

- **Testing clause**- Details the signing of the deed and the process used. The disponee does not sign.

Execution of deeds

Making the disposition valid:

- Scots law is vague on criteria required to validate the disposition.
- Disposition if it is subscribed by the Granter (signed at the end)- s2(1) Writing (Scotland) Act 1995
- Subscription is signing on the last page, excluding annexations. (s7.1)
- Rules for multiple granters can be found under section 7.3
- Definition of a signature has been brought up in court- **Park and anor., petrs. [2009] CSOH 122**-There was a document that had been sent by fax machine. Usually a copy is sent by fax and mail. The fax machine copy is not signed by the granter as it is a copy of the signature- photocopy is not enough
- Legibility?- **Stirling Stuart v Stirling Crawford's Trs (1885) 12 R 610**- Had medical condition which made it hard to hold pen. He had a stamp with his signature on it. Court held it was not valid as a signature, it is a copy.- **HOWEVER, if there are two deeds and one is signed by hand, then this is acceptable.** There is a reason why you should sign legibly- if it is not legible no one will be able to know if it is a genuine signature.

Method of subscribing- for natural persons the act spells out three ways (s. 7(2)):

- (a) with the full name with which he is identified in the document;
- (b) with his surname, preceded by at least one forename or an initial or abbreviation or familiar form of a forename;
- (c) with a name (not falling within (a) or (b)) or description or initial or mark, as long as it is the granter's usual method of signing or was intended as a signature of the document in question.- **THIS IS TO BE AVOIDED**- It is enough to make the document valid but a deed signed in this way cannot be made probative.

Note that a document signed using method (c) cannot be made probative.

Method of subscribing: juristic persons (such as a company)

Special rules contained in sch. 2 which apply to non-human granters:-

- Partnerships (para. 2)- can be signed by a partner or by a person authorised to sign on behalf of the partnership
- Companies (para. 3)- should be signed on company's behalf by one of the directors, company secretary or someone authorised.
- Limited liability partnerships (para. 3A)- signed by a member of the LLP.
- Local authorities (para. 4)- proper officer of the authority should sign.
- Other bodies corporate (para. 5)- member of companies governing board, secretary of the body, a person authorised to sign on the body's behalf.

You can reprint the deed and do the whole process again or alternatively you can alterate it. Includes "interlineation, marginal addition, deletion, substitution, erasure or anything written on erasure" (s. 12(1))

Alterations made before subscription are treated as part of the deed (s. 5(1)(a))

Alterations made after subscription are not part of the deed unless signed by the granter (s. 5(1)(b))

An alteration is presumed to have been made before execution if it is stated in the testing clause to have been so made (s. 5(4)), as long as the deed is probative (s. 5(5) and (6)) - rebuttable

Registration and Transfer of ownership

Requirements for transfer:

- **Title (Nemo dat quod non habet)** – Must have sufficient right to give ownership.
Morrison v Robertson 1908 SC 332- sale of two cows. M owned the cows and was approached by a man claiming to be the son of a farmer named W. M takes him to be acting as an agent and hands over the cows. It turns out he was a fraudster. Morrison believes he handed the cows to W but he didn't intend Telford to become the owner. When T sells the cows to R he cannot pass on good title because he was never the owner.

Chalmers v Chalmers 2015 SLT 793- The signature on the deed was a forgery.
- **Capacity (Age of Legal capacity (Scotland) Act 1991)**- under 16 you can own property but you cannot enter into any transactions that are normal or reasonable for people of your age.
- **Consent- both parties must consent.**
Findlay v Monro (1698) Mor 1767- F owns an ox which he is giving as a gift to his friend. He gives it to the servant to deliver but he gives it to Monro on his take. M disposes of it. The intentions of both parties did not meet and therefore there was no transfer of ownership.
- **For Land, registration is also required under the Land Registration etc. (Scotland) Act 2012 Section 50.**
- **In the case of a "race to the register", the first to register wins:**
Burnett's Trustee v Grainger 2009 SLT 113- Mrs Burnett owned house in Peterculter which she agreed to sell to the Graingers and disposition was delivered. Price was paid and they moved in. The solicitor failed to register the disposition. Then Mrs B went bankrupt and the trustees try to claim that the house was part of the estate and as the Graingers had not registered the disposition they were not the owners. The trustee owned it because he got to the register first.
- **The property must be capable of identification**
Macdonald v Keeper of the General Register of Sasines 1914 SC 854-There was an attempt to record in the register a deed that described the property as the house at number 140 McDonald Road the title to which is in my name. The property was a flat. The keeper rejected this deed but the court backed the keeper saying that the keeper had an obligation to exercise some kind of quality control over the description of properties.
PMP Plus Ltd v Keeper of the Registers of Scotland 2009 SLT (Lands Tr) 2- homeowners were given shared ownership of common land but the developer sold off part of it for building health centre. The homeowners refuted this. The tribunal said the development wasn't finished when the right was given and the common areas could not be identified and therefore conveyance was not valid.
The property must be capable of being put on the cadastral map in the land register-Land Registration etc (Scotland) Act 2012 Act, ss. 21(2), 23-26
The property may be identified either by a plan or by a verbal description
It is permissible to adopt a description from a previous deed- Conveyancing (Scotland) Act 1874, s. 61

