SCOTTISH LAW COMMISSION

MEMORANDUM No: 26

CORPOREAL MOVEABLES

SOME PROBLEMS OF CLASSIFICATION

31 August 1976

This Memorandum is published for comment and criticism, and does not represent the final views of the Scottish Law Commission.

The Commission would be grateful if comments were submitted by 31 January 1977. All correspondence should be addressed to:

Mr R Black
Scottish Law Commission
140 Causewayside
EDINBURGH
EH9 1PR

(Telephone: 031-668-2131)

CONTENTS

	Paragraph	Page
Introduction	1	1
Heritable or moveable - general	2- 3	1
Growing Crops	4-10	3
Trees	11-21	8
Other goods to be severed from land	22-23	15
Fixtures	24-30	16
Heritage or immoveables?	31-32	21
Summary of provisional proposals and other matters on which views are sought		23

MEMORANDUM NO.26

CORPOREAL MOVEABLES

SOME PROBLEMS OF CLASSIFICATION

Introduction

1. In this Memorandum we consider a number of problems which have been experienced in relation to the proper classification of certain kinds of property as either heritable or moveable. This is a matter of considerable importance, since the allocation of property to the category of "heritage" or of "moveables" determines to a great extent not only the manner in which ownership of or other real rights over that property can, or must, be transferred or constituted, but also the formalities with which any contract in pursuance of which such transfer is made must comply. Furthermore, the classification of property as moveable or immoveable has far-reaching implications in the context of private international law. Among the types of property in respect of which difficulties exist are growing crops, trees, things to be severed from land, and "fixtures". We conclude our study by considering whether the present division of property into heritage and moveables might not beneficially be superseded by a division into immoveable and moveable property.

Heritable or Moveable - General

2. Bell, discussing the classification of property[1] and its importance in many legal contexts, such as the law of bankruptcy, succession, diligence and private international law wrote:-

---

[1] Principles, (4th ed.,) s.1470.

> "The character of any subject or fund, as, in these important respects, heritable or moveable, may be either, 1. by its nature, as being immoveable, like lands or houses; or as moveable, like furniture or cattle; or, 2. by connexion or accession to some subject which has by nature the character of moveable or immoveable; or, 3. by destination of the owner, either as in connexion with something else, or in regard to succession. But in some respects a distinction is to be observed between the character of heritable or moveable, considered as in a question of succession, or as in a question of the competency of diligence."

So far as things may have a character accidentally impressed on them by destination, no more is implied than that, despite its character by nature, a thing is for limited purposes between two parties treated as though the owner's wishes had been carried out. The conversion does not operate in rem. Accordingly, though opinions have been expressed[1] that the concept of heritable or moveable by destination has been pressed too far, as at present advised, we do not contemplate suggesting any change or clarification of the law regarding destination. We should, however, consider any suggestions for clarification or reform and invite comment.

3. We have identified certain difficulties and uncertainties in the law regarding property which is to be treated as moveable by anticipation while still attached to or forming part of land or other immoveable property. The difficulties are increased by provisions of the Sale of Goods Act 1893 which have not been adequately harmonised with the common law of Scotland regarding real rights over corporeal moveables.

---

[1] e.g. Fairlie's Trs. v. Fairlie's Curator Bonis 1932 S.C. 216 per L.P. Clyde at pp.221-2.

The common law requirement of tradition (delivery) to transfer or create a real right such as ownership or security limited the situations in which a real right to crops, timber, minerals or fixtures could be transferred, while the definition of "goods" in the Sale of Goods Act 1893, section 62, and the Act's provisions regarding passing of property (sections 16-20) may lead to results very different from those of the common law. Sale has long been regarded as the main contract in implement of which ownership of corporeal moveables has been transferred, but exchange may increase in commercial importance in times of inflation. Contracts of exchange of crops for fertiliser or timber for stone raise problems regarding heritable or moveable by nature or by anticipation of law, and the solutions to these problems are not necessarily at present the same as those provided by the Sale of Goods Act.

Growing Crops

4. At common law Scots law recognises a distinction between the natural products of the soil and its industrial products:[1]

> "The fruits of the ground are carried as accessaries, by natural accession, and, while growing, are really pertinents, and, in a manner, parts of the ground, and pars soli, but, by our custom, corns, and other industrial fruits, are considered as moveables, distinct from the right of the ground, even from the time they are sown; and therefore do not accrue to the purchaser of the grounds, unless specially exprest, and fall to the executors, and not to the heir of the sower."

