MEDITATIONS ON STRATHCLYDE: CONTROLLING PRIVATE LAND USE RESTRICTIONS AT THE CROSSROADS OF LEGAL SYSTEMS

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This article presents a comparative study of a pivotal case decided by the Lands Tribunal of Scotland, Strathclyde Joint Police Board v. The Elderslie Estates Ltd. The decision exemplifies how Scotland, one of the world’s leading mixed jurisdictions, addresses several fundamental property law issues. Should landowners be allowed to impose restrictions on the use of land that bind future owners in perpetuity? Should courts have any power to modify or terminate those land use restrictions if the passage of time appears to undermine their initial purpose and utility? Does the application of the European Convention on Human Rights change how a court must protect fundamental property rights? This comparative case study sheds light on how Scotland has answered all these questions, reflects on the costs and benefits of its solutions, and contrasts the Scottish approach with typical approaches under American law. The Lands Tribunal’s decision, the article also argues, demonstrates a powerful communitarian conception of property in Scottish law, one that has continued to surface even after the formal abolition of Scottish feudalism in 2004 and that differs substantially from the market based conception of property reigning in the United States today.

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Comparative law is always a dangerous endeavor. It can be especially treacherous when a scholar delves into property law, a subject whose traditions, rules, and fundamental concepts are often deeply intertwined with a legal system’s unique history, culture and values. In fact, the native particularity of property law might discourage some from exploring property institutions from a comparative perspective.

In recent years, however, a number of scholars have bravely begun to examine modern property institutions from a diverse range of comparative perspectives. Many of these explorations share a public law orientation. They frequently examine the extent of constitutional protection for property rights across political boundaries, often framing property rights as a subspecies of human rights.1 Another branch of comparative scholarship has focused on traditional private property law institutions. Examples of these efforts include two recently published sets of essays that explore the nature of real rights and land burdens throughout Europe in the hope of laying the groundwork for a possible harmonization of European property law,2 a transnational analysis of property law applying the

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2 SIEF VAN ERP & BRAM AKKERMANS, EDs., TOWARDS A UNIFIED SYSTEM OF LAND BURDENS? (2006); STEVEN BARTELS & MICHAEL MILO, EDs, CONTENTS OF REAL RIGHTS (2004).
principles of law and economics scholarship, and a comparison of several core private property institutions in both Scotland and South Africa, two of the leading and most often studied mixed jurisdictions in the world today.

Most of these studies tend to be macroscopic in nature. They examine property law from a relatively high altitude and seek to uncover broad differences in values, structures and rules. The primary lens of this article, however, is microscopic. Rather than begin with generalizations about differences or similarities in property regimes, it opens with a case study of one recent and important Scottish property law dispute, Strathclyde Joint Police Board v. The Elderslie Estates Ltd. Though the underlying case might seem pedestrian at first glance, its unusual trajectory through the Scottish legal system, including a challenge under the European Convention on Human Rights, has already attracted attention from Scottish scholars and provides valuable insights about the unique development of modern Scottish property law that crosses both national boundary lines and the thematic boundary line between public and private law. For American readers, it will highlight how another well developed legal system from a widely admired political culture has developed several fundamentally different assumptions about the nature of an important category of property rights.

For all readers this story is important for another reason. Scottish law matters in its own right. It matters because it exemplifies a rare breed of mixed jurisdiction. Scotland presents us with a jurisdiction featuring an Anglo-American style, adversarial court system whose substantive private law received continental civil law principles and institutions en masse across the sixteenth and seventeenth centuries but which never codified those principles and institutions into a civil code. The only other mixed

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7 Elspeth Reid, Scotland, in VERNON VALENTINE PALMER, MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY 201-203 and 208-219 (2001). The exact date and extent of the reception of civil law into the Scottish legal system is a subject of intense debate. For a sense of the debate, see ROBIN EVANS-JONES, ED., THE CIVIL LAW TRADITION IN SCOTLAND (1995). The debate is complicated by the fact that elements of Roman law were already
jurisdiction with roughly the same “mix” is South Africa, a fact which partially explains the rich blossoming of Scottish-South African comparative law dialogue over the past two decades. In recent decades, Scottish law has only grown in international significance as Europeans look to its unique mixture as a potential model for harmonizing common and civil law institutions in a quickly converging and unifying European Union.

A final reason to care about the case study at the heart of this article is that it shows us how one legal system at the crossroads of two of the world’s great legal systems has dealt with the core property problem of controlling private land use restrictions. There are few property issues that are more pivotal than the inter-related questions of whether landowners should be allowed to impose restrictions on the use of land that bind future owners in perpetuity and whether or to what extent courts should have the power to modify or terminate those land use restrictions if the passage of time appears to undermine their initial purpose and utility. This comparative case study sheds light on how Scotland has answered both questions and allows us to reflect on the costs and benefits of its solutions in comparison with the typical approaches followed under American law.

1. The Origins of a Scottish Property Law Dispute

This story opens in 1942 when a land owner, Elderslie Estates Ltd. (“Elderslie”), sold a triangular plot of land to the County Council of the County of Renfrewshire (“the Council”) present long before the large scale reception of the *ius commune* in the sixteenth and seventeenth centuries. William Gordon, *Roman Law in Scotland*, in EVAN-JONES, *supra*, 13, at 15-23.

8 See e.g., ZIMMERMANN & REID, *supra* note 4.

9 One of the great exponents of both the mixed jurisdiction movement and Scots law as an autonomous legal system, T.B. Smith, presciently warned decades ago, as the process that would later come to be called harmonization was just beginning to get under way, that harmonization should proceed only on the basis of mutual respect and recognition for the autonomy of legal systems of all constituent European states. Eric Schanze, *The Recognition Principle, Tracing Sir Thomas’ Vision to the Present European Law*, in ELSPETH REID & DAVID L. CAREY MILLER, *A MIXED LEGAL SYSTEM IN TRANSITION: T.B. SMITH AND THE PROGRESS OF SCOTS LAW* 293, 294-295 (2005). But see Lord Roger of Earlsferry, “Say Not the Struggle Naught Availeth”: The Costs and Benefits of Mixed Legal Systems, 78 TUL. L. REV. 419, 430-33 (2003) (expressing reservations about the proposed use of Scots law in the formation of common European Code of private law).
pursuant to a *feu* contract. The Council acquired the land from Elderslie for the purpose of constructing a police station and dwelling house for its police officers. Elderslie later claimed that it transferred the land to the Council for no financial consideration other than a promise by the Council to pay a *feuduty* (a small annual payment of money from a feudal vassal to a feudal lord) because it was sympathetic to the Council’s plan to use the land for such a beneficent public purpose. More important to our case, the land was transferred from Elderslie to the Council subject to a special kind of title condition that was specifically intended to run with the land and to prohibit use of the property for any purposes other than as a police station and police dwelling house, except with the written consent of “the superiors” (i.e., Elderslie). The deed and the attendant title condition were duly recorded in the local land registry, the General Register of Sasines for the County of Renfrewshire.

2. A Short History of the Real Burden and the Impact of Scottish Feudalism

Now where do all these references to “feu contracts,” “feuduty” and “superiors” come from, an American reader might ask? Rather than transfer the complete bundle of rights associated with real property ownership in the United States or England today (the famous fee simple) or the undivided ownership interest that a civil law trained lawyer from Continental Europe, Quebec or

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10 Strathclyde Joint Police Board v. The Elderslie Estates, Ltd., 2001 S.L.T. (Lands Tr.) 2 (hereafter “Strathclyde”). Elderslie Estates Ltd. was owned by one individual, Mark Crichton Maitland, but I refer to the corporate entity throughout. Id. at 3.

11 Feuduty is also known as “the reddendo (periodic payment) due by a vassal to a superior under *feu farm* tenure, the standard tenure of modern [Scottish] feudalism.” KENNETH G.C. REID, THE ABOLITION OF FEUDAL TENURE IN SCOTLAND § 10.1 (2004). Although the twice yearly sums owed were sometimes large in the nineteenth century and seem to have functioned as a kind of alternative seller financing mechanism that enabled a purchaser of land to avoid borrowing a substantial sum for a capital payment (known as the *grassum*), the size of feuduty payments tended to decrease in the twentieth century. Id. §§ 1.3 and 10.1. See also Kenneth G.C. Reid, *Vassals No More: Feudalism and Post-Feudalism in Scotland*, 3 EUR. REV. PRIVATE L. 282, 290-291 (2003) The practice of imposing feuduty was discontinued altogether in 1974 by the LAND TENURE REFORM (SCOTLAND) ACT 1974 § 1.

12 Strathclyde, at 3. The Lands Tribunal noted that Elderslie could not substantiate this assertion and that in any event there was no evidence that the amount of the *feuduty* to be paid was less than what would be paid for comparable properties at the time. Id.

13 Strathclyde, at 2.
Louisiana might recognize, Elderslie here conferred a property interest known in Scottish land law as the *dominium utile*, the actual right to possess the land held by the lowest level vassal in the feudal chain of property ownership created by the practice of *subinfeudation*, a practice abolished in England by the statute *Quia Emptores* of 1290 but which continued unabated in Scotland until the early twenty first century.\(^\text{14}\) Meanwhile Elderslie retained for itself the *dominium directum*, a kind of reversionary interest not tethered to any other tangible, real (*i.e.*, “heritable” or immovable) property.\(^\text{15}\) If one were to combine these fragmentary property interests in the same person, full ownership would be the result.

To an American eye, this title condition might look like nothing more than a quaint defeasible estate, a relic from the first year law school property course, entertaining but not much more relevant to every day practice than habendum clauses in famous cases that restrict the use of real property to “school purposes” or for the use and benefit of some curious “Odd Fellows Lodge.”\(^\text{16}\) Such anachronisms in American law are often cured by operation of a marketable title act or by special legislation designed to terminate these kinds of future interests,\(^\text{17}\) or they simply fade into

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\(^\text{14}\) *REID, ABOLITION, supra* note 11, §§ 1.1-1.4.

\(^\text{15}\) Id. § 1.4. Scottish law still employs the term “heritable” to distinguish interests in land and other things joined to land by the principles of accession from “moveable” or personal property. *RODERICK PAISLEY, LAND LAW* § 1.17 (2000).

\(^\text{16}\) See e.g., Mahrenholz v. County Board of School Trustees, 417 N.E.2d 138 (Ill. Ct. App. 1981) (holding that wording of a grant restricting use of property for school purposes was a fee simple determinable followed by a possibility of reverter); Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano, 64 Cal. Rptr. 816 (Ct. App. 1967) (holding that a clause creating a fee simple subject to condition subsequent with title to revert to grantors or their successor or assigns if land ceases to be used for lodge or fraternal purposes was not an invalid restraint on alienation). Under American law, conditions imposed in creating defeasible fees are distinguishable from covenants containing land use restrictions in that if the former are breached a forfeiture may result but breach of the latter only results in injunction or a suit for damages. *JESSE DUKEMINIER ET AL., PROPERTY* 215 (6th ed. 2006). For a more detailed discussion of the overlap between defeasible estates and covenants, see Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law’s Functional Equivalents*, 66 Tex. L. Rev. 533 (1988).