Stevenson-Hamilton's Exrs v McStay (No 2) 2001 SLT 694- Urban gapside- gap between two houses. At the time of the case the land had been in a derelict condition for some time and the McStay's trying to obtain the land through positive prescription carried out acts occasionally like grass cutting and rubbish collecting- held not to be enough as the urban property was capable of much more use. Urban land- easier to get witnesses along so more is required than rural land.

Peaceable possession-

Even if you have possessed the land for ten years openly, if you have had to use force to maintain possession then the clock is reset.

Judicial interruption-

Defined in s. 4(1) as meaning "the making in appropriate proceedings, by any person having a proper interest to do so, of a claim which challenges the possession in question".

Includes both court proceedings and arbitration.

Sets the clock back, even if the challenger cannot demonstrate ownership.

Continuity of possession-

No need to exercise possession at all times – possession animo solo will be presumed, as long as there is not too long a gap.

However, need for continuous possession means that any interruption of possession, whether lawful or unlawful, will interrupt prescription.

Need for habile title-

The title must be capable of constituting the right in question. Must appear on its face to give title.

Suttie v Baird 1992 SLT 131 Shape of area conveyed was different from ground- court was flexible and allowed this.

Auld v Hay (1880) 7 R 663- Two parties owned between them 3/7 share of the land. They then conveyed their share of the land and how they prescribed they said that their several shares. The acquirer had sole possession of the land and claimed to have ownership of the whole lot. One of the owners said that they only had three 7ths share. The court said no, the disposition doesn't say what share was being conveyed- it just said our several shares. Can mean anything up to and including 100% shares. It didn't matter what the disponent meant to convey- it is based on what looks to be conveyed.

There can be no prescription beyond a title.

Title must not be ex facie invalid or forged-

- Deeds granted by a party in their own favour- **Aberdeen College v Youngson 2005 SC 335, 2005 SLT 371**-Foundation writ was by a number of parties in their own favour and this was ex facie invalid and so prescription cannot apply. A to A prescription used to be a method of prescription where you disponent to yourself but Aberdeen college disregarded this.
- Deeds which fail to comply with the Requirements of writing (Scotland) Act 1995
- Deeds stating that granter does not have title-**Watson v Shields 1994 SCLR 819, 1996 SCLR 81**-Action for a declaratory from Watson that they were the owner of land they had possessed for 40 years under a disposition issued to themselves. The defender had come

Court held that the pursuer must also show a valid title (which in this case W could not) as well as the defender. The issue of two valid deeds is solved in the next case.

Colquhoun v Paton (1850) 21 D 996 at 1001- There was a dispute over the use of a pier. The pursuer wanted to close the pier off on Sundays. The defender broke the barrier to use the pier on a Sunday. It was held you must show two things-

- 1- Apparent title to the property – doesn't need to prove validity only appear as valid
- 2- Show one of two things. Either defender has no apparent title or when both have apparent title the pursuer must show in addition 7 years possession. (Possessory judgement – rule that if have apparent good title and possession for 7yrs – you are to be treated as owner until proven otherwise)

Where neither have title the pursuer will be preferred. If one had good title and the other doesn't, the one with the good title will be preferred. If both have good title – either resolve issue of ownership (proof in court) or the 7yr possession will be preferred.

There was not enough proof for the pursuer to have the interdict granted, due to the discretionary nature of the remedy (court does not have to grant an interdict) only when they decide it is appropriate. Need to show good cause and is serious enough with repetition- no damages unless damage is caused.

Winans v Macrae (1885) 12 R 1051- Pursuer owned a 200,000 acre estate. The defenders lamb had been wandering on to the estate and eating grass, the pursuer sought an interdict to prevent this. Court refused the interdict as it was a stupid idea, and the lamb was allowed to wander and eat the grass.

Normally damages are not available.

Graham v Duke of Hamilton (1868) 6 M 955 – trespass gained financially by the trespass – no damages payable as no damage is actually being caused to the land.