[1] Bankton II.1.10; cf. Stair II.1.2.

Erskine[1] seemingly expresses the same opinion:

> "All subjects which were immoveable by the Roman law, as a field, or whatever is either part of the ground, or united to it, fundo annexum, as minerals, houses, mills, etc., are heritable by ours. This rule, if understood without limitation, would comprehend all the fruits of the earth not yet separated from the ground (called by the Romans pendentes), because they continue partes soli until separation; but it is, by our usage, restricted to such of that kind as grow annually, for a tract of years together, without repeated culture or industry, as natural grass not yet cut, or fruits not yet plucked from the tree. For those annual fruits which require yearly seed and industry, as wheat, barley, etc., are accounted moveable even before separation, from the moment they are sown or planted; see Somervel, 2 February 1627, M.5074; because the seed, and labour in preparing the ground, cannot be said to be employed on the lands for their perpetual use, but for the immediate profit of the possessor. Trees themselves, though they may be called in some sense fruits of the earth, and though most of them require seed and culture at first rearing, are deemed partes soli, and so descend to the heir. For they are truly destined, not for the present use of the proprietor or possessor, as industrial fruits are, but for the use of the ground; and may, after they have taken firm root, continue united to it without further culture for many successive generations."

5. In Scots law hay was formerly treated as a natural crop, because when the corn was cut, grass seed was not sown but the land was allowed to produce grass from such seeds as remained in the soil - Sinclair v. Dalrymple.[2] It was subsequently held, however, that since under more recent systems of cultivation the ground was prepared and grass seeds were sown, whether or not with the corn crop, hay fell to be treated like other industrial crops - Lyall v. Cooper.[3]

---

[1] II.2.4; cf. Chalmers' Tr. v. Dick's Tr. 1909 S.C. 761 at p.769. Bell Commentaries ii. 2; Principles s.1473.

[2] (1744) Mor. 5421.

[3] (1832) 11 S.96.

6. Following the view of the institutional writers it was held that, though not separated from the soil at the time of a heritor's death but merely in course of springing up from seed, growing crops belonged to his executors rather than his heir: Gordon v. Gordon.[1] The same principle was applied in the succession to a tenant: his heir had the tack, but his executors obtained the crop which the tenant had sown in the ground.[2] In one case, in which no opinions were delivered, it was seemingly held that a sale of growing crops soon after they had been sown was effective to carry a real right.[3] For such a sale to be effective prior to 1894 the vendor had to effect delivery, but this requirement was conjecturally, though not clearly, satisfied in the unusual circumstances of Grant v. Smith by the buyers posting their servants to take care of the crops when they grew. However, security over moveables, which is still regulated by common law, cannot be constituted while the debtor remains in possession, and this rule applies in the case of security over growing crops.[4] It has also been decided that growing crops can be poinded, on the view that it is possible to fix their value before separation;[5] but the growing crop must be so far advanced that an approximate estimate of that value can be made and the identity of the thing poinded with what is sold can be traced.[6] However, as the poinding is not completed

---

[1] (1806) Hume Dec. 188.

[2] Duke of Gordon v. Leslie (1791) Mor. 5444. See also Rankine on Leases pp.319-20; McLaren on Wills 1 p.197.

[3] Grant v. Smith (1758) Mor.9561; W M Gordon Studies in the Transfer of Property by Traditio p. 217: "The precise ground of the decision does not appear and in later cases the courts have shown great reluctance to admit any form of delivery not involving an overt change of possession."

[4] McGavin v. Sturrocks Tr. (1891) 18 R. 576 per Lord Young at p.581.

[5] Ballantine v. Watson (1709) Mor. 10526.

[6] See cases cited in Graham Stewart on Diligence p.339 and particularly Elders v. Allen (1833) 11 S.902 where poinders unsuccessfully sought to gain control of the crop at an early stage of growth.

until the sale, the debtor can give good title to a bona fide purchaser for value.[1]

7. Some of these authorities cited are somewhat equivocal, and could imply that industrial crops may at a certain stage of development, though still part of the land by nature, be treated as moveable, and in Chalmers' Trustee v. Dick's Trustee[2] the brocard messis sementem sequitur was not regard as having the effect of making such crops, if properly classified, moveable property of the tenant. The right of severance of the tenant - or his executor or creditor - was regarded rather as a privilege than as a property right in the full sense. Lord Low remarked[3] :

> "I agree with the view expressed by the Lord Ordinary that a tenant's right to reap a crop which he has sown is not properly a right of property. The crop until separation is not moveable property of the tenant, and I do not think that Mr Erskine intended to affirm that it is so. The crop is pars soli but the law recognises the right of the tenant who has sown it to separate it from the soil unless he has contracted not to do so."