\(^\text{17}\) See *WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY* § 11.12, at 899-901 (3d ed. 2000) (describing the range of statutory responses to old property interests, including reversionary interests). Some states have special statutes targeting particular kinds of property interests. See e.g., ILL. COMP. STAT. ANN. § 765-330-4 (limiting possibilities of reverter and right of entry to 40 year durations); IND. CODE ANN. § 32-5-11 (extinguishing mineral interests “unused” after 20 years). Some states also have special marketable title statutes that terminate title conditions and restrictive covenants if they are not
meaninglessness as the heirs of the original grantor move away or lose interest in enforcing them. But American readers should be warned. This kind of title condition, including its seemingly peculiar feudal trappings, was very common in Scotland throughout the nineteenth and twentieth centuries and is better understood as falling into a much broader class of title conditions, closer in fact to what American lawyers would call “restrictive covenants” and “equitable servitudes.”

Startling as it may seem, then, here in the midst of World War II, as Great Britain endured the Nazi Blitzkrieg, this otherwise pedestrian and quite typical land transfer was cast, at least facially, as a feudal grant. For American readers, this may come as a shock. But as some English readers may already know, Scottish feudalism did not fade away as early or decisively as English feudalism did. Instead, it endured at least in name until November 28, 2004, at which date it was finally abolished by an act of the new Scottish Parliament at Holyrood. To be sure, many of the classic features of a feudal land ownership structure had long since disappeared by the time Elderslie sold its land in Renfrewshire to the Council. For example, the military tenure of wardholding and the right of heritable jurisdiction (private courts) were abolished in 1746, while

intentionally revived within a prescribed period. See e.g., MASS. GEN. LAWS ANN.ch. 184 § 27 (limiting title “restrictions” to 30 years but allowing renewal for 20 year extensions); IOWA CODE ANN. § 614.24 (covenants restricting use of land terminate 21 years from recording unless a verified claim to extend them is filed within 20 years within the 21 year period); N.C. GEN. STAT. ANN. §§47B-2, 47B-4; WIS. STAT. ANN. § 893.33(6). A few states have statutes that limit the duration of covenants and title conditions more dramatically without allowing for renewals. See GA. CODE ANN. § 44-5-60(b) (limiting duration of covenants to 20 years in municipalities with zoning laws); MASS. GEN. LAWS ANN. ch. 18 § 23 (providing that title conditions and use restrictions “unlimited as to time” are limited to 30 year terms, except for gifts or devises for public, charitable or religious purposes). Minnesota at one time had one like this, MINN. STAT. ANN. § 500.20 (“all covenants, conditions, or restrictions . . . shall cease to be valid and operative thirty years after the date of the deed”), but it was repealed. See POWELL ON REAL PROPERTY § 60.09, at 60-118 (Michael Allen Wolf ed. 2000).

18 Pinpointing the precise date of the demise of feudalism in English land law is beyond the scope of this article. Suffice it to say, the process began as early as the enactment of Quia Emptores in 1290, which banned subinfeudation and thus substantially enhanced alienability, progressed significantly under Cromwell, was consolidated with passage of the Tenures Abolition Act of 1660, and was completed with the six great property law reform acts of 1925. KENNETH G.C. REID, THE LAW OF PROPERTY IN SCOTLAND ¶ 45 (1996); A.B. SIMPSON, A HISTORY OF LAND LAW 21-23, 54-55, 198-199 (2nd ed.1986); PETER SPARKES, A NEW LAND LAW 20-24 (1999).

19 ABOLITION OF FEUDAL TENURE ETC (SCOTLAND) ACT 2003, § 1.
feudal casualties slipped away in 1914. But feudalism still survived, primarily as a conveyancing mechanism.\textsuperscript{20}

The reasons for its technical survival are numerous and complex. For the purposes of this article, though, it is enough to know that feudalism endured in Scotland as a commercial institution because it proved capable of producing solutions to new social challenges. The most significant of those challenges was the need for a flexible mechanism to create private land use restrictions that “would run with the land” and facilitate the orderly development of the burgeoning Scottish cities of the late eighteenth and nineteenth centuries. Another more particular need was for a mechanism to facilitate the creation of planned and managed housing communities, especially for the elderly.\textsuperscript{21} As one expert on Scottish property law has put it, feudalism was transformed into “property management” and “[t]he Lord of the Middle Ages has become the management company of the early twentieth century.”\textsuperscript{22}

In the late 1700’s and early 1800’s, Scottish conveyancers began to use feu (i.e. feudal) conditions as one means of creating what came to be known as “real burdens.” Scottish conveyancers employed feudal conditions to create these binding obligations that ran with the land in part because the traditional, heavily Roman in origin, Scottish law of servitudes was not flexible enough to accomplish the task on its own as it suffered from three fundamental limitations. First, Scottish servitudes generally could not impose any affirmative obligations on the servient land owner to perform an action. This prevented servitudes from being used to require landowners to do important tasks such as paying for the maintenance of common facilities and building specified kinds of improvements.\textsuperscript{23} Second, the institution of servitudes itself was confined by a fairly rigid \textit{numerus clausus} (a closed list) consisting of the traditional Roman servitudes (\textit{via}, \textit{iter}, \textit{aqueduct} . . . etc), which typically obligated a servient estate owner to \textit{tolerate} something being done on his property (the passage of carts, horses, water, the removal of minerals, or the pasturage of animals), and which could only impose restrictions on a servient owner’s use and enjoyment of his property in narrowly circumscribed ways such as

\textsuperscript{20} Ken Reid, \textit{Abolition, supra} note 11, § 1.5.
\textsuperscript{21} For further details of how this transformation occurred, see Reid, \textit{Vassals No More, supra} note 11, at 284-286 and 287-288.
\textsuperscript{22} Reid, \textit{Vassals No More, supra} note 11, at 288.
\textsuperscript{23} Ken Reid, \textit{Modernising Land Burdens, The New Law of Scotland, in Van Eper & Akkermans, supra} note 2, at 63, 64; Reid, \textit{Law of Property, supra} note 18, at ¶ 381.
prohibiting the erection of a building or the obstruction of a view. 24 Innovative servitutes that deviated too much from this received list were not welcome because of the fear that they would unduly surprise future land owners if there were no visible signs of their existence. 25 Finally, the requirement that a servitude provide an actual benefit to a dominant tenement—in fact one adjacent to or in close proximity to the servient tenement—meant that a servitude could not be held by a person except in his capacity as owner of such an estate. In the language of Anglo-American law, a servitude benefit had to be *appurtenant*, not *in gross*. 26 This also limited the usefulness of servitudes as a land development planning tool if the developer/sub-divider did not plan on retaining any nearby, obviously benefited land. 27

It is important to note, however, that not all private land use restrictions in Scotland were imposed using feudal conditions with a feudal superior holding the enforcement rights. 28 In fact, only about half of the total did so prior to 2004, according to the estimate of the Scottish Law Commission. 29 The rest originated in non-feudal deeds. Nevertheless, the inherent flexibility of feudal conditions, which permitted a feudal lord to impose affirmative obligations on the vassal, undoubtedly helped Scottish jurists visualize a way to overcome the rigidity of the law of servitudes. By blending elements of the feudal condition, the servitude, and a security like device known, confusingly, as the *pecuniary real burden*, Scottish lawyers and jurists created what came to be known as the modern *real burden*. 30

After a crucial 1840 House of Lords decision, *Corporation of Tailors of Aberdeen v. Coutts*, 31 which actually involved a condition imposed in a non-feudal grant by a guild-like institution that was developing property in Aberdeen, 32 it was clear that land

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27 Reid, *Law of Property*, supra note 18, at ¶ 381.
31 (1840) 1 Rob. 296.
owners could create a property right known as a real burden. Just like a Roman law servitude, a real burden could “run with the land” and bind successive owners of the burdened property. But unlike a traditional Roman servitude, a real burden could also impose a wide range of negative restrictions on land use and could also impose a host of affirmative obligations on the burdened owner. The burdened proprietor could thus be made to construct a building in a certain architectural style, to maintain it and to contribute to maintenance of common areas and facilities. With a real burden there was also no need for the developing proprietor to retain neighboring land. In other words, all that was necessary for the creation of a modern “common interest community” as the American Law Institute’s Restatement (Third) of Property: Servitudes would say, could be accomplished through the imposition of real burdens in either feudal or non-feudal grants. Real burdens thus became pervasive throughout Scotland as developers used them to create Edinburgh’s New Town and the growing urban and suburban areas of Glasgow, Aberdeen, Dundee and other cities and towns.

3. Back to Renfrewshire: The Problem of Obsolete Covenants and Burdens

With this diversion into Scottish feudalism behind us, let us now return to Renfrewshire. After the 1942 transfer from Elderslie to the Council, a police station and dwelling house were constructed on the subject parcel, all in one single story building. At some point title to the burdened property was transferred from the Council to a new owner, the Strathclyde Joint Police Board (“the Police Board”), a regional administrative successor to the more localized Council. Over the years, the neighboring land developed into residential estates, but the use of the subject property as a police facility never changed.

33 Reid, Law of Property, supra note 18, ¶¶ 384-391; Reid, Modernizing, supra note 18, at 65.
34 Restatement (Third) of Property: Servitudes, § 6.2 (2000) (defining a “common interest community” as one in which the property is burdened by servitudes requiring property owners to contribute to maintenance of commonly held property or to pay dues or assessments to an owners association that provides services or facilities to the community or that enforces other servitudes burdening the property in the community).
35 Reid, Law of Property, supra note 18, ¶¶384-85; Reid, Modernising, supra note 18, at 65-66.
36 Strathclyde, at 2.
37 Id. at 2-3.
In 1998, however, the Police Board decided it no longer needed a police house for its officers at this location. Consequently it decided to sell the police house and make it available for general residential use while retaining only a police office in part of the structure. The Police Board hoped to make a handsome profit of approximately £100,000 on the transaction, funds which could then be used to accomplish other important police purposes. The impediment to this plan, of course, was the feu condition or real burden, which restricted the use of the entire 870 square meter parcel to police purposes, except with the written consent of the “superiors.” Unless the Council could obtain a release of the burden from Elderslie or discharge it in some other way, the Council would probably be unable to sell the land and building and would not realize any economic gain.

So what could the Council do? One alternative might have been to exercise the power of compulsory purchase (eminent domain) to acquire Elderslie’s property interest involuntarily. Of course this would have required compensating Elderslie for the value of its enforcement rights in the real burden. Perhaps because it wanted to avoid the cost of compensating Elderslie altogether, perhaps because it wanted to avoid litigating the amount of compensation owed, or perhaps because the public necessity for such a purchase was questionable as the property, after all, was just moving from the public to the private domain, the Council chose not to use any power of compulsory purchase it might have had. Instead, it chose to act just like any other private property owner might have in attempting to solve the problem presented by Elderslie’s real burden. And that is how we must treat the Council for purposes of understanding this case—as a private landowner confronted with a privately created title condition that prevents the landowner from changing the use of its property when the ability of the condition to achieve its original purpose is now in some doubt.

4. The Problem of Obsolete Land Covenants and Burdens

The problem faced by the Council, then, is one that is familiar to any legal system that allows real rights in land to be held by persons other than the actual owners entitled to possess the

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38 Id. at 2-3. Later, in the thick of litigation, the Police Board determined that it no longer even needed the police office and proposed to have the Lands Tribunal discharge the real burden with respect to the entire parcel. Id. at 3.
39 See W.M. GORDON, SCOTTISH LAND LAW 901-938 (2d ed. 1999) for a thorough discussion of compulsory purchase under Scottish law.
land and that permits such rights “to run with the land” or have “third party effect” and thus bind parties other than the original promisor and promisee who conferred the use restriction. How should such a system control or limit servitudes, covenants, or real burdens running with the land that have become burdensome or obsolete because of a change in surrounding circumstances or conditions? In other words, how does a legal system undo the permanency of contractual obligations running with the land when their perpetual nature has the potential to lead to economic waste or inefficiency?