2) Encroachment

The court may order the removal of an encroachment but this is discretionary. This occurs when someone builds something that goes over their boundary and encroaches on their neighbour's lands. The Court usually orders removal but this is not always the case.

Jack v Begg (1875) 3 R 35 – new building built in Edinburgh. The gable wall was right next to the boundary, half on neighbour land.

N raised action to have it removed. On the other hand – only a few inches.

Important point – lord lay principle – yes could order to be removed. Sometimes that will be what is done but there will be cases when that is disproportionate.

In these cases, the court can award an equivalent – they can say upon what equitable conditions the building can remain there although it has no legal right.

Can give alternative remedy – eg damages.

Because done in good faith and it was disproportionate, court allowed to stay so long as the p can use as a common gable wall.

Anderson v Brattisani's 1978 SLT (Notes) 42- There was a ventilation duct running from the defender's chip shop along the side of the pursuer's property. P petitioned for removal. The defender had been given the permission of the previous owner to the pursuer's property. Court

Negative burdens (9.2) prohibit someone from doing something, can be enforced against anyone who makes use of the burdened property.

Affirmative burdens (9.1) Only enforceable against the burdened proprietors themselves- if BP is sold after breach is committed, either the new or old owner can be sued, but if the new owner is sued they will be entitled to sue the old owner for compensation.

Joint and several liability in affirmative burdens (10)- Where burdened property is divided all of the property remains burdened unless the burden specifically relates to one part of the property such as the garden.

Variation and discharge of real burdens

2003 – act introduces procedures of getting rid of burdens by the consent from only a proportion of the benefited proprietors.

S 33 + 35

Express consent-

Minute of waiver- may be a variation or discharge- must be in formal writing. Must be registered against the burdened property.

Sections 33 and 35 are completely separate- cannot use both at the same time.

Community burdens 1-

Variation or discharge by majority – 2003 Act, s. 33 – intended to provide a more convenient procedure. But at the same time it would not be reasonable to take away people's rights without them being allowed to object. So have to send to all in consenting form – schedule 4 of act – each have 8 weeks to object by applying to the Lands Tribunal - need to show cause why the burden should be maintained. – if no one objects or objection is objected, then the notice will be endorsed.

Effect will be discharge the burden if appropriate.

Requirement for intimation – 2003 Act, s. 34

Registration procedures – 2003 Act, s. 37(2)

If one bp owns a majority of the units the deed must be granted by more than one.

Community burdens 2-

Variation or discharge by neighbours- 2003 act 35- variation by immediate neighbours- adjacent, within 4 metres typically and measured horizontally. **Exception – facility or service burden or in a sheltered or retired housing development. Or excluded by the deed creating the real burden.**

There can sometimes be the problem of some neighbours not consenting. It is not necessary to send everyone a notice, you can use the lamp post rule instead.

Intimation to other benefited proprietors by;

- sending notice, or
- using the “lamp-post rule” – if only one pl within 100 metres, attach copy to lamp post, if >2 attach to at least 2 w/ 100 mtrs. , or

Tuley v Highland Council 2009 SC 456- T owned part of woodland area. He opened up to public use and encouraged people to come. One path was deemed unsuitable for heavy use by horses, so he put up a gate to stop this but it was still suitable for light use. Inner house held that as long as what they done could be responsible exercise of land management, T was entitled to exclude and to organise for particular rights of access to different paths.

Forbes v Fife Council 2009 SLT (Sh Ct) 71- there was a housing development near Fife which had a path owned in common by all of the owners of the houses. It was an open path so people made use of it. One owner suggested they put up a gate out of fear for anti-social behaviour. Sheriff held this could be done but only at night (although some responsible people would still be excluded) as this is when anti-social behaviour was most likely to occur.

Access code prepared by Scottish natural heritage under section 10.

Public rights of way- still exist but most cases are overturned by the right to roam- look at the right to roam before considering public right of way.

Right of passage held by public at large- can be created voluntarily but mostly acquired through prescription.

Created by positive prescription- 1973 act s.3.3 allows creation.

Requirements-

- Fixed route- Rhins District Committee v Cuninghame 1917 2 SLT 169 – doesn't have to be visible on the ground but has to be a definite path. The way you go determined by the contours of the land.
- Must be between two public places that 1) public have the right to be at and 2) public habitation or resort, such as a road

Love-Lee v Cameron 1991 SLR 61- post office in private house (faced 1st ground)

Duncan v Lee (1870) 9 M 274 – rock formation near St Andrews. This place public entitled to be. On foreshore so right to be. BUT people only go there for curiosity. So there was no habitation and resort – have to do something there.

- Adverse and uninterrupted use for the whole length by the public for 20 years

Cumbernauld and Kilsyth DC v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035 affd 1993 SLT 1318 - raised walk way through town centre – claimed right of way – council objected when defender closed at night to prevent vandalism.