This view of the classification of growing crops extended by analogy a principle applied in the law of fixtures by Lord Cairns L.C. in Brand's Trustees v. Brand's Trustees.[4] It was there decided that, when the tenant of a colliery had erected upon the land fixed machinery for its exploitation, that machinery was heritable in the succession of the tenant. Since growing crops are treated as moveable in the succession of the tenant in Scots law, the analogy with the law of fixtures was only of qualified validity.

---

[1] Op. cit. p.358.

[2] 1909 S.C.761.

[3] At p.769.

[4] (1876) 3 R. (H.L.)15 at p.20.

In McKinley v. Hutchison's Trustees[1] dicta were expressed casting doubt on the unanimous view expressed in Chalmers' Trustee that crops were partes soli. Nevertheless, support was subsequently given to that view in a sheriff court decision - Trinity House of Leith v. Mitchell & Rae Ltd.[2] The sheriff observed:[3]

> "I do not think the quality of growing crop, as pars soli or moveable, can depend on the character of the man who sowed it. If quoad a heritable creditor the crop was pars soli I think the pursuers had the same right to it as they would have had to a timber plantation, whether it was planted before or after the date of service."

8. It is clear that there is a conflict among the authorities at common law. There is some ostensible support for the proposition that industrial growing crops are to be classified as moveable, even at an early stage of growth, for all purposes including transfer of property by a mode appropriate for moveables. On the other hand, there is authority for the proposition that industrial growing crops are heritable by nature, but that for some purposes[4] they can be regarded as moveables by anticipation - looking to their future state when severed - but not moveable by fiction while still growing. In short, on this view, only personal rights can be acquired to moveables before severance. Security rights over, inter alia, growing crops are being studied by us in a separate but related exercise. We invite

---

[1] 1935 S.L.T. 62.

[2] 1957 S.L.T. (Sh. Ct.) 38.

[3] At p.40.

[4] Standard Conditions of Contract of the British Association of Grain, Seed, Feed and Agricultural Merchants Ltd provide (Condition 9) that though ownership shall normally pass to the buyer on delivery, it may pass exceptionally at other dates, provided that the seller has notified the buyer that the goods are in a deliverable state and appropriated to the contract. On "passing of property" by agreement see our accompanying Memorandum No. 25: Corporeal moveables: passing of risk and of ownership.

comment, especially from those with experience of agricultural affairs, as to which classification of growing crops should be preferred.

9. So far as sale of goods is concerned, the Sale of Goods Act 1893, section 61, preserves the rules of the common law of Scotland " save in so far as they are inconsistent with the express provisions of this Act." Section 62 defines "goods" to include "industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." It is not clear how far the common law is affected by this definition.

10. Accordingly, we invite comment on the question whether industrial growing crops, as may be the case at present, should be treated differently from trees and other things attached to or forming part of the land which are agreed to be severed under or before contract.

Trees

11. It is clear from the institutional writers and from the decided cases that at common law trees in general are regarded as pars soli and heritable or immoveable property.[1] Even at common law, however, there has been doubt as to how trees and shrubs in a nursery garden should be classified,[2] since, as in the

---

[1] Paul v. Cuthbertson (1840) 2D. 1286, approving Erskine II.4.5.

[2] Begbie v. Boyd (1837) 16 S.232. Fruit trees and bushes may be removed by a tenant at the termination of a lease - discussed in Paton and Cameron Landlord and Tenant p.360.

case of industrial crops, though implanted into the land such trees and shrubs are manifestly intended to be dealt with as moveables eventually - as, of course, are certain forest trees cultivated for timber. Since, however, at common law a real right can only pass by tradition, few problems of classification can arise except as to the formalities to be observed for transfer. Thus in Paul v. Cuthbertson[1] it was held that until severance trees could not be conveyed apart from the land on which they grew, and consequently conveyance would require to conform to the formalities for transfer of land. Presumably this rule would still apply, e.g. to exchange of growing trees for some counterpart. In England at common law judicial innovation, even before the Sale of Goods Act 1893, to avoid the inconvenience of complying with the formalities for conveying an interest in land, had construed a sale of trees to be severed by the buyer as a sale of goods. The land was regarded as a mere "warehouse" for the trees.[2]

12. "Goods" are now defined by the Sale of Goods Act 1893, section 62(1), to include "things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." This definition clearly permits growing trees to be sold as moveables free of the formalities required for transfers of interests in land. While the position regarding sale is thus settled, the common law still regulates other contractual relationships.