To appreciate the novelty of the Scottish legal system’s answers to this fundamental problem, it helps to consider how a burdened private land owner in the Police Board’s situation would have approached this conundrum had the drama unfolded in the United States and then compare these responses to Scotland’s solutions. Under contemporary American law, the Police Board and its lawyer would have first explored two solutions grounded in basic common law doctrinal principles.

4.1 **Ex Ante Limits on the Content of Real Burdens**

In the United States today, a lawyer for a burdened land owner like the Police Board would initially consider challenging the police use restriction on the basis that it is void *ab initio* for failing to satisfy one of the essential requirements for validly constituting a restrictive covenant or equitable servitude, or what the *Restatement (Third) of Property: Servitudes* would simply label “a servitude.” Unfortunately for the burdened land owner (here the Police Board), the benefited party (Elderslie) could easily prove to an American court that all of the constitutive requirements for creation of a valid servitude were satisfied.

First, it is clear that the original parties, Elderslie and the Council, expressed their agreement to create the title condition in a document satisfying statutory writing requirements and expressly and unambiguously manifesting their intent to bind successive owners. In addition, the document was properly recorded in the

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40 See generally ERP & AKKERMANS, supra note 2 (discussing problem of regulating land burdens across Europe).

41 *RESTATEMENT*, supra note 34, §§ 1.1, 1.4.

42 Id. §§ 2.1, 2.2, 2.7. Scotland does not have a statute of frauds per se as in the United States, but the Requirements of Writing (Scotland) Act 1995 § 1(2)(a)(i) performs similar functions.
public records—here the General Register of Sasines.\textsuperscript{43} Satisfaction of these threshold writing and recording requirements would thus create actual or at least constructive notice to all future purchasers or acquirers of the affected land that a potentially indefinite interest in the land had been created by the original parties.\textsuperscript{44}

Next, the Police Board could show that \textit{horizontal privity} of estate existed between the original parties \textit{if} an American court was inclined to enforce this ancient and often confusing requirement.\textsuperscript{45} Horizontal privity could be found in this case because there was an actual transfer or conveyance of an interest in land between Elderslie and the Council, not just a transaction designed merely to create the title condition alone. Happily, for those American jurisdictions that elect to follow the lead of the \textit{Restatement (Third) of Property: Servitudes}, the whole maddening business of determining whether horizontal privity exists could be avoided altogether.\textsuperscript{46}

Finally, and probably most important, assuming that a title condition could be enforced by a person or entity that did not own a nearby or adjacent benefited property (\textit{i.e.}, assuming that the condition could be held “in gross”),\textsuperscript{47} the benefited party (Elderslie) could easily show that the \textit{burden} “touched and concerned” the servient parcel as it had the unmistakable effect of literally restricting the use of the triangular lot and thus directly limiting its economic value.\textsuperscript{48} Although this requirement has been

\textsuperscript{43} The General Register of Sasines is a public register maintained since 1617 in which all deeds transferring, creating or extinguishing rights to heritable property must be recorded to have effect and which is being progressively superseded by the Land Register of Scotland. \textsc{Reid, Law of Property}, \textit{supra} note 18 \S\S \textit{90-93}.

\textsuperscript{44} This requirement is either explicitly or implicitly stated in American decisions. See e.g., River Heights Associates Ltd. Partnership v. Batten, 591 S.E.2d 683, 689 (Va. 2004). It derives from \textit{Tulk v. Moxhay}, 2 Phi. 774, 778, 41 Eng. Rep. 1143, 1144 (Ch. 1848), where \textit{actual} notice was present.

\textsuperscript{45} For a thorough discussion of the various doctrinal positions on the horizontal privity requirement and why it matters very little any more since restrictive covenants can just as easily be enforced as equitable servitudes, see \textsc{Stoebuck & Whitman, \textit{supra} note 17}, \S\S \textit{8.18, 8.26}.

\textsuperscript{46} \textit{Restatement}, \textit{supra} note 34, \S 2.4, cmt (a)(b).

\textsuperscript{47} Under the new Restatement, this is authorized with respect to all servitudes, although some American courts have prohibited easement or covenant benefits from being held in gross. \textit{See Restatement}, \textit{supra} note 34, \S 2.6, cmt (a) and Rep. Note, at 108. The extent to which some American courts are still reluctant to recognize and enforce title conditions held in gross is a serious question, but one beyond the scope of this article.

\textsuperscript{48} \textit{See Stoebuck \& Whitman, \textit{supra} note 17, \S\S \textit{8.15} \& 8.24} (discussing the touch and concern requirement).
ridiculed by countless American commentators and rejected by the Restatement (Third) of Property: Servitudes.\(^{49}\) American courts still frequently go through the motions of examining whether a particular covenant touches and concerns the burdened land.\(^{50}\) Here, however, the direct limitation imposed on the Police Board’s land would have made short work for an American court applying this requirement in our case. Who could seriously contest that the title condition restricting the use of the parcel to “police purposes” seriously limited the use of the triangular plot and thus lessened its economic value?\(^{51}\)

In Scotland an equivalent line of inquiry based on *ex ante* requirements for constituting a real burden would have been available to the burdened landowner, but, just as in the United States, it, too, would have failed to free the property from the shackles of the old title condition. First, the actual *burden* here was certainly *praedial* in nature in that it regulated use of the servient estate.\(^{52}\) It is important to note that this crucial *praedial* requirement for the creation of a valid title condition is maintained in Scotland’s post-feudal environment by virtue of the Title Conditions (Scotland) Act 2003, legislation enacted by the Scottish Parliament that thoroughly updates its law of private land conditions.\(^{53}\)

\(^{49}\) *RESTATEMENT*, *supra* note 34, §§ 3.1, 3.2, 3.4-3.7 (suppressing “touch and concern” doctrine and replacing it with nakedly instrumental public policy content limits on creation of servitudes). *See also* Id., § 3.2 Rep’s Note, at 416 (cataloguing academic critiques of horizontal privity).

\(^{50}\) For an intriguing recent example of American courts’ continuing reliance on “touch and concern,” see Miller v. Associated Gulf Land Corp., 941 So.2d 982, 984-987 (Ala. Ct. Civ. App. 2005) (citing “Spencer’s Case” (5 Coke 16) and holding that a covenant whose benefit was personal and in gross and that restricted the use of land to residential purposes nevertheless satisfies the “touch and concern” test because it benefits other lands owed by the covenantee lying immediately adjacent to the burdened land). *See also* Susan French, *Can Covenants not to Sue, Covenants Against Competition and Spite Covenants Run with the Land?*, 38 REAL PROP. PROB. & TRUST J. 267 (2003) (analyzing cases applying the “touch and concern” test and the *Restatement* alternative).

\(^{51}\) *See* STOEBUCK & WHITMAN, *supra* note 17, § 8.15, at 478 (for common articulations of the touch and concern test). According to Stoebuck and Whitman, it is possible that the Restatement does not really reject the “touch and concern” requirement after all but embraces its principles by employing them in its definition of “appurtenant” benefits and burdens and by providing that only appurtenant benefits and burdens automatically run to subsequent owners and possessors of the benefited and burdened land. *Id.* at 48 (discussing *RESTATEMENT*, *supra* note 17, §§ 1.5, 4.5 and 5.2).

\(^{52}\) *See* REID, *LAW OF PROPERTY*, *supra* note 18, ¶ 391 (elaborating on the traditional praedial requirement for real burdens).

\(^{53}\) *TITLE CONDITIONS (SCOTLAND) ACT 2003* §§ 3(1)-(2).
Just as important, this real burden did not explicitly transgress any of the broad substantive policy limits on the creation of real burdens first established in Corporation of Tailors of Aberdeen v. Coutts, and that still remain a part of the modern, post-feudal law of real burdens today. These policy limits were designed, much like the broad, instrumental policy limits on servitudes proposed in the Restatement (Third) of Property: Servitudes, to eliminate conditions that would impede commerce, create monopolies, were unlawful or would accomplish some purpose not related to the nature of property ownership at all. In our case, although neither the litigants nor the tribunal ever explicitly examined the title condition through the lens of these ex ante substantive policy limits, we will see that concerns about the proper role that title conditions should play in a property system certainly animated later developments.

Perhaps the most difficult of the constitutive requirements for Elderslie to satisfy under Scottish common law would have been the requirement that the real burden produce some actual benefit to a dominant tenement, i.e., that it benefit the holder in a patrimonial or praedial sense, not in a purely personal capacity. This requirement is typically expressed in the long-standing Scottish common law rule that a proprietor seeking to enforce a real burden ex post must have an actual “praedial (or patrimonial) interest to enforce.” Historically, Scottish courts and jurists seem to have been uncertain whether feudal superiors like Elderslie were required, just like any other disponer or co-feuar would be, to show the existence of a praedial interest in land or other heritable property that would be benefited by the enforcement of a real burden or whether their mere superiority right (the remote possibility that the dominium utile of the burdened land might revert back to the superior if the vassal fails to pay the feuduty) was sufficient to establish an interest to enforce.

In our case, it is not altogether clear whether Elderslie owned any neighboring land or heritable property which might

54 (1840) 1 Rob. 296, 306-307; Reid, Law of Property, supra note 18, ¶ 391.
55 Title Conditions (Scotland) Act 2003 §§ 3(6)-(7).
56 Restatement, supra note 34, §§ 3.1., 3.4-3.7.
58 Reid, Law of Property, supra note 18, ¶ 391.
59 Id.
60 Id. ¶¶ 407-408. In some cases, though, Scottish courts have implied that such a “bare superiority” might be sufficient to meet the interest to enforce requirement. See e.g., Howard de Walden Estates, Ltd. v. Bowmaker Ltd., 1965 SC 163, at 181, 1965 S.L.T. 254, at 264.
arguably have provided it with a sufficient patrimonial or *praedial* interest to protect through enforcement. In any event, as we shall see, the Scottish court that eventually resolved this case did not explore this question directly. Yet it was deeply concerned about the nature of the property interest that Elderslie sought to have recognized. Although the Police Board thus perhaps could have terminated the title condition burdening its plot using Scottish common law rules regarding the constitution of a real burden, this was far from the end of the story.

### 4.2 *Ex Post* Challenges: Change in Circumstances and Interest to Enforce

Asserting non-compliance with *ex ante* rules concerning the creation of private land use restrictions is not the only means of terminating an old and potentially inefficient title condition. Most jurisdictions at least recognize in principle the need for some doctrine that can be invoked *ex post* by a landowner faced with an obsolete use restriction. In the United States today, a burdened property owner can thus argue that a real covenant or equitable servitude should be ignored because the surrounding circumstances have changed so radically since its creation that the covenant or servitude can no longer serve its original purpose.  

Although American courts often acknowledge this so called “changed conditions” doctrine in principle, they frequently decline to use it to invalidate a covenant or servitude even when there is evidence that changes in the surrounding neighborhood (the area outside the burdened and benefited parcels) have substantially decreased its amenity value to the benefited land owners. Indeed, only when

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61 See *Restatement, supra* note 34 §7.10 (endorsing the changed conditions doctrine in general and courts’ ability to award monetary damages in lieu of specific performance as an alternative method of terminating servitudes and covenants).

