dominated by the right of responsible access found in Part 1 of the Land Reform (Scotland) Act 2003. There is a new chapter on community rights to buy, considering all four community rights to buy in the Land Reform (Scotland) Acts of 2003 and 2016.

Structurally, the preface to Volume 1 had suggested that Volume 2 would have two Parts (on security rights and burdens imposed under public and private law), following on from its Introduction (Part I),

¹ W.M. Gordon and S. Wortley, *Scottish Land Law* 3rd edition (Edinburgh: W. Green, 2009), Vol.1. The supplement was published by the same publisher as Vol.1.

² Para 19-05.

³ I do not believe I ever met Professor Gordon, although I, of course, knew of his work.

⁴ Incidentally, Jill Robbie was one of the five research assistants named in the Preface to Volume 1.

Land and Rights Associate with Land (Part II), and Rights over Land (Part III). As published, Volume 2 has three Parts: Rights in Security; Restrictions on the Use of Land; and Social Control of Land. In a broad sense, some of the social control content might also be thought of as restrictions on the use of land, but overall this reworked partitioning of Volume 2 makes sense.

The securities content – now nicely divided into four chapters – begins at chapter 19. This first chapter of Volume 2 (and of Part IV overall) serves as an excellent introduction to the theory and practice of security rights without shirking from any tricky issues, before the three subsequent chapters of Part IV consider the two voluntary securities that can affect land (standard securities and floating charges) and involuntary securities. This is all suitably up-to-date and able to draw on recent scholarship.⁵ Part IV could feasibly have been hived off and made into a short but effective standalone book on heritable securities.

Part V, on restrictions, begins with a short chapter 23 that leads into separated analyses of real burdens and servitudes. Again, this considers up-to-date case law and recent developments, and the new coverage (by Craig Anderson) on real burdens (chapter 24) and judicial variation and discharge of title conditions (chapter 26) is a welcome addition.⁶ The content on servitudes (chapter 25) and public access to land (chapter 27) is thorough and, in the case of the latter, set out in a more authoritative style than any other contemporary secondary source on the topic. This Part concludes with relevant content from the law of delict (such as occupiers' liability and nuisance) in chapter 28, addressing matters that some land lawyers might struggle with in an accessible and logical way. One difficult occupiers' liability point that this reviewer would have been grateful to see deeper consideration of relates to section 5(2) of the Land Reform (Scotland) Act 2003, on the interaction of the right of responsible access and the duty occupiers have towards those taking access to land. I confess I found some of the analysis of this issue a little challenging,⁷ and a comparison with equivalent English legislation⁸ might have been helpful given it is much clearer than the Scottish statute when it comes to sculpting the scope of occupiers' liability there. As already mentioned, and as is noted in the volume itself, the point is not an easy one and it seems prudent not to get overly bogged down with it here.

Part VI is an important contribution, not just in terms of the Scottish land law position on policy-affected matters, but also in terms of where Scottish land law might be going. It begins with a chapter that shares its title with Part VI – “Social Control of Land Use” – which draws in apparently disparate subjects such as human rights, the regalia, land designations, licensing, and fiscal measures. In this chapter 29, there is a useful pivot point after the coverage of human rights where the means by which land might be socially controlled are highlighted.⁹ This includes brief consideration of altering the nature of land ownership in Scotland, with reference to the Land Rights and Responsibilities Statement.¹⁰ This non-binding instrument does not alter the blackletter law position in Scotland, but I think it was nevertheless proper to highlight it and the related work of the Scottish Land Commission¹¹ as a possible marker for the future. The chapter then considers vesting the ownership of land or rights in land in public bodies, and signposts to the immediately following chapter on compulsory acquisition. That topic has (thankfully) survived the purge of planning law, and it gets its own detailed treatment. Finally, chapter

⁵ See e.g. Andrew Steven's work on accessoriness (at 19.07), Alisdair MacPherson's work on floating charges and diligence in the aftermath of *MacMillan v T Leith Developments Ltd (In Receivership and Liquidation)* 2017 CSIH 23 (at 21.15), and the Scottish Law Commission's work on heritable securities (in chapter 20, *passim*). This reviewer was also pleased to see a reference to a 2019 article that he co-authored with Colin Mackie (at 22-20).

⁶ A flavour of this analysis can be found in Craig Anderson, 'Real Burdens and Implied Enforcement Rights: The Scottish Law Commission's Recommendations' 2021 *Juridical Review* 38.

⁷ Around Para 28-04.

⁸ Section 13 of the Countryside and Rights of Way Act 2000.

⁹ Para 29-13.

¹⁰ This was legislated for by the Land Reform (Scotland) Act 2016, Pt 1, and can be found at <<https://www.gov.scot/publications/scottish-land-rights-responsibilities-statement/>>.

¹¹ See <<https://www.landcommission.gov.scot/>>.

31 (by Jill Robbie) is the aforementioned new chapter on the means by which land can be redistributed from an existing private owner to another private body (albeit one that embodies the local community). Such private takings are relatively new to Scots law, and this meticulous analysis of the relevant statutory provisions coupled with helpful background information and contextual examples is a valuable addition to the literature.

In a review of Volume 1, channelling the late Professor Bennett Miller and his use of phrases such as “a monumental work of scholarship” and “no practitioner’s shelves should be without this volume”, Douglas Cusine expressed confidence that academics and practitioners would agree with his deployment of those phrases in relation to that earlier work.¹² Can the same be said of Volume 2?

I have the same confidence as Cusine in relation to the first phrase: this is a stellar contribution to the discipline. As for the second, I suspect it might actually be possible for some practitioners with access to legal databases and other contemporary texts on property and conveyancing to muck along without this book on their shelves – assuming of course they still have shelves – but then again, I suspect that is not the point. This volume is a bookend to the respected *Scottish Land Law* story and all those who contributed to it deserve huge credit. Volume 2 brings new insights to traditional heritable property topics and provides fresh perspectives on emerging areas of land law scholarship.

I have already declared my admiration for one of the co-authors as an interest, and I think I can count (and hope I can still count) all the contributors as friends. The reviewer must declare a further interest: I had sight of one chapter before publication, as acknowledged in the book’s preface. Readers of this review can rest assured that the chapter in question was, like the rest of the book, of a high standard before this reviewer deigned to offer any suggested tinkering.

Malcolm M Combe

University of Strathclyde

¹² (2010) 14 (3) Edin LR 539, 540.