13. We suggest that it should be made clear by statute that the same freedom from the contractual formalities appropriate for transfers of heritage, at present enjoyed by contracts of

---

[1] Sup. cit.

[2] Marshall v. Green (1875) 1 C.P.D. 35.

sale of things agreed to be severed, should be accorded to other obligations for transfer at common law, e.g. exchange and agreements for donation which contemplate severance. We invite comment on this provisional proposal. We express no view meanwhile regarding security rights.

14. The Sale of Goods Act definition creates much greater difficulties when the contract of sale purports to effect immediate transfer of a real right. On this question there are clearly divided opinions and consequent doubts which it is our duty to attempt to resolve. In Munro v. Liquidator of Balnagown Estates Co.[1] the First Division, and in particular Lord President Cooper, seem to have taken the view that a real right to timber passes only on severance. Moreover, Morison v. Lockhart[2] decided that the rights of a purchaser of timber could not, while it was unsevered, prevail over the rights of an heir of entail. A right to sell timber as goods did not entitle a vendor to sell another's land. Dr J J Gow in The Mercantile and Industrial Law of Scotland[3] apparently considers that section 62(1) permits an immediate transfer of "property" in unsevered timber, while Professor Walker[4] would require severance before trees could become moveable, and other Scottish textbook writers take a similar view. Other

---

[1] 1949 S.C. 49 esp. at p.55; see also Morison v. Lockhart 1912 S.C.1017.

[2] 1912 S.C.1017.

[3] pp. 79-80; see also "When are Trees 'Timber'?" 1962 S.L.T. (News) 13.

[4] Principles of Scottish Private Law 2nd ed., pp. 1188-9; also T B Smith A Short Commentary on the Law of Scotland p.500; Gloag and Henderson Introduction to the Law of Scotland 7th ed., p.175; Rankine Landownership 4th ed., p.119.

writers on the Sale of Goods Act[1] take the view that "property" can pass only when severance takes place. However, there is a tendency to link this conclusion with the provisions of section 18 of the Act, which lays down rules for ascertaining the parties' intention regarding passing of property, and is relevant only when there is doubt as to that intention. The growing trees which have been sold may be specific and clearly identified. The parties' intention that property shall pass may be clearly expressed. In this case section 17(1) of the Act would seem to apply on a literal construction. Benjamin's Sale of Goods, discussing the problem, comments:[2]

> "The owner of land to which such things are attached may, for the purposes of a contract of sale, treat them as 'goods' within the Act; but this conventional characterisation cannot displace the overriding fact that for many purposes they remain land. It is an open question whether, even as a matter inter partes, the property in such things can pass before severance: certainly the statutory presumption that goods must be 'in a deliverable state' before the property will pass would be difficult to displace. This is borne out by the many cases in which it was thought not open to argument that property passed only on severance. In the graphic phrase used in Liford's Case,[3] 'timber trees cannot be felled with a goose quill'."

---

[1] e.g. Chalmers (17th ed.) p.151; Fridman p.75.

[2] 1974 ed. para. 92. In Memorandum no.25 we doubt whether passing of "property" can only take effect inter partes. Part of the object in extending sections 16-18 of the Act to Scotland was to protect the buyer and a subpurchaser from the creditors of the seller. If the agreement regarding passing of property affected only the contracting parties it would seem to be no more than an obligation inter partes, and not to transfer an indefeasible right in re. See paras. 46 et seq of Memorandum no. 25.

[3] (1614) 11 Co. Rep. 46b, 50a.