62 See e.g., City of Bowie v. MIE Properties, Inc., 922 A.2d 509, 530 (Md. 2007) (enforcing covenant restricting certain kinds of commercial activities in planned university affiliated science and technology research park despite university’s withdrawal from project and changes in surrounding neighborhood), Miller v. Associated Gulf Land Corp, 941 So.2d 982, 984 & 988 (Ala. Ct. Civ. App. 2005) (enforcing covenants prohibiting commercial activity even though development company holding enforcing rights had released neighboring properties from covenants and in spite of commercialization of surrounding area); River Heights Associates L.P., v. Batten, 591 S.E.2d 683, 689 (Va. 2004) (enforcing covenant prohibiting commercial development despite adoption of zoning ordinance prohibiting residential development on affected property, intensive commercialization of nearby property and expansion of adjacent two lane road into eight to ten lane highway); Tippecanoe Associates II, v. Kimco
there is unmistakable evidence of either widespread abandonment of the condition both inside and outside of the affected land area, or of widespread acquiescence to violations by the persons entitled to enforce the condition, will American courts typically dare to invalidate a land covenant under the changed conditions doctrine.63

Up until 1970 the Scottish law on changed conditions was surprisingly similar to what we find in the United States today. Scottish courts recognized the theoretical possibility that if surrounding circumstances had changed so dramatically since the creation of a real burden, the person with legal title to enforce the burden (be it a dominant estate owner or a feudal superior) might then lack a sufficient “interest to enforce.”64 Yet Scottish courts rarely, if ever, used this doctrine to invalidate a real burden for two reasons. First, they presumed that a feudal superior always had an interest to enforce and thus put the burden of proof (a particularly

Lafayette 671, Inc., 811 N.E.2d 438, 447-448 (Ind. Ct. App. 2004) (enforcing anti-competition covenant in commercial lease prohibiting use of part of shopping center for grocery store even though benefited lessee no longer operated a grocery store in the shopping center); Country Club District Homes Ass’n v. Country Club Christian Church, 118 S.W.2d 185, 194-195 (Mo. Ct. App. 2003) (enforcing 90 year old covenants restricting anything but use of land for residential purposes to block church from building a parking lot despite introduction of zoning regulations into area, transformation of street in front of church from dirt road into six-lane major thoroughfare, church members’ increased reliance on cars, and prospect that construction of parking lot would alleviate hazardous and annoying traffic patterns).

63 See e.g., Chesterfield Meadows Shopping Center Associates, L.P. v. Smith, 568 S.E.2d 676, 680 (Va. 2002) (invalidating covenant restricting use of one piece of property to protect historic home located on other property across the road when historic home was moved to another location and surrounding area had become thriving commercial district); Medaris v. Trustees of Meyers Park Baptist Church, 558 S.E.2d 199, 203-306 (N.C. Ct. App. 2001) (complete transformation of affected area destroyed uniformity of plan imposing residential use restriction and possibility of equal enforcement); El Di, Inc. v. Town of Bethany Beach, A.2d 1066 (Del. 1984) (invalidating restrictive covenants prohibiting sale of alcohol and restricting constructions to residential cottages in old beach front community where alcohol was readily available nearby, “brown-bagging” was permitted, and affected area had become heavily commercial); Robinson v. Donnell, 374 So.2d 691 (La. Ct. App. 1979) (finding abandonment of residential use restriction for large tract that could not be subdivided further, could not receive municipal water supply and which had already been largely converted to a lake used for motor boat testing); Muilenburg v. Blevins, 87 S.E.2d 493 (N.C. 1955) (declaring residential use restriction void because subject lot was surrounded by shopping areas, supermarkets, restaurants, offices, and gas stations); Starkey v. Gardner, 138 S.E. 408 (N.C. 1927) (voiding commercial use prohibition because more than 80% of lots in affected subdivision had waived restrictions by building businesses).

64 Reid, LAW OF PROPERTY, supra note 18, ¶¶ 408, 430.
high burden in fact) on the burdened property owner to establish its complete lack of utility arising from a change in circumstances.\textsuperscript{65} Second, as late as 1965, the Court of Session displayed overt hostility to the prospect of upsetting prior contractual commitments expressed through real burdens, commenting in one case that “[o]ur law has never looked kindly on attempts to evade contractual obligations solemnly made.”\textsuperscript{66} What we find is that under Scottish common law, at least prior to 1970, a burdened land owner’s \textit{ex post} tools for challenging and invalidating a potentially obsolete title condition were, just as in the United States, more theoretical than real.

\section*{4.3 Let the Parties Bargain}

In the United States, there is one more option for a burdened property owner like the Police Board facing a title condition or covenant that restricts its ability to change the use of the land for purposes of redevelopment. This option, which would be endorsed by most American law and economics scholars, can be summed up in just four words—let the parties bargain!\textsuperscript{67} Indeed, in the United States we often say let the parties negotiate until they

\textsuperscript{65} Reid, \textit{LAW OF PROPERTY}, \textit{supra} note 18, ¶ 408. Professor Reid explains that while it is undoubtedly true that a feudal superior’s interest to enforce was presumed, thus placing the onus on a vassal seeking a release of the condition to demonstrate a change in circumstances, it would be incorrect to assume that the presumption was irrefutable or that a vassal could not claim that an interest to enforce was not present at the outset. Id. at 323. The crucial cases in the development of these rules on a feudal superior’s right to enforce are \textit{Earl of Zetland v. Hilslop} (1882) 9 R (HL) 40, 44-45 (holding that an interest to enforce must be patrimonial but suggesting that the title and interest do not necessarily have to coincide), and \textit{Menzies v. Caledonian Canal Comm’s} (1900) 2 F 953, 961-62, 8 S.L.T. 87 (suggesting that the amount of interest a superior must have to enforce is quite modest and that a “heavy onus” is placed on the burdened proprietor seeking to escape a restriction).


\textsuperscript{67} The iconic citation for the American law and economics scholar would be R.H. Coase, \textit{The Problem of Social Cost}, 3 J. L \& ECON. 1 (1960). Of course, Coase’s point was slightly different—not that bargaining is always better than \textit{ex ante} legislation of property rights or \textit{ex post} judicial allocation of property rights—but that in a world of zero transaction costs it might not matter in a typical dispute between two adjacent property owners which one is given the initial entitlement to interfere with the other’s use of his property because the property owners can always negotiate to maximize the value of production on their respective properties. Id. at 1-3, 6-8, 13-19. Coase, however, never asserted that a world of zero transaction costs was a realistic assumption. Id. at 15; R.H. COASE, THE FIRM, THE MARKET AND THE LAW 14-15 (1988).
agree to a price high enough to induce the covenant holder (Elderslie) to release the covenant and not so high that it will outweigh all the gain the burdened property owner (the Police Board) expects to obtain if it can change the property’s use.68 Two key assumptions, however, underlie this response: (1) transaction costs must be minimal; and (2) the burdened property must have owner enough money or other resources to enter the bargaining process in the first place. If transaction costs are high or a burdened property owner lacks enough resources to initiate bargaining, the gains that could theoretically be achieved by bargaining might never be attained.69

Back in Renfrewshire our parties started down this Coasian road and began to bargain. The Police Board approached Elderslie’s factors to ask for a minute of waiver to release the condition and permit residential, non-police use of the property, except for the retained police office. Elderslie’s factors responded that their client would be willing to grant such a waiver for the sum of £10,000, plus all legal and negotiating expenses. The Police Board countered with an offer of £1,000 plus expenses, noting that it was only proposing to transfer a single house and garage and that the police office would remain. This bargaining went on for a couple of months, but an agreement could not be reached, perhaps because the transaction costs had grown too great, or perhaps because Elderslie’s price was just too high. In late 2000, the Police Board, apparently fed up with its feudal superior’s demands, turned to the judicial process and applied to the Lands Tribunal of Scotland for a discharge of the entire real burden so that it could sell the whole property for residential use, now having decided it no longer even needed to retain a police office.70

The fact that the bargaining failed here is significant because Scottish land owners have frequently been able to obtain minutes of waiver from benefited property owners in situations like this. According to one 1995 study, by far the most common method of varying or discharging a real burden in Scotland was for the benefited proprietor or superior to grant a formal minute of waiver that could be registered in the Land Register or the Register

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68 For a recent example of American property law scholarship’s faith in bargaining as the key tool to release future generations of property owners from the constraints of land allocation arrangements made by prior owners, see Gerald Korngold, Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations, 56 AM. L. REV. 1525, 1545, 1553 (2007).
69 See ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT 177-181 (2004) (offering a cogent critique of the usefulness and limits of the Coase Theorem).
70 Strathclyde, at 2-3.
of Sasines or for the benefited proprietor to offer a more informal “letter of comfort.” By contrast, in only three percent of cases in which variation or discharge was sought did a burdened land owner actually appeal to the Lands Tribunal for a variation or discharge—the route ultimately chosen by the Police Board in our case. Yet the very possibility that a landowner could seek a judicial cleansing of an obsolete or annoying real burden is extremely significant, particularly if that tribunal is predisposed to grant a variation or discharge request. To understand the impact of this judicial variation and discharge power, we now have to turn to the statutory landscape.

5. The Police Board’s Trump Card—The Conveyancing and Feudal Reform (Scotland) Act 1970

The statutory basis of the Police Board’s right to seek variation or discharge before the Lands Tribunal is found in the Conveyancing and Feudal Reform (Scotland) Act 1970 (the 1970 Act), which was modeled on section 84 of England and Wales’ Law of Property Act 1925, which itself was partially expanded by amendments in 1969 and whose antecedents date back to nineteenth century land registration legislation. The 1970 Act revolutionized the Scottish law of private land use regulation by making it relatively easy to vary or discharge a whole host of “land

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72 Id.

obligations.” After the 1970 Act, a burdened proprietor only needed to convince the Lands Tribunal a land obligation (a) had become “unreasonable or inappropriate” due to some change in the character of the burdened land or the surrounding neighborhood, (b) was “unduly burdensome” compared with the benefit produced by compliance with its terms, or (c) would “impede some reasonable use” of the burdened land. 74 Significantly, the 1970 Act also authorized the Lands Tribunal to condition an order of variation or discharge on a payment by the burdened owner of a sum to the benefited proprietor (i) to compensate the latter “for any substantial loss or disadvantage” suffered as a consequence of the variation or discharge, or (ii) to make up for any reduction in consideration paid to the benefited proprietor at the time the condition was imposed. 75

In effect, the 1970 Act encouraged the Lands Tribunal to use a “liability rule” approach to solve the problem of obsolete title conditions. 76 Rather than face a binary choice between enforcing an old condition or declaring it invalid, the Lands Tribunal might recognize its legal validity but allow the burdened landowner to buy out the party entitled to enforce the condition at a judicially determined price. 77 If the title condition still had some amenity value left or if termination or modification would undermine the negotiated marketplace expectations of the benefited proprietor, yet the Lands Tribunal still believed termination or alteration could produce a substantial net gain in social utility, a monetary award could be given to the benefited proprietor to compensate for losses resulting from variation or discharge order. In effect, the 1970 Act gave the Lands Tribunal precisely the kind of remedial flexibility to deal with obsolete or burdensome title conditions that the American Law Institute tentatively recommended to U.S. courts in sections 7.10 and 8.3 of the Restatement (Third) of Property: Servitudes, 78 and which U.S. courts only occasionally exercise. 79

74 Conveyancing and Feudal Reform (Scotland) Act 1970 (ch. 35) s. 1(3)(a)-(c).
75 Id. s. 1(4)(i)-(ii). For even more detailed discussion of the Lands Tribunal’s experience applying the 1970 Act, see Sir Crispin Agnew of Lochnaw, Variation and Discharge of Land Obligations (1999).
77 Id.
78 Restatement, supra note 34, §7.10(1)(“Compensation for resulting harm to the beneficiaries may be awarded as a condition of modifying or terminating the servitude” under the changed conditions doctrine.), §8.3(1) (“A servitude may be enforced by any appropriate remedy or combination of remedies, [including] compensatory damages . . .”). The official comments to section 8.3 sound a note of caution, however, warning that because it is often
It seems, then, that the Police Board had the trump card up its sleeve all along.

