

The Honourable Lord Drummond Young



Parliament House
Parliament Square
Edinburgh, EH1 1RQ

28 August 2014

The Honourable Lord Pentland
Chairman
Scottish Law Commission

Dear Paul,

Ninth Programme of Law Reform

I thought that I should offer some thoughts about possible content for the Ninth Programme. In part this is based on discussions that I had when at the Commission, in part on experience on the bench and in part on general reading of recent cases.

Property. After the project on moveable transactions has been completed the intention is to move on to heritable securities. This is a subject that undoubtedly requires work, not so much in relation to the concept of the standard security, which has worked well, but in relation to the procedures used for enforcement. In this connection the decision in *Wilson v Royal Bank* 2011 UKSC 66, is pertinent, because it caused a degree of chaos in the enforcement of standard securities. After heritable securities, I think that leases might be an appropriate area for consideration. So far as I am aware the law of leases has never been systematically reviewed, and it gives rise to a very varied selection of practical problems in the courts. As with heritable securities, procedure and remedies are important; some of the existing provisions are old, and it would be very helpful to have a comprehensive statement of the procedures that are available to enforce parties' rights under a lease. Ron Mackay mentioned to me that he agrees with this suggestion.

Criminal law. In the field of criminal law, the intention is, as I understand it, to move on to homicide once the relevant Commissioner is available. While homicide is an important subject, and the law is not wholly clear, there could be practical difficulties in putting it in statutory form. The English Commission tried to do so some years ago and encountered serious problems. In Scotland perhaps the greatest source of difficulty in a criminal context is the chaotic nature of the criminal procedure legislation; the 1995 Act has been amended so often that it is verging on the unusable. A restatement of the legislation in this area would, however, be an

Telephone 0131 225 2595

Fax 0131 240 6711

DX549306 Edinburgh 36

email.supreme.courts@scotcourts.gov.uk

extremely onerous task which would be well beyond the resources of the Commission. Nevertheless I mention this area in case there are moves to reform the legislation, in which case the Commission might be able to work on selected areas that have a relatively high legal content, for example time limits or appeals.

Public law. This is an area that the Commission has looked at from time to time, most recently in relation to compulsory purchase and level crossings. The law relating to roads and streets is in a chaotic state, and would undoubtedly merit rationalization.

Private law. Now that the trusts project has been completed (!) the main focus is obviously on the contract project. The law of delict has been reviewed in a number of short projects over the last 15 years or so, such as damages for wrongful death and prescription and limitation. Succession has also been reviewed, as have judicial factors. The area of private law that most clearly requires comprehensive reform is partnership, but as you will be aware the joint report produced some years ago has never been implemented, despite considerable pressure to do so. The main problem was that the City of London Law Society and the chambers that specialize in partnership law in London set their faces against reform, and the DTI/DBERR/DBIS has been unwilling to do anything in the light of that opposition. If the joint report were to be implemented now, in view of the time that has elapsed since it was produced considerable revision would be required. Ideally I would like to see that done, but without any assurance from DBIS that it will give serious consideration to reform I doubt if there is any point in going down that route.

Consequently the main area of private law where review would be practicable is leases. Leases take in the law of contract as well as property and procedural aspects, and in view of the scale of such a project it might be that two commissions with different expertise could usefully work on it.

There are, in addition, two small areas where reform would be helpful; both arise out of decisions of the UK Supreme Court. The first of these is cohabitants' rights on the termination of the relationship *inter vivos*, a matter regulated by section 28 of the Family Law (Scotland) Act 2006. This was considered by the UK Supreme Court in *Gow v Grant* 2012 SLT 828. I had the misfortune to be the first judge to consider the practical application of their view of the law, in *Whigham v Owen* 2013 SLT 483, and I found the task extremely difficult; the opening paragraph of my opinion in the latter case is intentionally ironic. The problem is that no rational guidance is given as to how awards are to be made; instead reference is made to a criterion of "fairness", a concept so vague as to be completely useless. The same problem arose in relation to section 29 of the 2006 Act, which deals with succession rights. In the Commission's report on succession the reform of section 29 was recommended; in summary, it was suggested that the court should compare the parties' relationship with a marriage and then award an appropriate percentage of what a surviving spouse would receive. In this way a cohabitant's entitlement was integrated with the general law of succession and the main exercise of judgment that had to be made was to determine how strong the parties' relationship was by comparison with a marriage.

Joe Thomson was the original source of this recommendation, and he discussed it with a reference group of sheriffs; they were extremely enthusiastic about it. In the Court of Session section 29 was considered in another recent case in which I sat, *Kerr v Mangan*, and the Commission's recommendation was supported (and not only by me). It seems to me that something like the Commission's recommendation in relation to section 29 could usefully be adapted to section 28.

The second area that has been thrown into some degree of chaos is the law relating to prescription where a prospective pursuer does not know the full facts and is not aware of the existence of a right of action, as against the existence of loss. This was considered in the recent UK Supreme Court decision in *Morrison v ICL*, where it was decided by a majority of three to two that existing case law should be overturned, with the result that the prescriptive period is triggered by the existence of loss rather than knowledge that a right of action exists. There is some discussion in the case of previous recommendations made by the Commission. It seems to me that this decision may be unfortunate; the existing law worked well, and I think that the process of reasoning used by the majority is somewhat flawed. There is a powerful dissent, which obviously accords with prior case law. This is a small and technical area, but I think that it is one where the Commission could usefully review the decision of the UK Supreme Court and past recommendations and perhaps put the law on a more satisfactory footing.

I hope that these suggestions may be of some use. I would be very happy to discuss them further if that would be helpful, and likewise to discuss any other projects that have been suggested. I look forward to seeing the Ninth Programme in due course.

Yours,

James