15. Nevertheless in other jurisdictions where English-type law applies - in particular in North America[1] - it has been decided that there can be an immediate sale of standing timber as "goods", and the Review Committee for Article 9 of the Uniform Commercial Code of the American Law Institute in 1971 proposed a revision of the "secured transactions" provisions of the Code, and consequently a revision of the Article on sale which would make growing timber the subject of a "present sale". The reasons for changing section 2-107 were given as follows:

> "Several timber-growing states have changed the 1962 Code to make timber to be cut under a contract of severance goods, regardless of the question who is to sever them. The section is revised to adopt this change. Financing of the transaction is facilitated if the timber is treated as goods instead of real estate. A similar change is made in the definition of 'goods' in section 9-105. To protect persons dealing with timberlands, filing on timber to be cut is required in Part 4 of Article 9 to be made in real estate records in a manner comparable to fixture filing."

16. As the law of Scotland stands at present, the requirement of delivery to constitute a real right in security over moveables would make it difficult to grant such a right over standing timber to be severed. By section 61(4) the Sale of Goods Act excludes from the provisions of the Act any transaction in the form of a contract of sale which is intended to operate as a right of security.[2] However, the whole law of security over moveables in Scotland is currently being considered by us in a separate but related exercise, and the comparative material being studied includes solutions based on Article 9 of the U.S.

---

[1] See refs. in Gow, The Mercantile and Industrial Law of Scotland, p.79.

[2] See e.g. Scottish Transit Trust v. Scottish Land Cultivators 1955 S.C.254.

Uniform Commercial Code. It may be observed that Article 2 of that Code (Sale) and Article 9 (Security) expressly provide for protection of third party rights when goods are to be severed from the land under a contract of sale - whether these are crops, timber, minerals, fixtures or the like. Section 2-107(3) (as recommended) provides:

> "The provisions of this section are subject to any third party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale."

17. This solution might be construed as treating, e.g., growing timber both as land (pars soli) and also as goods. However, it is proposed under the revised U.C.C. that in the case of identified crops and timber, parties will be able to effect a present sale before severance, while in the case of minerals, structures or other materials to be removed from land, a purported present sale which is not effective as a transfer of an interest in land shall be effective only as a contract to sell. The Sale of Goods Act 1893 does not seem to distinguish between the categories of goods to be severed under a contract of sale, and it may be that at the time when the Act was passed the importance of commercial growing of timber was not as fully realised as it has been after two major wars this century.

18. Among the most recent codes in E.E.C. countries is the Italian Civil Code. This provides[1] that, until separated, fruits whether natural or industrial (including trees) form part of the land. They can, however, be disposed of in the

---

[1] Art. 820; cf. Arts. 771 and 1472.

same way as future moveables. This approach seems rational. Though commercial considerations may weigh against a solution which reflects a classification of property according to its nature, the Italian solution merits consideration.

19. It might be thought that in the case of industrial growing crops, nursery bushes and trees, and commercially grown timber, unlike other things to be severed from the land under contract, third parties would by the very nature of the things growing have sufficient intimation, without any need for registration, that they were intended to be dealt with ultimately as moveables, and would therefore be put on enquiry regarding third party interests. There might, however, be difficulties in discriminating between categories of forest trees. We do not at this stage offer even a provisional solution of our own until we have considered the views of those with experience of commercial practice relating to timber. We are, however, concerned that there should be doubt as to whether, before severance, growing trees can be regarded as corporeal moveable property and, if clearly identified, be transferred as such.

20. We invite opinion as to whether growing trees (or trees which are cultivated commercially for timber) should be classified and treated by the law in effect as industrial crops, so that both should be capable of being treated, and actually transferred, as goods while still partes soli. If this solution is preferred, is special protection desirable for third parties' interests in the land?

21. Alternatively, is it desirable to clarify the law to the effect that trees generally (or trees which are not grown commercially for sale) should be regarded as part of the land until severance, but should be capable of transfer as future goods?

Other Goods to be Severed from Land

22. The Sale of Goods Act 1893, section 62, when defining "goods", does not distinguish between categories of things attached to or forming part of the land which are agreed to be severed before sale and under the contract of sale. Benjamin's Sale of Goods[1] discusses difficulties in treating for all purposes things capable of severance as already goods prior to severance. The proposed section 2-107 of the American Uniform Commercial Code would distinguish between trees and crops on the one hand and other goods to be severed on the other. It is proposed that[2]:

> "(1) A contract for the sale of minerals or the like or a structure or its materials to be removed from realty is a contract for the sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell."

As we have noted, crops and timber are under the U.C.C. goods capable of immediate sale, whether buyer or seller is to effect the severance. However, if chalk is sold from a quarry, or slates from a house, it is not thought appropriate to classify such things as already moveable prior to severance, though they can be dealt with as future goods if they are to be severed by the seller.