Today the remarkable *ex post* reordering power of the Lands Tribunal of Scotland has been clarified and strengthened by the Title Conditions (Scotland) Act 2003. After considering an expanded list of relevant factors, the Lands Tribunal can still vary or discharge any “title condition” (including a real burden, a servitude, or a condition in a long lease) upon application of a burdened property owner. But now the factors that the Lands Tribunal can consider have been expanded to include:

(a) any change in circumstances since creation of the title condition (whether to the benefited or burdened property or the surrounding neighborhood);
(b) the benefit conferred on the benefited property or the public;
(c) whether the condition unreasonably impedes enjoyment of the burdened property;
(d) if the condition imposes an affirmative obligation to do something, how practicable and costly compliance is;
(e) the length of time since the condition’s creation;
(f) the purpose of the condition;
(g) actual or apparent consent of planning or regulatory authorities to the proposed use prevented by the condition; and
(h) the willingness of the benefited property owner to pay compensation.81

“difficult to monetize” the value of a servitude and may be “impossible to replace” without a change of location,” servitudes are “appropriately protected by property rules rather than liability rules.” Id. §8.3 cmt. b, at 495. “An award of damages instead of injunctive relief,” the comments continue “will seldom be appropriate so long as the servitude continues to serve the purpose contemplated at its creation.” Id. at 496. Further on in the comments to section 8.3, though, the drafters endorse once again a more unbridled utilitarian, cost-benefit balancing process for deciding whether coercive injunctive relief or monetary damages is the most appropriate remedy. Id. cmt. h. at 505.

For a classic, pre-*Restatement (Third)* example of this kind of utilitarian balancing that produced a monetary damage award, rather than injunctive relief, in the case of servitude that was not totally obsolete but whose enforcement would have prevented a significant net economic benefit to local community, see Blakely v. Gorin, 313 N.E.2d 903 (Mass. 1974). In *Blakely*, the court could rely upon a state statute that specifically authorizes monetary damages in lieu of injunctive relief as a remedy for obsolete covenants and requires a multi-factored utilitarian analysis. See MASS. GEN. LAWS ch.184, § 30.

80 TITLE CONDITIONS (SCOTLAND) ACT 2003 ss. 90, 98, 100.
81 Id. s. 100(a)-(h).
In addition, the same liability rule compensation principles articulated under the 1970 Act continue to apply if the Lands Tribunal grants an application for a variation or discharge. In sum, the Title Conditions (Scotland) Act 2003 entrenches and expands the radical transformation that the 1970 Act brought to the Scottish law of real burdens.

Scotland’s decision to sanction such a bold changed conditions doctrine and to endorse a liability rule remedial approach has, not surprisingly, changed the legal landscape in significant ways. Recent reports suggest that the Land Tribunal’s variation and discharge jurisdiction has become a powerful tool for terminating obsolete real burdens. According to one sample, in more than half the cases in which a burdened owner applied for a discharge or variation, the benefited property owner did not even bother to oppose the application or eventually withdrew an initial opposition. Even when benefited proprietors oppose applications, recent studies reveal that the Lands Tribunal wields its discharge and variation power quite liberally, resulting in success rates for contested variation and discharge applications approaching 90%. The Land Tribunal’s bias in favor of variation and discharge now appears so strong that it is conceivable that some Scottish property owners might lose confidence in real burdens as reliable land use control mechanisms capable of binding future property owners unless the burdens protect the most easily discernible amenity interests.

6. Elderslie Estate’s Trump Card—The European Convention on Human Rights

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82 Id. s. 90(6)-(7).
83 See GEORGE GRETTON, KENNETH REID, & ALAN BARR, EDINBURGH LAW SCHOOL TERCENTENARY SEMINAR: SOME CURRENT ISSUES IN PROPERTY LAW 19 (2007) (reporting that in anywhere between 50% to 75% of variation and discharge cases resolved by the Lands Tribunal applications are unopposed or an initial opposition is withdrawn).
84 According to a 1997 survey, survey applications in opposed cases achieved a 70% success rate. This success rate rose to 89% under the Title Conditions Act. Id. at 20
85 In one of the few recent decisions in which the Lands Tribunal has denied a discharge application, benefited neighbors were threatened with losing a scenic view of the Firth of Clyde had the burdened property owner been able to void the real burden and build a new house. Faieley v. Clark, 2006 GWD 28-626, discussed in GRETTON, supra note 83 at 20-29, available at http://www.lands-tribunal-scotland.org.uk/title.html.
Perhaps because the Police Board’s application to vary and discharge Elderslie’s title condition was such an easy case to make in light of the Police Board’s changed staffing needs, Elderslie did not even bother to contest the merits of the Police Board’s discharge application. Rather it focused its defense on a claim for compensation under the 1970 Act. More significantly still, Elderslie asserted that it was entitled to compensation, not for the putative difference between the value of the land burdened with the condition at the time of the original feu contract and the land freed of the condition (a differential that it could not substantiate in any event), but for the “loss or disadvantage suffered” as a consequence of the discharge of the real burden. In other words, it sought compensation for the loss of “the right to extract money” for granting a release of the burden, that is, for the loss of its veto power associated with its enforcement rights in the real burden.\(^{86}\)

Unfortunately for Elderslie, however, Scottish case law was not particularly favorable to this claim. Soon after adoption of the 1970 Act, in a series of seminal variation and discharge cases, the Scottish Lands Tribunal rejected claims by feudal superiors and other benefited proprietors to compensation either for a share of the “development value” released by a discharge or variation award or for the loss of the superior or benefited proprietor’s veto power.\(^{87}\) In these cases, the Lands Tribunal reasoned that the statutory reforms giving it the power to vary or discharge land obligations were never intended to allow compensation for the loss of this kind of ransom power. Rather, they were intended to effectuate a more radical transformation of Scotts law, leaving obstructionist superiors or proprietors able to claim compensation only for loss of some tangible amenity value connected with an actual dominant tenement—i.e., the loss of a view, the loss of tranquility, the loss of some protection from an actual nuisance-like activity.\(^{88}\) Although the reasoning of these Lands Tribunal

\(^{86}\) Strathclyde, at 5. It was relying on section 1(4)(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970.


\(^{88}\) In Robertson, the Lands Tribunal distinguished the English case of Re SJC Construction Company Ltd.’s Application (1974) 28 P. & C.R. 200, 205-207, in which the English Lands Tribunal had awarded monetary damages to the Borough of Sutton equal to one half of the released development value of the burdened land, but only because the Borough demonstrated that it owned adjacent land which suffered a loss of amenity value—principally resulting from a loss of view—roughly equal to this amount as a result of the modification of the restrictive covenant. In Robertson, by contrast, the Lands Tribunal noted
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decisions has occasionally been questioned, in particular by J.M. Halliday, the author of the 1966 report that led to adoption of the 1970 Act, on the ground that they misunderstood Scottish feudal theory.\textsuperscript{89} their results and principles have not been seriously challenged prior to \textit{Strathclyde Joint Police Board}. Further, an examination of some of the parliamentary committee debates leading to the adoption of the 1970 Act confirms that the Lands Tribunal may well have correctly gleaned Parliament’s intent at least—to strip feudal superiors of any compensation for the loss of the right to condition a minute of waiver upon a ransom payment.\textsuperscript{90}

that the feudal superiors did not own any land in the vicinity, were unconcerned with preserving the neighborhood, disclaimed any amenity interest and were clear that their only interest was “in obtaining money in return for selling the superiority or granting a minute of waiver.” Robertson, 1977 S.LT. at 13. The tribunal in \textit{Robertson} also found support for its holding in Lord Denning’s opinion for the Court of Appeal in \textit{SJC Construction Company Ltd v. London Borough of Sutton} (1975) 29 P. & C.R. 322, at 326, in which he approved of the Scottish Lands Tribunal’s earlier decisions rejecting compensation under the 1970 Act for loss of the ability to extract a ransom payment and he suggested compensation should be limited to cases where there is “injury to the amenities or obstruction of view, or increase in noise, or anything of that kind.”

\textsuperscript{89} \textit{JOHN M. HALLIDAY, THE CONVEYANCING AND FEUDAL REFORM (SCOTLAND) ACT 1970}, 41 (1977). Halliday assumes that if a proposed development can only be carried out by contravening existing feudal title conditions, both the superior and the feuar have valuable interests: “the superior because a waiver will be required and the feuar because the potential development may not be realized if he elects to continue the existing permitted use.” Id. Halliday claims the reasoning in \textit{Robertson} was wrong because if Parliament really intended to expropriate this “valuable right” from superiors, one “based on contract and widely accepted in feudal theory and in daily practice,” the legislation would have provided so “in plain language.” Id. In the end, Halliday accepts the results in \textit{Robertson} and \textit{McVey}, claiming only that a simpler rationale would have been to say that at the time of the 1970 Act’s adoption a land obligation was only enforceable if there was a “praedial interest to enforce” and that it was at least doubtful whether “a claim to extract money for a waiver,” absent some amenity value to protect, ever qualified as such an interest to enforce. Id. W.M. Gordon has also expressed skepticism that Parliament intended to go quite so far in eradicating feudal superior’s rights at least until the feudal system itself was entirely abolished. \textit{GORDON, supra} note 39, para 25-34 at 797-98.

As these decisions weighed so heavily against Elderslie’s compensation claim, it creatively tried a new tack. It urged the Lands Tribunal to re-examine a superior’s right to claim compensation for loss of the right to extract money for a minute of waiver by suggesting the tribunal take a “fresh look” in light of the Human Rights Act 1998, a statute which mandates that all primary and subordinate legislation in the U.K. be read and given effect in a way that is compatible with the European Convention on Human Rights (the Convention), and particularly in this case, with Protocol 1, Article 1 (P1-1) of the Convention.\footnote{Strathclyde, at 5.} In a sense, Elderslie was making a claim that the Convention could have “horizontal effect” in a dispute between private parties. Although there is considerable controversy over just how wide an application the Convention can have in a private dispute like this in Scotland and the rest of the U.K., Elderslie hoped that a “fresh look” at its compensation claim in light of the Convention’s values might produce a different outcome.\footnote{See Stevens, Property Law and Human Rights, supra note 6, at 295-97 (discussing controversy over “horizontal effect”)}

The remarkably broad and deliberately vague language of P1-1 is well known.\footnote{The reasons for the intentionally cryptic nature of the references in the First Protocol to the problem of compensation are detailed in Tom Allen, Compensation for Property under the European Convention on Human Rights, 28 MICH. J. INT’L L. 287, 292-92 (2007).} It provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.\footnote{Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262.}
Elderslie’s argument under the Convention had two prongs. First, it contended that its right to extract money for a waiver of the 1942 police purposes condition, a condition which it claimed to be legally entitled to enforce, was itself a “possession” under the first paragraph of P1-1. Second, although it acknowledged that there was undeniably some “general interest” which might justify the tribunal in taking away this “possession,” Elderslie maintained that this “possession” could not be taken away without awarding it compensation under the “fair balance” test articulated by the European Court of Human Rights (the European Court). In short, Elderslie argued that the Lands Tribunal’s prior cases had never even attempted to balance the competing interests in a case like this and thus the Lands Tribunal could not declare that its compensation rules were in compliance with P1-1 of the Convention, a basic requirement of section 3(1) of the Human Rights Act 1998.