Court pointed out owners did nothing at all to indicate that the use was by tolerance – inference that the use was as a right - so should also need to show objections.

Extent of right depends on possession- **Aberdeenshire County Council v Lord Glentanar 1999 SLT 1456**- issues arose regarding cycling- decided on 1930 and came to attention 70 years later.

Question of whether bicycle counted as use of vehicle. Court – distinction – vehicle depends on owners own power verses their own power source. Own power to use aids to pedestrianism so does not count as vehicles.

The land owner is not permitted to obstruct the route. Land Reform (Scotland) Act 2003 section 14.

- Millar v MacRobbie- Tenant took possession of property after lease granted but before the date of entry the owner sold the land. No real rights acquired.
- Long leases- real right on registration regardless of entry date.

Licences

- Where the lease does not comply with requirements it is not a lease and cannot become a real right- licence.
- Parties can contract out of agreement being a lease- state it's a licence.
- If an essential lease requirement is missing, it will be a licence, not lease- court will look at substance of the agreement.
- **Bradford Properties Ltd v British Telecommunications plc 1992 SC 12**- sub lease entered into by tenant. Expressly stated it was not a lease- court thought it was a sham and it was intended to be a lease which was dressed as a licence to avoid legal implications. Wording will not be used necessarily.

Rights and obligations of the parties

- 1) These are default obligations- parties can decide themselves
- 2) There are various forms of lease governed by statute

Tenant's obligations

- Obligation to enter into, and remain in, possession- does not have to be exercised personally and there can be periods where the tenant is not present
 - **Beggs v Kilmarnock & Loudon DC 1955 SC 333**- Tenant had been sentenced to 6 years in prison but was held to still be possession of the flat because his parents visited on occasion for repairs and maintenance- physical element of possession and intention to return.
 - Obligation does not go beyond just being in possession- with a shop there is no obligation to open as a shop unless expressly stated as an obligation in the lease.
 - **Whitelaw v Fulton (1871) 10 M 27**- Tenant for shop is not required to open up as a shop unless specifically mentioned in the lease- keep open clause.
- Obligation to use the property only for purpose for which let
 - **Moore v Munro (1896) 4 SLT 172**- Lease required shop to be used for grocers business but it was used as a dwellinghouse- used for three years in the knowledge of the landlord- allowed because he acquiesced.
- Obligation to take reasonable care of the property
 - **Mickel v M'Coard 1913 SC 896**-Left house empty during winter without turning off the water or telling the land lord. Pipes burst – Tenant liable
 - **Fry's Metals Ltd v Durastic Ltd 1991 SLT 689**- broken into after lease was finished but before keys were handed back- alarms had been disabled- tenant liable
- Obligation to pay the rent when due

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not liable- T could remain in house (acquiescence) or give notice to L to have the defects remedied then leave the house after reasonable time has expired.

- Landlord's obligation may be contracted out of- usually done in commercial lease- full repairing and insuring lease- obligation placed upon the tenant.

Landlord does not guarantee property will remain in suitable condition- only that it will be repaired if it is not in suitable condition.

Assignment

Tenant may want to sell or transfer the benefit of the lease to someone else- assignment. Holder of right over incorporeal property transfers that right to someone else. Tenant drops out of picture completely.

- Assignment means transfer by tenant of interest in lease to another person (the assignee)
- Process:
 - to obtain personal right against landlord – intimation- informing the land lord.
 - to obtain real right – possession by the assignee or registration of the assignment- depends in which method was used to create the lease
 - <20 years- possession
 - >20 years- Registration in land register
 - Both rights are present in a lease.
- Landlord needs to actually hold the lease- slight exception for non-tenants.
- Note special rules for assignments *a non domino* of registered leases (Land Registration etc (Scotland) Act 2012, s. 88)- where someone has registered as tenant but does not hold a valid lease, assignment will be valid as long as the assigning tenant has been in possession for a year, openly, peaceably, continuously and is in good faith.
- Does the land lord need to consent?- this is determined by looking at the lease- if it says consent is required then it will, if it says it is assignable, then it is conclusive. It is difficult if the lease says nothing
- If the lease provides that consent is required or that it is not required, that will be decisive
- If the lease is silent, the answer will depend on whether there is an element of *delectus personae* (choice of person)- where the tenant has been chosen for particular characteristics, the the lease cannot be assigned without landlords consent
 - *Scottish Ministers v Trustees of the Drummond Trust* 2001 SLT 665 at 668- lease of land for forestry purposes (forestry commission) Held no DP:
 - 1) not agricultural lease (more personal)