---

[1] 1974 ed., para. 92.

[2] S. 2-107(3), relating to notice to third parties through realty (i.e. land) records, also governs s.2-107(1).

23. We invite views as to whether the solution set out in the proposed section 2-107(1) of the United States Uniform Commercial Code could with advantage be incorporated into Scots law.

Fixtures[1]

24. There seem to us to be possible problems of classification of things as heritable or moveable in the context of the law on fixtures. The locus classicus for the statement of the law which would classify things as heritable or moveable by "objective" criteria is the speech of Lord Chancellor Cairns in Brand's Trustees v. Brand's Trustees:[2]

> "Looking at it in that way, I would remind your Lordships that there are with regard to matters of this kind, which are included under the comprehensive term of 'fixtures,' two general rules, a correct appreciation of which will, as it seems to me, go far to solve the whole difficulty in this case. My Lords, one of those rules is the general well-known rule that whatever is fixed to the freehold of land becomes part of the freehold or the inheritance. The other is quite a different and separate rule. Whatever once becomes part of the inheritance cannot be severed by a limited owner .... Those, my Lords, are two rules - not one by way of exception to the other, but two rules standing consistently together. My Lords, an exception indeed, and a very important exception, has been made, not to the first of these rules, but to the second. To the first rule which I have stated to your Lordships there is, so far as I am aware, no exception whatever. That which is fixed to the inheritance becomes a part of the inheritance at the present day as much as it did in the earliest times. But to the second rule, namely, the irremovability of things fixed to the inheritance, there is undoubtedly ground for a very important exception. That exception has been established in favour of the fixtures which have been attached to the inheritance for the purpose of trade, and perhaps

---

[1] Rankine Landownership 4th ed., p.117: "The word 'fixture' has come to have two different meanings: one, its natural and obvious sense - viz, anything which is infixed into or annexed to an immoveable, that is, directly or indirectly to the soil; and the other, a technical sense - viz, a moveable which has been annexed to the soil, but may be removed in certain circumstances at the will of the person who annexed it ... a curious perversion of the term, whereby fixture denotes removeability."

[2] (1876) 3 R. (H.L.) 16 at p.20.

> in a minor degree for the purpose of agriculture. But, I repeat, the exception is not to the first of these rules, but the exception is to the second. Under that exception a tenant who has fixed to the inheritance things for the purpose of trade has a certain power of severance and removal during the tenancy."

More recently Lord Justice-Clerk Thomson in particular stressed more subjective considerations as follows:[1]

> "It is difficult to extract from the authorities and text writers any very satisfactory general statements of the law, but this is probably due to the fact that the character of the problem varies so much according to the legal relationship in which the parties stand. What may be suitably stated in a case of heir or executor may be almost misleading in a case of landlord and tenant. Even within the ambit of one particular relationship, circumstances may vary greatly."

25. Though the courts have regard to competing different contexts, e.g. landlord and tenant, seller and purchaser of heritage, heritable creditor and general creditor, liferenter and fiar, and in the law of rating,[2] we are inclined to the view that a thing should be classified by the law as either heritable or moveable according to the "objective" criteria stated by Lord Chancellor Cairns.[3] However, the privilege of severing a fixture which has become part of the heritage, claiming it as a moveable in competition with a party entitled to the heritage, should depend on the legal relationships mentioned by Lord Justice-Clerk Thomson. Shortly after the decision in Christie v. Smith's Executrix the late Dr J C Gardner[4] urged that the question whether a thing

---

[1] Christie v. Smith's Exix. 1949 S.C. 572 at p.578.

[2] See Walker Principles of Scottish Private Law 2nd ed., p.1196 et seq.

[3] We appreciate that classifications based upon such supposedly "objective" criteria are open to attack on philosophical grounds: e.g. Lon L Fuller Legal Fictions, esp. at pp. 120-121.

[4] (1950) 62 Jur. Rev. 136 et seq.

is heritable or moveable should be determinable by some rule in the law of things relating to the nature of the subject itself. We agree with this viewpoint. For the law to treat such fixtures as heritable or moveable according to the relationship of the parties could, we think, give rise to uncertainty. In the context of private international law in particular it seems undesirable that the classification of property should depend upon the legal relationship of the parties to a particular transaction, rather than upon the nature of the property in question. If there is doubt whether the law has not in fact been settled to this effect by the House of Lords decision in Brand's Trustees, we should welcome comment. If the law is indeed unsettled, and if a solution other than that enunciated in Brand's Trustees is favoured, we could only consider the law of fixtures in detail in the context of Landownership as well as title to corporeal moveables, which would be beyond the scope of the present exercise.