7. The Result – Elderslie Estates Only Gets £1000

And what did the Lands Tribunal do when asked to take this fresh look? Initially, it told Elderslie that it did not feel compelled to “take an entirely fresh approach” to the interpretation of the compensation provisions of the 1970 Act. Nonetheless, it did take a serious look. And after it did so, the tribunal held that its well established approach to compensation for discharging or varying real burdens was entirely compatible with P1-1. Consequently, Elderslie was not entitled to any compensation for loss of its right to extract money in exchange for a waiver of the condition.

There was one curious quirk, however, to the ultimate disposition of the case. In the course of its discharge application the Police Board had offered to pay £1000 as its assessment of the amount owed Elderslie under section 1(4)(ii) of the 1970 Act as compensation for any reduction in the 1942 sales price attributable to the imposition of the title condition on the burdened land. Although Elderslie might not have been able to support (and apparently did not even claim) this element of compensation, the

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95 Strathclyde, at 5
96 Strathclyde, at 5.
97 Strathclyde, at 4-5.
98 Strathclyde, at 6.
99 Strathclyde, at 12.
100 Strathclyde, at 5.
Lands Tribunal, swayed by the Police Board’s offer, in the end ordered this amount to be paid to Elderslie.\textsuperscript{101}

8. The Lands Tribunal’s Reasoning

But how did the Lands Tribunal reach its principal conclusion? The tribunal’s reasoning can be divided into four main branches. The remainder of this Article will examine this reasoning and what it reveals about Scottish conceptions of non-possessory property rights in land and how they differ from those in the United States today.

8.1 A superior has a “possession,” but not a right to extract money; only a right to control use.

The first challenge for the Lands Tribunal was to characterize Elderslie’s asserted right to enforce the title condition. Was it a “possession” within the meaning of P1-1, and, if so, what kind of possession? The tribunal’s analysis here is complicated, even convoluted. It has the quality of a false start. Ultimately the tribunal concedes, though, following the Police Board’s own admission, that Elderslie’s right to enforce the condition is a “possession” under P1-1 and is thus entitled to some kind of human rights protection. Yet it also refuses to accept Elderslie’s characterization of the nature of the possession as being a “right to extract money.” Instead, it describes the nature of Elderslie’s possession as a mere “right to control the use” of the subject property.\textsuperscript{102} It turns out that this seemingly formalistic decoupling of the land use control right created by the title condition from its practical economic value to Elderslie is a central theme of the Tribunal’s decision.

The tribunal here is caught between two divergent impulses. On one hand, it is perceptive enough to realize that although Elderslie’s right “could be described as the right to control use of the \textit{dominium utile} by enforcement of the real burden,” this same “right to control had a \textit{value[,]} and the reality behind any formal legal description was that the superior possesses \textit{a right to extract money.”\textsuperscript{103} Here the tribunal seems to be following the advice of the European Court in \textit{Sporrong and Lonnroth v. Sweden,}\textsuperscript{104} that is, to “look behind the appearances and

\textsuperscript{101} Strathclyde, at 12.
\textsuperscript{102} Strathclyde, at 7-8.
\textsuperscript{103} Strathclyde, at 7 (emphasis added).
investigate the realities of the situation.” One logical consequence of this realist line of reasoning would be to recognize that a discharge of the title condition would deprive Elderslie of a valuable possession.

On the other hand, the tribunal cannot completely succumb to this kind of legal realism. Thus it insists that Elderslie’s property interest (its “possession”) cannot properly be characterized as a right to extract money—as a mere pretext for bargaining. For one thing, the tribunal notes, the right could not be enforced “by way of legal process,” in the way, for example, a covenant or obligation to pay rent might be enforced. “No money is due to [Elderslie],” the tribunal insists, and it has “no right to payment,” unless the parties reach an agreement for a minute of waiver. The relevance of this observation is questionable, however, because in the absence of the 1970 Act and its liberal enforcement by the Lands Tribunal, Elderslie certainly could have enforced its title condition through a suit for injunctive relief or damages if the burdened proprietor, the Police Board, violated the condition. In other words, Elderslie could have enforced the condition as long as it established “an interest to enforce,” a requirement that was presumed in the case of feudal superiors and rarely challenged successfully before the passage of the 1970 Act. It appears that the Lands Tribunal is torn between its realistic perception of the actual marketplace value of the real burden to Elderslie and its reluctance to legitimize this value.

Immediately after insisting upon this formalistic characterization of Elderslie’s “possession,” the tribunal once again acknowledges:

. . . in the absence of our powers under the Act, the superior’s right of control would have a cash value. It is a right with some similarity to a right of ownership of a “ransom” strip, a piece of land which has no use value in the hands of the owner but is needed for a neighboring development.

Here the tribunal is back in the world of legal realism once again and seems to be employing an economic conception of property rights. This seemingly drunken, almost schizophrenic reasoning reveals the pressure this simple case and Elderslie’s appeal to the protections of the Convention produced for the tribunal.

105 Strathclyde, at 7.
106 See supra notes 64 – 66 and accompanying text.
107 Strathclyde, at 7-8.
One other approach to the problem of defining the relevant “possession” was also possible in this case, but it still might not have resolved the fundamental conflict. As one Scottish scholar has suggested, the tribunal could have characterized Elderslie’s quasi-reversionary interest (the “dominium directum”) as the relevant possession. In theory this “bolder approach” might have eased the tribunal’s resolution of Elderslie’s compensation claim by allowing it to declare that it was only “controlling” that particular possession, rather than “depriving” Elderslie of it, thus avoiding the question of compensation entirely. The underlying assumption in this approach is that the superior’s dominium directum would continue to exist in some meaningful manner—most likely through Elderslie’s insistence on the right to collect some minimal feuduty even after the title condition was thoroughly breached. Even with this “bolder approach,” though, the tribunal would still have needed to confront the central issue of how much respect to give this particular possession, grounded as it might be in formalistic feudal theories of property rights, when it eventually confronted the general issues of proportionality and fair balance.

In the end, the tribunal appears to give Elderslie the benefit of the doubt by assuming that its discharge of Elderslie’s real burden would lead to a deprivation of possession of some sort. Yet this branch of the opinion, with its oscillating movement from realism to formalism and back to realism again, is crucial even though it does not decide the case. The tribunal’s analogizing of Elderslie’s enforcement right to a “ransom strip” is particularly telling. It foreshadows the tribunal’s ultimate conceptualization of non-possessory property rights in terms of neighborliness—in terms of a social understanding of property, rather than a merely legal or economic one focused on the property owner’s autonomy and freedom from state coercion.

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108 Steven, Property Law and Human Rights, supra note 6, at 303.
109 Id. See infra note 112 and accompanying text on different compensation standards for control and deprivation.
110 Strathclyde, at 8.
111 Allen describes a social model of property in the context of just compensation under the European Convention on Human Rights as recognizing “that the allocation of property rights to one person necessarily restricts the choice of another,” rather than focusing on property “as an autonomous zone, free from state interference.” Allen, supra note 93, at 315. Put differently, a social model views “the claims of individuals and the collective” as “grounded in social life” and that property law thus mediates between the needs of individuals to control and have access to resources and the state to “ensure that the distribution and use of resources reflect social goals relating to, for example,
8.2 A Fair Balance Struck: Reasonableness, Good Faith the Proprietarian Vision of Scottish Property Law

The second main branch of the tribunal’s opinion focuses squarely on the primary line of analysis that has been framed by the European Court’s jurisprudence interpreting P1-1. Assuming the proposed deprivation of Elderslie’s possessions could be justified in “the public interest” under P1-1, the key question for the tribunal became whether that deprivation strikes a “fair balance” between the “demands of the general interest” and “the protection of the individual’s fundamental rights,” whether there is a “reasonable relationship of proportionality” between the “means employed and the aim sought to be realized by any measure depriving a person of his possessions.” As Thomas Allen has put it succinctly, the “real issue” in the European Court’s case law applying P1-1 “is whether the interference [with property rights] strikes a fair balance between community and individual interests.” This search for a “fair balance,” is, of course, inherent in many nations’ jurisprudence that regulates whether a community is singling out an individual or minority of the population to bear a personal burden for the benefit of the community at large.

A few corollary principles of European Court jurisprudence flow from this concept of a fair balance.. P1-1 generally requires that a property owner receive some compensation reasonably related to the value of the property whenever a deprivation has occurred to avoid imposing a disproportionate or unfair burden on the afflicted property holder. Thus a total lack of compensation is normally considered a violation of the Convention. The amount of reasonable compensation owed for a deprivation, however, is elastic. In some cases compensation might fall below the “full market value” of the property taken, especially when the deprivation is motivated by “legitimate objectives of public interest”—for instance “economic reform” or “measures designed

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justice, equality, dignity, and economic growth that is sustainable and environmentally sound.” Id.

112 See generally Allen, supra note 93, at 294-305.
115 Allen, supra note 93, at 295.
117 Pressos, 21 E.H.R.R at 303, para. 38; James, 8 E.H.R.R. at 147, para. 54.
to achieve greater social justice.”¹¹⁸ When the state or its courts merely exercise the power to “control” a possession under the second paragraph of P1-1, rather than to “deprive” a person of a property interest, some European Commission on Human Rights decisions suggest that compensation is only required in exceptional cases—when regulation has “severe economic consequences to the detriment of the property owner.”¹¹⁹

Finally, relying in part on the United States Supreme Court’s decision in *Hawaii Housing Authority v. Midkiff*,¹²⁰ the European Court has held that there is no reason that a compulsory transfer of property from one private individual to another private individual cannot be in the public interest and thus would not satisfy the fair balance test under P1-1, as long as the transfer is pursued for the purpose of enhancing “social justice.”¹²¹ Although “a deprivation of property for no reason other than to confer a private benefit on a private party” would *not* be “in the public interest” and thus would fail the fair balance test, the European Court has been clear that P1-1 does not require that the transferred property “be put into use for the general public or that the community generally, or even a substantial portion of it, should directly benefit from the taking.”¹²² The similarity of this reasoning to the deferential approach of the United States Supreme Court’s in *Kelo v. City of New London*,¹²³ in which it held that governmental bodies can condemn private property and transfer it to another private owner as long as they can demonstrate a plan to achieve some public purpose, is obvious.

In *Strathclyde Joint Police Board*, the Lands Tribunal was undoubtedly aware of all of these principles. Yet its opinion reduces them to a single lesson—the importance of taking a “broad approach” to the question of compensation.¹²⁴ The tribunal tries to signal what “a broad approach” means by describing the facts of *Van Marle v. The Netherlands*.¹²⁵ Strangely, though, in *Van Marle* the amount of compensation was not the issue before the European Court. Rather, the court’s focus there was on whether a state’s

¹¹⁸ James, 8 E.H.R.R. at 147, para 54.
¹²¹ James, 8 E.H.R.R. at 140-141, paras 40-41.
¹²² Id.
¹²⁴ Strathclyde, at 8-9.
interference with the claimants’ possessions—their status as certified accountants—was justified in the first place, an issue that was never really in dispute in our case, which dealt with a horizontal relationship between private parties.