26. We invite comment as to whether, for the avoidance of doubt, the principle enunciated by Lord Chancellor Cairns should be declared in statutory form.

27. The Italian Civil Code[1] allows the owner of former moveables which have been annexed to another's immoveable property to claim them after having had them severed at the cost of the person who had used them, provided that this can be accomplished without serious damage to the "fixture" or the land. If severance is not demanded or severance is impracticable, a remedy is competent for the value of the materials, and the remedy of reparation

[1]Art. 937.

is also competent where there has been culpa. We think that Scots law would recognise claims for recompense and reparation in such situations, but doubt whether the law would give a right to sever at the expense of a landowner.

28. We invite comment as to whether the law of Scotland should give to a person whose moveables have become the property of another by accession the right to claim either severance at that other's expense, or the value of the moveables.[1]

29. The Crowther Committee on Consumer Credit recommended[2], in the context of fixtures and accessions, that a party who has a security over goods which are annexed to land by the hire-purchaser (who is also tenant) should in general be accorded priority in competition with the landowner - but should be bound to reimburse the landowner for physical damage caused by the severance or removal of a "fixture". Because purchasers and mortgagees might be misled into believing that the "hire-purchase fixture" was pars soli and the property of the landlord, the Crowther Committee recommended that, in cases of lease, security over these fixtures should be registrable in the "Land Registry". The Committee stated that in England (unlike the position in Scotland) such an interest over fixtures is not registrable. The Review Committee for Article 9 of the Uniform Commercial Code (which Article greatly influenced the Crowther Committee on Consumer Credit) recommended[3] in April 1971 (i.e. after the Crowther Committee had reported) that "chattels" should fall into three categories - namely those which never became part of the "real estate"; those, like building materials, which became totally integrated; and an intermediate class which

---

[1] Such a right would, of course, be qualified by the rules protecting bona fide onerous acquisition of another's moveables.

[2] Cmnd. 4596 (1971) paras. 5.7.78-79.

[3] Report of the Review Committee for Article 9 of the Uniform Commercial Code, p.198, para. A-3.

became "real estate", i.e. immoveable for certain purposes, but as to which "chattel financing" could be preserved by registration.[1]

30. We are not in this Memorandum considering security over moveables, which is the subject of a separate study by the Commission, but in the wider context of title to corporeal moveables we are interested in the practicability of protecting interests in moveables through the registers relating to heritable property. When a moveable affixed to heritage may be severed without serious damage to the heritage, and when a part of the heritage which has not yet become moveable is dealt with as moveable by anticipation (as is arguably the case with growing trees), it may be thought that to protect the rights of those interested in the heritage, and the rights of those interested in the moveables, registration of some rights over moveables in land registers, or in special registers, would be sound policy. On the other hand, a policy which might be sound in relation to acres of timber growing on land might be quite impracticable for, e.g., "mobile homes"[2] or hired fixtures. We make no provisional proposals regarding registration of this kind, since it cannot usefully be considered in isolation from security rights. However, at this stage we are inclined to think that the classification of property as heritable (immoveable) or moveable might for registration purposes be considered in relation to its past or future state, as well as with regard to its present classification. We invite comment on this provisional view.

---

[1] "Mobile houses" provide an example. The provisions of the Mobile Homes Act 1975 leave unresolved a number of problems arising from the hybrid character of agreements between possessors of such homes and owners of protected sites.

[2] The Mobile Homes Act 1975 now confers on occupants of mobile homes rights comparable to those of occupiers of buildings.

Heritage or Immoveables?

31. A thing which was formerly heritable may be acquired as a moveable. There are many situations in which the question "heritable" or "moveable" may arise. For this reason we feel justified in raising the question whether, as we reach the end of the twentieth century, it is desirable to perpetuate a terminology which does not reflect a true distinction in the law of property. Property rights in most modern legal systems are classified as either "moveable" or "immoveable" - a distinction which is important in matters other than succession. This classification is adopted in Scotland in cases involving a foreign element where questions of private international law arise. For historical reasons, however, Scots law generally distinguishes between heritable and moveable property, the former category, in theory at all events, having been primarily concerned with the succession rights of heirs to land and its accessories, while the category "moveable" related primarily to the nature of the property itself. Legislation during the 19th century altered to some extent the rules of feudal law, and, for example, abolished the categories of heirship moveables; and two important modern enactments seem to have made largely irrelevant the basic philosophy of the traditional Scottish classification of property. By the Succession (Scotland) Act 1964 the privileged position of the heir-at-law in relation to heritage has been abolished so far as succession to property rights of patrimonial value are concerned, while the deceased's heritable or moveable estate is distributed by executors.

32. Though part of the policy of the Act was to assimilate heritage and moveables for the purposes of succession, certain distinctions remain which are relevant in relation to legal

rights and prior rights, and also succession to titles, coats of arms and honours.[1] Though the descent of honours remains truly heritable in the feudal sense, it seems that the other matters which are not assimilated would not be affected by classification of property as "moveable" or "immoveable". Though the process of redemption of feuduties will continue over a considerable time, the Land Tenure Reform (Scotland) Act 1974 has provided in effect for the eventual abolition of the feudal system. Even at the present time, however, we find difficulty in identifying patrimonial rights in relation to land which remain feudal which could not as usefully be classified as "immoveable" rather than "heritable". Except in relation to titles of honour and the law with which the Lyon Court is concerned, the category of "heritage" seems now obsolete or at least obsolescent in Scots law, and might well be replaced by the term "immoveable". This would not only correspond to the actual legal position in Scotland but would, we think, be more readily comprehensible internationally and in domestic law. Soon after the Sale of Goods Act 1893 had been enacted Professor R Brown in his Treatise on the Sale of Goods[2] criticised the division of property into "heritable" or "moveable". The proposals which we have made earlier in this Memorandum are in no way based upon the devolution of property in succession, but rather upon the nature of the property being considered. The terms "immoveable" and "moveable" reflect this fact, while the terms "heritable" and "moveable" disguise it. We therefore take the view that nothing of value would be lost, and much in the way of clarity would be gained, were "immoveable" to replace "heritable" in legal usage.

---

[1] M C Meston The Succession (Scotland) Act 1964 2nd ed., p.14 et seq.

[2] Introductory p.xix: "The leading division in most systems of jurisprudence is into immoveable and moveable, but in Scots law the word 'immoveable' has very inconveniently become synonymous with 'heritable' which implies a distinction applicable only to succession."

SUMMARY OF PROVISIONAL PROPOSALS AND OTHER MATTERS ON WHICH VIEWS ARE SOUGHT

1. Suggestions are invited regarding clarification or reform of the law relating to classification of property as heritable or moveable depending on the owner's destination. (para. 2)

2. Should industrial growing crops be classified as heritable or moveable? (para. 8)

3. Should industrial growing crops, as may be the case at present, be treated differently from trees and other things attached to or forming part of the land which are agreed to be severed under or before contract? (para. 10)

4. It should be made clear by statute that the same freedom from the contractual formalities appropriate for transfers of heritage, at present enjoyed by contracts of sale of things agreed to be severed from land, should be accorded to other obligations for transfer at common law, for example exchange and agreements for donation which contemplate severance. (para. 13)

5. Should growing trees (or trees which are cultivated commercially for timber) be classified and treated by the law in effect as industrial crops, so that both should be capable of being treated, and actually transferred, as goods while still partes soli? If this solution is preferred, is special protection desirable for third parties' interests in the land? (para. 20)

6. Alternatively, is it desirable to clarify the law to the effect that trees generally (or trees which are not grown commercially for sale) should be regarded as part of the land until severance, but should be capable of transfer as future goods? (para. 21)

7. Should the solution set out in the proposed section 2-107(1) of the United States Uniform Commercial Code, whereby there is a distinction between trees and crops on the one hand and other goods to be severed on the other, be incorporated into Scots law? (para. 23)

8. For the avoidance of doubt, should the principle enunciated by Lord Chancellor Cairns for determining whether fixtures are heritable or moveable be declared in statutory form? (para. 26)

9. Should the law of Scotland give to a person whose moveables have become the property of another by accession the right to claim either severance at that other's expense, or the value of the moveables? (para. 28)

10. The classification of property as heritable or moveable might for registration purposes be considered in relation to its past or future state, as well as with regard to its present classification. (para. 30)