When the Lands Tribunal finally reexamines the 1970 Act in light of this “broad approach,” it finds that what the Act really does is give it broad, discretionary power to grant its consent to a proposed reasonable use of affected land in the face of an unreasonable withholding of consent by feudal superiors or other proprietors. In effect, the tribunal is using the 1970 Act and its own post-1970 case law (in particular McVey and Robertson) to imply a kind of external duty of good faith on holders of non-possessory property rights. The main idea here seems to be that when the Lands Tribunal applies the criteria of the 1970 Act and determines that a superior or benefited proprietor has unreasonably withheld its consent to a request for a waiver of a title condition, this determination of unreasonableness itself guarantees that a fair balance has been struck. In a sense, the tribunal is setting itself up as an arbiter of the exercise of good faith in the context of property rights.

The tribunal’s meaning becomes even clearer when, returning to the basic reasonableness inquiry presented under the 1970 Act and its own case law, it and explains why there was nothing reasonable here about Elderslie’s attempt to withhold consent for the Police Board’s proposed change of use of the burdened land:

There was no suggestion that the superiors had any interest to prevent use of the subjects for a purpose other than policing. In short,

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126 Van Marle concerned the question of whether a law requiring practicing accountants to register as “certified accountants” infringed their right to peaceful enjoyment of their possessions under P1-1. The court held that the accountants right to practice their profession was equivalent to a private property right under P1-1 and that the state’s refusal to register the applicants as certified accountants was an interference with that right. The court nevertheless found that the interference was justified in the name of assuring the public of the professional competence of accountants and that a “fair balance between means and ends” had been achieved by providing for transitional measures by which unqualified accountants could gain entry to the new profession. Van Marle v. the Netherlands (1986) 8 E.H.R.R. 483, 490-491, at paras 39-44.

127 Strathclyde, at 9.

they had a right to control use but no apparent interest in doing so.\textsuperscript{129}

This passage harkens back to a key theme of Scottish property law, one that I identified in a comparative study of the Louisiana and Scottish law of servitude relocation.\textsuperscript{130} The idea is relatively simple.

Property, for much of the modern history of Scottish law dating back to the Institutional writers of the late seventeenth, eighteenth and early nineteenth centuries (Stair, Mackenzie, Bankton, Erskine, Hume and Bell),\textsuperscript{131} is not conceived exclusively as a means of protecting things of economic value alone. Rather, property is also understood as a means of protecting a proper social order. Property, in other words, is as much about what American legal historian and property theorist Gregory Alexander would call “propriety,” as it is about “commodity.”\textsuperscript{132} As Alexander explains, this particular vision, which is traceable to Aristotle and was deeply enriched during the eighteenth century Scottish Enlightenment,\textsuperscript{133} sees property as “the material foundation for creating and maintaining the proper social order, the private basis for the public good.”\textsuperscript{134} The “core purpose of property” in this proprietor vision “is not to satisfy individual preferences or to increase wealth but to fulfill some prior normative vision of how society and polity that governs it should be structured.”\textsuperscript{135}

In \textit{Strathclyde Joint Police Board}, we can detect this proprietor vision in the Lands Tribunal’s return to its concern with “ransom value” at the heart of its primary attempt to apply the European Convention on Human Rights to Elderslie’s compensation claim. Here the tribunal digresses at length about how negotiations typically unfolded before adoption of the 1970 Act and how these negotiations could be characterized as proceeding on a “ransom basis.” Although the tribunal notes that the term “is not necessarily used in a pejorative sense,” there is an unmistakable moral judgment underling the court’s reasoning. Observe another key passage from the opinion:

\textsuperscript{129} Strathclyde, at 10.
\textsuperscript{132} GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY 1-2 (1997).
\textsuperscript{133} Id. at 60-66.
\textsuperscript{134} Id. at 2.
\textsuperscript{135} Id.
It is plain that an important aim of the [1970] Act was to allow owners of property to use their property without being forced into ransom negotiations in circumstances where the obligation no longer had a valid purpose.\textsuperscript{136}

The Lands Tribunal clearly views itself and the 1970 Act as safeguards of a particular conception of property—one that prevents feudal superiors and others from turning title conditions into commodities that can be exchanged for “ransom” payments.\textsuperscript{137}

The tribunal, we can assume, is probably not ignorant of the teaching of \textit{Tulk v. Moxhay}\textsuperscript{138} and much of modern property law theory itself—namely that a current owner of property burdened with a title condition like the one at issue here may have acquired the burdened property at a discount precisely because of the condition. Thus the tribunal probably does realize that by releasing the Police Board from the condition, it will be providing the Police Board with an un-bargained for and un-earned “windfall.” Indeed, the compensation provisions of the 1970 Act and the £1000 offer made by the Police Board attest to this possibility.

Yet the Lands Tribunal here evidently has other, more pressing concerns. Perhaps, as Tom Allen suggests in interpreting decisions of the European Court of Human Rights, the tribunal felt that the real unearned “windfall” in this case was the one that Elderslie would have reaped had it been allowed to deploy its veto power over the Police Board’s development plans to extract a ransom payment for a minute of waiver. Although the Lands Tribunal does not address it, there is authority in the European Court of Human Right’ jurisprudence recognizing that the amount of compensation owed for a deprivation of property under P1-1 may be reduced below market value precisely when the possession

\textsuperscript{136} Strathclyde, at 10.
\textsuperscript{137} Earlier in Scottish history, feudal proprietors had also exploited the commercial value of their superiorities even before the institution of real burdens was solidified. According to a leading historian, Scottish feudal proprietors frequently broke down their superiorities into £10 units and distributed them to nominees who then were able to exercise the right to vote, as instructed by the feudal lords. Poor drafting of the 1832 reform legislation allowed this corrupting practice to continue unabated into the middle of the nineteenth century. T.M. Devine, The Scottish Nation 1700-2007, 274 (2006).
\textsuperscript{138} (1848) 2 Ph 774, 41 Eng. Rep. 1143.
itself is attributable to a windfall—to unpredictable and undeserved gains based on opportunistic behavior. In short, if a feudal superior’s enforcement right can be characterized as a windfall, then terminating that right might not warrant any significant amount of compensation, even if termination might produce a new windfall for the burdened landowner.

8.3 Fear of Assessment Error and Liability Rules

The Lands Tribunal, it should be clear by now, was not completely naive about the economic consequences of its decision. In yet another rationalization for its conclusion, the tribunal observes that had it awarded Elderslie some additional measure of compensation for loss of its right to extract a ransom payment, it would have had to determine exactly what the amount of that payment might be. This, the tribunal declares, would be an “artificial task,” one which it could not accomplish with any degree of confidence, especially in light of the parties’ own failure to determine the value of this ransom price. In other words, a fear of what James Krier and Stewart Schwab have called “assessment error” seems to motivate the tribunal to refrain from awarding Elderslie any compensation at all for the loss of its right to extract money for a waiver.

While this argument has some force, the tribunal curiously does not pursue the most logical consequence of its purported fear of assessment error—that it might be safer just to leave the title condition alone, unvaried, and allow the parties to keep on bargaining, aware that if a feudal superior or real burden holder like Elderslie is too unreasonable, it will get nothing at all for its “possession.” Yet that seems to be an option that the tribunal believes was eliminated by the 1970 Act.

Another way of understanding what the tribunal means here is to borrow Guido Calabresi and Douglas Melamed’s famous paradigm of property rules and liability rules. It appears that the tribunal is refusing to use its power to set an “objectively determined value” for the property interest at stake, the sine qua non of liability rule protection approach, out of fear that it cannot make this determination in an objectively reliable manner. The

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139 Allen, supra note 93, at 320-327.
140 Strathclyde, at 10.
142 Calabresi & Melamed, supra note 76.
143 Id. at 1092.
logical alternative, per Calabresi and Melamed (and Krier and Schwab), however, would be for the tribunal to deploy a property rule approach. A property rule entitlement protection approach assumes that an entitlement will only be transferred, modified, or terminated through a transaction in which the price, if any, is determined by consensual agreement of the parties, i.e., by market forces, however efficient or inefficient, fair or unfair, those forces may be.\textsuperscript{144}

The rub here is that although the tribunal is eschewing a liability rule solution to the problem of Elderslie’s old title condition, it is rejecting the most obvious property rule solution as well, that of enforcing Elderslie’s real burden as written and leaving the parties to bargain for a minute of waiver if they can. Instead, what the tribunal appears to be saying, despite its professed acknowledgment that Elderslie has a “possession” within the meaning of P1-1 of the Convention, is that Elderslie really has no legitimate property interest to protect in the first place.\textsuperscript{145} In short, it is taking a property rule approach but concluding that there is no property here at all.

\subsection{8.4 Praedial Interest to Enforce, Amenity Value and the Law of Neighborhood}

The final branch of the court’s reasoning is in some ways a recapitulation of the second branch, though it adds considerably more historical depth. Here, the Lands Tribunal explains that acceptance of Elderslie’s claim for compensation would require it to award compensation at the very same time that it has just found that the Police Board’s proposed use of the land is \textit{reasonable} and is being blocked by Elderslie’s \textit{unreasonable} withholding of consent. In other words, the tribunal would have to compensate a property holder for an unreasonable and abusive exercise of its property rights. Compensating Elderslie for loss of its possession would thus be inconsistent with a Scottish conception of property as \textit{propriety}.

The tribunal buttresses its analysis here by citing and quoting a number of Scottish, not European Court, authorities. In

\textsuperscript{144} Id.

\textsuperscript{145} Had this line of reasoning been applied to a paradigmatic nuisance case like \textit{Boomer v. Atlantic Cement}, 257 N.E.2d 870 (N.Y. 1970), the equivalent solution would be for a court to declare that there is no actionable nuisance at all, even though the smoke keeps bellowing from the smoke stacks, because the cement factory has an entitlement to pollute while the neighboring homeowner has none. This is consistent with Calabresi and Melamed’s famous “Rule 3.” Calabresi & Melamed, \textit{supra} note 76, at 1115-16.
addition to its own opinions in *McVey* and *Robertson*, the Lands Tribunal cites Professor John Halliday, who wrote that the Act should be interpreted in a manner consistent with the Scottish law of real burdens already in place at that time—a common law, which, he insisted, required a real “praedial interest to enforce,” or at least some identifiable “amenity value” that would be protected by enforcement of a title condition.147

Even more important, the Lands Tribunal resurrects from the depths of a 1965 Court of Session decision that actually rejected a landowner’s attempt to resist enforcement of a feudal condition on the basis of an alleged change in circumstances in the surrounding neighborhood, a statement by Professor John Rankine from his classic early twentieth century treatise commonly known as *Rankine on Land-ownership*. As Rankine put it, for a superior or proprietor to enforce a title condition, “the interest . . . must be maintained *bona fide* and not merely so as to extort a consideration for the relaxation of the condition.”150 Once again the good faith principle is made explicit: property—even a non-possessory interest held by a feudal superior or a neighboring property owner—can only be exercised if it serves some socially legitimate purpose related to the common good. Elsewhere in his treatise Rankine makes the point even more emphatically. All limitations or restrictions imposed on land ownership for the benefit of other individuals, he asserts, ultimately “resolve themselves into the law of neighborhood.”151 For Rankine, it is this principle of “neighborhood” that permits certain kinds of obligations to rise—almost magically—above contract “into a different sphere—that of real rights.”152 By linking its decision in *Strathclyde* with Rankine’s vision of neighborhood, the Lands Tribunal firmly anchors its twenty first century jurisprudence, informed by the values of the European Convention on Human Rights, with a much older tradition of proprietarian property law in Scotland.

9. Conclusions and Consequences

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146 *Strathclyde*, at 10-11.
147 *Halliday*, *supra* note 89, at 41.
150 Id at 478.
151 Id. at 367.
152 Id. at 369.
The feudal superior’s bold attempt to bring the European Convention on Human Rights to bear on its compensation claim under the Conveyancing and Feudal Reform (Scotland) Act 1970 in Strathclyde Joint Police Board produced many fruits for the comparative property law scholar. It forced the Lands Tribunal of Scotland to re-examine its basic assumptions about property interests like real burdens and question the purpose of the variation and discharge power that it had been granted under the 1970 Act. In conducting this re-examination, the Lands Tribunal concluded that its long-standing interpretation of the 1970 Act drew a “fair balance” between the interests of a feudal superior and a burdened property owner for a variety of reasons. Not only did Parliament clearly intend to take away a superior’s ransom power, but the tribunal found no evidence that the title condition at issue still served any neighborhood or amenity preservation purpose. Thus compensating the superior for its discharge would have been unreasonable. To hold otherwise, the tribunal concluded, would have produced “an unfair balance of property rights” in favor of the superior.

More important than this doctrinal clarification, the decision reminds us of a powerful communitarian, or at least proprietarian, streak in Scottish property law, one that has continued to surface even after the formal abolition of feudalism finally took place on the appointed day, November 28, 2004. In one recent decision, George Wimpey East Scotland v. Fleming, for instance, the Scottish Lands Tribunal reaffirmed its holding in Strathclyde, concluding that its application of the updated variation and discharge mechanisms contained in the Title Conditions (Scotland) Act 2003 is also compatible with the European Convention on Human Rights.

In George Wimpey, the Lands Tribunal used its title condition variation power to relocate a servitude of way across a servient tenement and ultimately denied fifteen benefited proprietors any compensation at all. It did so even though the rerouting allowed the servient owner to create a 500 unit housing development on its property but changed the benefited proprietors’ means of access from an apparently quaint, stone wall lined countryside road to a wider but less scenic passage through a

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153 Strathclyde, at 12.
154 Strathclyde, at 12.
155 Reid, Abolition, supra note 11, at Preface.
crowded housing estate. Here, as in Strathclyde, the tribunal refused to allow the condition holder to share in any of the increased development value produced by the variation of the title condition. The tribunal’s reasoning here is telling:

To compensate a benefited proprietor in respect of enabling the whole development, or even the temporary effect of the construction of the whole development, because the title condition actually impeded the development, seems to us to come close to compensating for the loss of a ransom value. It seems to us that the statute provides for compensation for the effect on the benefited proprietor of the discharge or variation itself, not for the effect on him of the development made possible.

Once again we witness the Lands Tribunal’s concern about compensating a title condition holder for loss of a ransom value, even though in this case there may have been some real, albeit difficult to substantiate, amenity values associated with strict maintenance of the servitude of way. The tribunal seems determined to constrain its understanding of a benefited proprietor’s rights in a title condition to one that comports with Scotland’s interest in promoting reasonable accommodation among neighbors, economic development and the common good, not a rigid adherence to freedom of contract principles or faith in the legal fiction of notice.

In the United States, the Restatement (Third) of Property: Servitudes has ironically recommended the same radical servitude relocation approach employed by the Scottish Lands Tribunal in George Wimpey. So far, however, only a handful of American jurisdictions have embraced this approach and a number have emphatically rejected it. In one of the most recent decisions on this issue, and in a factual setting almost identical to George

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157 Id. at 4, 13. See also George Wimpey East Scotland Ltd. v. Fleming 2005 S.L.T. 59, 64 (denying compensation for alleged loss and disadvantage suffered during construction and development phase of housing project and re-routing of access road and denying compensation for benefited proprietor’s role in enabling development of servient land).

158 Id. at 64.


Wimpey, the Wisconsin Supreme Court refused to recognize either the effect of changed conditions over time or that relocation of the easement would not significantly effect the dominant estate owner’s access while it would simultaneously allow development of a new housing subdivision. In a sign of American formalism and dedication to the principle of protecting land allocation arrangements between original land owners at the expense of limiting subsequent owners’ ability to maximize the economic value of land, the court declared “nothing . . . convinces us that we should sacrifice property rights in this case in favor of economic efficiency.”

Another fruit of this case study is that it reminds us just how different American and Scottish conceptions of property can be when it comes to evaluating the effect of transaction costs. Although both legal systems worry about transaction costs associated with private land use planning, they locate the problem in different temporal moments. In the United States, private restrictive covenants are often seen as a useful tool for solving repeat transaction cost hurdles faced by landowners who want to eliminate the potential for nuisance disputes to erupt between neighbors or want to preserve amenity values over time. Without binding restrictive covenants that run with the land, the reasoning goes, neighboring landowners would constantly have to negotiate with each other every time a neighborhood parcel changed ownership in order to reach agreements to avoid disputes over conflicting land use activities, to maintain neighborhood stability, and to protect amenities and investments.

Restrictive covenants that run with the land solve this recurring transaction cost problem by insuring that once the agreements are incorporated into constitutive documents and properly recorded in the public land records, all future owners of the affected property will be bound and benefited. Generally speaking, no further negotiation will be necessary because all future acquirers will be informed of the content of the land restrictions and obligations through the legal fiction of constructive notice or by actual notice and will or should factor in their benefits.

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162 Id. at 845.
and costs when they buy or sell the affected land.\footnote{164} If a release of a condition is needed to accomplish some development objective made possible through changed circumstances, negotiations are more than adequate to accomplish the task.\footnote{165}

Tellingly, the Restatement (Third) of Property: Servitudes embraces a strong freedom of contract model for servitude reform that is based on similar rationales and assumptions. At a general level the Restatement’s elimination of many of the traditional common law roadblocks to the creation of valid servitudes is grounded in the assumption that burdened landowners can and should overcome the problems of locating benefited proprietors and negotiating needed releases because notice has been made more effective through improved land records and because new technology has made long distance communication easier.\footnote{166} But when private negotiations are impossible or unfruitful, the Restatement encourages courts to use a strengthened change of circumstances doctrine to overcome irrational resistance to hold out behavior by benefited proprietors and to modify or terminate servitudes when benefited parties (particularly for servitudes held in gross) cannot be found.\footnote{167}

In Scotland, as we have, and in the rest of the U.K. perhaps, the most troublesome transaction cost problem is felt to arise when parties want to terminate obsolete and annoying conditions and cannot easily locate or negotiate with the parties who have the ability to release them.\footnote{168} It is for this reason that the Scots have put so much emphasis on creating mechanisms to terminate or modify covenants, including the recent creation of a 100 year sun setting mechanism that allows a burdened land owner to draw up a notice of termination and, after publication to neighboring proprietors and in the absence of protest from a benefited owner,

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\footnote{164}{See Korngold, supra note 68, at 1545-47, 1552, 1556 (articulating conventional American faith in notice, successor owners’ individual choice based on notice, and the responsiveness of price to limitations on marketability created by covenants and other land allocation arrangements).}
\footnote{165}{Id. at 1545, 1553.}
\footnote{166}{RESTATEMENT, supra note 34, Ch. 2 Introductory Note, at 50.}
\footnote{167}{RESTATEMENT, supra note 34, §§ 7.10, 7.13 (providing respectively for a general changed conditions doctrine and for modification or termination of servitudes held in gross when benefited parties cannot be located).}
\footnote{168}{Reid, Modernising, supra note 18, at 68-69; A.W.B. SIMPSON, A HISTORY OF LAND LAW 256-260 (1986) (expressing distrust of the inventions of the English Court of Chancery in Tulk v. Moxhay (1848) 2 Ph. 774, 41 Eng. Rep. 1143, and its progeny).}
\end{footnotes}
have the title cleansed of old burdens.\textsuperscript{169} American reformers, by contrast, remain more focused on creating additional space for contractual freedom to create new and innovative servitudes and covenants.\textsuperscript{170} In short, the nature of the problem is similar, but where the legal systems locate the transaction cost problem still makes a big difference.

Finally, an American outsider looking in on the Scottish (and by extension English) rules and procedures for terminating title conditions and other binding land use obligations cannot help but wonder what our legal landscape would look like if more U.S. jurisdictions borrowed a page from our friends across the Atlantic. Perhaps we would be better prepared to confront the inter-generational conflicts that perpetual land use allocation arrangements can so easily create.\textsuperscript{171} We might also give ourselves more flexibility to respond to the new economic, environmental and land use pressures that will we will face as a result of trends like global warming, rising energy costs, shortages of affordable housing and ever-mounting ecosystem losses.\textsuperscript{172}

This same American outsider also worries that there might be some negative consequences in store for Scotland as well. Could it be that private landowners in Scotland (and maybe England and Wales) might eventually lose confidence in the ability of real burdens and restrictive covenants to do the job they were designed to do?\textsuperscript{173} Might they stop creating real burdens in the first place and instead rely more heavily on alternative and perhaps more expensive or socially disruptive land use control measures—


\textsuperscript{170} \textit{RESTATEMENT}, supra note 34, Ch. 3, Introductory Note (explaining movement toward wider latitude on questions of validity of servitudes); see esp., Id., § 3.2, cmt a. (explaining that purpose of changing touch and concern doctrine to a rule presuming servitude validity is to “permit innovative land-development practices”).

\textsuperscript{171} \textit{See generally} Korngold, supra note 68.


\textsuperscript{173} Korngold, supra note 68, at 1545. \textit{See also} HERNANDO DE SOTO, \textit{THE MYSTERY OF CAPITAL} 54-56, 61-62 (Basic Books 2000) (elaborating on the importance of intangible property rights being certain and secure across time and space to facilitate commitment of property owners to all sorts of transactions and trust by others in these transactions).
perhaps covenants in short term leases, public land use planning, or perhaps even more nuisance litigation? Might private land owners increasingly lose the ability to bargain with each other over needed adjustments in private land use restrictions if they can simply go to the Lands Tribunal and get them varied or discharged with relative ease? If this latter speculation proves to be true, something might be lost as well as gained. Ironically, the easy availability of judicial variation and discharge of title conditions might thus even erode the neighborly tendency to negotiate and cooperate, the very value that Scottish courts now seem most determined to protect.

But perhaps the specter of judicial discharge will not make such a big difference after all and Scottish neighbors may in most cases continue to work out private land use conflicts in a neighborly fashion. A more detailed assessment of the long term effects of judicial variation and discharge of private land use restrictions and obligations and how this legal innovation will affect the proprietarian tendency in Scottish property law is a story for another day.

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175 This is the fear of American property theorists who are critical of a too easy resort to liability rules to modify or terminate property rights. Krier and Schwab, supra note 141, at 462-465; Carol M. Rose, The Shadow of the Cathedral, 106 Yale L.J. 2175, 2198 (1997).